Confidentiality of private confessions made to priests: A perspective from the Anglican Church in South Africa

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DECLARATION

I hereby acknowledge that the work contained in this thesis is my own original work and has not previously in its entirety or in part been submitted to any academic institution for degree purposes.

Signed

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ABSTRACT

The aim of this research is to determine the responsibilities of the Anglican Church priest regarding the confidential information received during the private confession. When the penitent makes a private confession to the priest and the private confession relates to a crime, the priest becomes a competent and compellable witness in terms of the Criminal Procedure Act, 1977. On the other side of the continuum, the priest cannot disclose the confidential information made during the private confession in terms of Anglican Church documentation.

The research revealed that the confidential information made to the priest during a private confession is not subject to disclosure except in the following circumstances:

- When the private confession relates a future event. The future event may relate to something that has not materialised or a revelation of intention, which may theologically constitute a sin but not yet, an act to confess.
- When the failure of the priest to disclose the confidential information is *contra bonos mores* in terms of legislation or any other law.

The research recommended that it is the responsibility of the Anglican Church to include in its prescripts indications when the priest may disclose the confidential information made during a private confession.

KEYWORDS: private confession, confidential information, seal of confession, priest, Anglican Church, priest-penitent privilege.

OPSOMMING

Die doel van dié navorsing is om die verantwoordelikhede van priesters in die Anglikaanse Kerk ten opsigte van vertroulike inligting wat hulle tydens private belydenisse ontvang, te bepaal. Wanneer die boetvaardige ‘n private belydenis aan ‘n priester maak wat betrekking het tot ‘n kriminele oortreding, word die priester in terme van die Strafreg Proses Wet, 1977, ‘n regsbevoegde en ‘n afdwingbare getuie. Aan die ander kant van die kontinuum, word die priester, in terme van dokumentasie van die Anglikaanse Kerk, verbied om enige vertroulike inligting wat tydens ‘n private belydenis aan hom gemaak is, te openbaar.

Die navorsing onthul dat vertoulike inligting wat tydens ‘n private belydenis aan die priester gemaak word nie openbaar gemaak sal word nie, behalwe in die volgende gevalle:

- Wanneer die private belydenis betrekking het op toekomstige gebeure. Die toekomstige gebeurtenis kan verband hou met iets wat nie gematerialiseer het nie of 'n openbaring van voorneme, wat teologies 'n sonde kan vorm, maar nog nie 'n daad om te bely nie.
- Wanneer die nie-openbaarmaking van vertroulike inligting deur die priester *contra bonos mores* is.

Die navorsing beveel aan dat dit die verantwoordelikheid van die Anglikaanse Kerk is om voorskrite in te sluit oor wanneer ‘n priester die vertroulike inligting wat tydens ‘n private belydenis aan hom gemaak is, openbaar mag maak.

TABLE OF CONTENTS

CHAPTER 3: THEOLOGICAL-CANONICAL MEANING OF THE PRIEST-PENITENT PRIVILEGE

CHAPTER 6: SUMMARY AND CONCLUSIONS

Chapter 1

Introduction

1.1 Background and problem statement

1.1.1 Actuality

The South African courts have not taken a decisive stand on the privileges of the priests to give evidence about the communication made to them during a private confession. There is at least some uncertainty from the church's view on the matter. After 1994 in South Africa, although there have been criminal cases where the priest-penitent privilege was discussed, there have never been an instance where the priest was subpoenaed to give evidence on confidential communication made to him during a private confession, where he refused to testify and was convicted or acquitted for contempt of court.

This position may however, change. The Anglican Church in South Africa has its own canons, rules and conventions in terms of which the priest cannot divulge the content of a private confession made to him. However, the Anglican Church does not exist in a vacuum. It exists within society where the South African Constitution of 1996 (The Constitution) is the supreme law of the land. The Constitution imposes certain rights and freedoms with attendant responsibilities. Section 2 of the Constitution provides that "this Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled". Section 15(1) provides that "everyone has the right to freedom of conscience, religion, thought, belief and opinion". Section 35(1) (a) provides that "everyone who is arrested for allegedly committing an offence has the right to remain silent.

Further, section 189 (1) of the Criminal Procedure Act 51 of 1977provides that:

> If any person present at criminal proceedings is required to give evidence at such proceedings and refuses to be sworn or to make an affirmation as a witness, or, having been sworn or having made an affirmation as a witness, refuses to answer any question put to him or refuses or fails to produce any book, paper or document required to be produced by him, the court may in a summary manner enquire into such refusal or failure and, unless the person so refusing or failing has a just excuse for his refusal or failure, sentence him to imprisonment for a period not exceeding two years or, where the criminal proceedings in question relate to an offence referred to

in Part III of Schedule 2, to imprisonment for a period not exceeding five years.

The Anglican Church is not immune from these. There is a legal challenge imposed by the relationship between the priest and the penitent. After the penitent has confessed the sin or sins, and the sin or sins amount to a crime, and whether the priest makes the pronouncement of absolution or not, the priest legally becomes a potential witness to the crime (Section 192 of the Criminal Procedure Act 51 of 1977). Should it be possible then to force the priest to testify in a court of law in the light of the oath of confidentiality a priest undertook with his ordination?

The South African law enjoins the priest to testify on private confessions made to him (section 189 (1) of the Criminal Procedure Act 51 of 1977). The church law on the other hand debars the priest from testifying (Anglican Prayer Book 1989:448; Nolan 1913:649). In this study, the focus is on the Anglican Church's approach to the oath of confidentiality taken by an ordained priest and the legal scrutiny it may attract. The study concerns the perspective from the Anglican Church law. The intention is not to solve all legal questions, but to engage the matter from the perspective of church law to indicate the church's position on the matter. What is the position of the priest if called upon to come and testify in court in terms of the South African Constitution? This tension prompted this research.

A *nexus search* reveals that there has been no academic research done in academic institutions in South Africa on this topic. The partial relevant research on the topic concerns the assessment of constitutional guarantees of religious rights and freedoms in South Africa (Gildenhuys, 2002). This research deals specifically with legal aspects of religious rights. However, there is research conducted in other parts of the world.

In his doctoral thesis, Cornett (2011) from the University of North Carolina investigated the private confession as a genre. He compiled a catalogue of known examples of Latin, French, and English forms of confessions from ca. 1200 to ca. 1500, including Latin and Old English precursors dating back to the ninth century. He did not however research the confidentiality of such written private confessions. Thompson (2006) from Murdock University, in his doctoral thesis concluded that contrary to many commentators, the priest-penitent privilege existed in England before the English Reformation. Neither common law nor statute law abrogated its applicability. His research does not address the priest-penitent privilege in South Africa.

Further literature review: Since the Anglican Church is partially the object of the study; the following prominent preliminary sources regarding Anglicanism deserve scrutiny; Bays (2012), MacCulloch (2006), Avis (2002), Neil (1997), Hannaford (1995) and Chadwick (1964). For private confessions and its genesis, the following preliminary sources were consulted; Cornett (2011), Uhalde (2007), Rittgers (2004), Karant (1997), Tentler (1977), Murray (1972), Schaff and Wace (1995), Pixton (1995), McNeill (1951), Kurtscheid (1927) and Hanna (1911).

The priests are a pivotal part of the study and the following preliminary sources were consulted in this regard; Larson (2014), Brandreth (2007), Lightfoot (2007), Garhammer (2005), Hartman (2005), Winroth (2004), Agnes and Guralnik (2001), Merlino (2002), Kuttner (1941). The inviolability of a private confession made to a priest is highly relevant in the study. The relevant preliminary sources consulted in this regard are the following: Helmholz (2006), Bevilacqua (1996), Martos (1994), Noonan (1979), McCarthy (1967), Ridley (1962).

The period before and after the Reformation, regarding private confessions is crucial. In this regard the following preliminary sources were consulted; Waller and Chefetz (2000), Horner (1997), Underwood (1996), Churchill (1990), Bush and Tiemann (1989), Yellin (1983:99-101), Coke (1979), Pollock and Maitland (1968), Wigmore (1961:869ff) and Plucknett (1956).

1.1.2 Background

The nature of confession in the Anglican Church: The Anglican Church practises two forms of a confession. The first form of a confession is the general confession. Its recitation by the congregants takes place before the services of Holy Eucharist. After that there is a pronouncement of absolution by the priest (Anglican Prayer Book, 1989:106).The second form of confession in the Anglican Church is referred to as auricular or private confession. It takes place in a private meeting with the priest in a room or a traditional confessional. After the private confession of sins, the priest then makes the pronouncement of absolution (p 449).

It is noteworthy that in the Anglican Church, it is not incumbent for churchgoers to make private confessions. However, each churchgoer may privately confess his sins as his circumstances dictates. This point is significant from both the legal and church polity perspectives. From a legal perspective, this point is important because it means that the penitent makes the private confession to the priest voluntarily. It is trite in the South African law that an admission, a confession, or any statement used as evidence or used must be voluntary (sections 217 and 219A of the Criminal Procedure Act 51 of 1977.

This point is also important from the church's policy perspective, firstly, because it means that the penitent acknowledges the sin committed and confesses voluntarily without coxing taking place. Secondly, it differentiates the Anglican Church from other religious denominations where private confessing is compulsory like the Roman Catholic Church (Alfeyev 2002:143ff) and other religions like Islam where confessions of sins to a priest is not practised at all. In fact, in Islam the penitent confesses his sins by asking forgiveness directly from God (Sahih Muslim Book 037, Hadith Number 6658).

The Anglican Church's aphorism regarding this practice of a private confession is "all may; none must; some should." The Anglican Church's practice regarding private confessions does not involve penance. There are divergent views in this regard. Some theology commentators like Kelly (2003:216) contends that there is no evidence of a sacrament of private penance in the Anglican Church. He is of the opinion that the confession "in spite of the ingenious arguments by certain scholars", was wholly public and the whole process was called *exomologesis*. Becker (2004: 1ff) on the other hand does not deny the existence of a private confession in the Anglican Church but is of the view that this aphorism indicates that the private confession is not compulsory.

The fact that in the Anglican Church, a private confession is not compulsory does not infer that the confidentiality of such communication is relaxed. Although the private confession is not specifically mentioned, Canon 37 part (c) (s) forbids "breach of confidentiality of whatever nature" (Canons of the Anglican Church of Southern Africa, 2005-2011). To foster confidentiality of communication between the priest and the congregant, the Anglican Church in South Africa relies on the Anglican Prayer Book (1989:448) which provides that: "Every priest in exercising this ministry of reconciliation, committed by Christ to his Church, is solemnly bound to observe secrecy concerning all those matters which are before him". There is no specific mention of the private confession. The Guidelines for the professional conduct of the clergy (2003:7.2-7.4) also prescribes that the priest cannot divulge what the penitent said during the confession even after the death of the penitent.

By virtue of the fact that in the Anglican Church, a private confession is not compulsory complicates the issue of confessions in the church. Firstly, this may give the impression that a private confession is thus not important for spiritual healing. This is not so because a Christian "needs to live in the continual reality of being a forgiven sinner, a forgiveness that leads to freedom, release and healing" (Gower 2007). Not only does a private confession spiritually heal, it promotes forgiveness (Fink 1990:473). It enhances the well-being and has

a cathartic effect to the penitent (Krause and Ellison 2003: 77-90). Furthermore, a person may contend that he has received absolution from the priest during a general confession said by all in the congregation and therefore it is not necessary to confess to the priest.

Court decisions with regard to private confessions made to a priest before 1994: Before the Constitution, it was clear that the priest could not refuse to testify in court and claim that the information between the priest and the penitent is privileged. In *Smit v Van Niekerk* (1976:293), Chief Justice Rumpff stated that the clergyman could not remain silent when required by the court to give evidence in matters communicated during a confession because the law does not recognise the clergy privilege. This was the remark from the Appellate Division; therefore, this decision is binding to all South African courts.

Court decisions with regard to private confessions made to a priest after 1994: It appears that the advent of the Constitution has changed how the courts view the priest-penitent privilege. For a start, section 14 (d) of the Constitution provides for the right to privacy to communication. There is also the Criminal Procedure Act (1977) (the CPA) which does not specifically accord privilege to the communication between the priest and the penitent. In fact, section 192 of the CPA provides that every person is a competent and compellable witness, unless specifically excluded. The CPA does not specifically exclude the priest.

Our courts have not dealt with the privilege of communication between the priest and the penitent adequately. In *S v Bierman* (2002:1098) the Constitutional Court, as the highest court in the land, had the opportunity to decide whether the priest-penitent privilege exist in our law in the light of the Constitution. Justice O'Reagan however declined to comment on the issue because there was evidence *aliunde* to convict the accused. Zeffertt and Paizes (2009: 670) after discussing a number of decided cases where the courts dealt with the priest privilege concluded that our courts are reluctant to take a decision on the matter. Our legal jurisprudence will have a lacuna on this issue until the Constitutional Court decides (See also *S v Bierman* 2002; *S v Makhaye* 2007; *S v Mshumpa* 2008).

The other side of the continuum: What does the Bible say about the confession of sins? Should Anglicans confess their sins to God or to the priest? What is a priest? In the Scripture of James 5:16 it is stated that Christians should confess their sins to each other and on the hand 1 John 1:9 provides that Christians should confess their sins to God. Therein lies the complication (Nicols, 1900:336-344). The question of "what is a priest" is relevant to the research because

the penitent cannot claim the priest-penitent privilege aimed if the private confession is not before the priest or someone acting in *persona Christi*.

What are the responsibilities of the priest if subpoenaed to come and testify in court concerning a private confession? The study will therefore investigate the seal of confession and the canons governing its inviolability. Must the priest obey canons governing the seal of confession or the law of the land, taking into account that the law of the land is not clear in this regard? It will also be necessary to compare the confessions in the Anglican Church with confessions in the Catholic Church to gather a wider view on confessions. The research will also examine South African law to determine whether the priest-penitent communication is privileged. It will be necessary to compare the South African law with the American law in this regard.

1.1.3 The research question

The research question of this study is as follows: What is the position of the Anglican priest in South Africa in light of his oath of confidentiality if requires of him to reveal the relevant information, for an example, in a court of law?

The main problem is complex and comprises the following sub-questions:

- What is the Anglican Church's understanding of the priest-penitent privilege in terms of relevant documents of the Church?
- What is the theological-canonical meaning and application of the confidentiality of the priest-penitent privilege with regard to church state relationship?
- What is the position of South African courts on the priest-penitent privilege before and after the 1996 Constitution?
- What is the responsibility of the Anglican priest in terms of relevant documents when something *contra bonos mores* is revealed to him?

1.2 Aims and objectives

1.2.1 Aims

The intention is not to solve all possible legal questions, but to engage the matter from the perspective of church law to indicate the church's position and ultimately the priest's position on the matter.

1.2.2 Objectives

In order to accomplish the aim of this research, the following objectives needs achievement:

1) Determine what the Anglican Church's understanding of the priest-penitent privilege is, in terms of relevant documents of the church.

2) Determine what is the theological-canonical meaning and application of the confidentiality of the priest-penitent privilege with regard to church state relationship.

3) Determine what the South African courts position on the priest-penitent privilege is, before and after the 1996 Constitution.

4) Determine what is the responsibility of the Anglican Church in terms of relevant documents when something *contra bonos mores* is revealed to the priest.

1.3 Central theoretical argument

The central theoretical argument of this research is that the priest is not obliged to disclose the confidential information revealed to him during a private confession unless such disclosure is *contra bonos mores.* The intention of the research is not to solve all possible legal questions, but to engage the matter from the perspective of church law to indicate the church's position and ultimately the priest's position of the matter.

1.4 Delimitation of the problem

Delimitations are self-imposed limitations that limit the scope of the research. They state what will be excluded from the research (Smith 2008:146).This exclusion prevents the research from being too wide and unscientific (De Wet *et al,* 1981). The first delimitation of this research is conceptual. The delimitation of the term "confession" is essential in this regard. The study will focus on the private confession made by a penitent to the priest; it will not deal with public confessions.

The second term that needs delimiting is *contra bonos mores.* This term does not have the same meaning in church law and in the law of the land. In church law, anything that is contrary to the Word of God is *contra bonos mores.* It is possible that something that is *contra bonos mores* in terms of church law will not be *contra bonos mores* in terms of the law of the land.

For an example, adultery is *contra bonos mores* in terms of God's law but it is not a crime in South African law.

This term refers to something that is inconsistent or contrary to good morals or public policy. This may include a variety of public policies. Therefore, when determining if something is *contra bonos mores* in terms of the laws of the land, the Constitution will therefore be the guide in dealing with this concept. It is for that reason that this research will confine itself to the definition of public policy that was expatiated in *Barkhuizen v Napier* (2007) where the court said, "Determining the content of public policy was once fraught with difficulties. That is no longer the case. Since the advent of our constitutional democracy, public policy is now deeply rooted in our Constitution and the values that underlie it".

The second delimitation is canonical. Although there may be dollops of reference to the Old Testament, the study refers prominently to the New Testament. The Bible version quoted throughout the study is the International Standard Version (ESV), unless otherwise stated. The researcher prefers this version because it is the latest translation that is dated 2012.

The next delimitation is ecclesiastical. A number of churches or denominations practice the sacrament of auricular confession. It is for this reason that the study will only focus on the Anglican Church. The Anglican Churches referred to in the study are those Anglican Churches that are "in the communion". In other words, they are part of the Anglican Communion. The study excludes those Anglican Churches that are not part of the Anglican Communion. The study involves the Anglican Churches in South Africa, which fall under the Anglican Church of Southern Africa. It should also be mentioned that sometimes the personal noun "he" will be used to denote the priest.

1.5 Research methodology

The research methodology in the research is the systematic-theology model. The research is literary and not empirical. This model is therefore appropriate for this research as it favours literary research. Smith (2008:153) warns researchers against adopting any research methodology uncritically. He avers that the research problem should direct which logical steps to follow. He further contends that it is sometimes necessary to modify or adapt the research methodology to attain the desired research objectives. This systematic-theology model has five logical steps (p 189). The first step looks at the "what" of the research. The second step

entails the treatment of current views on the research topic. The third step involves the Biblical evidence and exegesis of identified passages. The fourth step is the construction of the theory and the last step deals with the contemporary significance of the research.

The first step that is the “what” of the research requires the statement of the problem, the tabulation of the key questions and the delimitations of the research. The research problem together with the attendant sub questions and delimitations of the research will not find repetition here. This part of the research is important because it directs and delimits the research.

The second step of research methodology will involve the treatment of current views of prominent scholars. This will entail identifying prominent scholars on the topic of inviolability of private confessions, discussion of their views, arguments and counter-arguments. The discussion entails all the debates, strengths, weaknesses concerning current views on private confessions. There will be engagement of literary sources that are younger than ten years, but there will be a reference to older sources especially when discussing historical aspects of the research.

The third step will be concerned with Biblical evidence. This step concentrates on the identification of passages in the Bible that deal with private confessions. These passages about the private confession will be exegetically analysed. The private confession is the first element of the problem statement. The second element of the problem statement is the priest-penitent privilege. As stated above, the Anglican Church does not exist in a vacuum but is a microcosm of society that lives in a Constitutional environment; it will therefore be necessary to determine whether the priest-penitent privilege exists in our law in the light of the Constitution.

The fourth step will be the construction of the theory. In the light of this research, this step is concerned with the determining the defences or responsibilities that are available to the priest if called to come and give evidence about the private confession. The construction of the defences (theory) entails making deductions from scholarly views and Biblical evidence. The last step will indicate the significance of the research by showing the doctrinal significance and then practical significance of the study.

1.6 Ethical aspects

There will be no benefit, financial or otherwise, for the researcher. There is no legal conflict and financial conflict in the study. The discussion of the ethical aspects of the study took place in the manner that expected in studies done at the North West University. This study is a no risk study.

1.7 Research design

1.7.1 Provisional chapter classification

Chapter 1 will be introductory, describing the background, problem statement, objectives and aims, the research methodology and an overview of the structure of the research.

Chapter 2 deals with a general discussion on the genesis of a private confession in the Anglican Church and to the current views of prominent scholars on the research topic. It will also be necessary in this chapter to compare the private confession in the Anglican Church and the Roman Catholic Church.

Chapter 3 deals with the theological-canonical meaning and application of the confidentiality of the priest-penitent privilege concerning the church and state relationship. There is a detailed discussion of the genesis and the history of the priest-penitent privilege in this chapter.

Chapter 4 is concerned with the South African courts position on the priest-penitent privilege is, before and after the 1996 Constitution. There is a detailed discussion on the question of whether the South African courts recognise the priest-penitent privilege.

Chapter 5 discusses the responsibility of the Anglican priest in terms of relevant documents when something *contra bonos mores* is revealed to the priest. The chapter is concerned with the determining of defences that are available to the priest if called to come and give evidence about the private confession.

Chapter 6 will contain the recommendations and the doctrinal and practical significance of the study. The summary, an explanation of the limitations in the research as well as recommendations for further research pertaining to the topic find discussion in this last chapter.

1.8 Conclusion

This is an introductory chapter. It lays the foundation for the discussion of the tension between what is required of the priest in terms of the relevant Anglican Church documentation and the obligations in terms of the relevant law of the land. The chapter also deals with the research questions to lay the foundation for a scientific approach to the research. There was also a discussion on the aims and objectives of the research in this introductory chapter. Since the research is about the private confession in the Anglican Church, it is prudent to delve straight into the private confession discussion in the next chapter.

Chapter 2

The priest-penitent privilege in the Anglican Church

2.1 Chapter overview

The aim of this chapter is to discuss the current position in the Anglican Church in South Africa regarding the status of private confessions. The following topics will deal with this objective in detail:

Anglicanism: The research involves the Anglican Church and it is therefore important to give a brief exposition about the Anglican Church and its practice of Anglicanism. It is relevant because the priests in this research practise Anglicanism as their type of religion. Moreover, the private confession follows the process espoused in Anglicanism liturgy. Even the penitents, who make the private confession to the priest, make such a confession within the religious confines of Anglicanism. When did Anglicanism begin? The discussion of Anglicanism now makes it easier to compare it against other religions later in the study. The discussion here is in broader context.

Structure of the Anglican Church: The institutional structure of the Anglican Church in relation to the research is relevant. The institutional structure is vital because it explains the position of the priest in the structure. The penitent makes the private confession to the priest; therefore, the position of the priest in the structure will have the influence on the issue of the confidentiality of the private confession. For an example, it would make a difference if the penitent makes a private confession to lay minister because the lay minister does not have the canonical right to hear a private confession.

Priesthood: This chapter also discusses the important aspect of the research that is the priesthood. A priest is an important part of the private confession since he listens to the private confession. The priests are so important that without them there would have been no research. They are one of the pivots on which the research sits. The penitent makes the private confession to the priest. Therefore, the confidentiality of the private confession affects the priest directly.

The definition of priesthood is important to obviate any likelihood of the distortion of this concept. Its clarity is imperative. What is the genesis of priesthood? It is also important to explore history of the institution of priesthood to examine how it has influenced the private

confession, the seal of confession and the priest-penitent privilege. How did priesthood become applicable to the Anglican Church? How does it compare with priesthood in America since in America it operates within the statutory framework (Colombo, 1998:2-3)?

Private confession and penance: There is a remarkable difference between a private confession and penance. The tendency is sometimes to use these concepts interchangeably. This causes theological confusion, as the two concepts are fundamentally different (Rittgers, 2004). The examination of this relationship obviate any conceptual distortion.

Because of profound similarities between the Anglican Church and the Roman Catholic Church, there will be a comparative analysis between these two churches on these two concepts. These similarities are the result of the historical relationship between these two churches (Doe, 2013). It will also be perceptive to indicate in the chapter if these two concepts ultimately found application in the Anglican Church from the Roman Catholic Church.

Private confession: The private confession is an important point of discussion because it is the link between the priest and the penitent. The relationship between the priest and the penitent is the direct result of the private confession made to the priest. The private confession also links the priest and the seal of confession. After the penitent has confessed to the priest, the seal of confession prohibits the priest from divulging that private communication. To understand the private confession thoroughly, its definition and genesis will find detailed discussion in this chapter. It is important to discuss its history to show how it has evolved and developed with time. At the end of the chapter, there is a short discussion of the impact of a private confession to the penitent and his relationship with God.

2.2 Anglicanism

Anglicanism is a religious system. Private penitence is part of that religious system. Therefore, when a penitent makes a private confession to the priest, he makes such a confession according to Anglicanism. Anglicanism is a religious belief that derives its existence from Christianity as practised by the Anglican Church. The penitent who confesses to the priest is therefore an Anglican. The word Anglican relates to churchgoers that practise Anglicanism. The Anglican Church comprises the Church of England and all other churches which worship according to Anglicanism and fall within the institutional structure of the Anglican Communion. Bays (2012:25ff) confirms that Anglicans are members of churches which are part of the

international Anglican Communion. In fact, she refers to the Anglican Church as the “family of churches” (p 17).

As a religious system, Anglicanism did not find formation because of theological or religious reasons as the discussion on the Reformation would show below (MacCulloch, 2003:198). Other congregations like Lutherans left the Roman Catholic Church because of religious reasons (Fahlbusch & Bromiley, 2003:362). According to MacCulloch (2006:2), Anglicanism is peculiar to other denominations. He contends, “That in some mysterious or mystical way, this was the intention of the Tudor monarchs, churchmen and statesmen who founded it in the first place”. According to Hassert (2013), Anglicanism has both the grains of Catholicism and Protestantism. It is Catholic because most of its characteristics espouses catholic and apostolic faiths (Anglican Prayer Book, 1989:109). This fact is so fundamental in Anglicanism that it forms part of the Nicene Creed (p 109). Anglicanism accommodates a large measure of Catholicity. An example is the sacrament of Eucharist, which find practice in both the Anglican Church and the Roman Catholic Church. It is also Protestant in the sense that like the Protestants it rejects the supremacy of the Pope and the exceptionality of Rome (Hassert, 2013).

However, to pontificate that Anglicanism is therefore a distance between Catholicism and Protestantism would be simplistic. It may have rituals that are Catholic in nature but its Thirty Nine Articles originated from Lutheranism and Calvinism (Amstrong, 2015: chapter 5). Amstrong likens the similarities between Anglicanism and Catholicism as a “panther and a hind”. He avers that although they are “possessed of separate natures, and change from one to the other would be a distraction and reproduction, not a process” (chapter 5). This means that although Anglicanism may have similar characteristics with certain religions, it is still unique. For an example, how it adapted the Nicene Creed to reflect its brand of Christianity (Hannaford, 1995:109-12).

There is no denying that Anglicanism severed itself from the Roman Catholic Church during the Reformation. That is why there are certain similarities between the private confession and the penance as would be shown later in the study. MacCulloch (2006:2) even warns theologians from applying or referring to Anglicanism before the Reformation. He contends that “the Anglican word is comparatively recent as a usage” and it was around the nineteenth century that theologians started to use it.

2.2.1 Anglicanism and church law

Anglicanism is part of a religious system; it derives its existence from the Scripture, which is God's law. The church, which is the vessel that contains Anglicanism, is not the creation of man but comes into the world by virtue of God's unique (*sui generis)* order. This find *inter alia* expression in the arguments presented before the court in the *Church of the Province of Southern Africa Diocese of Cape Town v Commission for Conciliation Mediation and Arbitration and Others,* (2002). In this case, the court had to decide on the point *in limine* if the priest was the employee of the church. The applicant (Diocese of the Anglican Church) made following submissions, which form the basis of the practice of Anglicanism:

- Although the priest functioned within the framework of Constitution and Canons of the Church, he was not an employee of the Church. The relationship between the priest and the Church was not an employment relationship (par xiii).
- The Constitution and Canons of the Church just "provided the sphere within which priests serve God arising out of their calling" (par xiii).
- Further, that the relationship between the priest and the Church "is not a bilateral and enforceable civil contract" (par xiv). The benefits and the stipend that the priest received were just means to enable him to fulfil his calling as a priest.

This submission by the applicant is indicative of the uniqueness of the employment relationship between the priest and the church.

In principle, there is no distinction between the Anglican Church, the Evangelical Churches in Germany, reformed churches in the Netherlands, and the reformed churches in South Africa with regard to this point. The minister or priest provides his services within a religious ambit unique to his religion and denomination. The reformed perspective describes this position in the following terms. The church order is the *ius constitutum* and the scripture as the *ius constituendum.* There is a distinction between *ius constitutum* (the law as it is) and the *ius constituendum* (the law in God's Word). Johannes Smit, a theology Professor at the North West University gives a useful exposition of this distinction. He refers to the *ius constitutum* as the prevailing, existing and fallible law of the country while the *ius constituendum* is the infallible law of God based solely on the Word of God (Smit, 1984:73-75). The church order gives expression to the government of the church according to the reformed view revealed in Scripture. State or state law is therefore not a source for the church order, but Scripture, the confessions, and the tradition as tested in the Word of God.

Even the church itself comes into existence through the Word of God. It does not come into existence by way of state or government proclamation. The contention by Smit is that "the church is a creation of the proclaimed Word *(creatura verbi)* (Smit, 2018:2). According to Smit, the church is "by its nature, a religious community and a community which is unique *(sui generis)* in this world" (p 3). He goes further to state that even the manner in which the church government takes place, finds support from the Word of God. Nobody has the right to dictate to the government of the church except Christ (p 5). The words of Pringle (1854:278) also resonate in the regard, "the government of the church, by the preaching of the Word, is first of all declared to be no human contrivance, but a most sacred Ordinance of Christ". According to Pringle, even the ministers of the Word of God get the mandate to do from God. Pel (2018:115) is of the view that the church community (believers) regard church law as divine. According to Pel, even the ministers who conduct religious ceremonies have to comply with the divine church law.

The conflict is evident between the laws of the land the law of God. Spoelstra (1989:220) is of the view that the law of God constitutes the central essence and fundamentality of the church. According to Van Staden (2014:241) in his doctoral thesis, the God's law, which is the law of the believers, should receive protection from secular law. For this reason, Barth (1958:720) views church law as "a law which in its basis and formation is different *toto coelo* from that of the state and all other human societies". However, he cautions, "the law pertaining to church and state can never be, or try to be, the law of the church, nor can it be accepted and recognised as such".

Another caution comes from Van Staden (2014:241) where he mentions that, "state authorities should not abuse their *ius circa sacra* in order to become involved in the church *ius in sacra."* He further states, "God has given the church and the state the authority (*potestas*) to rule, but each in its own sphere of influence" (p 243). According to Van Staden, "church should enjoy freedom of autonomy with regard to church law" (p 342). This necessitates that the church should receive ample freedom to govern itself and enact policies necessary to effect self-governance. However, the church should be cognizant of the fact that such autonomy cannot remain unfettered (Warnink, 2001:263).

Martin Luther in his work "On Secular Authority" also captures the relationship between the God's law and secular law (Luther, 1523/1991). He views the God's law as sacred authority and describes the secular law as the "sword". Luther divides the world into the God's kingdom

and the world kingdom. The God's kingdom comprises Christian believers who find guidance from the Spirit and the Word. The rest of humanity makes up the other kingdom, which is the kingdom of the world. Luther advocates for the harmonious existence between these two kingdoms. He enjoins the believers to obey secular authority unless it encroaches upon matters relating to the Word and the Spirit (p 23).

It is instructive to note that the church operates from a Spiritual realm. It derives its mandate from the Bible, which is God's Word. Smit (2018:2) submits that Christ uses the Holy Spirit to govern believers. He avers, "The Christ government finds expression through the Word and the Spirit". The Spirit works within the believers (*in nobis)* (p 2). The law of the land on the other hand does not operate within a Spiritual realm (Bavinck, 1930:371). The law of the land finds its existence from the wishes of the people who occupy that land.

As stated above, Anglicanism is a religious system, and one of the aspects of Anglicanism is a private confession. Church law or canon law characterises this religious system. One of the characteristics of church law is that the religious calling of a priest does not make the priest the employee of the church as envisaged in ordinary relationship of employment. This relationship is *sui generis* (*Church of the Province of Southern Africa Diocese of Cape Town v Commission for Conciliation Mediation and Arbitration and Others, 2002).* In other words, the employment relationship between the priest and the church is unique. It is unique in the sense that the priest is not the employee of the church (par xiii). Priesthood is a calling from God. Therefore, when a priest hears a private confession, he does so within an employment environment that is *sui generis.*

Private confession is part of the Anglican religious system. A private confession is a religious act that may lead to reconciliation between the sinner and God. It is also a sacrament (Anglican Prayer Book, 1989:448). The secular world can therefore not dictate how the Anglican Church may conduct a private confession. This means that the governance of matters relating to the private confession should comply with the church law rather than secular law. For an example, it is not compulsory to Anglicans to make a private confession to the priest (Anglican Prayer Book, 1989:433). The government cannot issue a proclamation to force Anglicans to make a private confession.

2.2.2 The Reformation Period

The discussion on Anglicanism would be incomplete without linking it to the Reformation. The reason for this is that this is the period when the Anglicanism started as a religious system. During the beginning of the sixth century (between 597 and 697), Augustine was appointed the Archbishop of Canterbury. After his appointment, he developed the liturgy and other church practices thus beginning the Anglican tradition. During the fourteenth century, John Wycliffe after translating the Bible to English, started to distribute the English Bible in England. The people in England were able to read the Bible themselves and this confirmed the Scriptures as Neil (1997:21) puts it, "the unique and sole authority for life and doctrine in the Church". There was no mention of the Anglican word during this period. However, it is the fifteenth century, the period of Reformation that invites interest.

Many changes were taking place during the Reformation period. Different reasons precipitated these changes. According to Chadwick (1964:21) one of the reasons was that in England, people disliked the church because they had to pay taxes and the money that they paid went to Rome. This was perceived as oppressive and the means to enrich Rome rather English Christians. There was so much resentment for the church such that a "layman was insulted unpardonably if he were called a cleric, priest, or a monk" (p 21).

The other reason that contributed immensely to dissatisfaction with Rome was the translation of the Bible into English. The translation of the Bible into English and its accessibility played an important role during this period. Dorian and Durston (1991:3) state that the easy access to the Bible helped in the simplification of worship and banning of the worship of relics. According to Avis (2002:13), people of England started to realise that "in the Roman Church the Word was not pure nor were the sacraments correctly administered". There was also a feeling that Rome was not prepared to change unless it initiated the change itself. This served as a fertile ground for the reformation of the church.

2.2.2.1. Prominent role-players during the Reformation

Certain theologians in England played different roles during this period of the Reformation. These theologians contributed immensely to Anglicanism as a religious system. This would shape the manner in which Anglicans viewed private confession of sins. Dorian and Durston (1991:2) are of the view that Thomas Cromwell was responsible for the preparation of the legal aspects concerning the church while Thomas Cranmer received credit for the compilation of

the Book of Common Prayer. Avis (2002:5) laments this reverence of Cranmer. He avers that Cranmer was "committed to royal supremacy, regarding it as a fundamental datum of biblical revelation". This may be the reason why Cranmer was not consistent in the application of the church policy against the royal policy. However, the Reformation of the Church of England will not be complete without discussing, albeit not in detail, the contribution of Richard Hooker (1554-1600).

Hooker was a theologian who contributed immensely to the architecture of the Anglican ecclesiology. His political philosophy greatly relates to conciliar tradition. Runcie (1988:36) opines that Hooker's view was that the driver of Anglicanism was tradition together with human reason. This is important because human reason is a gift that humans receive from God. According to Avis (2002:31), Hooker identified Anglicanism "and brought it to light in a recognisable way". Hooker did not however start Anglicanism from the beginning; he built on the work of his predecessors like Jewel and others. Hooker believed according to Avis, that there was a mystical church and visible church (p 31). The mystical church is that part of the church that only God can understand. The visible church on the other hand is that part of the church that only humans can perceive and understand. Hooker also believed in justification by faith.

A lot happened during the Reformation period. It was during this Reformation period that the Church of England took the opportunity to confirm its "apostolic foundation through the historic episcopal succession" (Avis, 1988:465). This paved the way for the subsistence of the ministry of priests and deacons. The development of the Thirty-Nine Articles of Faith set out the fundamentals of faith. Green (1994:170) opines that the Thirty-Nine Articles of Faith assisted in the denunciation of heresy but did not stipulate, "What should be believed down to the last detail".

On the other side of the Reformation the Lutherans, Humanists and Calvinists were also dissatisfied with Rome. The Lutherans were rejecting the allegory and historic episcopate whilst retaining most traditions of the church. To disseminate the Lutherans protest, Martin Luther (1483-1546) nailed 95 theses to the church door at Wittenburg on 31 October 1517 (Kuiper, 1964:157ff). Books written by Martin Luther that were circulating at that time edified this. One of other contributions of Luther was his views on *ius divinum* (Gane, 1970:124). According to Gane, Luther viewed the "invisible church" as those who receive salvation through Christ and the "visible church" as those who receive justification by faith and partake

in sacraments. Van Staden (2014:45) contends that the greatest contribution of Martin Luther was “development of the modern concept of separation of church from the state”. He concludes, however, the contribution of Martin Luther to church law in South Africa is insignificant. However, Martin Luther’s influence to this study is not minimal as the discussion on priesthood and the forgiveness of sins below will show.

The Humanists also played an important role in the Reformation. During this period, a new manner of reasoning propagated by Humanists emerged. Humanists challenged the religious community by using concepts based on law, literature and economics. According to Pont (1978:108ff), this type of reasoning influenced a number of the clergy with the result that there was a decline of church influence within society. Van Staden (2014:42) reflects that this situation made the reformation of the church an absolute necessity. It is however not clear from available literature how the humanists view directly or indirectly influenced the public and private confession of sins.

One of the people who played a significant role during the Reformation is John Calvin. He rejected anything not supported by the teachings of the Bible (Coertzen, 1991:221). He rejected the Roman Catholic Church manner of governance and the papal supremacy. While this was happening, the Roman Catholics were busy trying to ward off the Reformation that the people were organising from all directions. The cessation by the Church of England from the Roman Catholic Church happened during this period. It can be summarised in the following manner:

Henry VIII who was the King of Britain at that time wanted to marry Anne Boleyn because he could not get a son from his wife. He took a history changing decision of dispensing with obtainment of the permission from the bishop of Rome to have his marriage annulled (Chadwick, 1964:99).He did this by enacting an Act in Restraint of Appeals in 1533 which removed all the authority of the Pope in church and legal matters (Pont, 1978:172). He thereafter declared himself Head of the English Church. He forbade the Anglican bishops from communion with Rome. He convened the Reformation Parliament and married Anne Boleyn. The cessation from the Roman Catholic Church was complete. This shows that Anglicanism only started after the Reformation. This gives credence to the warning by MacCulloch (2006:2) against referring to Anglicanism before Reformation.

Overview: Anglicanism is a religious system. The God's law rather than the law of man drives Anglicanism. There is tension between God's law and laws of the land. The employment regulatory framework of the priest is unique because priesthood is a calling. The Reformation period is significant for Anglicanism. Prominent theologians like Hooker contributed vastly to the architecture of the Anglican ecclesiology (Runcie, 1988:36). Thomas Cranmer received credit for the compilation of the Book of Common Prayer. (Avis, 2002:5). Martin Luther played an important role during the Reformation (Kuiper, 1964:157ff). The Humanists also played an important role in the Reformation (Pont, 1978:108ff), Anglicanism only started after the Reformation (MacCulloch, 2006:2).

Anglicanism is a tradition in Christianity. Its interpretative model is fluid and not grounded on immutable archaic religious dogma (Thomas, 1988:254). It is cognisant of the society in which it operates (Amstrong, 2015: chapter 5). It adapts to change whenever possible. That is why it is flexible. For an example, its stance on celibacy and women priests. The common worship practices derived from the Book of Common Prayer holds Anglicanism together.

2.3 The structure of the Anglican Church

The private confession of sins to the priest happen within the institutional structure of the Anglican Church. Where is the priest located within this structure? Where is the penitent located within this structure? What is the role of highest institutional structure in the formulation of policies that govern the local church? It is because of these reasons that the institutional structure of the Anglican Church receive attention. The institutional structure of the Anglican Church is not highly centralised. Unlike the Roman Catholic Church, the provincial level is where most of the governance authority is exercised (Pickering, 1988:406). The structure of the Anglican Church revolves around the provinces, the officials, the conferences and common confessions.

2.3.1 The provinces

The private confession happens in the local churches, which are within the provinces. These provinces influence or affect the practice of the private confession of sins to the priests. The initiation and strategic direction of the practice of private penitence and other governance imperatives start at provincial level (Stubbs, 1886:292ff). This is where the priest-penitent privilege finds application. The Anglican Communion that is the mother body consists of the Church of England and independent or autonomous provinces.

The provinces in turn consist of various dioceses. The diocese consists of a number of parishes or churches (Avis, 1988). The Anglican Church of Southern Africa is one of those provinces of the Anglican Communion in Africa and it has dioceses in all the countries in Southern Africa. The provinces are autonomous with their own decentralised federal authority and structure (pp 417ff). This means that the provinces have direct influence in formulation of the policy on the seal of confession.

The local church is important because the private confession in most instances takes place at the local church. According to Smit (2018:6), the local church is *ecclesia complete.* He explains the dichotomy between the universal church and local church. His view is that the universal church of Christ "finds expression in the local church". He contends that the Christ empowers the local church to manifest the His will. The private confession takes before the priest in the local church.

2.3.2 The officials

The priests who receive the private confession are part of the ordained officials of the Anglican Church. The priest claims the priest-penitent privilege. He should also comply with canons regarding the seal of confession. The officials of the Anglican Church are the Archbishop of Canterbury, the bishops, the archdeacons and priests. These officials are the servants of God (Smit, 2018:3). God is using them to pronounce on His Word. The office-bearers are central to the "edification of believers" (p 5). They execute their mandate within the parameters set by the Word of God (p 5).

2.3.2.1. Archbishop of Canterbury

The Archbishop of Canterbury is the top official but he does not have the same hierarchical authority as the Pope. The Archbishop of Canterbury is *primus inter pares* (the first among equals), and regarded as the glue that keeps the Anglican Church together (Ward, 2006). He is the first among equals because, although he is the most senior, he does not exercise authority over the provinces, as they are autonomous. In other words, he cannot exercise authority over a priest at the local parish. Ordained clergies exercise their ministry in different ways and at different levels (Doe, 2013:77). Resolution 111.6 (e) of Lambeth Conference declares that the Archbishop of Canterbury is a "personal sign of our unity and communion" (Lambeth Conference Resolutions Archive, 1999).

2.3.2.2 The bishop

The bishop is the member of the clergy that is in charge of the diocese. The governance of the diocese falls under his authority. It is his responsibility to ordain people as priests, which priests would later hear private confessions. If the priest violate the confidentiality of the private confession, the bishop should deal with such violation. The bishop also ordains deacons (Ingham, 1986:149). There are also archdeacons who exercise a certain amount of authority over a number of parishes.

2.3.2.3 The priest

Next on line are priests. They fall directly under the authority of the Bishop. Priests are members of the ordained clergy and they conduct church sacraments like the Holy Communion (Ingham, 1986: 149 and Doe, 2013:77). The priests are the face of the local church. They conduct certain sacraments and are the most likely to hear private confessions. They are therefore to some extent the object of the study. Deacons and lay ministers assist the priests in the performance of certain functions.

2.3.3 Common confessions

Although the Anglicans are different and located throughout the world, they have common belief systems. One of those aspects of the belief systems is the private confession made to the priests. The Nicene Creed captures the fundamentals of those belief systems. According to Green (1996:58), Anglicans all over the world believe in the Nicene Creed. The summary of the creed of the Anglicans shows that the Anglicans believe in:

- God the Almighty Father
- Jesus Christ the Son of God
- The death and resurrection of Jesus Christ
- The Holy Spirit
- Forgiveness of sins
- The prophets and the apostolic church
- The resurrection of the dead and the eternal life (Bernardin, 2008:63; Doe, 1988:434).

The form of worship is almost similar in Anglican churches. According to Bays (2012:22), some of the common characteristics found in the Anglican churches are that they have a common history and a common form of worship. She goes further to say “Anglican belief is recorded in

the words of the liturgy". To this effect, the sacraments come to mind. The private confession of sins is one of those sacraments. All the Anglican churches have the following sacraments, marriage, baptism, confirmation, Holy Eucharist, confession, anointing of the sick and the Holy Orders (Anglican Prayer Book, 1989). According to Hefling (2006:2), Anglicans have a common prayer *lex orandi, lex credenda.* This prayer binds them together. The Anglican Church prides itself with the Anglican Prayer Book. This Prayer Book is the collection of services that most Anglican churches have used for centuries (Nuttall, 2006). Many countries have revised the Anglican Prayer Book. Inside this revised Anglican Prayer Book is the sacrament of confession of sins.

2.3.4 Conferences

Although the provinces are autonomous, they still independently share the character of the wider communion. This means that the manner in which provinces deal with issues of a private confession, will not differ much from the character of the wider communion. The global communion meets in Lambeth Conferences and Anglican Consultative Councils.

Since the priest is located in the local church, he does not attend these conferences and council meetings. The power to govern and control the church rests squarely with the provinces (Stubbs, 1886:292ff). However, the opinions of the ordinary members of the church find expression through the Synod. The Synod *inter alia* represents the priest. There should be credit for the Anglican Church for taking into account the views of the ordinary church congregants through the structure of the Synod.

This type of devolved authority is another distinctive character of the Anglican Church governance model. The Lambeth Conference of 1948, enunciated the concept of this federalised authority and held that,

> Authority is distributed among Scripture, Tradition, Creeds, the Ministry of the Word and Sacraments, the witness of the saints, and the consensus *fidelium,* which is the continuing experience of the Holy Spirit through his faithful people in the Church. It is thus a dispersed rather than a centralized authority, having many elements, which combine, interact, and check each other.

This precept by the Lambeth Conference of 1948 simplifies the relationship between the provinces by stipulating that they "combine, interact and check each other". This is

symptomatic of a symbiotic relationship. These provinces have full autonomy (Stubbs, 1886:292ff). The membership of the Anglican Church is about 80 million members. It is the third largest Christian communion in the world. The only church groups that are bigger than the Anglican Church are the Catholic Church and the Eastern Orthodox Churches (Bays, 2012). The effect of this devolved authority is that there are numerous churches, which consider themselves Anglican in character and practice but operate outside the dominion or federalised authority of the Anglican Communion. The Continuing Anglican Churches and the Anglican Realignment Movement are examples of such churches (Bess, 2002).

Seeing that the Anglican Church finds its ancestral origin from the Church of England, it would make sense that when it expanded, it followed the pattern of expansion of the British Empire (Neil, 1965). This also means that even the practice of the sacrament of the private confession followed the same pattern. Bays (2012:20) suggests that its expansion travelled "on the coattails of the British Empire". In fact, this is not surprising considering how the Anglican Church came into being after cessation from Rome. It spread to the Americana, United States and British North America in the same pattern (Norman, 1976; Worsley, 2015:50ff).

What then is the effect of this Anglican structure on the study? Because the provinces are autonomous, it means that the Anglican Church in Southern Africa should adapt its application of the priest-penitent privilege to the legal and social environments of South Africa (Amstrong, 2015: chapter 5). This may differ from other countries, for instance, America where the statute regulates the application of the priest-penitent privilege as shown later in this study. This as it may be, the fundamentals of Anglicanism in all provinces remains the same. The common confessions, the officials' hierarchical structure and conferences are the same.

Overview: The private confession of sins to the priest happen within the institutional structure of the Anglican Church. The location of the priest in the institutional structure is at the local level. The provincial level is where most of the governance authority is exercised (Pickering, 1988:406). The provinces, the officials, the conferences and common confessions are the prominent features of the structure of the Anglican Church. The officials are the Bishop of Canterbury, bishops, archdeacons and priests.

The Anglicans are different and located throughout the world with common belief systems. One of those belief systems is the private confession made to the priests. The provinces are

autonomous. They independently share the character of the wider communion. This affects the manner in which they deal with issues of a private confession. The priest is located in the local church. He does not attend conferences and council meetings like the Lambeth Conference. The power to govern and control the church rests squarely with the provinces (Stubbs, 1886:292ff).

2.4 Priesthood

The priests are an important variable in the study. The priest hears the confession from the penitent. In addition, the priest is subject to the priest-penitent privilege. The priest is further subject to the inviolability of the private confession. What is priesthood? Is there recognition of priesthood in the Bible? Is priesthood in America the same as in South Africa?

2.4.1 Definition

The term priest offers no denominational differentiation or emphasis. It is also gender free. Moskowitz and DeBoer (1999:2) observe that the terms "clergy," "clergyperson," "minister," “priest”, or similar words are sometimes “used interchangeably and refer generally to any person who is ordained, serves in, and/or oversees a religious community”. They further hold that “these terms are not intended to be technical designations but rather encompass such titles or positions as imam, minister, pastor, priest, rabbi, and other religious officials or leaders”.

Traditionally, a priest is an ordained congregant with authority to conduct sacred religious rituals concerning the relationship between God and humans. One of those rituals is the private confession. According to Agnes and Guralnik (2001), the word "priest" derives from Greek, *via* a Latin word *presbyter*, which means “elder”. They opine that it is possible that this Latin word found translation into Old English. Lightfoot (2007) takes this further by holding that it is a problem that English should have only the single term “priest” which means both *presbyter* and *sacerdos.* The *presbyter* is the minister who presides over a congregation, while the *sacerdos* performs sacred rituals (Strong, 1996; Thayer, 1996). Garhammer (2005:348) is of the view that the word *sacerdos* “had since the third century applied to bishops and only in a secondary sense to *presbyters.*”

2.4.2 Priesthood and bishops

Private confessions to a priest gained prominence at the beginning of the fourth century (Bradshaw, 2002). However, originally the bishop heard confessions. There was a division of penitents, who were undergoing discipline according to four ranks during this century. There were mourners, the hearers, the kneelers and the standing (Schaff & Wace, 1995:256ff). These ranks were according to the severity of the transgression and they resulted in the debarment of the penitent from participating in church services for a period depending on the rank accorded to the sinner. Only the bishops were involved in this process. This shows that originally, it was the bishops and not the priests, which were involved in the process of reconciliation between the sinner and God (Kurtscheid, 1927:16-21).

A certain process was necessary for the process of reconciliation between the sinner and God. According to Uhalde (2007:105), the penitents first had to punish themselves by hanging their "minds on a cerebral scaffold and torture themselves there; they stripped bare their consciences gory with savage bites before the bishop's own eyes and awaited his medicinal attentiveness". He goes further to say that it was the duty of the bishop to "reckon the weight of sins objectively, appraise confessions, and gauge the sincerity behind the lamentations" before deciding whether the penitent deserved forgiveness. Again, this process shows that it was originally the bishops, which were involved with the process of reconciliation with God and not the priests.

There was another process called postulation whereby the archdeacon presented the penitents before the bishop and pleaded on their behalf for the forgiveness of sins. It was the responsibility of the priests to act for the bishop in deciding whether public discipline was necessary and the duration will public discipline take. It was during this century that many tribes and barbarians converted into Christianity, and it became necessary that penitents could confess also to the priests and not only to the bishops. Because of this, the training of priests to hear confessions became necessary (Carter 1885). This shows that at some stage both the bishops and the priests were involved in the process of confession of sins.

2.4.3 Gratian

The discussion of the origin of the priest would not be complete without dealing with the work of Gratian. His influence on the development of theology and the church is somehow underestimated. Some authors even claim that he was just a "Camaldolese monk who taught

canon law in the monastery of St Felix and Nabor in Bologna" (Winroth 2004:6). Gratian studied church canons including those that pertained to penance. According to Larson (2014:11) who examined Gratian's work at length, Gratian devoted much of his work on penance in one of work his called *De penitentia* that was a "theological treatise". According to Larson, Gratian did not spend much time on the process of the sacrament of penance. He did not prescribe to the priests which questions to ask during penance. He devoted much time in the examination of "theological basis for the practice of penance."

Another one of Gratian's work is the *Decretum,* which is of both intellectual and ecclesial importance. As a prominent scholar, Gratian compiled catalogue of canons from the history of the church. He harmonised opinions on canon law (Kuttner, 1941). Some of the issues that he wrote about were the power of priesthood and the proper use and understanding of the sacraments. The portion of the *Decretum* most relevant to this study is his discussion of the sacraments. He did not delve much on the process of conducting the sacraments. He only elaborated on the theological foundations for sacraments. He also managed to articulate the responsibility of the non-clergy.

2.4.4 Episcopi vagantes

There are bishops called the wondering bishops or *episcopi vagantes.* These bishops claim to have apostolic succession and yet do not belong to any church. Leeming (1964:259) states that they receive episcopal consecration in an unlawful and irregular manner and they in turn consecrate other people. His view is that the Orders that they confer are invalid. In other words, the priesthood conferred by the wondering bishops were invalid. This is important; this means that the priest "ordained" by the *episcopi vagantes* could not claim the priest-penitent privilege.

Other commentators took this view further. According to Brandreth (2007:1-2) some of these *episcopi vagantes* have been excommunicated from the churches that consecrated them. They are not even in communion with any church. Brandreth contends, "even if his Orders are valid; the exercise thereof is not legitimate". These bishops did not "having any church behind them" (p 2). Since these bishops did not have any religious status, their "bishop-hood" did not carry and ecclesiastical efficacy within the Anglican Church. These ordained members of the clergy are not the subject of the study.

2.4.5 Recognition of priesthood in Old and New Testaments

2.4.5.1 Priesthood in the Old Testament

There is no mention of the private confession to the priest in the Old Testament. The priest are however visible present throughout the Old Testament. According to Exodus 28, the priesthood was present in the wilderness soon after the revelation at Mount Sinai. There were priests who came from the Levi tribe and there were others, who came from the descendants of Aaron (see also Cross, 1957:1). In Numbers 10:8, a reference is made of priests as sons of Aaron whereas in Deuteronomy 18:1 the Levitical priests. Exodus 32:26-29 shows that the choice of the tribe of Levi to be God's servants in the tabernacle was a reward for their loyalty to Moses during the episode of the golden calf. However, in the Old Testament the word *kōhēn* denotes both the Aaronian priest and Levitical priest.

2.4.5.2 Priesthood in the New Testament

Nevertheless, where do priests derive the authority to perform private confessions? Part of the explanation to this question lies in John 20 where Jesus Christ said to His disciples that as God had sent Him, He is in turn sending them (v 21). He went further to say that they must receive the Holy Spirit (v 22). He then gave them the power to forgive sins (v 23) when He uttered these words “if you forgive the sins of anyone, they are forgiven, if you withhold forgiveness from anyone, it is withheld”.

John 20 explains that when the priest participate in the process of the private confession, they are doing so in the name of Jesus Christ because as His Father sent him, He in turn sent them. They are therefore acting in *persona Christi*. This point is also emphasised by Merlino (2002:660) where he states, “although God alone can forgive sins, Jesus Christ, the embodiment of divine power, ceded this power to humans”. The priests therefore exercise this power on behalf of Jesus Christ.

This empowering statement, “if you forgive the sins of anyone, they are forgiven” (John, 20) is interestingly wide because it does not explain at what stage this is supposed to happen. It does not explain what type of sins qualify for forgiveness. There are no criteria or condition for the forgiving of sins. In fact, it does not even mention whether the process of forgiving of sins should be private or public. This contention also applies *mutatis mutandis* to the statement “if you withhold forgiveness from anyone, it is withheld” (verse 23).

Because this empowering statement is so wide, it has led to theological debates. For example, the debate between private and public confessions. It is obvious that the mission of the apostles after the death of Jesus Christ was *inter alia* to forgive sins and not to forgive sins. The priest has the same authority as the apostles so the same power applies on them. It must however be stated that the priest is not the source of forgiving of sins but he is just the servant facilitating the process of forgiveness on behalf of Jesus Christ. Smith (2018:3) observes that all office-bearers like priests are "just instruments in the hand of God and responsible for the true proclamation of the Word".

The priests in the New Testament assume the historical continuation from the Old Testament. This is evident from Mark 1:44. After Jesus Christ had cleansed the leper He said to him "see you say nothing to any man: but go your way, show yourself to the priest, and offer for your cleansing those things which Moses commanded, for a testimony to them" (Mark 1:44). In this passage, Jesus Christ commanded the leper to go the priest for further cleansing. This was a ritual in the Old Testament. On the day of cleansing, the leper had to go to the priest with two birds, cedar wood, scarlet yarn and hyssop for cleansing. There is an explanation of the entire ritual cleansing process in Leviticus 14.

This assertion by Jesus Christ in Mark 1:44 shows that He did recognise the institution of priesthood. Gundry (1993:96) contends that it was clear that Jesus Christ wanted to complete the cleansing of the leper by referring him to the priest. Wiersbe (1989:114) view is that Jesus Christ shared His authority with His servants and that "only those who are under authority have the right to exercise authority". Although this cleansing ritual is not a confession, it is relevant because it shows some of the role that the priests played in the Old Testament.

Not all theologians support the role of the priest during the private confession. One of the reasons tendered by antagonists of this practice is that the priest is in a position of power (Hartman, 2005:535). In other words, the process of private confession itself elevates the priest to a position of power and relegate the penitent to a position of subordination. This may be partly true because the priest can probe and ask questions that are irrelevant to the confession *in casu*. There are no guidelines or limitations as how far the priest can probe during the private confession. The New Testament does not help in this regard.

There is therefore a possibility that the priest may usurp or exceed the authority vested in him. The priest may do this unconsciously, in other words, without knowing that he is usurping his authority. He may also do this because of malice. For an example, there would be perceived or real bias on the part of the priest if the private confession relates to somebody that he knows or the incident of which he is aware. There are no guidelines as to what the priest may ask and what he may not ask.

On the other hand, the penitent is just at the mercy of the priest because he comes in as somebody who lacks moral authority. The relationship formed between the priest and the penitent during the private confession is unequal. The penitent is just under the influence of the priest who also has moral authority over him. Because he came to the priest voluntarily, it can be very difficult for the penitent to refuse to answer probing, irrelevant or malicious questions from the priest. He is just sitting in the confessional like accused before a judge. He is in a state of helplessness.

The priest is not acting as a parent during a private confession. He is acting as a spiritual adviser. There is a view by Hartman (2005:535) that the priest may during the private confession act like a parent to the penitent. If he acts like a parent, Hartman is of the view that he erodes the power and authority of the father as the head of the household. He goes to say that private confession was a “threat to the family” by usurping the authority of the father. He opines that there was a prevalent view that the practice of a private confession was “a threat to the English patriarch” because the priest could gain access to an intimacy that is typically contained within the domestic relationship.

2.4.6 The views of Martin Luther on priesthood

Martin Luther contributed to the understanding and authority of the priest. There was a view that the priest did not have any greater spiritual power than any other baptized member of the church did. The protagonist of this view is Martin Luther. In his work *De Captivitate Babylonica Ecclesiae,* Martin Luther (1520) firstly recognises that absolution is a promise from Jesus Christ. The Word of God guarantees the promise of absolution. The confessor and the words of confession are just an “external mask” that can be equated to water during baptism.

This means that according to Martin Luther, any member of the congregation may hear a private confession. The word of forgiveness pronounced by the priest is not his word but God’s

Word. According to Martin Luther (1528/1521) in his seminal work *Vorlesungen über Jesaja und Hohesliedany,* a baptised person can pronounce the words of absolution. The privilege of granting absolution was not only the preserve of the priest. He even provides the words that the confessor should say “God be gracious to you and strengthen your faith. Amen”.

Overview: The priests are an important variable in the study. The priest hears the confession from the penitent and he is subject to the priest-penitent privilege. Traditionally, a priest is an ordained member of the church. Originally, if a member of the church missed the mark, he confessed his sins in public. The bishop would then pronounce on his absolution. It later became necessary to confess to the priest as many people sinned.

There is no mention of the private confession to the priest in the Old Testament. The priest are however visible present throughout the Old Testament. The New Testament recognises the priests in terms of John 20. Although Martin Luther was of the view that any member of the church can hear a private confession, this would not apply in the Anglican Church. Only ordained clergy can hear a private confession.

2.4.7 Priesthood in the Anglican Church

A priest in the Anglican Church forms part of the ordained clergy. He hears the private confession. The ordained clergy comprises bishops, priests and deacons. Sometimes there is a reference to the ordained clergy as the ministry. Ingham (1986:149) points out that lay priests form part of the ministry of the church. In the Anglican Communion, generally speaking, anyone who forms part of the ordained clergy is a minister. Buchanan (2006) in his definition of a minister includes lay ministers “as people who are of the laity, but hold some kind of charter or authorization for tasks they fulfil”. A lay priest or lay minister does not have *locus standi* to hear private confessions.

According the Anglican Prayer Book (1989:433), the ministry of the priest is as follows: “The ministry of the priest is to represent Christ and his (sic) Church, particularly as the pastor to the people; to share with the bishop in the overseeing of the Church; to proclaim the Gospel; to administer the sacraments; and to bless and declare pardon in the name of God.” From the above passage one can make the following the deductions.

Firstly, in the Anglican Church a priest represents Christ and therefore acts in *persona Christi*. McGovern (2010:79) is of the view that the term in *persona Christi* has its genesis from the Vulgate translation of 2 Corinthians 2:10 where Paul absolves the community "in the person of Christ". He goes further to say that "it is Christ, present in the liturgical action, who renders cult to the Father and offers his body to men through priests" (p 80). Therefore, in his performance of sacramental duties, the priest represents Christ at all times.

Secondly, part of the ministry of the priest is to "declare pardon in the name of God" (Anglican Prayer Book, 1989:433). This means that the priest can hear private confessions and make a pronouncement of absolution. He is doing all this in the name of Christ. In line with this assertion, is the contention by Schall (2009:1) a professor at Georgetown University, when he states, "every priest is there in *persona Christi*, not in his own charming or otherwise qualified personality". A priest is therefore not engaged in his own frolic or self- aggrandisement, but represents Christ during a private confession.

The position of the priest in the Anglican Church has influence on the priest-penitent privilege, which is the essence of the study. This is crucial because not any member of the church can claim the priest-penitent privilege. The Anglican Church relies heavily on the canons and the Anglican Prayer Book to determine the status of the priest since there are no statutory provisions or any legal framework, which determine or clarify this status. Is the concept of priesthood in the Anglican Church in South Africa similar to priesthood in America?

2.4.8 Priesthood in America

Statutes regulate priesthood in America. In South Africa, the statutes do not regulate priesthood. There are a number of different churches in America and this complicates the meaning of the word "priest" to whom confidential communication can be made (Reese, 1963:64-65). What have compounded the problem are the meanings that different states attach to the word "clergy". The word "clergy" may mean priest, minister, rabbi, licensed or ordained minister (Gumper, 1981). Colombo (1998:2-3) explains the different meanings from different states. According to Colombo, 23 states define the term clergy similarly as "a priest, minister, religious practitioner, or similar functionary of a church or of a religious denomination or religious organization". He further holds that 12 states do not define clergy at all, but states that the clergy-penitent privilege applies to any "clergyman or priest". He further notes that 14 states defines clergy as "members of *bona fide* established church or religious organization".

The analysis of the explanation by Colombo firstly shows that some states accord the priest-penitent privilege only to the clergy who are ordained or licenced by a particular church. Secondly, other states limit the protection to the clergy who belong to established churches (Colombo, 1998). In South Africa, the Anglican Church only allow the ordained clergy to take private confession. This means that only the ordained clergy can claim the priest-penitent privilege.

2.4.8.1 The American courts views on priesthood

Is a nun a member of the clergy? In *re Murtha (1971),* an American case, the court refused to regard the nun as a member of the clergy although she ministered to the youth with personal problems. The court stated that she is not a priest if she did not conduct any religious sermons. She was not empowered by church canons to hear private confessions. Even in the Anglican Church in South Africa, the nun is not a member of the clergy. There is no confusion in this regard.

Early in the nineteenth century, American courts had the opportunity to deal with the definition of the word clergy. In *Reutkemeier v Nolte* (1917), a farmer instituted a civil claim against his neighbour for deflowering and impregnating his daughter. During cross-examination, the defendant denied paternity and contended that the daughter was not a reliable witness as she had confessed to a Presbyterian minister and elders within the church that she had had sexual relations with other men. The court had to decide if a meeting between the victim, the minister and three elders of the church is confidential. The court had also to determine if such communication fell within the purview of the meaning of the priest-penitent privilege as indicated in the state privilege statute.

The court decided that the doctrine and policies of the church deserved scrutiny first. The court perused the Presbyterian Church doctrines and policies and concluded that elders were actual officers of the church with the power to preach in the absence of the minister, to exercise church discipline, and to monitor and supervise the conduct of the members of the church. The court concluded that the elders were ministers of the gospel.

This case shows that the courts do not ignore the church doctrine and canons if it interprets matters affecting to the church. The courts are also very reluctant to interfere in church matters. It is obvious that this interpretation does not cover the Anglican Church in South

Africa because in the Anglican Church, the minister or priest is formally ordained and his duties tabulated in the Anglican Prayer Book (1989:587). The legal framework and statutes do not define what is the priest or the ordained clergy. The fact that the elder of the church sometimes exercises church discipline, monitors and supervises the conduct of other members of the church does not *ipso facto* make him a member of the clergy.

2.4.8.2 The modern view in America

There is a modern view on the definition of the word clergy in America. The modern view is to try to be as inclusive as possible in the definition to accommodate different religious denominations. Cassidy (2003:1656) postulates that the safe approach to the definition is to include even any person doing the same function as the clergy. He confirms this approach as the majority view of most religious commentators and the courts. This view will not find comfort in the Anglican Church in South Africa because the definition of the clergy in the Anglican Church is clear. It is not permissible to be a member of the clergy unless you have been formerly ordained.

Overview: A priest in the Anglican Church forms part of the ordained clergy. He represents Christ and therefore acts in *persona Christi* (McGovern (2010:79). The position of the priest in the Anglican Church has influence on the priest-penitent privilege, which is the essence of the study. Statutes regulate priesthood in America (Reese, 1963:64-65). In South Africa, the statutes do not regulate priesthood. The modern view of priesthood in America is to be as inclusive as possible to accommodate different religious denominations (Cassidy, 2003:1656).

2.5 The private confession

The thin line between the private confession and penance is evident in the research. Although penance is not the object of the study, these two concepts need explanation to avoid religious confusion. Further, the fields of theology and law both use the word “confession”. What does this word mean?

2.5.1 Definition of a confession

Generally, a confession is an admission of certain facts to someone else, which facts the person who confesses would under normal circumstances not divulge. This term is usually

associated with something that is morally or legally inappropriate (Cerutti 2006:37). In legal parlance, a confession is an acknowledgement of guilt, which amounts to a plea of guilty in a court of law (*R v Becker 1929*; *S v Molimi 2008*). In theology, a confession is a process whereby a person admits his sin, and receives absolution or forgiveness from a priest or a person acting in *persona Christi,* believing firmly in the forgiveness of such sins by God through this process (Becker 2004). The confession is concerned with receiving absolution or forgiveness from the priest (Rittgers, 2004:2).

2.5.2 The origin of the private confession

There is an understanding that after the death of Jesus Christ, the practised form of confession was a public confession. There are different views on how the practice of confession of sins started. Some commentators like Pettazzoni (1937:1ff) believes that the confession in public was originally practised by Egyptians by the year 1300 B.C. Latko (1966:131) confirms that this public confession of sins entailed "sacramental procedure involving austere discipline". Others like Tentler (1977:3) believed that there was ecclesiastical practice designed to bring back to the church fold Christians who missed the mark. After this practice, they could be able to participate in church sacraments with other fellow Christians.

These views by Pettazzoni and Tentler show that there was some kind of practice performed by sinners. To comprehend the private confession, a discussion of the following topics is necessary: the private confession and the forgiveness of sins, the private versus the public confession, the contribution of Tentler towards private confession and the Fourth Lateran Council.

2.5.2.1 The private confession and the forgiveness of sins

The link between the private confession and the forgiveness of sins is important because Jesus Christ empowered His disciples to forgive sins. John 20:21-23 which serves as evidence to that effect provides "If you forgive anyone his sins, they are forgiven; if you retain the sins of any, they are retained." This indicates that Jesus Christ intended to leave the disciples with this ecclesiastically significant power not only to forgive sins but also the power not to forgive sins. There should have been the confession of sins before the forgiveness of such sins. The disciples would not have had been given power to forgive sins of which they were not aware.

Rittgers (2004:2) refers to this power to forgive or not to forgive as the “keys”. He opines that the “keys” have been the great influence in the theology and the mission of the church throughout the centuries. He further postulates that it “served as the basis for ecclesiastical claims to authority in both spiritual and temporal affairs”. He suggests that it has influenced “the papacy, the Crusades, and auricular confession, to name a few” (p 2). Not only has it had dominance in the field of theology but it has also “had a tremendous influence on the religious, social, and political life of Christianity’s various host cultures”. The keys lock and unlock. This means that Jesus Christ empowered the disciples to lock and unlock sin.

During the early centuries, the forgiveness of sins was such a debated issue in religion. Some commentators like Araujo and Robert (2000:643) contend that, “the early Patristic period saw rites of confession, forgiveness, and penance mature”. The confession of sins was not only a religious burning issue during this period, but it was also encouraged. However, Jurgens (1970:303) is of the view that it was only around the second century that the Christians were encouraged to confess their sins to the Lord. He quotes the Treaties of Aphraates where it was said that, “you ought not to deny a curative to those in need of healing. And if anyone uncovers his wound before you, give him the remedy of repentance”.

Sinning was a constant thorn in the side of religion. The church had to deal with it. There are even symbols that show how seriously the church took the importance of the forgiveness of sins. Around the third century, there was the symbol of Saint Ambrose which states that “1 believe in God, the Father almighty, and in Jesus Christ... the forgiveness of sin and the resurrection of the body” (Neuner, & Dupuis, 1981: par 3). Another symbol emerged through the third century by Rufinus which states that “I believe in God, the Father almighty, invisible and impassibly, and in Jesus Christ ... the forgiveness of sins and the resurrection of the body” (par 4).

The church was engrossed with the forgiveness of sins. Even during the First Council of Constantinople that happened in the third century, the church had to deal with the forgiveness of sins (Neuner, & Dupuis, 1981: par 12). Even the sitting Popes had to contend with it. During the fourth century, Pope Celestine, in one of his councils, implored the church to provide reconciliation to those who were facing impending death (par 1604). During the same century, Pope Leo, in a letter to Theodore, the Bishop of Frejus emphasised the fact that the sacrament of reconciliation was “the Church's official intercession to reconcile sinners, through penance, with God” (par 1605).

2.5.2.2 Public versus private confessions

The private and public confession take place in different church environments. The public confession takes place in public whereas the private confession takes place in a private setting. Karant (1997:92) is of the view that the sin was serious and discipline happened to those who committed “gross visible violations of Christian principle,” often in public. Sometimes excommunication from the church followed. Mead (1875) postulates that after committing a grave sin, a member of the church was excommunicated or denied access to the Eucharistic table until he would do penance proportionate to the sin.

Penance and reconciliation were in public and were arduous and protracted processes. The bishop would lay hands on the sinner as a sign of absolution. According to Uhalde (2007:98), those who offended against religious law “submitted to liturgical penance, assigned by a bishop and concluded by his laying of hands in a reconciliation ceremony”. After that, the admission of the penitent back to the congregation took place. The sinner could not participate in any sacraments of the church before the reconciliation process.

The prevalent notion at that time was that the sin had the spiritually destructive effect on the person. It also destroyed the fabric that held society together. Therefore, the spirit of the sinner needed resuscitation and the fabric of society deserved restoration. Cornett (2011:3) contends that the expectation in the middle Ages that Christians should confess their sins to gain absolution and the acceptance back into the church fold was not natural but it was a taught process. He goes further to say that after the time of the first sin in Eden, sinning became ubiquitous and what the priests and penitents said and did during confessions had to undergo a teaching process

Public confession: There were lots of discussions and writings about the practice of public confession during the 2nd century. Hermas (A.D. 145) wrote a series of articles about sinning and absolution. Firstly, he rejected the notion that a baptised person could sin and he rejected the forgiveness of such sins. He then advocated that the church offered an opportunity to sinners for conversion, but there should be one opportunity of restoration and repentance. He stated with acknowledged emphasis "there is but one repentance for the servants of God". However, he did not comment about the confession of sins.

A systematised approach came into effect during the 3rd century. The first place to systematise was the identification of sins. Lea (1896) states that three sins identified were idolatry, adultery and murder. The church regarded them as grievous sins to such an extent that the sinner could not partake in a Eucharist sacrament if he committed one or all of these grievous sins. Schaff and Wace (1995:256) furnish the following examples of in dealing with these serious sins:

Firstly, there was excommunication from the sacrament for twenty years if the sinner committed murder. For the first four years of those twenty years, the sinner should weep, standing outside the door of the church and confessing his sins, pleading with the churchgoers as they enter in to offer prayer on his behalf. It took four years, for the sinner to sit among the hearers. After seven years, he could pray with the kneelers. After another four years, he could stand with the faithful but would not take part in the oblation. Only after admission back to the sacrament of Eucharist would his acceptance back to the church fold become possible.

Secondly, if the sinner committed unintentional homicide, the exclusion was for ten years from the sacrament. For two years, he could weep. For three years, he could mingle with hearers. For four years, he could sit amongst the kneeler and only after that; his acceptance back into church fold could take place. The exclusion of the adulterer from the sacrament was for fifteen years. During those years, he could be a weeper, a hearer, a kneeler and a stander before he could participate in the communion.

What happened if a person sinned after baptism? There was excommunication for sins committed after baptism. If the sinner committed sins again after baptism, the church disciplined him. Baptism was the first lifeline that the sinner received. The second was a confession, which resulted in the sinner's discipline by the church. There was no third chance for the sinner. Whether the sinner sinned before or after baptism, the discipline process took place in public. Hopkins (1999:93ff) is of the view that it was during this period that the church manifested the eagerness to grant absolution to sinners at baptism. He maintains that sinning after baptism led irresistibly to excommunication from the church. Since the rite of penance was possible once in a person's life, there was a propensity amongst Christians to defer it until the imminence of death. It was during this period that public and general confession of sins became part of worship in Christian churches (Hanna 1911; Biller P & Minnis AJ 1998).

It appears that the emphasis was on the fact that the confession should be in public and in serious transgressions, it had to be in public and in the presence of a bishop. McNeill (1951:91) suggests that during the second century, the public confession of sins routinely took place on Sundays and in the presence of a bishop. He goes further to state that the public confession preceded a private interview between the bishop and the penitent. According to Uhalde (2007:102), the confession was a public exercise that ensured that a penitent could not just "experience regret like any pang of conscience", the penitent had to wear torn clothes and cover himself with ashes in front of the entire congregation.

The private confession: The private interview with the bishop before the public confession was the genesis of the notion of a private confession. It is not clear why a public confession preceded an interview with the bishop, save to speculate that the bishop was preparing the sinner for a public confession. Kurtscheid (1927:16-21) is convinced that even if the confession was made in public, the details of the confession and the penance were prescribed in private. Gatta and Smith (2012:15) posit that although the bishop had a private interview with the sinner, he later delegated this function to other junior members of the clergy. This ushered in the idea that since the junior members of the clergy could interview the sinner, he could also hear the private confession.

There are a number of views, which suggest why and how the practice of private confessions started. Kurtscheid (1927:16-21) believes the private interview with the bishop was in itself a private confession. He is of the view that the private confession was sufficient. He is confident that the fact that St Augustine did not mention the public confession when dealing with penance signifies that the private confession was sufficient for reconciliation. According to Kurtscheid, the church devised strategies to make it easy for the believers to confess their sins. Private confession was one of those strategies.

Some commentators did not accept this view on the genesis of the private confession. McNeill (1951:96) challenged it. He claims that the fact that St Augustine did not mention the public confession of sin does not mean that the private confessions were sufficient for reconciliation with God. He holds that Kurtscheid fails to show the evidence of the existence of the private confession. The failure of St Augustine to mention the public confession in his writings does not make the case for private confessions stronger. In fact, it neither, strengthens nor weakens the case for private confessions.

There is another view of the genesis of the private confession. Murray (1972:159) hold that the idea of a private confession began when St Patrick landed in Ireland in AD 432. He contends that the missionaries who were with him at that time devised an ecclesial penance practice whereby “novices went to the old for spiritual advice and to confess their faults”. According to him, this was the private confession of sins. According to McNeill (1951:116), when Theodore of Tarsus became the Archbishop of Canterbury, this Irish practice, which Murray explained was so entrenched that he just accepted it. According to Kurtscheid (1927:65), the reason for the acceptance of this practice by the Archbishop of Canterbury was to make conversion of Anglo-Saxons easier and to avoid the public humiliation of public confessions. The statements of these commentators gives credence to the fact that the Archbishop of Canterbury played an important role in the evolution of the practice of private confession.

2.5.2.3 The contribution of Tentler towards private confession

The contribution of Tentler (1977) in the history of the development of the private confession is noteworthy. He identified two stages that culminated in the practice of a private confession, namely, the public confession and the development of penitential manuals (Tentler (1977:4). According to Tentler, the church understood that there should be a practice and procedure for the confession of sins since it was crucial for the believer to reconcile with God after sinning.

During the second century, the church developed a method to forgive sins and the procedure for reconciliation. This method and procedure resulted in the codification into canons. Tentler (1977:4) held that after the codification, the canons then became the main source of reference. He referred to this as a canonical confession. The canons regulated the confessions. Like most writers, he concluded that during the second century, the practice of confession was public. This means that the penitent confessed in public and only those sins that he confessed in public became known. The public confession, then, had the inclination to conceal those sins not confessed in public.

The public confession followed a particular manner and had profound consequences. According to Tentler (1977:5), after the sinner had confessed the bishop lay hands on him. The church then accepted him back into the fold. He however, laments the fact that the ceremony of reconciliation involved the public humiliation of the sinner. Further, even the public humiliation was not enough. There were other consequences for the sinner. For instance, he could not become the member of the clergy. This consequence seems rational

because it could undermine the ministry, nobility and sanctity of the ordained clergy if someone who has been publicly humiliated form part of the same ordained clergy.

This was not the only consequence. Another consequence that the penitent had to endure after reconciliation was that he could not enter into marriage (Tentler 1977:5). In other words, he was not marriageable. If he was married already when he committed the sin, he could not enjoy his conjugal rights. This was not only irrational, but also unfair. This was tantamount to destroying his family life and religious life. In fact, he received double punishment for the same sin. This also made him susceptible to commit adultery again if his first sin was adultery.

The humiliation was not complete. The penitent had to endure further punishment as he could not perform military service (Tentler 1977:5). This treatment of the penitent made him feel worthless and untrustworthy. This destroyed him emotionally as he could not defend his country during the time when chivalry was the measure of patriotism and manhood. He was not only a pariah in church, but also a social outcast who could not even defend or honour his country. This was also not only harsh but also unfair.

The belief was that God forgave his sins after the sinner had confessed his sins and the bishop had put his hands on him. These other consequences were an extra burden that did not have anything to do with forgiveness of sins because God already forgave the sins. It means that this forgiveness was partial. It is therefore understandable why sinners deferred the confessions until before death. According to Tentler (1977:6), “arduous penitential exercises obviously could not be required of a dying man, and his exclusion from economic, military, and marital life would be similarly irrelevant”. The shrewd and manipulative sinners therefore conveniently confessed their sins right before death other than to bear the public humiliation plus debarment from becoming a clergy, denunciation of conjugal rights and exclusion from military duties.

The public humiliation needed stopping. The penitential manuals played this role. As explained, the second development of public confession according to Tentler was the development of penitential manuals (Tentler 1977:4). The penitential manuals were abridged manuals that guided the priests on the categorizations of sins. The manuals also provided the priests with confession procedures for particular sins (p 9). There is a fundamental difference between the penitent manuals and the canonical penance. The manuals provided for the

confession process to take place between the priest and penitent in private whereas the canonical penance took place in public.

Needless to point out, because the confession took place in private, there was no public humiliation. What is however more important according to Tentler is that once the forgiveness of sins has taken place the penitent was not encumbered with extra consequences (Tentler 1977:10). Tentler further points out that although there were profound differences between the two, there were fundamental similarities that remained namely; deathbed penance remained expression of sorrow, restoration of penitent after penance and sacramental participation.

The penitential manuals prescribed the process for a private confession. The structured process of confession encouraged more people to confess. The resultant end of this was the need for more priests to hear confessions. Tentler (1977:17) portends that because of this situation, priests began to expand the kinds of penance offered and moved beyond what was contained in the penitential manuals. The result was that penance became too punitive and impractical. The obvious consequence was that people stopped to confess or lied about their sins.

2.5.2.4 The Fourth Lateran Council

The treatment of the auricular confession will not be complete without expatiating on the crucial role played by the Fourth Lateran Council in the development of the private confession. During November 1215, Pope Innocent III summoned an assembly of a number of bishops and other church prelates at basilica of St John Lateran in Rome. Pixton (1995) describes this assembly as the "greatest ecumenical council of the medieval period". This assembly had profound influence on the medieval church. It was to charter the manner in which the church should operate. Pixton refers to it as the "greatest testimony of Pope Innocent III's vision and authority: it constitutions became integral part of the Church's law".

The main agenda of the Fourth Lateran Council was to reform the church and to promote the Fifth Crusade (Fourth Lateran Council, 1215). Pope Innocent III said the following in this Council:

> Two things particularly lie near my heart: the regaining of the Holy Land and the reform of the whole church. Attention to both can hardly be hardly any

> longer without any grave danger. After praying to God for enlightenments in this matter, and also after frequent consultation with cardinals and other learned men, I have decided after the manner of the ancient father to convoke a general council, by means of which evils may be uprooted, virtues implanted, mistakes corrected, morals reformed, heresies extirpated, faith strengthened, disputes adjusted, peace established, liberty protected, Christian princes and people induced to aid the Holy Land and salutary decrees enacted for the higher and the lower clergy (see also Foreville [no year] In his work Lateran 1-1V 278-279).

These words indicate that what the council's main point on the agenda was to reform the church. Pope Innocent III had prepared for this assembly by requiring all bishops from various provinces that were going to attend the assembly to prepare memoranda for all aspects of the church that they felt required conciliar attention. This indicates that the decisions taken at the Fourth Lateran Council were a result of the problems that were prevalent in the provinces. This was a bottom-up approach to strategic planning.

The main contribution of the Fourth Lateran Council as far as the private confession was concerned was in the decree *Omnis utriusque sexus*, canon 21 (Fourth Lateran Council, 1215). According to this canon, a private confession to a priest was obligatory once a year and participation in the Eucharist was mandatory during the Easter. An additional confession was required every time an individual wanted to participate in the Eucharist outside of Easter. One element is evident in this decree is that the private confession was no longer a voluntary spiritual expedition but forced spiritual exercise.

May be it was necessary at that particular time to make private confessing compulsory. The church needed to reform in that time. It needed to "implant virtues" (in the words of Innocent III). The view held by Myers (1996:29) is that the decree "exhibits the features of sacramental confession important to medieval religious life: discipline, pastoral care, and worthy reception of communion". He goes further to opine that the decree had all the hallmarks of an endeavour to instil discipline in the church. One of his assertions was that the decree intended to serve as "matter of social control" (p 30).

A perusal of sociology literature suggests that “social control” has a negative manipulative connotation. In fact, Janowitz (1975:82) from the University of Chicago explains “social control” as an intellectual manoeuvre “employed by some pioneer sociologists interested in social progress and the reduction of irrationality in social behaviour”. The submission is that the decree intended to regulate the practice of private confession in church rather than to regulate the general societal conduct as Myers suggests. The decree intended to instil discipline within the confines of the church. The church was not interested in the people outside the church.

As stated above the congregants had to confess a number of times per year. Myers (1996:30) points out that that made priest acquainted with congregants. The priests began to understand the way of life of the congregants. This relationship between the priests and congregants made future private confessions easy. Myers further points out that since the sins were categorised, there were times when the penitent came to the priest to confess but discovered during the private confession that the priest did not have the authority to forgive that particular type of sin. In that case, the priest gave spiritual advice instead of absolution (p 30).

Overview: The above discussion shows how the private confession started. If a penitent committed a sin, depending on the type of sin, his excommunication from the church followed and he could not participate in the Holy Eucharist. The penitent had to confess the sins in public. There was an attendant humiliation, which accompanied the public confession. Because of public humiliation people stopped to confess and this ushered in a concept of private confession. The public confession takes place in public whereas the private confession takes place in a private setting. Tentler (1977) contributed in the history of the development of the private confession is noteworthy. He identified two stages that culminated in the practice of a private confession, namely, the public confession and the development of penitential manuals (Tentler (1977:4). The Fourth Lateran Council also played an important role in the development of the private confession (Pixton, 1995).

2.6 Public and private confession in the Anglican Church

The private confession in the Anglican Church is one of the factors in the research problem. Its discussion at length is necessary so that it should be clear what happens when the penitent makes a private confession to the priest. The Anglican Church practises two forms of confession, namely, the public confession and the private confession.

2.6.1 Public confession in the Anglican Church

As stated above contemporarily, the Anglican Church practises two forms of a confession. The congregants performs the first form of a confession (public confession) before the services of Holy Eucharist. This form involves a general confession to sins. All present members of the congregation say it together and it goes thus:

> Almighty Lord, our heavenly Father in penitence we confess that we have sinned against you through our own fault in thought, word and deed and what we have left undone. For the sake of your Son, Christ our Lord forgive us all that is past and grant that we may serve you in the newness of life to the glory of your name (Anglican Prayer Book, 1989:106).

This public confession shows some important characteristic. Firstly, everyone present in the congregation say it. Gatta and Smith (2012:23) disavow the public confession on the ground that because it is repeated every Sunday, "it simply loses is force over time". In other words, congregants just recite it without attaching any Spiritual value to it. The contention by Gatta and Smith misses the fact that since we sin most of the time during the week, when we confess our sins on Sunday, we genuinely confess and need forgiveness. We all look forward to go and confess on Sunday through this recitation. Every Sunday is an opportunity to confess new sins, and therefore, the recitation will not lose force as they allege.

Secondly, there is no specificity of sins. In other words, nobody inside the church knows about what the next person is confessing. That is between that person and his God. Nobody in the church knows whether there is contrition or not. That is between that person and his God. The result of this state of affairs is that there is no public humiliation of the members of the church. However, an impression persists that this public confession is compulsory because of its repetition every Sunday before the participation in the Holy Eucharist.

The entire congregation confess to their sins and the priest stands up and pronounces on absolution. He states "Almighty God who forgives all who truly repent, have mercy on *you;* pardons *your* sins and sets *you* free from them; confirm and strengthen *you* in all goodness and keep *you* in eternal life; through Jesus Christ our Lord" ((Anglican Prayer Book, 1989:106). There is one aspect of the absolution that needs attention. What does "truly repent" mean? This may leave the impression that God only forgives those who truly repent. Ironside (1937: chapter 1) insists that true repentance "is not a mere intellectual process" True repentance should stem from "a divinely wrought conviction of sin which produces a repentance that is sincere and genuine" (chapter 1). Put differently, true repentance is not about pithy statements

and aphorism. It is about genuine faith. There should be unconditional acknowledgement of sin and a genuine belief that there was forgiveness.

True repentance therefore is about reforming. Ironside (1937: chapter 7) sees “new birth” as “the impartation of a new nature altogether, and practical sanctification that is produced by the indwelling Holy Spirit, through the cleansing power of the Word of God, bringing the whole man into conformity to Christ”. This “new birth” is the turning over of a new leaf. However, the fact that it is the Holy Spirit who cleanses means that forgiveness is by the grace of the Lord and not works. Ironside goes further to state that God forgives our sins “on the principle of pure grace, based upon the work our Lord Jesus has accomplished, when on the cross” (chapter 13).

The phrase “truly repent” may give the impression, as stated above, that forgiveness of sins is conditional. A person only receives forgiveness if he truly repents. Forgiveness of sins is the grace from God. It is an unmerited favour. The Scripture in Hebrews 8:12 provide that the Lord will not remember our sins anymore. This new covenant is not dependent on the works of individuals but on the sheer grace of God.

In conclusion, this does not mean that the public confession has less spiritual value. It is of great value but there is this lurking danger that because we recite it every Sunday before the sacrament of the Eucharist, congregants may narrate it without contrition. They may just recite it because it is part of the readings of the Prayer Book, without meaning the words that they say.

2.6.2 Private confession in the Anglican Church

The second form of confession in the Anglican Church is the auricular or private confession (Anglican Prayer Book 1989:449). The penitent confesses in a private meeting with the priest in a room or a traditional confessional. Firstly, the priest implores the penitent to confess; “The Lord be in your heart and on your lips, that you may truly and humbly confess your sins”. Even in the private confession, there is a special emphasis on to “truly and humbly confess”. The confession should therefore be genuine.

To ensure that the penitent is true and humble in confession, he must guard against few things. Denhoff (1720:8) who was a Cardinal Bishop of Cesena, in his seminal guiding work *"Pastoral instructions proper for penitents and confessors"* gives hints of what the penitent should not do during a confession. He says penitents must state the confession clearly and concisely. They should not "fay (sic) feveral (sic) things, that are not to the purpofe (sic) and neglect to fay (sic) what really is". He further states that there are times when the penitent lacks humility that is required for a genuine confession. He also warns penitents against telling their "sins without any senfe (sic) of compunction, as they were repeating a story of an indifferent matter". These warnings by Denhoff can also serve as a litmus paper to test whether the penitent truly and humbly confesses.

The Anglican Prayer Book (1989:447) also makes suggestions to the penitent to gauge whether the confession is genuine or not. It provides that "there must be a willingness to open our hearts, with all the darkness to be found there, to the light of the Holy Spirit". The opening of our hearts is the understanding that God is inside us although we are sinners. Keating (2002:44) advises us that to have an open heart to God because "we are always with God and that He is part of every reality". It is therefore advisable for the penitent to acknowledge during the confession that God is working in him through the Holy Spirit.

After the priest has invited the penitent to confess, the penitent makes a confession in the following words:

> I confess to the God Almighty, the Father, the Son, and the Holy Spirit, before the whole company of heaven, and before you, that I have sinned in thought, word, and deed, and in what I have left undone, through my own fault. And especially (since my last confession) I have sinned in these ways…
>
> For these and all my other sins which I cannot now remember, or of which I am not aware, I am truly sorry, firmly mean to do better and humbly ask pardon of God, and of your penance and absolution. Wherefore I pray to God to have mercy on me and you to pray for me to the Lord our God (Anglican Prayer Book, 1989:449).

After this confession, the priest may pray for the penitent or give advice accordingly. He then pronounces on absolution as follows:

> Our Lord Jesus Christ who has left power to his Church to absolve all sinners who truly repent and believe in him, of his great mercy forgive you your offences and by his authority committed to me, I absolve you from all your sins; in the name of the Father, the Son, and the Holy Spirit (Anglican Prayer Book, 1989:449).

2.6.2.1 Private confession not obligatory

It is noteworthy that in the Anglican Church, a church member is not forced or obligated to make a private confession, but there is a general acceptance that church members may privately confess if they so desire. In fact, an Anglican is not even compelled to make a confession to a priest. The Anglican Prayer Book (1989:448) stipulates clearly that the private confession of sins to a priest is not peremptory in the Anglican Church; "The Church does not require anyone to confess in the presence of a priest in order to receive forgiveness. It requires only that all may be honestly assured in their own conscience of their duty in this matter".

Firstly, can one infer from this statement that Anglicans can confess their sins directly to God? Secondly, can one infer from this statement that Anglicans can confess their sins to other Anglicans who are not priests? The Anglican Prayer Book (1989:448) provides the answer to the first question, "Those who are satisfied with a private confession to God in prayer ought not to be offended with those who use confession to God in the presence of a priest." The private confession directly to God through prayer is therefore acceptable. The Prayer Book further tries to create harmony between those who confess to God directly and those who confess to the priest. Whether the confession is to God directly through prayer or through the priest, it is immaterial, as long as the penitent "truly and humbly" confesses his sins (p 448).

James 5:15-16 provides the answer to the second question whether Christians can confess sins to one another. Martin Luther (1520) also provides the answer when he advocates that once a person is baptised, he is part of the spiritual community and that there should be no distinction between the clergy and ordinary congregants as far as listening to confessions is concerned. He propagated the principle of universal priesthood:

> It is pure invention that the pope, bishops, priests, and monks are called the spiritual estate while princes, lords, artisans, and farmers are called the temporal estate are called the temporal estate. This is indeed a piece of deceit and hypocrisy. Yet no one need be intimidated by it, and for this

> reason: all Christians are truly of the spiritual estate, and there is no difference among them except that of office. Paul says in 1Corinthians 12 that we are all one body, yet every member has its own work by which it serves the others. This is because we all have one baptism, one faith, and are all Christians alike; for baptism, Gospel, and faith alone make us spiritual and a Christian people (Martin Luther 1520).

The Anglican Prayer Book is silent on this issue. It is however accepted that because of lack of evidence to the contrary, that a private confession to another Anglican Church member is not contrary to the teachings of the Bible and the religious philosophy of Anglicanism.

The definitive Anglican maxim regarding this elastic practice to private confessions is "All may; none must; some should." Becker (2004: 1ff).succinctly explains this aphorism. Kelly (2003:216) the Anglican Church historian states:

> In spite of the ingenious arguments by certain scholars, there are still no signs of a sacrament of private penance such as Catholic Christendom known today. The system, which seems to have existed in the church at this time, and for centuries afterwards, was wholly public, involving a confession, a period of penance and exclusion from communion and formal absolution and restoration- the whole process being called *exomologesis*. The last of these was normally bestowed by a bishop, as Hippolytus's prayer of Episcopal consecration implies, but in his absence might be delegated to a priest.

The fact that in the Anglican Church, a private confession is not compulsory complicates the issue of confessions in the church. Should people confess their sins privately to the priest or not? A further complication is the fact that the canons of the Anglican Church of Southern Africa are silent on the question of private confessions. The Anglican Prayer Book (1989:447) however encourages the Church to "accept the fact and the gravity of sin with no attempt to conceal it". The unpacking of this statement is necessary.

Firstly, the use of the word "accept". It means that there should first be an acknowledgment of sins before the making of a confession. This is important because the person cannot confess before he "accepts" that he has missed the mark. The word "accept" also incorporates the element voluntariness. Once the congregant acknowledges the sin he has committed, he can

then voluntarily confess. The second aspect that needs unpacking is the "the fact and gravity of sin". The "fact" of sin is meant to bring to the attention of Anglicans that crime is a certainty in our lives (Romans 3:10). It is a fact that we as people are sinners. The "gravity of sin" indicates that sin is serious in the eyes of the Lord. God hates sin and loves righteousness (Hebrews 1:8-9). Our relationship with God "is a necessary constituent of the notion of sin" (Rondet 1960:103). Although not compulsory, this is more reason why Anglicans should confess their sins as it affects their relationship with God.

The statement "accept the fact and the gravity of sin with no attempt to conceal it" from the Prayer Book further indicates that the Anglican Church, although it does not compel the congregants to privately confess, it does recognise the need to confess sins (Anglican Prayer Book 1989:447). Although the Prayer Book does not compel congregants to confess, it tacitly encourages the Anglicans to confess. The Anglican Prayer Book (1989:448) further implores congregants to "receive God's forgiveness and be reconciled with Him in various ways, one of which is confession to God in the presence of the priest". From this statement, it is evident that one of the ways in which we receive God's forgiveness is "confession to God in the presence of the priest". This is in line with 1 John 1:9 wherein it is stated that "if we confess our sins he is faithful and just to forgive us our sins and to cleanse us from all unrighteousness". This verse however does not provide the person to whom we may confess our sins.

The sacrament of a private confession is included in most of Anglican Prayer Books. There is no canon or procedure manual compiled to guide the priest when hearing a private confession. Gatta and Smith (2012) have a written a book that gives guidance and coaching in terms of hearing private confessions in the Anglican Church. These writers are Americans and their book may have no authority on Anglicans in South Africa, but it can have referential value.

Overview: The Anglican Church practises two forms of a confession. The congregants performs the first form of a confession (public confession) before the services of Holy Eucharist. The second form of confession in the Anglican Church is the auricular or private confession (Anglican Prayer Book 1989:449).It is noteworthy that in the Anglican Church, a church member is not forced or obligated to make a private confession, but there is a general acceptance that church members may privately confess if they so desire.

2.6.3 The importance of a private confession in Anglican Church

The private confession is important to the Anglican Church. From the above discussions, what is evident is that the absolution from sin involves important factors. First, it involves the penitent as the person who should confess. The penitent is the pivot for the whole process. He is the one who has sinned and he is the one who needs forgiveness. Secondly, the church is affected. The penitent belongs to the body of the church and his sinning has some effect on the church as a whole. Another element is the priest. He sits on the other side of the confessional and is therefore significant to the whole process of absolution. The last but not least is the relationship with God. The link between all these elements is the centre of discussion hereunder.

2.6.3.1 The penitent

Why do people confess their sins to the priests? There is an interesting comment by Todd (1985:39) where she states “man has instinctual needs to confess that which he perceives to be wrong”. May be that is one of the reasons that induces man to confess. Gatta and Smith (2012:27) postulate, “Many of us need some way of dramatizing and exteriorising what we are feeling in order to change and evolve. The rite of reconciliation feels this gap”. May be some people confess their sins because of this. Whatever the case, the penitent initiates the process of private confessing by approaching the priest. After the confession of sins, the priest grants absolution to the penitent. There is a controvertible debate amongst theologians whether forgiveness of sins happens through the process of confessing.

Some commentators are of the view that the process of a private confession does not accord absolution to the penitent because the forgiveness of sins has already happened (Ott, 1974:434; see also Hebrews 8:12). Others like Merlino (2002:658) contend that the sacrament of confession or reconciliation cleanse the penitent of “perilous, mortal and venial sins”. Merlino conveys the impression that the blood of Jesus Christ in the cross was not enough to cleanse us of our sins. This runs contrary to the teachings of the Bible that Jesus Christ died in the cross for the forgiveness of sins.

There is also a version of Lynch (1976:176-81) where he states that the confession was essential for the forgiveness of sins because “while it abases the individual, it raises him; while it covers him with squalor, it renders him more clean; while it accuses it excuses, while it condemns it absolves”. Lynch concentrates on the effect of the confession of sin to an

individual. According to Lynch, although the confession may humiliate, put down the individual and "cover him with squalor", at the end it absolves the individual from the sin. The result is reconciliation with God.

2.6.3.2 The church

Another factor that is involved is the church. The penitent forms part of the church. This works like in the systems theory. If one part of the system malfunctions, it affects the whole system. If one member of the church misses the mark, the entire church is affected. The researcher has already discussed above the role that priest play in the process of a private confession and it would be tautological to repeat it.

2.6.3.3 God

The private confession affect the relationship with God. Merlino (2002:659) opines that the sacrament of confession "restores the penitent to the state of grace sullied by mortal sin and, reconciling her with God and sparing her the guilt inflicted by sin". This assertion by Merlino can be reconciled with the passage in 2 Corinthians 5:19 which provides that "in Christ God was reconciling the world to Himself not counting their trespasses against them". Lockyer (1964:191) when dealing with the doctrine of reconciliation reminds us that in the process of reconciliation with God, it is man that is the offender and thus it is man that must reconcile with God.

2.7 The concept of penance

There is a difference between a private confession and penance. Simply put, penance is a payment of debt for sins that committed by the penitent. Ott (1974:434) views penance as sacramental satisfaction, which is the penitential work, imposed by a confessor in the confessional in order to reconcile with God or to get redemption for missing the mark. This is necessary for the atonement for the temporal penalty in respect of sins or transgressions of whatever nature, which were committed. According to Ronzani, (2007:89) penance obliges us to compensate for the punishment, which we incurred as a direct result of our sins. There should be penance for the sins committed. Punishment is still due, although the guilt has been removed.

It is through these works that the sinner receives forgiveness. Ott (1974:434) confirms the Roman Catholic Church's standpoint on penance. By implication, this means that men should supplement the work of atonement done by the Jesus Christ by their own works. Such teaching undermines the fundamentals of the atonement of Jesus Christ by adding human works as a complement to His work. It also undermines the main reason for the death and resurrection of Jesus Christ, which is the forgiveness of our sins. Penance is therefore distinguishable from private confession in the Anglican Church because of the penalty paid for the sin committed.

2.7.1 Origin of penance

There are different views as to when the practice of penance started in the Roman Catholic Church. This is important for the difference between the private confession and penance to make liturgical sense. McNeill and Gamer (1965:16) are of the view that the early Church did not practise the liturgy of penance. Absolution was not just a legal exercise; it was a profound declaration by the presiding bishop that the sinner had complied with all the requirements necessary for atonement of sin and the restoration of the relationship with the church. After penance, there was a restoration with the fellowship of the church. They further contend that, "absolution was granted not at the beginning of penance but at its close, and it is not to be distinguished from reconciliation or readmission to communion" (p 16).

As stated above, there are conflicting views on the genesis of penance. According to Firey (2008:1), "the editor of the most recent volumes devoted to penance from the early Church to the early modern world has not attempted to present a unified collection of essays". This shows that there are glaring divergent views on how the doctrine of penance started. She goes further to say that there is acknowledgement of "the conflicts and varying interpretations represented in the contributions" (p 1). At the close of the twelfth century, a complete change happened in the doctrine of penance. There is a concerted attempt by Schaff (1910:731-737) to explain how the doctrine of penance evolved. According to Schaff, the theory was that penance is sufficient to remove sins committed after baptism and that a confession to the priest and absolution by the priest were necessary conditions for pardon.

The practice of penance became of liturgical importance in the church and it resulted in certain punishments for specific sins. This is unlike the private confession where the granting of absolution takes place after the confession of the sin. During the seventh century, there was a codification of this practice of penance into penitential books. The clear change in the

practice of penance was available in these penitential books. At a later stage, and in spite of the penitential books, the Council of Trent sanctioned the practice of penance. McNeill and Gamer (1965:16-17) comment that;

> The public procedure, in which the penitent in his humiliation implores the intercession of 'all the brethren,' was later to be replaced by a private and secret rite involving confession to and absolution by a priestly confessor and entailing acts of penance that were often mainly or wholly private. In this transformation of penance, the penitential books were to play an important role.

According to the penitential books, the priest administered penance privately to avoid unnecessary public humiliation and to encourage churchgoers to confess (Tentler, 1977).

2.7.2 The relationship between penance and private confession

There is a trace of the relationship between private confession and penance and its importance during to the twelfth century. Anselm of Canterbury expressed the accepted medieval understanding of penance in his discussion of the atonement (Anselm, 1969:84). According to Anselm, it all started with Adam and Eve. God demanded Adam and Eve to obey Him by freely submitting to Him. The two however disobeyed God and thereby earned His wrath. The failure to obey God is a commission of a sin. The sinner remains indebted to God because he had not made good of his debt.

The major problem is that people are perpetually indebted to God because they continue to sin and it is impossible for them to repay His honour. Only Jesus Christ addressed the debt difference between what people owed to God and what they could pay. However, the paying of the debt was not enough as Rittgers (2004:31) points out that "while Anselm could accept the idea that God had forgiven humanity's debt by an act of sheer mercy, he, along with his contemporaries, balked at the notion of God releasing them from their penalty without demanding something in return. Honour had been restored but restitution for injury still needed to be rendered."

This differentiation between the sin debt and the punishment for sin became the pivot around which the theology of penance revolved. Rittgers (2004: 37) has an opinion that before the Reformation most theologians believed that Christ's sacrifice had atoned for original guilt and damnation, but the tendency toward sin remained ingrained within people. Not only did this

tendency remain, but also people collected new debt daily as the propensity to sin subsisted. It then became logical that penance made up the difference between the debt paid by Christ for original sin and the debt incurred for new sins. This is contrary to a private confession where absolution happens even if there is no further payment.

However, during the twelfth and thirteenth centuries there was a general acceptance amongst theologians that forgiveness was not dependent purely on the work of the penitent. In other words, a private confession was enough. According to Tentler (1977:18), the theologians "accepted contrition as the principal part of the forgiveness of sins". He goes further to question the need for a private confession if contrition became the principal part of penance. This state of affairs trivialises the role played by the priest during a private confession. Taking into account that the priest is acting in *persona Christi*, this means that the role of Jesus Christ is *ipso facto* trivialised.

2.7.2.1 Rittgers three schools of thought

The aspect of contrition before private confession and penance was a catalyst to the proliferation of three schools of thought. Rittgers (2004: 37) offers a summary of the three main schools of thought on the topic. He refers to the first school as the contritionist school, the second as the attritionist school and the third as the absolutionist school. The first school, that is, the contritionist school rests on the belief that for absolution to take effect, honest contrition should take place before the obliteration of sin and its attendant punishment. According to this school of thought, contrition is important for private confession and penance.

The role of the priest in this situation was to declare God's forgiveness based on the contrition of the penitent. The priest did not provide forgiveness but declared the forgiveness that God gave. It is not clear however, how the priest could ascertain whether the contrition was genuine. Contrition is an innate process. How could the priest ascertain whether it was genuine? Was the measurement of the genuineness in terms of what the penitent said or in terms of what he did? Penitents could feign contrition in order to get absolution.

The second school, that is, attritionist school is the intersection between the first and the third schools. The school recognises the intrinsic value of the act of contrition on one hand and the infused grace by the sacrament of penance on the other hand. Even if the contrition was not perfect, the grace that is infused makes it perfect. In other words, the grace purifies the

contrition that was otherwise not genuine. Two questions are also necessary here. Does this mean that if the contrition was genuine there is no need for grace as there would be automatic absolution? Alternatively, does it mean that if the contrition is genuine the penitent deserves grace? Nobody deserves grace, as it is an unmerited favour. One cannot earn grace.

The third school of thought is absolutionist. By sheer implication, this means that this school of thought places much emphasis on absolution rather than on contrition. There is a deliberate downplay of the essence of a genuine or not genuine contrition. The focus is ineluctably on absolution. According to this school of thought, the gist of the sacrament is in the pronouncement of absolution. The contrition whether genuine or not cannot be a *condition sine qua non* for the receipt of grace. It is only the divine power of God, which grants absolution. Absolution is not dependent on the works of human beings. This third school of thought is in line with the teachings of the Bible. Only God can forgive sins (Hebrews 8:12 and 1 John 1:9).

Overview: The difference between penance and private confession is that in penance the penitent should do something extra to pay for the debt sins he owes to God. In other words, the confession of sins and the subsequent absolution is not sufficient (McNeill and Gamer, 1965:16). The practice of penance started in the Roman Catholic Church. In case of a private confession, the penitent confesses and the priest makes a pronouncement of absolution and the private confession process is complete. It is noteworthy that the Anglican Church does not practise penance.

The confession is usually associated with something that is morally or legally inappropriate (Cerutti 2006:37). The aspect of contrition before private confession and penance was a catalyst to the proliferation of three schools of thought. Rittgers (2004: 37) offers a summary of the three main schools of thought on the topic namely, the contritionist school, the second as the attritionist school and the third as the absolutionist

2.8 Penance in the Roman Catholic Church

The Anglican Church emanated from the Roman Catholic Church. It is therefore necessary to discuss the private confession in the Roman Catholic Church so that it will be easy to understand how the Anglican Church derived its current form of a private confession. In the Roman Catholic Church, the word penance commonly denotes a private confession. As

explained above the sacrament of penance and the private confession to a priest are part of the same process but are not the same.

2.8.1 Types of penance

The Roman Catholic Church practices communal and individual sacrament of penance.

- The communal penance can be categorised as an act of showing happiness or gratitude by the penitents for the forgiveness of sins.
- The private confessions of sins on the other hand is part of the liturgy and it accompanies contrition and the humble appeal for the forgiveness of sins by the penitent. (Catechism of the Catholic Church par 1482).

There is a discussion on this type of penance because it resembles the private confession that is the object of the study.

2.8.1.1 The individual sacrament of penance

In the Roman Catholic Church, a number of elements are necessary for the individual sacrament of penance to be valid. The first important element is contrition by the penitent; the second element is the confession by the penitent to the priest, the third act of satisfaction and lastly absolution (Catechism of the Catholic Church par 1480). It is through this process that the penitent can receive forgiveness of sins. As stated above, the Anglican Church does not embrace the third act of satisfaction.

The first element, that is, contrition is necessary according to Roman Catholic Church belief; a penitent cannot seek God's forgiveness when there is no genuine remorse on his side. Contrition means that the penitent should have a sense of sorrow in the heart. There should be regret for having offended God and a concomitant resolution not to repeat the offence. It should be the love of God that drive us to confess coupled with the understanding of the consequences of sinning. It is this relationship with God, which enables us to have contrition.

Contrition is therefore the beginning of forgiveness of sin. In the Anglican Church, the Anglican Prayer Book indirectly infers contrition. It makes suggestions to the penitent to gauge whether the confession is genuine or not. It provides that "there must be a willingness to open our

hearts, with all the darkness to be found there, to the light of the Holy Spirit" (Anglican Prayer Book (1989:447).

The other part of the sacrament of penance is the confession itself to the priest. The priest normally greets the penitent and makes the sign of the Cross. The priest then says the following words: "May God, who has enlightened every heart, help you to know your sins and trust in his mercy. Amen". The penitent may say words to this effect "Bless me Father, for I have sinned. It has been (state a time) since my last confession". The priest may read a passage from the Bible. The penitent then tells his sins to the priest both mortal and venial. After the confession, the priest may advise the penitent what to do to show that he is sorry (Catechism of the Catholic Church par 1480).

The priest asks the penitent to pray the Act of Contrition that goes thus,

> O my God, I am heartily sorry for having offended you, and I detest all my sins because I dread the loss of heaven and the pains of hell; but most of all because they offend you, my God, who are all good and deserving of all my love. I firmly resolve with the help of your grace, to confess my sins, to do penance and to amend my life. Amen (Catholic Prayer Book p 28).

The priest gives absolution by extending his hands over the head of the penitent. He then says, "God, the Father of mercies, through the death and resurrection of his Son has reconciled the world to himself and sent the Holy Spirit among us for the forgiveness of sins; through the ministry of the Church may God give you pardon and peace". The priest makes the Sign of the Cross over our heads as he says, "And I absolve you from your sins in the name of the Father, and of the Son, and of the Holy Spirit" (Catholic Prayer Book p 28).

The Roman Catholic Church teaches that justification is a process that is dependent upon infused grace of God, which we lose by committing serious sin. Private confession becomes the only conduit to justification again. Penitential works are meritorious before God who accepts them as a payment for the punishment for sins committed. According to Schroeder (1978), Canon XIII of the Council of Trent provided:

> If any one saith, that the satisfaction for sins, as to their temporal punishment, is nowise made to God, through the merits of Jesus Christ, by

> the punishments inflicted by him, and patiently borne, or by those enjoined by the priest, nor even by those voluntarily undertaken, as by fastings, prayers, alms–deeds, or by other works also of piety; and that, therefore, the best penance is merely a new life: let him be anathema.

The difference between the Roman Catholic act of penance and the private confession in the Anglican Church lies largely on the differentiation between sins and on the act of satisfaction.

2.8.2 Types of sins

The Roman Catholic Church unlike the Anglican Church recognises two types of sins. There are mortal sins which are “a grave violation of God's law" that "turns man away from God" (Catechism of the Catholic Church par 1855). If the penitent is aware that he has committed this type of sin, he must confess in order to receive the benefit of the sacrament of penance.

The second type of sin is venial sin. This type of sin does not set us in direct “opposition to the will and friendship of God” (Catechism of the Catholic Church par 1863). Contrition and reception of other sacraments remit this type of sin. It should however not be trivialised as this type of sin is also morally unacceptable (Catechism of the Catholic Church par 1875). It is noteworthy that the Anglican Church does not differentiate between these two sins. The Anglican Prayer Book does not differentiate between the two because it does not practise the doctrine of penance.

2.9 Conclusion

The essence of the chapter is to discuss the Anglican Church, the private confession and the concept of priesthood. Starting with the Anglican Church; in summary it is a Christian Church. It practices what Anglicanism. Henry VIII formed it when cut off ties with Rome. It has Roman Catholic Church traditions but also incorporates dollops of other theologies. It has a decentralised structure. The Anglican Communion is the consultative but not legislative structure. Its interpretative model is flexible. Common worship practices hold Anglicanism together. Bishops, priests, deacons, and lay ministers have important but different roles in church ministry.

The chapter also dealt with definition and etymology of the word “confession”. The word has social, religious and legal connotations. The context in which it is used should lay basis for its interpretation. The discussion of the concept of penance and its relationship with a private confession took place. The discussion dealt with the resultant confusion in using the two concepts interchangeably. .

Another discussion involved the origin of the concept of priesthood. Originally, the penitent confessed to the bishop. Many people sinned and people converted into Christianity in droves, and the bishops could not carry the load. It became necessary that to train the priest to hear private confessions. The priests act in the person of Christ during the private confession. Part of the ministry of the priest is to declare pardon in the name of the God. He is not engaged in the frolic of his own. In America, the definition of a priest is in most regulated by statutory law.

The chapter dealt with a private confession and it genesis. There is a difference of opinion as to how the private confession started. If a penitent committed a sin, depending on the type of sin, he faced defilement and excommunication from the church and he could not participate in the Holy Eucharist. The penitent had to confess the sins in public before his acceptance back into church fold. The bishop would then pronounce on his absolution. There was an attendant humiliation, which accompanied the public confession. Because of public humiliation people stopped to confess and this ushered in a concept of private confession.

The Anglican Church practices two forms of confession. The first form is the one that involves the recitation by the congregation before the sacrament of the Eucharist. There is no mention of the type of sins forgiven. The second form of confession takes place in private before the priest. The overriding factor is that the Anglican does not force its members to confess. It is however desirable that they should confess their sins privately. The penitent can privately confess to a fellow member of the church or to a priest or to God directly.

The last point of discussion was the effect of the private confession to the penitent, the church and the relationship with God. After the confession of sins by the penitent, the priest grants absolution. The private confession and the absolution from sin cleanse church as the body of Christ and promotes restoration of the relationship or reconciliation with God.

The chapter managed to capture the priest, the penitent, the private confession and its inviolability. As stated in the first chapter, when a penitent has confessed to a sin to the priest and the sin amounts to a crime in a court of law, the priest becomes a potential competent and compellable witness. The priest in his refusal to give evidence may state that the information between him and the penitent is confidential and privileged. Is this confidentiality inviolable? Does this privilege exist? The next chapter will discuss these aspects.

Also discussed in this chapter was the private confession in the Roman Catholic Church. According to the Roman Catholic Church, there should be contrition first then followed by a private confession. After the private confession, there should be an act of penance before the granting of absolution. There were divergent views on whether the act of penance does contradict the teachings of the Bible. A private confession is compulsory in the Roman Catholic Church. The penitent confesses a number of times per year.

Chapter 3

Theological-canonical meaning of the priest-penitent privilege

3.1 Chapter overview

The purpose of this chapter is to discuss the meaning and application of the priest-penitent privilege. This chapter arrangement is as follows:

The priest-penitent privilege: There is an explanation of the word “privilege”. The use of this word in theology is not common. The discussion will relate to how it applies in relation to theology. Did the priest-penitent privilege exist before the Reformation? The answer to this question is in this Chapter. It is important to see how it permeated through to the Anglican Church. Did the priest-penitent privilege exist after the Reformation? The discussion of some views from commentators will answer whether it existed or not. There will also be a discussion on selected criminal cases, which support the existence or non-existence of the priest penitent privilege after the Reformation.

The seal of confession: The private confession made to a priest is confidential. The seal of confession debars the priest from divulging the contents of a private confession. The seal of confession is a significant part of the research because it regulates the relationship between the priest and the penitent. The seal of confession also defines the relationship between the priest and the church in that, private confessions improves the ministry of the church.

The seal of confession further describes the relationship between the priest and the laws of the land, whether common law or statutory law. For example, after a private confession, can the priest refuse to testify in court? The seal of confession is also important when the relationship between the church and the state is scrutinised. For an example, what is the role of the church in reporting sexual offences against children? Can the priest invoke the seal of confession in this instance?

Attached to the seal of confession are also church canons that determine the extent of relationships between the priest, the penitent and the church. The history of the seal of confession needs discussion because it is important to show how it originated and how it developed over a period. Is it still relevant today? How is the seal of confession dealt with in the Anglican Church taking into account that the private confession is not compulsory?

The discussion will also involve comparative analysis. The Anglican Church in Australia caters for this purpose. Australia has strong ties with England from where the Anglican Church originated. Australia has had problems with sexual abuse of children by members of the clergy. This affected the application of the priest-penitent privilege. America is also included in the comparative analysis because the confidentiality of private communication in America falls under the purview of statutory law.

3.2 Priest-penitent privilege

The term "privilege" will be defined first and then the priest-penitent privilege. The discussion then focuses on the views of prominent commentators on whether the priest-penitent privilege and the seal of confession existed before and after the Reformation. The discussion ends with the application of the seal of confession in the Anglican Church.

3.2.1 Definition of privilege

The word "privilege" derives from the Latin word *privilegium,* which means a right granted by law though contrary to the usual rule (Oraegbunam, 2015:545). Privilege is a rule that excludes certain evidence, which protects certain categories of communications from disclosure to parties in litigation. This class of information does not form part of evidence in legal proceedings and the witness may refuse to answer questions in court relating to this class of information (McNicol, 1992).

3.2.2 Privilege in Canada

How do other countries like Canada perceive the privilege? There is rationale behind this privilege. Canadian commentators Sopinka *et al* (1999:713) explain this rationale where they state:

> Although such evidence is relevant, probative and trustworthy, and would thus advance the just resolution of disputes, it is excluded because of overriding social interests. In any discussion about privileges, one must keep in mind the constant conflict between two countervailing policies. On the one hand, there is the policy, which promotes the administration of justice requiring that all relevant probative evidence relating to the issues be before the court so that it can properly decide the issues on the merits. On the other hand, there may be a social interest in preserving and encouraging particular

> relationships that exist in the community at large, the viability of which are based upon confidential communications. Normally these communications are not disclosed to anyone outside that relationship (par 14.1 and 14.2).

From this passage, the rationale for the privilege is clear. There is a question of the administration of justice, which requires that all the evidence should become available to the court and on the other hand there are certain relationships in communities which need protection and the "the viability of which is based upon confidential communications" (Sopinka *et al*, 1999:713). This speaks directly to the priest-penitent privilege. The priest-penitent privilege involves the administration of justice. The admission or exclusion of evidence affects the administration of justice. This may result in conviction or acquittal of the accused.

It has been the practice in the law of evidence to recognise certain relationships, "where essentially the preservation of trust between the confider and confidant, overrides the law's interest in full disclosure of facts" (Callahan, 1976:328). This applies to the priest of the Anglican Church, in that, if called upon to testify on matters relating to a private confession, there is obviously a conflict between the administration of justice and that relationship which the commentators alluded to in Sopinka *et al* 1999:713).

The Canadian courts explain the rationale of the privilege succinctly in *R v Gruenke* (1991:263) wherein Your Ladyship Justice L'Heureux-Dubé posits as follows:

> If the aim of the trial process is the search for truth, the public and the judicial system must have the right to any and all relevant information in order that justice be rendered. Accordingly, relevant information is presumptively admissible. Exceptions may be found both in statutory form, and in the common law rules of evidence, which have developed in order to exclude evidence that is irrelevant, unreliable, susceptible to fabrication, or which would render the trial unfair. Courts and legislators have also been prepared to restrict the search for truth by excluding probative, trustworthy and relevant evidence to serve some overriding social concern or judicial policy. The latter are the source of privileges for certain private communications.

The Canadian courts looked at the rationale for the privilege from another angle. It looked at the admissibility of relevant evidence. Obviously, if the penitent has confessed about a crime to the priest, that information is relevant to the proceedings and therefore admissible. This

means that if the priest refuses to testify or answer questions when called upon to do so by the court, he will be refusing to divulge relevant and admissible information to the court, which may assist the court into arriving at a just conclusion. Another factor that the court brings forth is the social concern. The refusal of the priest to testify would be a social concern, as it would affect the relationship between the church and the state.

3.2.3 Explanation of priest-penitent privilege

In terms of the priest-penitent privilege, if the private confession made to the priest, and the confession relates to a crime, the priest may claim that the communication falls within the protection of the priest-penitent privilege. The priest-penitent privilege is the right of the priest to refuse to disclose confidential information, made by the penitent during a confession (McCormick, 1938:447). The Black‟s Law Dictionary refers to this as a privilege barring a clergy member from testifying about a confessor's communication (Garner 1999:1216).

3.2.4 Different views on the definition of priest-penitent privilege

To avoid confusion of terms, different views on the definition of priest-penitent privilege need explanation. This privilege is sometimes referred to as the clergy–penitent privilege, clergy privilege (*privilegium clericale*), or confessional privilege or clergyman-communicant privilege or ecclesiastical privilege (Wright & Graham, 1992:27-8). According to Oraegbunam (2015:544), the main reason for the existence of the privilege is to "protect(s) the contents of communications between a member of the clergy and a penitent, who share information in confidence". If the priest divulged the contents of a private confession, Bentham (1827:586) suggests that he would have violated "the most sacred…. religious duties". This privilege empowers the priest to refuse to divulge information received from the penitent during a confession to anyone.

There are commentators who do not agree with the use of the term priest-penitent privilege. Wright and Graham (1992:27-8) are of the view that the traditional term of priest-penitent is not accurate. Their view is that the privilege is no longer limited to priests. However, they also do not agree with the use of the term "clergy-penitent privilege" either. They contend that the term "clergy" as a replacement for "priest" is not "particularly euphonious" (page 28). Their proposal is that the privilege should be referred to as the "the penitent's privilege". This proposal by Wright and Graham creates the impression that the penitent claims the privilege.

The priest claims the privilege because of the vows he took as a member of the ordained clergy. For purposes of this research, only the term priest-penitent privilege will enjoy usage.

3.2.5 Application of the priest-penitent privilege

So that the applicability of this principle becomes clear, a discussion of law relating to the privilege in South Africa is relevant. Firstly, the Constitution imposes certain rights and freedoms with attendant responsibilities. The Anglican Church does not operate in isolation; the Constitution of the country binds it. Section 2 of the Constitution provides that "[T]his Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled". This means that whenever a matter is pending before a court of law the Constitution will be superior to the canons of the Anglican Church and any other law for that matter.

Further, section 189 (1) of the Criminal Procedure Act 51 of 1977 provides that:

> If any person present at criminal proceedings is required to give evidence at such proceedings and refuses to be sworn or to make an affirmation as a witness, or, having been sworn or having made an affirmation as a witness, refuses to answer any question put to him or refuses or fails to produce any book, paper or document required to be produced by him, the court may in a summary manner enquire into such refusal or failure and, unless the person so refusing or failing has a just excuse for his refusal or failure, sentence him to imprisonment for a period not exceeding two years or, where the criminal proceedings in question relate to an offence referred to in Part III of Schedule 2, to imprisonment for a period not exceeding five years.

The Anglican Church is not immune from these provisions. There is a religious and legal challenge imposed by the relationship between the priest and the penitent. After the penitent has confessed the sin or sins, and the sin or sins amount to crime, and whether or not the priest makes the pronouncement of absolution, the priest legally becomes a potential witness to the crime (Section 192 of the Criminal Procedure Act 51 of 1977).

The analysis of section 189 (1) above shows that if the priest is summoned before the court after the penitent has confessed, he is in terms of this section forced to answer questions put to him in court. He should produce relevant books or documents if required by the court. If he refuses to answer questions, to testify, or to produce documents required by the court, he is guilty of an offence. The sentence is "imprisonment for a period not exceeding two years or, where the criminal proceedings in question relate to an offence referred to in Part III of Schedule 2, to imprisonment for a period not exceeding five years" (section 189 (1) of the Criminal Procedure Act 51 of 1977).

Should it be possible then to force the priest to testify in a court of law in the light of the oath of confidentiality a priest undertook with his ordination? The South African law enjoins the priest to testify on private confessions made to him (section 189 (1) of the Criminal Procedure Act 51 of 1977). The church law on the other hand debars the priest from testifying (Anglican Prayer Book 1989:448; Nolan 1913:649). What should the priest do? Should he betray the penitent and face church discipline, which may result in him losing his priesthood? Should he refuse to testify and face the wrath of the courts? These questions will find answers in the chapter relating to recommendations.

3.2.5.1 The jurisdiction of the courts

As stated in Chapter 2.2.1, there is sometimes tension between church law and civil law (Smit, 2018:5; Spoelstra, 1989:220; Van Staden, 2014:241-243). The application of the priest-penitent privilege would entail that the courts should interpret church documents relating to the seal of confession. The position in South African law is that the courts will not entangle itself in doctrinal issues. In *Singh v Ramparsad (2007),* the court held that "the doctrine of non-entanglement is part of our law". However, this principle is not that simple.

The relationship between the church and the courts is intricate in litigation proceedings. Although the church exercises autonomy on matters relating to church doctrine, this autonomy is not absolute. To compound the problem, our courts are not consistent in this regard. The two following cases illustrate this point. In *Presiding Bishop of the Methodist Church of Southern Africa and Others v Mtongana and Others (2008),* the appointment of a superintendent minister in terms of the Laws and Disciplines of the church was in dispute. The court concluded that the Laws and Disciplines of the church excluded the jurisdiction of the court. However, in *Danville Gemeente van die AGS van Suid-Afrika en Andere v AGS van Suid-Afrika en Andere (2012),* the court rejected the church rules applicable in the termination

of pastoral status of pastor and ordered his reinstatement. The court held the same view regarding the pastoral status of the pastor in *Mbombo v Church of the Province of Southern Africa, Diocese of Highveld (2011).*

An overview of the literature indicates that the courts do not hesitate to evaluate the testimony of the churches. This always allow a certain amount or level of interpretation of the church order or constitutions of churches. It is in this regard that the courts are hesitant to pronounce on this matter. Van Coller (2017;1022) states that after the enactment of section 200A of the Labour Relations Act 56 of 1995, it is evident that there are no general rules which clearly posit whether the minister is an employee of the church or not. She goes further to emphasise that *"verskillende denominasies het ook verskillende uitgangspunte. Elke saak moet op sy eie meriete beoordeel word".* However, in the case of *The Universal Church of the Kingdom of God v Myeni and others (2015: par 52),* the court held that the pastor was not an employee of the church. It further pronounced that:

> As the main dispute in the instant matter concerns the internal rules adopted by the Church, such dispute as far as is possible, should be left to the Church to be determined domestically and without interference from a court. A court should only become involved in a dispute of this kind where it is strictly necessary for it to do so. Even then, it should refrain from determining doctrinal issues in order to avoid entanglement

A vast majority of churches which found their historical roots in the 16th century Reformation view their church order or constitutions either as an application of Scripture and the confessions or put a clear emphasis on the theological foundation of the relevant church laws (Van Coller, 2013b and Van Coller, 2013a). The majority of these churches share common principles despite difference in doctrines. This irresistibly leads to distinguishable Christian identity (Doe, 2013)

The courts acknowledge that the church has the right to define itself and its institutions. It does not fall within the ambit of a secular court to interpret the order or constitution of a religious institution or church. Smit (2006:1) concurs with this assertion and adds that this right is not detachable from the right of religious freedom. He goes further to state that *"die kerk se selfdefiniëring op grond van die Skrif en die kerklike belydenis as die corpus Christi behoort deur die howe erken te word, en wel so dat by die kerk se selfdefiniëring aangesluit word*" (p 6).

Malherbe (2008:272) is adamant that the state should not interfere in church doctrinal matters. He is of the view that the doctrine of non-entanglement in church matters excludes jurisdiction of the courts. Many cases deal with the tension between the doctrines of the church (church law) and the jurisdiction of the courts (civil law). It is not possible to cite all or most them. Suffice is to conclude that jurisdiction of the courts in church doctrinal matters is complicated. The merits of each case will determine how the courts deal with the matter.

3.2.5.2 Claiming of the priest-penitent privilege

The claim of the privilege is possible in relation to the confidential information made to a priest or ordained clergy during private confession. Information made outside the circumference of a private confession does not enjoy the comfort of this privilege. The priest-privilege serves two essential functions. It creates "privacy zones" within society and promotes tolerance toward those religious denominations that require protecting the contents of penitential information to encourage private confessions (Wigmore, 1961:877).

In instances where the priest divulges the confidential information made to him by the penitent, the American courts are reluctant to admit such evidence if the penitent objects to the disclosure. This was evident in *People v Reyes* (1989:653). The facts of this case are that Edwin Reyes entered a church and spoke with Father Schmidt (the priest) for spiritual guidance. He confidentially informed the priest that he had held two people as hostages and even fired one shot at them. He also informed the priest that he still had the gun in his possession but he was afraid to hand himself it over to the police.

Reyes was hysterical and just wanted to pray with the priest. After praying, the priest went to the police station and summoned the police to come and arrest Reyes. The police came and arrested Reyes and based on the testimony of the priest, the jury indicted Reyes for attempted murder. Reyes objected to the evidence rendered by the priest on the ground that such evidence was inadmissible because of the priest-penitent privilege. Reyes further argued that the charges against him could not stick because they were a result of a "fruit of the poisonous tree" (*People v Reyes*, 1989 655).

The court ruled that the priest had no authority to divulge the information furnished to him in confidence. It is interesting to note that the accused raised the defence of the priest-penitent privilege, not the priest. The court convicted the accused because there was other evidence

that incriminated him except the testimony of the priest. Of importance is the fact that the court recognised the priest-penitent privilege. In South Africa, the court would have taken the same stance because there is no need to pronounce on the pries-penitent privilege, which is an exception rather than the rule, if there is other evidence that is enough to convict the accused.

Lastly, The Anglican Church is an international Communion, and laws concerning priest-penitent privilege differ from country to country. However, each member of the Anglican Communion has its own canons, or other governing regulations. Because of the fact that each member has its own canons, the emphasis placed on the private confession and the attendant priest-penitent privilege or seal of confession is different depending on the level of significance in that country.

The Book of Common Prayer is the glue that binds the Anglican Communion together despite certain emphasis placed on different issues (Doe, 1998:434). Although members of the Anglican Communion have different attitudes towards the private confession, the seal of confession and the priest-penitent privilege, there is a common understanding on the non-disclosure of the confidential communication between the priest and the penitent by virtue of a seal of confession.

Overview: The understanding of the term priest-penitent privilege is important because it is one of the indispensable variable of the study. Briefly, the priest-penitent privilege is the right of the priest to refuse to disclose confidential information, made by the penitent during a confession (McCormick, 1938:447). Some people refer to the priest-penitent privilege as the clergy–penitent privilege or confessional privilege or clergyman-communicant privilege or ecclesiastical privilege (Wright & Graham, 1992:27-8). Only the ordained priest can claim the privilege (*People v Reyes*, 1989 655). The confidential information should be penitential (Wigmore, 1961:877).

3.2.6 The priest-penitent privilege before the Reformation in England

Did the priest-penitent privilege exist before the Reformation in England? The discussion on the priest-penitent privilege focuses on England because that is where the Anglican Church originated. The origin of the priest-penitent privilege, the views that support the existence of the privilege, and the views that support the non-existence of the privilege, the *Articuli Cleri* and the Garnet's case attempt to answer this question.

3.2.6.1 The origin of the priest-penitent privilege in England

The discussion on the priest-penitent privilege before the Reformation in England will assist in understanding when and how it started so that it can be easier to interpret its historical meaning and its applicability in the contemporary religious environment. As explained in the previous chapter (chapter 2.6.3.3), the Christians confess their sins to the priest so that they may reconcile with God. It was incumbent upon the priest to ensure protection of the communication between him and the penitent from disclosure to encourage the penitents to confess.

During this period (before the Reformation), there was little separation between the church and the state in England. Yellin (1983:97) confirms this when he avers that the courts of England "were greatly influenced by common law and were staffed by bishops and clerics" and there was no clear separation of powers between the state and the church. From this statement by Yellin, the obvious fact is that the administration of laws pertaining to justice and the administration of the laws of the church fell under the authority of the same people.

Some commentators support this view. Bush and Tiemann (1989:47) hold that there was equivalence between church and state. They contend, "In those times, close connections between church and state existed". The religious, social and political order in society at that time made it inconceivable that the church could be separate from the state. Plucknett (1956:41) even suggests that the notion that there could be separation between state and church was "repugnant to mediaeval thought".

One of the reasons for the symbiotic relationship between the state and the church was that both institutions were of the view that transgressions were not only crime, but also sins. There were instances where the ecclesiastical courts had jurisdiction over certain crimes (Helmholz, 1987:120). An example of this type of crime would be murder, which was a crime in common law and contravention of the Ten Commandments. Helmholz also quotes instances where these types of courts had jurisdiction over other certain crimes. He gives the example of theft. He goes further to postulate that ecclesiastical courts had jurisdiction to try common law crimes where there was scarcity of secular courts to try these cases (page 122).

The ecclesiastical courts interfered in secular matters at the slightest sinful or criminal excuse. Although there was interference by ecclesiastical courts on secular matters, commentators do

not comment on whether there was interference by secular courts in church matters. Their comments are mostly about the involvement by the church in secular matters and secular crimes. Pollock and Maitland (1968:439) opine that the involvement of the church in secular matters was so deep that “every layman, unless he was a Jew, was subject to ecclesiastical law. It regulated many affairs of his life, marriages, divorces, testaments, intestate succession.” This statement by Pollock and Maitland ineluctably indicates the extent in which the ecclesiastical courts were involved the life of the people.

There are no records, which indicate that the privilege did exist during this period. However, because the lines between the state and the church were blurred and there was no provision for the courts to recognise the privilege, Yellin (1993:98) extrapolates that “it is reasonable to conclude that secular law so held, given the close relationship between canon and common law”. Yellin infers that the priest-penitent did not exist because of the relationship between the state and the church in England.

3.2.6.2 Support for the existence of the priest-penitent privilege in England

Some commentators proffer reasons for the approval and recognition of the priest-penitent privilege. Nolan (1913:649) postulates on the reason why the priest-penitent privilege enjoyed recognition during this period by stating the following:

> But this recognition of the secrecy of the confession would not have rested on any principle of immunity from disclosure of confidential communications made to clergymen. It would have rested on the fact that confession was a sacrament that the doctrine of the Church laid it down as a necessity, that both king and people practiced it in some degree of faithfulness and that the practice was wholly a matter of spiritual discipline on which the church had declared the law of absolute secrecy.

The above statement by Nolan lays the basis that the practice of the priest-penitent privilege did not depend on the “principle of immunity from disclosure of confidential information made to the clergyman” (Nolan, 1913:649). His contention is that secrecy of the confession was because the confession was a sacrament. On top of that, both the priest and the presiding officers practised and respected this sacrament and therefore it was unthinkable that the presiding officer would compel the priest to break the sacramental seal of confession.

With the marriage of convenience between the state and the church, it was unimaginable that the court would reject the privilege. In fact, Thompson (2006:44-5) asks whether a judge would "in one of the King's temporal courts, ever ask a priest to disclose a secret learnt in the confessional, and would that judge send the priest to gaol if disclosure of such secrets was refused". He concludes that no judge would risk doing that. Taking into account the relationship between the state and church at that time, Thompson is correct in his submission.

3.2.6.3 Support for the non-existence of the priest-penitent privilege in England

Some commentators explicitly deny that the privilege existed before the Reformation in England. When scrutinising the history of the priest-penitent privilege, Bush and Tiemann (1989:111-2) note that the priest-penitent privilege did not exist at common law. Their view is that the priest-penitent privilege should not have existed because Anglican Church practices and traditions opposed the privilege. Horner (1997:700-1) also agrees that common law in England was greatly influenced by church law but that "at common law, English law did not recognize the privilege". He even recommends that because the priest-penitent privilege did not exist at common law in England, the United States should abandon the privilege "thereby promoting the important goal of ensuring a trial based on the most accurate evidence available".

The protagonists of this view extend different reasons for their opinion. Waller and Chefetz (2000:89-90) dispute the existence of the priest-penitent privilege before the Reformation in England. They contend that there is no concrete evidence to support its existence. Their view is that since there is no evidence to support the view that the priest-penitent privilege existed before the Reformation, conjecture and speculation are not sources of evidence in this regard. According to them, the view on the existence of the priest-penitent privilege should be the direct result of obtained facts.

There is another view that the priest-penitent privilege existed but ceased to exist after the Reformation. Yellin (1983:101) supports this view and according to him there is a possibility that priest-penitent privilege may have existed in the common law of England before the Reformation but "the virtually unanimous opinion is that the privilege ceased to exist after the Reformation". Colombo (1998:230) also contends that the priest-penitent privilege did not exist in England after the Reformation.

3.2.6.4 The Articuli Cleri

Edward II enacted the *Articuli Cleri* in 1315 during his reign. The statute *inter alia* provides that; "it also pleases our Lord the King that felons and approvers be able to confess their misdeeds to the priest" (*Articuli Cleri*. Clergy Act, 1315; Privilege of Clergy Act, 1315). This statute deals with the privilege of the clergy to hear confessions. It does not deal with the priest-penitent privilege or the inviolability of a private confession. Yellin (1983:99) complains that some commentators quote this statute to support the view, that priest should not disclose confidential information. Coke (1979:629) is one of the commentators who supports the view that this statute allows priest-penitent privilege except in cases of treason.

Yellin is of the opinion that this statute is not the authority for the existence of the priest-penitent privilege. The statute is silent on the confidentiality of the confession. Yellin holds that "the true meaning of the statute, however, is uncertain and furnishes no concrete evidence on the privilege itself" (Yellin, 1983:99). It is difficult to disagree with Yellin in his contention when the *Articuli Cleri* is silent on the priest-penitent privilege. The *Articuli Cleri* only speaks of the confession of sins.

3.2.6.5 Garnet's case

This case is important although it adds to the confusion whether the priest-penitent privilege existed under common law before the Reformation. It is important because commentators who support the privilege and those who do not support the privilege conveniently quote it (Wigmore, 1961:869; Allard, 1953:4; Hogan, 1951:9; Yellin, 1983:100 and Thompson, 2006:70). The facts of the case are as follows: James 1 became the King of England after the death of Elizabeth in 1603. His views were regarded as controversial, especially his views on religion which were oscillating between Catholicism and Protestantism. The people hated his "middle way". There was no stability and peace in church because of this religious and ideological uncertainty. Underwood (1996:313) states that his political and spiritual philosophy were an example of "a course plotted between Scylla and Charybdis". In other words, his philosophy was result of two philosophical opposing extremes.

Because of this, Guy Fawkes and a small group of extremist Catholics then devised a plan to fill up the cellars of Westminster with gunpowder to blow up James 1 and the whole Parliament into smithereens. The aim of the treasonous act was to precipitate a Catholic uprising. Somebody disclosed the plot and as Churchill (1990:151) puts it, "the big bang was stifled". In

the middle of this was Father Garnet who was the spiritual adviser to Guy Fawkes and other accused. Father Garnet and all other accused appeared before the court on the ground that they attempted to cause the death of King James 1 by using gunpowder. The charge was thus treason, which was punishable by death because James 1 was a king.

During the trial, Father Garnet testified regarding his knowledge of the plot. The court wanted him to give evidence and explain his role regarding the plot. Garnet refused to furnish any information. He even refused to disclose whether he obtained the information through a private confession or not. He refused to disclose the confidential information relating to the other accused. His defence was that he only knew of the plot after the consultation with one of the accused (Greenwell). He contended that this consultation with the accused was confidential and fell under the protection of the priest-penitent privilege. He further contended that he was not the chief perpetrator as the state was alleging (Carswell, 1934:136). He had dissuaded the other accused from carrying out plot.

The further submission by the state was that the consultation between Garnet and Greenwell was not a penitential communication because the communication related to a future event in respect of which there would be no repentance because it had not yet happened. Further, that the communication penitential because Greenwell just wanted an advice. The communication was therefore not a confession.

Another important point raised by the state was that the communication was not penitential as the case involved treason (Garnet, 1606:246). Father Garnet's trial took place on 26 March 1606. The court found him guilty. The deliberation by the jury took only fifteen minutes. He was guilty of "having knowledge of a treasonous plot without disclosing it, though not participating in the plot or approving it (Hogan, 1951:11). The court ordered his execution in the yard of St Paul church on 3 May 1606.

The case does not provide clear evidence that the priest-penitent privilege existed before the Reformation or not. Wigmore (1961:869) quotes a particular point that arose during the state's case. "The Earl of Nottingham asked him if one confessed this day to him, that to-morrow [sic] morning if he must conceal it. Whereupon Garnet answered that he must conceal it, but the questioners did not attempt to compel a disclosure of the confessional's secrets". In other words, the state did not ask enough questions to elicit if information could enjoy the priest-

penitent privilege or not. In fact, there was no analysis of which information fell within the circumference of a priest-penitent privilege.

The submission by Sir Edward Coke the prosecutor in the case, regarding the existence of the priest-penitent privilege partially relied on the statute *Articuli Cleri*. The statute is long but it *inter alia* provided, "this branch declareth the common law that the privilege of confession extendeth only to felonies….and not to appeals of treason". Although this was a sufficient authority for Coke to hold that the privilege existed for all crimes except treason, Wigmore (1961:869) contended that the statute was ambiguous. Thompson (2006:54) is of the view that "while the statute *Articuli Cleri* may seem ambiguous if we expect it to fulfil the function of a modern statute, it is not ambiguous at all when we understand that the King was using the statute to answer a petition and to clarify the common law". The assertion by Thompson is generous considering that the statute spoke of "privilege of confession". This is ambiguous as it may create the impression that the person has a privilege and not a priest-penitent privilege as envisaged in law.

When Sir Edward Coke presented the state's case, he said, "If the confession was about high treason it ought to be revealed" (Allard 1953:4). This means that he regarded that the priest-penitent privilege existed but did not apply in cases of where the charge relates to high treason. When Hogan (1951:9) commented on Garnet's case, he maintained that the priest-penitent privilege did exist in pre-Reformation England, but did not apply in the case of treason.

Not every commentator agreed with Sir Edward Coke. It is therefore difficult to assume that one of the reasons, which led to the conviction of Garnet, was because he blatantly refused to provide the court with the information that was confidential. In this hypothetical scenario, it would mean that the priest-penitent privilege did not exist. Another scenario would be that one of the reasons he was guilty was because the offence charged was treason. This scenario would support the recognition of the priest-penitent privilege but not in cases involving the element of treason. Yellin (1983:100) comes to the conclusion that;

> It also follows then that the privilege could well have existed in instances when treason was not involved. It is therefore difficult to conclude much about the minister's privilege from Garnet's Case despite all the attention afforded it by legal writers. What remains, however, is a virtual consensus of opinion that the clergy privilege did exist in England.

Because of the congruence between the church and the state, it would be injudicious to suggest that Garnet during those times would be compelled to disclose the private communication made to him. Thompson (2006:70) even concludes that Garnet was guilty by the jury and not because of the submissions by Sir Edward Coke who submitted that the priest-penitent privilege did not exist in cases of treason. What compounds the problem is the fact that the jury was not required to give reasons for their judgment. The judges who were themselves priests would not have compelled Garnet to disclose confidential information because the canons and church practice forbade such disclosure. Garnet's case does not shed any light whether the priest-penitent privilege existed or not.

This case does not assist in dealing with the priest-penitent privilege. The reason is that it is not clear why the priest-penitent privilege was not recognised. It is for that reason that some commentators quote this case to support or oppose the existence of the priest-penitent privilege in England before the Reformation. It also does not assist the Anglican Church except to show that the priest would rather face the wrath of the courts rather than betray the seal of confession in cases of the private confession.

Overview: The tracing of the origin of the priest-penitent privilege will assist in understanding and interpretation. It is easy to assume that the priest-penitent privilege existed before the Reformation because there was little separation between the church and the state. (Yellin, 1983:97 and Thompson, 2006:44-5). The *Articuli Cleri* and Garnet's case do not assist in proving that the priest-penitent privilege did not exist before the Reformation.

3.2.7 The priest-penitent privilege after the Reformation in England

As shown above, there is no consensus amongst theologians as to whether the privilege existed in England after the Reformation. Some theologians are of the view that the privilege did not exist before the Reformation (Waller & Chefetz, 2000:89-90). Other theologians vowed for its existence (Nolan, 1913:649; Allard, 1953:4). Yellin (1983:101) is of the view that although there is no consensus among scholars that the priest-penitent privilege may have existed in the common law of England before the Reformation, the essentially agreed upon opinion is that the privilege ceased to exist after the Reformation.

After the Reformation, it was obvious that the Anglican Church would shed some of the Roman Catholic principles. Yellin (1983:101) opines that the principle that was not done away with,

“at least by implication was the seal of a confession”. Tiemann (1964:43) is of the view that although, after the Reformation the confession in the Anglican Church was not compulsory but voluntary, if the penitent decided to confess, the confession was still protected by the seal of confession in terms of Canon 113 of the Anglican Church (1603).

After the Reformation, the significance of the private confession ebbed and became less frequent in England. Jones (1879:9) states that because of the unimportant status accorded to private confessions after the Reformation, coupled with the rise of Protestantism, the priest-penitent privilege ceased to exist after the Reformation. Mitchell (1987:736) is also of the view that the priest-penitent privilege did not exist after the Reformation. Yellin (1983:103) put it succinctly “what is certain is that at least after the Reformation the common law of England no longer recognized the minister's privilege.” Doyle (1984:293) asserts that the priest-penitent privilege did not apply to any member of the clergy after England terminated its religious link to Rome; she concludes that the British practice denied the existence of such a privilege.

Other scholars hold that the privilege existed after the Reformation but ceased to exist around the sixteenth century. Wigmore (1961:869) admits that English courts continued to recognize the priest-penitent privilege even after King Henry VIII's cessation from Rome in 1531; however, he opines, “the privilege ceased to exist after the Restoration of the monarchy in 1660”. Wright and Graham (1992:39) are not convinced that the assertion by Wigmore relies on facts. They point out that he based most of his finding on *dicta* extracted from cases. They allege that in seven out of twelve cases Wigmore relies on *dicta*. They further accuse him of utilising two cases that were not of any binding to the courts.

Peake (1801:175) made a commentary about the existence of the privilege after the Reformation. He stated, “A statement to a clergyman or priest is not within the protection of the law”. Many courts use this statement to support decisions to deny the existence of the priest-penitent privilege. Thompson (2006:13) contends that this assertion by Peake “was followed as a gospel by contemporary text writers and judges alike without any apparent critical review of the conclusion from the case cited”.

In summary, although the above discussion highlights that there are divergent views on whether the priest-penitent privilege existed after the Reformation, the scale seems to tip towards the fact that it did not exist. The implications of this in South Africa is that when the

time comes for the Anglican Church and the courts to decide on the issue of a priest-penitent privilege, they should take cognisance of the fact that the scale seems to tip towards the fact that it did not exist.

3.2.7.1 Criminal cases that deal with priest-penitent privilege after the Reformation in England

As shown above there is no consensus amongst theologians as to the existence of the privilege after the Reformation. This controversy was also evident in criminal cases tried in courts from the Reformation century to the nineteenth century. The court tried these cases in the light of the rule of evidence that states "*nemo tenetur prodere seipsum*" which means that "no man is bound to betray (accuse) himself" (Lawrence, 1992:111).

(a) Criminal cases which do not support the priest-penitent privilege

One of the cases quoted in cases of priest-penitent privilege is *Wheeler v Le Marchant (1881).* This case is not relevant to the discussion on priest-privilege. However, there were words the judge said in the trial that attracted the attention of the supporters of the priest-penitent privilege. The facts of this case are briefly as follows; the defendant trustee sought advice information from the estate agent and surveyor in respect of certain property. In terms of the agreement, the plaintiff had to erect certain buildings and then receive a lease of that land.

There was a dispute arising out of the agreement. The plaintiff instituted an action for specific performance. The defendant trustee claimed privilege for the reports of the estate agent and surveyor made to the solicitors in the course of the administration of the estate. The court held that the communication between the defendant trustee and the estate agent and surveyor enjoyed the priest-penitent privilege. It is the comment by the court as per Justice Jessel that is noteworthy:

> In the first place, the principle protecting confidential communications is of a very limited character. ... There are many communications, which, though absolutely necessary because without them the ordinary business of life cannot be carried on, still are not privileged. ... Communications made to a priest in the confessional on matters perhaps considered by the penitent to be more important than his life or his fortune, are not protected.

As shown, this case had nothing to do with the priest-penitent privilege. It is not clear in the judgment why the judge made the comparison. The theologians and legal commentators use

the *dicta* by the judge to support or not support the existence of the priest-privilege. This case adds little value to this research.

Theologians and lawyers sometimes quote *Du Barré v Livette (1791)* to support arguments relating to the priest-penitent privilege. In this case, the lawyer could not speak French and the client could not speak English. During consultation, the client admitted *via* an interpreter that he stole the diamonds. Civil proceedings subsequently ensued and the interpreter gave evidence as to what the client said during consultation. The defence objected because the information enjoyed the attorney-client privilege.

The plaintiff's lawyer submitted to the court that in another case, *R v Sparkes*, (which is not reported) the judge admitted the evidence of a confession made to the clergyman. On the strength of such evidence, the court found the accused guilty and sentenced him. On hearing this submission, Lord Kenyon said that he "would have paused before admitting such evidence". It is not clear what the judge meant by this but it can be assumed that he meant that he would have been cautious before admitting such evidence. In spite of this lack of clarity, this case is sometimes utilised by lawyers to either support or not support the idea that the priest-penitent privilege did not exist after the Reformation. This case adds little value to the research.

There is an unreported case of *R v Redford (1823),* which was before William Draper Best. In this case, the court summoned the Church of England priest to give evidence as a witness in a criminal trial about a confession of guilt made to him by the prisoner. The fact that a clergyman could reveal the contents of a private confession made to him by the penitent exasperated the judge. He expressed this displeasure by stating that it was improper for a clergyman to disclose the contents of the communication, which he received during a private confession. Commentators use this case to confirm the existence of the priest-penitent privilege. This case supports the argument that after the Reformation, there were courts that recognised the pries-penitent privilege.

Another case that the lawyers quote is *R v Gilham (1828*). The court charged the accused with murder. His gaoler convinced him that he should talk to the prison chaplain about the crime with which he was charged. The facts of the case are that Mrs Coxe employed the accused, Gilham and the deceased, Maria Bagnall. The accused admitted that he stole goods

from the employer but denied that he committed the murder. The gaoler was convinced that the accused did not only steal the goods but he also murdered the deceased. He suggested to the accused that he should read the Bible, then go, and confess the murder to the prison chaplain.

The accused went to see the chaplain. The chaplain implored the accused to repent and to confess his sins so that he can reconcile with God. The chaplain left and the accused subsequently confessed to the murder to the gaoler and then the mayor. The accused did not confess to the chaplain. He confessed his sin to the persons that did not form part of the clergy and therefore had no right to act in *persona Christi.*

His defence counsel argued that his confession was not admissible in law, as the accused did not make the confession voluntarily. This case is therefore concerned with the admissibility of confessions. It does not deal with the priest-penitent privilege. Lawyers cite this case in many texts as authority for the proposition that the priest-penitent privilege did not exist in England after the Reformation. For an example, Starkie (1860:40) added this case to a list of cases that support the proposition that "it has never been held that a minister is bound to disclose that which has been revealed to him in a matter of religious confession".

There are instances where the courts and commentators categorically deny that the privilege ever existed in England. Bursell (1990:84ff) denies the existence of the by referring to an unreported case *R v Kent (1865).* In this case, of murder the Anglican priest refused to answer a question put to him by the magistrate. Lord Westbury in the House of Lords had this to say about the privilege:

> There can be no doubt that in a suit or criminal proceedings a clergyman of the Church of England is not privileged so as to decline to answer a question which is put to him for the purposes of justice, on the ground that his answer would reveal something that has been made known to him in confession. A witness is compelled to answer every such question, and the law of England does not extend the privilege of refusing to answer to Roman Catholic clergymen who have obtained the information in confession from a person of their own persuasion.

Some courts refused to equate the priest-penitent privilege with the status of the attorney-client privilege, which forms part of most legal jurisprudence. In *Anderson v Bank of British Columbia (1876),* the court said the following in dealing with this issue:

> Our law has not extended that privilege, as some foreign laws have, to the medical profession, or to the sacerdotal profession … Again, in foreign countries where the Roman Catholic faith prevails, it is considered that the same principles ought to be extended to the confessional, and that it is desirable that a man should not be hampered in going to confession by the thought that either he or his priest may be compelled to disclose in a Court of Justice the substance of what passed in such communication. This, again, whether it is rational or irrational, is not recognised by our law (pp 650-1).

Khan, Buisman and Gosnell (2010:144) also support the view that the English courts did not recognise the priest-penitent privilege when they state:

> English law has a distinctly illiberal attitude to the matter of protecting confidential information from compelled disclosure at the instance of an opponent……..Without prejudice communications between parties are privileged for most purposes. But English law does not recognise other privileges…….for an example, the privileges between spouses, ministers of religion and those who consult them…"

(b) *Criminal case which support the priest-penitent privilege in England*

There are some cases where the courts seemed to lean on the idea that the priest-penitent privilege did exist after the Reformation in England. Auburn (2000:175) opines that at least by the nineteenth century, there were indications that the priest-penitent privilege was somewhat recognised. One of such cases is *Broad v Pitt (1828)* where the confidential information between an attorney and his client came into discussion. Best CJ said: "The privilege does not apply to clergymen since the decision the other day in the case of Gilham ….I, for one, will never compel a clergyman to disclose communications made to him by a prisoner: but if he chooses to disclose them, I shall receive them in evidence".

This case also indicates the uncertainty that the courts paraded in the application of the law relating to the priest-penitent privilege. In the first instance, he does acknowledge the fact that the priest-penitent privilege does not apply to the clergy, yet on the hand he contends that he

will never compel the clergy to give evidence. This does not make legal sense because if the clergy did not enjoy the priest-penitent privilege, he is then compellable to give evidence. This case also does not help the study much.

There are also other cases where it is evident that the courts were reluctant to confront the ecclesiastically delicate issue of the priest-penitent privilege. The example of such a case is *R v Hay* (1860), wherein the accused committed robbery. He robbed the complainant Daniel Kennedy of his silver watch. The evidence was that Hay went to John Kelly (the priest) to confess and handed over the watch. The priest gave the watch to the police but did not say from whom he received it.

In a subsequent trial, the prosecutor asked John Kelly as to who gave him the watch that belonged to the complainant. The priest replied, "I received it in connexion with the confessional" (p 934). The judge then explained to him that he did not want him to disclose the content of the confession but only to reveal who gave him the watch. He repeatedly refused to proffer the identity of the person who gave him the watch. The court found him guilty of contempt of court.

In this case, the priest had a difficult choice to make. If the priest had answered the question posed to him by the prosecutor, he would have stated that he received the watch from the accused, which is Mr Hay. This would then mean that Hay was in possession of the watch that belonged to the complainant. This would associate Hay with the crime as either a robber or an accomplice. Consequently, the court would convict Hay because of what took place or said in the confessional. The seal of confession would have broken thereby.

The seal is inviolable. Any communication, which discloses what, took place in the confessional between the priest and the penitent, the seal of confession will insulate. This then also mean that the priests should be vigilant so that they do not divulge the content of confidential communication that they received by virtue of a private confession. The same warning is relevant to the priest of the Anglican Church.

Commentators use this case to support the existence of the priest-penitent privilege after the Reformation (McWilliams, 1984:923). Thompson (2000:164) is of the view that the case can

be used to support as well as deny the existence of the priest-penitent privilege. He states that:

> *R v Ray* is a precedent that denies the existence of a religious confession privilege since the clear result of Hill J's adjudication was to deny Father Kelly understands of his own canon law obligations. It is also true to state the contrary, since the Judge was at pains to point out that the question required no breach of the confessional seal.

There is another case where the court shows the reluctance to rule on the issue. In *R v Griffin* (1853), a Church of England workhouse chaplain appeared before the court to testify on the case of infanticide. The chaplain had a conversation with the accused regarding the death of the infant. The chaplain as the spiritual adviser had counselled the accused in terms of religion.

The judge, Baron of the Exchequer Sir Edward Hall Alderson, strongly intimated to counsel that the confidential information between the chaplain and the accused received the same standing in law as the confidential communication between the attorney and his client. He added, "I do not lay this down as an absolute rule: but I think such evidence ought not to be given". This case is applicable to the Anglican Church to support the fact that there is at least a case during the eighteenth century that supported the priest-penitent privilege

It is also instructive to note that prominent law practitioners who are Senior Council like Rupert Bursell and Roger Kaye in England do not show the light in this regard. Bursell and Kaye (2011:813) in Halsbury's Ecclesiastical Law state that:

> The obligation of a priest to observe strict secrecy concerning what is communicated to him in the course of a private confession is enjoined by ecclesiastical authority [ie by canon 113 of the Canons Ecclesiastical 1603/04 which remains unrepealed]; it seems unlikely that the courts would recognise such a communication as belonging to the category of privileged communications, but this remains uncertain.

From the assertions of these prominent law practitioners in England, it appears that the priest-penitent privilege does not get recognition. However, there may be legal ways to work around this non-recognition. A highly regarded lawyer and scholar Hill (2007:179) is of the view that

an Anglican priest who divulges confidential communication obtained during a private confession is committing canonical crime. He goes further to say that he doubts whether a secular court would consider such communications privileged.

He also comments that the Criminal Law Revision Committee of 1972 did not support the idea that priest-penitent communications enjoy the privilege. He, however, opines that the court can exercise discretion whether to accept such confidential information or not. Further that the penitent and the church can seek a *quia timet* injunction to prevent a priest from disclosing confidential information (Hill, 2007:180). “An Anglican priest is in a different position from a priest of another denomination, since the duty of confidentiality which attaches to him is part of the law of the land” (p 180).

Overview: The above cases show how the courts were reluctant to deal with the priest-penitent privilege. There is confusion and uncertainty in this regard. It would be very difficult for the South African courts to rely on the English decisions when dealing with this matter. The theologians are not unanimous on this issue as shown above. Townsley (2007:15) gesticulates this theological and legal confusion when he asserts that “[f]urther, there is a paucity of judicial support for the claim that no privilege arises out of the priest and penitent relationship. Both positions, as to existence or non-existence of the privilege, can be legitimised by the manipulation of traditional history”. This shows how difficult it will be when the South African courts deal with the priest-penitent privilege in future if it were to rely on English law. It may be prudent to show how other countries deal with the issue of priest-penitent privilege. Australia is ideal for this very purpose.

3.3 The priest-penitent privilege in Anglican Church in Australia

Seeing that in English courts offer uncertainty in cases that involve the priest-penitent privilege, the Australian courts can pave the way in this regard. The Australian Anglican Church community had a fair share of bad publicity regarding the child abuse committed by the clergy (Parkinson *et al,* 2009). This research is not directly concerned with child abuse cases in Australia. Australia’s involvement in the study is for comparative purpose only. The attitude of the Australian legislatures towards the priest-penitent privilege may be the result of the prevalent problem of child abuse by the clergy. The discussion on this aspect in the Anglican Church of Australia relates only to the jurisdictional imperatives; the regulatory framework; application of the privilege in different jurisdictions and the claimants of the privilege.

3.3.1 Jurisdictional imperatives

In some parts of Australia, the statute and common law regulate the applicability of the priest-penitent privilege. The five jurisdictions where the statute regulate the priest-penitent privilege are Victoria, the Northern Territory, the Commonwealth, New South Wales and Tasmania.

- In Victoria, section 28(1) of the Evidence Act 1958 provides that no clergyman shall divulge the confidential information he received during a confession unless the person who made the confession gives his consent.
- In Northern Territory, section 12(1) (3) of the Evidence Act of 2005 provides that the clergyman shall not divulge what was said to him during a confession unless the person who made the confession gives his consent.
- In Commonwealth and Tasmania, section 127 of the Evidence Act of 1995 provides that a member of the clergy may refuse to disclose the confidential information he received during a confession.
- In New South Wales, section 127 of the Evidence Act of 2000 provides that a member of the clergy may to refuse to disclose the confidential information received during a confession.

The perusal of these statutes reveals that in Victoria and Northern Territory the wording of the statutes is mostly similar. The most important aspect of the provisions is that the penitent may authorise the priest to disclose the contents of the confidential information. Both these statutes leave open the question; what would the Anglican priest do if the penitent authorises him to disclose the confidential information and the court requests him to divulge it? Which is important, the right of the penitent or the solemnity of the oath of office of the priest? This also shows that these statutes make the seal of confession violable at the instance of the penitent.

In New South Wales, Tasmania and Commonwealth the statutes relating to the priest-penitent privilege are also mostly similar. Unlike in Victoria and Northern Territory, the authority of the penitent waives this priest-penitent privilege. The priest may claim the privilege. The statutes provide that the priest may refuse to disclose the confidential information. This effectively means that the priest has a choice whether to disclose the confidential information or not. This also shows that seal of confession is violable in this regard at the instance of the priest.

In Queensland and Western Australia, the Law Commissions established commissions to investigate the applicability of the priest-penitent privilege. Both commissions rejected the

inclusion of the priest-penitent privilege in their statutes (Queensland Law Commission, 1995; Western Australia Law Commission, 1993). The implication of this is that if a case can arise where the priest-penitent privilege is in dispute, common law would apply. This means that it is most likely that the courts would reject the priest-penitent privilege. This inference is evidence from the fact that the Law Commissions established rejected the inclusion of this privilege in their statutory law.

In summary, the statute regulates the applicability of the priest-penitent privilege in Australia. At least there is a concerted effort to standardize it. The situation here in South Africa is different as there is no statute, which talks to the priest-penitent privilege. The result of this legislative lacuna is uncertainty.

3.4 The priest-penitent privilege in America

The comparison of the priest-penitent privilege in America and in South Africa will assist because in America statutes in most states regulate the priest-penitent privilege whereas in South Africa it does not. The discussion will show that in America the priest-penitent privilege is recognised. It is trite that in America the priest-penitent privilege accords protection to all confidential information made by the penitent to a priest. According to Catalano (2001:358), the priest-penitent privilege protects the confidential information if it falls within its ambit. However, the confidentiality of information should subscribe to certain standards:

3.4.1 Penitential information

The information that the priest receives should be penitential. In other words, the priest should have received the information during the course of a private confession. In one case of *Cimijotti v Paulsen* (1963) in the United States District Court in Iowa, the court had to decide whether the private communication was privileged or not. The court adopted a certain criteria to determine whether the communicate fell within the purview of the priest-penitent privilege. Seemingly, this case established a trend for most cases. The court made critical decisions in this case.

According to this case, the penitential character of the priest-penitent privilege is not a requirement in Iowa. The court however took cognisance of the fact that there is no unanimity in courts as to whether the statement should be penitential before it enjoys the pries-penitent

privilege (p 625). As mentioned in pervious chapters, the South African courts have not made a ruling on whether it recognises the priest-penitent privilege. It is therefore not ripe at this stage to speculate on types of confidential information the courts would regard as privileged.

There is a distinction between penitential information and sacramental confession. Sacramental confession is a private confession made to a priest in private with the view to obtain reconciliation with God (*Scott v Hammock,* 1994). On the other hand, penitential communication, according to Cassidy (2003:1646) is confidential communication made to a minister of the church irrespective of whether such minister has authority or not in terms of church policy to hear such communication. In the Anglican Church in South Africa the person, receiving the private confession should be an ordained member of the clergy (Anglican Prayer Book, 1989:448-9).

Even as early as the eighteenth century, the courts had a strong view that when the penitent makes confidential communication to the priest; the reason should be to allow the priest to discharge religious duty. In *Knight v Lee*, (1881), an old Indiana state case, the defendant referred to the plaintiff as a whore while being questioned by an elder and deacon who were investigating certain charges against the plaintiff. In a subsequent civil case, the court requested the deacon to disclose the communication made during the remonstration. When the deacon tried to claim that the communication is privileged, the court refused and said:

> The confessions, concerning which clergymen are incompetent to testify, are, evidently, such as are penitential in their character, or as are made to clergymen in obedience to some supposed religious duty or obligation, and do not embrace communications to clergymen, however confidential, when not made in connection with or in discharge of some supposed religious duty or obligation.

In the Anglican Church in South Africa the person, receiving the private confession should be an ordained member of the clergy (Anglican Prayer Book, 1989:448-9). Moreover, the communication should be penitential. Not all communication to the priest could receive protection of the privilege.

3.4.2 Private information

Generally, in most states in America, to claim the priest-penitent, the communication made to the priest should be confidential; in other words, it should be private. There is a view by Webb

(1969) that the presence of third parties during the conversation between the priest and the penitent does not necessarily destroy the priest-penitent privilege if the penitent gives the information in confidence. Webb's opinion is that the presence of the third party should not interfere with the priest's capacity to render spiritual advice. He further contends that sometimes the presence of the third party is necessary during the consultation with the priest. Cassidy (2003:1645) shares this view. He confirms that, "the presence of third parties will not defeat the privilege where those third parties are essential to the objective of the conversation". This view would not be applicable in the Anglican Church in South Africa because the confession must be in private between the penitent and the priest (Anglican Prayer Book, 1989:448-9).

3.4.3 Taped information

What happens in case of taped communication? The answer to this question lies in the case of *Mockaitis v Harcleroad*, (1997). The facts of this case are as follows: Conan Hale allegedly committed a brutal triple homicide and detained at the Lane County Adult Corrections Facility. He requested the presence of a Catholic priest, Father Mockaitis so that he can make a confession. Father Mockaitis was not aware of the fact that the officials of the Lane County Adult Corrections Facility recorded the conversation with Hale. After the transcription of the tape, two deputy district attorneys from the office of the Lane County District Attorney listened to it.

It came to the attention of the church that the taping of Hale's confession took place. The church petitioned to have the tape destroyed. It further demanded a guarantee that prison officials would not secretly record any further sacramental confessions. The state trial court denied this motion. The church filed a civil rights claim in federal court. The federal court held that the state had violated Father Mockaitis's reasonable expectation of privacy in his communications with Hale. From this case, the deduction is that that the priest-penitent privilege may find application even when the recording of the confidential information was clandestine. Although in South Africa this type of case has not arisen, the logical assumption is that the Anglican Church would follow the same stance as taken by the Roman Catholic Church in this regard.

3.4.4 The waiver of the privilege

What is the position if the accused person informs the court that the priest may disclose the communication he made to the priest? The case of *Commonwealth v Kane* (1983) indicates the views of the court in this regard. Kane, a Roman Catholic priest refused to testify about confidential communications that the defendant made to him. The twist in this case is that the defendant had intimated that the priest might divulge the communication in question. According to the defendant, he needed the priest to testify so that the court may hear the exculpatory communication that he made to the priest. In fact, he wanted the priest to corroborate part of his exculpatory version.

The defendant was of the view that since he gave the priest the permission to disclose the information, the priest has no choice but to disclose the information since it was he, the defendant, who made the communication. The priest on the other hand was of the view that this was immaterial and he was not going to break the seal of the confession by divulging the confidential information made to him. The court held that the right to assert the priest-penitent privilege belonged to the defendant and that the priest's refusal to testify after the defendant had indicated that the communication was no longer confidential was unlawful. The priest was in contempt of court for refusing to violate the dictates of his religion, which forbade him from revealing the confidences made to him.

It is unlikely that the Anglican Church in South Africa would agree with this view. This decision is, with due respect, harmful to the seal of confession. The principle is that the priest must not divulge the confidential information made to him by the penitent otherwise he breaks the seal of confession. There is a danger in the decision of this case that the penitent may attempt to exonerate himself by using the testimony of the priest. The penitent may say something to the priest that will exculpate him from the crime and then force the priest to divulge it under the guise of waiver of the priest-penitent privilege.

3.4.5 Written private confession

What is the position if the confidential information to the priest is in writing in a form of a letter? The court in *Sherman v State* (1926) deals with this question. The accused in this case allegedly raped his own daughter. He wrote a letter to his preacher wherein he requested the preacher to pray for him. The contents of the letter became a confession to the charge of rape. The priest became a witness in the case because he received the letter.

The court was of the view that the mere fact that a confession made to a minister of the gospel to obtain his help is not a ground to grant the priest-penitent privilege. The accused just wanted a prayer from the priest. According to the court, the request for a prayer was not penitential information. The court further held that the confession did not conform to the prescripts of the church and the communication was not a penitential communication in the true sense of the word.

The decision of the court is questionable because the mere fact that the accused wanted the priest to pray for him is an indication that he wanted to reconcile with God after having committed a sin. This fell within the circle of a private confession. In South Africa, the Anglican Church would have regarded this as a private confession. The letter was confidential as only to the priest had access to the letter. The only difference was that the confession was in the form of a letter.

3.4.6 Other approaches

Most American states have adopted a liberal approach when dealing with the type of communication that may find protection in terms of the priest-penitent privilege. This approach accords protection to all confidential information made to the clergy seeking counsel or advice (*Simpson v Tennant*, 1994). This approach places attention on the minister's role in providing spiritual advice, and secondly, whether there was shared confidence (Cassidy, 2003:1647).

There is an interesting case in this regard: *Lightman v Flaum*, (2001). The plaintiff in this case, Chani Lightman and her husband Hylton Lightman were both Orthodox Jews. Their marital relationship experienced problems due to the lack of communication, unsatisfactory sexual relations and infidelity. The plaintiff even revealed that she had stopped going to the Mikvah. (Mikvah is a ritual bath taken by Jewish women after their menstruation).

The plaintiff approached the two rabbis (defendants) for advice and spiritual guidance. A third party was present during some of these consultations. The rabbis reported the conversations to the husband of the plaintiff. Their reason for doing that was that since the plaintiff was no longer going to the Mikvah, there was religious expectation on their part to advise her husband to end sexual relations with her. She filed for a divorce.

The argument of the plaintiff was that the defendants breached the fiduciary duty of confidentiality and thereby violated the priest-penitent privilege. The plaintiff submitted that the evidence of the defendants be excluded from the record because it was privileged communication. They also pointed out that the communication was not confidential because there was a third party during these conversations between the plaintiff and them. The defendants further argued that granting plaintiff such a relief and disregarding their own religious submissions would infringe upon their constitutional right to religious freedom.

The trial court found that the communication was made in confidence and that there was an "overwhelming public and societal interest in preserving the sanctity of such confidential communications" (p 570). Of interest is also the fact that the court did not specify whether the confidentiality of information in the clergy is different from other professionals. The court rejected the submission by the defendant that their right to religious freedom was infringed. The court stated that the Jewish law did not demand disclosure of confidential information and it indicated to the defendants how they could have complied with the Jewish law without disclosing confidential information.

The defendants appealed this decision. The Court of Appeal reversed the decision of the lower court and granted summary judgement to the defendants. The Court of Appeal did not deliberate on the right to freedom of religion. However, it ruled that the plaintiff waived any priest-penitent privilege because of the presence of third parties during her communication with the defendants. There were dissenting judges in this case who were of the view that it was important to determine whether the plaintiff intended her communication to be confidential.

The case went to the New York Court of Appeals, which agreed with the defendants on constitutional ground. This court found that although the state could pass regulations regarding secular professions on confidential information, it could not do so in religion. The court opined that to regulate confidential information in religion would make demands on the court to interpret and apply religious law. This could constitute constitutional difficulty. The court further held that the statute on priest-penitent privilege did not confer fiduciary duty of confidentiality.

The implication of this case is that the court is reluctant to interfere with canons that regulate conduct within the church. The court does not want a situation where it will have to interpret

and apply church law. It wants the churches to regulate their own internal arrangements. If the same facts of this case were to relate to the Anglican Church in South Africa, our courts would arrive at the same decision. The right to religious freedom demands that there should less interference by the state in the internal operations of the church lest it risks interference with such right.

A minority of states in America adopts another approach. This approach protects all confidential communications made to a minister in his professional capacity without restricting such communication to any purpose of the communication. This view is criticised by Knapp and Van de Creek (1985:293) on the ground that "lack of competency in counselling means that society should not sedulously encourage ministers to enter such relationships".

Even in the Anglican Church, priests are not psychologists and they should not wittingly venture into that space. This may be problematic because it is difficult to distinguish between what needs psychological counselling and what needs religious counselling. Griffith and Young (2004:43) have the view that "[it] should be evident that clergy, in carrying out their professional duties of providing psychological succour to parishioners, may employ both ecclesiastical and secular rituals".

Overview: In America, statutes regulate the priest-penitent privilege in most states. That is not the position in South Africa. In America, the confidential information should be penitential (*Cimijotti v Paulsen* (1963). It is also the requirement in the Anglican Church that the information should be penitential (Anglican Prayer Book, 1989). Generally, in most states in America, to claim the priest-penitent, the communication made to the priest should be confidential (Webb, 1969). The situation is the same in the Anglican Church (Anglican Prayer Book, 1989).

In America, confidential information obtained through illegal taping is inadmissible (*Mockaitis v Harcleroad*, 1997). It is also inconceivable that the courts in South Africa would admit evidence obtained through illegal taping. The priest can claim the priest-penitent privilege (*Commonwealth v Kane,* 1983), and not the penitent. Even in the Anglican Church in South Africa, only the priest can claim the priest-penitent privilege. The courts accepted confidential information that was in writing (*Sherman v State* (1926). There is also no reason why the Anglican Church would not support this view.

3.5 The seal of private confessions

There is a difference between the priest-penitent privilege as discussed above and the seal of confession. The priest-penitent privilege is claimed in court whereas the seal of confession relates to the non- disclosure of communication between the priest and the penitent according to church law or prescripts. This is the tension civil law and church law alluded to in chapter 2 (Smit, 2018; Van Staden, 2014). After a penitent has confessed his sins privately to the priest, the communication between the priest and the penitent becomes confidential and it is not subject to disclosure by virtue of a seal of confession. The discussion of its sanctity, purpose and origin takes place hereunder. This will then be easy to understand how it found application in the Anglican Church.

3.5.1 The sanctity of the seal of confession

Countless motives actuate people to confess their sins. Besides the knowledge that the private confession will reconcile the penitent with God, the penitent confesses his sins because he believes that the conversation between him and the priest is confidential and not subject to disclosure. Smith (1984:2) adds that "at the same time, spiritual assistance surely will be facilitated by the knowledge that the cleric will not be forced to divulge a counselee's admissions in court or to the police, or be tossed into prison for refusing to do so". From this assertion by Smith, it can be deduced that not only do penitents believe that their confession will not be disclosed, but also believe that the priest will not be forced or imprisoned for refusing to divulge the confession. This sense of inviolability of the private confession serves to some degree as an impetus for penitents to confess.

This effectively means that a priest shall not divulge what the penitent said to anybody. The priest cannot even confer with other fellow priests concerning the private confession made by the penitent. He cannot even divulge the content of a private confession to the spouse of the penitent. The private confession is sealed. It is a watertight compartment. The priest shall not disclose what the penitent said during the private confession even if the penitent agrees that the priest may divulge such. According to McCarthy (1967:134), this level of confidentiality of information leads to what he terms a "sacred trust" between the priest and the penitent. Oraegbunam (2015:545) takes this point further and states "priest- penitent privilege is coterminous with the confessional seal in which no disclosure of the confessions can be made in spite of any waiver from the penitent. In this sense, the confessions are absolutely inviolable".

3.5.2 The purpose of the seal of confession

The seal of confession serves a particular purpose. This particular purpose is also applicable in the Anglican Church since it practises the private confession, albeit not compulsorily. There is naïve thought that a seal of confession is a "prophylactic measure designed to preserve the penitent's reputation and to save her from embarrassment or exploitation" (Hanna, 1911). This is just a partial purpose of the seal of confession. The seal has a religious purpose. The Archbishop of Philadelphia, Anthony Bevilacqua (1996:1736), briefly explains the religious purpose of the seal of confession. Firstly, he refers to the seal of confession as a sacramental seal. The obvious reason for such a reference by Bevilacqua may be that the seal of confession seals the sacrament of a private confession. In addition, even the Anglican Prayer Book (1989:447-453) refer to the private confession as a sacrament.

Bevilacqua further refers to the sacramental seal in a strict and a wide sense. In the strict sense, the seal forbids any divulging of communication by the priest that could expose the identity of the penitent (Bevilacqua, 1996:1736). This prohibits any comment or action from the priest that will expose directly or indirectly the identity of the penitent. In the wide sense, any disclosure that could "render sacramental confession itself burdensome or odious either to an individual penitent or to penitents in general" is forbidden (Bevilacqua, 1996:1736).

Put differently, this means that the strict sense relates to the identity of the penitent, whereas the wide sense relates to the disclosure of the private confession itself. The wide sense of the definition of the seal of confession aims at ensuring the protection of the private confession as a sacred sacrament. The use of the words "burdensome" by Bevilacqua indicates that it should be an easy task to confess without unnecessary obstacles put on the way. The use of the word "odious" mean it should be a simple task to confess and not an arduous task (Bevilacqua, 1996:1736).

However, not only does the seal of confession accord the penitent confidence; it also insulates the private confession as a sacrament. It encourages the penitent to reveal "their darkest and deepest transgressions" (Thurian, 1985:112). The penitents are encouraged to confess their sins because there is no fear of the revelation of their darkest secrets. The seal of confession mitigates any fear that the penitent may harbour. According to Bailey (2002:503), shame and fear act as deterrents to the potential penitent. There is therefore no reason for the penitent to anticipate any humiliation because of the seal of confession. Moreover, it provides the penitent with spiritual closure. Collett (1996:1755) even suggests that after the confession and after

the knowledge that the seal of confession protect the confidential information, “the old sinful being is no longer spoken of or remembered”. This result in the reconciliation with God. The seal of confession soothes the soul injured by sin.

The impact of the seal of confession to the church itself cannot be underestimated. If penitents confess their sins, there is a cleansing of the church and the creation of an environment for the church to improve its ministry accordingly. According to Kurtscheid (1927:1), “the seal obligates in virtue of divine law”. The church benefits from the seal of confession as individuals improve their lives in the process of confidential confession by cleansing their souls and reconciling with God. Again, this creates the environment for the church to improve its ministry accordingly.

Furthermore, the more penitents confess and reconcile with God, the easier it is for the church to enhance spiritual cohesion and general unity of the church. The church unity is important for the growth of the congregation. Grasso (1995:30) concludes that the seal of confession “affirms the independence and superiority of the Church's claim over the spiritual dimension of life”. Even in the Anglican Church, the purpose of the seal of confession can relate to this contention.

Overview: One of the purposes of the seal is sacramental. It encourages the penitent to confess in that it gives them comfort that there will be no humiliation by disclosure of the confidential information. Moreover, it provides the penitent with spiritual closure by reconciliation with God. The seal of confession affects the church itself. It improves the ministry of that church. The seal of confession is therefore very sacramentally and spiritually important to the Anglican Church.

3.5.3 The origin of the seal of confession

How did the seal of confession come into being? It is important to deal with this question because it will not be wise to discuss the applicability of the seal of confession in the contemporary Anglican Church environment without understanding its origin. The church recognised the applicability of the seal of confession in the church for centuries. Martos (1994:771) contends that the real official recognition did not take place until the Fourth Lateran Council in 1215. He opines further that although the confidentiality of the communication

between the priest and the penitent got official recognition during the twelfth century, discussion about it began as early as the fourth century.

The Fourth Lateran Council however is not the only factor, which played an important role regarding the seal of confession during the early Church. The following are some of the other factors, which played this role.

- Pope Leo Letter.
- Theodore of Mopsuestia assertion.
- The Norman conquest of England.
- The Fourth Council of the Lateran.
- The martyr St John Nepomucen.
- The *Decretum* Gratian.
- The Provincial Council of Oxford of 1222.
- Canon 983 of the Code of Canon Law.
- The Statute of the Six Articles.
- The Lyndwood factor.

3.5.3.1 Pope Leo Letter

During the fourth century around 469, Pope Leo sent out a communiqué to the district bishops to the effect that there was a great necessity for them to defend the reputation of the penitents and preserve the confidentiality of the private confession. The letter read thus:

> I order that all measure be taken to eradicate the presumptuous deviation from the apostolic rule through an elicit abuse of which I have learnt of late. In the procedure of penance, for which the faithful ask, there should be no public confession of sins, in kind and number read from a written list, since it is enough that the guilt of conscience be revealed to the priests alone in secret confession……[T]his objectionable practice must be removed lest may be kept away from the remedies of penance, either out of shame or for fear that their enemies may come to know of facts which could bring harm through legal procedures. For that confession is sufficient which is first offered to God, then also to the priest whose role is that of an intercessor for the sins of the penitent. Finally, a greater number will be induced to penance only if the conscience of the penitent is not made public for all to hear (Pope Leo Letter, 469: 427, 115; Neuner, & Dupuis, 1981: par 1606).

Kurtscheid (1927:51) refers to this communiqué as the “the first papal decretal safeguarding the secret of a confession”. The above quotation from Pope Leo’s letter deals with a number of aspects relating to private confessions that needs further explanation.

The aim of Pope Leo’s letter was to encourage the penitents to confess their sins. Firstly, it shows that he did not approve of the public confession. This is evidenced by the sentence “[I]n the procedure of penance, for which the faithful ask, there should be no public confession of sins” in his letter (Pope Leo Letter, 469:427, 115). Secondly, it shows that he believed that the private confession was enough to reconcile with God after the penitent confessed to God and then to the priest. Thirdly, he was of the view that the practice of a public confession was open to abuse. He also describes the role of the priest as the “intercessor for the sins of the penitent” (pp 427, 115). Lastly, he emphasises that the private confession of sins will inspire the sinners to confess their sins because of the attendant secrecy.

Although Pope Leo’s letter was during the fourth century, it is relevant to the Anglican Church today as it advocates the private confession of sins. It also promotes the notion that the private confession of sins is the step towards reconciliation with God. However, the letter did not explicitly mention the seal of confession, but the seal of confession can be inferred from the use of the sentence “conscience of the penitent is not made public for all to hear” (Pope Leo Letter, 469:427, 115). This sentence may mean that the confession is private but it may also mean that it is not subject to disclosure.

3.5.3.2 Theodore of Mopsuestia assertion

The discussions about the inviolability of a private confession did not end in the fourth century. Jurgens (1979:83-84) observed that Theodore of Mopsuestia entertained the notion of a seal of the confession during the fifth century when he (Theodore) stated;

> It behoves us, therefore, to draw near to the priests in great confidence and to reveal to them our sins; and those priests, with all diligence, solicitude, and love, and in accord with the regulations.., will grant healing to sinners. [The priests] will not disclose the things that ought not to be disclosed; rather, they will be silent about the things that have happened, as befits true and loving fathers who are bound to guard the shame of their children while striving to heal their bodies.

The statement by Theodore shows that the protection of the penitent is of paramount importance to the priest. He adds another dimension to the status of the priest; that the priest is like a father who protects his children from humiliation while healing them spiritually at the same time. This means that as the father, the priest should protect the confidentiality of the confession to protect his children. This as it may be, the paramount reason for the practice of private confession is the spiritual healing and the reconciliation with God. This is relevant to the Anglican Church today. It is in line with the private confession of the Anglican Church (Anglican Prayer Book, 1989:452-3).

3.5.3.3 The Norman conquest of England

Some commentators believe the seal of confession was in existence before Norman Conquest. According to Douglas (1964), the Norman conquest of England was the invasion of England by William the Conqueror, also known as the Duke of Normandy in 1066. He goes further to postulate that the invasion led to the control of England by the Normans. The view of Huscroft (2009) is that the conquest changed the English language and culture, pagans converted to Christianity and the English-French conflict that would last into the 19th century started. Tiemann (1964:47) on the same topic opines, “Because the religion of the Anglo-Saxons was closely tied with their laws, there is also good reason to believe that the seal of confession was recognized as the law of the land in pre-Norman England. This recognition continued throughout Norman times during the formation of English common law”. This contention sheds some light that the seal of confession applied throughout Norman times, or that it existed during those times. This is important for the research and the Anglican Church because it indicates the time or period of the existence of the seal of confession.

3.5.3.4 The Councils

The Fourth Council of the Lateran officially made the confidentiality of the seal of the confessional inviolable by Pope Innocent III with the Papal Bull of April 19, 1213 (Herbermann 1913). The Fourth Council of the Lateran gathered at Rome's Lateran Palace in 1215 (Herbermann 1913). It was responsible for the passing of about 71 constitutions and a number of legislations designed to reform the church and the society (Hartman & Pennington, 2008). Canon 21 of the Fourth Council of the Lateran, the famous *Omnis utriusque sexus*, provides *inter alia,*

> Let the priest absolutely beware that he does not by word or sign or by any manner whatever in any way betray the sinner: But if he should happen to need wiser counsel, let him cautiously seek the same without any mention

> of person. For, whoever dares to reveal a sin disclosed to him in the tribunal of penance, we decree that he shall not only be deposed from the priestly office but that he shall also be sent into the confinement of a monastery to do perpetual penance (Fourth Lateran Council, 1215; see also Herbermann 1913; Nolan 1913:649; Brooks 2000).

This passage from the Fourth Council of the Lateran deserves further elucidation. Firstly, it emphasises that the priest should not disclose what was said to him by the penitent in any manner whatsoever "not by word or sign" (Fourth Lateran Council, 1215). If the priest were to divulge such communication, the church regard such disclosure as a "betrayal" of the penitent. Secondly, according to this passage, the priest may seek advice regarding the private confession made to him but he must not disclose the identity of the penitent. This is definitely in line with the views of the Anglican Church. The Anglican Prayer Book (1989:448) provides that the priest should "observe the secrecy concerning all those matters which are confessed before him".

There is also a punitive element built in this passage if the priest disclosed the confidential information given to him by the penitent. The sanction is severe, as he would be "deposed from priestly office" (Fourth Lateran Council, 1215). In other words, he lost his priesthood. As if this is not enough, he would also be compelled to stay inside the convent forever. Not only did the priest lose his priesthood at that particular time, but also he would never practise as a priest again. This is indicative of how the church viewed the inviolability of the seal of confession during that time.

Even after the Fourth Council of Lateran, the confidentiality of the private confession continued. During the fifteenth century (1551), the Council of Trent accentuated the fact that the private confession was necessary for salvation and therefore the confidentiality thereof was of paramount importance for the relationship with God. (Neuner, & Dupuis, 1981: par 1646; Mullett, 1999:29-68.). The Catechism of the Council of Trent (1833:262) further accentuates the inviolability of a seal of confession by providing that; "but as all are anxious that their sins be buried in eternal secrecy, the faithful be admonished that there is no reason whatever to apprehend that what is made known in confession will ever be revealed by the priest…" This means that penitents expect their private confessions to be "buried in eternal secrecy". They must not have even the minute suspicion that their private confession will be subject to disclosure by the priest.

Yellin During the twelfth century (1222), Stephen Langton the Archbishop of Canterbury held a provincial council in Oxford, which council popularly known as “the Provincial Council of Oxford, 1222”. This council made many canons regarding the reformation of the church especially in the area of “monastic discipline” (Du Pin, 1724:225). This council also contains a similar canon as the Council of Durham regarding the sanction for the violation of the seal of confession.

The Catechism of the Council of Trent (1833:262) is also evidence in this regard; it provides that “all laws human and divine, guard the inviolability of a seal of confession and against its sacrilegious infraction, the church denounces her heaviest chastisement”. This is another example of the heavy punishment visited for the violation of the seal of confession. These two Councils can also form the bases from which the Anglican Church may form an opinion on the inviolability of a private confession.

Although both the Fourth Council of the Lateran, the Provincial Council of Oxford, 1222 and the Council of Trent took place during the twelfth and the fifteenth centuries respectively, both emphasise that the seal of confession is inviolable. This is significant for the research because it shows the period during which the confidentiality of a private confession found application. This is important for the study and it is in line with the prescripts of the Anglican Church, which supports this confidentiality (Anglican Church Prayer Book, 1989:448).

3.5.3.5 The martyr, St John Nepomucene

The priests demonstrated the solemnity of the seal of confession by sacrificing their lives rather than succumb to the pressure of divulging the contents of a private confession. In this regard, Butler (1956) gives an example of St John Nepomucene who blatantly refused to divulge the contents of a private confession made to him by the Queen. King Wenceslaus IV ordered the extraction of the private confession from him through torture to no avail. Because of his refusal to divulge the contents of the confession, the King ordered his killing by drowning him in the river. After this, there was a veneration of St John Nepomucene as one of the martyrs of the seal of confession (Butler, 1956).

The martyrdom of St John Nepomucene shows the extent to which the priests were prepared to protect the seal of confession. If the same scenario were to happen today in the Anglican Church, and the court forces the priest to divulge the content of a private confession before

the court, the laws of the country would determine the appropriate terms of engagement. At least he will not be tortured and drowned. The martyrdom of St John Nepomucene may serve as an impetus for present day priests in the Anglican Church rather to go to jail than betray the confidentiality of a private confession.

3.5.3.6 The Decretum Gratian

Some scholars hold the view that some part of the concept of the seal of confession are a direct contribution of Gratian who was a canon lawyer from Bologna. An example of such scholar is Noonan (1979:145-172). According to Noonan, Gratian compiled the *Decretum* Gratian, a collection of canon laws during the 12th century (Noonan 1979:145-172). History is deplete with Gratian's work, but the study will concentrate on the work relating to the seal of confession. The *Decretum* Gratian *inter alia* provided "*Deponatur sacerdos qui peccata p nitentis publicare præsumit"* which means, "Let the priest who dares to make known the sins of his penitent be deposed". Gratian further wrote that anyone who violated the seal of confession be made "a life-long, ignominious wanderer" (Gratian, ca. 1140).

The proposal by Gratian that the priest who violated the seal should be "deposed" indicates further how seriously Christians viewed the seal of confession at that time. Gratian's contention that the deposition of the priest should be "life-long" indicates that there was no prospect of the acceptance of the priest back into fold of the ordained clergy (Gratian, ca. 1140). This is another manifestation of grievous consequences of breaching the seal by the priest. The further relegation of the priest to the "ignominious wanderer" is the ultimate humiliation of the priest (Gratian, ca. 1140). These degrading consequences did not only punish the guilty priest but it also served as a warning to other priests that the seal of confession was indeed inviolable.

Seemingly, the view has always been that for the priest who violates the seal of confession, there will always be concomitant punishment. For an example, in 1212 the Council of Durham provided that any person who divulged what was said during a confession would be "degraded without mercy". The church is the first place where a person expects to find mercy. Therefore, when the church uses strong language as "without mercy", there is one conclusion that it views the transgression in the most serious light. These are all indications of how seriously the early Church viewed the seal of confession. This also gives the Anglican Church the foundation to interpret the inviolability of a private confession.

3.5.3.7 The Statute of the Six Articles

The enactment of the Statute of the Six Articles took place in 1540. The Six Articles contained a plethora of church governance issues. The study deals with only those pertaining to the seal of confession. Ridley quotes this statute and it provides *inter alia* that “auricular confession is expedient and necessary to be retained and continued, used and frequented in the Church of God” (Ridley 1962:180). The articles emphasised the importance of the auricular confession. According to Ridley, the transgression of these articles deserves harsh punishment ranging from fines, terms of imprisonment and the death penalty. The Six Articles are relevant to the church today in this regard. The Statute of the Six Articles is the source of most of the Anglican Church governance issues.

3.5.3.8 Canon 983 of the Code of Canon Law and the Catechism of the Roman Catholic Church

In the Roman Catholic Church, there is Canon 983 of the Code of Canon Law (1983:361) which provides that: "the sacramental seal is inviolable; therefore, it is a crime for a confessor in any way to betray a penitent by word or in any other manner or for any reason.” The “sacramental seal” means that the seal will only operate if the communication happened during the sacrament of the private confession. This also *ipso facto* excludes communication outside this sacrament.

According to this canon, the sacramental seal is “inviolable”. This means that the seal cannot be broken under any circumstances. It is sacrosanct and is the *sigillum sacramentale* (Canon 983 of the Code of Canon Law, 1983:361). The latter part of the canon even criminalises the breaking of the seal. The breaking of the seal is a betrayal of the penitent. In fact, McCarthy (1967:134) regards the violation of the seal of confession as a “sacrilege”.

When discussing sanctions for the violation the seal of confession in the Roman Catholic Church, it is crucial to refer to the Catechism of the Roman Catholic Church (1994:368). It provides that “the Church declares that every priest who hears confessions is bound under very severe penalties to keep absolute secrecy regarding the sins that his penitents have confessed to him”. Also in the Catechism, it is evident that the seal of confession is sacrosanct and that the violation of its secrecy deserves “severe penalties”. The words “absolute secrecy” shows that there are no exceptions to the inviolability of the seal of confession.

The study shows that the Anglican Church was born out of the Roman Catholic Church during the Reformation. Therefore, it is inevitable that the Anglican Church would also view the sanctity of the seal of confession as inviolable based on these prescripts of the Roman Catholic Church. The cursory look at the prescripts Anglican Church shows that the inviolability of the seal of confession had influence from the Catechism of the Roman Catholic Church.

3.5.3.9 The Lyndwood factor

The English Bishop and canonist Lyndwood (1534) in his work called the *Provinciale*, articulated that the essence of the confession as a sacrament was to keep the confession confidential. According to Helmholz (2006), Lyndwood insisted that for a confession to acquire the protection of a seal of confession, the subject matter of such confession should be a sin. In other words, if the confession did not relate to a sin, it did not deserve the protection of the seal of confession. This was an exception to the principle. Even in the Anglican Church, it is imperative that the private confession should relate to a sin. There would be no need to confess something that is not a sin.

This was not the only exception. Lyndwood (1534) suggested a further exception. He contended that the priest might divulge the contents of the confession if the penitent directed the priest to do so. However, such disclosure should not result in a scandal. Lyndwood (1534) and Badeley (1865) are agreeable on this point. This means that there was acceptance that the content of the private confession was amenable to disclosure at the instance of the penitent if it did not result in a scandal. However, both commentators do not define the type of a scandal to which they are referring. Was it a scandal in relation to the church, or priest, or penitent, or community at large?

The suggestion by Lyndwood that if the penitent agreed for the disclosure of the private confession, the priest may disclose such communication is contrary to Canon 21 of the Fourth Council of the Lateran. As shown above this canon makes it clear that “[f]or, whoever dares to reveal a sin disclosed to him in the tribunal of penance, we decree that he shall not only be deposed from the priestly office but that he shall also be sent into the confinement of a monastery to do perpetual penance”. If the contention by Lyndwood were to be acceptable, it would mean that the seal of confession is violable; but is violable at the instance of the penitent. This was never the intention of this canon.

The proviso by Lyndwood that the private confession is open to disclosure at the instance of the penitent provided it would not result in a scandal defeats the purpose of inviolability of the seal of confession. This creates the impression that the seal of confession has the unintended result of protecting the church from scandals. The aim of the seal of confession was to encourage the sinners to confess and reconcile with God without fear and apprehension that whatever they communicated to the priest in confidence will not be subject to disclosure. As Thurian (1985:112) puts it that the penitents reveal "their darkest and deepest transgressions" during the private confession. According to Bailey (2002:503), the sinners should be able to do this without fear and shame.

During this period, there was a preoccupation with prevention of scandals. This is evident when Lyndwood (1534) argued further that if the matter came to the attention of the priest by means of other than the private confession, he could reveal the contents of the communication to the judge or court official without disclosing the identity of the person involved. The aim was to avoid unnecessary priest scandals. It would have been undesirable for scandals to create the impression that the communication emanated from the office of the priest. The church community held the priest in high esteem.

In instances where the penitent confesses to the priest about the sin that he has not yet committed, Lyndwood (1534) was of the view that beneficial disclosure was acceptable. This means that the contents of the communication may become subject of disclosure if it will benefit the other person. An example would be if the penitent states that he cannot resist the temptation to rape a certain woman. The priest may divulge the communication to the woman about the impending rape because it was beneficial to the woman. However, the priest must not disclose the identity of the penitent.

This line of reasoning is rational because the disclosure of the identity would betray the penitent and desiccate the essence and purport of the confession as a sacrament. Furthermore, the disclosure of this communication would prevent the commission of the actual sin and harm to another person. In other words, the failure of the priest to disclose the confidential information is *contra bonos mores*. This is *contra bonos mores* in terms of church law. It is not *contra bonos mores* in terms of secular law because only the intention to commit a crime is present. This point will find detail discussion in chapter 5.

The sanction for the violation of the seal of confession by a priest was harsh sanction. According to Lyndwood (1534), a priest who committed this grave sin could not participate in the Eucharist without first making a private confession. A general public confession was not sufficient for absolution of this grave sin. Lyndwood (1534) further held that “no priest dare from anger, hatred or fear, even of death, to disclose in any manner whatsoever, whether by sign, gesture or word, in general or in particular, anybody's confession. And if he shall be convicted of this he shall be deservedly, degraded, without hope of reconciliation". This point is important because it meant that if the priest violated the seal of confession, there was no hope of him being a church member again, let alone being a priest. His excommunication from the Church was permanent.

In summary, the seal of confession is inviolable. Lyndwood provides suggestions or instances where the seal of confession is subject to violation. According to him, the seal of confession is violable if the disclosure will avoid a scandal. Secondly, the seal of confession is unenforceable if the communication between the priest and the penitent did not relate to sin. Lastly, according to Lyndwood, there will be instances where beneficial disclosure is acceptable, in other words, the seal of confession is partly violable. If the priest violated the seal of confession, he is permanently defiled. Beneficial disclosure is relevant in this study because it forms one of the recommendations for the Anglican Church and the Anglican priest regarding their responsibilities in cases of private confessions.

Overview: There are factors that played an important role to the origin and evolution of the seal of confession. The Pope Leo’s letter encouraged the penitents to confess their sins and promised the protection of the confidential information by the seal of confession (Pope Leo Letter, 469:427, 115). According to Theodore *of* Mopsuestia the protection of the penitent was important to the priest who acted like a father to protect his children from humiliation during spiritual healing Jurgens, 1979:83-84). The seal of confession got recognition during Norman times during the formation of English common law (Tiemann, 1964:47).

The Fourth Council of the Lateran officially made the confidentiality of the seal of the confessional inviolable by Pope Innocent III with the Papal Bull of April 19, 1213 (Herbermann 1913). The priests believed in the seal of confession such that they were willing to sacrifice their lives for it. For an example, St John Nepomucene (Butler, 1956). Gratian further wrote that anyone who violated the seal of confession be made “a life-long, ignominious wanderer” (Gratian, ca. 1140). The Statute of the Six Articles also advocated the inviolability of the seal

of confession (Ridley 1962:180). Lyndwood suggested that the seal was violable if the disclosure was beneficial (Lyndwood, 1534). All these factors will receive consideration during the recommendations in Chapter 5.

3.6 Seal of confession in the Anglican Church

The seal of confession in the Anglican Church does not receive the same level of importance or same level of application in the provinces. This is because of the federal relationship between the provinces. The Anglican Communion comprises many provinces "joined in one universal Church, which is Christ's Body, spread throughout the earth, we serve His gospel even as we are enabled to be made one across the dividing walls of human sin and estrangement" (Anglican Communion Covenant*,* par 3). There is no formal body of law, which bind these provinces together. Each province is autonomous and with its own laws.

According to the Anglican Communion Covenant (par 3.1.2), these provinces are bound together "not by a central legislative and executive authority, but by mutual loyalty sustained through the common counsel of the bishops in conference and of the other instruments of Communion". According to The Principles of Canon Law Common to the Churches of the Anglican Communion*,* Principle 11:2 "each church recognises that the churches of the Anglican Communion are bound together, not juridical by a central legislative, executive, or judicial authority, but by mutual loyalty maintained through the instruments of Anglican unity as an expression of that communion".

The Communion Legal Advisors met in Canterbury in March 2002 and produced a document, which spells out clearly the principles of canon law common in the Anglican Communion (Doe, 2008:73). One of the principles is that each province or church contributes through its own legal system to the principles of canon law common within the Communion. It is this relationship, which invites comparison between the Anglican Church in South Africa and the Anglican Church in Australia. Both provinces recognise the seal of confession in private confessions but the degree or level of recognition is not the same.

Before a discussion on the inviolability of a private confession in the Anglican Church takes place, an ethical dilemma present itself first in this regard. This ethical dilemma was poised by an Assistant Minister in the Episcopal Church in New Hampshire, Donald Welles Jr. in his paper *"Violare inviolabile*: the ethical paradox of the confessional seal" (Welles Jr. 1966:22).

This ethical dilemma is relevant in this paper because the Episcopal Church is a member of the Anglican Communion. The ethical dilemma finds expression in the following scenario.

The priest frequently visits sentenced prisoners in jail. During some of these visits, the prisoners sometimes privately confess to the priest. During one of the visits, prisoner A approaches the priest and confesses that he is the one who committed the crime for which prisoner B is going to hang the following day. The confession is in detail with conclusive evidence of the commission of the crime by prisoner A. The priest informs prisoner A that he cannot grant absolution unless he goes to the authorities and furnish this information. Prisoner A refuses to go and tell the authorities. The priest uses all his persuasive skills to convince prisoner A to go to the authorities. Prisoner A blatantly refuses to oblige.

The seal of confession prevent the priest to disclose the confidential information available to him. The prisoner remains recalcitrant because of his diabolical choice. The ethical dilemma here is whether an innocent man should die because of the inviolability of the seal of confession. Which is important; the seal of confession or the life of the innocent man? Nothing forces the priest to go and tell the authorities. However, he cannot violate his oath of office and at the same time his Christian conviction dictates that he should love his neighbour (Mark 12:30 NIV). This ethical dilemma will get attention on the last chapter of conclusions and recommendations.

3.6.1 The treatise De Celanda Confessione

When did this veil of secrecy arise in the Anglican Church? This principle is traceable back to the mediaeval England when there was a very close connexion between the religion and laws of the country. It became necessary to enact many laws to enforce a particular religious standpoint. Kurtscheid (1927:92) extrapolates that even before the Fourth Council of Lateran, which passed the canon that made the seal of confession inviolable, there were indications that the church viewed the seal as inviolable. He refers to treatise *De Celanda Confessione* written by Lanfranc who was the Archbishop of Canterbury from 1070. In this treatise, Lanfranc stated, “[he] sins against this sacrament who in any manner whatever arouses public suspicion regarding what has been confessed to him, or causes penitents to be defamed”.

Lanfranc viewed the disclosure of a confession as the ultimate sacramental betrayal and equated it to the betrayal of Jesus Christ by Judas. In the Christian community, this is the

greatest of betrayals. According to Kurtscheid (1927:93ff), Lanfranc went further in his treatise to suggest that this betrayal was punishable with death. The sanction of death for the violation of the seal of confession is indicative of the fact that even during the early times of the Church; the church viewed it as the betrayal of Judastic proportions of the sacrament of private confession.

Anselm succeeded Lanfranc as the Archbishop of Canterbury. Kurtscheid, (1927:75) suggests that Anselm was in *ad idem* with Lanfranc in relation to the inviolability of the seal of confession and he dealt extensively with the rationale behind the secrecy of the seal of confession. According to Kurtscheid, Anselm was of the view that the purpose of the private confession is only achievable if it was a secret, in other words, if it was confidential. Anselm also opined that the penitents would not be eager to confess their sins if there is exposure to humiliation and criminal allegations because of disclosure of the confession. According to Anselm, the secrecy of the confession would encourage penitents not to wait until the impending death to confess (p 75). Even in the Anglican Church, it is common sense that the idea of a private confession will be best find greater acceptance if it is confidential.

3.6.2 The Council of Durham

Some of the laws passed by English Church councils strengthened the inviolability of the seal of confession. For an example, in 1220 the Council of Durham provided that:

> A priest shall not reveal a confession, let none dare from anger or hatred or fear of the Church or of death, in any way to reveal confessions, by sign or word, general or special, as (for instance), by saying “I know what manner of men ye are” under peril of his Order and Benefice, and if he shall be convicted thereof he shall be degraded without mercy (Wilkins, 1737).

The Council of Durham also reveals the stance of the English Church as far as the seal of confession is concerned. Firstly, the use of the word “shall” is peremptory. It signifies that there is no choice for the priest except not to reveal the confession. There are no options for the priest in this regard. The use of the words “anger”, “hatred” and “fear” is indicative of the fact that there is no emotional excuse for violating the seal of confession. The use of the words “fear of the Church” shows that even senior clergy in the church cannot coerce the priest into disclosing the contents of a private confession. The use of the words “fears …of death” gives the impression that the priest may rather die than betray the seal of confession.

The Council of Durham is relevant to the Anglican Church today. It can assist the Anglican Church in South Africa on matters relating to the seal of a confession. It can also assist the South African courts when it decides whether to adopt the priest-penitent privilege or not. The language used by the Council of Durham creates very little doubt it intended the seal of confession to be inviolable. For an example, the use of the word “shall”.

3.6.3 Canon 113 of 1603

There is a very important canon, which subsisted during the 16th century. It is canon 113 of the Anglican Church. It provided:

> That if any man confess his secret and hidden sins to the minister, for the unburdening of his conscience, and to receive spiritual consolation an ease of mind, we do not in any way bind the said minister by this our Constitution, but do straitly charge and admonish him that he do (sic) not at any time reveal and make known to any person whatsoever any crime or offence so committed to his trust and secrecy (except they be such crimes as by the laws of this realm his own life may be called into question for concealing the same) under pain of irregularity” (Canon 113 (1603).

According to this canon, the priest should not divulge the contents of a private confession to anyone. The canon however creates an exception to this principle. The exception lies in “crimes as by the laws of this realm”. Although there is no specificity of crime in the canon, it is evident that the government could pass laws that would strip the priest of the right to refuse to divulge the contents of a private confession. This is indicative of the fact that it was never the purpose of the seal of confession to protect the penitents from subsequent criminal prosecution. In other words, these laws could make the seal of confession violable. There may also be common law crimes that would have made the seal of confession violable. Barring this exception, Kurtscheid (1927:57-67) opines that a priest sinned against the sacrament of penance if he divulged to anyone what was confessed to him.

“Crimes as by the laws of this realm” may not only refer to common law crimes. It may also refer to statutory crimes. The statutory crime that is troubling in the church in these contemporary times is sexual abuse of children. In South Africa, there is a law that enjoins all people to report sexual abuse of children. Section 54 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 obligates everyone, including priest, to

report commission of sexual offences against children. Canon 113 accommodates the application of section 54 in church government matters. This will find discussion in detail in chapter 5.

Canon 113 of 1603 is significant in the discussion of the seal of confession in the Anglican Church. Gibson (1761), a chaplain to the Archbishop of Canterbury who later became the Bishop of London, compiled a book called *Codex Juris Ecclesiastici Anglicani,* which contained canons and constitutions for the Church in England, which were applicable at different times. Between 1959 and 1969, there was a review of most of these canons. It is however, enlightening to note that Cannon 113 of 1603 did not enjoy such review and it remained intact. This is confirmed by Bursell (1990:84-95) who indicates that although there was this extensive review of all the canons, the fact that Canon 113 of 1603 remained unchanged shows how sacrosanct the church views the seal of confession. Does the Anglican Church in South Africa view the seal of confession as sacrosanct?

3.6.4 The Anglican Prayer Book

In South Africa, the Anglican Church relies on the Anglican Prayer Book, which provides that: “Every priest in exercising this ministry of reconciliation, committed by Christ to his Church, is solemnly bound to observe secrecy concerning all those matters which are before him” (Anglican Prayer Book 1989:448). The priest is “solemnly bound” not to disclose what was said to him during a private confession. The use of the word “solemnly” is indicative of the fact that the confidential information enjoyed serious confidentiality. The phrase “ministry of reconciliation” sets the boundaries upon the communication between the priest and the penitent should occur. The seal of confession do not protect the communication unless it happened during the “ministry of reconciliation”.

The Anglican Prayer Book is not the only document that supports the seal of confession. There is also the Archbishop Council (2006) which provides *inter alia* that “the ministry of reconciliation requires that what is said in confession to a priest may not be disclosed". Even certain canons like canon 37 part (c) (s) prescribe offences for a “breach of confidentiality of whatever nature” (Canons of the Anglican Church of Southern Africa 2005-2011). This canon does not stipulate the circumstances under which confidentiality may arise. It just warns that if there is a certain measure of confidentiality attached to a communication the priest may not divulge it to the other person. This is strengthening the seal of confession in the Anglican

Church. This ushers in the principle of the priest-penitent privilege that the priest may claim in court in respect of the confidential information given to him by the penitent.

Overview: The following are fundamental in tracing the inviolability of a seal of confession in the Anglican Church; *The treatise De Celanda Confessione,* the Council of Durham, Canon 113 of the Anglican Church and the Anglican Prayer Book (1989). They assist in determining how the seal progressed within the Anglican Church.

3.7 Seal of confession in Anglican Church in Australia

The Anglican Church in Australia is preferable for comparative analysis as it has strong ties with England from where the Anglican Church originated. Australia has had problems with sexual abuse of children by members of the clergy and this affected the application of the seal of confession. The Anglican Church in Australia is a member of the Anglican Communion. Like all members of the Communion, it boasts of its own canons, which regulate the governance of the church. The canon which deals with private confession is Canon Concerning Confessions 1989 Canon 10 of 1992 (Anglican Church of Australia [2006] Private confession pastoral guidelines with special reference to child sex abuse). This canon repeals the Church of England Canon 113 of 1603, which deals with the seal of confession in the Anglican Communion.

Canon Concerning Confessions 1989 Canon 10 of 1992 provides that:

> If any person confess his or her secret hidden sins to an ordained minister for the unburdening of conscience and to receive spiritual consolation and ease of mind, such minister shall not reveal or make known any crime or offence or sin so confessed or committed to trust and secrecy by that person without the consent of that person.

All the dioceses of Australia consented to this canon except Sydney and Ballarat (Anglican Church of Australia [2001:2-3, 12] Report of the clergy discipline-working group). The most important distinction between Canon 113 of 1603 and the Australian Canon 10 of 1992 is that the penitent may give consent for the disclosure of confidential information. This means that the seal of confession is violable in the Anglican Church in Australia. Another noteworthy dimension of the seal of confession in Australia is that the priest may refuse to grant absolution

in case of a crime after the penitent has confessed if he does not want to report the crime to the police.

Another dimension that is important in the priest-penitent privilege in Australia is that the private confession should be formal or ritual. In other words, a mere conversation or dialogue to elicit advice will not fall within the ambit of the meaning of confession. There was an attempt in *R v Lynch* (1954) to explain what the formal confession is:

> At common law I have no doubt it was confined to a ritual confession made according to the discipline of the particular faith in so far as a privilege existed at all. I do not wish to be taken as deciding that nothing other than a ritual confession is covered by that section. It may be that in our statute we have gone further. It may be that it extends to confessions for spiritual ends which do not conform with the requirements of liturgy. But here the confession was not made for any spiritual purpose. I am satisfied that it was not here made to a priest in the character of a priest… I hold the evidence to be admissible.

According to this decision, the term "confession" enjoys interpretation in terms of common law. In common law, the word "confession" means a ritual confession. A ritual confession is a private confession done according to the prescripts of that particular congregation. Some commentators refer to the ritual confession as the religious confession (Odgers, 2002:402). It is noteworthy that not all religious denominations practice a ritual confession (Townsley, 2007:7).

In Australia, the statutes enacted regarding the seal of confession and the priest-penitent privilege render the seal violable. In Victoria and Northern Territory, the penitent may waive the priest-penitent privilege. In New South Wales and Commonwealth, the priest is entitled to refuse to disclose the confidential information. He may disclose the confidential information if he wants to. Canon 10 of 1992 also provides that the penitent may give authority to the priest to disclose the confidential information. Even the canons of the Anglican Church in Australia make the seal of the confession violable in certain instances.

Although the law governing the priest-penitent privilege in Australia is not perfect, the authorities in Australia is commendable for passing legislation to regulate the priest-penitent privilege compared with the South African government, which has made no effort at all in this

regard. The type of information protected by the priest-penitent privilege is also a contended terrain in America.

3.8 Conclusion

In summary, the seal of confession is inviolable save for the exceptions mentioned by Lyndwood (1534). Firstly, the seal of confession is violable if the disclosure will avoid a scandal. Secondly, the seal of confession could be broken if the communication between the priest and the penitent did not relate to sin. Lastly, beneficial disclosure is acceptable. If the priest violated the seal of confession, he is permanently defiled. The Roman Catholic Church recognises the seal of confession and the breach thereof may result in severe penalties. The Anglican Church recognises the seal of confession and this is evident from the Prayer Book and other canons.

There is so much uncertainty as to whether the priest-penitent privilege existed before the Reformation or not. Most commentators believe that it did exist before the Reformation because of the relationship between the Church and the state. There is also uncertainty as to whether it existed after the Reformation. The decided case do not help much also in this aspect.

It would appear that in Australia the statutes regarding the seal of confession and the priest-penitent privilege render the seal violable. In Victoria and Northern Territory, the penitent may waive the priest-penitent privilege. In New South Wales and Commonwealth, the priest is entitled to refuse to disclose the confidential information. He may disclose the confidential information if he wants to. Canon 10 of 1992 also provides that the penitent may give authority to the priest to disclose the confidential information. Even the canons of the Anglican Church in Australia make the seal of the confession violable.

The situation in America as a far as the type of communication protected by the priest-penitent privilege is concerned, is different from the situation in the Anglican Church in South Africa. There may be similarities here and there but the fundamental difference is that in America the type of communication of communication that enjoys protection by the priest-penitent privilege is regulated statutory law. In South Africa, on the other hand we do not have the statutes that specifically regulate priest-penitent privilege. It is therefore easy in America to ascertain which communication receives protection and which does not.

Chapter 4

The priest-penitent privilege in the light of the 1996 Constitution

4.1 Chapter overview

The aim of this chapter is to discuss the position of the priest in the Anglican Church in South Africa regarding the private confession before and after the advent of the democratic dispensation. Chapter 1 mentions that the Anglican Church does not exist in a vacuum but it exists within a South African society. It operates within the parameters of the provisions of the Constitution and the other existing legal framework. It would therefore, be naïve to discuss the position of the priest in terms of church law if requested to come and testify on the contents of a private confession, without exploring the constitutional and legal environment in which the Anglican Church operates in South Africa. It is in this light that this chapter discusses the following:

Religion: Firstly, since the chapter will be *inter alia* deal with religious freedoms in South Africa, it is prudent to explain the meaning of the term religion. This is so because there are many religions, cults and customary practices in South Africa. Is Anglicanism a religion or a cult?

Apartheid: Before the Constitution, the Anglican Church operated in an apartheid environment. There will therefore be a brief discussion on the concept of apartheid in this regard. The responsibilities of the priest when called upon to give evidence in court on matters that fall within the periphery of a private confession and a priest-penitent privilege, will also have to be understood in the context of the role that the Anglican Church played during the apartheid era, that is, before the advent of the Constitution.

The relationship between the church and the state before the 1996 Constitution: The relationship between the state and the Anglican Church cannot be complete without referring to the comparative relationship between the Dutch Reformed Church and the state. This is important because the Dutch Reformed Church is the first Christian church that operated in South Africa. Like the Anglican Church, the Dutch Reformed Church initially had a very unsteady relationship with the state. This will also make it easier to understand the relationship between the Anglican Church and the state if there is a comparison at least with one church.

Several issues characterised the relationship between the Dutch Reformed Church and the state from 1652 but before the advent of democracy. However, the study will discuss the following important and relevant ones; the British occupation of the Cape, the Ordinance 7 of 1843, and the important role that the National Party played and lastly, the Cottesloe Deliberations. Several issues characterised the relationship between the Anglican Church and the state from 1652 but before the advent of democracy. However, the study will discuss the following important and relevant ones: the canonical obedience, doctrinal controversy and the indigenisation of the Anglican Church.

The relationship between the church and the state after the 1996 Constitution: The relationship between the state and the Anglican Church after the 1996 Constitution will be centralised around the relevant constitutional provisions. Except the constitutional framework, there are also some other relevant legal provisions that warrant discussion. These legal provisions are section 189 of the Criminal Procedure Act 51 of 1977, the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, the Criminal Law (Sexual offences and related matters) Amendment Act 32 of 2007 and lastly the South African Charter of Rights and Freedoms (Charter). It is important to discuss this Charter because, firstly, the Anglican Church is a signatory to the Charter. It will be useful to the position that the priest may take if called upon to testify on matters that fall within the ambit of the confidential information made during a private confession.

To understand the priest-penitent privilege, it would also be judicious to have an international perspective. It is for this reason that there is comparison with the Episcopal Church in America. The main reason for choosing the Episcopal Church for comparative analysis is that America is one of the countries that is in a legally advanced position in dealing with the priest-penitent privilege. The case that is an ancient authority on priest-penitent privilege is *People v Phillips* (1813) which is an American case. Secondly, America experienced a considerable number of children sexual abuse cases and that necessitated concomitant adjustment to the priest-penitent privilege.

In America, the priest-penitent privilege is virtually a topical discussion because of sexual abuse cases. The discussion will therefore deal with the issue of mandatory reporting in sexual abuse cases. The Episcopal Churches in America, like the Anglican Church in South Africa do not exist in a vacuum. They exist within the laws of the country and are subject to those laws. The common law and constitutional framework that deals with the priest-penitent in

America therefore deserves a discussion. The American Constitution has, unlike South Africa, a Free Exercise Clause and an Establishment Clause. The discussion will show that the Free Exercise Clause is applicable in the South African legal environment whereas the Establishment Clause is not.

4.2 The concept of religion

This study will not attempt to define the concept of religion, because of the problems that are inherent in trying to define it. There also seems to be a sufficient consensus amongst commentators that ***attempting*** to define religion is an impossible and arduous academically challenging exercise. The words of Smith (1962:135) resonate in this regard, "we have learnt more about the religious but this has made us perhaps less aware of what is it that we mean by religion." According to Underkuffler-Freund (1997:45), academics avoid unpacking of the definition of the term religion because of "the difficulty in defining religion is often a mirror of deep cultural, social, and political divisions within a society". There is an undertaking by this study to try to explain this problem of defining the concept of religion in America and South Africa.

4.2.1 The concept of religion in America

Even the Americans are struggling to define religion as a concept. The United States First Amendment provides *inter alia* that "congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof" (American Constitution). Booher (2010:34) decries the fact that the scholars and courts have failed to fashion the definition of the term "religion" as mentioned in the First Amendment. He contends that commentators who focus their definition "upon **whether** the religion clauses require a broad or a narrow definition" are misguided because the focus should be on "upon **when** the religion clauses require a broad definition and **when** they require a narrow definition".

Although there is partial failure to define religion in America, there are persistent attempts by the academics to do so. Idinopulos (1998:1), a Professor of religion at Miami University of Ohio explicated the difficulties in finding the definition of religion. He contends that there are "two transcendent dimensions of religion". There is an observable and non-observable dimension. The observable dimension are those parts of religion that we can see, like the sacrament of baptism. The non-observable dimension are the spiritual part of religion. According to Idinopulos, believers are unable to appreciate the difference between observable

and non-observable dimensions of the concept of religion. This contention by Idinopulos does not help in defining the concept of religion. Even if believers understood the difference between the observable and non-observable dimensions of religion, it does mean that believers will be able to define religion.

The fact that there is a plethora of different religious groupings makes it hard to define religion as an ecclesiastical concept. In an attempt to define religion, Idinopulos (1998:2) warns us against accentuating the similarities and downplaying the differences in religions in order to find a concise definition. He is of the view that comparing religions channels us into viewing religion in terms of "discrete set of symbols, myths, ritual ceremonies, and verbally stated beliefs or teachings". He laments the fact that the believers ignore the "cultural matrix" altogether. Defining religion seems to be an impossible intellectual exercise. Idinopulos further asserts, "No single definition of religion seems possible" (p 3). He then concludes that the paucity of a single academically accepted definition is the direct result of theologians and philosophers who accentuate a particular feature of religion and exclude or downplay others and then make that particular feature the preferred definition of religion.

The discussion of the concept of religion will be incomplete without expatiating on the vital contribution of John Witte (2007). In his book, he discusses a variety of aspects of religion. For example, the relations between the church and the state (p 235) and religious rights (p 226). However, it is his view on the concept of religion that caught the researcher's attention. He distinguishes between the broad and narrow analysis of religion. He views the broad analysis as "all beliefs and actions that concern the ultimate origin, meaning, and purpose of life, of existence" (p 100). From the statement, there is a temptation to deduce that according to Witte religion supports the reason for our existence. In other words, it answers the enquiry as to why we are here on earth.

Witte's broad view does not end there. He includes in his broad analysis with the notion that religion "involves the responses of human heart, soul, mind, conscience, intuition, and reason to revelation, to transcendent values, to fundamental questions" (Witte, 2007:100). By including the heart, soul, mind and conscience, an irresistible inference is that John Witte understands religion to affect all aspects of our life. In other words, it affects our totality as human beings. By referring to "transcendent values", it means that his contention is that religion as a concept goes beyond what we conceive as our values.

Witte also espouses a narrow view of the concept of religion. According to him, the narrow view embraces “a creed, a cult, a code of conduct, and a confessional community (Witte, 2007:100-101). What is interesting in his perception of a narrow concept of religion is how he views a cult. He views a cult as “appropriate rituals, liturgies, and patterns of worship and devotion that give expression to those beliefs” (p 101). An appropriate deduction from the narrow view of Witte is that there should be a structured manner in which people express their beliefs. Religion is therefore one of those constructs that allows people to express their beliefs.

4.2.2 The concept of religion in South Africa

South African academics like Francois Venter who is a Professor at the North West University have a view on the concept of religion and the inherent difficulties in trying to define it. Venter (2015:9-10) posits that the human nature is so complex that it would be near impossible to define concepts like religion. He goes further to lament the fact that “the language is not always employed with precision, often causing notions such as belief, faith, religion and so on to be used interchangeably” (p 10). According to Venter, the language is restrictive in use and “precision regarding the words potentially bearing emotive and subjective meaning is not achievable” (p 10). One of the reasons for the difficulty in defining religion is, according to Venter, the inadequacy of language. Further, to compound this language problem, there is a relationship between language and our thoughts (Vygotsky, 1987). This then ushers the element of subjectivity.

The narrow interpretation of the religion is not sufficient, as it would effectively exclude certain religions. Gildenhuys (2002:148) adds, “A traditional theistic definition might be sufficient for the protection of "traditional" religions but does not account for non-theistic religions as well”. If for instance, the definition would include only theistic belief systems, it would exclude Zen Buddhism (Taliaferro 1998). Zen Buddhism is a Japanese school of Mahayana Buddhism emphasizing the value of meditation and intuition rather than ritual worship or study of scriptures (Dumoulin, 2000). It is also doubtful whether the End Times Ministries under Pastor Penuel Mnguni of Soshanguve in Pretoria would be classified as practising religion when its members are made to eat snakes and rats for spiritual healing (see The Citizen Newspaper, 14/7/2015, page 1).

However, in South Africa, religion enjoys protection under the section 15 of the Constitution. The provisions of this section broadens the explanation of religion to include conscience, thought, belief and opinion (section 15 of the Constitution). Gildenhuys (2002:151) in her doctoral thesis explains that the attempt to define religion in South Africa is an exercise in futility as “the right not to hold a religion or the right to hold other sincere beliefs would in any event be protected under freedom of belief, conscience or opinion." According to De Winter (1996:1), section 15 of the Constitution, accords protection even to “principles”.

This inclusive approach is commendable taking into account that some individuals may be prompted or actuated by the “principles” to commit or omit to perform certain actions. An example that comes to mind is the question of virginity testing. A woman may refuse to be tested based simple on “principle” which can be secular or religious. She can also agree to the test because of similar “principle”. In Shembe Church, for instance, virginity testing may be encouraged because a woman must remain a virgin until marriage (Vilakazi et al, 1986; Irving & Oosthuizen, 1996).

This inclusion of “principles” for protection in terms section 15 of the Constitution shows the difficulty that is inherent in trying to define religion. Because of this, De Waal *et al* (2001:290) opine that in South Africa the “debate about the meaning of the term religion is unnecessary because it also protects the rights to freedom of conscience, thought, belief and opinion along with the right to freedom of religion”.

This contention by De Waal *et al* makes sense if one considers how inclusive the right to religious freedom is in South Africa. It is evident that this section encompasses a wide selection of issues relating to an individual conscience (Labuschagne, 1997:397). If one looks at the international debates on religion, an obvious assumption can be drawn that the drafters of the Constitution took into account all the international views and incessant debates on the definition of religion. The discussion of the sections of the Constitution relating to religion takes place in detail below. Although the above discussion is indicative of the fact that there is no unanimous approach to the definition of the concept of religion, there is general acceptance that Anglicanism or the Anglican Church belief system is not a cult. Anglicanism may downplay or emphasise certain aspects of the definition, but it enjoys international acceptance.

4.2.3 The concept of religion in general

As shown in the preceding paragraphs above that, there is difficulty in trying to define religion as many commentators emphasise one aspect of the term and downplay the other aspects. The result has been different definitions emphasising certain aspects of the term. Some like Fontana (1988:738) in his definition of religion view it as “awe towards God or any supernatural being, accompanied by beliefs and affecting basic patterns of behaviour”. Although it is evident that in this definition there is emphasis on supernatural beings, his definition also includes beliefs and behaviour systems.

The behavioural feature of the definition gets accentuation by James and Mandaville (2010). They emphasise the behavioural aspect of spiritual beings. They define religion as "a relatively-bounded system of beliefs symbols and practices that addresses the nature of existence and in which communion with others and otherness is lived as if it both takes in and spiritually transcends socially-grounded ontologies of time, space, embodiment and knowing”. This definition takes a communal route and relationships. It also includes practices that involve symbols. The involvement of symbols makes it even more difficult to define religion because different people according to the theory of symbolic interactionism interpret symbols differently (see Blumer, 1969).

Some classical definitions are as inclusive as possible in trying to formulate the definition. For instance, Tylor (1871:424) defines religion as "the belief in spiritual beings". He was of the view that narrowing the definition to mean the belief in God or eschatological aspects or idolatry, would effectively keep certain people outside the definitional circle of religion and thus "has the fault of identifying religion rather with particular developments than with the deeper motive which underlies them" (p 424). He also contended that every society believes in one form or another of spiritual beings. This definition is too wide, as it does not explain what spiritual beings are.

Some theologians take the liberty to emphasise the cultural aspect of religion. Vergote (1996:16), for an example, defines religion as "the entirety of the linguistic expressions, emotions and, actions and signs that refer to a supernatural being or supernatural beings". The linguistic expressions and emotions indicate the cultural dimension of the definition. Vergote, took the extra effort in trying to define religion by further defining the term "supernatural". He defines it as whatever “transcends the powers of nature or human agency”

(Vergote, 1996:16). His definition is better than that of Tylor (1871:424) because he does explain what he means by “supernatural”.

Other theologians offer interesting philosophical and pithy maxims in defining religion. The definition by Pals (1996:143) comes to mind in this regard. He contends, "Religion is the sigh of the oppressed creature, the heart of a heartless world, just as it is the spirit of a spiritless situation". From his philosophical definition, the ineluctable conclusion is that he views religion as spiritual sanctuary for the people adversely affected by the unfair and “heartless” world. He also views it as the “heart of the heartless” world. This can mean that he views religion as the “conscience” of the world that is so cruel. His use of the word “spirit” shows that he associates religion with the soul.

Overview: Religion is such a nebulous term that is difficult to define. There are commentators who postulate that religion has an observable and non-observable dimension. Others warn us against accentuating the similarities and downplaying the differences in religions in order to find a concise definition. Even the scholars and courts in the United States failed to fashion the definition of the term “religion” as mentioned in the First Amendment. Others restrict the definition to the relationship with spiritual beings whilst others pay particular attention to the cultural aspects of religion. The irresistible assumption is that in South Africa, the legislature attempted to explain rather than to define the concept of religion by invoking section 15 of the Constitution. Anglicanism in South Africa enjoys the protection and regulation by section 15 of the Constitution.

4.3 The state and the church before the Constitution

It would be difficult to comprehend the present relationship between the state and the church without first understanding the same relationship before the Constitution. The Anglican priest existed before the Constitution and his relationship with the state then deserves exploration to understand the present relationship. In other words, the status of the priest-penitent privilege in relation to the Anglican priest is relevant before the Constitution to understand its status after the Constitution. The relationship between the state and the church is succinctly explained by Venter (2015:20) when he avers that “the state is the primary domain of the law, and the church that of religion in its public manifestation”. It is therefore important for this research to look at this relationship before the advent of the democratic dispensation in South Africa.

Before the advent of the democratic dispensation in South Africa, the laws that were applicable at that time did not guarantee that existence of the freedom of religion. Although this was the position, Stringfellow (1959:112) contends that the state allowed the church to enjoy certain privileges and imposed certain liabilities. Therefore, to understand the freedoms, that the religion enjoyed, the relations between the state and the church need investigation from 1652, when Jan Van Riebeeck arrived in South Africa, to 1994 when South Africa attained democracy. The Dutch Reformed Church is the first Christian religion that enjoyed dominance in South Africa during the era of Jan Van Riebeeck and is therefore comparable with the Anglican Church, which arrived at a later stage.

4.3.1 The concept of apartheid

The concept of apartheid as a political system was applicable before the democratically elected government of South Africa. Its discussion will lay the foundation for the understanding the legal and political environment in which the Anglican Church operated before 1994. The word apartheid is an Afrikaans word, which if interpreted literally means “apartness”. Shore (2009:26) explains apartheid as the state of being apart. The definition by Song (1999:4) is better and more succinct. He defines it as "a legislated state policy based on the separation of White and non-white races, and forcibly imposed on the majority of South Africans by a minority-elected White government which entrenched the regime's status and power”. The word apartheid has a negative undertone as Van Rooyen (1990:1) puts it “*daarby is hierdie woord bekend as ‘n lelike woord met ewe seer en lelike konnotasies”.*

Put differently, apartheid is just institutionalised racism (see also Amstutz, 1995; who is a Professor and an American scholar). Gunn (1991:28) reminds us that discrimination and racial segregation started when Jan van Riebeeck and about 200 settlers set foot at the Cape of Good Hope in 1652. The following discussion will refer to the relationship between the church and the state during the period 1652 to 1994.

4.3.2 The Dutch Reformed Church between 1652 and 1994

The Dutch settlers arrived in the Cape in 1652. According to Van Staden (2014:75), this arrival is the “roots of church law and church-state relations in South Africa”. The Dutch settlers were under the leadership of Jan Van Riebeeck. By that time, the recognised state religion of Holland was the Dutch Reformed Church (Gildenhuys, 2002:20). According to Gildenhuys, in 1651 a year prior to the arrival of Dutch settlers in South Africa, there was a meeting, known as *"De Groote Vergadering*" which consisted of representatives of the different states of

Netherlands. This is where the Dutch Reformed Church got confirmation as the state religion of the states of the Netherlands as defined by the Synod of Dordrecht 1618-1619 (p 20).

The confirmation of the Dutch Reformed Church as the state religion was the impetus for Jan Van Riebeeck to introduce the religion of the Dutch Reformed Church in the Cape on his arrival. It then became necessary to bring priests from Holland to come to the Cape for evangelisation of the Cape community. As a result, the first permanent minister of the Dutch Reformed Church arrived in the Cape in 1665 (Gildenhuys, 2002). At that time, the Dutch Reformed Church had the recognition and the protection as the only religion in the Cape. This is evident from the law passed in 1642, namely the *Statuten van Batavia*, which provided that only the Dutch Reformed Church could practise any formal religion in the Cape (p 69). The contravention of this statute resulted in harsh punishment ranging from deprivation of property to the death sentence (p 69).

In fact, only members of the Dutch Reformed Church could become government officials (Gildenhuys, 2002:70). At a later stage, however, other religious groups also arrived at the Cape, like the German Lutheran Church (De Gruchy, 1986:1). The Lutheran church was only acknowledged in the Cape in 1779 (Gildenhuys, 2002:70 footnote 25). Even after their acceptance in the Cape, the Lutheran Church did not have a free reign. The Political Council reserved the right to decide on the membership of the Lutheran Church Council (p 71).

4.3.2.1 The Dutch Reformed Church structure

What did the Dutch Reformed Church structure look like during this period seeing that there was little separation between the state and the church? Vorster (1956) explains the institutional structure of the church community succinctly. According to Vorster, before 1665, the spiritual care of the people in the Cape and all ecclesiastical interventions fell under the authority of the Church Council. The Church Council in turn fell under the Political Council. All the decisions of the Church Council were only approvable by the Political Council before implementation. The Political Council in turn fell under the leadership of the commander of the army. The political commissioners represented the Political Council at all Church Council meetings (page 38). The church effectively fell under the control of the state.

Who influenced this relationship between the state and the church? Raath (2002:999) rejects the idea that teachings of Calvin, which supported no separation between the state and the church, influenced the state of affairs in the Cape. He advocates that there is no literature,

which support this view. De Gruchy (1979:9) on the hand suggests that the church in Cape did receive influence from Calvinism. Van der Vyver (2004:25) believes that the relationship between the church and the state in Cape had both grains of Calvinism and Lutheranism. However, Van Staden (2014:77) is of the view that the relationship assumed its own distinctive shape.

What would have been the status of the priest-penitent privilege in a structure like this? If one looks at the Dutch Reformed Church structure at that time, it means the Political Council would be responsible for the admission of the priest-penitent privilege. This is so because the church fell under the Church Council, which fell under the Political Council. The army would not have directly pronounced on the priest-penitent privilege. It would have let the Political Council to manage the status of the priest-penitent privilege.

4.3.2.2 The British rule of the Cape

The British occupied the Cape in 1795 because there was a civil war in Netherlands, which began during 1785, and this occupation lasted until 1803. During this period of British rule, the church did not experience any freedom from the control by the state (Moorrees, 1937:430ff). This subjugation of the church meant that the state indirectly controlled the church. During this period, some of the British troops were even using the church buildings as their quarters. The inference drawn from this was that the state and the church shared resources. The assumption is that if there was vacant army building the church could also use it as a church. This in itself is indicative of the influence that the state had on the church. The state could utilise the resources that belonged to the church and *vice versa*.

4.3.2.3 The Batavian rule (1803-1806)

According to Jooste (1946), when the Netherlands governed the Cape again after the British occupation, a Dutch by the name of de Mist arrived in the Cape to implement the wishes of the Netherlands government in relation to the relationship between the church and the state. De Mist introduced a Church Ordinance in 1804 to improve the governance of the church. Jooste (1946:78-92) lament the fact that the reform that de Mist introduced with this Church Ordinance were not progressive but rather entrenched the powers of the state to interfere in the affairs of the church. For an example, the church had to obtain the consent of the state if it wanted to congregate on the day, which is not a Sunday.

The new administration came in and there had to be changes in the governance of the church. Van der Watt (1976:69) enumerates some of the changes that took place during that period: Firstly, the Political Council had the authority to transfer or remove a minister or any other church official from a particular congregation without the say-so of the Church Council. It appointed ministers, determined their salary structure and paid their salaries. It could transfer them from one place to another at will and sometimes without consultation (p 70).

4.3.2.4 The second British rule (1806)

The British occupied the Cape again in 1806 and settlers that are more English arrived at the Cape during this period. According to Kotze and Greyling (1994:26), it was during this period of occupation that many religious groups arrived at the Cape. The English settlers however, belonged to the Church of England. Because the Dutch Reformed Church was already in existence in the Cape, Suberg (1999:14) opines that the conflict between the Church of England and the Dutch Reformed Church was inevitable. Suberg further states that many factors gave a contribution to this state of affairs. For an example, the language, nationalism and different religious doctrines (p 14).

The church was still indirectly under the authority of the government. According to Van der Watt (1976:70–71) the Political Council was still represented in the Church Council and it had profound influence in the church. It could still appoint church ministers and deacons. It could determine their salary structures. These ministers therefore depended on the state for their social and economic survival. The state could discipline and dismiss them. If the state could discipline the ministers and deacons and paid their salaries, this means that the state effectively controlled the church.

The fact that the Political Council was still represented in the Church Council meant that if issues of the penitent-privilege were to arise at that time, the Political Council would determine whether to admit it or not. Even if the Church Council wanted to admit the priest-penitent privilege, they would first sought the permission of the Political Council as it had legal and political dominion over it.

4.3.2.5 The Ordinance 7 of 1843

As time went on, the church became uncomfortable with this subordinate relationship with the state and tried to extricate itself from the tentacles of the government. The result was the passing of the Ordinance 7 of 1843, which superficially made the church free from control by the government. Kleynhans (1973:80ff) notes this attempt to be free from the state. He is however convinced this freedom was superficial. Firstly, the Political Council had no representation in the Church Council. This means that there were no politicians in the Church Council. The church could conduct its own affairs without the interference of the state. This as it may be, the freedom was superficial because the state indirectly controlled the church through the exercise of its financial power. For the church to implement any of the resolutions taken in the Church Council, it had to go to the state to ask for funds. The freedom from the state was superficial (see Gildenhuys, 2002:83)

Furthermore, the Ordinance limited the church in terms of its organisational structure. The church could not operate in certain geographical areas (Kleynhans, 1973:80-4). The church could not hire, fire, or promote at will because the Ordinance restricted their organisational structure. The church could also not deploy its employees anywhere in the country because it was geographically restricted to operate in certain places. It had to get permission from the state if it wanted to operate in areas not specifically mentioned in the Ordinance. According to Van der Watt (1976:44 – 6) the Ordinance did not usher freedom in the environment of the church, but "severely restricted" it. Taking into account that the Ordinance limited the church in terms of its organisational structure and geographical areas, the submission by Van der Walt that the Ordinance restricted the church is acceptable.

The Dutch Reformed Church continued with its efforts to try to disentangle itself from the controlling web of the government. It decided to rescind Ordinance 7 of 1843 in October 1957. Kleynhans (1973:95) cites its declaration of independence:

> The Dutch Reformed Church in South Africa declares and confirms its historical view that this Church as an organized body had an independent existence in own competence even though always subjected to the articles of law applicable to the church. Since the existence of the church is not dependent on the articles of law, Synod, given the legal advice, which was obtained, mandates the Moderature to approach the authorities to revoke Ordinance 7 of 1843.

This declaration of independence entailed that the church recognised itself as an independent body that had authority to pass laws pertaining to its governance. It also means that it was not dependent on the state laws for its existence. Most importantly, the declaration meant the revocation of Ordinance 7 of 1843.

4.3.2.6 The role of the National Party

However, the subjection of the church continued even after 1948. In 1948, the National Party in South Africa came into power and tactically initiated the implementation of the infamous policy of apartheid. Van der Watt (1987:84ff) contends that the tentacles of the apartheid policy also profoundly affected the church. This policy of apartheid also affected The Anglican Church. The church did not operate in a vacuum and it felt the tentacles of the policy of apartheid. Van der Watt cites examples where the state controlled the church through its policy of apartheid. There are many of examples in this regard but only a few will be cited (p 84ff).

Prohibition of Mixed Marriages Act 55 of 1949 effectively forbade the marriage between Whites and other race groups. The church had to obey this law whether it approved of it or not. Another example is the Sexual Offences Act 23 of 1957. This legislation prohibited sexual relations between Whites and other race groups. However, it was section 29(c) of the Native Laws Amendment Act 36 of 1957, which especially targeted the church. In terms of this section, people that were not White could not attend church services in areas designated as White areas without the authority of the Minister of Native Affairs. This meant that even if the church wanted to have interracial congregations, it could not do so because of this law. The obvious consequence of this state of affairs was that the ministry and the evangelisation of Blacks became difficult. This also affected the Anglican Church.

4.3.2.7 The Cottesloe deliberations

Further endeavours to detach the church from the state came about in December 1960. In 1960, delegates from different churches in South Africa gathered in Cottesloe to discuss the relationship between the church and society. These deliberations also included the relationship between the church and the state. The Dutch Reformed Church and the Anglican Church partook in the deliberations. Van der Watt (1987:105ff) summarises the contentious decisions that were taken at the Cottesloe deliberations. Firstly, he states that one of the decisions taken was that all race groups in South Africa were permanent residents with equal responsibilities and privileges; secondly, nobody could face exclusion from a church on the grounds of race or colour and the prohibition of interracial worshipping could not be justified

by the Bible. These Cottesloe decisions were brave interventions, taking into account that the deliberations took place while the apartheid laws were still in operation.

After the Cottesloe deliberations, the delegates of the Dutch Reformed Church in Africa issued a statement that contradicted all the decisions taken at the Cottesloe deliberations. Plaatjies-Van Huffel and Vosloo (2013:347) reflect on the attitude in the Dutch Reformed Church after the deliberations when they state:

> The vast majority of the members of the Dutch Reformed Church and many other white South Africans were not ready for the outcome of Cottesloe deliberations. To put it mildly, after the publication of the Cottesloe report, the white Afrikaans-speaking ecclesiastical was in turmoil. The report stirred up deep-seated emotions, prejudices and painful memories that had become engrained in the attitudes and thinking of many.

After the Cottesloe deliberations, it was clear that the Dutch Reformed Church tried to develop its own type of freedom of religion. In 1962, the General Synod of the Dutch Reformed Church had this to say on the freedom of religion:

> The Church accepts with gratefulness the protection by the authorities as well as the recognition of its undeniable right to freedom of religion in confession and assembly with the proviso that these freedoms will not be misused to undermine the foundations of state authority or to cause chaos in the public sphere (Church Order 1962: art 65 c).

As stated above, the apartheid laws were still valid despite the Cottesloe deliberations. The declaration by the Synod shows that the church was not prepared to disobey the laws of the country and thus be in conflict with the state. The perusal of the Church Orders shows how the Dutch Reformed Church viewed its relationship with the state as important. Church Order (1962: art 65) provides, “The Church accepts with gratefulness the protection by the authorities”.

The relationship between the Dutch Reformed Church and the state was symbiotic. The church needed the state for protection (Church Order, 1962: art 65) whilst the state needed the church to control the people and thus perpetuate its apartheid policy. Pillay (1995:86) is of the view that although from 1800 different religions emerged in South Africa, it was the Dutch Reformed Church that had influence in the government. Pillay’s opinion on the Dutch Reformed Church is visible from his assertion that “despite the presence of other Christian

denominations and, indeed, other religions, there existed a state church". He refers to this as "influence in Caesar's household". Pillay does not explain how much influence the Dutch Reformed Church had in the government. This should have shown the result and magnitude of such influence.

4.3.2.8 Other approaches to state church relationship

Some commentators understand the relationship between the state and the church in terms race relations. According to Kuperus (1996:2), the Dutch Reformed Church was involved in matters concerning race relations between the government and society. She further holds that the involvement in these race relations ineluctably culminated in political involvement. She decries the fact that this involvement propelled it to support apartheid as an ideology. She states that by the end of 1978 the Dutch Reformed Church and the government could not be separated (page 3).

There are also commentators who espouse certain models when considering the relationship between the church and state. One of those commentators is Raath (2000). He advocates federal paradigm concept. According to Raath, the federal paradigm is that it is not wise to view society in terms of its relationship with the state. Society is viewable as people bound together by its belief in God (page 30). This is an indirect propagation of completely Christian society which may be viewed a theocratic approach of society.

Hiemstra on the other hand endorses three basic models of state church relationship (Hiemstra, 2005:28ff). The first one is the Constantinian model. According to this model, the state may interfere in any manner in the government of the church. This model accords secular law the right to interfere in church law. The second model is the theocratic model. This model suggests that the church should hold a leading role in political and societal environments. In other words, church law should influence all spheres of society. The third model is the Christian separationist model. According to this model, the church and the state should be completely independent of each other.

Overview: The Dutch Reformed Church had a relationship, which was distinct in character (Van Staden,2014:77) This is perceptible from the relationship between the Political Council and the Church Council and its rejection of the recommendations of the Cottesloe deliberations. The Dutch Reformed Church was of the view that the church should not

undermine the foundations of state authority. It should not cause chaos in the public sphere. The discussion of the relationship between the Dutch Reformed Church and the state lays the basis for the comparative discussion of the relationship between the Anglican Church and the state in South Africa.

4.4 The relationship between the state and the Anglican Church

The relationship between the Anglican Church and the state is traceable back to the eighteenth century when the British occupied the Cape for the first time. After the occupation of the Cape, the Anglican Church started to do missionary work all over South Africa. It established dioceses in Grahamstown in 1852, Natal in 1858, Zululand in 1859, Bloemfontein in 1864 and Pretoria in 1872 (Suberg, 1999). Like the Dutch Reformed Church, it was going to be difficult, if not impossible for the Anglican Church to dissociate itself from the strong clutches of politics and regionalism in South Africa. Moreover, it had also to contend with its relationship with the Anglican Church in England.

It is important to discuss this relationship between the Church of England and the Anglican Church in South Africa. The reason is that this relationship had a bearing into the relationship between the South African state and the Anglican Church in South Africa. The Anglican Church in the Province of South Africa had a sour relationship with the mother Church of England. The conflict ended with the Anglican Church in the Province of South Africa gaining independence from England (Suberg, 1999:22ff).

The main reason for the conflict was that the Anglican Church in the Cape was in fact an extension of the diocese of England. According to Esau (2013), the arrival of Bishop Robert Gray accentuated the challenges emanating from the relationship between the Anglican Church in South Africa and the Church of England. Bishop Gray wanted the Anglican Church in South Africa to have its own province. He tried in vain in the House of Commons to have an Act of Parliament passed in this regard. He then embarked on an effort for the development of the Constitution for the Anglican Church in South Africa (p 65). To have a Constitution, he had to bring the members of the Diocese of Cape Town together in a Synod, the church's highest decision-making body. This body had to adopt the Constitution (p 65).

The first Synod took place in 1856. According to Esau (2013:66), the Synod discussed "rules and regulations which would help with the organisation of a local church". It was clear that

Bishop Gray was pushing for an independent Anglican Church. This received resistance from the clergy and laity from five parishes who did not attend the Synod. The greatest objector to this cessation from the Church of England was Reverend Long of St. Peter's Church in Mowbray (Easu, 2003:66).

Aware of the resistance that he was receiving from the conservative members of the church, Bishop Gray summoned the second Synod in 1861. The five parishes and Reverend Long refused again to participate (Easu, 2003:66). Bishop Gray then disciplined Reverend Long and had him unfrocked. Reverend Long approached the Supreme Court of Cape Town for relief. The court ruled that he was a member of the ordained clergy and subject to "Canonical Obedience". He could not refuse to obey a lawful instruction from the bishop (*Long v Bishop of Cape Town, 1863).*

4.4.1 Canonical Obedience

The doctrine of Canonical Obedience is relevant in this study because if the Anglican Church canons make certain stipulations on the confidentiality of private confessions, the priest has no choice but to obey those stipulations. According to Doe (1998:197), "Anglican churches are not confessional denominations possessing formal and definitive legal statements of their beliefs. Laws are employed simply to point to doctrinal documents, extrinsic to the law, which are accepted by the church as normative in matters of faith".

The doctrine of "Canonical Obedience" is a thorny issue in the Anglican Church (Brummer, 2011). According to this doctrine, it is required of the ordained clergy of Anglican Church of Southern Africa to take an oath and make a declaration that they will be canonically obedient to the Bishop and to carry out all his lawful and honest instructions. This is because the governance of the Anglican Church is subject to stubborn control by canons so that there should be an unwavering obedience to those canons.

In terms of the doctrine of canonical obedience, there is an obligation on the bishops and clergy to take an oath of canonical obedience to the bishop. The oath of canonical obedience regulates their relationship with their superiors (Canon C14 of the Canons of the Church of England, 2000). In terms of this oath, the bishops and the clergy should obey the canonically and or ecclesiastically lawful instructions from their superiors.

4.4.1.1 The nature of obedience

In terms of the canons, the priest should obey the lawful and honest instructions from the bishop (Canon C14 of the Canons of the Church of England, 2000). The Bible does provide various instances of obedience in the New Testament. Ephesians 5:22 enjoins wives to obey their husbands. This advocates an unequal relationship between husband and wife. This is however understandable taking into account that the Ephesians Epistle was written while Paul was in prison around 70 AD (Ephesians 3:1, 4:1, 6:20). Although there are differing views on the date of the Letter to the Ephesians, Barth (1974:50) puts the date around 70 AD.

In the present day, there is a problem of sexual abuse of children in churches. It is inconceivable that a priest would not comply with mandatory reporting of sexual offences against children under the guise of canonical obedience. In other words, it cannot be a valid defence for the priest to state that he is complying with a doctrine of canonical obedience, and thus not report sexual abuse of children. In this regard, the laws of the land are stronger than the law of the church.

4.4.1.2 Obedience to the bishop

The Bible does not provide any clues regarding the obedience to the bishop. May be the church structure did not provide the environment in which the senior clergy could demand obedience from the junior clergy. Bray (2004:7) posits, “The apostles appointed deacons to administer the affairs of the church, but we do not know how their relationship with them was structured”. It is then evident that the deacons were responsible for the daily activities of the church. They did not owe any allegiance to the apostles. They did not take any oath of obedience to the apostles. This means that there is no reason for the priest to take oath of obedience to the bishop since this does not have genesis from the Bible.

The bishop is responsible for the governance of the diocese. He uses the canons as one of the instruments with which to run the province. The question arises then as to why the priest should take an oath of canonical obedience to the bishop who ordains him (Canons of the Church of England, 2000). Should he obey the canons of the church or the person of the bishop or the Bible? One has heard in legal constitutional parlance that politicians should be obedient to the Constitution and not the person of the State President. Should the same not apply in canon law?

The scrutiny of canons 1/3 and 14/3 specifically reveal that the oath of obedience is to the bishop and not the church (Canons of the Church of England, 2000). It creates the impression that failure to abide by the oath of canonical obedience offends against the bishop at personal level. Bray (2004:21) laments the fact that the manner in which the oath is phrased exudes personal character. It seems the transgression of the oath of canonical obedience offends against the bishop and not the church as a whole. This means that if the priest refuses to divulge confidential information by the penitent, he is transgressing against the bishop in his personal capacity. Should the priest forsake the God-penitent reconciliation on the altar of canonical obedience to the bishop?

The oath of canonical obedience can trigger subtle and unintended consequences. A priest who disobeys the honest and lawful instruction of the bishop may receive harsh treatment from the bishop and the bishop may not even allude to canonical disobedience (Bray, 2004:21). This has the inclination of victimization of priest who ignore the oath of canonical obedience. Therefore, there should be acceptance that although, canonical obedience relates directly to the bishop, it has all the hallmark of the hierarchical structure of the church (p 24). The bishop derives his authority from being the senior member of the ordained clergy and he can abuse this authority (see also Doe, 1992). Should the priest abandon the God-penitent reconciliation for the fear of victimization if he defies an honest and lawful instruction from the bishop?

The doctrine of canonical obedience received criticism from some commentators. Doe (1996:213-4) has harsh words for canonical obedience when he analyses Canon C1/3 and 14. He states that these canons are “legally superfluous: the oath amounts to a promise to fulfil a pre-existing obligation … [it] has merely symbolic significance … it is unclear when an episcopal instruction is not honest and it is unclear whether an episcopal order which is lawful but not honest might be disobeyed”. The criticism from Doe is from a legalistic point of view. He questions why there should be an obligation to abide by something that will happen in future. He further queries the application of the concept of “honest and lawful”. According to Doe, this concept is “vague and embarrassing”.

Canonical obedience is a church doctrine and the courts are reluctant to interfere in church doctrines because of the doctrine of non-entanglement in church affairs. This court attitude is evident in the remarks by Justice Watermeyer in *Long v Bishop of Cape Town*, (1863): “The origin of the differences which have led to this litigation was a direction by a Bishop to the

plaintiff (Long) to give a certain notice, which was disobeyed. Now this incumbent is bound to the Bishop in canonical obedience, in all things lawful and honest." The judge also stated that the notice issued by the Synod was lawful in all material respects. The notice had to receive compliance from Long because of the doctrine of Canonical Obedience. The application of the doctrine of Canonical Obedience in the Anglican Church of Southern Africa has been a continuous cue that the court will not easily overrule the church on matters relating to church government.

The matter of *Felix v Diocese of False Bay* (2011) in the Council for Conciliation Mediation and Arbitration (CCMA), Cape Town is another case that dealt with Canonical Obedience. During the conflict with his employer, Felix who is an ordained clergy approached the CCMA for relief. He was aware that in terms of Canons 36 to 41 of the Laws of Anglican Church Southern Africa, which relates to *Ecclesiastical Tribunals and the Discipline of Ministers of the Church,* he was subject to the disciplinary processes of the church rather than the CCMA. In terms of these canons, he had taken an Oath of Canonical Obedience. The commissioner found that; "his (Felix) submissions regarding to be an employee are fraught with his confusion to distinguish the laws of the land with the laws of the church. He maintained that God called him to the church to His full time ministry within the shelter of the church and that he is subject to Canonical Obedience".

From this statement of the commissioner in the CCMA, it is clear that the commissioner is of the view that there should be a distinction between the laws of the land and the laws of the church. This statement further serves as a reminder that the courts will not easily interfere in ecclesiastical matters if there are internal church processes that are sufficient to regulate conduct within the church environment. This further reminds the Anglican Church that when it deals with priest-penitent privilege and the inviolability of the seal of confession it should keep the doctrine of Canonical Obedience in mind.

4.4.2 Doctrinal controversy

The Anglican Church in South Africa formed its own Province in 1870 at the first Provincial Synod. The resolution taken at this Synod set the ambit within which the Anglican Church in South Africa still operates:

> And being further confirmed by the oaths of Canonical Obedience taken by the other Bishops of those Diocese to the Bishop of Cape Town as their first

> Metropolitan, and by express acceptance of these relations by all the aforesaid Dioceses, either in acts of the Synods, or in the action of their Clergy and Laity, as well as by the recognition of such Dioceses as a Province by the Archbishops, Primates and other Bishops of the Anglican Communion: We do therefore claim for this Province the Ecclesiastical status, rights, powers, and relations of a Province of the Anglican Communion (see Constitution and Canons of the Anglican Church of Southern Africa, 2011).

The problems of the Anglican Church were by no means over; it imploded into another splinter, the Colenso's Church of England in South Africa (De Gruchy, 1986:17). Although the Anglican Church in the Province of South Africa broke away from the Church of England, it still obeyed the foundational doctrines of the Church of England namely, the Nicene and Apostle's Creeds, the King James Version of the Bible; the Book of Common Prayer and the Thirty-nine articles (Suberg, 1999:1).

The reason for the implosion into a splinter church had its cause on the divergence of two schools of thought. Hill (2005:264) views these divergent thoughts at that time as “doctrinal controversy”. One group aligned to Robert Gray was of view that one of the aims when preaching the gospel should be to detribalise Blacks so that they conform to Western standards of living. The splinter church group did not support this line of thought. They were of the view that African traditions are irrelevant when preaching the gospel. The other group felt that the African culture with its attendant societal institutions deserved retention at all costs so that the “Africanness” should be preserved (De Gruchy, 1986:17-18).

During this period, the Anglican Church also committed an error of judgment by trying to subdue those that had opposite sentiments. There were concerted efforts to thwart liberalism that was nascent at that time. According to Hinchliff (1968:68), the divergent liberal views were subdued with the institution of heresy trials. That as it was, the Anglican Church preached to Whites and Blacks in the same manner. However, Blacks were not part of the decision-making processes and this polarised the church (Prozesky, 1990:102).

To the credit of the Anglican Church, it endeavoured to deal with its problems of race in a surreptitious manner. On the other hand, the Dutch Reformed Church prompted by the English

annexations of the Transvaal Boer Republic in 1877, and the subsequent First Liberation War (1880-1881), made it clear that Afrikaner nationalism took precedence over anything else (Davenport, 1991:494). According to Loubser (1987:16), it appeared Afrikaner nationalism and survivalist existence became very important.

This state of affairs in the Dutch Reformed Church did to a lesser extent influence the Anglican Church as the conduct of some of its bishops like Bousfieeld of Transvaal and Wilkinson of Zululand would show. According to these two bishops, missionary work was only applicable to Whites who were already Anglicans. The Africans were not a missionary priority (Davenport, 1991:494). It would be folly to assume that the Africans were unaware of the unfair and discriminatory environment, in which the church operated. Hence, the subsequent naked resentment and contempt of White churches by Africans. This naked resentment and contempt towards White churches later led ineluctable to the mushrooming of African churches like the Tembu National Church in 1884 and the Ethiopian church in 1892 (Davenport, 1991:410).

4.4.3 Indigenisation of the Anglican Church

The Anglican Church had to do something drastic to cure this state of affairs. The strategy was the indigenisation of the church. According to Suberg (1999:69-71) it was important for the Anglican Church to grow in South Africa. This was doable by indigenising the church. The church then embarked on this process of indigenisation by educating Africans to be priests so that they qualify for appointment to senior church positions. It was therefore necessary to establish theological schools around the country to attain this indigenisation objective. The first African was ordained as a priest in 1877(pp 65-71). Dioceses opened around the country with obviously indigenous character. The Book of Prayer had to be adapted to suit the South African environment. The publishing of a completely adapted South African Prayer Book took place in 1954 (pp 65-7).

The indigenisation process forced the Anglican Church to undergo introspection. In 1941, the Johannesburg diocese of the Anglican Church appointed a commission to define and determine how it was going to relate with the overall society of South Africa and how it was going to go about preaching Christianity (Suberg, 1999). One of the important findings of this commission was that apartheid could not find support from reference to the teachings of the Bible. According to the commission, the church should have the duty to serve all the sections of society without discrimination. The teachings of the Bible are the yardstick, used to measure

the morality of human beings. The name of the documentation from the commission was Church and the Nation Report (Suberg, 1999:86-7).

The Church and the Nation Report did not receive the same acceptance from church members. There were members of the church who were of the view that the report did not sufficiently deal with the problems that related to the relationship between the church and society. For an example, Worsnip (1991:540) felt that the Church and the Nation Report did not come out clearly to declare that apartheid was deplorable. In fact, his view was that the report was lenient in the criticism of government policies. Further, Suberg (1999:91) singles out Scott as one of the church members who was not satisfied about the extent of the criticism in the report. Scott became the campaigner against injustices perpetuated by the state against the African people.

The Anglican Church did not stop with the indigenisation process; it had to deal with the inexcusable ignorance and the flippant attitude of White people concerning the plight of Africans that were Christians. It sensitised the White community about the unfortunate environment in which African Christians found themselves. It created an environment where the White and African Christians were encouraged to work together in the improvement of relations between the Anglican Church and society (Brookes, 1968:85). The Johannesburg diocese that initiated the commission that wrote the Church and the Nation Report was the example of how the Anglican Church endeavoured to ameliorate relations between the church and society.

The attempt to encourage the White and African Christians in the Anglican Church to co-exist was not smooth sailing. The White and African parishes did not have the same views on how to deal with the apartheid policies of the government, for an example, the policy on education (Prozesky 1990:106). This was conceivable taking into account that the Whites enjoyed the benefits of the apartheid policy while the same policy brought subjugation and untold misery to African people. The view by Prozesky and De Gruchy (1995:94) is that there was a feeling that Whites were interested in preaching the gospel without taking into account the well-being of Africans. This was a miscalculation on the part of White people at that time, as their preaching would give the idea that Christianity is less concerned with issues that affect society. According to Suberg (1999:87), the bishops also did not improve the relationship between races because they initially censured individuals who openly criticised the apartheid policy.

The censuring of individuals for talking against apartheid changed when the senior echelons of the church like the bishops and the clergy started to criticise the apartheid policy openly. The Bishop of Johannesburg, Geoffrey Clayton, was one of those senior church members who started to highlight the injustices of the apartheid policies openly. Other bishops like Huddlestone and Scott even went further by going to live amongst African people to experience their plight first hand (Villa-Vicencio, 1996:130ff). This sacrifice by Huddlestone and Scott helped them to understand the way of life of African Christians and thus ameliorated the relationship between the White and African Anglicans. According to Worsnip (1991:54), this was the only way of bringing about change by those in power to speak against apartheid openly.

Even amongst the bishops and the clergy that criticised the apartheid policy, there were disagreements. Bishop Geoffrey Clayton, for instance, disagreed with Huddlestone on the ground that Clayton did not believe that the church should align itself with a particular political organisation ((Villa-Vicencio, 1996:135). However, it would have been impossible for Huddlestone not to be supporting a certain political organisation if the political organisation had the same views on the policy of apartheid.

Overview: The Anglican Church had a rocky relationship with the state. The cause of this was the apartheid policy that the South African government practised. The Anglican Church opposed this policy. However, the Anglican Church faced its own internal problems when it tried to spread the gospel to African communities. They had to understand the social environment of African people. This resulted in the indigenisation of the church. While indigenising the church, it had at the same time to speak against the apartheid policy openly.

4.5 Legal framework before the Constitution

The general relationship between the Anglican Church and the state was discussed above hence the necessity to now zoom into the legal relationship. Before the advent of democracy in South Africa, the right to freedom of religion did not enjoy any guarantees. There was only international jurisprudence that was not binding to South Africa community but could only have persuasive value. Some of the international legal framework is obtainable from the United Nations.

The United Nations recognises the right to freedom of religion. Article 18 of the Universal Declaration of Human Rights states “everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance (Universal Declaration of Human Rights, 1948). Other international legal frameworks further make provisions for the right to freedom of religion. Article 18 of the International Covenant on Civil and Political Rights provides that:

> [1] Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
>
> [2] No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.
>
> [3] Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.
>
> [4] The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions (International Covenant on Civil and Political Rights, 1966: Article 18)

Of particular significance is the fact that article18 (1) shows that freedom of religion includes freedom of conscience and thought. This article also espouses the fact that freedom of religion includes the right not be forced to adopt a particular religion or conscience or thought (article 18 [2]). This article further shows that the right to freedom of religion is not absolute. It can be limited by law (article 18 (3). It is instructive to note that these international legislations are the source of the guarantee to freedom of religion in South Africa after 1994. There are remarkable similarities between section 15 of the Constitution and these two legal instruments.

4.5.1 Court decisions before 1994

Before the Constitution, it was clear that the priest could not refuse to testify in court and claim that the information between the priest and the penitent is privileged. In *Smit v Van Niekerk* (1976:293), the court had to deal with the priest-penitent privilege. The facts of this case are as follows: The appellant was the minister in the Dutch Reformed Church in Uitenhage East. On 28 April 1975, he received a telephone call from Heinse who was a deacon in his congregation. Heinse informed the appellant that he was upset as his sister, Mrs Geldenhuys, had a serious remonstration with Mr Nel.

Heinse asked the appellant if he would meet with his sister and counsel her. The appellant agreed and proceeded to a local police station. At the police station, the appellant obtained the use of a private office in which he conducted a conversation with Mrs Geldenhuys in the presence of her brother Heinse. During this conversation, the appellant learnt that Mrs Geldenhuys had attacked Mr Nel and the police were looking for him in connection with this attack. The appellant then advised Mrs Geldenhuys to surrender to the police, which she subsequently did.

After Mrs Geldenhuys had surrendered to the police, the police questioned the appellant by regarding the conversation he held with Mrs Geldenhuys. The appellant refused to answer their questions on the ground that the communication between him and Mrs Geldenhuys enjoyed the priest-penitent privilege. The state prosecutor issued summons for him to appear before a magistrate for questioning. At the subsequent hearing before the Magistrate, counsel for the appellant argued, *inter alia*, that as a member of the clergy the appellant was entitled to claim a professional privilege and that this privilege amounted to a legal excuse. The magistrate rejected this argument and suspended the proceedings to allow an appeal against his decision. The appellant unsuccessfully appealed to the Eastern Cape Provincial decision and thereafter appealed to the Appellate Division.

Rumpff CJ of the Appellate Division noted that the case was not concerned with whether the appellant had a “just excuse” in the wide sense, but rather whether members of the clergy are entitled to a professional privilege, which can justify them to refuse to testify. In this regard, the judge first referred to English law and said the following:

> Ten spyte van die feit dat in Engelse beslissings die swygreg hoofsaaklik in obiter dicta ontken word en dat daar geen uitdruklike beslissing deur die

> Court of Appeals of House of Lords skyn te wees nie, en ten spyte suggesties deur enkele skrywers dat die swygreg erken word of behoort te word, is die oorwig van gesaghebbende mening in die Engelse reg dat n swygreg van n geestelike nie erken word nie. Die rede vir hierdie afwesigheid skyn te wees dat koning Hendrik VIII in 1534 'n end gemaak het aan die heerskappy van die Rooms-Katolieke kanonieke reg en mettertyd die priviligies van die geestelikheid afgeskaf het (p 302C-E).

Briefly, Rumpff CJ was of the view that the English law did not recognise the priest-penitent-privilege. The judge then turned to consider whether public policy or the public interest required religious communications between the penitent and the priest to enjoy the priest-penitent privilege. In this regard, the learned judge concluded that public policy and public interest did not support the view that a member of the clergy ought to receive absolution from the duty to assist the court in dispensing justice (p 303F-G). He further held that if public policy did intend to recognize a clergy privilege the legislature would have made express provision for this in the Criminal Procedure Act.

There was no other decision of the Supreme Court of Appeals regarding the priest-penitent privilege before 1994. It is then safe to state that the South African courts did not recognise this privilege before 1994. The decision of the Supreme Court of Appeals was binding to all courts of the land, as there was no Constitutional court at that time. However, it is not clear what happened in the magistrates' court after the judge had made the ruling. Did the minister ultimately testify or not? What was the implication of this decision in the Anglican Church in South Africa?

Before the implications of this decision at that time in the Anglican Church gets the necessary examination, there are aspects of this case that need to be scrutinised. From the facts of this case, the Anglican priest would not succeed in claiming the priest-penitent privilege. The penitent, Mrs Geldenhys did not voluntarily approach the minister to make a confession. Heinsie requested the minister to approach Mrs Geldenhys. This confession cannot be categorised as private as Hensie was present when the conversation took place. This conversation took place at the police station and not even at the confessional or church environment.

The implication of this judgment is that a priest in the Anglican Church before the advent of the Constitution could be legally compelled to give evidence in court because the priest-

penitent did not exist in our law. What would the defences of the priest had been because the Anglican canons forbids the priest to divulge what was said to him during a private confession? Would the presiding officers send a priest to jail for refusing to testify?

Overview: Legal framework before the Constitution is instrumental in determining the scope of the priest-penitent privilege. Before the advent of democracy in South Africa, the right to freedom of religion did not enjoy any guarantees. There was only international jurisprudence that was not binding to South Africa community but could only have persuasive value. For an example, Article 18 of the International Covenant on Civil and Political Rights and Article 18 of the Universal Declaration of Human Rights. There were also court decisions, which proved that the right to freedom of religion did not enjoy any guarantees. For an example, Smit v Van Niekerk (1976:293). Before the Constitution, it was clear that the priest could not refuse to testify in court and claim that the information between the priest and the penitent is privileged.

4.6 The relationship between the state and the Anglican Church after the Constitution

It is difficult to elucidate the priest-penitent privilege after the Constitution without first explaining the relationship between the Anglican Church and the state after the Constitution. After the advent of democracy in South Africa, the relationship between the state and the church is regulated by *inter alia* the provisions of the Labour Relations Act 66 of 1995 (Labour Relations Act) and the Constitution. Therefore, it would be difficult to explain the relationship between the state and the Anglican Church without first dealing with the provisions in the Constitution that relate to the religious freedoms. Attached to these religious freedoms is the South African Charter of Religious Rights and Freedoms (the Charter).

There are mainly two aspects that are a focus of the right to freedom of religion in South Africa, namely, the church and the schools (for an example, *Christian Education South Africa v Minister of Education [2000]*). However, this does not mean that this right is limited to matters related to schools and the church. The Constitution is the custodian of the right to this freedom of religion. There is no other legal framework (Coertzen, 2008:61). Coertzen contends that the Constitution provides the fundamental framework for the freedom of religion. There is a need for churches to identify this right to freedom of religion and then apply it to their circumstances since the churches are not similar and the right is wide and encompassing. Coertzen (2012:835) implores the churches to recognise this diversity and then cooperate with each other, and with the state, to find common ground.

As stated before, the church forms part of society and functions within the periphery of the Constitution. Be that as it may be, the church has the right to formulate its policies to regulate its internal affairs. According to Smit (2006:639), the internal policies of the church are the responsibility of respective churches. They cannot leave that the responsibility to the state as this would usher in a new form of theocracy. Coertzen (2008:66) contends that the responsibility to formulate internal policies carries an extra obligation to align them with the laws of the country. That is when issues like abortion, gay marriages and women in office become a constitutional battleground. However, it will also make sense to start with the discussion on Labour Relations Act.

4.6.1 The priest employment regulatory framework

In the Anglican Church, the employment relationship between the priest and the church is unique in the sense that it does not resemble normal employer- employee relations. This is clear from the questions asked during the ordination of the priest. One of the questions that the bishop asks the priest is, “do you believe that you are truly called by God and His church to the life and work of a priest” (Anglican Prayer Book 1989:588). From this question, it is evident that the work of the priest is therefore a calling and not just a job. According to the Churches’ Legislation Advisory Service Case-Law on Church Employment (June 2015), the priest are regarded as “ecclesiastical office-bearers”.

Our courts have had the opportunity to deal with the nature of the employment relation between the priest and the church. In *Church of the Province of Southern Africa Diocese of Cape Town v Commission for Conciliation Mediation and Arbitration and Others* (2001) the applicant in this case which is the Anglican Church dismissed the third respondent and froze his remunerative benefits. The third respondent then contented that the holding of benefits amounted to an unfair dismissal. There are number of issues that the court dealt with, however, the discussion will only relate to the employment relationship.

The court confirmed that being a priest is a calling and that before the appointment of the priest; there is a test to ascertain whether the calling is present before ordination. The court further held that it is clear from Canon 16.2, which is the Form of Oath and declaration that this employment relationship between the church and the priest rests heavily on this calling. According to the court, the Commission for Conciliation Mediation and Arbitration (CCMA) does not have *locus standi* to hear the matter. In the Anglican Church, the canons rather than the Labour Relations Act govern the employment relationship between the church and the

priest. If the priest were to go against the Anglican Church in matters relating to priest-penitent, the canons rather than the Labour Relations Act would apply.

4.6.2 The regulatory constitutional framework

The Anglican Church does not exist in a vacuum but operates within the confines of the Constitution. This relationship with the Constitution is important for the determination of the rights of the priest and the church at large. The Honourable Judge Willis once remarked that "[t]he church also has rights" (*United Apostolic Faith Church v Boksburg Christian Academy*, 2011:39). This is a loaded assertion by the officer of the court because it *ipso facto* means that with the rights that the church has, there are attendant responsibilities.

One of the responsibilities of the church is to ensure that the policies do not offend against the provisions of the Constitution and the laws of the land. As the Constitution binds everyone, the church cannot demand special exemptions from the Constitution because of their beliefs and values. To circumvent unnecessary conflict between the state and the church, a judge in *Christian Education South Africa v Minister of Education* (2000:35) proffered a suggestion that the state should avoid to place the church in a situation where it will have to choose between its beliefs and the Constitution. The judiciary is reluctant to cause conflict between the church and the state.

There should be mention from the outset that the Constitution is the supreme law of the land. The Constitutional Court made this clear in *Executive Council of the Western Cape Legislature v President of the Republic of South Africa* (1995:par 100) in the following words: "It is of crucial importance at this early stage of the development of our new constitutional order, to establish respect for the principle that the Constitution is supreme". Because of the injustices of the past, the Constitution has a Bill of Rights that are entrenched. The Bill of Rights binds all persons whether natural or juristic (section 8 (2) of the Constitution) including the legislature, the executive, the judiciary and other organs of state (section 8 (1) of the Constitution; (Rautenbach, 2000:296). The Anglican Church is a juristic person and cannot claim exclusion from the application of the Bill of Rights.

However, although the Bill of Rights is also applicable in the Anglican Church, it should not create the impression that the state as the dispenser of law can dictate what constitute sin to the church. This is because religion and law operate at different environments of existence

within society. Venter (2015:18) demonstrates the societal environments in which law and religion operate. He contends that religion "belongs in human existence, both profoundly personal and public". At personal level, religion involves faith, which is evidence of things that a person cannot see as shown in Hebrews (11:1). In other words, rationality and factual substantiation are not elements of faith. At public level, religion involves, for instance, in the Anglican Church, rituals such as sacraments or anything that performed by the Anglicans during religious observations.

The law on the other hand operates in the public environment. Venter (2015:18) views the law as a "normative construct" that is public in nature. He contends that law is rational and does not demand the existence of faith (p 18). This is more reason for the state not to dictate to the church what constitutes the sin. The judge in the case of *Everson v The Board of Directors* (1962) has this to say about law and religion "neither a state of Federal Government can set up a church……openly or secretly participate in the affairs of any religious organisation or groups or vice versa" (p 608). From this statement, one conclusion is evident that although the Bill of Rights binds the Anglican Church, it does not accord the state the constitutional right to dictate to the church on matters concerning faith.

4.6.2.1 The preamble of the Constitution of South Africa

The preamble of the Constitution of South Africa ends with the words "May God protect our people. God bless South Africa". This in itself is indicative of the fact that the Constitution recognises the existence of God (Malherbe 1998). The fact that the Constitution recognises the existence of God, suggests that the South African Constitution is not a religiously neutral document. Devenish (1995:30) even suggests that the Constitution "as a whole reflects a bias in favour of religion as opposed to atheism and agnosticism".

There are other views in this regard. Du Plessis (1996:461) on the other hand views the Constitution of South Africa as religion-neutral. This view by Du Plessis may be construed to indicate that while our Constitution guarantees the right to freedom of religion, it does not preclude the involvement of state in church affairs (see also Du Plessis, 2001:19). Van Der Vyver (1999:649) is of the view that the reference to "God" in the closing sentences of the preamble favours monotheistic beliefs. Although this reference to God in the preamble of the Constitution may appear insensitive to people that are not Christians, it may not be such because all religions believe in some Superior Being.

Therefore, the inclusion of the word God in the preamble enable a person to understand it in the context in which it is applicable in a particular text. It does not mean that it discriminates against the section of the community that is not religious. Section 9 of the Constitution protects every individual against unequal treatment and this includes even individuals who are not religious. There will be instances where the values, views and practices of both the religious groups and non-religious groups will clash. According to Du Toit (2006:685-692), the irony of it all is that sometimes the values that are supported by the community that is not religious are not necessarily different from the values held by the religious community. In spite of this, there are commentators like Coetzee (2006:151; 2008:233) who regards South Africa as a secular state.

Because of the protection accorded by section 9 of the Constitution, it does not matter whether the South Africa is a secular state. Every individual enjoys constitutional protection and assurance of equal treatment. So far, in South Africa there is a relatively peaceful existence between the religious and non-religious communities. What is of paramount importance is that in instances where there were conflicting values within the religious and non-religious groups, the courts have been able to resolve the differences by relying on the Constitution (see for an example, *Christian Education South Africa v Minister of Education [2000]; MEC of Education, Kwazulu Natal v Pillay (2008*).

4.6.2.2 Relevant sections of the Constitution

Section 9 (3):

> The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

This section forbids the discrimination of any individual or individuals on the listed grounds. Religion is one of those grounds. The discussion on the concept of religion took place on paragraph 4.2 and it is not necessary to define religion again. The implication of this equality clause is that members of the Anglican Church cannot be prejudiced or discriminated against on the ground of religious belief. This equality clause protects the members of the Anglican Church as individuals and protects the church as an entity.

Section 15(1):

> Everyone has the right to freedom of conscience, religion, thought, belief and opinion.

As mentioned above the debate on what the term religion means is unnecessary because the section includes conscience, thought, belief and opinion. The section is so wide and embracing such that it may include beliefs and thoughts that have no connection to deity such as atheism and agnosticism. A thought, for an example has its basis on human reason (Shaw, 1993:447), atheism, and agnosticism have their basis on conscience, belief and thought (Farlam, 1998:308). The words of the judge in *Wittmann v Deutscher Schülverein, Pretoria* (1998:449) resonate in this regard; “The atheist and agnostic is afforded his protection under the freedom of thought, belief and opinion part of this section. There is conceptually room for him under the freedom of religion part. Freedom of religion does not mean freedom from religion”.

In *Christian Education South Africa v Minister of Education (2000),* Sachs J explained:

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

The Anglican Church practises Anglicanism, which is a form of religion. It therefore receives the protection in terms of this section. The priest is a member of the Anglican Church and therefore afforded the protection under section 15 of the Constitution. The protection of the priest will therefore be not by virtue of his conscience, thought or belief as these may contain elements that are not religious. Van der Vyver (1994:265) is of the opinion that “matters of conscience include persuasions that are not essentially religious in nature”. However, this does not mean that matters of conscience may not have grains of religion in them. An example is homosexuality. Homosexuality is sexual orientation that enjoys protection in terms of the

Constitution but a member of the Anglican Church may refuse to practise homosexuality because of religious conscience.

Section 15 (1) of the Constitution afford the bearer the right to freedom of religion which may include the right to believe or the right not to believe (Dlamini, 1995:592ff; *S v Lawrence,* 1997: par 148). Du Plessis and Corder (1994:155) posit that even the right not to hold any belief receives the embrace of this section. This right may also include the right to believe in one religion and at the same time reject another religion. An example is a member of the Anglican Church who believes in Christianity and rejects Islam as a religion or the member of Islam religion who rejects Anglican Christianity.

This right to believe or not to believe is applicable to any individual, a collective or an institution. An individual as the bearer of the right to freedom of religion may exercise this right individually by making his own individual choices. In the Anglican Church for an example, a private confession is not compulsory. An individual may therefore express his right to freedom of religion by going to confess privately or not to confess at all. Malherbe (1998:680) supports the idea of an individual exercise of this right as he views religious freedom as a personal matter.

At the level of a collective, a group or community may exercise the right to freedom of religion. For an example, all the priests of the Anglican Church may stage a protest march against abortion. At the institutional level, the right to freedom of religion may be exercise by the institution. For an example, the Anglican Church as an institution may exercise its right to freedom of religion. It may for an example, refuse to endorse passive euthanasia

Section 15 (2):

> Religious observances may be conducted at state or state-aided institutions, provided that (a) those observances follow rules made by the appropriate public authorities; (b) they are conducted on an equitable basis; and (c) attendance at them is free and voluntary.

Firstly, it is obvious that this section is applicable to government schools although it can still include state-aided institutions. This section is very specific and it even enjoins the authorities to issue specific rules in this regard.

Our courts have interpreted the term of “religious observance” in some cases to remove any doubt of what it really means. Interestingly, in *Wittmann v Deutscher Schülverein Pretoria* (1998) when the court interpreted “religious observance”, it applied a narrow meaning because a wide meaning would have been burdensome. The court held in this case that “religious observance” must have religious meaning. It must relate to deity. It may concern the reading of Scriptures or praying. It excluded thoughts, beliefs and opinions. When the court interpreted “state-aided institutions”, it accorded it even a narrower meaning.

According to the court, “state-aided institutions” only related to educational institutions like colleges, schools and homes. State-aided institutions are educational institutions although they are not all schools in the traditional sense (*Wittmann v Deutscher Schülverein Pretoria* (1998). If the school practised Anglicanism, it would fit within the definition of religious observance because Anglicanism relates to some of form of religion as envisaged by the courts. An example is an Anglican Church school of divinity that situated in Grahamstown where training of priests takes place.

In cases that involve the state-aided institutions, it is further imperative to scrutinise the views of Malherbe. He is of the view that that “religious instruction (in schools) is subject to the Constitution, may not disregard the right to freedom of religion, and should be presented within the framework of the right” (Malherbe, 2004:5). This implies that if the school intends to exercise its right to freedom of religion it must do so within the confines of section 15 of the Constitution. Malherbe goes further to state “this should be possible simply because religious freedom in South Africa does not mean the denial of religious differences. It also does not mean religious neutrality. Once again, the only condition in the educational context is that this happens equitably, freely and voluntarily” (p 5).

Section 15 (3):

> (a) This section does not prevent legislation recognising - (i) marriages concluded under any tradition, or a system of religious, personal or family law; or (ii) systems of personal and family law under any tradition, or adhered to by persons professing a particular religion. (b). Recognition in terms of paragraph (a) must be consistent with this section and the other.

This section creates the possibility for the recognition of marriages that are not in conflict with the Constitution. The Anglican Church is not immune from the application of this section. For

an example, the Anglican Church would not solemnise a “forced marriage” because it offends against the right to freedom of association.

Section 31 (1):

> Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community -(a) to enjoy their culture, practise their religion and use their language; and (b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society. (2) The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights.

This section permits the recognition of customary and religious marriages by the law. However, the *proviso* is that such customary or religious marriage must not be in conflict with the Constitution. One of the areas of contention in this regard is the issue of polygamous marriages. It discriminates against women because they cannot have more than one husband. Even before the Constitution, the issue of polygamous marriages is contentious. There are commentators who did not support it (Kaganas & Murray, 1991:126-7) and there those who supported, albeit, with certain conditions (Dlamini, 1989:333ff).

After the Constitution, because of divergent views, the South African Law Commission established a commission to investigate the status of religious and customary marriages (South African Law Commission, Project 90, 1996). The recommendations of the commission resulted in a number of legislations passed to ensure that women got equal treatment as men. An example is “The Recognition of Customary Marriages Act 120 of 1998”. In terms of this legislation, the practice of polygamous marriages is permissible as long as there is a written contract that regulates the disposal of matrimonial property.

4.6.3 Other legislative framework

4.6.3.1 The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000. (Equality Act)

It is common cause that the aim of the enactment of the Equality Act was to strengthen or supplement section 9 of the Constitution (section 2 of Equality Act). Kok (2008:445) suggests that the aim of the Equality Act is to deal directly with all forms of discrimination. It rejects unfair discrimination in all levels of society. The Equality Act binds the state, which includes

the executive, all persons and juristic persons. The Equality Act binds the church because it is a legal entity. However, it is unfortunate that Chapter 2 does not specially mention religious discrimination as the object of the Equality Act. Chapter 2 is the Chapter that deals in detail with important prohibited grounds of discrimination. The prohibited grounds mentioned on Chapter 2 are race, gender, disability, hate speech, harassment and publications that unfairly discriminate.

The relevance of the Equality Act in this study is minimal since it does not include discrimination in terms of religion as on one of the prohibited grounds. However, the Equality Act become applicable and taken into consideration when deciding on the defences that are available to the priest if he is requested to testify in court in matters relating to a private confession. An example in this regard can be a priest who hears a private confession from a member of the congregation who is gay or the private confession relates to homophobic crime. Should the priest maintain the seal of confession even if it relates to something that to which the church does not agree? Should the priest take into account the Equality Act during and after the private the private confession? What happens if the church law is in conflict with the Equality Act?

4.6.3.2 Section 189 (1) of the Criminal Procedure Act 51 of 1977:

> If any person present at criminal proceedings is required to give evidence at such proceedings and refuses to be sworn or to make an affirmation as a witness, or, having been sworn or having made an affirmation as a witness, refuses to answer any question put to him or refuses or fails to produce any book, paper or document required to 4.6.2.4be produced by him, the court may in a summary manner enquire into such refusal or failure and, unless the person so refusing or failing has a **just excuse** for his refusal or failure, sentence him to imprisonment for a period not exceeding two years or, where the criminal proceedings in question relate to an offence referred to in Part III of Schedule 2, to imprisonment for a period not exceeding five years.

The implication of this section for the priest is that if there is a request in terms of the law to come to court and give evidence, and he refuses to answer question, he is liable to a conviction of an offence. The only defence that is available for the person charged under this section is that the reason for the refusal to answer questions must be a “just excuse”. What “just excuse”

is envisaged in this section? Is it a “just excuse” for the priest to refuse to testify because of the priest-penitent privilege?

In legal nomenclature, the phrase 'just excuse' means a lawful excuse, arising from the rules of privilege, compellability of witnesses or the admissibility of evidence. However, in *Attorney-General, Transvaal v Kader* (1991:734F-G), the Appellate Division held that the expression “just excuse” was not limited to lawful excuses. It also extends to circumstances where it is humanly intolerable to testify. The decision of the Appellate Division in this case made it possible for a priest to refuse to answer a question in criminal proceedings regarding communications made to him in confidence if he can show that it is humanly intolerable to testify. What is humanly intolerable may depend on the merits of each case.

Can the “just excuse” defence be invoked if the answering of the question may infringe upon the constitutional rights of the witness? The Constitutional Court held in *Nel v Le Roux (*1996:578) that if the answer to any question put to a witness may infringe upon his constitutional rights, he may refuse to answer that question and that may be acceptable as a “just excuse”. This opens the door for the Anglican priest to refuse to answer questions that may infringe upon his constitutional right, for an example, his right to freedom of religion. While the court may require proof of the witness’s infringement of a right to freedom of religion, the suggestion is that a court approaches this evidence with an attitude of generosity as a gesture for appreciation of this right (Du Plessis, 2000:299). Although the priest may refuse to testify on the ground of a “just excuse”, it does not mean that the court recognises the priest-penitent privilege.

4.6.3.3 Section 192 of the Criminal Procedure Act 51 of 1977:

> Every person not expressly excluded by this Act from giving evidence shall, subject to the provisions of section 206, be competent and compellable to give evidence in criminal proceedings.

This section lists the categories of people that are competent and compellable witnesses. The section does not specifically mention the priest. This means that the priest is therefore competent and compellable to give evidence on matters in which he is a witness. It is noteworthy that this section just compels the Anglican priest to testify as a witness and it has nothing to do whether the priest-penitent privilege finds recognition in our law (Van der Vyver, 1977:218).

4.6.3.4 Decided cases

The case of *S v Bierman (2002):* This case concerns the application in the Constitutional Court against the conviction and sentence in the case of murder. The High Court convicted and sentenced the applicant. She applied for leave to appeal to the Supreme Court of Appeal, which dismissed the leave to appeal. The applicant then approached the Constitutional Court to appeal against the decision of the Supreme Court of Appeal.

One of the bases for her application was that the High Court infringed her constitutional rights in that it admitted the evidence of a minister of religion to whom applicant had confessed to certain facts in private. She stated that the admission of this evidence was in breach of both her right to privacy and her right to a fair trial. She contended that her conviction was on the strength of inadmissible evidence. She further argued that the principles pronounced in the *Smit v Van Niekerk* case were no longer valid in terms of the Constitution. In *Smit v Van Niekerk* the court held that the priest-penitent privilege did not form part of our law.

The Court noted that the Applicant's conviction had not rested solely on the testimony of the minister of religion. Another witness testified that the applicant committed the murder. There was further direct evidence tendered by an accomplice that implicated her to the crime. There was also circumstantial evidence given by the police official that irresistible led to the conclusion that she committed the crime. Further, there was corroboration of evidence from the evidence of the applicant's employee.

The Constitutional Court further held that the Applicant had not pertinently raised all these issues in her application for leave to appeal to the Supreme Court of Appeal. Special leave to appeal against a decision of the Supreme Court of Appeal would only succeed when it was in the interests of justice to do so. However, she had in any event failed to establish that she had reasonable prospects of success. The court held:

> It was not in the interests of justice to grant leave to appeal against a criminal conviction on a point of law where a decision favourable to the applicant would not result in the conviction being set aside. The application for special leave to appeal therefore fell to be refused. The Court added that the question whether the common-law principle enunciated in Smit's case was inconsistent with the spirit; purport or objects of the Bill of Rights had been left open.

The Constitutional Court had a window of opportunity to address the pertinent question whether the priest- penitent privilege exists in our law in the light of the Constitution. It chose not to decide on this issue. The court delivered this judgment in 2002. It means that by 2002, it was not clear whether the priest-penitent privilege exists in South African law. The implication of this in the Anglican Church is that in 2002, the priest of the Anglican Church could refuse to testify about a private confession made to him, but it is not clear what the legal implications would have been.

Another case is *S v Mshumpa and Another (2007).* On 14 February 2006, Melissa Shelver (Melissa) and David Best (David) went to see a gynaecologist because Melissa was pregnant. The gynaecological examination revealed that the baby was healthy and the birth was going to be free of complications. The mother was 38 weeks pregnant. They left the gynaecologist offices. When they entered their car, Ludwe Mshumpa (the accused) confronted them. He threatened them with a gun and ordered David to drive to an isolated area near Fort Jackson outside East London.

When they arrived at this isolated area, he shot David in the shoulder. He thereafter shot Melissa twice through the stomach from her right side to her left. He took some of their goods and left them there. David managed to drive to hospital. They both survived but the unborn child died. The shooting of an unborn child in the mother's womb raised the vexing legal question of whether such a killing constitutes a separate crime of murder. During the trial, new evidence came to the knowledge of the court. As the judge puts it "in true Alice in Wonderland terms, things only get curiouser and curiouser" as David was later added as an accused because it later emerged that he had conspired with the accused to have his own child killed.

During the arrest, David requested permission to speak to Reverend Gernetzky. The court granted permission. He told Reverend Gernetzky to relate the contents of their conversation to his wife and her family. However, Reverend Gernetzky told the entire congregation the following day what David had told him. The defence counsel raised the fact that the police only became aware of the contents of the conversation by its later public disclosure by Reverend Gernetzky in church, and that they initially regarded the conversation as private. The statement made to the Reverend thus fell within the ambit of the priest-penitent privilege. Other things happened in the trial but they are irrelevant to the study.

The judge had the following to say about the confidential communication made to a priest:

> I want to emphasize a last aspect again before ending the discussion on the admissibility of the statement to Reverend Gernetzky. We expressed no view on the question of whether a legally protected privilege exists between a spiritual advisor and a congregant, or in respect of private conversations generally. The Constitution may well allow the extension of privilege to those situations (*compare S v Bierman 2002 (2) SACR 219 (CC)),* but a decision on that issue need not be made in this case. Our conclusion is based on the factual finding that Mr. Best authorized the disclosure of what he said to Reverend Gernetzky to other people and that it is that permission to disclose which destroys any legal privilege that may attach to such a conversation (par 37).

The court in this case also did not want to deal with the question of whether the priest-penitent exists in our law after the advent of the Constitution. The court delivered this judgment in 2007. It means that by 2007, it was not clear whether the priest-penitent privilege exists in South African law. The implication of this in the Anglican Church was that in 2007, a priest of the Anglican Church could refuse to testify about a private confession made to him, but it is not clear what the legal implications would have been.

Overview: After the advent of democracy in South Africa, chiefly the provisions of the Labour Relations Act and the Constitution regulate the relationship between the state and the church. In the Anglican Church, the employment relationship between the priest and the church does not resemble normal employer- employee relations (Anglican Prayer Book 1989:588). The preamble of the Constitution of South Africa is indicative of the fact that the Constitution recognises the existence of God (Malherbe 1998). The fact that the Constitution recognises the existence of God, suggests that the South African Constitution is not a religiously neutral.

The following legal prescripts regulate religious environment; Section 9 (3), section 15(1), Section 15 (2), section 15 (3), section 31 (1) of the Constitution; the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000; section 189 (1) of the Criminal Procedure Act 51 of 1977; section 192 of the Criminal Procedure Act 51 of 1977. The following decided cases are relevant: *S v Bierman (2002)* and *S v Mshumpa (2007).* This entire legal framework has direct impact on the determination of the priest-penitent privilege.

4.7 Canon Law in the Anglican Church

To understand the canon law framework in the Anglican Church it is prudent to begin with the framework at Anglican Communion level. Firstly, the reason for the existence of the Anglican Communion is clear "Our divine calling into communion is established in God's purposes for the whole of creation (Eph 1:10; 3:9ff.). It is extended to all humankind, so that, in our sharing of God's life as Father, Son, and Holy Spirit, God might restore in us the divine image" (Anglican Communion Covenant, par 2 of the Introduction). The Anglican Communion comprises many provinces "joined in one universal Church, which is Christ's Body, spread throughout the earth, we serve His gospel even as we are enabled to be made one across the dividing walls of human sin and estrangement" (par 3).

There is no formal body of law, which bind these provinces together. Each province is autonomous and with its own laws. According to the Anglican Communion Covenant (par 3.1.2), these provinces are bound together "not by a central legislative and executive authority, but by mutual loyalty sustained through the common counsel of the bishops in conference and of the other instruments of Communion". According to The Principles of Canon Law Common to the Churches of the Anglican Communion, Principle 11:2 "each church recognises that the churches of the Anglican Communion are bound together, not juridical by a central legislative, executive, or judicial authority, but by mutual loyalty maintained through the instruments of Anglican unity as an expression of that communion".

It is evident from these two documents which form the basis for the Anglican Communion, that there is no central legislature, which pass laws, and that these two documents strengthen the federalisation of the Anglican Communion. Each province of these institutions cannot make decisions and laws binding on other provinces of the Anglican Communion.

Archbishop Rowan Williams recognised the protection of the membership of the body of Christ, when he said:

> Canon Law begins from that basic affirmation of equity which is the fact of membership in the Body of Christ - a status deeper and stronger than any civil contract or philosophical argument. And it seeks clarity about who may do what and who is - answerable to whom, because every Christian has to know how to work out their responsibility to God within the context of the various relationships and obligations they are involved in. Understanding

> and knowing how to work with Canon Law is a necessary aspect of exercising authority and holding responsibility in the Church (The Principles of Canon Law common to the Churches in the Anglican Communion 2008).

The Anglican Church in the Province of South Africa has its own canon laws. These laws however do not conflict with the principles of canon law common in the Anglican Communion. The Communion Legal Advisors met in Canterbury in March 2002 and produced a document, which spells out clearly the principles of canon law common in the Anglican Communion (Doe, 2008:73). Briefly, these principles can be summarised as follows:

- Each province or church contributes through its own legal system to the principles of canon law common within the Communion.
- These principles have strong persuasive authority and are fundamental to the self-understanding of each of the member churches.
- These principles have a living force, and contain within themselves the possibility for further development.
- The existence of the principles both demonstrates and promotes unity in the Communion (Doe, 2008:73).

Within the Anglican Communion, there are instruments of unity. They comprise the Archbishop of Canterbury, Lambeth Conference, Anglican Consultative Council, and Primates' Meeting (Anglican Communion Covenant, par 3.1.4). The Archbishop of Canterbury, as an office and as a person, is pillar that holds the Anglican Communion together. He is the focus of unity and is *primus inter pares* (par 3.1.4). The Lambeth Conference is where the bishops meet for guidance and consultation in their ministries to forge the unity of the Anglican Communion. The Anglican Consultative Council comprise the clergy and episcopal representatives from the provinces. Lastly, the Primates' Meeting are "convened by the Archbishop of Canterbury for mutual support, prayer and counsel" (par 3.1.4).

This discussion on the hierarchy of the Anglican Communion shows that it is an ecclesiastical body comprising of many provinces. It does not have any legislative or executive powers. The provinces promulgate their own laws and canons, which regulate governance and issues of faith. It must also be mentioned that this federalised relationship resulted in certain problems in the past. An example, the Episcopal Church in America ordained a gay bishop in defiance

of the Anglican Communion, which was against this. This disagreement resulted in the drafting of the Anglican Communion Covenant, which all provinces adopted.

The Anglican Church in South Africa also adopted the Anglican Communion Covenant. This means that the Anglican Church in South Africa has the authority to pass its own laws and canons "while upholding mutual responsibility and interdependence in the Body of Christ, and the responsibility of each to the Communion as a whole" (Anglican Communion Covenant, par 3.2.2). This indicates that although the Anglican Church in South Africa is autonomous, there should be undiluted loyalty to the canons and principles of the Anglican Communion. This is relevant to the study *in casu* because it may be necessary to suggest amendments to the existing canons when recommendations relating to the priest-penitent privilege become applicable.

4.8 South African Charter of Religious Rights and Freedoms

The Anglican Church in South Africa is a signatory of the South African Charter of Religious Rights and Freedoms and Father Matthew Esau is its representative. South African religious groups together with relevant civil organisations drew up the South African Charter of Religious Rights and Freedoms (the Charter).

The main objective of the Charter is to outline the parameters of religious freedoms and to define the attendant rights and responsibilities of South African citizens (Benson, 2011:125ff). All the members of the Council endorsed the Charter on 21 October 2010 for the protection and promotion of religious rights and freedoms. The Charter still needs the approval of Parliament in terms of section 234 of the Constitution of South Africa.

The religious community in South Africa comprises different religions. About eighty percent of this religious community is Christian (Gouws & Du Plessis, 2000:659). Van der Vyver (2000:803) dissects this Christian community as follows:

- In the White Afrikaner community, the dominant churches is the Dutch Reformed Church and the Apostolic Faith Group, transplanted from the United States.
- White English speaking South Africans are predominantly Anglicans, Methodists, or Roman Catholics.

- Twenty-five percent of the mix-raced South African population are Anglicans or the Roman Catholics.
- About ten percent of the Asian community is Christian; Twenty percent of black Africans belong to syncretistic churches (see also Cochrane, 1999 about syncretistic churches);
- Twelve percent of Blacks are Methodist.
- According to Gouws and Du Plessis, (2000:660), the other large religious groups are African traditionalists, Hinduism, Islam and Judaism.

The Constitution accords sufficient protection of the religious freedoms. The question then is why the need for the Charter for religious freedoms. Some commentators like Shelton and Kiss (1998:559ff) believe that the Charter for religious freedoms is not good idea seeing that all religions receive enough protection in terms of the Constitution. On the other hand, De Freitas (2007:45ff) is of the view that the exclusion of religion from law studies takes place because of this false notion that the Constitution protects religious freedoms adequately. Others like Sachs (1990:46) a former judge of the Constitutional Court, supports the idea of the Charter when he states:

> Ideally in South Africa, all religious organizations and persons concerned with the study of religion would get together and draft a Charter of religious rights and responsibilities … It would be up to the participants themselves to define what they consider to be their fundamental rights.

One commentator, Malherbe (2011:3), supports the drafting of the Charter and lists numerous reasons for the drafting of the Charter. According to Malherbe, religion is very important in the life of South Africans. He posits that in South Africa the relationship between the state and the churches is symbiotic. However, he warns against complacency. He is of the view that society should be proactive and put strategies in place to deal with conflict between church and state should the need arise (Malherbe, 2011:6). The Charter is one of those proactive strategies. Since the Anglican Church is one of the signatories of the Charter, it means that it marvels its relationship with the state and intends to sustain this relationship.

Section 234 of the Constitution encourages society to "deepen the culture of democracy established by the Constitution" by drafting the Charter so that the Constitution may be extended. When Parliament adopts the Charter, it becomes law. According to Malherbe (2011:8), this improves the relationship between the state and society. He further contends that this is necessary because sometimes the Constitution describes most constitutional rights

in cryptic, vague and general terms. The Anglican Church will also benefit from the Charter because it simplifies the relevant provisions of the Constitution and attracts the acceptance from the ordinary members of the church.

Malherbe is of the opinion that religion is such an important aspect of life in society and therefore religious freedoms and rights are not safe if left only in the hands of the state. Civil society has an intimate knowledge of their religious beliefs and practices and they should be involved in the framing of the religious rights and beliefs (Malherbe, 2011:5). It would therefore be injudicious for the state to ignore the input from society. The Anglican Church like other religious groups will benefit from the Charter on matters that are sacrosanct to the Anglican Church.

Although the relationship between the state and the church is cordial now, it cannot be like this forever. The cracks are beginning to show as the church is starting to criticise the government openly on matters relating to rampant corruption. The Charter will ensure that in those trying times, the relationship does not result into religious chaos. The Anglican Church is one of those religious groups that are openly speaking out against the corruption of the state. It is important then to participate in the drafting of the Charter because the Charter will govern their relationship even during the times of mutual resentment.

4.8.1 The summary of the Charter:

The content of the Charter can be summarised as follows:

(a) Every person has the right to believe according to their own convictions and to make choices regarding their convictions and religious affiliation (art 1)

This means that a person has the right to choose which religious group to which he wants to belong. In other words, it is not compellable for a person to belong to a particular religious group. A person may change from one religious group to the other without fear of reprisals (Walkate, 1983:148ff). A member of the Anglican Church is also free to leave and join any other church groups.

(b) No person may be forced in any way in respect of their religion or convictions, or to act against their convictions (art 2)

For an example, it is not compellable for a member of the Anglican Church to wear a headscarf because he is attending a school that is predominantly Islam. This may include even the right to choose death or life in cases of passive euthanasia. Fletcher (1960: 313) states that patients must be at liberty to choose the type of death they want. He argues that the life belongs exclusively to the patient, and he or she should decide what to do with it. His convictions whether religious or not are paramount. Trowell (1973:16) also views the right to die as a human right.

One case that dealt with the right not to compel someone to act against one's conviction is *S v Lawrence* (1997). In this case, three employees of a Seven Eleven chain store faced charges of contravention of the Liquor Act of 1989, which prohibited the sale of liquor on Sunday. The employees challenged the laws as "inconsistent with the right to freedom of religion, belief and opinion". The Constitutional Court held that the law was constitutional and conceded that there were circumstances in which the state infringed on free exercise by coercing people, directly or indirectly, to observe particular religious practices. The Anglican Church should note this decision because it shows that there will be instances where the infringement of the right to freedom of religion will take place.

This may also include the reasonable accommodation of religious convictions. The principle of reasonable accommodation appears in s 14(3) (i) of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000. The court in a famous case of the nose stud dealt with this. In this case, *MEC of Education, Kwazulu Natal v Pillay (2008,)* a student Sunali Pillay of Durban Girls High School, wore a nose stud at school contrary to the policy of the school. Her contention was that it was her religious and cultural practice to wear the nose stud. The Constitutional Court held that "as a general rule, the more learners feel free to express their religions and cultures in school, the closer we will come to the society envisaged by the Constitution".

(c) Every person has the right to the impartiality and protection of the state in respect of religion (art 3)

This enjoins the state to create an environment where people can practice their religion freely. The state may not favour or prejudice one religion over the other. This includes the Anglican Church; the state may not favour or prejudice the Anglican Church. The use of the word "impartiality" exude positive connotation in that the state is involved but is impartial (Sandsmark, 2000:87ff).

(d) Every person has the right to the private or public, and the individual or joint, observance or exercise of their convictions (art 4)

This section is primarily about religious observance. It includes the right to observe certain sacred days and holidays and the right to pray. Religious observance may take a multitude of forms. It may even include the right to make a private confession to the Anglican priest, which is the object of this study.

(e) Every person has the right to maintain traditions and systems of religious personal, matrimonial and family law that are consistent with the Constitution (art 5)

This would relate to, for an example, polygamous marriages in certain religions. How would the Anglican Church deal with a person who converts to be an Anglican but he has more than one wife. Will they refuse him to be the member of the church?

(f) Every person has the right to freedom of expression in respect of religion (art 6)

This issue got the attention of the court in *MEC of Education, Kwazulu Natal v Pillay* (2008) *supra*.

(g) Every person has the right to be educated in accordance with their religious or philosophical convictions (art 7)

The parents may refuse to allow their children to partake in programs that will offend against their religious convictions. For an example, a Muslim parent may refuse to give permission for his daughter to participate in school activities or sports activities that may reveal their bodies. The same would apply to the child of the Anglican Church parent.

Some commentators denounce religious education. Hans Pietersen (2011:346) is an ardent opponent of religious education in South African schools. He believes that religion makes children stupid. He is of the view that religious education should not find application in public schools and be restricted to parents, churches and private schools (p. 197, 277, 282, 321, 367). State schools must be secular (p. 164), Bible instruction in these schools is wrong (p. 182, 256) and the (Calvinist) indoctrination of faith in state schools must be stopped (p. 351, 354, 363). Pietersen pleads for even handling of all religious groups in schools (p. 285, 357). Van der Vyver (2007:94) remarks, “in public education, South Africa remains favourably disposed toward promoting spiritual values in the minds of young people, and does so through

the good offices of state institutions". An Anglican Church member is free to have his child attend a school of his choice.

(h) Every person has the right to receive and provide religious education (art 8)

This may also include the right to refuse religious education especially if it is inconsistent with a person's religious conviction. For instance, it is inconceivable that an Anglican child can attend a Muslim school.

(i) Every religious institution has the right to institutional freedom of religion, and has authority over its own affairs (art 9)

The most important aspect of this clause is that this institutional freedom of religion should be consistent with the Constitution as the Constitution is the supreme law of the land. The church does not exist in a vacuum. The laws of the land also apply to the church. However, according to Van Staden (2014:241) the God's law, which is the law of the believers, should receive protection from secular law. For this reason, Barth (1958:720) views church law as "a law which in its basis and formation is different *toto coelo* from that of the state and all other human societies". However, he cautions, "the law pertaining to church and state can never be, or try to be, the law of the church, nor can it be accepted and recognised as such". The Anglican Church in South Africa has the right to dictate if the private confession should be compulsory or not. It is not the state that should do so.

(j) Every person has the right, on religious grounds, and in accordance with their convictions or ethos, to conduct relief, upliftment, social justice, developmental, charity or welfare work (art 12)

This may include the right to refuse to partake in charity or welfare work that will offend one's religious conviction. For an example, the Anglican Church member may refuse to do volunteer work for the abortion clinic. There is also a case of *Gaum v Dutch Reformed Church of South Africa (DRC)* (Unreported: Judgment reserved). In this case, the DRC Synod took a decision in 2016 that homosexual ministers should be celibate and that ministers could solemnise same sex unions if they choose to do so. On August 2018, the court reserved its judgment. The applicants and respondents raised a number of legal issues during their submissions. Relevant here is only the aspect that concerns reversal of the decision of the Synod to permit ministers to solemnise same sex unions if they so choose. The Alliance Defending the Autonomy of Churches in South Africa (ADACSA), which was the second *amicus curiae*

submitted that the autonomy of the church suggests that churches should be free to determine their own doctrines without undue interference from the state. The implication of this impending judgment is that it will determine if the minister or government can be compelled to solemnize same sex unions.

4.9 The relationship between the state and the Episcopal Church in America

The general and legal relationship between the Anglican Church and the state in South Africa is comparable with the Episcopal Church in America. The reason for this comparison is to understand the extent of the priest-penitent in South Africa if compared with other countries. The Episcopal Church in the United States is a member of the Anglican Communion and like the Anglican Church in South Africa, its origins can be traced to the Church of England (Douglas,2005:188ff). It came into existence after the American Revolution when it broke away from the Church of England on political grounds. It practises Anglicanism, which is Christian in character (Zahl, 1998:56, 69). There are similarities in this regard with the Anglican Church in South Africa (Bernardin, 2008:63). They both share the "common ancestor" which is the Church of England and both practise Anglicanism. They also both maintain apostolic succession (Sydnor, 1980:64).

Like the Anglican Church of South Africa, the liturgy, prayer and sacraments of the Episcopal Church are contained in the Common Prayer Book. The basic teachings are also the same and are summarised by Joseph Buchanan Bernardin as follows:

- Jesus Christ is God and He died and rose from the dead.
- Jesus provides the way of eternal life for those who believe.
- God the Father, God the Son and God the Holy Spirit, are one God, that is, the Holy Trinity.
- The Old and New Testaments of the Bible
- The two great and necessary sacraments are Holy Baptism and Holy Eucharist.
- Other sacramental rites are confirmation, ordination, marriage, reconciliation of a penitent (Bernardin, 2008:63; Doe, 2008:73).).

4.9.1 Slavery and the Episcopal Church

This chapter deals with the position of the priest-penitent privilege in the Anglican Church in South Africa before and after the advent of the democratic dispensation. This involves the relationship between the state and the Anglican Church in terms of the existing legal framework. To understand this priest-penitent privilege, it would be judicious to discuss the international perspective. It is for this reason that there is comparison with the Episcopal Church in America. In South Africa, before the advent of democracy, government battled with apartheid whereas in America the government had to deal with slavery and segregation during the corresponding period.

Slavery did indirectly affect the priest-penitent privilege in America. This is inferable from the fact that firstly, during the Americanization of Native Americans and slaves, the government forced their children to attend Christian Boarding Schools (Churchill, 1998:182). Secondly, it was unlawful for the slaves to practice any form of religion except Christianity (p 182). It is therefore inconceivable that during those suppressive times, the slaves could claim a priest-penitent privilege in the government system that did not allow him to practice his religion. However, the enactment of the *Freedom of Religion Act* in 1978 put end to this suppression of religion.

Therefore, the explanation of slavery gives further light in this regard. Addison (1951:191) posits that during the eighteenth and nineteenth centuries, there was economic prosperity in America, which was the direct result of the invention of the cotton gin and the establishment of the textile industry. Slavery contributed to this economic boom because of cheap labour. Although slavery was evil and exploitative in nature, the Episcopal Church refused to take a position on the implementation of slavery. According to the Episcopal Church, slavery was not a matter that fell within circumference of religion. It presumed that secular affairs like slavery were matters of no concern to the church (p 192).

If the church could not protect its own believers from the clutches of slavery, how would they enforce the seal of confession in respect a private confession from a penitent they perceived as a slave (sub human)? It is inconceivable that a White priest would regard the private confession of a slave as confidential. The church did not even want to deliberate on status of slavery in the church as moral issues of a private nature could form part of ecclesiastical deliberations. Moral issues of a public nature such as slavery did not form part of religious concerns (Addison, 1951:192). One of the protagonists of this non-committal stance on slavery

was Bishop John Henry Hobart. He advocated the separation of religious duty from civic duty. According to Prichard (1999:147), Bishop Hobart was non-committal on slavery, but overtly distanced the church from secular moral campaigns.

According to Prichard, Bishop John Henry Hobart, the catholic and apostolic truth was a higher moral principle. Political truth had no place in church. The political truth had no place in the church because it is possible that the political truth can conflict with the ecclesiastical truth. Moreover, the political truth may change whereas the Word of God is inerrant. Bishop John Henry Hobart views manifested themselves when the church took a neutral position during Border War (Prichard, 1999:147).

To cement this position, the church issued the Pastoral Letter of the bishops at the General Convention of 1856, which provided that the Church had "nothing to do with party politics, with sectional disputes, with earthly distinctions, with the wealth, the splendour, and the ambition of the world" (Addison, 1951:192). According to Shattuck (2000:9), the main reason was the fear that any stance on slavery would divide the church. It is disquieting that the church was concerned with ecclesiastical unity at the expense of the suffering of Black people because of slavery.

Prominent members of the clergy who belonged to the same school of thought like Bishop John Henry Hobart were present at that time. One of them was Dr Samuel Seabury, a professor of the General Seminary of New York. According to Addison (1951:194), Seabury endeavoured to justify slavery and racism. Applying the New Testament, he proclaimed that "the precepts of love and equity enjoined on us by our Blessed Lord have no such tendency as is supposed to impair and ultimately subvert the relation of master and slave" (p 194). He further advocated White supremacy because "the Anglo-Saxon race is king; why should not the African race be subject" (p 194).

However, not all members of the clergy supported this view. Some of the opponents of this view were Rev. E.M.P. Wells of Boston, Bishop Hopkins of Vermont, Bishop Whittingham of Maryland, and Bishop Phillips Brooks of Massachusetts (Addison, 1951:193). According to Addison, these members of the clergy were openly against slavery. They believed that it had no place in communities that were Christian. They also thought that it was ethically reprehensible that the church could be neutral on aspects that involved slavery. It is then

evident that like how apartheid divided the Anglican Church in South Africa, slavery divided the Episcopal Church in America.

This means that the members of the clergy that were against slavery would accept that the private confession of a slave should enjoy the protection of a seal of confession. It is doubtful if the clergy that support neutrality on slavery would accord the slave penitent the protection of a seal of confession. The irony of this neutral stance by the Episcopal Church was that while it did not want to get involved in secular issues, it continued to preach Christianity to the very same slaves. As a result, the number of converted slaves accreted exponentially. Brewer (1969:52) opines that this increase in number of converted slaves was a direct result of evangelism. The biggest feature of colonial education was that it included to a very large degree a religious purpose.

The Christianization of slaves continued after the Civil War and during the segregation that characterised the twentieth century. Reimers (1962:231) states that segregation entailed that the White congregations were not part of Black congregations in “segregated slave galleries” or “slaves chapels”. Even to segregation, the Episcopal Church “remained inveterately reluctant, reticent, and reserved” (Lewis, 1996:162). Noteworthy is also the fact that segregation was also the main characteristic of apartheid (section 29[c] of the Native Laws Amendment Act 36 of 1957). This segregation in America entailed that the Black penitent could not even approach a White priest for a private confession because of segregation.

Because of this religious neutrality, after the Civil War, there was an exodus of Blacks from the Episcopal Church. According to Shattuck (2000:8), the Blacks left the Episcopal Church in droves and joined the mushrooming independent Baptist and Methodist Churches. These independent churches became a vehicle to transport Blacks away from the unfair treatment they received from the practice of slavery. This was however not easy because of segregation which continued even after the advent of the Constitution of America. The Episcopal Church adopted the same approach on segregation as it had adopted on slavery; it remained neutral. It did not condemn it and it did not approve of it.

There was segregation with the Episcopal Churches. Blacks could not participate in dioceses processes. Blacks could not elect their own bishops. They could not even pass their own church laws so that they could manage their congregations independently. A Black bishop

could not be elected even if he was qualified if it meant that he would have jurisdiction over White churches (Addison, 1951:233ff). The inference from this segregation is that the Black priest would only hear a private confession from the Black penitent. This means that the Black priests practised their own “Black seal of confession”. All this shows that the problems that the Anglican Church faced in South Africa, were not only unique to it, America also faced their own problems regarding the Christianisation of the Black community.

4.9.2 Attempts to improve race relations

The Episcopal Church tried to rectify this sordid state of affairs in the church. The changes that followed mitigated the problems of slavery and segregation. This also helped with aspects regarding the private confessions of Black penitents. In 1877, a proposal was made that there should be bishops that would be elected specifically for different races in special missionary districts. After court ruling in *Brown v. the Board of Education* in 1954, the Episcopal Church started to do away with policies that promoted segregation. (Edison, 1951:243).

The Office for Black Ministries was established and it started to appoint Blacks to senior positions and elected Black bishops to General Convention committees. In 1952, the General Convention openly rejected the practice of racial segregation (Reimers, 1962:241). There was another General Convention in 1958. In this convention, delegates openly rejected the practice of racial segregation in the South. The convention attested to the belief of the “natural dignity and value of every man, of whatever colour or race, as created in the image of God” (Hein & Shattuck Jr, 2004:134).

These endeavours to improve race relations made it easy for Black or slave penitents to approach any priest for private confession. Because there was no longer segregation, any penitent could approach any priest for a private confession. This also removed the doubt that the White priest could accord the private confession of a Black penitent the necessary protection of a seal of confession

4.9.3 The legal relationship

The recent sex scandals in America rattled the priest- penitent privilege in the Roman Catholic Church. This has caused the public to lose confidence not only in the Roman Catholic Church, but also in all orthodox churches. For example, from 1987 to 1997 in the Episcopal Church,

there has been a consistent rise in the incidence of clergy sexual misconduct (Schafera & Levinea, 1996:30). The public sees the priest- penitent privilege and the seal of confession as means to conceal sexual abuse that is buoyant in these churches.

The churches on the other hand view the obliteration or restricting of the priest-penitent privilege as the unwarranted interference in their right to freedom of religion and a slippery slope to theocracy. O'Reilly and Eichman (2014:78) acknowledge these two opposing situations when they state "mandatory child abuse reporting statutes have come into conflict with other state laws, which in earlier years had created a legal privilege against requiring the court testimony of the clergy members in regards to communications made confidentially while seeking spiritual assistance".

There are two competing forces that are distinct, the seal of confession on one side of the continuum, and the duty to report sexual abuse on the other side of the continuum. This is the reason why legislators are walking on a tight rope between these two opposing but equal forces. Jackson (2006:1067) contends that "[t]he question becomes whether the priest-penitent privilege or the affirmative duty to report should control". This is no easy task for the legislators who face the wrath of the community for sexual abuse cases and the unchangeable church stance on the inviolability of the seal of confession

The legislators are also cautious of not creating conflict between the church and the state. Dalton (2012: 20ff) posits that legislators have been willing to include clergy as individuals who are required to report child abuse under the mandatory child abuse reporting statutes, notwithstanding the sacrosanct of the seal of confession. Abrams (2003:1142) laments the fact that there has not been a uniform approach to resolve this tension.

One of the reasons for the existence of the priest-penitent privilege in America is the utilitarian ground. This is seemingly the most accepted reason for the recognition of the priest-penitent privilege (Louisell & Crippin Jr, 1956: 413). At social level, the relationship between the state and the church is important because the majority of the people in America are religious and therefore view religion as the means to reform unacceptable and sinful conduct. According to Cassidy (2003:1633), this may lead to "a morally-grounded and well-behaved citizenry". The state needs the church to inject acceptable behaviour in society such as "the obligation to tell

the truth, the importance of mutual respect, and the value of mutual care" (Maddigan, 1993:309).

Another rationale for the priest-penitent privilege is that there are privacies that society regards as important for their well-being. One of those privacies is to communicate with your priest without fear that the communication will lose its confidentiality or that the priest will experience unbearable pressure to divulge the communication. Gula (1996:120) posits that it would be essentially offensive for the state to encroach upon certain intimate relationships. According to Watts (1987:596), there is a natural revulsion toward compelling a priest to divulge communications made by persons seeking spiritual guidance. Smith (1984:2) contends that the priest should be able to guarantee confidentiality and should not become betrayer of confidences. Even courts in America have recognised the role that the priest should play as the guarantor of confidences.

The American society would lose faith in government if the priest disclose confidential information made to him by the penitent. What would compound the problem is that the priest would refuse to disclose the confidential communication. The result of this refusal would be the laying of a charge of contempt of court against the priest. This would strain the relationship between the state and the religious community (Yellin, 1983:111). Even the aim of the legislations applicable in America is to try to obviate a situation where the state would have to confront the religious community. This is not the situation in South Africa where there is no legislation regarding the priest-penitent privilege.

One of the deeply rooted values in American society is for the state not to interfere in matters of religion. This is because of the fact that the church is completely independent from the government. Louisell (1956: 110) extrapolates that the churches just need to experience this independence so that they can have unfettered freedom to express their religious freedoms and practice their faith without direct or indirect interference from the state. Theocracy has no place in American society. The same is applicable in South Africa that there is no room for theocracy because of our ever-vigilant Constitutional democracy.

4.9.4 The Wigmore factors

There were attempts by commentators to formalise the prerequisites for the admission of the priest-penitent privilege in America. One of those commentators is Wigmore (1961:877). He

lists the following conditions for admission of the priest-penitent privilege (also known as Wigmore factors):

- The communication must have originated in confidence.
- The confidence must be essential to the relationship in question.
- The relationship must be one worth fostering.
- The injury to society from disclosure of the communication must be greater than the benefit to society and the truth finding function achieved by disclosure (p 877ff).

Can these Wigmore factors pass the scrutiny of the Anglican Church in South Africa when dealing with the inviolability of the seal of confession? The first factor that *"the communication must have originated in confidence*" would be acceptable in the Anglican Church in South Africa. This is so because for the communication to enjoy the seal of confession in the Anglican Church, the communication should have been confidential and made privately (Anglican Prayer Book 1989:448). After we receive forgiveness for our sins, one of the ways in which we reconcile with God is "confession to God in the presence of the priest" (p 448).

The second Wigmore factor is that *"the confidence must be essential to the relationship in question"*. This factor is relevant in the Anglican Church in South Africa. The relationship between the penitent and the priest is essential. The penitents would not be eager to confess their sins if they anticipated that their private conversation with the priest will be disclosed. Penitents confess their darkest secrets to the priests with the assurance that these secrets will not experience disclosure. In the Anglican Church in South Africa, the Prayer Book is clear in this regard. The priest is "solemnly bound to observe secrecy concerning all matters which are confessed before him" (Anglican Prayer Book 1989:448).

The third Wigmore factor is, *"the relationship must be one worth fostering*". Two relationships are relevant in this regard. The first relationship is between God and the penitent. The seal of confession is a direct result of the private confession made before a priest. The penitents confess because of sin and "sin is an offence against God" and "it disrupts and can destroy our relationship with him" (Anglican Prayer Book 1989:447). Our relationship with God "is a necessary constituent of the notion of sin" (Rondet 1960:103). The private confession is therefore one of the ways in which we restore the relationship destroyed by sin. The second relationship is the relationship between the penitent and the priest. In the Anglican Church in

South Africa, the relationship between the priest and the penitent is characterised by the confidence that whatever the penitent says to the priest during the private confession will remain confidential (Anglican Prayer Book 1989:447). This relationship is very important because it prompted this study.

The last Wigmore factor is *"the injury to society from disclosure of the communication must be greater than the benefit to society and the truth finding function achieved by disclosure*". This factor may find application in the Anglican Church in South Africa. Firstly, the benefit to society may mean the benefit to the church itself as the church is part of the community. The community needs an effective church. Therefore, if people do not confess their sins because they suspect that their confidences will be betrayed, "the spiritual life of the church is harmed and its effectiveness is diminished" (Anglican Prayer Book 1989:448).

4.9.5 Other legal considerations

The priest-penitent privilege is now entrenched in the American legal system. All the fifty states and the District of Columbia have a statute that recognises the priest-penitent privilege and thus protect the confidential information between the priest and the penitent (Mayes, 1987; Sippel 1994: 1128). An entrenched practice has historic, legal and ecclesiastical underpinnings. Horner (1997:700) even suggests that church canons greatly influenced the common law relating to priest-penitent privilege.

However, long ago there was an attempt to have a generic definition of the priest-penitent privilege ((Mayes, 1987). Most definitions in the statutes tried to copy this attempt in the enactment of statutes relating to the priest-penitent privilege. According to Smith (1984:5), Emory University law Professor Stanley Joslin made this attempt in the legal manual for clergy:

> Every communication made by a person professing religious faith, or seeking spiritual comfort, to any Protestant minister, or to any priest, or to any Jewish rabbi, or to any Christian or Jewish minister, shall be privileged. No such minister, priest, or rabbi shall disclose any communications made to him by any person professing religious faith or seeking spiritual guidance, or be competent or compellable to testify with reference to any such communication in any court (see Smith, 1984:5).

Other scholars on the other hand drafted an ideal statute that states refer to as reference when they draft their statutes relating to priest-penitent privilege. This draft states:

(a) Definitions as used in the rule:

> (1) A "clergyman" is a minister, priest, rabbi, accredited Christian Science practitioner, or other similar functionary of a religious organization, or an individual reasonably believed so to be by the person consulting him.
>
> (2) A communication is "confidential" if made privately and not intended for further disclosure except to other persons present in furtherance of the purpose of the communication.
>
> (b) General rule of privilege. A person has a privilege to refuse to disclose and to prevent another from disclosing a confidential communication by the person to a clergyman in his professional character as spiritual adviser.
>
> (c) Who may claim the privilege? The privilege may be claimed by the person, by his guardian or conservator, or by his personal representative if he is deceased. The person who was the clergyman at the time of the communication is presumed to have authority to claim the privilege but only on behalf of the communicant (Uniform Rules of Evidence 505 (1971).

The courts on their own in these different states have expanded the meaning of confidential information and the priest-penitent privilege. It would cause confusion and antagonism between the churches and the state if these concepts are not defined (Yellin, 1983). Secondly, America has different states, which pass different laws relating to priest-penitent privilege. This is different from South Africa because, although there are different religious groups, the law that is applied is not diverse, as South Africa does not have federal states.

This however does not mean that all the commentators favour the existence and application of the priest-penitent privilege in America. Wright and Graham (1992:87) lament the fact that there is no empirical evidence to prove that churchgoers will not do private confessions to the priests if the priest did not enjoy the priest-penitent privilege. They state that “[t]he absence of any such privilege in most of the United States for much of our history suggests that the privilege is not essential to the legitimacy of the government or presumably to the existence of the church and the continued practice of religious confession”. They further contend that even in countries where there is no priest-penitent privilege, there is no failure of the administration of justice.

4.9.6 Common law cases

The allegations of child abuse in the Catholic Church in the United States triggered the theologians to review the inviolability of the private confession. According to Cassidy (2003:1629), these allegations further prompted the theologians to weigh the sanctity of the private communication made to a priest against public interest. The courts also have played their role in the shaping of the law relating to the priest-penitent privilege. Many cases dealt with the priest-penitent privilege during the nineteenth century. It will be an arduous task to cite them *in extenso.*

One of the *locus classicus* case in priest-penitent privilege is *People v Phillips* (1813). This case was a constitutional test case, which William Sampson brought to court. He was a lawyer of Irish Protestant religion who was against the religious oppression that was taking place in Ireland. He was a very astute lawyer who defended the religious cause. The facts and the circumstances of this case are as follows:

The state attempted to force a Catholic priest, Father Anthony Kohlmann to testify in court regarding confidential communication made to him during a private confession. The private confession relates to stolen goods given to him by the penitent during a confession. After the confession, the priest handed back the stolen goods to its lawful owner. During the subsequent criminal trial, the court asked the priest to reveal the identity of the person who gave him the stolen property. The priest refused to disclose the identity of the person. He even refused to divulge the content of the private confession made to him.

The priest argued that he could not disclose the identity of the penitent as such disclosure would violate the priest-penitent privilege. Not only did he refuse to disclose the identity of the penitent, he also refused to disclose the content of the private confession made to him because it would violate his conscience and infringe upon the oath he took as the priest. The disclosure would invade the very privacy that is a basic tenet of his priesthood. The priest intimated that he was prepared to die than betray the seal of confession. The disclosure would also infringe upon the right to free exercise of religion. The prosecutor submitted that the court was not interested in the content of the private confession. The court wanted to know only the identity of the person who gave him the stolen goods.

The court held that the confidentiality of a private confession is paramount for the free exercise of the Catholic faith. The court further held that the priest-penitent privilege does endanger peaceful existence within the community and within the church. It held further that it does not imperil the state in any manner whatsoever. According to the court, the priest-penitent privilege was *sine qua non* for the guarantees of religious freedom. The New York City Court of General Sessions refused to coerce the priest to disclose confidential information and stated:

> After carefully examining this subject, we are of the opinion that such a witness ought not to be compelled to answer. The benevolent and just principles of the common law guard with the most scrupulous circumspection, against temptations to perjury, and against a violation of moral feeling, and what greater inducement can there be for the perpetration of this offence, than placing a man between Scylla and Charybdis, and in such an awful dilemma that he must either violate his oath, or proclaim his infamy in the face of day, and in the presence of a scoffing multitude (p 201)

This case had profound implications for the priest-penitent privilege. On December 10, 1828, the New York State Assembly passed a Bill, which codified the priest-penitent privilege. The Bill covered spiritual communications to clergy of all denominations (Walsh, 2005:1056). The Bill read as follows, “no minister of the gospel, or priest of any denomination whatsoever, shall be allowed to disclose any confessions made to him in his professional character, in the course of discipline enjoined by the rules or practice of such denomination” (Butler, 1829:406).

This Bill was applicable to all religious community irrespective of domination. It covered the priest-penitent privilege for American Anglicans. In South Africa, we do not have the statute that recognises the priest-penitent privilege. The brevity and decisive ruling of the court in *People v Phillips* paved the way for the codification of the priest-penitent privilege in America.

Four years after the case of *People v Phillips* the court in New York had to deal with another priest-penitent privilege case of *People v Smith* (1817). The circumstances of this case attracts the interest of the scholars of the priest-penitent privilege. Christian Smith (the accused) was involved for sixteen years in a family feud with Bornt Lake (the deceased) who was a very difficult neighbour. The accused allegedly shot the deceased and he died. The ballistic report proved that the firearm that killed the deceased was the same firearm owned by the accused. While the accused was in the local jail awaiting trial, he sent for Reverend Peter J. Van Pelt,

his Protestant pastor (the pastor). The pastor visited the accused and he confessed the crime with the view to absolution. The prosecution called the pastor as a witness.

The defence council objected to the testimony of the priest on the ground that the conversation between him and the accused was confidential and relied on *People v Phillips* as his authority. In a twist of things, the pastor said that he was willing to disclose what the penitent said to him during the private confession. On hearing this, the court allowed the pastor to testify and admitted his evidence. However, to the surprise and consternation of the court, the jury found the accused not guilty. Of noteworthiness in this case is what the judge said after the acquittal of the accused:

> Christian Smith, you have been tried and acquitted by a jury of your country, for having taken away the life of one of your fellow creatures. I mean not to censure the jury who acquitted you, it is not my province so to do; I hope they will be able, upon future consideration, to reconcile their verdict to their consciences. But I should feel myself wanting in my duty as a man, if I did not express my opinion that, notwithstanding their verdict, I consider you a guilty, a very guilty man (p 788).

It is not clear in this case why the jury acquitted the accused when the evidence ineluctably pointed to the guilt of the accused. The suggestion from Walsh (205:1053) is that the acquittal of the accused was because the jury was of the view that the evidence of the pastor was inadmissible. If the case of *People v Phillips* is the precedent, it is obvious that the court should not have admitted the evidence of the pastor. If the pastor in this case were an Anglican, the claim of the priest-penitent privilege would have been proper.

The following are some of the cases where the court had to make a pronouncement on the priest-penitent privilege. In *Totten v United States* (1875) case the focus was on matters of national security and secrecy. The case was about the validity of a contract entered into between and secret service behind Confederate lines. The court was of the view that the contract was valid but unenforceable. The Court explained that there are some matters, which the law itself regards as confidential, and the court will not be flippant in violating such confidentiality. Then unexpectedly Justice Field stated in fact that the same principle would apply to the priest-penitent privilege.

This matter-of- fact statement by the judge gave commentators like Yellin (1983:107) the platform to opine that the pronouncement by the Supreme Court in the *Totten* case was a tacit recognition of the priest-penitent privilege. It is instructive to note that this happened at the time when there was no statutory law, which supported the existence of the privilege, and there was a general understanding that the priest-penitent privilege did not exist at common law. This decision further shows that the courts in America were at that time inclined to recognise the priest-penitent privilege.

In another case *Christensen v Pestorious* (1933), a priest met with a road accident victim. The priest was of the view that the accident victim wanted spiritual advice. It turned out that the victim only gave an account of the accident to the priest. The court correctly held that the conversation was not a confession that warranted spiritual advice. The court further found that the priest-penitent privilege therefore was not an issue in this case. This case indicates that each case is triable on its own merits. The intention of the penitent is of crucial importance. Even in the Anglican Church in South Africa, a situation like this would not receive the status of confidential information.

The consistency of the American Courts has been shattered by the court in Louisiana in the case of *Charlet [Parents of Minor Child] v Charlet* (2014). This case pities the priest-penitent privilege against the mandatory reporting laws in Louisiana. The parents of a minor daughter (complainants) sued George Charlet who was the child's priest in the Diocese of Baton Rouge (the perpetrator) damages for pain and suffering because of sexual abuse.

The perpetrator had inappropriately touched her, kissed her and told her he wanted to make love to her. The perpetrator was a parishioner in the church for a long time. The minor child then approached another priest (defendant priest) for spiritual guidance and confession. During the subsequent deposition, the child stated under oath that the defendant priest told her not to tell anyone about the alleged abuse. The child further testified that the abuse continued even after she had informed the defendant priest about it.

Before the trial could start, the church filed a motion *in limine* to prohibit the court from hearing any evidence relating to the private confession made to the defendant priest. The court rejected the motion and held that the child was the holder of the privilege in relation to the private conversation she had with the defendant priest. The minor child was the holder of the

privilege and had the right to waive it. The minor child made the confession and she had the right to request its disclosure.

The church and the defendant priest appealed this decision of the trial court. The Court of Appeal reversed the decision of the trial court. The Court of Appeal was of the view that there was no cause of action against the defendant priest. The court held further that the defendant priest was not a mandatory-reporter and concluded that any evidence relating to the private confession made to him was not admissible. The plaintiff was not satisfied with this decision and approached the Louisiana Supreme Court.

The Louisiana Supreme Court then reversed the decision of the Court of Appeal and reinstated the initial order made by the trial court. The court had to look at the statute of Louisiana relating to priest-penitent privilege. The statute provides that a person have a privilege to refuse to disclose or to prevent another person from disclosing a confidential communication by that person if the communication to clergyman in his professional character as spiritual adviser receives such communication. The court concluded that based on the language of the statute it was evident that the penitent was the holder of the privilege and not the priest as decided by the Court of Appeal. The priest could not claim the privilege as his right. The court concluded that the penitent was free to testify as to her own confession.

The Louisiana Supreme Court further decided that whether the priest had a duty to report the alleged sexual abuse of children is a question of fact and law that had to be determined by the trial jury. The court further held that in terms Louisiana statutes, a member of the clergy is compelled by law to report to the authorities if he believes that physical or mental health or welfare of the a child is endangered as a result of sexual abuse. This duty however does not arise when confidential communications where the clergy member has a duty to keep the communication confidential.

It is imperative to compare the same set of facts with the situation of the Anglican Church in South Africa. Would the defendant priest have been compelled to disclose what the minor child said to him during the confession and spiritual guidance? Firstly, in South Africa there is a mandatory report clause in the Sexual Offences and Related Matters Amendment Act 32 of 2007(the Sexual Offences Act). Section 54 provides:

(1) (a) A person who has knowledge that a sexual offence has been committed against a child must report such knowledge immediately to a police official.

(b) A person who fails to report such knowledge as contemplated in paragraph (a), is guilty of an offence and is liable on conviction to a fine or to imprisonment for a period not exceeding five years or to both a fine and such imprisonment.

The court would have to balance between the provisions of the law in South Africa and the inviolability of the seal of confession in the Anglican Church. The Chapter concerning the conclusion and recommendations deals with this aspect in detail.

4.9.7 Constitutional law considerations

The American Constitution encapsulates both the Free Exercise Clause and the Establishment Clause. These Clauses are Religion Clauses. The Free Exercise Clause protects religious beliefs and practice, and the Establishment Clause protects "the rights of religious and non-religious citizens (O'Malley, 2002:701). The Religion Clauses prohibit the making of any law respecting an establishment of religion, impeding the free exercise of religion and prohibits the making of any law respecting an establishment of religion, impeding the free exercise of religion (First Amendment of United States Constitution).

This means that in the interpretation of the Constitution, the courts should at all times maintain a balance between freedom of religion, that is, tolerating religious belief on one side of the continuum and not promote religion on the side of the continuum. In *Walz v Tax Comm'r* (1970:668) the court warned against taking this balancing act lightly. Cassidy (2003:1701) explain the importance of this caution eloquently when he states, “the religion clauses require at a minimum that the government not establish an official church, and that the government be neutral in its treatment of religions, not preferring or burdening one sect to the advantage or disadvantage of another”.

It is inconceivable that the state in South Africa should establish a church. The assertion that the state should be “neutral in its treatment of religions” (Cassidy, 2003:1701), can find countenance from section 9(1) of the Constitution. This section forbids discrimination on a number of grounds. One of those grounds is religion.

4.9.7.1 The Free Exercise Clause

The American Constitution Amendment 1 states that "congress shall make no law . . . prohibiting the free exercise of religion". The wording used in the Free Exercise Clause prohibits the state from making laws, which suppress religious belief or practice. In other words, the Free Exercise Clause is "prohibitory" in nature. Wolterstorff (2001:539) opines that the main purpose of the Free Exercise Clause is to restrict the state in interfering with the right of the people to exercise their right to freedom of religion. According to Wolterstorff, the restriction ineluctably leads to two intended consequences: Firstly, the state cannot force any person to belong to a particular church or congregation. Secondly, it cannot victimise a person because of his religious preference or belief (p 539).

In South Africa, section 15(1) of the Constitution governs and regulate the right to freedom of religion. Like the Free Exercise Clause, this section prohibits the state from making laws that result in the suppression of religious belief or practice. It also restricts the state from interfering with such a right. The neutrality in dealing with the application of the law in the Free Exercise Clause may be equated with section 9 (1) of the Constitution which demands equal treatment for all before the law.

Three factors determine whether a statute violates the Free Exercise Clause. Brocker (1991:481) lists these three factors as follows:

- Does the statute place a burden on the free exercise of religion?
- Is there a compelling interest that justifies the burden imposed upon the free exercise of religion, and
- Whether the state employed the least restrictive means to satisfy its compelling interest.

In practice, the courts were inclined to be cautionary in interpreting laws that exerted undue weight on religious practices. This was evident in the case of *Department of Human Resources v Smith* (1990) where the court was of the view that the substantial burdening of religious practice is permissible if such burden will not offend against the First Amendment. The court also concluded that in child abuse cases, it was permissible to place substantial burden on religious practice by imposing the mandatory reporting burden. The courts have also made it

clear that that no one enjoys complete protection from every aspect of law that offends against their right to practice religion (*United States v Lee,* 1982).

Although certain churches practice certain sacraments, and receive different treatment than churches that do not practise those sacraments, it does not mean that the law will not be neutral in application. Sacramental difference does rob the law of its neutrality (Soifer 2000:469). An example of different treatment in this regard would be a sacrament of marriage. In some churches in America, a sacrament of marriage is between a man and a woman whereas in other churches it includes people of the same sex. This state of affairs does not mean that the application of the law loses its neutrality when dealing with these two different churches.

In South Africa, for another example, there are churches like the Shembe Nazareth Church that allows polygamous marriages and the Anglican Church that does not allow polygamous marriages. The differences between these two churches does not mean that the law does not treat these churches equally. Marriage is a sacrament and this sacramental difference between these churches does rob the law of its impartiality (Soifer 2000:469).

4.9.7.2 The Establishment Clause

The First Amendment provides in part that "Congress shall make no law respecting an establishment of religion". The Establishment Clause prevents the government from forcing the churches into taking a particular stance or supporting a particular religion. It forces the government to maintain its neutrality when dealing with religion (*Larson v Valente, 1982*). For an example, It forces the government not to make religious observance compulsory (*Zorach v Clauson, 1952*). When dealing with religion, the American courts have developed certain tests to try to maintain their neutrality.

Firstly, there is a multiple-part test. The case of *Lemon v Kurtzman* (1970) discuss the test in detail. Commentators refer to this test as the three-part Lemon Test. This test involves asking the following questions:

- Does the law have a secular purpose? If not, it violates the Establishment Clause.

- Is the primary effect to advance religion or to inhibit religion? If so, it violates the Establishment Clause.
- Does the law foster an excessive governmental entanglement with religion? If so, it violates the Establishment Clause.

Secondly, there is the coercion test. The case of *Lee v Weisman*, (1992) enunciate this test. In this case, the court said:

> The principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause. It is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which establishes a [state] religion or religious faith, or tends to do so.

Thirdly, there is the strict scrutiny test. The case of *Larson v Valente* (1982) explain the test. When dealing with this test, the court said "[s]ince the challenged statute grants denominational preferences, it must be treated as suspect, and strict scrutiny must be applied in adjudging its constitutionality" (p 244).

Can the Establishment Clause find application in the South African situation? As stated above the aim of the Establishment Clause is to prevent the government from forcing the churches into taking a particular stance or supporting a particular religion. It forces the government not to make religious observance compulsory. In South African religious observance is allowed but it is regulated by section 15 (2) of the Constitution which lays down the conditions for such religious observance.

Can the multiple-part test as explained in *Lemon v Kurtzman* (1970) be applicable in South African courts in matters relating to religion? The questions in this multiple-part test may get scrutiny by the courts but it will all come back to the application of section 15 of the Constitution. If the right to freedom of religion is to be limited, it will experience that limitation by the application of section 36 of the Constitution that deals with the limitation of rights. The same would apply to the scrutiny test and the coercion test. From the above it shows that the Establishment Clause does not find application in the South African law because of the

encompassing nature of section 15 of the Constitution. By operation of fact, it means that the Establishment Clause would not apply in the Anglican Church in South Africa.

4.10 Conclusion

Religion is such a nebulous term that it is difficult to define. There are commentators who postulate that religion has an observable and non-observable dimension. Others warn us against accentuating the similarities and downplaying the differences in religions in order to find a concise definition. Even the scholars and courts in the United States have failed to fashion the definition of the term "religion" as mentioned in the First Amendment. Others restrict the definition to the relationship with spiritual beings whilst others pay particular attention the cultural aspects of religion.

The Dutch Reformed Church had a relationship with the state that was symbiotic. This is evident from the relationship between the Political Council and the Church Council. The church needed the government to expand its ministry and the government relied on the church to control certain aspects of the community. The Dutch Reformed Church was of the view that the church should not to undermine the foundations of state authority or to cause chaos in the public sphere.

The Chapter also dealt with the institutional hierarchy of the Anglican Church. The Anglican Church in South Africa adopted the Anglican Communion Covenant. This means that the Anglican Church in South Africa has the authority to pass its own laws and canons "while upholding mutual responsibility and interdependence in the Body of Christ, and the responsibility of each to the Communion as a whole" (Anglican Communion Covenant, par 3.2.2). This indicates that although the Anglican Church in South Africa is autonomous, there should be undiluted loyalty to the canons and principles of the Anglican Communion. This is relevant to the study.*in casu* because it may be necessary to suggest amendments to the existing canons when making recommendations.

The South African law shows that before the advent of the Constitution, the courts did not recognise the priest-penitent privilege. After the adoption of the Constitution, the legal precedent shows that the court is reluctant to rule on the priest-penitent privilege. The pertinent question as whether our courts recognise the priest-penitent privilege remain unanswered.

The Episcopal Church in America and the Anglican Church in South Africa have profound similarities and differences. One of the common features is the ancestral Anglican Communion. There are differences relating to the meaning of the word clergy. There is a modern view on the definition of the word clergy. The modern view is to try to be as inclusive as possible in the definition to accommodate different religious denominations. Cassidy (2003:1656) postulates that the safe approach to the definition is to include even any person doing the same function as the clergy. He confirms this approach as the majority view of most religious commentators and the courts. This view will also not find comfort in the Anglican Church in South Africa because the definition of the clergy in the Anglican Church is clear. A member of the clergy should undergo formal ordination.

The situation in America as a far as the type of communication that receives protection from the priest-penitent privilege is concerned, is different from the situation in the Anglican Church in South Africa. There may be similarities here and there but the fundamental difference is that in America statutory law regulates the type of communication that receives protection by the priest-penitent privilege. Unlike the situation in South Africa where there is no statutory regulation specifically for the priest-penitent privilege, in America it is therefore easy to ascertain which communication receives protection and which does not.

From the above it shows that the Establishment Clause does not find application in the South African law because of the encompassing nature of section 15 of the Constitution. By operation of fact, it means that the Establishment Clause would not apply in the Anglican Church in South Africa. In South Africa, the right to freedom of religion gets protection from section 15(1) of the Constitution. Like the Free Exercise Clause, this section prohibits the state from making laws that result in the suppression of religious belief or practice. It also restricts the state from interfering with such a right. The neutrality in dealing with the application of the law in the Free Exercise Clause may be equated with section 9 (1) of the Constitution which demands equal treatment for all before the law.

Chapter 5

The responsibilities of the Anglican priest in terms of the priest-penitent privilege

5.1 Chapter overview

The aim of this chapter is to determine the responsibilities of the priest of the Anglican Church in terms of relevant documents when something *contra bonos mores*[1] is revealed to the priest. This Chapter unpacks how the priest can deal with such a situation from a church perspective and a legal perspective. The church perspective implies the application of the canon law and other relevant Anglican documents. The legal perspective involves the application of the Constitution and other legal prescripts. As stated in chapter 1, the aim is not to solve all attendant legal problems but to look at the problem from church law perspective.

This discussion has three categories. The first category relates to a priest-penitent privilege where the penitent confesses to a sin and the sin is something that is personal to the penitent but it is not a crime. An example of this would be the private confession by the penitent that he has committed adultery. The second category is about a priest-penitent privilege where the penitent makes a private confession about something that will happen in future. For an example, the penitent confesses to the priest that he intends to kill somebody.

The third category is concerned with a priest-penitent privilege where the penitent makes a private confession that is a sin and a crime: for an example murder. Murder is a transgression against God's law; in other words, it is a sin. Murder is also a contravention of common law, which means that it is a crime. Included in this category is a priest-penitent privilege where the penitent confesses to a crime that relates to the sexual abuse of children. This category is included because of the sexual abuse of children by the members of the clergy that have received such negative publicity within the church and society. The responsibilities of the Anglican priest are not the same in these three categories, as discussion of the recommendations will show.

[1] The explanation of the parameters of the term, *contra bonos mores* is in Chapter 1.4.

5.2 When the private confession is not a crime

When the private confession to a priest is a sin and not a crime, for example adultery, the responsibilities of the Anglican priest are that he shall not disclose the content of such confidential information to anyone. Adultery is not a crime in terms of the laws of the land. It is however, a sin and is *contra bonos mores* in terms of God's law. The testing of this happened during the month of May in 2014, when the Archdeacon of Durban Central, Rev Msimango had a meeting with all the priests of Durban Central archdeaconry. Rev Msimango invited the researcher to explain the research to the priests. After explaining the objective of the research, the question posed to the priests was what they would do if confronted with a situation where they should disclose the contents of a private confession if such confession is not a crime. All the priests were adamant that they would never betray the inviolability of the seal of confession. This is indicative of the attitude of the priests towards the confidentiality of a private confession.

5.2.1 The Council of Durham

As indicated in Chapter 3, even the early English Church councils strengthened the inviolability of the seal of confession. For an example, in 1220 the Council of Durham provided that:

> A priest shall not reveal a confession, let none dare from anger or hatred or fear of the Church or of death, in any way to reveal confessions, by sign or word, general or special, as (for instance), by saying "I know what manner of men ye are" under peril of his Order and Benefice, and if he shall be convicted thereof he shall be degraded without mercy (Wilkins, 1737).

The Council of Durham reveals the stance of the English Church as far as the seal of confession is concerned. Firstly, the use of the word "shall" is peremptory. It signifies that the priest shall not reveal the contents of a private confession. The priest has no options in this regard. The use of the words "anger", "hatred" and "fear" is indicative of the fact that there is no emotional excuse for violating the seal of confession. The responsibilities of the Anglican priest are clear in this regard. In terms of the Council of Durham, the priest shall not disclose the contents of a private confession.

5.2.2 Documents of the Anglican Church

The documents of the Anglican Church do not distinguish if the subject of confession is *contra bonos mores* or not. In terms of Anglican Church documents, the confidential information

between the priest and the penitent is not subject to disclosure. Documents in the Anglican Church forbid the disclosure of confidential information by the priest. The Anglican Church is an international Communion, and laws concerning priest-penitent privilege differ from country to country (Doe, 1988:434). Each different member church of the Anglican Communion has its own canons or other governing regulations (Bays, 2012:25ff).

This state of affairs in the Anglican Church means that the practice of private confession has a varying degree of importance and application in the different churches of the Anglican Communion (Doe, 1988:434). This is despite the fact that all these different churches base their doctrinal position upon the doctrine expressed in the Book of Common Prayer (1662). The doctrine encourages the use of private confession by all who have sinned and want to reconcile with God. Despite the huge range of attitudes towards the practice, there is an understanding among the clergy throughout Anglican Churches that the communication between the priest and the penitent is inviolable (Archbishop Council, 2006:270).

When the Church of England introduced new canons in 1969, they repealed most of the canons of 1604. There was only one canon that remained unchanged, namely, Canon 113 (Gidson, 1761; Bursell, 1990:84-95). The canon remains in force even today. According to this canon, the seal of confession is inviolable. It is noteworthy that Canon 113 creates one exception to the inviolability of a private confession. The exception lies in certain “crimes as by laws of this realm” (Canon 113, 1604). This exception entails that the state could pass certain laws that would override the seal of confession. This is further indicative of the fact that it was never the intention of the seal of confession to protect penitents from prosecution. This exception find discussion below in this chapter.

There are other Anglican documentation, which protects the seal of confession. The Guidelines for the Professional Conduct of the Clergy (2003) are currently in force throughout the Church of England. Section 7.2 thereof provides that "there can be no disclosure of what is confessed to a priest. This principle holds even after the death of the penitent. The priest may not refer to what has been learnt in confession, even to the penitent, unless explicitly permitted". This shows that the seal of confession even “lives” after the death of the penitent. It is noteworthy that the seal may be broken if “explicitly permitted”. This is an exception, to the rule that priest shall not disclose the contents of a penitent’s private confession. There is also section 7.4, which provides that "if a penitent's behaviour gravely threatens his or her well-being or that of others, the priest, while advising action on the penitent's part, must still

keep the confidence". The seal of confession is inviolable even in instances where there are potent threats.

In South Africa, the Anglican Church relies on the Anglican Prayer Book, which provides that: “Every priest in exercising this ministry of reconciliation, committed by Christ to his Church, is solemnly bound to observe secrecy concerning all those matters which are before him” (Anglican Prayer Book 1989:448). Although this passage mentions “ministry of reconciliation”, one can draw an inference that a private confession is included in the ministry of reconciliation. One of the aims of a private confession is to reconcile with God. The words “solemnly bound” is indicative of the weight accorded to the secrecy of the ministry of reconciliation.

The Anglican Prayer Book is not the only document that supports the seal of confession. There is also the Archbishop Council (2006:270) which provides *inter alia* that “the ministry of reconciliation requires that what is said in confession to a priest ***may*** not be disclosed". It is however strange that the Archbishop Council uses the word “may”. This can mean that it is not compulsory to seal the confession. Even certain canons like canon 37 part (c) (s) prescribe offences for a “breach of confidentiality of whatever nature” (Canons of the Anglican Church of Southern Africa 2005-2011). This canon does not stipulate the circumstances under which confidentiality may arise. It just warns that if there is a certain measure of confidentiality attached to a communication, the priest may not divulge it to the other person. This strengthens the position of the seal of confession in the Anglican Church.

The inviolability of the seal of confession is not unique to the Anglican Church. As shown in Chapter 3, the Roman Catholic Church practises this principle to the letter. Even the Lutheran Church protect the inviolability of the seal of confession (Minutes of the United Lutheran Church in America, 22nd Biennial Convention, 1960, quoted in Reese, 1963:68). "No minister . . . shall divulge any confidential disclosure given to him in the course of his care of souls or otherwise in his professional capacity, except with the express permission of the person who has confided in him or in order to prevent a crime".

The inviolability of a seal of confession is traceable in the history of the Anglican Church. However, it is not just a historical principle; it is an ecclesiastical principle that should enjoy

recognition at all costs. Oraegbunam (2015:17) has this to say about the inviolability of the seal,

> Will the court succeed in extracting, even if *vi et armis*, the information sought? Well, one may hold that it depends on the priest's individual commitment to his calling which demands, *inter alia*, total obedience to church law and discipline. Canon law has provided for the absolute inviolability of confessional seal with the threat of automatic excommunication at the event of breach. The result is that the priest would be placed at the crossroad of choosing to obey the human law rather than God's law or vice versa.

The priesthood is a calling rather than an ordinary job; it is unlikely that the priests would give in to the threats of imprisonment by the courts. Moreover, the courts will not prefer to send the priest to jail for doing his sacramental duties. It may even be likely that public policy would be on the side of the priest considering that the majority of the society in South Africa is religious. The courts also cannot be keen to enter a religious arena. This is symptomatic of the tension between church law and secular law.

5.3 Recommendation

Except in cases of crimes where there is an express exclusion and where the offence is sexual abuse of children, the priest shall not divulge the contents of a private confession made to him in confidence. The canons of the Anglican Church in South Africa are clear in this regard. Even if the court compels the priest to come and testify, he should inform the court that the oath binds him as the priest that he cannot disclose the contents of a private confession made to him in confidence by the penitent. Every diocese should issue a directive to the effect that if the court requires a priest to come and testify, there should be a consultation with the Bishop so that the church can provide the best defence for the priest. The Anglican Church in South Africa should task its legal department to monitor the development of law regarding the priest-penitent privilege.

5.4 When the private confession relates to future events

The seal of confession insulates confidential information in respect of something that has happened. Does the seal of confession protect information in respect of something that will happen in future? In other words, can something that will happen in future be *contra bonos mores* for purposes of a seal of confession? For an example, when the penitent confesses

to the priest that he is going to kill the person who raped him in prison when that person is released the following day. What will happen if the priest fails to convince the penitent not to do it? What are the responsibilities of the priest in this regard in term of church law and in terms of civil law?

5.4.1 Church law and future events

If the penitent confesses that he is going to kill somebody in future, the mere thought to kill somebody is a sin and *contra bonos mores* in terms of God's law (see Proverbs 6:18; 15:26; Mathew 5:27-8). The scenario creates a problem in that there is no one to compel the priest to warn the person who may lose his life. If the priest does not report the matter to the police and the penitent kills the rapist, the death of the rapist would weigh heavily on the conscience of the priest. His failure to report the matter to the police would have been the direct cause of death. The priest would have caused the death of the rapist by omitting to report. Moreover, public interest would demand that the priest reports this matter. It would be *contra bonos mores* for the priest not to report this matter to the authorities. The submission therefore is that the priest should report the matter to the police to prevent the loss of a life in future. This is an exception to the inviolability of a seal of confession.

The second problem is that the priest may violate the seal of confession if he informs the authorities of the impending murder. Certain commentators support the breaking of the seal of confession in order to save a life. Lyndwood (1534) was of the view that beneficial disclosure was acceptable. Beneficial disclosure includes the disclosure of physical harm to another person or killing of another person. Lyndwood advises however, that there should no disclosure of the identity of the penitent. This means that only the contents of the communication may be subject to release if it will benefit the other person but not the identity of the penitent.

The shielding of the identity of the penitent also finds support from Bevilacqua (1996:1736) when he explains the religious purpose of the seal of confession. He refers to the sacramental seal in a strict and a wide sense. In the strict sense, the seal forbids any divulging of communication by the priest that could expose the identity of the penitent (p 1736). This prohibits any comment or action from the priest that will expose directly or indirectly the identity of the penitent. In the wide sense, any disclosure that could "render sacramental confession itself burdensome or odious either to an individual penitent or to penitents in general" is forbidden (p 1736).

5.4.2 Civil law and future events

In criminal law, which is secular law, a mere wish to kill somebody is not a crime. There is also no positive duty on the priest to report to the police that the penitent wishes to commit murder. (see *Minister of Police v Ewels, 1975*)[2] This ethical dilemma is contained in Chapter 3.10 of the study. (Repeated here for ease of reference). It was explained by an Assistant Minister in the Episcopal Church in New Hampshire, Donald Welles Jr. in his paper *"Violare inviolabile*: the ethical paradox of the confessional seal" (Welles Jr. 1966:22). The scenario is as follows:

The priest frequently visits sentenced prisoners in jail. During some of these visits, the prisoners sometimes privately confess to the priest. During one of the visits, prisoner A approaches the priest and confesses that he is the one who committed the crime for which prisoner B is going to hang the following day. The confession is in detail with conclusive evidence of the commission of the crime by prisoner A. The priest informs prisoner A that he cannot grant absolution unless he goes to the authorities and furnish this information. Prisoner A refuses to go and tell the authorities. The priest uses all his persuasive skills to convince prisoner A to go to the authorities. Prisoner A blatantly refuses to oblige.

The seal of confession prevents the priest to disclose the confidential information available to him. The prisoner remains recalcitrant because of his diabolical choice. The ethical dilemma here is whether an innocent man should die because of the inviolability of the seal. Which is important; the seal of confession or the life of the innocent man? There is no legal obligation on the priest to go and tell the authorities. Public policy on the other hand enjoins him to report this matter. However, he cannot violate his oath of office and at the same time his Christian conviction dictates that he should love his neighbour (Mark 12:30 NIV).

Before the address of this ethical dilemma, there is a need to mention first that Welles Jr who created this scenario of an ethical dilemma is an American. In America, the statute recognises and regulates the priest-penitent privilege. This dilemma is solvable here from a South African perspective. What are the responsibilities of an Anglican priest in this scenario? Should he let the innocent man hang for the crime he did not commit?

Since the priest failed to convince prisoner A to go to the authorities with this information, the priest can do the following: Firstly, he can tell prisoner A that he is not going to grant him

[2] *Minister van Polisie v Ewels* 1975 (3) SA 590 (A) deals with the positive duty of police to act. No such positive duty exist for priests

absolution until he tells the authorities that he is the one that committed the crime. Secondly, he is not going to let authorities to punish an innocent man for the crime he did not commit. Thirdly, he can approach the relevant authorities with this information to save an innocent man.

In this instance, public policy demands that the priest should report this to the relevant authorities. The priest-penitent privilege is not a means to protect criminals from retribution. There will be instances when the public policy overrides the sanctity of the seal of confession (Gatta and Smith, 2012:53).The failure of the priest to report the communication is *contra bonos mores.* The main reason for the private confession is to reconcile the penitent with God after the commission of a sin. The retribution is a separate process that the penitent should face.

5.5 Recommendation

It is highly recommended that the canons of the Anglican Church in South Africa reflect that the priest may break the seal of confession in situations where there is serious future harm to third parties. In other words, failure to disclose the confidential information in this instance is *contra bonos mores.* It is therefore critical for canons to distinguish between situations where the private confession relates to past event or the future conduct that may cause harm to others. Where there is a future risk of harm to others, it may be legally and morally incumbent upon the priest to notify the state authorities and thereby break the seal of confession.

5.6 When the private confession is a crime

There is separation between ordinary crimes and sexual crimes committed against children.

5.6.1 Ordinary crime

When a priest has heard a private confession from a penitent and the private confession is an offence, the priest becomes a compellable and competent witness in terms of section 192 of the Criminal Procedure Act, 1971. He is compellable to testify in a court of law in respect of such an offence in terms of section 189 of the same Act. On the other hand, the seal of confession debars the priest to divulge the contents of a private confession made by the penitent. The previous chapters dealt in detail about the inviolability of the seal of confession. It also dealt with how the courts of law deal with the priest-penitent privilege. This is an uncomfortable position for the priest. He should however, understand that the church is a link

between Christ and the world (Berkhof, 1985:349). What are duties of the priest in this regard taking into account that a crime is *contra bonos mores?*

The confidential communication between the priest and the penitent during a private confession is not subject to disclosure. However, there are instances where the penitent confesses to a sin, which is also a crime and therefore *contra bonos mores*. When this happens, the priest should understand that there are always consequences for crime and he should make this clear to the penitent. The priest cannot decide on his own which crimes he will report to the police and which ones he will not. He should report all crimes, even victimless crimes like possession of a firearm.

The church should be intolerant of any type of crime. There should not be a perception that the church is an institution that harbours criminals. The penitent cannot try to circumvent justice by confessing to the priest. There should be restitution for wrong done. This is even more important in cases where the third person is the victim of the crime committed. This is an example of the failure to disclose that is *contra bonos mores.* These are instances where the moral obligation overrides the sanctity of the seal of confession (Gatta and Smith, 2012:53).

5.6.2 Sexual abuse of children

Sexual abuse of children is definitely *contra bonos mores.* The Anglican Church in South Africa like all the Anglican Churches is under social pressure to deal with sexual abuse of children in the church. In the Australian Newspaper *The Observer* dated16 December 2010, the Anglican Church is accused of having “swept under the carpet” the child abuse cases committed by Wilfred Edwin Dennis. The Anglican Church in South Africa in 1970 excommunicated him for sexually assaulting altar boys. The church accepted him back in 1971.

The diocese transferred him from one church to another. He committed seven more cases of sexual assault. He raped three more boys and was ultimately tried and sentenced. Child abuse cases in the church have meant that clergy must be aware when they are under a duty to disclose information where the protection of children is concerned. The child abuse cases in the church have also exposed the clergy in terms of their training in counselling the victims of sexual abuse.

Another dimension is that public policy demands that priests cannot hide behind the seal of confession where the sexual abuse of children is concerned.[3] Professor Margaret Battin exposes the strength of the seal of confession when she gives the following illustrative example: In the city of Langerberg in West Germany, Jurgen Bartsch, a fifteen-year-old confessed to his priest that he had committed a murder. He further informed the priest that he intended to commit other murders. The priest attempted to persuade Bartsch to give himself up to the police to no avail. The inviolability of the seal of confession prevented the priest to disclose this information to anyone. Bartsch killed eleven more young boys after sexually assaulting them (Battin, 1990:20-76).

This is a typical case of sexual abuse and murder of children. In the above example by Battin, it is evident that the priest may claim that the seal is inviolable and he cannot divulge what was said it him during the confession. Who will then protect our children from murder and sexual abuse if the priest cannot disclose such information? Public policy has turned against the seal of confession in such cases. Sexual abuse of children *and* failure to report sexual abuse of children is *contra bonos mores.* What can the priest of the Anglican Church in South Africa do if called to testify about confidential information in sex abuse cases?

The Anglican Church should be proactive in this regard. There should be guidelines formulated to deal with such issues. Fortune (1986:582) opines that the church should deal with sexual abuse of children that happens in the church by involving an external organ or institution. The church cannot investigate itself. She contends that there should be a report of sexual abuse of children because the victims of such sexual abuse need counselling. Priests lack necessary training to deal with counselling in sexual abuse cases. She goes further to state that offenders will continue to abuse children unless they get special treatment also. Treatment of offenders is most effective when done under the direction and supervision of the courts. Quick forgiveness of the offender is likely to be a form of cheap grace, and is unlikely to lead to repentance.

5.6.3 Alignment with legislation relating to sexual abuse of children

The Anglican Church in South Africa does not exist in a vacuum. It operates within the periphery of the law. It is also a moral guardian of the society. There should be no perception that it is acting *contra bonos mores.* While it is acceptable that the seal is inviolable, the

[3] For definition of sexual abuse, see Burchell and Milton, 2005:734.

church should meet the state halfway in cases of abuse of children. It should try to adapt the canons to the existing legislation where the abuse of children is concerned. Public policy demands the protection of children, as they are the most vulnerable segment of society. There should not be a perception that the church protects the clergy or any person for that matter who sexually abuse children.

However, this does not mean that the church should align all its canons to government legislation. Firstly, that would be impossible, as there is a constant tension between church law and the law of the land. According to Smit (2018:2), the Christ government finds expression through the Word and the Spirit". The Spirit works within the believers (*in nobis)* (p 2). The law of the land on the other hand does not operate within a Spiritual realm, but it finds its existence from the wishes of the people who occupy that land (Bavinck, 1930:371). This constant tension is one of the reasons why it would be impossible to align all church canons to state legislation.

Secondly, the application of the state law applies differently in the church environment compared with other institutions. Smit (2018:25) gives an example that underlies this assertion. He states that some churches do not define the relationship between the minister and the church in terms of employer-employee relationship. They use theological presuppositions to explain this relationship (p 25). Therefore, the alignment of canons to legislation should find application in this context.

In South Africa, there is a law that enjoins all people to report sexual abuse of children. The seal of confession should not mitigate the mandatory reporting of sexual abuse of children. Section 54 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 is clear on mandatory reporting:

> Obligation to report commission of sexual offences against children or persons who are mentally disabled
>
> *(*1) (a) A person who has knowledge that a sexual offence has been committed against a child must report such knowledge immediately to a police official.
>
> (b) A person who fails to report such knowledge as contemplated in paragraph (a), is guilty of an offence and is liable on conviction to a fine or to imprisonment for a period not exceeding five years or to both a fine and such imprisonment.

(2) (a) A person who has knowledge, reasonable belief or suspicion that a sexual offence has been committed against a person who is mentally disabled must report such knowledge, reasonable belief or suspicion immediately to a police official.

(b) A person who fails to report such knowledge, reasonable belief or suspicion as contemplated in paragraph (a), is guilty of an offence and is liable on conviction to a fine or to imprisonment for a period not exceeding five years or to both a fine and such imprisonment.

(c) A person who in good faith reports such reasonable belief or suspicion shall not be liable to any civil or criminal proceedings by reason of making such report.

In the Anglican Church, there should be an alignment of canons with section 54. In the attempt to align the canons with section 54, there is glaring use of the masculine pronoun, he. The intention is not to discriminate against any gender. The established language rules relating to gender expressions dictates such an approach. It is also instructive to mention that in paragraph 1.4 on page 8, there is an explanation on the use of the masculine pronoun. The following is an attempt to formulate such a canon:

Canon x:

Whereas section 9 of the Constitution of South Africa prohibits discrimination on religion amongst other grounds;

Whereas section 15 of the Constitution of South Africa provides for the right to freedom of religion;

Whereas Canon 113 of the Church of England provides for the inviolability of the seal of confession;

Whereas the Guidelines for the Professional Conduct of the Clergy (2003) also provide that the priest shall not divulge what was said to him during a private confession;

Whereas in terms of Anglican Prayer Book (1989) the priest is solemnly bound to observe secrecy concerning all those matters which are before him and

Whereas the Anglican Church in South Africa binds its priests to the inviolability of seal of confession in general, this canon provides that:

(a) A priest who has knowledge through a private confession that a sexual offence has been committed against a child must advise the penitent to report such knowledge immediately to a police official.

(b) If the priest who has knowledge through a private confession that a sexual offence has been committed against a child, and has advised the penitent to report such knowledge immediately to a police official and the penitent refuses to report same to the police, the priest shall report such knowledge to the police.

(c) The priest who reports the knowledge of that a sexual offence has been committed against a child by the penitent shall not be deemed to have violated the seal of confession.

The importance of the canon is that it will be in line with the mandatory reporting that is envisaged by section 54 of the of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007. What is also significant about this canon is that it will specifically exonerate the priest in terms of church law if he divulged the confidential information in compliance with section 54. It will also show that the Anglican Church will not tolerate the sexual abuse of children by hiding behind the inviolability of the seal of confession. The words of Bok (1983:30) resonate in this regard “the premises supporting confidentiality are strong, but they cannot support practices of secrecy whether by individual clients, institutions, or professionals that undermine and contradict the very respect for persons and for human bonds that confidentiality was meant to protect". It will show that the Anglican Church is serious about curbing sexual abuse of children in the church.

The canon will be in line with the Australian guidelines relating the same matter. Private Confession Pastoral Guidelines with Special Reference to Child Sexual Abuse in Australia (2011:1) provides that:

> Should a priest form the view that a person wishes to reveal a criminal offence, the priest should immediately give an explanation of the limits to confidentiality and the conditions of the granting of absolution if a formal confession (according to a Rite of the Church) is made. These may include reporting the criminal offence to the police and making reparation to the victim. If a person wishes to proceed with the formal confession then the priest and the would-be penitent should go to some private place (ideally the parish church) where the confession would be heard.

The prevalent sexual abuse of children in the Anglican Church necessitated these guidelines in Australia. The guidelines advocate mandatory reporting to the police. This canon is therefore not peculiar to the province of South Africa.

This canon will also be in line with the American approach towards mandatory reporting. The study has shown that statutes in all federal states regulate the inviolability of the seal of confession in America. However, there is unanimity amongst federal states that in matters relating to sexual abuse of children, the mandatory reporting principle applies. Winters (2012:30) summarises this perfectly when he states:

> Abrogating the clergy exemption would result in a neutral statute of general applicability. Indeed, because abrogation would result in a statute that obligates members of the clergy similar to other professionals, the resulting law would be more neutral and more generally applicable. Attempts to justify the exemption do not find purchase because hybrid claims are of dubious constitutionality and individualized governmental assessments cannot apply to across-the-board criminal prohibitions. Accordingly, abrogating the clergy exemption to mandatory reporting laws does not raise Free Exercise Clause problems.

Even the Free Exercise Clause is not safe from mandatory reporting where the inviolability of the seal of confession is concerned. Winters (2012:33) again puts it succinctly:

> Abrogation of the clergy exemption does not raise Free Exercise Clause problems. Instead, the exemption is itself a violation of the Establishment Clause. After discussing the exemption's constitutional defects, the gains a society receives by abrogating the exemption must be considered.

The protection of the child from sexual exploitation outweighs the inviolability of the seal of confession. Winters (2012:34) confirms this when he states, “[t]o be sure, the rights of the penitent are important. However, in the face of child abuse, the rights of the at-risk child outweigh penitent rights. While the notion of disclosing confidences is disturbing, even more disturbing are the devastating effects experienced by victims of child abuse”.

Public policy acknowledges the vulnerability of children and it will not allow the clergy to hide behind the seal of confession. Winters (2012:34) supports this view when he avers that “though clergy members may loathe violation of what they consider to be sacred trust, these factors, which are peculiar to children and the injuries they suffer, make non-reporting of known child abuse far more loathsome”. Moreover, according to Backstrom (2011:20) sexually abused children suffer even more when the abused has long taken place.

5.7 Recommendations

5.7.1 Ordinary crime

In these instances, where the private confession is in relation to a crime, the priest should indicate to the penitent that the crime should get the attention of the authorities. This is even if the crime is in the eyes of the priest justifiable. For an example, if the non-believer blasphemes the Holy Spirit in the presence of Christian and the Christian severely assaults the non-believer. This may appear justified but it is a crime. The priest should explain that and the penitent should present himself to the authorities. The failure of the priest to do this is *contra bonos mores.* Gatta and Smith (2012:55) state that the priest should make the penitent understand he should accept the consequences of the crime and report it to the authorities.

The importance of the fact that the priest should report crime or advise the penitent to submit himself to the authorities cannot be overstated. This is more important if an innocent person goes to jail for a crime he did not commit. For example, the penitent confesses to the priest that he killed a person. The police however, arrest the wrong the person. The priest is obliged to implore the penitent to hand himself to the authorities so that an innocent person cannot go to jail for the crime he did not commit. Failure to report something like this is *contra bonos mores*. One can imagine if South Africa still had the death penalty and an innocent person sits on death row when the priest knows who committed the crime.

This situation is worse if the penitent does not report the crime to the authorities in order to avoid restitution. The priest should explain to the penitent that the forgiveness of sins and reconciliation with God is one process and that the other process is justice and or restitution. These processes are not the same. Gatta and Smith (2012:55) hold that reporting the crime to the authorities is important "especially if there is a chance that an innocent party might otherwise fall under suspicion". The contention by Gatta and Smith makes moral sense. The aim of the seal of confession is not to protect people that have committed crimes so that they can escape justice and innocent people go to jail for crimes that they did not commit. The main purpose of the private confession is that the penitent should off-load his burden of sin and ask for forgiveness so that he may reconcile with God.

5.7.2 Sexual abuse of children

The alignment of the Anglican Church canons with section 54 will go a long way in improving the trust between the church and the community at large. The church on the other hand

should understand that the mandatory reporting is not to attack the inviolability of the seal of confession, but to protect the most vulnerable members of society. Sexual abuse of children *and* failure to report sexual abuse of children is *contra bonos mores.*

5.8 Conclusion

Although the practice of private confession has a varying degree of importance and application in the different churches of the Anglican Communion, there is an understanding among the clergy throughout Anglican Churches that the communication between the priest and the penitent is inviolable. The Anglican Prayer Book and canons are evidence to that effect.

However, it is highly recommended that the canons of the Anglican Church in South Africa reflect that the priest may break the seal of confession in situations where there is serious future harm to third parties. The seal of confession should not be applicable where the confession relates to the sexual abuse of children. To effect mandatory reporting there should be a canon aligned with section 54 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007. The mandatory reporting of the sexual abuse of children outweighs the inviolability of the seal of confession.

Chapter 6

Summary and conclusions

6.1 Chapter overview

This chapter accords the opportunity to ascertain that all the objectives of the study received adequate attention. The objectives of the study are the following:

- Determine what the Anglican Church understanding of the priest-penitent privilege is, in terms of relevant documents of the church.
- Determine what is the theological-canonical meaning and application of the confidentiality of the priest-penitent privilege with regard to church state relationship.
- Determine what the South African courts position on the priest-penitent privilege is, before and after the 1996 Constitution.
- Determine what is the responsibility of the Anglican priest in terms of relevant documents when something *contra bonos mores* is revealed to the priest.

The review of each objective takes place below.

6.2 Anglican Church understanding of the priest-penitent privilege in terms of relevant documents of the church

The discussion on this objective revolved firstly around the Anglican Church institutional structure. This is important because it is going to be difficult to understand Anglican canon law without understanding the institutional hierarchy. The second aspect is the private confession. The discussion on private confession contributes to the understanding of the priest-penitent privilege because it is the private confession that attracts the confidentiality of the confession. The third and last aspect that helps to achieve this objective is the discussion of priesthood. The priest claims the priest-penitent-privilege.

6.2.1 The Anglican Church institutional structure

The conclusion is that the Anglican Church in South Africa falls under canonical supervision of the Anglican Church of Southern Africa. It is part of the Anglican family, which exists all over the world. This was evident in the study when the random comparison with America and Australia took place. Although the governance of the respective provinces falls within the circumference of those provinces, the Church of England serves as the common ancestor. The meeting of the global communion in Lambeth Conferences and Anglican Consultative Councils is evidence to this effect (Brown, 2012:49).

The discussion shows that the Archbishop of Canterbury sits in the “Anglican Headquarters” in England. He is the glue that keeps the Anglican Church together. The Anglicans are visible in churches throughout the world but they share common characteristics and liturgy (Green, 1996:58). They base their faith on the Bible, which is, the Old and New Testaments, traditions of the apostolic church, historic episcopate, and writings of the Church Fathers (Bays, 2012:22). The Anglican Prayer Book, which is the collection of services that worshippers in most Anglican churches used for centuries, is another common denominator (Nuttall, 2006).

The study shows that the institutional hierarchy of the Anglican Churches is largely similar. The utilisation of human resources is similar. The ranks relating to the governance are similar (see Hefling, 2006:2 and Nuttall, 2006). There are Bishops, priests, deacons, and lay ministers. These officials have important but different roles in church ministry. Because of these mentioned characteristics, it is safe to say that the Anglican Church in South Africa is part of the broader Anglican family.

6.2.2 Private confession in the Anglican Church

The study shows that there is a difference between the private confession and penance. In theology, a confession is simply a process whereby a person admits his sin, and receives absolution or forgiveness from a priest or a person acting in *persona Christi*, believing firmly that God will forgive all the sins through this process (Becker, 2004). Penance on the other hand is a payment of debt for sins that have been committed. Otto (1974:434) views penance as sacramental satisfaction, which is the penitential work, imposed by a confessor in the confessional in order to make up for the injury done to God and to atone for the temporal punishment for the sins that have been committed.

Contemporarily, the Anglican Church practises two forms of a confession. The first form of a confession is the one performed before the services of Holy Eucharist. This form involves a general confession to sin, which present members of the congregation say together during the service. The second form of confession in the Anglican Church is an auricular or private confession (Anglican Prayer Book 1989:449). This happens in a private meeting with the priest in a room or a traditional confessional.

It is noteworthy that in the Anglican Church, there is no requirement for private confession, but a common understanding that it may be desirable depending on individual circumstances (Anglican Prayer Book, 1989:448). In fact, an Anglican is not even compelled to make a

confession to a priest. The classic Anglican aphorism regarding this elastic practice to private confessions is "All may; none must; some should." This aphorism is succinctly explained by Becker (2004: 1ff).The fact that in the Anglican Church, a private confession is not compulsory complicates the issue of confessions in the church

6.2.3 Priesthood in the Anglican Church

A priest in the Anglican Church forms part of the ordained clergy. Ingham (1986:149) points out that lay priests form part of the ministry of the church. In the Anglican Communion, generally speaking, anyone who forms part of the ordained clergy is a minister. Buchanan (2006) in his definition of a minister includes lay ministers “as people who are of the laity, but hold some kind of charter or authorization for tasks they fulfil”. The lay priest cannot perform some of the functions performed by the priest. For an example, a lay priest or lay minister does not have canonical *standi* to hear private confessions. The lay priest was therefore not the object of the study.

Secondly, part of the ministry of the priest is to “declare pardon in the name of God” (Anglican Prayer Book, 1989:433). This means that the priest can hear private confessions and make a pronouncement of absolution. He is doing that all in the name in the name of Christ. In line with this assertion, is the contention by Schall (2009:1) when he states, “Every priest is there *in persona Christi*, not in his own charming or otherwise qualified personality”. A priest is therefore not engaged in his own frolic or self- aggrandisement, but represents Christ during a private confession. The concept of priesthood in the Anglican Church in South Africa is similar in America, except, that in America the statute regulates it.

6.2.4 Overview of the objective

There is fulfilment of this objective. The Anglican documentation and views of prominent commentators supported the objective. The Anglican Church practise a sacrament of a private confession. However, there is no requirement for private confession, but a common understanding that it may be desirable depending on individual circumstances. A priest who is acting in the place of Jesus Christ administers the private confession and grants absolution.

6.3 Theological-canonical meaning and application of the confidentiality of the priest-penitent privilege with regard to church state relationship

The discussion of this objective included the seal of confession or the inviolability of the private confession in the Anglican Church and the priest-penitent privilege.

6.3.1 The seal of confession

The study shows that one of the reasons that prompt people to confess their sins is the knowledge and understanding that whatever they say to the priest will not experience disclosure to anyone. Smith (1984:2) adds that “at the same time, spiritual assistance surely will be facilitated by the knowledge that the cleric will not be forced to divulge a counselee's admissions in court or to the police, or be tossed into prison for refusing to do so”.

It is in this light that the confidential information between the priest and the penitent during a private confession enjoys protection by the seal of confession. This effectively means that a priest shall not divulge what the penitent to anybody said. “Anybody” means that the priest cannot even confer with other fellow priests concerning the private confession made by the penitent. He cannot even divulge the content of a private confession to the spouse of the penitent. The private confession is sealed. According to McCarthy (1967:134), there is a “sacred trust” between the priest and the penitent. The priest shall not disclose the communication elicited during the private confession even if the penitent agrees that the priest may divulge such.

The study shows that the seal is relevant even to the contemporary Anglican. Bevilacqua (1996:1736) succinctly explains the religious relevance of the seal of confession. He refers to the seal of confession as a sacramental seal. The obvious reason for such a reference by Bevilacqua may be that the seal of confession seals the sacrament of a private confession. He then advocates that the sacramental seal warrant definition in a strict and a wide sense.

In the strict sense, the seal forbids any divulging of communication by the priest that could expose the identity of the penitent. This means that any comment or action from the priest that will expose directly or indirectly the identity of the penitent is not permissible. In the wide sense, any disclosure that could “render sacramental confession itself burdensome or odious

either to an individual penitent or to penitents in general" is forbidden (Bevilacqua, 1996:1736). The inevitable conclusion is that the seal of confession is inviolable.

The impact of the seal of confession to the church itself cannot be underestimated. If penitents confess their sins, the church experience cleansing and an environment created for the church to improve its ministry accordingly. According to Kurtscheid (1927:1), “the seal obligates in virtue of divine law”. The church benefits from the clergy-penitent privilege as individuals improve their lives in the process of confidential confession by cleansing their souls and reconciling with God. The seal of confession also improves the ministry of the church.

Although the seal of confession is in existence as early as the fifteenth century, there were commentators like Lyndwood who suggested that there might be exceptions to the rule that the seal of confession is inviolable (Lyndwood, 1534). He provides suggestions or instances where the seal of confession may find violation. According to him, the seal of confession may find violation if the disclosure will avoid a scandal. Secondly, the seal of confession could be broken if the communication between the priest and the penitent did not relate to sin. Lastly, beneficial disclosure is acceptable. For an example, this means that the seal may find violation if it will prevent the killing of an innocent person.

6.3.2 The seal of confession in the Anglican Church

The study shows that the inviolability of the seal of confession principle finds application in the Anglican Church in South Africa. This principle is traceable back to the mediaeval England when there was no separation between the church and the state. That is why there was a very close connexion between the religion and laws. The objective of many laws was to enforce a particular religious standpoint. Kurtscheid (1927:92) extrapolates that even before the Fourth Council of Lateran, which passed the canon that made the seal of confession inviolable, there were indications that the church viewed the seal as inviolable.

The study shows evidence of this principle even before the Reformation period where we find the laws of the Church relating to the inviolability of the seal of confession being perpetuated by English councils; for an example, the Council of Durham in 1220 (Wilkins, 1737). There is also canon 113 of the Anglican Church, which is the canon that was not a subject of appeal when the Church of England was repealing the canons. The principle has therefore been with the Anglican Church for a long time.

The study shows that in South Africa, the Anglican Church practises the principle of the inviolability of the seal of confession by relying on the Anglican Prayer Book (Anglican Prayer Book 1989:448). However, The Anglican Prayer Book is not the only document that supports the seal of confession. There is also the Archbishop Council (2006:270) which protects the confidential information made during the ministry of reconciliation from disclosure.

Even certain canons like canon 37 part (c) (s) prescribe offences for a "breach of confidentiality of whatever nature" (Canons of the Anglican Church of Southern Africa 2005-2011). This canon does not stipulate the circumstances under which confidentiality may arise. It just warns that if there is a certain measure of confidentiality attached to a communication the priest may not divulge it to the other person. This ineluctably proves that the Anglican Church does recognise the inviolability of the seal of confession

The inviolability of the seal of confession enjoyed comparison with the situation in Australia. The study showed that the Anglican Church in Australia is a member of the Anglican Communion. Like all members of the Communion, it has its own canons, which regulate the governance of the church. The canon which deals with private confession is Canon Concerning Confessions 1989 Canon 10 of 1992 *(*Anglican Church of Australia [2006] Private confession pastoral guidelines with special reference to child sex abuse*).*

This canon repeals the Church of England Canon 113 of 1603, which deals with the seal of confession in the Anglican Communion. There is another canon in Australia, which protects confidential information made to an ordained minister. The aim of the canon is to unburden the conscience and to receive spiritual consolation and ease of mind (Canon Concerning Confessions 1989 Canon 10 of 1992).

6.3.3 The priest-penitent privilege

When the courts requests the priest to disclose the confidential information made to him by the penitent, he can claim the priest-penitent privilege. The study shows that the priest may invoke the privilege in respect of the confidential information made to him during private confession. Information made outside the circumference of a private confession does not enjoy the comfort of this privilege. The study further parades two essential functions of the privilege. It creates "privacy zones" within society and promotes tolerance toward those religious denominations that require protecting the contents of penitential information to encourage private confessions (Wigmore, 1961:877).

The study shows that the Anglican Church is an international Communion, and laws concerning priest-penitent privilege differ from country to country. However, each member of the Anglican Communion has its own canons, or other governing regulations. Because of the fact that each member has its own canons, it is obvious that the emphasis placed on the private confession and the attendant priest-penitent privilege or seal of confession will find application with a varying degree of importance. Although members of the Anglican Communion have different attitudes towards the private confession, the seal of confession and the priest-penitent privilege, there is a common understanding that the confidential communication between the priest and the penitent is not subject to disclosure by virtue of a seal of confession.

The study further shows that there is no consensus amongst theologians as to whether the privilege existed after the Reformation. Some theologians are of the view that the privilege did not exist before the Reformation (Waller & Chefetz, 2000:89-90). Other theologians vowed for its existence (Nolan (1913:649; Allard, 1953:4). The privilege ***may*** have existed in the common law of England before the Reformation. There is a virtually unanimous opinion that the privilege ceased to exist after the Reformation (Yellin 1983:101).Townsley (2007:15) gesticulates this theological and legal confusion when he asserts, “further, there is a paucity of judicial support for the claim that no privilege arises out of the priest and penitent relationship. Both positions, as to existence or non-existence of the privilege, can be legitimised by the manipulation of traditional history”.

6.3.4 Overview of the objective

The confidential information between the priest and the penitent is inviolable. However, the perusal of literature and the views of prominent commentators reveal that there is no consensus amongst commentators whether the priest-penitent privilege existed in England before and after the Reformation. The seal of confession is inviolable save in circumstances mentioned in Chapter 5. Literature also showed how the seriously the early Church regarded the seal of confession.

6.4 The South African courts position on the priest-penitent privilege

This required an in depth discussion on the concept of religion, the relationship between the Anglican Church and the state, Constitutional and legal framework in South Africa and America, Canon Law in the Anglican Church, the South African Charter of Religious Rights and Freedoms,

6.4.1 Religion

The study showed the problems inherent in trying to define religion. The words of Smith (1962:135) resonate in this regard, “we have learnt more about the “religious” but this has made us perhaps less aware of what is it that we mean by religion.” Idinopulos (1998:1) explicates the difficulties in finding the definition of religion when he refers to two transcendent dimensions of religion. There are commentators who postulate that religion has an observable and non-observable dimension (p 1). Others warn us against accentuating the similarities and downplaying the differences in religions in order to find a concise definition (p 2). Even the scholars and courts in the United States experience difficulty in fashioning the definition of the term “religion” as mentioned in the First Amendment (Booher, 2010:34). Others restrict the definition to the relationship with spiritual beings whilst others pay particular attention the cultural aspects of religion (Tylor, 1871:424). Religion is such a nebulous term that it is difficult to define. The conclusion is that Anglicanism is a distinct religious body within Christianity.

6.4.2 The relationship between the state and the Anglican Church

Another conclusion is that the Anglican Church had a rocky relationship with the state. The South African government implemented the apartheid policy. The Anglican Church opposed this policy. However, the Anglican Church faced its own internal problems when it tried to spread the gospel to African communities. They had to understand the social environment of African people. This resulted in the indigenisation of the church. While indigenising the church, it had at the same time to speak openly against the apartheid policy.

6.4.3 Constitutional and legal framework

As stated, the Anglican Church does not exist in a vacuum. It exists in a country that is subject to the law. The study deals with firstly with Court decisions with regard to private confessions made to a priest before 1994. Before the Constitution, it was clear that the priest could not refuse to testify in court and claim that the information between the priest and the penitent is privileged.

There is one important decided case in this regard. In *Smit v Van Niekerk* (1976:293), the court had to deal with the priest-penitent privilege. Rumpff CJ was of the view that the English law did not recognise the priest-penitent-privilege. The judge then turned to consider whether public policy or the public interest required religious communications to enjoy the privilege. In this regard, the learned judge concluded that public policy and public interest support the

view that a member of the clergy ought to assist the court in dispensing justice (p 303F-G). He further held that if public policy did indeed recognize a clergy privilege the legislature would have made express provision for this in the Criminal Procedure Act. It is clear that in South Africa, the courts did not recognise the priest-penitent privilege.

The study also dealt with the priest-penitent privilege after the advent of the Constitution. The study showed that the Constitution is the supreme law of the land. The Constitutional Court made this clear in Executive Council of *the Western Cape Legislature v President of the Republic of South Africa* (1995:par 100) in the following words: "It is of crucial importance at this early stage of the development of our new constitutional order, to establish respect for the principle that the Constitution is supreme".

The preamble of the Constitution of South Africa ends with the words "May God protect our people. God bless South Africa". This in itself is indicative of the fact that the Constitution recognises the existence of God (Malherbe 1998). What is of paramount importance is that in instances where there were conflicting values within the religious and non-religious groups, the courts have been able to resolve the differences by relying on the Constitution (see for an example*, Christian Education South Africa v Minister of Education [2000]; MEC of Education, Kwazulu Natal v Pillay (2008).*

The study shows the relevance of the Constitution in the investigation of the defences that are available to the priest if the court request him to testify. Section 9 (3) forbids the discrimination of any individual or individuals on the grounds that are mentioned. Religion is one of those grounds. Section 15(1) relates to the right to freedom of conscience, religion, thought, belief and opinion". Section 15 (2) relates to the religious observances that may be conducted at state or state-aided institutions, with the proviso that those observances follow rules made by the appropriate public authorities and they are conducted on an equitable, free and voluntary basis.

Section 31 (1) deals with persons belonging to a cultural, religious or linguistic community that may not be denied the right, with other members of that community to enjoy their culture, practise their religion and use their language and to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.

Other legislative framework is the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000. (Equality Act) which was enacted to strengthen section 9 of the Constitution which deals with unfair discrimination on one or more prohibited grounds (section 2 of Equality Act). Kok (2008:445) suggests that the Equality Act deals directly with all forms of discrimination. It rejects unfair discrimination in all levels of society. The Equality Act binds the state, which includes the executive, all persons and juristic persons. The Equality Act binds The Anglican Church in South Africa is bound by virtue of the fact that it is a juristic person

Another legislative framework is section 189 (1) of the Criminal Procedure Act 51 of 1977 which deals with persons and the powers of the court in case a witness refuses to testify or produce a book or document and as requested by the courts. Section 192 of the Criminal Procedure Act 51 of 1977 makes people competent and compellable to give evidence in criminal proceedings. This section lists the categories of people that are not competent and compellable witnesses and the priest is not in that list. This means that the priest is therefore competent and compellable to give evidence on matters in which he is a witness.

6.4.4 Canon Law in the Anglican Church

The study shows that the canon law framework in the Anglican Church starts at Anglican Communion level. The Anglican Communion consists of various provinces. There is no formal body of law, which bind these provinces together. Each province is autonomous and with its own laws. According to the Anglican Communion Covenant (par 3.1.2), these provinces are bound together "not by a central legislative and executive authority, but by mutual loyalty sustained through the common counsel of the bishops in conference and of the other instruments of Communion". According to The Principles of Canon Law Common to the Churches of the Anglican Communion, Principle 11:2 "[e]ach church recognises that the churches of the Anglican Communion are bound together, not juridical by a central legislative, executive, or judicial authority, but by mutual loyalty maintained through the instruments of Anglican unity as an expression of that communion".

It is evident from these two documents which form the basis for the Anglican Communion, that there is no central legislature, which pass laws, and that these two documents edifice the federalisation of the Anglican Communion. Each province of these institutions cannot make decisions and laws binding on other provinces churches of the Anglican Communion.

Within the Anglican Communion, there are instruments of unity. They comprise the Archbishop of Canterbury, Lambeth Conference, Anglican Consultative Council, and Primates' Meeting (Anglican Communion Covenant, par 3.1.4). The Archbishop of Canterbury, as an office and as a person, is the pillar that holds the Anglican Communion together. He is the focus of unity and is primus inter pares (par 3.1.4). The Lambeth Conference is where the bishops meet for guidance and consultation in their ministries to forge the unity of the Anglican Communion. The Anglican Consultative Council comprises the clergy and episcopal representatives from the provinces. Lastly, the Primates' Meeting are "convened by the Archbishop of Canterbury for mutual support, prayer and counsel" (par 3.1.4).

The Anglican Church in South Africa also adopted the Anglican Communion Covenant. This means that the Anglican Church in South Africa has the authority to pass its own laws and canons "while upholding mutual responsibility and interdependence in the Body of Christ, and the responsibility of each to the Communion as a whole" (Anglican Communion Covenant, par 3.2.2). This indicates that although the Anglican Church in South Africa is autonomous, there should be undiluted loyalty to the canons and principles of the Anglican Communion.

6.4.5 The South African Charter of Religious Rights and Freedoms

The South African Charter of Religious Rights and Freedoms is a charter that drawn up by South African religious and civil organisations. The main objective of the Charter is to define concisely the religious freedoms, rights and responsibilities of South African citizens (Benson, 2011:125ff). All the members of the Council for the Protection and Promotion of Religious Rights and Freedoms endorsed the Charter on 21 October 2010. The Anglican Church of Southern Africa is the member of this Council and Father Matthew Esau is its representative.

The Constitution accords sufficient protection of the religious freedoms. The question then is why the need for a charter for religious freedoms. Some commentators like Shelton and Kiss (1998: 559ff) believe that the charter for religious freedoms is not a good idea seeing that all religions have enough protection in terms of the Constitution. On the other hand De Freitas (2007:45ff) is of the view that religion is excluded from law studies because of this false notion that the Constitution is protecting religious freedoms adequately.

Others like Sachs (1990:46) a former judge of the Constitutional Court, supports the idea of a charter. He states "ideally in South Africa, all religious organizations and persons

concerned with the study of religion would get together and draft a Charter of religious rights and responsibilities … It would be up to the participants themselves to define what they consider to be their fundamental rights".

6.4.6 Comparative analysis: Anglican Church versus Episcopal Church

There is a comparison of the Anglican Church in South Africa with the Episcopal Church in America. Like the Anglican Church of South Africa, the liturgy, prayer and sacraments of the Episcopal Church are contained in the Common Prayer Book. The basic Biblical teachings are also the same (Bernardin, 2008:63).

6.4.6.1 Apartheid versus slavery

According to the study, the Anglican Church in South Africa had to navigate through the tricky minefield of the apartheid policy of the government, whilst the Episcopal Church in America had to deal with the social evil of slavery. Addison (1951:191) posits that eighteenth and nineteenth centuries in America was characterised by slavery with its attendant cheap labour. The Episcopal Church refused to take a position on the implementation of slavery. The conclusion is that the Anglican Church in South Africa had to deal with apartheid whilst the Episcopal Church had to deal with the challenge of slavery.

6.4.6.2 Priesthood: Anglican Church versus Episcopal Church

The study showed that there is no statutory definition of clergy in South Africa as in America. This statutory regulation in America has complicated the meaning of the word priest who receives confidential communication (Reese, 1963:64-65). Clergyman, priest, minister, rabbi, licensed or ordained minister are some of the meanings attached to the word "clergy" (Gumper, 1981). Colombo (1998:2-3) explains the different meanings from different states. He states that 23 states share the same definition of clergy. The definition of a clergy is "a priest, minister, religious practitioner, or similar functionary of a church or of a religious denomination or religious organization". Twelve states do not define clergy at all, but state that the clergy-penitent privilege applies to any "clergyman or priest". Fourteen states define clergy as "members of bona fide established church[es] or religious organization[s]". The conclusion is that the definition of the clergy in America does not differ substantially from the definition within the South African context.

6.4.6.3 Protected communication: Anglican Church versus Episcopal Church

The study showed that the situation in America as a far as the type of communication that enjoys the protection of the priest-penitent privilege is concerned, is different from the situation in the Anglican Church in South Africa. There may be similarities here and there but the fundamental difference is that in America the type of communication of communication enjoys the protection of the priest-penitent privilege is regulated statutory law. It is therefore easy to ascertain which communication enjoys the protection and which does not.

6.4.6.4 The priest-penitent privilege: South Africa versus America

The study showed that the priest-penitent privilege is now entrenched in the American legal system. All the fifty states and the District of Columbia have a statute that recognises the priest-penitent privilege and thus protect the confidential information between the priest and the penitent (Mayes, 1987; Sippel 1994: 1128). It has both historic legal and ecclesiastical underpinnings. Horner (1997:700) even suggests that the common law relating to priest-penitent privilege got influence from the church canons.

The study showed that in South Africa before the advent of democracy, the courts did not recognise the priest-penitent privilege (*Smit v Van Niekerk* 1976). After the promulgation of the Constitution, the courts have not had the opportunity to rule whether the priest-penitent privilege forms part of our law.

The recommendation was clear that, except where the offence is sexual abuse of children, the priest should not divulge the confidential information of the penitent. The study showed that the canons of the Anglican Church in South Africa confirm the inviolability of the seal of confession. Even if the court requests the priest to come and testify, he should inform the court that the oath binds him and he cannot disclose the confidential information of the penitent.

According to the study, the seal of confession insulates confidential information in respect of something that has happened. The seal does not protect the information in respect of something that will happen in the future. The seal can be broken to save a life. Public interest certainly favours the saving of life than the preservation of the seal of confession. Society would not tolerate the loss of life for the inviolability of a seal of confession.

The canons of the Anglican Church in South Africa should reflect that the priest might break the seal of confession in situations where there is serious future harm to third parties. It is therefore critical for canons to distinguish between situations where the acts for which one seeks help are in the past and where the conduct is in the future. Where there is a future risk of harm to others, it may be legally and morally incumbent upon the priest to notify the state authorities and thereby break the seal of confession.

6.4.7 Overview of the objective

There was an attainment of the objective. The Anglican Church practises a religion. There was a discussion of the relationship between the Anglican Church and the state. Before the advent of democracy, the relationship between the state and the Anglican Church was without constitutional guarantees. There were discussions on the laws that govern the country namely the Constitution and other statutes. These laws are not dealing adequately with the priest-penitent privilege. There are court decisions and views of commentators that support the objective.

6.5 The responsibility of the Anglican Church when something *contra bonos mores* is revealed to the priest

Although the practice of private confession has a varying degree of importance and application in the different churches of the Anglican Communion, there is an understanding among the clergy throughout Anglican Churches that the communication between the priest and the penitent is inviolable. The Anglican Prayer Book and canons are evidence to that effect.

However, it is highly recommended that the canons of the Anglican Church in South Africa reflect that the priest may break the seal of confession in situations where there is serious future harm to third parties. The canons should distinguish between situations where the acts for which one seeks help are in the past and where the conduct is in the future.

6.5.1 The seal of confession in Anglican Church in cases involving crime

The Anglican Church in South Africa like all Anglican Churches is under social pressure to deal with crime and sexual abuse of children in the church. Child abuse cases in the church have meant that clergy must be aware when they are under a duty to disclose information where the protection of children is involved. The child abuse cases in the church have also

exposed the clergy in terms of their training in counselling the victims of sexual abuse. Public policy demands that priests cannot hide behind the seal of confession where the sexual abuse of children is concerned. The Anglican Church should be proactive in this regard. There should be guidelines to deal with such issues.

6.5.2 Alignment with legislation relating to sexual abuse of children

The Anglican Church in South Africa does not exist in a vacuum. It should try to adapt their canons to the existing legislation where the abuse of children is concerned. Public policy demands the protection of children, as they are the most vulnerable segment of society. The church cannot protect the clergy or any person for that matter who abuse children. The recommendations suggested the alignment of Anglican Church canons to Section 54 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, which deals with obligation to report the commission of sexual offences against children or persons who are mentally disabled. The canon got alignment to section 54.

The importance of the canon is that it will be in line with the mandatory reporting that is envisaged by section 54 of the of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007. What is also significant about this canon is this canon is that it will specifically exonerate the priest if they divulged the confidential information in compliance with section 54. It will also show that the Anglican Church will not tolerate the sexual abuse of children by hiding behind the inviolability of the seal of confession. It will show that the Anglican Church is serious about curbing sexual abuse of children in the church.

The canon will be in line with the Australian guidelines relating the same matter (Private Confession Pastoral Guidelines with Special Reference to Child Sexual Abuse in Australia, 2011:1).The guidelines advocate mandatory reporting to the police. This canon will also be in line with the American approach towards mandatory reporting. The study has shown that statutes in all federal states regulate the inviolability of the seal of confession in America. However, there is unanimity amongst federal states that in matters relating to sexual abuse of children, the mandatory reporting principle applies. This is so in respect of both the Free Exercise Clause.

6.5.3 Overview of the objective

There was the discussion of the objective at length and discussions resulted in recommendations made in respect of private confession, which relates to some future event

that has not happened and cases of sexual abuse of children. The study showed that the priest should disclose the contents of a private confession if it relates to something that is *contra bonos mores.*

6.6 The research problem

The research question is "*The research question of this study is as follows: What is the position of the Anglican priest in South Africa in light of his oath of confidentiality if requires of him to reveal the relevant information, for an example, in a court of law?"* The study answered the research question. It showed that the seal of confession is inviolable except where the disclosure is *contra bonos mores*.

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