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**Sincerely believing in freedom: a reconstruction and comparison of the interpretation of the freedom of religion and belief on the Canadian Supreme Court, the South African Constitutional Court and the European Court of Human Rights**

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# Sincerely believing in freedom

A reconstruction and comparison of the interpretation  
of the freedom of religion and belief on the Canadian  
Supreme Court, the South African Constitutional Court  
and the European Court of Human Rights

F.H.K. THEISSEN

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*Sincerely believing in freedom*



Sincerely believing in freedom

A reconstruction and comparison of the interpretation of the freedom of religion and belief on the Canadian Supreme Court, the South African Constitutional Court and the European Court of Human Rights

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*For my father Hubert Ernst Theissen, the teacher;  
my wife Sandra L. Brugman, the healer; and  
my daughter Kailani Nurdina Kartini Theissen, the dream come true.*





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## Preface

“Religion is of dominating importance particularly in this part of the world. There are perhaps more religions here than in other regions of this globe. But, again, our countries were the birthplaces of religions. Must we be divided by the multiformity of our religious life? It is true, each religion has its own history, its own individuality, its own ‘raison d’être’, its special pride in its own beliefs, its own mission, its special truths which it desires to propagate. But unless we realize that all great religions are one in their message of tolerance and in their insistence on the observance of the principle of ‘Live and let live’, unless the followers of each religion are prepared to give the same consideration to the rights of others everywhere, unless every State does its duty to ensure that the same rights are given to the followers of all faiths – unless these things are done, religion is debased, and its true purpose perverted.”

President ir. Soekarno in his address to the Asia-Africa Conference in Bandung, 18 April 1955.

*Bismillah ir-rahman ir-rahim*; in the name of God, the most Gracious, the most Merciful. Uncountable of my co-religionists have begun their scripts with these words. To some today, the phrase may imply that the author is somehow claiming authority, to be uttering something which is pleasing to God. But traditionally, the phrase expresses quite the opposite. The writer begins his thoughts in a deep humility, and awareness that while they have given their best and considered all things relevant, they are constrained by their human existence in a certain context, time, and place. The Truth is only God’s prerogative. All we can ever hope to achieve is a sincere and honest strive for some truth in what we do. It is in this tradition in which I feel at home and so I that I begin this dissertation: *Bismillah ir-rahman ir-rahim*.

Having finished this dissertation truly feels like a milestone in my life. I believe in life as a journey, without destinations. But from time to time, by the Grace of God we reach a milestone, some intended, some necessary, some because they are part of our path. I might say that the path I began to walk towards this milestone started in 2007. That year, I started working on the texts, which have somehow evolved into this dissertation. I also started working as a consultant for my day job, meaning that I had to use scarce free time to work on my research. In the meantime, I have done many interesting cooperative governance projects, been co-founder of a consultancy firm, and

found out that I am a generalist with a law degree, instead of a jurist in a narrow sense.

After having erred in my first choice of topic and tutelage for my dissertation, the choice of the freedom of religion and belief and a combination of positive law and legal theory represents the continuation of a path that I started walking much earlier in life. I have been a believer, since I can remember, making the discovery between the age of 14 and 16, that my faith was different from the one I was brought up in. And ever since I have developed a political and historical perspective, I have also been a sincere believer in human rights. No words, could more eloquently explain what I mean by this, than these lines from Bruce Springsteen's 'Ballad of Tom Joad':

"Mom, wherever there's a cop beating a guy,  
Wherever a hungry newborn baby cries,  
Where there's a fight against the blood and hatred in the air,  
Look for me Mom I'll be there,  
Wherever there's somebody fighting for a place to stand,  
Or decent job or a helping hand,  
Wherever somebody's struggling to be free,  
Look in their eyes Mom, you'll see me."

In today's world, as in previous eras, there are religious believers who reject human rights, as there are believers in human rights who reject religion. To some religious believers, human rights represent a surrogate secular religion, which is replacing religion as a source of societal values. To some believers in human rights, religion represents a value system, which is undermining that of human rights. But historically, there have always been those who felt at home in both their own religious beliefs and the notion that all human beings were given unalienable rights by their Creator.<sup>1</sup> To them, religious values were the very reason they supported human rights, as expressed in the quote above by President Soekarno at the Bandung Conference.

Personally, people belonging to this tradition, triggered my interest in human rights. They made me want to study law. I remember very well, how after I had moved to India as a child, my attention was always caught by the portraits of the bespectacled man, dressed in a simple *dothi*, displayed not only in official buildings but many offices, hotels, shops etc. Gandhiji's struggle for Indian independence became my gateway into a political outlook. I learned of the beginnings of his struggle in South Africa, where at the time the struggle against *apartheid* was in full swing. I learned about the inspiration the *Mahatma* had been for Dr. King in leading the American Civil Rights Movement. Later, when we moved from India to Indonesia, I learned about the Indonesian

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1 See *The unanimous Declaration of the thirteen United States of America*, July 4, 1776.

struggle for independence and how the Indian and Indonesian national movements had influenced each other.

In each of these movements, people with a religious outlook on life, justice and humanity played a leading role. I have been committed to their thoughts, theories and aims which inspired the path I took in 2007 to do this research project. The Bandung Conference, mentioned before, symbolized the hope for a future free of colonialism, imperialism, racism, suppression, and exploitation. Most certainly, it has been an uphill struggle from there, but I continue to believe in Dr. King's words that "the arch of the moral universe is long, but it bends towards justice". In his words to the Bandung delegates the president of the Indonesian Republic urged for the "Golden Rule" which is required by all faiths and is the prerequisite for their shared true purpose. This thought is synonymous with Indonesia's state motto "*bhinneka tunggal ika*", unity in diversity.

Unity in diversity may be taken to be a normative appeal. And for a long time, I took it to mean just that. But having traveled my path with this dissertation and everything else taking place in my life since then, I have come to realize that it means much more, than just that. If we read closely in the above quote, we see that the president tells us, that diversity is the expression of true unity. Unity, pure and true, can only exist in diversity. Because the Creation in which we live is diverse, human beings, animals, vegetation, the natural order is diverse. Therein lies the unity, the oneness of everything. Wherever human beings have created homogeneity, based on false conceptions of unity, or by simply being ignorant of the existing diversity, bad things have happened. Not only in the form of abuse of human rights, but the (near) annihilation of species and the (near) destruction of our planet. I sincerely believe, that cherishing and protecting diversity is required by the long arch of the moral universe. And I sincerely believe, that to protect the diversity of religion, belief, thought and opinion, we must rely on the freedom of religion and belief. This was my motivation for this dissertation.

What I am trying to say is that the path towards this academic milestone has been deeply personal. And of course, it has been intertwined with many personal stations of my private and professional life. I've seen breathtakingly beautiful mountaintops and deep, dark, and foggy valleys along the way. Sometimes, experiences were related to my stations in the dissertation, sometimes they had a direct influence on the pace of my dissertation path. Through one of the cases I became reconnected to an old friend: reggae music and its spiritual messages, which provide so much comfort. My trips down memory lane also reintroduced me to another soulmate, *qawwali* music of the subcontinent, which in turn allowed me to become acquainted with *Sufi* writings and to experience the healing impact of the words of the great Maulana Jalaluddin Rumi. More generally, my exploration of Sufism has influenced my dissertation and *vice-versa*. This has merged with the rebellious spirit, best symbolized by some of my rock'n'roll heroes and favorite anthems. It may

only be rock'n'roll, but I like it. Indeed, many of the believers in the selected cases show a spiritual rebelliousness, following their conscience instead of institutions, mainstream society or even their own faith-based community. They have inspired me in my personal life as well.

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“There are as many paths to God, as there are souls in this world.”  
Sufi Wisdom

### 1.1 GENERAL INTRODUCTION: DIVERSITY OF RELIGION AND BELIEF AND JUDICIAL INTERPRETATION

“There are as many paths to God, as there are souls in this world”. So goes an old Sufi wisdom. This wisdom may inspire a lifelong spiritual journey. It may trigger theological or philosophical debate. It is possible that sociological or anthropological research will draw a hypothesis for factual research from this wisdom: how many different ways can be conceptualized and counted?

Legal questions might not be the first that come to mind when hearing about the many paths to God. Yet the Sufi wisdom is of legal relevance, as numerous court cases have proved in numerous jurisdictions throughout the world over. Those who believe – including those who believe divergently and those who disbelieve – can clash in daily life with others who believe or disbelieve differently. They can come into conflict with laws and regulations, which are contrary to their beliefs or with state institutions which disturb, interfere with or obstruct their lives which are based on their beliefs.

Freedom of religion and belief is a so-called classical human right. It is universally recognized in the Universal Declaration of Human Rights, many international human rights instruments and most constitutions the world over. The freedom of religion and belief is inherent to the notion of human rights, according to which inherent rights, which include life, liberty and the pursuit of happiness,<sup>1</sup> must be respected and protected by any entity entrusted with power. It is this notion which underlies contemporary human rights instruments, both national and international.

Whatever we believe or disbelieve, it is the essence of liberty not be forced to declare, act or refrain from acting contrary to those beliefs. Whatever we believe, it will inspire our choices, guide our conduct, align us with some, while distinguishing us from others. When others or the powers that be,

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1 See Declaration of Independence of the Thirteen United States of America, 4 July 1776.

disturb, interfere with or obstruct this, the very essence of our liberty is threatened. Such is the ratio of the universally recognized human right of freedom of religion and belief. This is also its core, which has been reiterated in human rights instruments, court cases and policy documents.

It is inevitable, however, that situations occur – in daily life, anywhere – in which one or more believers experience interference with their freedom of religion and belief by others or by the state. This is inevitable because of the great diversity between various religions and belief systems within (nominally) the same religion and/or belief system. Indeed, the diversity is the result of the many paths referred to by the Sufis. Because of this diversity, it is impossible to anticipate everything, and it is natural that different beliefs can collide or come into conflict with each other. Moreover, states – even those that recognize the freedom of religion and belief – sometimes give certain beliefs (religious, a-religious or anti-religious) a preferential status as part of a state ideology. As a consequence, those who do not have a preferential status may experience disadvantage.

Courts throughout the world deal with cases in which believers, including non-believers, claim that their freedom of religion and belief has been interfered with. Sometimes, similar cases lead to different outcomes in different courts. Sometimes, when the courts belong to the same jurisdiction, they will become aware of such differences, and the secondary rules and procedures within the jurisdiction will ultimately determine whose interpretation is the correct one. When courts are not part of the same jurisdiction, no one can determine who is right, and moreover the courts involved may not even be aware of the differences in interpretation.

This study is interested in the differences in outcome caused by interpretation of the freedom of religion and belief by courts in three different jurisdictions: the Supreme Court of Canada (SCC), the Constitutional Court of South Africa (CCSA) and the European Court of Human Rights (ECtHR). The study sets out to find the standard interpretations of the freedom of religion and belief of three tribunals which have the final say within their own jurisdiction. Once identified, the standard interpretations can be compared to find their similarities and differences. Ultimately, this comparison should contribute to understanding how judicial interpretation can provide for optimal protection for all believers of their essential liberty to choose, act, and align in accordance with their beliefs, while keeping the conflict-provoking content of the decision low in pluralist societies.

## 1.2 OVERALL PURPOSE OF THE STUDY AND READING GUIDE CHAPTER 1

In this study, the three respective standard interpretations are reconstructed by identifying them through systematic analysis of selected freedom of religion and belief case law of each tribunal, stretching over a number of years. The

respective standard interpretations are compared in order to find parallels and differences. The respective standard interpretations are comparatively analyzed through the prism of optimal freedom for believers in enjoying the human right. This is done in order to find the factors in the standard interpretation which contribute to more or less freedom granted to believers in judicial proceedings.

The respective standard interpretations are also comparatively analyzed through the prism of judicial minimalism. This is done in order to find out whether this theory of judicial interpretation does indeed, as claimed, achieve optimal freedom in the enjoyment of human rights while at the same time minimizing the political costs of the conflict in a pluralist social context.

The overall purpose of the study is to identify which elements in the three standard interpretations do and do not provide for optimal protection for all believers of their essential liberty to choose, act, and align, in accordance with their beliefs, while keeping the conflict provoking content of the decision low in pluralist societies. The purpose is also to identify which elements within the three standard interpretations do or do not qualify as “judicial minimalism” and how this relates to the optimal protection provided or not provided by these elements.

Given that the study reconstructs the standard interpretation of the freedom of religion and belief by the three highest tribunals in three jurisdictions, it provides for judicial borrowing in freedom of religion and belief cases, not just between the three tribunals, between or within their jurisdictions, but generally, for any judicial tribunal dealing with the freedom of religion and belief. After all, this right is universally recognized, and contains a common core which is present in different codifications.

In the following we shall first see why the protection offered by a universally recognized human right is still a matter of interpretation of this right by the competent tribunals in different jurisdictions (section 1.3). Then, the choice for the three selected tribunals is argued (section 1.4). Hereafter the global dynamics with regard to the featured universally recognized right are described (section 1.5). The research questions which this study answers are formulated in section 1.6. In section 1.7, the period for the cases and choice of cases are discussed. The final section ( 1.8) provides a reading aid for the entire study.

### 1.3 A MATTER OF INTERPRETATION?!

#### 1.3.1 The common core of freedom of religion and belief as a universal human right

The universally recognized human right which is called freedom of religion and belief in the previous paragraphs goes by many names. The three instru-



ments which feature in this study, each use a different name and pairing with related rights. The European Convention on Human Rights recognizes the “Freedom of thought, conscience and religion”. The South African Bill of Rights recognizes the “Freedom of religion, belief and opinion”. The Canadian Charter of Rights and Freedoms recognizes the “Freedom of conscience and religion” as well as the “Freedom of thought, belief, opinion and expression”.

These different names highlight that conceptually, rights can be grouped and differentiated in various ways. The freedom of opinion, which in the Bill of Rights is paired with the freedom of religion and belief, is a totally separate right in the Convention and is paired with expression. The Charter pairs expression and opinion, with thought and belief, while pairing freedom of conscience with religion.

The different names, and different wording in the codification of the right can be due to semantic rather than conceptual differences. Do we see “thought” as being included in the terms “opinion” and “expression”; is “conscience” included in “religion and belief”? Nevertheless, in theory, such differences, whether conceptual or merely semantic, can lead to differences in the standard interpretation. However, it should be noted that underlying such possible differences, not only in concept or semantics, but also differences in scope and application, there still is a universally recognized common core of the right, which all the different codifications share.

Article 18 of the Universal Declaration of Human Rights (freedom of thought, conscience and religion) reads:

“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.”

Neither the Bill of Rights, nor the Charter or the Convention, negate, dispute or contradict in any way the universally recognized core of the freedom of religion and belief as codified in the UDHR. As a matter of fact, the Charter and the Bill of Rights add in their codification of said right the common core of Article 19 of the Universal Declaration (freedom of opinion and expression).

The right which is central to this study will be referred to as “*freedom of religion and belief*”. Unless otherwise specified, this term shall at all times also include the freedom of conscience, thought and opinion and the expression thereof. Freedom of expression unrelated to religion and belief will not be the subject of this study.

Using the term “freedom of religion and belief” for the featured right, highlights that not only religion and/or beliefs formally recognized by organized/established religions are protected. The right protects the rights of all believers: those who are adherents of organized/established religions; those who are adherents of non-organized and non-established religions; those who

hold very personal and individualized beliefs; those who hold beliefs not connected to any belief system one would call a religion; and those who do not believe or define themselves by rejecting (a certain) religion or belief.

The common position of human rights scholarship is that case law concerning the same universally recognized human right can be compared, because the differences due to codification and context are not of such a nature as to make such a comparison absolutely flawed. Having established the common core, the codifications in the three instruments share, there is no objection to comparing the freedom of religion and belief case law of the three tribunals. Whether and to what extent similarities and differences in codifications explain similarities and differences in the standard interpretations is the topic of Chapter 3.

### 1.3.2 Differences in interpretation

The three tribunals chosen for this study each apply a universally recognized human right, with a common core. Yet the outcomes of cases can differ radically, even in situations with very similar facts. For example, in the Canadian *Multani*<sup>2</sup> case (section I1.4.10), a Sikh schoolboy argued successfully that the freedom of religion and belief protects his practice of carrying a metal *kirpan* (ceremonial dagger) to school. Sunali *Pillay*<sup>3</sup> (section I2.4.11) successfully argued before the SCC that she had a right to wear a nose stud, common among South Indian Tamil Hindu girls like herself, internationally and in South Africa. The school regulations allowing only for earrings were overruled. However, Leyla *Şahin*<sup>4</sup> (section I3.4.7), who argued her right as a practicing Muslim woman to wear a headscarf while attending classes in a Turkish university before the ECtHR, was not successful. The law and regulations prohibiting religious attire and their enforcement were upheld.

In *Christian Education*<sup>5</sup> (section I2.4.6), the CCSA had to decide whether a group of Christian Schools could be exempted from a new nationwide ban on corporal punishment. Although corporal punishment was once widely accepted in the South African educational system, the CCSA upheld the universal ban, even for privately run Christian schools, after a careful analysis of the colliding rights in question. In the (in)famous *Lautsi*<sup>6</sup> case (section I2.4.10), the Grand Chamber of the ECtHR had to decide whether to overrule

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2 SCC, *Multani v. Commission scolaire Marguerite-Bourgeoys*, Case 30322, [2006] 1 SCR 256, 2 March 2006.

3 CCSA, MEC for Education: Kwazulu-Natal and Others v. Pillay, Case CCT51/06, 5 October 2007.

4 ECtHR (GC), *Leyla Şahin v. Turkey*, app. no. 44774/98, 10 November 2005.

5 CCSA, *Christian Education South Africa v. Minister of Education*, Case CCT4/00, 18 August 2000.

6 ECtHR (GC), *Lautsi and Others v. Italy*, app. no. 30814/06, 18 March 2011.

the Chamber. The Chamber had decided that the law which in accordance with the majority Catholic cultural heritage of Italy required that every public school room featured a crucifix, could not be justified under the Convention. The Grand Chamber found that the law was not at odds with the Convention.

In *Trinity Western Union (TWU)*<sup>7</sup> (section II.4.5), the SCC overruled a policy of the British Columbia Teachers College. The Teachers College had decided that the policy of systematically refusing TWU University graduates as being fit to become teachers was uncalled for. TWU had made all staff and students sign an agreement that they would not engage in same-sex romantic or sexual relationships.

The differences in outcome are only a part of the story. In each of the aforementioned cases, each of the courts builds a reasoning for the outcome, referring to the freedom of religion and belief as codified in the applicable instrument (Charter, Bill of Rights, Convention) and the facts of the case. The reasoning cites earlier cases and contains a concept and scope of said right and the precondition for and conditions of its application. This is the main object of interest for this study.

A study of the differences in jurisprudence on the freedom of religion in various jurisdictions could focus on explaining “why” there are differences and/or agreements due to the influence of history, politics, culture, socio-economics, social reality and so forth. This would certainly be interesting on a macro level. A study could also explain the “why” with a focus on the individual judges, their social, religious, ethnical and socio-economic background, their education, their psychology, their political and philosophical affiliation. All of this could be very helpful even for the legal perspective. Yet, legal scholarship is also interested in the “how”. What are the differences in application, reasoning, scope, context and so forth? The “how” focuses on judicial interpretation.

The great majority of legal practitioners and legal scholars will concede that the view of the judge as mere “*la bouche de la loi*” (attributed to Montesquieu, although one must concede his notion is often misinterpreted<sup>8</sup>) is highly simplistic or even false. However, the degree and manner of interpretation of constitutional law and rights are the subject of much discourse and debate.<sup>9</sup> The “law in the books” certainly has a meaning in its own right, but the mere fact that the law in the books needs to be applied to concrete cases means that

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7 SCC, *Trinity Western University v. College of Teachers*, Case 27168, [2001] 1 SCR 772, 17 May 2001.

8 See C. de Montesquieu, *Spirit of the Laws*, e.g., Cambridge University Press, Cambridge (UK) et al., 1989.

9 See, e.g., C. Wolfe, *The Rise of Modern Judicial Review. From Constitutional Interpretation to Judge-Made Law*, Basic Books, New York (USA), 1986; A. Scalia, *A Matter of Interpretation. Federal Courts and the Law*, Princeton, Princeton University Press, New Jersey (USA), 1997; C.R. Sunstein, *Radicals in Robes. Why Extreme Right-Wing Courts Are Wrong for America*, Basic Books, New York (USA), 2005.

judges create, shape and/or find law (depending on the theory one supports). In any case, the concept, scope and application of a universal right in a local and situational context is greatly determined by the tribunal which decides the case.

While the study pre-supposes this dependency on judicial decisions, it does not enter into the normative discussion regarding the desirability of (the extent of) law creation, shaping and/or finding by judges. The study does also not inquire into how judges experience or explain their *modus operandi*. Rather, the study is interested in how the influence of judicial interpretation becomes manifest in the output generated by courts, i.e. the case law.

### 1.3.3 Standard interpretation

This study is about the “*standard interpretation*” of the freedom of religion and belief by three judicial tribunals. Standard interpretation shall refer to the concept, scope and application given to the freedom of religion and belief in the concrete cases before the tribunals in question.

This study neither presumes nor presupposes, that judges have an abstract, general and “instant” standard interpretation of the freedom of religion and belief which is technically applied in solving concrete cases. This study, however, does presume that by systematically analyzing a number of important cases in which the freedom of religion and belief features, the existing standard interpretation can be *reconstructed*.

The reconstruction of the standard interpretation will be done by identifying in the reasoning in the selected cases, in the majority as well as in the separate opinions, the concept, the scope, and the application of the freedom of religion and belief as interpreted in the different cases. By combining them, an overall concept, scope and application becomes visible. Even if the interpretation found manifests itself as diffuse, inconsistent or even internally contradictory, this is an important finding for this study.

The standard interpretations as used by different courts, each contain certain *guiding principles*, so the study shows, which aid in interpreting the human right in every concrete and specific case. These guiding principles are in turn shaped by interpretation the human right in every concrete and specific case. The guiding principles are connected to the greater narrative of the constitutional and legal order in question, yet still very much related to the right in question: the freedom of religion and belief.

Legal theoretical scholarship with regard to judicial interpretation descriptively and normatively often focuses on the process of interpretation: techniques employed for application, reasoning, scoping, contextualizing and so forth. The interest is in judicial interpretation as a profession with its (secondary) rules regarding what constitutes professional (or good) interpretation. This study, however, focuses on the output and outcome of this process in one very

specific area: the freedom of religion and belief. The output is the case law, the outcome is the concept, scope and application of the right within the context of the legal system in which the tribunal operates.

As the study focuses on the output and outcome of the case law, it does need to presuppose that certain (secondary) norms guide judicial interpretation, without arguing and/or researching them. These secondary norms relate to integrity (the judge wants to apply law, not his personal preference), consistency (the judge adheres to a general meaning of the law, which must be applied in concrete circumstances) and finally completeness (the judge wants to take all the relevant law and facts into consideration). These provide that judges must apply what is called “*balancing*”,<sup>10</sup> especially when deciding human rights cases.

The term “standard interpretation” in this study shall thus denote the factual and/or intended consistency of interpretation and standard elements which reoccur with regard to the freedom of religion and belief. Such a “standard interpretation” becomes part of what is referred to as the “*jurisprudence*” of a certain tribunal in this study. Such a jurisprudence is the theoretical foundation of applying the law as the specific tribunal does.

Meta-theories of judicial interpretation such as minimalism and its contenders identified by Cass. R. Sunstein and discussed in Chapter 2 shall be called “*theories of judicial interpretation*” in this study. They contain a theory on what the best way is to achieve (the best) standard interpretation of law in all cases. Such theories of interpretation are a part of *jurisprudence as an academic discipline*: legal theory or the theoretical study of law, legal reasoning, legal institutions and of law in society and practice. In this way, the study aims to contribute to jurisprudence with regard to the three tribunals and the freedom of religion and belief.

#### 1.3.4 Is analysis of standard interpretations sufficient to explain differences in judicial outcome?

Most certainly, many areas of academic expertise can offer very valuable and interesting perspectives on why tribunals interpret the freedom of religion and belief in a certain way and in a certain context of jurisdiction, time, situation and circumstances. These areas of expertise include political science, sociology, anthropology and psychology. This study uses none of these areas of expertise. Instead, it focuses strictly on the facts created when a judicial judgment is reached and rendered: the argumentation found in the written judgment.

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10 See, e.g., J.A. Bomhoff, ‘Balancing, The Global and The Local: Judicial Balancing as a Problematic Topic in Comparative (Constitutional) Law’, in *Hastings International & Comparative Law Review*, vol. 31, no. 2, pp. 555-586 (2008).

A study such as this one that employs merely positive law and legal theory, certainly does offer valuable and interesting perspectives on why tribunals interpret the freedom of religion and belief in a certain way and in a certain context of jurisdiction, time, situation and circumstances. Even when compared to studies that employ other academic disciplines as the determinative rationality for explaining a judicial decision, a study such as this one, still offers an interesting perspective. After all, judges, in every jurisdiction are required to make their argumentation and motivation of the outcome explicit in their judicial opinions. Everything they do make explicit constitutes facts of great value and interest for an academic study. The selected case law therefore constitutes the factual material in this study.

#### 1.4 THE COMMON CORE OF FREEDOM OF RELIGION AND BELIEF AS A UNIVERSAL HUMAN RIGHT

The universally recognized human right which is called freedom of religion and belief in the previous paragraphs goes by many names. The three instruments which feature in this study, each use a different name and pairing with related rights. The European Convention on Human Rights recognizes the "Freedom of thought, conscience and religion". The South African Bill of Rights recognizes the "Freedom of religion, belief and opinion". The Canadian Charter of Rights and Freedoms recognizes the "Freedom of conscience and religion" as well as the "Freedom of thought, belief, opinion and expression".

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The different names, and different wording in the codification of the right can be due to semantic rather than conceptual differences. Do we see "thought" as being included in the terms "opinion" and "expression"; is "conscience" included in "religion and belief"? Nevertheless, in theory, such differences, whether conceptual or merely semantic, can lead to differences in the standard interpretation. However, it should be noted that underlying such possible differences, not only in concept or semantics, but also differences in scope and application, there still is a universally recognized common core of the right, which all the different codifications share.

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The right which is central to this study will be referred to as “freedom of religion and belief”. Unless otherwise specified, this term shall at all times also include the freedom of conscience, thought and opinion and the expression thereof. Freedom of expression unrelated to religion and belief will not be the subject of this study.

Using the term “freedom of religion and belief” for the featured right, highlights that not only religion and/or beliefs formally recognized by organized/established religions are protected. The right protects the rights of all believers: those who are adherents of organized/established religions; those who are adherents of non-organized and non-established religions; those who hold very personal and individualized beliefs; those who hold beliefs not connected to any belief system one would call a religion; and those who do not believe or define themselves by rejecting (a certain) religion or belief.

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11 SCC, *Multani v. Commission scolaire Marguerite-Bourgeoys*, Case 30322, [2006] 1 SCR 256, 2 March 2006.



*kirpan* (ceremonial dagger) to school. Sunali Pillay<sup>12</sup> (section I2.4.11) successfully argued before the SCC that she had a right to wear a nose stud, common among South Indian Tamil Hindu girls like herself, internationally and in South Africa. The school regulations allowing only for earrings were overruled. However, Leyla Şahin<sup>13</sup> (section I3.4.7), who argued her right as a practicing Muslim woman to wear a headscarf while attending classes in a Turkish university before the ECtHR, was not successful. The law and regulations prohibiting religious attire and their enforcement were upheld.

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In *Trinity Western Union (TWU)*<sup>16</sup> (section I1.4.5), the SCC overruled a policy of the British Columbia Teachers College. The Teachers College had decided that the policy of systematically refusing TWU University graduates as being fit to become teachers was uncalled for. TWU had made all staff and students sign an agreement that they would not engage in same-sex romantic or sexual relationships.

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A study of the differences in jurisprudence on the freedom of religion in various jurisdictions could focus on explaining “why” there are differences and/or agreements due to the influence of history, politics, culture, socio-economics, social reality and so forth. This would certainly be interesting on

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12 CCSA, MEC for Education: Kwazulu-Natal and Others v. Pillay, Case CCT51/06, 5 October 2007.

13 ECtHR (GC), Leyla Şahin v. Turkey, app. no. 44774/98, 10 November 2005.

14 CCSA, Christian Education South Africa v. Minister of Education, Case CCT4/00, 18 August 2000.

15 ECtHR (GC), Lautsi and Others v. Italy, app. no. 30814/06, 18 March 2011.

16 SCC, Trinity Western University v. College of Teachers, Case 27168, [2001] 1 SCR 772, 17 May 2001.



a macro level. A study could also explain the “why” with a focus on the individual judges, their social, religious, ethnic, and socio-economic background, their education, their psychology, their political and philosophical affiliation. All of this could be very helpful even for the legal perspective. Yet, legal scholarship is also interested in the “how”. What are the differences in application, reasoning, scope, context and so forth? The “how” focuses on judicial interpretation.

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#### 1.4.2 Standard interpretation

This study is about the “standard interpretation” of the freedom of religion and belief by three judicial tribunals. Standard interpretation shall refer to the concept, scope and application given to the freedom of religion and belief in the concrete cases before the tribunals in question.

This study neither presumes nor presupposes, that judges have an abstract, general and “instant” standard interpretation of the freedom of religion and belief which is technically applied in solving concrete cases. This study, however, does presume that by systematically analyzing a number of important

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17 See C. de Montesquieu, *Spirit of the Laws*, e.g., Cambridge University Press, Cambridge (UK) et al., 1989.

18 See, e.g., C. Wolfe, *The Rise of Modern Judicial Review. From Constitutional Interpretation to Judge-Made Law*, Basic Books, New York (USA), 1986; A. Scalia, *A Matter of Interpretation. Federal Courts and the Law*, Princeton, Princeton University Press, New Jersey (USA), 1997; C.R. Sunstein, *Radicals in Robes. Why Extreme Right-Wing Courts Are Wrong for America*, Basic Books, New York (USA), 2005.

cases in which the freedom of religion and belief features, the existing standard interpretation can be reconstructed.

The reconstruction of the standard interpretation will be done by identifying in the reasoning in the selected cases, in the majority as well as in the separate opinions, the concept, the scope, and the application of the freedom of religion and belief as interpreted in the different cases. By combining them, an overall concept, scope and application becomes visible. Even if the interpretation found manifests itself as diffuse, inconsistent or even internally contradictory, this is an important finding for this study.

The standard interpretations as used by different courts, each contain certain guiding principles, so the study shows, which aid in interpreting the human right in every concrete and specific case. These guiding principles are in turn shaped by interpretation the human right in every concrete and specific case. The guiding principles are connected to the greater narrative of the constitutional and legal order in question, yet still very much related to the right in question: the freedom of religion and belief.

Legal theoretical scholarship with regard to judicial interpretation descriptively and normatively often focuses on the process of interpretation: techniques employed for application, reasoning, scoping, contextualizing and so forth. The interest is in judicial interpretation as a profession with its (secondary) rules regarding what constitutes professional (or good) interpretation. This study, however, focuses on the output and outcome of this process in one very specific area: the freedom of religion and belief. The output is the case law, the outcome is the concept, scope and application of the right within the context of the legal system in which the tribunal operates.

As the study focuses on the output and outcome of the case law, it does need to presuppose that certain (secondary) norms guide judicial interpretation, without arguing and/or researching them. These secondary norms relate to integrity (the judge wants to apply law, not his personal preference), consistency (the judge adheres to a general meaning of the law, which must be applied in concrete circumstances) and finally completeness (the judge wants to take all the relevant law and facts into consideration). These provide that judges must apply what is called “balancing”,<sup>19</sup> especially when deciding human rights cases.

The term “standard interpretation” in this study shall thus denote the factual and/or intended consistency of interpretation and standard elements which reoccur with regard to the freedom of religion and belief. Such a “standard interpretation” becomes part of what is referred to as the “jurisprudence” of a certain tribunal in this study. Such a jurisprudence is the theoretical foundation of applying the law as the specific tribunal does.

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19 See, e.g., J.A. Bomhoff, ‘Balancing, The Global and The Local: Judicial Balancing as a Problematic Topic in Comparative (Constitutional) Law’, in *Hastings International & Comparative Law Review*, vol. 31, no. 2, pp. 555-586 (2008).

Meta-theories of judicial interpretation such as minimalism and its contenders identified by Cass. R. Sunstein and discussed in Chapter 2 shall be called “theories of judicial interpretation” in this study. They contain a theory on what the best way is to achieve (the best) standard interpretation of law in all cases. Such theories of interpretation are a part of jurisprudence as an academic discipline: legal theory or the theoretical study of law, legal reasoning, legal institutions and of law in society and practice. In this way, the study aims to contribute to jurisprudence with regard to the three tribunals and the freedom of religion and belief.

#### 1.4.3 Is analysis of standard interpretations sufficient to explain differences in judicial outcome?

Most certainly, many areas of academic expertise can offer very valuable and interesting perspectives on why tribunals interpret the freedom of religion and belief in a certain way and in a certain context of jurisdiction, time, situation and circumstances. These areas of expertise include political science, sociology, anthropology and psychology. This study uses none of these areas of expertise. Instead, it focuses strictly on the facts created when a judicial judgment is reached and rendered: the argumentation found in the written judgment.

A study such as this one that employs merely positive law and legal theory, certainly does offer valuable and interesting perspectives on why tribunals interpret the freedom of religion and belief in a certain way and in a certain context of jurisdiction, time, situation and circumstances. Even when compared to studies that employ other academic disciplines as the determinative rationality for explaining a judicial decision, a study such as this one, still offers an interesting perspective. After all, judges, in every jurisdiction are required to make their argumentation and motivation of the outcome explicit in their judicial opinions. Everything they do make explicit constitutes facts of great value and interest for an academic study. The selected case law therefore constitutes the factual material in this study.

### 1.5 THE TRIBUNALS: SCC, CCSA, ECtHR

#### 1.5.1 The choice of tribunals for a comparison

The trio of tribunals featuring in this study was chosen for a number of reasons. First, from a global perspective the three tribunals represent three unique perspectives on the interpretation of a universally recognized human right. While adding more tribunals from other jurisdictions in the world would have certainly been interesting, comparing “just” three is no less interesting.

The reconstruction of the standard interpretation as outlined above, requires reviewing and analyzing a substantial number of cases from each of the tribunals. Comparing more than three tribunals would thus have added complexity and volume to the study, making the study less accessible, while not necessarily adding substantially more to the overall purpose. Obviously, from the perspective of the overall purpose, the more, the better. The more comparative analysis of the standard interpretation of the freedom of religion and belief is made, involving any of the tribunals in this study or others, the better for the overall purpose. Hence, the author certainly does not rule out engaging in such future comparative research.

The second reason to choose the trio, is that the three tribunals also each represent legal and constitutional orders in which constitutionalism, rule of law, democracy, human rights and finally human rights based judicial review are important fundaments. The legal and constitutional orders also each combine the common law and the continental law traditions, instead of being shaped by just one of them. Moreover, within each of the jurisdictions the social context, including with regard to religion and belief, is very pluralist.

The three tribunals are comparable in the sense that they each have the final say in the interpretation of the freedom of religion and belief in their respective jurisdiction. Yet while the SCC and CCSA are the highest tribunals in national constitutional orders, the ECtHR is a supranational court within a multilevel jurisdictional constitutional framework, involving not only the constitutional and legal orders of the Council of Europe and the high contracting parties, but also enjoying a complex relationship with the legal order of the European Union.<sup>20</sup>

Obviously, much of the above line of reasoning for the comparison would also have been valid had the SCC and CCSA been compared to a European national highest tribunal. However, for the author the perspective of the ECtHR was more compelling, because within the scope of Europe overall, the standard interpretation of the ECtHR has more impact. On the other hand, no other international human rights tribunal has an impact on national legal orders comparable to that of the ECtHR. Hence, the comparison with national tribunals was regarded as being more relevant than the comparison with, for example, the Inter-American and African Human Rights courts. The national tribunals chosen for the comparison, however, do exist in federal constitutional and legal orders. So, the dynamics between different levels of jurisdiction are relatively comparable to those of a supranational jurisdiction.

Finally, the choice for the three tribunals can be argued from the perspective of responses to the freedom of religion and belief cases. All three courts

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20 See further, e.g., R.A. Lawson, 'A Twenty-First-Century Procession of Echternach: The Accession of the EU to the European Convention of Human Rights', in F. Dorssemont, K. Loercher, I. Schoemann (eds.), *The European Convention on Human Rights and the Employment Relation*, Hart Publishing Ltd, Oxford (UK), 2013, pp. 47-59.

feature in the critical response to judicial interpretation of freedom of religion and belief from freedom of religion and belief advocates, freedom of religion and belief sceptics, and many of the “shades of grey” in between. This makes it particularly interesting to study the similarities and differences in the standard interpretations of the human right by these three tribunals.

### 1.5.2 Is the comparison between a supranational and two national courts fair?

In this study, the ECtHR is being compared to the highest national tribunals in federal constitutional and legal orders. But is the comparison really fair? Fairness mandates that the jurisdiction, context and complexity are comparable.

As argued above, this comparison makes more sense than comparing the ECtHR’s case law on the freedom of religion and belief to that of another international court which has much less impact on national legal orders. Comparing with the highest court in a highly centralized nation, would obviously not be fair. Federal constitutional and legal systems like the ones in Canada and South Africa have similar dynamics to those in the Convention system in Europe. The ECtHR, like the other two selected tribunals, must take into consideration legal and political differences between the divergent levels which constitute its jurisdiction. They all sometimes walk a fine line between using authority to guard the rights protected in the instrument of which they are guardian, while not losing their authority with the institutions and majority of people through unpopular decisions.

A relevant point in this regard is that the (supposed) supra-national character of the ECtHR has become the subject of discussion.<sup>21</sup> In Britain, reversal of the implementation of the ECHR and even withdrawal from the ECtHR has been raised in public debate.<sup>22</sup> Elsewhere in Europe, the judgments have also triggered “new nationalism” responses. Arguably the “margin of appreciation” doctrine’ (see further Chapter 3) has been given renewed attention in response to this.<sup>23</sup> This has led to the adoption of Protocol 15, introducing a reference to the principle of subsidiarity and the doctrine of the margin of appreciation. Some might even argue that if the ECtHR has been a supra-national court in the past, it is on its way back to becoming an international court again. So, is the comparison as fair as suggested under these circumstances? I argue that it is.

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21 See, e.g., T. Baudet, *The Significance of Borders – Why Representative Government and the Rule of Law Require Nation States*, Brill, Leiden (Netherlands)/Boston (USA), 2012.

22 See A. Wagner, ‘What would happen if the United Kingdom withdrew from the European Court of Human Rights?’, in *New Statesman* online, published 3 March 2013.

23 See the discussion in the Opening Statement by M. Jean-Claude Mignon, President of The Parliamentary Assembly, High Level Conference on the Future of the European Court of Human Rights, Brighton, 19 April 2012.

Contesting the legitimacy of judicial decisions and of courts which render them is a common feature of public debate as well as in academia. This is true for international as well as national courts. Sometimes this contesting is subtle, precise and well argued, especially when only one judgment is concerned. Sometimes the contesting is blunt, aggressive and founded in political emotions rather than legal doctrine.

The discussion in the United States about the role of the Supreme Court as constitutional arbiter is mainly generated by a much broader “culture war”. As Supreme Court judgments touch on the issues of the “culture war”, the judgments lead to heated debates in which one side or the other (sometimes even judges in dissenting opinions) contest the legitimacy of the judgment or the legitimacy of the Supreme Court.<sup>24</sup> Similarly, the Quebec debate on inter-culturalism v. Canadian multi-culturalism which also touched on judicial decisions in human rights cases, is clearly part of a more general debate about Quebec’s (separate) identity.<sup>25</sup>

Hence, the debate concerning the ECtHR is not so unique. It is a part of a more general debate about European integration versus national separationism. This is a debate which has an impact on the ECtHR, but that is no reason not to compare the ECtHR as (supra-national) last arbiter in human rights cases within its jurisdiction to national courts in a federative order. Elsewhere in the world there are similar debates. It makes the comparison of judgments only more relevant.

## 1.6 DYNAMICS AND DIMENSIONS IN FREEDOM OF RELIGION AND BELIEF JURISPRUDENCE

### 1.6.1 Does judicial interpretation of freedom of religion and belief lead to secularization?

The freedom of religion and belief cases in Strasbourg have attracted quite some attention over the years. While some lament that the Court (as courts in general) is instrumental to the cause of further secularization of society and the public space,<sup>26</sup> others criticize the Courts communitarian tolerance for

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24 See, e.g., Supreme Court of the United States, *Obergefell et al. v. Hodges, Director, Ohio Department of Health et al.*, no. 14–556, 26 June 2015, *Dissenting opinion of Justice Scalia*.

25 See G. Bouchard & C. Taylor, ‘Building the future, A time for reconciliation’, Government of Quebec, 2008.

26 See for a general critique I. T. Benson, ‘The Attack on Western Religions by Western Law: Re-framing Pluralism, Liberalism and Diversity’, in *International Journal for Religious Freedom*, vol. 6, no. 1-2, pp. 111-125 (2013), p. 112 ff. Compare M. Rosenfeld, ‘Recasting Secularism As One Conception Of The Good Among Many In A Post-Secular Constitutional Polity’, in S. Mancini and M. Rosenfeld (eds.), *Constitutional Secularism In An Age Of Religious Revival*, Oxford University Press, Oxford (UK), 2014, p. 1-3 (of paper).

constitutional relics from a time when state and church would lend each other authority and power to further their mutual control of society.

The Supreme Court of Canada and the Constitutional Court of South Africa receive less attention in European academic literature. Yet both of them feature, much like the ECtHR, in academic debates on freedom of religion and belief and the relationship between secular law and human rights on the one hand, and religion and belief inspired normativity on the other. Canadian legal theorist Ran Hirschl, for example, sees the highest courts in South Africa and Canada as prime examples of a deified constitutionalism as an all-encompassing, overreaching civil religion.<sup>27</sup> This deified constitutionalism claims a place, historically inhabited by religion as the prime and *a priori* source of fundamental norms governing human interaction, morality and even truth.

According to Hirschl, judges are stakeholders in the civil religion of modern societies, which the deified constitutionalism, or simply law has become. As stakeholders, they take action to restore the superiority of its sources of legitimacy, rules of engagement, methods, and style of reasoning.<sup>28</sup> In this regard, there is no difference even between strong establishment states, accommodationist states or separationist states.

Strong establishment states are states where religion is a (strong) source of state legitimacy and/or religious and state institutions are strongly intertwined. Accommodationist states try to accommodate the existing religious pluralism existing in society, without preference, while not regarding religious beliefs as sources of legitimacy for state or society as a whole. Separationist states try to keep the public arena as clear as possible from any manifestation of any religion. Yet, whether the system is strong establishment, accommodationist or separationist, Hirschl argues, the law reconstructs and reformats religion.<sup>29</sup>

South Africa and Canada both represent accommodationist models; both are (historically) familiar with a stronger establishment. After all, the apartheid regime explicitly claimed a religious mandate (grounded in Afrikaner Calvinism) for its dogma of race separation and in Quebec strong establishment notions were, and still are, popular amongst advocates of the regional nationalism and secessionism. The High Contracting Parties of the Convention display varying models of religion-state relationships. If Hirschl is correct, the various cases selected for this study should display a tendency towards secularization. If this hypothesis is right for these cases, then this would automatically mean that the cases do not display a tendency of minimalism in Sunstein's

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27 See R. Hirschl, *Constitutional Theocracy*, Harvard University Press, Cambridge (USA), 2010, pp. 187 and 203.

28 R. Hirschl, 'The Secularist Appeal of Constitutional Law and Courts: A Comparative Account', *Keynote address for the ReligioWest Kick-off Meeting*, Robert Schuman Centre for Advanced Studies, European University Institute, Florence, 14-15 October 2011, p. 23.

29 *Ibid.*, p. 4.



categorization. After all, a minimalist norm is that political costs for either party have to be minimal. If courts display a general tendency towards secularization of society and the displacement of religion and beliefs with law and constitutionalism, this will certainly entail a political cost for all believers.

### 1.6.2 The features of freedom of religion and belief cases

While social and political contexts in different societies may vary, from a global perspective there are simultaneous developments which contribute to the significance of the “many paths to God” for judicial case solving. These developments are:

- Secularization;
- Re-religionization; and
- Religious diversification.

Even if one does not agree with Hirschl’s analysis, secularization is certainly an existing global development. At least if one defines it as the “decreasing impact of religion in social life, law, politics and economics”. In many societies, this also means that there is a substantial number of individuals who on a personal level do not associate themselves with any religious or philosophical affiliation or who nominally adhere to a religion while admittedly not practicing it in daily life.<sup>30</sup> Depending on the protection given to freedom of religion and belief, these individuals are more or less vocal in expressing this.

As the same time as secularization, a second process is occurring which we could call re-religionization. Religious individuals and groups, possibly under the influence of the simultaneous development of secularization attach increasing value to their religion. They derive new meaning from their religion’s principles for everyday life, social affairs, politics, and economics. Re-religionization sometimes takes on the features of revivalism, neo-orthodoxy or religious nationalism.

A third development is religious diversification.<sup>31</sup> Historically, contrary to popular belief, religiously homogeneous societies are the great exception. Yet globalization has greatly increased the religious diversity in many modern societies. Immigration has led to new religious minorities in nations where their religion was once foreign, while at the same time religions have gained new adherents amongst the non-migrant population in regions where they were foreign until fairly recently. New religious and spiritual movements also contribute to religious diversity, while finally modernization has also led

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30 See A. Reuter ‘Charting the Boundaries of the Religious Field: Legal Conflicts over Religion as Struggles over Blurring Borders’, in *Journal of Religion in Europe*, vol. 2, no. 1, pp. 1–20 (2009), pp. 3–4.

31 *Ibid.*



people to abandon the traditional features of their own religion and to work out new ways in which to believe and manifest their beliefs.

While all these three developments trigger disputes and conflict between individuals, between institutions and between individuals and institutions, the co-existence of the three developments catalyzes the potential collision of individuals and groups. Unfortunately, we are all familiar with situations and incidents which exceed a mere legal dispute, and which display extremism and political violence by many shades and types of the secularization/re-religionization/diversification divide. Whether such extremist groups feature ideology based on a religion or belief and/or are directed against a religion and belief, their common feature is disputing the very core of the universally recognized human right of freedom of religion and belief.

Freedom of religion claims in courts can be triggers, symptoms, or consequences of these developments. Some even argue that human rights claims dominate the discourse regarding religion.<sup>32</sup> Interestingly, some of the freedom of religion and belief case law from the three tribunals which feature in this study display very different outcomes, even when the facts are similar. Amongst the cases one finds:

- claimants from minority religions or beliefs, who use the right to challenge (perceived) disadvantages vis-à-vis the mainstream religion and beliefs and/or the secular mainstream;
- claimants who are adherents of the mainstream religions or beliefs who use the right to challenge (perceived) disadvantages vis-à-vis minorities and/or the secular mainstream, or challenge the loss of earlier entitlements;
- individuals who feel unfairly treated because of (perceived) privileges granted to religion in general or a specific religion or belief by the state, state institutions, or private organizations;
- new religious, semi-religious or belief movements who challenge their non-recognition as equal to known or accepted religions and beliefs.

### 1.6.3 Dimensions in freedom of religion and belief cases

Examples from the cases selected for this study illustrate the different perspectives claimants in freedom of religion and belief cases can have. Section 1.3.2 introduced the cases of *Multani*, *Pillay* and *Şahin*. Guarbaj Singh Multani and Sunali Pillay are members of minority religious groups who challenge mainstream *status quo*. Laila Şahin is a member of the majority religion in her country, but the *status quo* is determined by the strictly separationist Kemalist outlook of the Republic of Turkey. In all three cases, the freedom rights raised

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<sup>32</sup> *Ibid.*

relate to the *personal sphere*, the everyday practice of religion and/or belief. All three claimants also clash with educational institutions.

Personal freedom is also an important dimension in two famous ECtHR cases, *Thlimmenos* and *Bayatyan*,<sup>33</sup> (sections I3.4.2 and I3.4.11) which feature Jehovah's Witnesses who conscientiously objected to military service.

Issues involving the freedom of religion and belief in relation to *family matters and personal law*, have a community autonomy as well as a personal freedom component, but always raise very specific questions. Can a religious marriage that was never registered as a civil marriage nevertheless be seen as a marriage once one party has deceased in the interest of insurance, social security, and inheritance entitlements of the remaining partner? These issues are raised in one selected case before the ECtHR, *Yiğit*<sup>34</sup> (section I3.4.9) and three before the CCSA (*Amod*,<sup>35</sup> *Daniels*,<sup>36</sup> *Hassam*,<sup>37</sup> sections I2.4.5, I2.4.8 and I2.4.12). While the Turkish case features a member of the mainstream religious group, the South African cases feature members of the Muslim communities in South Africa, once victims of racial as well as cultural discrimination under apartheid.

In the Canadian *Bruker*<sup>38</sup> case (section I1.4.11), the central question is whether a state court can enforce a clause in a divorce agreement which obliges the husband to provide his ex-wife with a Jewish religious divorce. Also in the family sphere are cases dealing with parental authority and different religious convictions after a divorce and cases relating to refusals to undergo medical treatment for children on religious grounds.

Issues of faith related to personal and family law often also illustrate another dimension, that of *group autonomy* and freedom of religion and belief. For example, in the Canadian *Hofer*<sup>39</sup> case (section I1.4.2), the Supreme Court must decide whether or not to measure the rules of the Hutterite community against those of the legal order when deciding a dispute between a member of the community and its leadership. While autonomy issues can be related to the running of faith-based organizations, they can also be related to the freedom of self-organization from the state as such.

The Hungarian case of *Hasan and Chaush*<sup>40</sup> (section I3.4.4) was brought before the ECtHR by claimants who accused the government of having directly

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33 ECtHR (GC), *Thlimmenos v. Greece*, app. no. 34369/97, 6 April 2000; ECtHR (GC), *Bayatyan v. Armenia*, app. no. 23459/03, 7 July 2011.

34 ECtHR (GC), *İrfan Yiğit v. Turkey*, app. no. 3976/05, 2 November 2010.

35 CCSA, *Amod v. Multilateral Motor Vehicle Accidents Fund*, Case CCT4/98, 27 August 1998.

36 CCSA, *Daniels v. Campbell NO and Others*, Case CCT40/03, 11 March 2004.

37 *Hassam v. Jacobs NO and Others*, Case CCT83/08.

38 SCC, *Bruker v. Marcovitz*, Case 31212, [2007] 3 SCR 607, 14 December 2007.

39 SCC, *Lakeside Colony of Hutterian Brethren v. Hofer*, Case 22382, [1992] 3 SCR 165, 29 October 1992, p. 73.

40 ECtHR (GC), *Hasan and Chaush v. Bulgaria*, app. no. 30985/96, 26 October 2000.

interfered with the religious community by taking sides in an internal leadership dispute and only recognizing their competitors as the official representatives of their minority religious community. In the South African *Prince*<sup>41</sup> cases (see section I2.4.7, the case was dealt with before the Constitutional Court twice), a central issue is whether the state must and can craft an exemption from the prohibition of intoxicants for Rastafarians, a minority community who use cannabis as part of their religious practice. In *Raëlian Movement*<sup>42</sup> (section I3.4.12), the ECtHR has to decide whether Swiss authorities were right in restricting a new religious movement's public advertisements of their message.

Many autonomy cases also relate to *educational institutions*. In section 1.3.2 we saw that in the South African case *Christian Education* and the Canadian case *Trinity Western Union*, educational institutions run by religious communities also raised the issue of autonomy for faith-based communities. Other cases which strongly feature the educational dimension relate to the state-run institutions, like *Multani*, *Pillay* and *Şahin* mentioned above. In the Strasbourg *Lautsi* case, also mentioned in section 1.3.2., the ordained display of a religious symbol in a public school classroom was challenged. In another Strasbourg case, *Fernández Martínez*<sup>43</sup> (section I3.4.14), a former priest challenged the end of his employment by the state, after the Church had decided, he was no longer qualified to teach Catholic religion.

While the *balancing of interests and rights* plays a role in almost every freedom of religion and belief case, it is a dominant dimension in some more than in others. In *Christian Education*, as we saw in section 1.3.2., a Christian University challenged the decision that its graduates were not fit for the British Columbia teachers program, only because the university policy required all staff and students to refrain from same-sex relationships. Balancing between equality rights of students in the public education system and freedom of religion and belief of those graduates of TWU is required. In the South African *Fourie*<sup>44</sup> case and the Canadian Reference case *Same Sex Marriage*<sup>45</sup> (section I2.4.10 and 4.4.9), the courts had to decide on the constitutionality of same-sex marriage, while some interveners, many from mainstream denominations, raise their concerns regarding recognition based on their beliefs. In *Chamberlain*,<sup>46</sup> a Canadian school board disallowed a first-grade school book displaying same-sex families. Members of the school board were concerned about the conflicting

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41 CCSA, *Prince v. President of the Cape Law Society*, Case CCT36/00B, 25 January 2002.

42 ECtHR (GC), *Mouvement Raëlien Suisse v. Switzerland*, app. no. 16354/06, 13 July 2012.

43 ECtHR (GC), *Fernández Martínez v. Spain*, app. no. 56030/07, 12 June 2014.

44 CCSA, *Minister of Home Affairs and Another v. Fourie and Another; Lesbian and Gay Equality Project and Others v. Minister of Justice and Constitutional Development*, Cases CCT60/04 and CCT10/05, 1 December 2005.

45 SCC, *Reference re Same Sex Marriage*, Case 29866, [2004] 3 SCR 698, 9 December 2004.

46 SCC, *Chamberlain v. Surrey School District No. 36*, Case 28654, [2002] 4 SCR 710, 20 December 2002.

ethics of portraying these families as “normal” with the message taught to some children at home. But is this a sound basis for such a decision in a public school context, or should the teaching materials in a public school portray the plurality of families as they exist?

In the *Chamberlain* case, as in many others of the selected cases like *Şahin*, *Lautsi*, *Hasan and Chaush*, *Bruker* and the same-sex cases, a dominant dimension was also that of *secularism*, or in other words, *institutional state-religion relationships*. Other cases in which this is dominant are the ECtHR cases *Folgerø*<sup>47</sup> and *Refah*<sup>48</sup> (sections I3.4.8 and I3.4.5). In *Folgerø*, parents felt there were too many burdens for them to get an exemption for their children from the religion and ethics class in public schools. In *Refah*, the ECtHR had to decide whether the judicial prohibition of a faith-based political party, which formed the government at the time, was called for by the protection of secularist principles in the constitution of Turkey.

As the examples show, in cases involving freedom of religion and belief, one or more of the following dimensions are dominant:

1. personal freedom;
2. family law and family relations;
3. group autonomy;
4. education;
5. balancing freedom of religion and belief with other rights and;
6. secularism.

These are the dimensions in which the case law has been analyzed and compared in this study.

## 1.7 RESEARCH QUESTIONS

Based on the above sections, the following research questions will be answered in this study:

1. *What are the standard interpretations of the freedom of religion and belief of the Canadian Supreme Court, the South African Constitutional Court, and the European Court of Human Rights; and how are they applied in the six dimensions personal freedom; family law and family relations; group autonomy; education; balancing freedom of religion and belief with other rights; and secularism?*
2. *What concept of the freedom of religion and belief do each of the Courts apply, how broad is the scope of protection and how is the freedom of religion and belief*

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47 ECtHR (GC), *Folgerø and Others v. Norway*, app. no. 15472/02, 29 June 2007.

48 ECtHR (GC), *Refah Partisi (The Welfare Party) and Others v. Turkey*, app. nos. 41340/98, 41342/98, 41343/98 and 41344/98, 13 February 2003.

- triggered in the three standard interpretations and what are the reoccurring guiding principles within the standard interpretation?*
3. *Which elements of minimalism are present in the standard interpretation and in which elements does the standard interpretation contradict minimalism and what is the effect of this on optimal protection for believers?*
  4. *What can the Courts learn from each others standard interpretation, when it comes to optimal protection of believers; what are the best practices?*

## 1.8 PRACTICAL MATTERS

### 1.8.1 Period of time for selected cases

This goal of this study has always been to provide insights into current standard interpretations by the three tribunals. Hence the period had to be long enough to provide enough cases that would lead to such insights. In order to enhance comparability, there also had to be one continuous period in which all the selected cases occurred. In determining a starting point, it was relevant to take into consideration certain events and developments for each of the courts and legal orders.

The Grand Chamber of the ECtHR was only introduced in 1998 by the 11<sup>th</sup> Protocol of 1998 which merged the European Court and the European Convention of Human Rights into one full-time ECtHR. Within the ECtHR, the Grand Chamber was to solve the leading cases and to set the precedents. It seemed opportune therefore to let the selection of cases for the ECtHR start in 1998 and select only Grand Chamber cases from the great number of freedom of religion and belief cases decided since 1998.

1998 could have been a good starting point, were it not that the current South African Constitution entered into force in 1996 and immediately produced freedom of religion and belief case law. In order to allow this case law to be included in the selection, the starting point needed to be at least 1996. However, the relevant event for Canadian constitutional history had been much earlier. The Canadian Charter was introduced following the Repatriation of the Constitution in 1982. The first major case regarding the freedom of religion and belief was *Big M Drug Mart*<sup>49</sup> in 1985. A number of cases have been decided since then. Setting the starting point for the scope of the study to 1990 allowed for the selection of six very interesting Canadian cases which would have been disqualified if the period had started in 1996.

Hence, the period for selection starts in 1990 and runs until 2015. For the ECtHR, however, only cases after 1998 were selected and for the CCSA, only cases after 1996 were selected.

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49 SCC, *R. v. Big M Drug Mart Ltd.*, Case 18125, [1985] 1 SCR 295, 24 April 1985.

### 1.8.2 Selection of cases

In the period from 1990 until 2015, 26 cases regarding the freedom of religion and belief were decided by the Canadian Supreme Court.<sup>50</sup> In the period from 1996 until 2015, 17 cases regarding the freedom of religion and belief were decided by the South African Constitutional Court.<sup>51</sup> The Grand Chamber of the European Court of Human Rights decided 21 cases regarding the freedom of religion and belief from 1998 until 2015.<sup>52</sup> After 2015 up to April 2022, roughly two more cases regarding the freedom of religion and belief were decided by the SCC, seven by the CCSA and three by the ECtHR. To get a comparable number of cases, the number of cases selected from each Court was limited to the 15 cases in which the freedom of religion and belief features most prominently and which are most essential to understand their standard interpretations.

The selections only include cases in which the freedom of religion and belief featured as the central right. It was considered to be the central right, if the interpretation of the freedom of religion and belief was decisive in determining the outcome of the case. This includes cases in which the freedom of religion was raised as a major argument, although the central right was equal treatment of gender or sexual orientation or in which the freedom of religion was raised in combination with equal treatment, freedom of opinion or another right. This excludes cases that mention the freedom of religion in passing for whatever reason or where the judgment did not include enough material to analyze any interpretation of the freedom of religion by the specific court.

### 1.9 OUTLINE AND READING AIDE

In the next chapter, Chapter 2, the theoretical framework is set out. It is formed by the freedom of religion and belief as a universally recognized human right. Chapter 3 describes the codification of the freedom of religion and belief in the three jurisdictions which feature in this study. In Chapter 4 the interpreta-

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50 Based on a Lexbox query, <https://scc-csc.lexum.com/scc-csc/en/d/s/index.do?cont=%22freedom+of+conscience+and+religion%22+OR+%22freedom+of+belief%22&ref=&d1=1990-01-01&d2=2015-12-31&p=&or=date> (3 April 2019).

51 Based on a DSpace query [https://collections.concourt.org.za/handle/20.500.12144/1/discover?query=religion&submit=Go&rpp=100&sort\\_by=score&order=desc](https://collections.concourt.org.za/handle/20.500.12144/1/discover?query=religion&submit=Go&rpp=100&sort_by=score&order=desc) (17 April 2019), and on a SAFLII query, [http://www.saflii.org/cgi-bin/sinosrch-adw.cgi?method=auto;meta=%2Fsaflii;mask\\_path=za%2Fcases%2FZACC;mask\\_world=;query=%20%22freedom%20of%20religion%22;results=50;submit=Search;rank=on;callback=off;legisopt=;view=date;max=;offset=0](http://www.saflii.org/cgi-bin/sinosrch-adw.cgi?method=auto;meta=%2Fsaflii;mask_path=za%2Fcases%2FZACC;mask_world=;query=%20%22freedom%20of%20religion%22;results=50;submit=Search;rank=on;callback=off;legisopt=;view=date;max=;offset=0) (18 June 2018).

52 Based on a HUDOC query [https://hudoc.echr.coe.int/eng#{"languageisocode":\["ENG"\],"article":\["9","9-1","9-2","13+9","13+9-1","14+9","14+9-1"\],"documentcollectionid2":\["GRANDCHAMBER","DECGRANDCHAMBER"\]}](https://hudoc.echr.coe.int/eng#{) (3 April 2019).

tion of the freedom of religion and belief by the three courts is compared along the lines of the six dimensions. Chapter 5 then reconstructs the three standard interpretations, including guiding and supporting principles. In Chapter 6 the three standard interpretations will be on the minimalist features of the three reconstructed standard interpretations are the focus. Chapter 7 answers all the research questions consecutively and formulates the overall conclusions.

The case studies of the selected cases are presented in Appendix I. Chapter I1 features the selected SCC cases after a short introduction of Canadian legal and constitutional system and recent the recent legal and political history of Canada. Chapter I2 features the selected CCSA cases after a short introduction of the South African legal and constitutional system and recent legal and political history of South Africa. Chapter I3 features the selected ECtHR cases after a short introduction of the Strasburg supranational legal order and recent legal and political history of the Strasbourg system. In Appendix II includes all the relevant provisions of the Canadian Charter of Rights and Freedoms, the South African Bill of Rights and the European Convention on Human Rights.

## 2.1 INTRODUCTION

The freedom of religion and belief is one of the oldest classical human rights. Debate is possible regarding the starting point of the current understanding of human rights and/or constitutional rights. Some would have them begin with the codes of Hammurabi (ca. 1780 before the common era, BCE) or Ancient Roman Law; others with the *Magna Carta* (1215 common era, CE), the US Declaration of Independence (1776 CE), or the *Déclaration des Droits de l'Homme et du Citoyen* (1789 CE). Religious liberty in some form or another has always been an element. As a matter of fact, several of the world's religious and philosophical traditions point out that the very concepts underlying human rights, such as human dignity, sanctity of life, and integrity of the human person, originate from these traditions, not from "secular" sources.

The freedom of religion and belief is closely linked to the Peace of Westphalia in 1648 CE, which ended strife in post-Reformation Europe. Hence the freedom of religion and belief is intertwined with the birth of the modern law of nations and modern constitutionalism, which evolved after Westphalia.<sup>1</sup> Being products of Western legal and political thought, they became globally relevant through the dominance of European nations in the eras of colonialism and imperialism.

Modern human rights instruments after World War II, beginning with the Universal Declaration of Human Rights all include the freedom of religion and belief. It is incorporated in regional human rights instruments such as the European Convention of Human Rights and Fundamental Freedoms, the American Declaration of the Rights and Duties of Man, the African Charter on Human and Peoples Rights.<sup>2</sup> It has been affirmed by faith-based and/or interfaith initiatives like the Cairo Declaration of Human Rights in Islam,<sup>3</sup>

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1 See M. D. Evans, 'Historical Analysis of Freedom of Religion and Belief as a Technique for Resolving Religious Conflict', in T. Lindholm, W.C. Durham Jr., B. Tahzip-Lie (eds.), *Facilitation Freedom of Religion or Belief, A Deskbook*, Marinus Nijhoff Publishers, Leiden (Netherlands), 2004.

2 See T. Lindholm, W.C. Durham Jr., B. Tahzip-Lie (eds.), *Facilitation Freedom of Religion or Belief, A Deskbook*, Marinus Nijhoff Publishers, Leiden (Netherlands), 2004, Appendix A.

3 [https://www.oic-oci.org/upload/pages/conventions/en/CDHRI\\_2021\\_ENG.pdf](https://www.oic-oci.org/upload/pages/conventions/en/CDHRI_2021_ENG.pdf)



the Vatican's Declaration on Religious Freedom – *Dignitatis Humanae*<sup>4</sup> and by the Parliament of the World's Religions.<sup>5</sup> Most of the world's constitutions also acknowledge this right. And thus, the world over, courts, be they "ordinary" national, constitutional, international, or supranational tribunals, adjudicate in conflicts which involve believers in the broadest sense of the term.

Court cases involving the freedom of religion and belief and/or the relationship between state, society, and religion, often involve the "judicialization of mega-politics" (Hirschl)<sup>6</sup> such as religious education, same-sex marriage, legal pluralism and pluralism in public life. Legal theorists have long focused on theories of interpretation of constitutional and human rights. Whereas the discourse regarding judicial interpretation of freedom of religion and or state/religion relationships may be a particular one, it is fundamentally linked to the broader corpus of legal theory on interpretation of modern legal rights.

When courts adjudicate these cases, they engage in an internal discourse. With every new case, they continue the discourse. Even when the judges disagree, they make use of the same principles and conceptions, which function as a mid-level agreement between them. While these principles and concepts evolve, one case at a time, they are seldomly aborted completely. I call this the standard interpretation of the freedom of religion and belief.

While the standard interpretation is the result of combined efforts on courts, judges and those who study interpretation of constitutional and human rights, like the freedom of religion and belief, distinguish between different theories of interpretation. My preference for the adjudication of human rights is Cass Sunstein's interpretation theory, judicial minimalism. Sunstein positions this interpretation theory in the American debate on interpretation as an alternative to originalism, perfectionism and majoritarianism. Minimalism and its three alternatives are the broad categories, in which all other theories of interpretation of constitutional and human rights fall, not only in the US, but generally. Sunstein argues that minimalism is strongly connected to the concept of liberal democratic constitutionalism (LDC) as meta-values transcending political agendas. He also argues that it is best fitted for pluralist societies. I support his argument.

The adjudication of freedom of religion and belief cases, also triggers broader debates regarding the position of this freedom right in constitutional government and its influence on (communities of) believers. At the time of finishing this dissertation, a new phase in the debate is taking place. While

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4 Vatican, *Declaration on Religious Freedom – Dignitatis Humanae On The Right Of The Person And Of Communities To Social And Civil Freedom In Matters Religious*, December 7, 1965.

5 <https://parliamentofreligions.org/history/about/>.

6 R. Hirschl, *Constitutional Theocracy*, Harvard University Press, Cambridge (USA)/London (UK), 2010.

it was not possible to incorporate all the newest materials into this dissertation, I am confident that the dissertation still has a place in it.

In current and earlier debates broad positions can be sketched which categorize all positions held. There are those who would abolish the freedom of religion and belief positioning more general freedom rights as better alternatives in a secular society. There are those who view the freedom of religion and belief as a threat to their religious world view. There are those who by and large are satisfied with the freedom of religion and belief's embedment in classical liberalism. Finally, there are those who argue for more pluralistic understanding of the notions underlying the freedom of religion and belief. I position this dissertation in a combination of the latter two positions and in strong rejection of both former positions.

This is, because I believe in LDC as potential as meta-values transcending political agendas and different worldviews. Fully aware I hasten to add, that it has become contested regarding its meta position and that it may mean different things to different people (incompletely theorized agreement). I also support the view that many current conceptualizations of the freedom of religion and belief and for that matter other human rights have developed in a Western and Western-Christian bias and that more pluralistic re-development is required, in Western legal systems and globally.

The position in the discourse on freedom of religion and belief and the choice for minimalism as a preferred theory of interpretation is indicative for how I see "optimal protection" throughout the study: a form of maximum protection, which also includes maximum protection of other human rights and compelling general interests (see further section 2.8).

This chapter first explores the origins of freedom of religion and belief as a modern human right/ constitutional right (section 2.2). It turns to the significance of interpretation when the right is applied to concrete cases (section 2.3). From there we turn to interpretation theories, introducing Sunstein's categorization (section 2.4) and the choice for judicial minimalism (section 2.5). Thereafter constructing the theoretical framework is continued by looking at the debate in literature about the freedom of religion and belief and its adjudication (section 2.6) and the position of this dissertation in that debate (section 2.7). The chapter ends with an intermediate conclusion on the theoretical framework and the operationalization of "optimal protection" (section 2.8).

## 2.2 ORIGINS OF FREEDOM OF RELIGION AND BELIEF AND LEGAL RECOGNITION

In this section, the historical origins of the freedom of religion and belief are investigated in a bird's view. Hereafter arguments for the freedom of religion and belief from different angles are explored: pragmatic, faith based, and pluralist. Finally, we look at the legal recognition of the freedom of religion and belief.

### 2.2.1 A bird's view of the historical origins of freedom of religion and belief

There is a persisting view that religion is the most significant cause of war in human history. This view is misguided.<sup>7</sup> Looking at history, we see, that it is the political significance of religious division, which can lead to a violent conflict. In turn, the human desire to live in peace, necessitates religious tolerance, which can be supported by “secular” and faith-based arguments (see below).

Predecessors of the contemporary freedom of religion and belief have existed in ancient realms, as Hammurabi's code or Roman law show, often encouraging pantheistic understandings of religion and belief. The introduction of the beliefs and customs of various peoples and cultures (often directly after a new conquest) provided universalist common ground, rather than particularistic divisions. Hence this “inclusiveness” *avant la lettre* contributed to both the high ideal and political necessity of social peace.

In Europe, after the Roman Empire's conversion to Christianity, inclusiveness was gradually replaced by exclusiveness of what became the state religion. Refusal to accept the one and only true (interpretation of) faith also became the *casus belli* to launch “just wars” against the “infidel” inhabitants of known and new worlds and to punish the sinners in the Inquisition. From the Spanish Inquisition to the Peace of Westphalia, attempts by states to ordain the “true faith” and annihilate all “untrue faiths” had been more common in Europe than religious tolerance. Even after the Peace of Westphalia, princes could still make a choice on the religion of their subjects and conscientious objectors would have to leave the country. Yet the Reformation had once and for all annihilated the possibility of a Europe united under one church. Pragmatism required a re-emergence of religious tolerance to fashion peace between the nations. Hence, Westphalia signifies the triplet birth of modern international law, modern constitutionalism and modern freedom of religion and belief.<sup>8</sup>

The dominance of European powers in global history in the following centuries exported their understanding of (the) law (of nations), constitutionalism and of religious freedom to colonies, dominions, protectorates and counterparts. Often understood as a collective right, European powers tried to ensure that non-Christian rulers would allow Christian minorities to practice their religion and customs and govern their own affairs. This coincided with the religious and cultural understandings of the rights of religious minorities dominant in de colonized or semi-colonized territories. For example, Islamic entities in the Middle East, South and Southeast Asia, had long developed

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7 Evans, *supra* n. 1, at 1-6 and 14. See also T. Lindholm, ‘Philosophical and Religious Justification of Freedom of Religion or Belief’, in Lindholm, Durham and Tahzip-Lie, *supra* n. 2, at 25-27.

8 See Evans, *supra* n. 1, at 2-6 and 14-16.

a system of recognition for the self-governance of religious minorities based on Islamic law.

Similarly, where European powers controlled non-Christian colonial populations, systems of recognition of autonomy and own law were worked out. Sometimes these were based on ethical considerations sometimes on sheer pragmatism, often on a combination of both.<sup>9</sup> After World War I, as the right to self-determination of peoples developed, the rights of religious minorities to practice their religion without hinderance and to be protected against discrimination also further evolved.<sup>10</sup>

The 1942 Declaration of the United Nations emphasized four freedoms the nations united by the declaration set out to protect. Religious freedom was one of them. When the newly founded United Nations adopted the Universal Declaration of Human Rights (UDHR) in 1948, Article 18 specified:

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.

Later, the freedom of religion and belief was included in the International Covenant on Civil and Political Rights (ICCPR, 1966 CE). However, as Malcom Evans notes, the 1960 Krishnaswami "Report on Discrimination in the Matter of Religious Rights and Practices" signified the shift from freedom of religion and belief as such, to prevention of discrimination based on religion and belief.<sup>11</sup>

Most of the constitutions of the nations of the world nowadays recognize the freedom of religion and belief in some form. Hence, we may distinguish in (Western) legal history "three different, successively realized, but partially overlapping models of political protection of religious liberty", namely:<sup>12</sup>

1. The *cuius regio, eius religio* model keeping religious communities apart in different territories;
2. The minority protection, providing for minority protection within the territory of a hegemonic majority;
3. The human rights model: providing for individual and communal rights to freedom of religion and belief.

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9 For a thorough analysis of this with regard to the former Dutch East Indies see D. van Reybrouck, *Revolusie, Indonesie en het Ontstaan van de modern wereld*, De Bezige Bij, Amsterdam (Netherlands), 2020, Chapter 2.

10 Evans, *supra* n. 1, at pp. 6-11.

11 *Ibid.*, pp. 11-12.

12 Lindholm, *supra* n. 4 at 27, referring to Evans, *supra* n. 1.

### 2.2.2 Pragmatic arguments for the freedom of religion and belief

Malcom Evans notes both the age and the controversy of the freedom of religion and belief in historic overview. Often enough, history points to pragmatism and *realpolitik* as reason for freedom of religion and belief. As explained above, ancient pantheism served a pragmatic inclusiveness to forge the bonds that would hold together empires.<sup>13</sup> European understandings of freedom of religion and belief were globalized in the late modern era of colonialism and imperialism, and after that in the post-colonial age. Yet these European understandings date back to the early ages of modernity. After the Thirty Years' War in Europe (or even eighty years if you follow Dutch national history), the princely states of Europe had not only seen large sections of their populations perish and suffer. They had also been bled financially by continuous warfare. Rulers and populations were longing for peace, which is a desire as much as an ideal.

The Westphalian peace discloses the pragmatism of both, tolerance at the inter-state level, as well as (in some cases) intolerance at the inner-state level. The princely states recognized each other's sovereignty in choosing a faith for the nation, giving rise to the concept of sovereignty of nations. International peace was hereby enabled. This implied also that on the national level, one faith could be declared exclusive.<sup>14</sup> From an instrumental point of view, religious intolerance towards all other creeds than the one creed adopted by the state, can create serious conflict and severe disruption of social cohesion. However, from the same pragmatic stance, religious tolerance can also be challenged. If in a relatively homogeneous society the majority of people are intolerant of a religious minority, institutionalizing oppression might have a greater benefit for social peace than challenging the feelings of the overwhelming majority by treating the minority as equals.<sup>15</sup> Thomas Hobbes serves as the advocate of Enlightenment thought which defended the sovereign's power in all matters of faith and doctrine. John Locke is usually cited to show Enlightenment thought proclaiming freedom of conscience.<sup>16</sup>

With further historical developments, active state policy to make one faith exclusive within its territory became gradually less popular, while state control of religious activity in order to prevent real or perceived disorder, crime and anti-social behavior was deemed legitimate.<sup>17</sup> De Tocqueville in his famous

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13 Evans, *supra* n. 1, at 1-2.

14 *Ibid.*, pp. 4-6.

15 See C. Evans, *Freedom of Religion under the European Convention of Human Rights*, Oxford University Press, Oxford (UK) et al., 2001, p. 23.

16 T. Hobbes, *Leviathan*, R. Tuck (ed.), Cambridge University Press, Cambridge (UK), 1996, chs XLII and XLVII. J. Locke, *A Letter Concerning Toleration*, J. Horton and S. Mendus (eds.), Routledge, London (UK)/New York (USA), 1991.

17 See Evans, *supra* n. 15, at 24-25. J. Locke, *A Letter Concerning Toleration*, J. Horton and S. Mendus (eds.), Routledge, London (UK)/New York (USA), 1991.

work on the then new American republic, formulates a pragmatic argument against intra-state enforcement of religious precepts. While they may “be sometimes of momentary service to the interests of political power, they always sooner or later become fatal to the church”. He is indeed “so much alive to the almost inevitable dangers which beset religious belief whenever the clergy take part in public affairs”, that he professes he rather “shut up the priesthood within the sanctuary than to allow them to step beyond it”.<sup>18</sup> These arguments have since been repeated in many generations. If religion becomes synonymous with (political) power, every failure suffered, and every injustice committed is equated with the religion. Indeed, it is sometimes argued that this explains the continued abandonment of organized religion by large parts of the population in Western Europe since the later decades of the 20<sup>th</sup> century; a process often called secularization (see further section 2.6.2).

Pragmatism can thus be considered to be a factor in enabling freedom of religion and belief. Yet it can also assist its foes and it can never be adequate on its own to ensure a wholesome freedom of religion and belief. Principled arguments are needed for this. They can be raised from an intra-faith, interfaith or pluralist position.

### 2.2.3 Faith-based arguments for freedom of religion and belief

Iranian philosopher Abdolkarim Soroush is no stranger to religious authorities exercising political power, nor to the effects this has on (religious) belief amongst the population. But his argument is less pragmatic than Tocqueville’s, and more founded in an understanding of the nature of faith.

Faith as love can only exist in freedom, Soroush argues following the great mystic Jalaluddin Rumi. Faith enters hearts freely. Action motivated by faith alone is always synonymous with freedom. Fear of punishment or coercion renders the action not only unfree but a-religious. “Prophets have come in love to enchant the hearts of the pure and virtuous”, their “miracles were meant to subdue enemies not to terrify hearts or inculcate faith”. They founded a “faithful spiritual community, not a legal-corporeal society”. To compel people to confess and to adhere to a faith (falsely), “creates not a religious society but a monolithic and terrified mass of crippled, submissive and hypocritical subjects”.<sup>19</sup> Soroush explains the Quranic induction that there “shall

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18 A. de Tocqueville, *Democracy in America*, Wordsworth Editions Ltd, Ware (UK), 1998, 2:13 at p. 246.

19 A.K. Soroush, ‘Reason and Freedom’, in *Reason, Freedom, and Democracy in Islam, Essential Writings of Abdolkarim Soroush*, M. Sadri and A Sadri (eds.), Oxford University Press, Oxford (UK) et al., 2000, pp. 141-143. See also A. A. An-Na’im, ‘Complementary, Not Competing, Claims of Law and Religion: An Islamic Perspective’, *Pepperdine Law Review* vol 39, no. 5 (2013), p. 1236.

be no compulsion in religion”<sup>20</sup> in this manner. The verse is not only normative, but also descriptive, as An-Na’im affirms. Whatever is motivated by fear of coercion or punishment is simply not a religious deed.<sup>21</sup> “Religion is meant for understanding and willing embrace, not dread and reluctant submission.” Quoting another great mystic, Al Ghazali, Soroush reiterates that religion is a matter of the heart, “not the limbs”.<sup>22</sup>

In Islam as in other religions, freedom of religion and belief as well as tolerance for other religionists are essential parts of the creed. As Aulad Abdellah explains, the Quran mandates that there “shall be no compulsion in religion”, makes clear that heavenly rewards are open to believers of different faiths and that existing (religious) pluralism is God willed.<sup>23</sup> Similar arguments can be invoked from various (historical and contemporary) strands of Judaism, Christianity Buddhism, Hinduism<sup>24</sup> as well as from natural religions. Indeed, at the pinnacle of Spanish acquisition in the New World, Francisco de Vitoria claimed that wars waged with religion as their sole motive were unjust.<sup>25</sup> While alas historically and currently not all believers – in power, without power, or resisting power – follow these precepts, they have inspired interfaith cooperation and great cultural achievements.

Another line of religious arguments has historically been used in favor of religious freedom in Enlightenment thought. Locke<sup>26</sup> and Mill argued for religious freedom because true religion (i.e. Christianity) would benefit from the absence of coercion, while advocates with various religious backgrounds have argued that true and sincere faith requires the absence of state coercion, while not all state sponsored moral obligations are not seen as such. There is also another religious perspective. Many religions and denominations have experienced what it is like to be a new and or minority faith, which the existing power structures persecute. Freedom of religion is the guarantee that “religious

20 *Holy Quran*, 2:256.

21 A. A. An-Na’im, *supra* n. 18 at 1252.

22 A.K. Soroush, *supra* n. 18 at 143.

23 M. Aulad Abdallah, ‘Er is geen dwang in de godsdienst’ (9:129) Het recht op godsdienstvrijheid en burgerlijke vrijheden in de Islam’, in C. van den Broeke et al. (eds.), *Perspectieven op de godsdienstvrijheid en de verhouding tussen staat en religie*, Uitgeverij Paris, Zutphen (Netherlands), 2019, pp. 195-205, quoting *Holy Quran*, 2:256, 18:29; 2:62; 109:6, 30:22, 49:13, 11:118.

24 Lindholm, *supra* n. 4, at 30-35. For a Protestant and a Jewish delineation see L.J. Koffeman, ‘Vrijheid van Godsdienst binnen de kerk?’ and S. Katzman, R.P. Baruch, ‘Een licht voor de naties. Vrijheid van godsdienst voor de vreemdeling, de afvallige en als fundament voor staatsinrichting’, both in van den Broeke, *supra* n. 23, at pp. 151-164 and pp. 181-194.

25 F. de Vitoria, *De Iure Belli*, Washington, The Carnegie Institution of Washington, Washington DC (USA) 1917. bk 1, ch. 9, quoted by Evans, *supra* n. 1, at 3.

26 For a reevaluation of the Lockean approach see M. Adams and A. J. Overbeeke, ‘The Constitutional Relationship between Law and Religion in the History of Ideas: A Contemporary European Perspective’, in *Global Jurist*, vol. 8, no. 3, pp. 1-24 (2008), pp. 1-2 and 20.



truth is not suppressed, and can thus be known".<sup>27</sup> This is essentially the same argument made in favor of freedom of speech which will contribute to the finding of truth.

Hence, while many religious traditions display tendencies to regard one's own tradition as closer to universal truth than others, which can lead to a rivalry of "fundamentalisms", there are also tendencies to regard universal truth as (partly) unknowable, leading to toleration of or even spiritual embrace of difference. In any case, believers, will have to find a religious justification for their support for human rights in general and the freedom of religion and belief specifically.<sup>28</sup>

While both pragmatic and historical arguments may inform the need for religious tolerance in accordance with human rights, according to Evans they do not suffice and neither do religious arguments.<sup>29</sup> A pluralist meta-position is required. Many attempts to formulate such a position have been made, from interfaith inclusive universalism to secular humanism.

#### 2.2.4 Pluralist arguments for freedom of religion and belief

The "classical" liberal approach to pluralism of religion and belief is toleration. John Locke in *A Letter Concerning Toleration* in response to the Edict of Nantes, which revoked religious freedom for the French Huguenots, famously formulated the principles of liberal tolerance, based on "the Gospel of Jesus Christ and the genuine reason of mankind".<sup>30</sup> While the first may be a moral tribunal relevant for Christians (and other non-/believers who regard his Gospel as authoritative), the latter has a potentially universalist appeal. Indeed, the classical Enlightenment position, formulated in various ways by Enlightenment philosophers like Hobbes, Locke, and Kant, was that universalism stemmed from natural law which could be known by human reason and/or human reason itself.<sup>31</sup> It was the position from which modern human rights were formulated and developed over centuries. Indeed, as An-Na'im argues, religious belief logically requires disbelief. Religious convictions and practices must be a matter of choice.<sup>32</sup>

While the notion of universal human rights has been rejected by religious authorities in the past, many have come to embrace the concept over time, especially after World War II. Indeed, faith-based arguments advance pluralist

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27 See Evans, *supra* n. 15, at 25-28, referring to the argument made by J.S Mill, in *On Liberty* regarding subjective and absolute truth.

28 Lindholm, *supra* n. 4, at 30-35, 20-21 and 44. An-Na'im *supra* n. 18 at 1239.

29 See Evans, *supra* n. 15, at 25- 28.

30 Lindholm, *supra* n. 4, at 44-45, quoting Locke, *supra* n. 12.

31 A. van der Braak, 'Godsdienstvrijheid en meervoudige religieuze betrokkenheid: naar een intercultureel perspectief', in van den Broeke, *supra* n. 23, at 207.

32 An-Na'im, *supra* n. 18, at 1252.



position especially when formulated from a universalist position, as Soroush does, or when drawing on the parallels and common denominators between several traditions. Such “salvific pluralism”<sup>33</sup> is espoused by the Parliament of the World’s Religions initiated by Hans Küng,<sup>34</sup> but also by (inter)faith movements such as the Universal Sufis of the Inayati Order founded by Indian mystic Hazrat Inayat Khan.<sup>35</sup>

The classical Enlightenment take on universalism does not go unchallenged. Van der Braak with Joseph Prabhu distinguishes the supracultural, supercultural and intercultural approaches to the universality of human rights. Both the supracultural and the supercultural model are problematic because of their Western bias. The intercultural model offers a perspective for a truly universalist cross-cultural view.<sup>36</sup>

The classical Enlightenment model is synonymous with the supracultural model, which tries to transcend cultural (and historical) relativism by adhering to a higher and deeper universalism founded in nature, human reason and/or human nature. For many believers, God is the ultimate source of all of these, while this goes without saying. Unlike some constitutions which invoke a divine inspiration, the UDHR was silent on and distant towards the issue of religion, explicitly delineating the right in Article 18 as “freedom of thought, conscience and religion” in that order. As a source, human dignity was invoked. Yet the notion of an inherent human dignity, which implies that humans are carriers of rights, is itself not a universal one. Whether the origin is divine or anthropological, they need to be translated into a cultural context. In this regard the model tends to confuse universalism and uniformity.<sup>37</sup>

The supercultural model provides an escape for some. In this model, human rights and their foundation in human reason are an expression of Western culture, which according to the protagonists, has reached a more advanced stage than other cultures. This is shown, amongst others, by the elevation from a religious outlook on the world to a more mature secular stance. In this view, non-Western cultures can reach the advanced Western stance by following the Western model. This view is now generally identified as cultural imperialism.<sup>38</sup> Once very popular in mainstream western legal and constitutional thought, it was used to justify colonialism and (neo-)imperialism. However, in the attempts to subjugate and control foreign peoples and their cultures,

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33 Lindholm, *supra* n. 4, at 44-45.

34 <https://parliamentofreligions.org/> (27 September 2021). See also Lindholm, *supra* n. 4, at 59.

35 <https://inayatiorder.org> (27 September 2021).

36 van der Braak, *supra* n. 31, at 207-211, referring to J. Prabhu, ‘Human Rights in Cross Cultural Perspective’, *Proceedings of the United Nations Conference on Human Rights and Traditional Cultures*, Geneva, 2011.

37 *Ibid.*, pp. 209-210.

38 *Ibid.* See also, e.g., P.B. Cliteur, *Natuurrecht, Cultuurrecht, Conservatisme*, new 1st ed., Universitaire Pers Fryslan, Leeuwarden (Netherlands), 2005.

its advocates committed grave violations of human rights. This has made the model utterly unfeasible outside the context of (neo-)conservative Western “islands of thought”.

Van der Braak, following Charles Taylor in this regard, proposes the intercultural model instead, which involves an “open minded and truth seeking dialogue” (Prabhu) between cultures. This also requires accepting the relativity of Western Cartesian dualistic thought.<sup>39</sup> For the freedom of religion and belief in particular, the intercultural model proposes an open, non-exclusive and fluid definition of religion and belief, including the idea that individuals can be members of several communities and/or adhere to more than one system of belief. In line with John Rawls consensus-oriented approach, Taylor, and subsequently Van der Braak, propose to differentiate between norms, legal mechanisms and their underlying justifications. Human rights and their implications can thus be justified by differing philosophical and religious traditions. This presents an opportunity to escape Western ethnocentrism. Freedom of religion and belief would thus combine several narratives on religion and belief, along with several narratives regarding the freedom of religion and belief and, more broadly, human rights.<sup>40</sup> Their effort to differentiate between agreement on a norm and disagreement on underlying assumptions is called “constructive use of silence” and “incompletely theorized agreement” by Cass Sunstein (see section 2.5).

In Calo’s view, the proponents of the dominant secular narrative must be reminded that the very concepts now used to combat religion out of the public sphere were, amongst other things, founded on religiously inspired notions of freedom, dignity and equality. The secular narrative interlocks modernization and freedom with an emancipation from religion and a secular public order in which secular arguments and reason dominate. From the perspective of this narrative, “[r]eligion might be tolerated so long as it does not challenge the predominance of the secular.”<sup>41</sup> On the other hand, religious individuals and communities benefit from the narrative of human rights, which constructs a common political morality that avoids the sectarianism of politicized religion.<sup>42</sup> Calo proposes to establish a new normative religious pluralism which will move “beyond this hegemonic secular tradition and its assumptions about universality. Only by turning from the universal to the particular and from the secular to the post-secular can space be established for realizing normative religious pluralism – space within which theological traditions might contribute to the construction of human rights norms.”<sup>43</sup>

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39 van der Braak, *supra* n. 31, at 211, quoting Prabhu, *supra* n. 36, and at pp. 216-218.

40 *Ibid.*, pp. 211-218.

41 See Z. R. Calo, ‘Pluralism, Secularism and the European Court of Human Rights’, in *Journal of Law and Religion*, vol. 26, no. 1, pp. 261-280 (2010), p. 271.

42 *Ibid.*

43 *Ibid.*, pp. 268-274.

### 2.2.5 Recognition of the freedom of religion and belief in international law

The UDHR in Article 18 codifies the freedom of religion and belief in the three elements of “thought”, “conscience” and “religion”. The right includes freedom to change religion or belief. Only here, “belief” is introduced as an element, connotating that beliefs are not always of a religious nature, and that people may change from religious, to non-religious beliefs. While this first part of the Article focuses on the “internal” and individual dimension, the second part stipulates that the “external” and “collective” dimensions are also protected. The right entitles, “alone or in community with others” in “public or in private” the right to “manifest his religion or belief in teaching, practice, worship and observance”. Here again, religion and belief are paired, while it may be assumed that either may be present in “thoughts” and highly determinative for the “conscience”.

The ICCPR in Article 18 elaborates further on the theme of the UDHR. It uses the same concepts of “thought”, “conscience”, “religion” and “belief” in exactly the same fashion as Article 18 of the UDHR. The ICCPR right includes “freedom to have or to adopt a religion or belief of his choice”. It also specifies that “no one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.” Only the external dimension may be limited, never the internal dimension. And limits must be “prescribed by law” and “necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others”. Article 18 ICCPR also specifies that parents and guardians have a right to see the moral and religious education of children in conformity with their own convictions. This is the only place in the Article where the term “convictions” is used; probably denoting that “thought”, “conscience”, “religion” and “belief” translate into “convictions” about moral and religious education.

Neither the Canadian Charter, nor the South African Bill of Rights, nor the European Convention, negate, dispute or contradict in any way the universally recognized core of the freedom of religion and belief as codified in the UDHR. As a matter of fact, the Charter and the Bill of Rights add in their codification of said right the common core of Article 19 of the Universal Declaration (freedom of opinion and expression).

Using the term “freedom of religion and belief” for the featured right in this study, highlights that not only religion and/or beliefs formally recognized by organized/established religions are protected. The right protects the rights of all believers, those who are adherents of organized/established religions, those who are adherents of non-organized and non-established religions, those who hold very personal and individualized beliefs, those who hold beliefs not connected to any belief system one would call a religion and those who do not believe or define themselves by rejecting (a certain) religion or belief.

### 2.3 THE SIGNIFICANCE OF INTERPRETATION

In this section the significance of interpretation for the understanding, scope, and impact of the freedom of religion and belief is explored. First, by taking by an initial look at some of the selected cases, it is argued that interpretation leads to different outcomes in similar cases (section 2.3.1). Then we take a closer look on how commentators view matters of interpretation of cases before the three tribunals generally (section 2.3.2). We then turn to the concept of a standard interpretation (section 2.3.3). Finally, we look at different interpretation theories (section 2.3.4).

#### 2.3.1 Universal right, different outcomes

H.L.A. Hart argued that laws “require interpretation if they are to be applied to concrete cases” and that “the open texture of law leaves a vast field for a creative activity which some call legislative.” Section 2.2.5. shows this regarding the international codification of the freedom of religion and belief. He further argued that the judicial activity ought to be guided by “impartiality and neutrality”, consideration of all affected interests and a concern to deploy some “acceptable general principle as a reasoned basis for decision”.<sup>44</sup>

Judicial interpretation of a universal human right with a common core in several codifications is thus inevitable. It also has a high impact for those seeking protection, because the outcomes of cases can differ radically, even in situations with very similar facts. For example, in the Canadian *Multani*<sup>45</sup> case, a Sikh schoolboy argued successfully that the freedom of religion and belief protected his practice of carrying a metal *kirpan* (ceremonial dagger) to school (see section I1.4.10). Sunali Pillay<sup>46</sup> successfully argued before the SCC that she had a right to wear a nose stud, common among South Indian Tamil Hindu girls (see section I2.4.11) The school regulations allowing only for earrings were overruled. Leyla Şahin<sup>47</sup> on the other hand, arguing her right as a practicing Muslim woman to wear a headscarf while attending classes in a Turkish university was not successful before the ECtHR (section I3.4.7). Law and regulations prohibiting religious attire and their enforcement were upheld.

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44 H.L.A. Hart, *The Concept of Law*, 2nd ed., Clarendon Press, Oxford (UK), 1994.

45 SCC, *Multani v. Commission scolaire Marguerite-Bourgeoys*, Case 30322, [2006] 1 SCR 256, 2 March 2006, paras 78-79 and 98-99.

46 CCSA, *MEC for Education: Kwazulu-Natal and Other v. Pillay*, Case CCT51/06, 5 October 2007, para. 119.

47 ECtHR (GC), *Leyla Şahin v. Turkey*, app. no. 44774/98, 10 November 2005, paras 121, 123, 161, 163-166.

In *Christian Education*,<sup>48</sup> the CCSA had to decide whether a group of Christian Schools could be exempted from a new nationwide ban on corporal punishment (section I2.4.6). Although corporal punishment was once widely accepted in the South African educational system, the CCSA upheld the universal ban, even for privately run Christian schools after a careful analysis of the colliding rights in question. In the (in)famous *Lautsi*<sup>49</sup> case, the Grand Chamber of the ECtHR had to decide whether to overrule the Chamber (section I3.4.10). The Chamber had decided that the law by which, in accordance with the majority Catholic cultural heritage of Italy, every public school room had to feature a crucifix, could not be justified under the Convention. The Grand Chamber nevertheless found that the law was not at odds with the Convention.

In *Trinity Western Union (TWU)*,<sup>50</sup> the SCC overruled a policy of the British Columbia Teachers College (section I1.4.5). The Teachers College had decided that the policy of systematically refusing TWU University graduates as fit to become teachers was uncalled for. TWU made all staff and students sign an agreement to not engage in same-sex romantic or sexual relationships.

The three tribunals interpret a universal human right, with a common core present in its several codifications, which leads to different outcomes. Chapter 3 looks at the similarities and differences in codification and the conclusions that can be drawn from them. As Hart suggested, quoted above, it is feasible that all three tribunals are guided by “impartiality and neutrality”, consideration of all affected interests and a concern to deploy some “acceptable general principle as a reasoned basis for decision”.<sup>51</sup> So can the difference in outcome be explained by establishing these “general principles”? This is the main object of interest of this study.

Theories of judicial review have long been an important discipline within legal theory. Some are descriptive, in the sense that they try to explain what happens when courts develop the general principles which lead them in the interpretation of law, facts and the application of one to the other. Others are normative, in the sense that they distinguish between “good” and “bad” judicial interpretation. In this distinction, the proper place of the judge within the framework of liberal democratic constitutionalism is usually the issue. “The rule of law” prescribes that the executive and legislative are bound by the law. It also prescribes that judges are bound by the law and may not use their position to conduct pseudo-politics, also because that would seriously violate democracy. How do commentators view the three tribunals selected for this study in this regard?

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48 CCSA, *Christian Education South Africa v. Minister of Education*, Case CCT 4/00, 18 August 2000, paras 51-52.

49 ECtHR (GC), *Lautsi and Others v. Italy*, app. no. 30814/06, 18 March 2011, paras 77-81.

50 SCC, *Trinity Western University v. College of Teachers*, Case 27168, [2001] 1 SCR 772, 17 May 2001, paras 31-33 and 35-38.

51 Hart, *supra* n. 44, at 179.

### 2.3.2 Matters of interpretation on the SCC, CCSA and ECtHR

Venter suggests that, in general, the Canadian public and academia are content with the rulings of the Supreme Court, mainly because its careful balancing and proportional approach made it less vulnerable to accusations concerning democracy-encroaching judges.<sup>52</sup> In an article published just as he took up his appointment at the Supreme Court, Justice Iacobucci warned that an overemphasis on individual rights, detached from underlying values and principles, might be disadvantageous for social cohesion and undermine democratic institutions.<sup>53</sup> However, democracy, even for Iacobucci, is more than mere majoritarianism. In his opinion, the Charter has largely contributed to an understanding of democracy that encompasses both equality and liberty.<sup>54</sup> In practice, Iacobucci appeared everything but a conservative dissenter on issues of liberty. While he originally might have voiced concern, he eventually came to view the Charter as a framework for a new democracy.<sup>55</sup>

In his interesting work on the first ten years of the South African Constitutional Court, Roux also looks at the dynamics between judicial interpretation and democratic legislation. The success of a Constitutional Court, first introduced in South Africa after the transition from apartheid to democracy, he contends depended greatly on the ability to “be if not above politics, then at least a political actor of a particular type: one whose institutional role is limited to holding other political actors to the terms of the Constitution. Society will look at this from the point of view that “whatever lies in the realm of the legal is the court’s legitimate business, and whatever lies without the forbidden zone of politics. But if the boundary between the two is fluid and contested, there is a considerable scope for a court to reposition it in its favor”.<sup>56</sup>

Roux concludes that the Chaskalson CCSA has been criticized for maintaining “an overly strict, and at times strained, conception of the law/politics distinction”, based on their “sincere and genuine” “commitment to the liberal-legalist ideal”. The experience of most of the judges as human rights lawyers in the apartheid era had taught them that law can restrain abuse of political power and they were committed to uphold this in the new era. Therefore the Court made no use of the alternative, which in Roux’s opinion would also

52 See F. Venter, *Constitutional Comparison; Japan, Germany, Canada and South Africa as Constitutional States*, Juta & Co, Ltd, Cape Town (South Africa), 2000, p. 97.

53 F. Iacobucci, ‘The Evolution of Constitutional Rights and Corresponding Duties: The Leon Ladner Lecture’, in *University of British Columbia Law Review*, vol. 26, no.1, pp. 16-17 (1992).

54 F. Iacobucci, ‘The Charter: Twenty Years Later’, in *Windsor Yearbook of Access to Justice*, vol. 21, pp. 3-32 (2001), pp. 4-5.

55 L.E. Weinrib, ‘“This New Democracy ...” Justice Iacobucci and Canada’s Rights Revolution’, *University of Toronto Law Journal*, vol. 57, no. 2, pp. 399-413 (2007), p. 410.

56 T. Roux, *The Politics of Principle: The First South African Constitutional Court 1995-2005*, Cambridge University Press, Cambridge (UK), 2013, at 387.

have exited to “demystify the law/politics distinction and openly declare the political nature of its function”.<sup>57</sup> De Vos also attributes this to most South African lawyers having been trained to “adhere to the traditional liberal school of adjudication, a tradition that jealously guards the boundary between law on the one hand and politics on the other”.<sup>58</sup> Others echo that “[t]he Constitutional Court has endorsed the principle of self-restraint on a number of occasions”<sup>59</sup> and that “[t]he Court has, in the past, been willing to defer to legislative bodies to come up with solutions to constitutional problems [...]”.<sup>60</sup>

In Roux’s opinion, the CCSA can help to “dispel the myth that liberal constitutionalism is necessarily the enemy of politically driven social change”. But to do so, the Court must “intrude even further into politics than to date, trusting that the public will accept the required expansion of law’s domain”. “Law and politics are not locked in a zero-sum game” and liberal legalism sees law as both “moral conscience” as well as an “instrument of democratic politics”.<sup>61</sup>

Given the ECtHR’s position as an international human rights court, the focus on the distinction between law-making and law interpreting has been especially keen. The Convention has a role as a European human rights guarantee that must be interpreted so as to permit its development with time. It is in this latter connection that statements to the effect that “the Convention represents the public order of Europe are relevant”.<sup>62</sup> The dynamic or evaluative interpretation referred to as the “living instrument doctrine” is reflective of the policy of the law in European states. Examples are the cases dealing with, amongst others, treatment of prisoners, children born out of wedlock, homosexuals, the death penalty and conscientious objectors to military service.<sup>63</sup> Yet the Court tends to emphasize incremental rather than sudden change.<sup>64</sup>

Nevertheless, the Court has faced severe criticism for encroaching too much on national sovereignty, in spite of the doctrine of “margin of appreciation” developed to create space for the national institutions (see section 3.4.3). This criticism is in a way similar to criticism of too liberal judges and too much judicial activism, which we know from elsewhere in the world, but is formu-

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<sup>57</sup> *Ibid.*

<sup>58</sup> P. de Vos, ‘South Africa’s Constitutional Court: Starry-Eyed in the Face of History?’, in *Vermont Law Review*, vol. 26, pp. 837-864 (2002, p. 838-839 and 843).

<sup>59</sup> P. Lenta, ‘Judicial Restraint and Overreach’, in *South African Journal on Human Rights*, vol. 20, no. 4, pp. 544-576 (2004), p. 546.

<sup>60</sup> E.E. Goodsell, ‘Constitution, Custom, and Creed: Balancing Human Rights Concerns with Cultural and Religious Freedom in Today’s South Africa’, in *Brigham Young University Journal of Public Law*, vol. 21, no. 1, pp. 111-154 (2007), p. 150.

<sup>61</sup> Roux, *supra* n. 56, at 398.

<sup>62</sup> D. Harris, M. O’Boyle and C. Warbrick (eds.), *Law of the European Convention on Human Rights*, 2nd ed., Oxford University Press, Oxford (UK) et al., 2009, p. 6.

<sup>63</sup> See Harris, O’Boyle & Warbrick, *supra* n. 62, at 7 and 33.

<sup>64</sup> See Paul Mahoney, ‘Judicial Activism and Judicial Restraint in the European Court of Human Rights: Two Sides of the Same Coin’, in *Human Rights Law Journal*, vol. 11, pp. 57-88 (1990).



lated in terms of national sovereignty versus a European Court.<sup>65</sup> It coincides with a general sentiment against European integration.<sup>66</sup> Yet there is criticism from another camp as well. Gerards, for example, warns that the focus on speediness and efficiency directed at managing the enormous caseload of the Court has resulted in a “loss of quality and transparency of judicial reasoning, especially where admissibility decisions are concerned”. This has recently been highlighted by the UN Human Rights Committee.<sup>67</sup>

The combination of the organizational problem of the case load and the perception of the Court in public debates led to the outcome of the Brighton Conference<sup>68</sup> on the future of the Strasbourg Court. Preceded by the Interlaken and Izmir conferences, the Brighton Conference aimed to formulate solutions. Protocol No. 15, adopted in 2013, inserts a reference to the principle of subsidiarity and the doctrine of the margin of appreciation into the Convention’s preamble; it also reduces from 6 to 4 months the time within which an application must be lodged with the Court after a final national decision. 2013 has also seen the adoption of Protocol No. 16, which will allow the highest domestic courts and tribunals to request the Court to give advisory opinions on questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or the protocols thereto. Protocol No. 16 is optional for member states.

Gerards, on the other hand, seeks the solution to the Courts crisis not in procedural or institutional reform, but in methodological reform. “Many scholars have critically evaluated the argumentative techniques of the Court, finding inconsistencies in its interpretation, defective use of important doctrines and unfortunate application of Convention provisions in concrete cases. Clearly much can be improved in this respect.”<sup>69</sup> Gerards regards the case-by-case incremental development of the jurisprudence through analogy as problematic, because it is exactly that which leads to the ever-growing number of rights and interests being covered by the Convention.<sup>70</sup> “A step-by-step approach without a clear aim or a clear direction can unconsciously lead the judge to a place where he did not want to be, or it can lead to outcomes that the judge would not have reached if he would have been able to foresee the consequences.”<sup>71</sup>

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65 See J. Gerards, ‘The Prism of Fundamental Rights’, in *European Constitutional Law Review*, vol. 8, no. 2, pp. 173–202 (2012), p. 173.

66 See, e.g., T. Baudet, *The Significance of Borders – Why Representative Government and the Rule of Law Require Nation States*, Brill, Leiden (Netherlands)/Boston (USA), 2012.

67 J. Gerards, ‘Inadmissibility Decisions of the European Court of Human Rights: A Critique of the Lack of Reasoning’, in *Human Rights Law Review*, vol. 14, no. 1, pp. 148–158 (2014).

68 High Level Conference on the Future of the European Court of Human Rights, Brighton, 19–20 April 2012.

69 Gerards, *supra* n. 67, at 177.

70 *Ibid.*, pp. 179–182

71 *Ibid.*, p. 183.



### 2.3.3 The concept of a standard interpretation

Whether one generally has positive or negative views on the way in which either the SCC, the CCSA or the ECtHR have adjudicated human rights generally, or the freedom of religion and belief specifically, no one will deny that interpretation matters. Any court will result to interpretation in (almost) any case. Yet, as Gerards comments on the ECtHR in the above paragraph highlight, there is always a connection between cases. A principled “case by case” approach encloses analogy as guiding principles. A more direction driven approach, like she proposes, will also connect dots between cases.

As we saw in section 2.3.1, H.L.A. Hart argued that judges are driven by “impartiality and neutrality”, consideration of all affected interests and a concern to deploy some “acceptable general principle as a reasoned basis for decision”.<sup>72</sup> Whatever the methodology used by a tribunal in the cases concerning the freedom of religion and belief, the chance is that we will find reoccurring general principles, used to argue for the outcome in concrete cases. Chance is, that even where there are disagreements, voiced in separate or dissenting opinions, they will be explained in reference to the same general principles, the majority uses. This highlights the agreement on the principle and disagreement on how it directs the outcome of the case.

Whether consistent or not, incremental or fully theorized, static or dynamic, the three tribunals are bound to have standard interpretations of the freedom of religion and belief, which can be reconstructed by closely reading a number of cases. This should then show what the overall concept, scope and application of the freedom of religion and belief is for the tribunal in question. It should also show characteristics like the ones, mentioned in the first sentence of this paragraph. These standard interpretations are the main object of this study.

### 2.3.4 Different interpretation theories

Section 2.3.1 shows that in legal theory, the view of “good” or “bad” interpretation will often determine how the performance of a concrete court is assessed. While some judges are active participants in such debates, others do their work guided by “impartiality and neutrality”, “consideration of all affected interests” and “acceptable general principles”. They may even view their own participation in the legal theoretical debate as faulted because it crosses the line between law and politics.

This study is interested in the standard interpretations of the freedom of religion and belief by the SCC, CCSA and ECtHR. Analyzing the standard interpretations of the freedom of religion and belief by the three courts against

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<sup>72</sup> Hart, *supra* n. 44.

the backdrop of the cacophony of interpretation theories, which distinguish between good and bad adjudication, will ultimately only distract from this aim. The risk of becoming caught up in the divisions between them, will draw attention away from the freedom of religion and belief as the concrete right which is the subject of this study. In order to provide a theoretical framework nevertheless, one interpretation theory has been chosen for the theoretical foundation.

American legal theorist Cass Sunstein has developed a typology of judicial interpretation in four different types: perfectionists, who want to make a constitution the best it can be; originalists (or fundamentalists), who aspire to read a constitution according to its original understanding; majoritarians, who grant legislatures a primacy in constitutional interpretation; and minimalists, who are skeptical about general theories of interpretation.<sup>73</sup> This distinction should replace the one often used in the United States between “liberals” and “conservatives” because it is “hopelessly inadequate”.<sup>74</sup>

While developed in an American setting, the typology is nevertheless useful in many other settings of judicial and constitutional review as well. Typologies used often distinguish, for example, between “judicial restraint” and “judicial activism” or between “substantive” and “procedural” review. Obviously, the difference between liberal and conservative is also used outside the American context. The benefit of the Sunstein typology is the fact that it serves to integrate many other typologies, while explaining the different methods of interpretation in a descriptive rather than normative way. It also targets misperceptions. We see that conservatives and liberals can both be activist or restrained, that procedural review can be exercised in restrained and activist ways etc. It uses a categorization which is meta-normative and allows for all normative interpretation theories to be analyzed in comparison.

Sunstein himself advocates minimalism as the best suited theory of interpretation for constitutional and/or human rights in a pluralist context. This study follows Sunstein’s arguments in choosing for “judicial minimalism” as an interpretation theory, which deeply rooted in the LDC tradition and combines constructive use of silence, incomplete theorization, optimal protection of rights and reducing political costs in a pluralist context. This will be explained further in the following sections.

## 2.4 SUNSTEIN’S DISTINCTION BETWEEN FOUR THEORIES OF INTERPRETATION

In the following sections, the four types of interpretation in Sunstein’s categorization are introduced and discussed, where possible making use of

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73 C. R. Sunstein, *Radicals in Robes. Why Extreme Right-Wing Courts Are Wrong for America*, Basic Books, New York (USA), 2005, pp. xii-xv.

74 *Ibid.*, p. xi.

authors who are representative of category, within and form outside the American context. Section 2.5 provides deeper insights into the meaning and workings of judicial minimalism.

#### 2.4.1 Perfectionism

According to Ronald Dworkin, legal interpretation is a matter of making the existing legal materials “the best they can be”.<sup>75</sup> This view expresses the essence of perfectionism as a theory of interpretation, in Sunstein’s typology. Perfectionists do not advocate judge-made law instead of law made by the legislature, they merely insist that when the law leaves gaps, ambiguities, and contradictions, judges must try to make the law, and especially the constitution, the best it can be, not the worst.<sup>76</sup>

A distinction can be made between democratic perfectionists and rights perfectionists.<sup>77</sup> Democratic perfectionists believe that constitutional courts should interpret the constitution so as to enhance rather than compromise democracy. “Unblocking stoppages in the democratic process”,<sup>78</sup> favored by many deliberation procedure advocates like Habermas and Ely, is a form of democratic perfectionism. Rights perfectionists emphasize human dignity and a realm of freedom in which the state should not interfere. Ronald Dworkin’s theory is closer to rights perfectionism than to democratic perfectionism.

Dworkin, who sees the (American) constitutional system as resting on a particular moral theory, argues that a court which “[...] undertakes the burden of applying these clauses fully as law must be an activist court, in the sense that it must be prepared to frame and answer questions of political morality”.<sup>79</sup> Dworkin here counters widespread criticism that liberals favor judicial activism. According to Sunstein, the terms “activism” and “restraint” miss an uncontroversial definition. He therefore proposes calling the striking down of acts of parliament activist in a value-neutral way, while the opposite is restraint. Consequently, perfectionists are restrained where their opponents are activist and vice versa.<sup>80</sup>

Is judicial restraint (never mind who practices it) to be preferred over activism (never mind who practices it)? Dworkin answers that while undoubtedly striking down constitutional legislation entails changing the constitution, refusing to invalidate unconstitutional statutes is “[...] changing the

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75 R. M. Dworkin, *Law’s Empire*, Hart Publishing, Oxford (UK), 1998, p. 229.

76 Sunstein, *supra* n. 73, at 32-33.

77 *Ibid.*, pp. 38-39.

78 J. Habermas, *Faktizität und Geltung*, Suhrkamp, Frankfurt am Main (Germany), 1998, p. 321, referring also to J.H. Ely, *Democracy and Distrust*, Harvard University Press, Cambridge (USA) et al., 2002.

79 Dworkin, *supra* n. 75, at 147.

80 Sunstein, *supra* n. 73, at 42-44.

Constitution by fiat, usurping authority in defiance of a constitutional principle".<sup>81</sup> Thus restraint, as opposed to activism, is no guarantee for the supremacy of the constitution, and neither is activism law-creation by definition.

Whether perfectionists are democratic perfectionists or rights perfectionists, they will favor activism with regard to at least four types of measures:<sup>82</sup>

1. measures of the legislature which seek to exclude political opinions on the margin, which may not find expression in dominant political parties;
2. measures which have a significant impact on the lives of the population;
3. measures which impact discrete and insular minorities; and
4. measures which increase social exclusion and hence inhibit the capacity of particular groups to participate in the democratic process.

#### 2.4.2 Originalism

Many critics of perfectionism reject "natural justice" review<sup>83</sup> as well as reference to a "living constitution".<sup>84</sup> They believe it will ultimately lead to judges interpreting the law according to their private conceptions of justice and wisdom, thereby changing the constitution. In the eyes of fundamentalists, this is contrary to the original reason for constitutional review. Wolfe explains: "The classic defenses for judicial review were based on the fact that judicial review did not imply the superiority of the judges to the legislature, but the superiority of the will of the people to both. This claim could only be made, however, if judicial review was 'interpretation' or ascertaining the will of the people in the Constitution, rather than 'legislation', or asserting the will of the judges."<sup>85</sup>

Whereas originalists do not reject interpretation of constitutions or rights, they do reject legislation by judges. In order to prevent judicial legislation, judicial interpretation should draw on the original understanding of legal provisions. Should the meaning of terms be vague or ambiguous, it is best to consult the "original understanding", the founder's intent<sup>86</sup> or that of the

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81 R. Dworkin, *Taking Rights Seriously*, 6th impression, Duckworth, London (UK), 1991. p. 371.

82 S. Livingstone, 'Constitutional Review as Dialogue', in E. Cotran and A.O. Sherif (eds.), *Democracy, Rule of Law and Islam*, Kluwer Law International, The Hague (Netherlands), 1999, pp. 93-103 and 104.

83 C. Wolfe, *The Rise of Modern Judicial Review. From Constitutional Interpretation to Judge-Made Law*, Basic Books, New York (USA), 1986, pp. 108-113.

84 A. Scalia, *A Matter of Interpretation. Federal Courts and the Law*, Princeton University Press, New Jersey (USA), 1997, pp. 41-42.

85 Wolfe, *supra* n. 83, at 104.

86 Sunstein, *supra* n. 73, at 55. According to Sunstein, fundamentalists are not interested in what the constitution meant to the framers, but what it meant to the ratifiers of the constitution.

legislature at a particular time when an amendment was adopted. Anything else would be, in accordance with fundamentalist perception, a tyranny of judges, a gross violation of the separation of powers, constituting an anti-democratic form of government, fundamentally at odds with the rule of law as judge-made law is always ex-post facto law. Only constitutional review based on “a rock-solid, unchanging constitution”<sup>87</sup> is legitimate.

According to American Supreme Court Justice Scalia, one of the most eloquent champions of “originalism”, it is also not true that originalism as a theory of interpretation is aimed at diminishing rights. Pointing to several cases which reduced rights of defendants in criminal procedures, rights of those who wish to bear arms, or property rights, he claims that judicial activism reduces as many rights as it creates, although they are different rights.<sup>88</sup> Furthermore, federalism as a constitutional system according to Scalia “[...] includes within it the idea that the constituent states will preserve a considerable degree of their own character and hence their own laws”. And “[t]he maintenance of differences is not only the purpose of federalism; it is a condition for its survival.”<sup>89</sup> A theory of interpretation which consistently transfers areas of law to the jurisdiction of the federal government, is bound to destroy the pluralism, which is meant to be protected by federalism, many originalists warn.

Through judge-made law, many fundamentalists believe that the “real” constitution has been forced into “exile” from which this “lost constitution” must be saved. But this rediscovery can hardly be realized without radically altering constitutional law as it now stands by means of broad and ambitious rulings.<sup>90</sup> Justice Scalia, who unlike many other fundamentalists still feels bound by precedent, defends these broad and ambitious rulings as being coherent with the rule of law as a law of rules.<sup>91</sup> When general rules are made by judges, rather than applied by them, this violates the rule of law. Yet, making specific rules for specific cases violates the rule of law as a law of (general) rules. This is the main fundamentalist objection against minimalism. Clear broad rules constrain judges and embolden them to protect liberty when the stakes are highest.<sup>92</sup>

Originalism is by no means less activist than perfectionism. The “constitution in exile” theory leads to an activist attitude amongst many fundamentalists. In terms of sheer numbers of invalidating acts of congress, the Rehnquist court with its fundamentalist majority has been the “all-time champion”.<sup>93</sup>

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87 Scalia, *supra* n. 84, at 11, 43 (citing Robert Rantoul) and 47.

88 *Ibid.*, p. 43.

89 A. Scalia, Opening Speech, Leiden University Law School, Leiden, 2004, pp. 3 and 7.

90 Sunstein, *supra* n. 73, at 23 and 27.

91 A. Scalia, ‘The Rule of law as a Law of Rules’, in *University of Chicago Law Review*, vol. 56, no. 4, pp. 1175-1188 (1989).

92 Scalia, *supra* n. 84, at 119.

93 Sunstein, *supra* n. 73, at 43 and 15.

### 2.4.3 Majoritarianism

Majoritarianism largely coincides with the positions sketched as “will-of-the-people-majoritarians” and constitutional-review-critical deliberation proceduralists. These (methodological) majoritarians “are willing to give the benefit of doubt to other branches of government – to uphold the actions of these branches unless they clearly violate the constitution”.<sup>94</sup> The majoritarian position is motivated by two concerns: first, the fallibility of judges in interpreting the constitution; and second, the possible harm this could do to democracy.

While it would be arguable to bring the theory of Habermas concerning constitutional review performance under the position of minimalism or maybe even democratic perfectionism, his notion of constitutional review as norm-jurisprudence rather than value-jurisprudence illustrates majoritarian criticism of perfectionism and fundamentalism. According to Habermas, conflicts arising from constitutional review in practice are essentially conflicts concerning the separation of powers, an alleged intrusion of the judiciary into the legislature’s constitutional sphere. Indeed, if such intrusion is proven, the principle of the separation of powers is violated.<sup>95</sup>

Constitutional courts have three types of tasks according to this theory: solving organ conflicts; norm control; and handling constitutional complaints. The possible competition with the legislature exists in the control of norms. While the concrete control of norms benefits the unity of law, the abstract control of norms is the task of the parliament. So, shifting this task to the judiciary requires complex justification; even more so, because it involves the abstract, open, and ideologically loaded constitutional principles. However, the mere fact that constitutional review requires interpretation, does not automatically endanger the logic of the separation of powers. What Habermas sees as problematic is the qualification of constitutional principles as values instead of norms. There are four differences between norms and values:<sup>96</sup>

1. norms are teleological, values are deontological;
2. norms are either valid or invalid, while values describe a relationship of preferences;
3. norms are absolute, while values are relative; and
4. norms have a relationship of coherence towards each other, while values a relationship of competition.

Value jurisprudence by constitutional courts does raise a problem of legitimacy for majoritarians, because the interpretation of values will always be to some

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<sup>94</sup> *Ibid.*, p. 44.

<sup>95</sup> Habermas, *supra* n. 78, at 292-293.

<sup>96</sup> *Ibid.*, pp. 294-296, 299 and 310-311.

degree law-creation. Therefore, the legislator must interpret values, while the constitutional court must interpret norms.<sup>97</sup>

#### 2.4.4 Minimalism

Minimalism is the theory which Sunstein himself advocates. However, minimalism is a widely accepted theory amongst judges.<sup>98</sup> “Minimalists favor narrow rulings over wide ones”; they refuse to solve a series of problems at the same time, they focus on solving the case at hand. Minimalism is not associated with any political program; it is a method of constraint favored by people of opposing political denominations.<sup>99</sup> Central to minimalism as a theory of interpretation, is the notion of “incompletely theorized agreements” and constitutional principles without a constitutional theory.<sup>100</sup>

Incompletely theorized agreements are incompletely theorized in the sense that they exclude the most fundamental and contested questions. People may agree that a certain right exists, but disagree on its scope and content. They can agree on mid-level principles, without having to agree on a general theory. Incompletely theorized agreements have a great value, especially for societies characterized by diversity. Social peace and law are not possible if fundamental disagreements were to surface every time a private or public legal dispute arose. In a free society, minimalists assert, it should be possible for “people to agree, when agreement is necessary, and unnecessary for people to agree, when agreement is impossible”,<sup>101</sup> thereby enabling productive systems.

Judicial decisions should then be incompletely theorized as well, according to Sunstein’s minimalism. When deciding a case, the court should focus on the case at hand and not try to solve all resembling and related cases at the same time. Hence, minimalism has a preference for small, incremental rulings with due regard for precedence.

Minimalism absorbs some of the elements of the other three positions, while rejecting others. The perfectionist notion of a “living constitution” is preferred to a constitution stuck in the past, while precedent is taken seriously without being absolute. The notion of a broad, ethically founded constitutional theory is rejected in favor of a spirit of modesty and humility. Sunstein has great admiration for Judge Learned Hand’s statement, “the spirit of liberty is that spirit which is not too sure that it is right”.<sup>102</sup>

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97 *Ibid.*, p. 314-315.

98 Sunstein, *supra* n. 73, at 30.

99 *Ibid.*, p. 29.

100 See Sunstein, *supra* n. 73, at 28 and C.R. Sunstein, *Designing Democracy. What Constitutions Do*, Oxford University Press, New York (USA), 2001, ch. 2.

101 Sunstein, *supra* n. 100, at 50-58 and Sunstein, *supra* n. 73, at 28.

102 Sunstein, *supra* n. 73, at 35.

The notion of incompletely theorized agreements incorporates the consideration of judicial fallibility and respect for democratically elected legislatures, and thus rejects the broad and ambitious general rules and the fundamentalist project of rescuing the lost constitution as dangerous for constitutionalism. Minimalism shares with majoritarianism the desire for a non-partisan restraint and a non-politicized judiciary, yet will not accept alteration of the constitution at will, by coincidental legislative majorities.<sup>103</sup>

## 2.5 THE CASE FOR MINIMALISM: UNDERSTANDING AND OPERATIONALIZING JUDICIAL MINIMALISM

This section further explores judicial minimalism, its rationale and application. First, we look into incompletely theorized agreements, as a concept underlying the use of judicial minimalism (section 2.5.1). We then turn to the most relevant arguments for minimalism in favor of the other categories of interpretation theories (section 2.5.2). Hereafter the methodology of minimalism is further explained (section 2.5.3). Finally, we look at the use this study will make of judicial minimalism for analyzing and comparing the standard interpretations in Chapter 6 (section 2.5.4).

### 2.5.1 Incompletely theorized agreements

Judicial minimalism is an approach to adjudication first, and an interpretation theory second. Sunstein notes that minimalism is often employed by judges in practice, and he seeks to explain this rather than prescribe the use of judicial minimalism. On the other hand, Sunstein also argues that in many instances minimalism is better suited than maximalist theories for diverse societies. However, he also points out that minimalist rulings are not to be preferred over maximalist rulings in all instances.<sup>104</sup>

In constitutional matters, Sunstein asserts, it is easier for people to agree on constitutional practices and constitutional rights than to agree on constitutional theories. Constitutional orders make use of this possibility of agreement for stability. They tend to focus on what people can agree on and leave the theoretical foundation incompletely theorized. Incompletely theorized agreements can be based on abstract principles, a concrete outcome, or a rule.<sup>105</sup>

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<sup>103</sup> See *ibid.*, p. 51.

<sup>104</sup> C.R. Sunstein, 'Beyond Judicial Minimalism', in *Tulsa Law Review*, vol. 43, pp. 825-842 (2013), p. 825.

<sup>105</sup> C.R. Sunstein, 'Incompletely Theorized Agreements in Constitutional Law', in *Social Research: An International Quarterly*, vol. 74, no. 1, pp. 1-24 (2007), p. 1.



Incompletely theorized agreements are widely used in law and in politics. They are especially valuable for diverse societies based on democratic, rule of law, and human rights values. This is because they make it “possible to obtain agreement where agreement is necessary, and to make it unnecessary to obtain agreement where agreement is impossible”. Incompletely theorized agreements on abstractions are an important aspect to make constitutions work: “Constitution-makers can agree on abstractions without agreeing on the particular meaning of those abstractions.”<sup>106</sup> Sunstein’s book *Designing Democracy* illustrates the designing of constitutional orders making frequent use of South Africa’s transition from apartheid to liberal democracy.<sup>107</sup> He points to Israel which, given competing foundational narratives, could never agree on a written constitution, while there are incompletely theorized agreements on constitutional principles.<sup>108</sup>

Constitutional law and human rights (international or national constitutional) are made out of general principles. The Universal Declaration of Human Rights was indeed drafted by selecting the common core of practices and convictions amongst nations on what constituted a human right. General principles are incompletely theorized agreements, in the sense that while there is agreement on the principle, the possible disagreement on application and outcome in specific cases is made possible by the absence of specification. Human rights are such constitutional abstractions. It is important for judges to acknowledge that in a functioning democracy, especially one set in a pluralistic society, there is a political risk of invalidating outcomes of the political process by reference to abstract philosophical considerations. The abstract deserves no general priority over the particular.<sup>109</sup>

Sometimes the agreement is on a concrete outcome rather than the abstraction, leaving the abstraction incompletely theorized. Sunstein explains: “incompletely theorized agreements on certain rules and doctrines help to ensure a sense of what the law is, even amid large-scale disagreements about what, particularly, accounts for those principles and doctrines.” In these situations, people can come to an agreement by “moving to a level of greater particularity”, they “attempt conceptual descent”. This approach employs silence for a constructive end. Freedom of religion and belief can be used to explain this. Freedom of religion and belief can be argued from a great many diverse theories, as we saw in section 2.2. While disagreeing on the theoretical foundations, proponents of all these can agree that religious liberty is an important human right. The agreement, however, is incompletely theorized.<sup>110</sup>

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106 *Ibid.*, pp. 5 and 1-2.

107 Sunstein, *supra* n. 100.

108 Sunstein, *supra* n. 105, at 11.

109 *Ibid.*, pp. 7 and 20.

110 See *ibid.*, pp. 2-3. See also Sunstein, *supra* n. 104, at 829.

Sometimes people agree on a certain rule – allowing workers to practice their religion – without agreeing on the foundations. Sometimes people agree on an outcome – a worker should be able to take a day off from work on his religious holy day – without understanding or converging on an ultimate ground for this. The ultimate example of incompletely theorized agreements exists when there is “full particularity”, and people agree on a result without agreeing on any supporting rationale.<sup>111</sup>

Critics of incomplete theorization regard it “as embarrassing, or reflective of some important problem, or a failure of nerve, or even philistine”. Sunstein readily admits that incomplete theorization is not always good or right in every instance. When there is sufficient information and sufficient agreement, it is alright to be ambitious. Yet, there are many situations in which there is neither sufficient agreement nor sufficient information. Moreover, even when there is agreement and the information is deemed sufficient, it is important to take into account that humans, including those with key functions in a constitutional arrangement, like judges and legislators are fallible. The constructive use of silence that incomplete theorization makes use of, is important for four reasons:<sup>112</sup>

1. Social stability: all societies, especially heterogeneous ones are characterized by a large quantity of disagreement on social issues. If fundamental disagreements were to always materialize in every public or private dispute, there would be no social stability.
2. Constitutional democracy and liberal legal order. Constructive use of silence promotes and enables mutual respect, reciprocity, civility and charity.
3. Reducing the political cost of disagreements: incompletely theorized agreements reduce the political cost of enduring disagreements. The “loser” of a conflict loses a case and not the world.
4. Enabling moral development and progress. Incompletely theorized judgments enable the accommodation of social change and changing viewpoints.

However, because minimalism is not always optimal and because minimalism is founded in pragmatism, over time incompletely theorized agreements should be placed under scrutiny and critique. This might require ambitious constitutional reasoning. Even the appraisal of incomplete theorization deserves modesty: incomplete theorization does not “warrant respect whatever their content”.<sup>113</sup>

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111 Sunstein, *supra* n. 105, at 3. See also Sunstein, *supra* n. 104, at 829.

112 Sunstein, *supra* n. 105, at 13-15 and Sunstein, *supra* n. 104, at 832-833.

113 Sunstein, *supra* n. 105, at 22-23.

### 2.5.2 Pragmatic, traditionalist, rationalist and realist motives for minimalism

I. As we are fallible as human beings, “caution and humility about theoretical claims are appropriate, at least when multiple theories can lead in the same direction”.<sup>114</sup> The caution and humility provide the *raison d’être* for incomplete theorization in the first place. They mandate critical review of the incompletely theorized agreements from time to time. Incompletely theorized agreements then help “illuminate an enduring constitutional and indeed social puzzle: how members of diverse societies can work together on terms of mutual respect amid sharp disagreements about both the right and the good. If there is a solution to this puzzle, incompletely theorized agreements are a good place to start.”<sup>115</sup>

Sunstein formulates his theory amidst sometimes heated debates about the adjudication of human rights. As explained above, delineation of theories of judicial interpretation along a conservative liberal divide is unhelpful and misleading. As a matter of fact, while many originalists claim to uphold conservative virtues, it is minimalism which unlike fundamentalism is rooted in traditionalism and rationalism. Incomplete theorization, Sunstein explains, owes credit to Edmund Burke, the 17<sup>th</sup> century British political theorist who was critical of the French Revolution. Because he believed in the fallibility of the individual mind, Burke was skeptical of abstractions and big theories for social change and instead believed that close attention should be paid to tradition as a kind of collective memory of constitutional arrangements. He was also enthusiastic about the use of analogy.<sup>116</sup>

However, it is certainly possible to apply incomplete theorization and to willingly break with tradition. For example, the South African constitution deliberately and thoroughly breaks with tradition in South African constitutional law by explicitly rejecting apartheid and colonialist elements as well as doctrines that helped to keep the apartheid state in power. Yet the South African constitution also employs incomplete theorization to this end, as it needed to enable consensus amidst extremely opposing views on what a good constitution would entail.<sup>117</sup>

Research in the area of law and politics has attempted to show that political ideology plays a decisive role in judicial decisions. Generally, in many areas of law, in the United States Democratic appointees will cast liberal votes more often than their Republican appointed colleagues and vice versa. Yet liberal or conservative voting typically increases with the number of co-panelists who are Democrat appointees or Republican appointees. In other words, a conservative judge sitting with two liberal co-judges will typically vote less

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114 *Ibid.*

115 *Ibid.*

116 *Ibid.*, pp. 16-17.

117 *Ibid.*, p. 17.

conservatively and a liberal judge will vote less liberally when sitting with two conservative judges. Yet amongst judges, empirical evidence shows that Republican and Democratic appointees do not differ in their voting patterns in areas where this might well be expected, like criminal appeals, property rights, congressional power under the Commerce Clause, and standing to sue.<sup>118</sup>

New legal realism hopes to erode the distinctions between “law and politics” on the one hand, and political science and “empirical legal studies” on the other and wants a combined political scientist, economic and juridical study of law.<sup>119</sup> Judicial minimalism is essentially a normative theory of interpretation which hopes to appeal across political, gender, and ethnic divides. Being incompletely theorized itself, minimalism as a judicial interpretation theory promises equal maximum protection against low political cost. Yet, minimalism is also descriptive in the sense that according to Sunstein it is the theory most judges adhere to in practice, although possibly not consciously.

### 2.5.3 Methodology of judicial minimalism

Judges should think of the vertical and horizontal consistency of their judgments not just the “local pockets of coherence offered by incompletely theorized agreements.” Sunstein believes that former U.S. Supreme Court Justice Sandra Day O’Conner is a good example of a judge who consistently applied this minimalist method.<sup>120</sup> Judicial minimalism requires judgments that are shallow, rather than deep. They decide what needs to be decided to solve the case, leaving the most fundamental issues undecided. They require staying away from some “large account of how the relationship or the problem should be handled”.<sup>121</sup> For example, if a minimalist has to decide a case about religious apparel in a public educational institution, he will stay away from large theorization about the relationship of state and religion and the meaning of secularism.

Judicial minimalism also requires narrow, rather than wide judgments. Rulings should focus on the case at hand and resist the temptation to also decide future cases with similar questions.<sup>122</sup> In our example, this means that the ruling should be focused on the student in question, his or her re-

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118 T. J. Miles and C. R. Sunstein, ‘The New Legal Realism’, in *The University of Chicago Law Review*, vol. 75, no. 2, pp. 831-851 (2008), pp. 833 and 838-839.

119 *Ibid.*, p. 834.

120 Sunstein, *supra* n. 105, at 19. C.R. Sunstein, ‘Problems with Minimalism’, in *Stanford Law Review*, vol. 58, no. 6, pp. 1899-1918 (2006), pp. 1901-1902.

121 Sunstein, *supra* n. 104, at 826.

122 *Ibid.*

ligious apparel, and the educational institution in question. The ruling should not engage in solving the issue of all religious symbols in all educational institutions. Judicial maximalism, on the other hand, favors deep and wide rulings. Yet judgments can also be shallow and wide, or deep and narrow. The following table visualizes the difference and convergence between minimalism and maximalism:<sup>123</sup>

|         | Narrow                    | Wide                       |
|---------|---------------------------|----------------------------|
| Shallow | Minimalism                | Shallow and wide judgments |
| Deep    | Deep and narrow judgments | Maximalism                 |

Figure 1: Minimalism and maximalism

The terms “high-, low- and mid-level” as well a “narrow”, “shallow”, “hollow”, “abstract”, and “theory” have a comparative or relative meaning in Sunstein’s approach. They connote a certain degree as compared to something else.<sup>124</sup> The shallower a ruling, the more likely it is to get support from judges with a different appreciation of the foundational issues. The narrower a judgment, the more likely unanimity in the outcome can be reached. Sometimes these agreements involve agreeing on certain abstractions. In this sense, the incompletely theorized judgment is hollow. The abstraction must be filled, and it is not yet filled. Hollowness is necessary when nothing else is feasible. Specification may be too controversial or require information or confidence in future developments which is lacking.<sup>125</sup>

To be sure, the narrow rulings are to be preferred when it is impossible to produce (rigid) rules that provide more predictability because the “Court lacks the information that would permit it to produce *sensible* rules”. Yet, by its very nature a minimalist ruling “leaves a great deal undecided, in a way that frees up future decision makers but also leaves them to some extent at sea”. Sometimes this is necessary, because otherwise insensible rules would be produced, yet there is no reason to assume that “standard over rules” should be a rule.<sup>126</sup> After all, this would not be very minimalistic in itself.

Narrow rulings also permit dialogue regarding the constitutional issues addressed in Court cases. Not only do such rulings permit a public discourse on important matters regarding the constitutional design of society, but they also enable an interinstitutional dialogue. Narrow rulings allow for a response from the legislative and/or executive power, which can be responded to by courts and invite another round in the dialogue. Thereby the “grand narrative”

123 See C.R. Sunstein, *One Case at a Time*, Harvard University Press, Cambridge (USA)/London (UK), 2001, p. 17.

124 Sunstein, *supra* n. 105, at 12.

125 Sunstein, *supra* n. 104, at 826-828.

126 Sunstein, *supra* n. 123, at 1909-1910.

is written not by the courts alone, but in interaction with the other powers. Such a dialogue fits well with discourse models of democracy. Narrow rulings can even be democracy forcing. Courts can consciously choose to avoid constitutional objections, where possible in order to force the democratically elected branches to react directly and first. Another way of forcing democracy can be to stipulate that a certain constitutional problem exists and then implicitly or explicitly ask the democratically elected branches to find the proper solution.<sup>127</sup>

While shallowness implies that reference is made to low-level principles or the least degree of abstraction, hollowness makes constructive use of the fact that an abstraction is incompletely specified.<sup>128</sup> However, it is narrowness in particular that enables unanimity amongst judges in court cases; the narrower the question they have to agree on, the more likely the agreement is.<sup>129</sup>

Maximalists, on the other hand, adhere to the rule that rules are to be preferred over standards. Yet, maximalists would also concede that standards are sometimes not avoidable because rules are not possible. Sunstein's minimalist response is that rules should not be preferred if they are *possible*, but only when they are *optimal*. Meta-questions can usually not be solved by rules and require the particularism of narrow judgments. Yet this immediately implies that standards should not be used, when rules are more optimal. Standards are definitely more optimal than rules in the frontier questions of constitutional law.<sup>130</sup>

When to use and not to use minimalism should be decided by weighing the advantages of incomplete theorization against the disadvantages. When the risk of error is higher in incomplete theorization than in more complete theorization, it is better to be more ambitious. When the political cost or burden of minimalist rulings is larger in the long run, it might be better to have a deep or wide ruling or both. The same arguments used in favor of narrowness, shallowness and hollowness should also be applied to scrutinize when to go beyond them.<sup>131</sup>

Narrowness is inappropriate when a certain question must be faced continuously. Predictability is then required to reduce the political cost and burden. Sunstein cites the *Miranda*<sup>132</sup> ruling as an example. After decades of being confronted with the question of when a confession is voluntary, the Supreme Court issued a wide ruling, spelling out a set of warnings before any interrogation. Deep rulings are required when the fundamental issue can

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127 *Ibid.*, pp. 1915-1917.

128 Sunstein, *supra* n. 104, at 829-830.

129 *Ibid.*, p. 836.

130 Sunstein, *supra* n. 105, at 1910-1914. Compare Scalia, *supra* n. 91, at 1187.

131 Sunstein, *supra* n. 104, at 826 and 838.

132 US Supreme Court, *Miranda v. Arizona*, 384 US 436 (1966), 13 June 1966.

no longer be left unanswered. Segregation in the southern United States serves as an example here.<sup>133</sup> For decades, the U.S. Supreme Court had investigated on a case-by-case basis whether “separate” was also “equal”. In the famous case of *Brown v. Board of Education* (1954),<sup>134</sup> the Supreme Court decided that “separate is inherently unequal”. *Brown* was not only a wide decision, but also a deep one.<sup>135</sup>

#### 2.5.4 Judicial Minimalism and analysis of the selected cases

In this study judicial minimalism will be used to analyze the selected cases. The study follows Sunstein’s arguments, that judicial minimalism is best suited as an interpretation theory because it is deeply rooted in the underlying concepts of LDC and because it is best fitted for a pluralist context. The study thus accepts the hypothesis that minimalism reduces the political costs of a decision. It also accepts, that judicial minimalism is not a dogma, and that from time to time a deep or wide ruling is better suited within the context.

Applying the prism of minimalism/maximalism to the study of case law on a certain human right is useful for the understanding of the case law. Whether or not one believes *a priori* in the value of minimalism, the application of the prism to concrete cases is useful to mark parallels and distinctions between the methodologies of interpretation actually used by judges. This is why the study will try to answer the question of which court and/or which cases are more minimalist than others.

This study reviews the case law on freedom of religion and belief of three judicial tribunals which serve as the highest judge in their respective jurisdiction. It aims to identify the differences in reasoning and outcomes of similar cases and to analyze and explain them. The elements of minimalism identifiable in the cases will serve for the analyses of the selected cases from each court, and between the three courts.

Given that Sunstein himself concedes that “narrow” and “shallow” are not always best suited, any identification of maximalist elements in the cases is no disqualification. Rather, the purpose is to understand why the maximalist elements were used and whether or not a minimalist alternative was more optimal. The systematic analysis of the selected cases, with the aid of judicial minimalism as an interpretation theory leads a functional comparison of the standard interpretations of the freedom of religion and belief by the SCC, CCSA and ECtHR. With such a functional comparison, the study hopes to contribute to possibilities for judicial borrowing where the freedom of religion and belief is concerned, between the three tribunals and beyond.

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<sup>133</sup> Sunstein, *supra* n. 104, at 836-837.

<sup>134</sup> US Supreme Court, *Brown v. Board of Education*, 347 US 483 (1954), 17 May 1954.

<sup>135</sup> Sunstein, *supra* n. 123, at 17. See also pp. 36-38.



## 2.6 THE IMPACT OF THE FREEDOM OF RELIGION AND BELIEF

The freedom of religion and belief, much like other rights such as private life or freedom of expression always triggers societal debate and academic discourse. The freedom of religion and belief may be more contested in these debates than other rights. There are those who blame it for actually undermining a religion-based world view, while others find it a remnant of a pre-secular age, that should be replaced by “secular” rights. Indeed, the relationship between this right and the institutional principles that guide the relationship between state and organized religion is always intense and complex. After all, there may be as many “secularisms” as there are beliefs. And then again, is the way we look at religion and belief from the perspective of the freedom right inherently biased?

This paragraph explores different viewpoints in the discourse concerning the freedom of religion and belief. While it was not possible to incorporate all the newest materials into this dissertation, the viewpoints discussed here, are still representative of the positions held in the current discourse.

First, we investigate the challenge that the freedom of religion and belief and case law are inherently biased (section 2.6.1). Then the concepts of secularism, secularity and secularization will be discussed (section 2.6.2). We will then turn to post-secularisms and post-liberalisms (section 2.6.3). Hereafter we look at some Canadian, South African, and European views regarding the freedom of religion and belief and the case law by the SCC, CCSA and ECtHR (sections 2.6.4, 2.6.5, and 2.6.6). The next paragraph categorizes the positions in the debate and positions this dissertation within said debate.

### 2.6.1 An inherent liberal and Western bias?

Arguments and underlying notions of the freedom of religion are relevant for its codification in constitutional and human rights instruments and certainly for the interpretation by judicial tribunals. These have been linked to a liberal, individualist, and Western understanding of religion and belief. Van der Braak notes in repetition of Sharma, how the two instruments seem to exalt a bias towards missionary religions. In fact, non-Western nations have been skeptical towards the freedom of religion and belief, which had been employed in the past by the Western colonial powers to protect the activities of Christian missionaries in non-Christian lands and those with a predominantly different Christian orientation. While Islam, Judaism and Christianity all view “apostasy” as problematic, it was mainly Islamic nations who objected to a repetition of the right to change one’s religion in the ICCPR. The experience



of Christian missionary pressure, protected by colonial authorities, on people to change their religion was still very real.<sup>136</sup>

While the Western and secular origins of the *status quo* of the freedom of religion and belief as a “universal human right” are hardly deniable, this does not mean automatically that cultural differences imply that there is no universalism, or that it cannot be realized. As shown in section 2.2.4 the intercultural model provide a change for arguing and realizing universalism, which takes non-Western cultures seriously.

Twining, summarizing and comparing the views of Deng, An-Na'im, Ghai, and Baxi, selected to represent “southern voices” notes that each of them takes the UDHR as a reference, while also emphasizing the necessary translation into specific cultural, religious and national contexts. Each of them acknowledge that we live in a diverse world, which creates problems of co-existence and co-operation. They also emphasize that recognition of particularities is needed. But they all reject a strong concept of cultural relativism, which makes the existence of universal rights impossible in an absolute sense. A universalism of human rights argues Twining can be defended from a natural school of human rights, a deliberative school of human rights and a protest school of human rights. He sees An-Naim and Deng exemplifying the natural school, Ghai the deliberative school and Baxi the protest school.<sup>137</sup>

An-Na'im concedes that while human rights as codified in international and constitutional instruments have a Western and secular origin. But universality can and must be realized through deliberation. This requires amongst others legitimation in the context of various religious traditions of the world.<sup>138</sup> In his view this can be provided by realizing the interdependence of religion, secularism (in the sense of institutional secularism, see next section) and human rights. In short the argument is as follows: (1) Human rights require legitimacy from religious traditions, and their experience of combating injustice. They require stability and security, which secularism can generate in a pluralist context. (2) Religion always requires the freedom of religion and belief, because whatever coercion can achieve, is never ‘belief’. It therefore requires the protection of the rights of believers and a state that abstains from covering in the name of a religion or belief. (3) Secularism to work as a constructive and just arrangement, depends on the moral guidance from human

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136 van der Braak, *supra* n. 31, at 212, referring to A. Sharma, *Problematizing Religious Freedom*, Springer, Dordrecht (Netherlands), 2011. See also A.A. An-Na'im, 'Islamic Politics and the Neutral State, A Friendly Amendment to Rawls?', in T. Bailey, and V. Gentile (eds.), *Rawls and Religion*, Columbia University Press, New York (USA), 2014, p. 245.

137 W. Twining, 'Conclusion', in W. Twining (ed.) *Human Rights, Southern Voices; Francis Deng, Abdullahi An-Na'im, Yash Ghai and Upendra Baxi*, Cambridge University Press, Cambridge (UK) e.a., 2009, pp. 2015-2019.

138 A.A. An-Na'im, 'Islam and Human Rights: Beyond the Universality Debate' in M. A. Baderin (ed.) *Islam and Human Rights. Selected Essays of Abdullahi An-Na'im*, Collected Essays in Law Series, Ashgate, Surrey (UK), 2010, pp. 62-63.

rights and the moral justification by religion.<sup>139</sup> An-Na'im deserves enormous credit for his career long endeavor to provide to this legitimation for human rights from an Islamic perspective.

An-Na'im also challenges the Rawlsian approach, insofar as it would disqualify faith-based views from its discourse model for being "grand narratives". He agrees with Rawls that a neutral state is prerequisite for social peace and for effective freedom of religion and belief, and that religion, state and politics should be distinct. He also agrees with the necessity of "public reason", proposing his "civic reason" as a non-prescriptive model of Rawls' "public reason".<sup>140</sup> But he argues it is neither possible nor desirable to separate religious views and politics. Rawls may have based his theory too much on an essentialist understanding of religion, based of course on his knowledge of Western Christianity (or even just Protestantism). But this can hardly be determinative for all religions in all contexts. For believers, their (religious) beliefs are so essential to their identity and so determinative of every conviction or opinion they hold, that they cannot forget about them when they engage politically and socially with others. But An-Na'im also thinks that they are required to base their arguments not only on their own beliefs, which by definition other believers or non-believers will not accept, but on "civic reason". Disqualifications from the discourse should not be on the religious and/or secular nature of policy or legislation, but only because they are unconstitutional.<sup>141</sup>

In any case "World Religious Paradigm" which views religions as monolithic, mutually exclusive entities, if used as an underlying assumption for the freedom of religion and belief and its interpretation by courts, may be unfit to protect believers. The realities of believers are different. In many traditions, exclusiveness is not that common; in many traditions there are varying degrees of orthodoxy and heterodoxy and many strands and brands under one umbrella. "Popular religion" is too often forgotten in views of religion and belief. In the West, popular opinion will sometimes have us believe in a dichotomy between traditional organized religion and secularism, but actually, the "real" pluralism is caused by the shades of grey consisting of "flexible believers", the "trans-religious". New religious movements also contribute to the diverse existence of religion and belief globally.<sup>142</sup>

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139 A.A. An-Na'im 'The Interdependence of Religion, Secularism, and Human Rights: Prospects for Islamic Societies', in Baderin *supra* n. 138, at 350-351 and 354-360.

140 An-Na'im, *supra* n. 136, pp. 254-256; 247 and 257-258.

141 *Ibid*, pp. 243-247 and 257-264.

142 van der Braak, *supra* n. 31., p. 213, referring to the term introduced by P. Hedges, in 'Multiple Religious Belonging After Religion: Theorizing Strategic Religious Participation in a Shared Religious Landscape as a Chinese Model, in *Open Theology*, vol. 3, no. 1, pp. 48-72 (2017).

### 2.6.2 Secularity, secularism, and secularization

Secularism, just like religion and belief is a legally and politically contestable concept, as we see in the selected cases (section 4.7). It means different things to different people, and for some it important values are attached to it. Secularism is commonly understood to be a constitutional principle which prescribes the separation of state authority and religious authority. The secularity of state institutions thus is the idea, that state authority is not (primarily) based on metaphysical authority, but on factors of the physical world such as the consent of the governed (democracy) and the rule of law (supremacy of the constitution). Rosenfeld distinguishes between institutional secularism and ideological secularism. Institutional secularism mandates “the public sphere should warrant neutrality among religions and among the latter and non-religious ideologies in order to provide an optimal setting for the realization of freedom of religion as well as of freedom from religion.” Ideological secularism is a “conception of the good”. It relates to notions of human happiness, freedom and therefore public policy and the “common good”. Therefore, ideological secularism is in direct competition with religious theological and ethical views and or religious ideologies.<sup>143</sup>

States can choose from a variety of models when it comes to institutional arrangements. In Hirschl’s view, the ways in which a state can relate to religion and belief can be divided into: (1) a separationist model; (2) an accommodationist model; and (3) a strong establishment or theocratic model.<sup>144</sup> When using the term “secularism” without any accompanying adjective in this dissertation, the term is understood as a flexible concept of institutional secularism. Flexible in the sense, that it shall be understood to encompass all different concepts that denote the secularity of institutions and/or evenhandedness towards religious and non-religious world views. All interpretations of the concept are understood to be part of it, when used in this way.

When wanting to emphasize someone’s preference for a strict separation and/or ideological secularism, I will use “rigid secularism”, “ideological secularism” or “militant secularism” depending on the context. When wanting to emphasize someone’s preference for accommodationism or inclusive understandings of secularity, I will use “state neutrality”, “evenhandedness”, or “open secularism”.

Secularization is a process that leads to increasing levels of secularity. Charles Tayler distinguishes three interrelated phenomena: (1) increasing

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143 M. Rosenfeld, ‘Recasting Secularism as One Conception of the Good Among Many in a Post-Secular Constitutional Polity’, in S. Mancini and M. Rosenfeld (eds.), *Constitutional Secularism in an Age of Religious Revival*, Oxford University Press, Oxford (UK), 2014, pp. 1 and 5 ff (pages of paper).

144 R. Hirschl, ‘The Secularist Appeal Of Constitutional Law And Courts: A Comparative Account’, *Keynote address for the ReligioWest Kick-off Meeting, Robert Schuman Centre for Advanced Studies, European University Institute, Florence, 14-15 October 2011*, pp. 3-4.

secularity of public spaces, amongst which, importantly the state; (2) increasing numbers of people not following or practicing a religion; (3) an increasing shift from a society in which religious belief is unproblematic and unchallenged to one in which it becomes one option amongst others.<sup>145</sup> Secularization as a term, usually does not imply a positive or negative attitude towards either of these phenomena. It aims to solely describe them.

According to some, liberalism, LDC and/or human rights contribute to secularization, meaning at least the first and possibly the second and the third of Taylor's distinction. Ran Hirschl stipulates, that modern law and constitutionalism leads to secularization, not only in separationist or accommodationist legal orders but also in strong establishment/theocratic legal orders. According to him, law becomes the civil religion. He regards the SCC and CCSA as prime examples of a deified constitutionalism as an all-encompassing, overreaching civil religion.<sup>146</sup>

When using the term "secularization" in this study it shall mean first and foremost the first of Taylor's categories. In light of this dissertation's position in the wider debate, I emphasize that Taylor specifies that the first and the third category do not imply secularization of the third category. He mentions the United States as example. The US were the first government to ever adopt strict separation and are highly secularized in the third sense. However, amongst Western nations they are (amongst) the society with most religious believers.<sup>147</sup> Elsewhere in this dissertation (see section 5.6 and Chapter 7) I will elaborate why I view the role of the courts differently than Hirschl. While it is true that all three of them uphold institutional secularism (and thus Taylors first category) some of the selected cases show how room can be crafted for believers to formulate meaningful alternatives to ideological secularism, enabling a more holistic pluralism. Hence, reshaping Taylor's third category, various religious and/or belief-oriented lifestyles become a serious option alternative to ideological secularism and/or the second category of Taylors secularization.

### 2.6.3 Post-secularisms and post-liberalisms

For some, however, a paradigm shift is needed to prevent further secularization (in all three of Taylor's categories) and to stop liberalism's inherent bias for secularism. They argue that secularism, whatever its precise content and meaning, creates a paradigm which is totalizing and insufficiently flexible to

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145 C. Taylor, *A Secular Age*, The Belknap Press of Harvard University Press, Cambridge (USA)/ London (UK), 2007, pp. 1-4.

146 See R. Hirschl, *Constitutional Theocracy*, Harvard University Press, Cambridge (USA), 2010, pp. 187 and 203.

147 Taylor, *supra* n. 145.

facilitate a broad pluralism. Others point to secularism's origins in liberalism, arguing that only a post-liberal constitutionalism allows for the required paradigm shift.<sup>148</sup>

Modern liberal democratic constitutionalism recognizes the freedom of religion and belief as a human right, but its various interpretations tend to also include institutional principles regulating the relationship between the state and religion, political and spiritual authority. While secularism may have many different and competing faces, Rosenfeld argues that liberal democratic constitutionalism's adherence to institutional secularism has put ideological secularism in a privileged position. It is this privilege that has come under attack.<sup>149</sup> Ian T. Benson regards secularism as an anti-religious ideology, which increasingly seeks to employ law to fulfill the function of a religion with one moral viewpoint.<sup>150</sup> Bader argues for a de-constitutionalization of secularism. This requires judges to be activist when it comes to the minimal core of liberal constitutionalism, but practice self-restraint with regard to all thornier debates. Judges should join neither conservatives, libertarians or (neo-) liberals, nor radical democrats or socialists in their viewpoints in constitutional debates. The constitutionalization of secularism require judges to rule on the thornier issues and pick sides. This will erode the core of liberal-democratic constitutionalism.<sup>151</sup>

Ten Napel points to the "theological traits" of "liberal-egalitarian thinking" and the "strong belief in ongoing secularization" as key components of current European adjudication with regard to the freedom of religion and belief. He credits post-liberal thought with challenging "the conventional wisdom that liberalism automatically guarantees religious freedom". Secularization "does not necessarily lead to greater tolerance" and "under liberalism, the freedom of thought, conscience, and religion is not guaranteed without question." From a scholarly perspective, it is fascinating to note that 250 years after its inception, modern constitutionalism is once again coming under full discussion.<sup>152</sup>

This is in stark contrast with Francis Fukuyama's 1998 prediction, that liberal-democratic constitutionalism marked the "end of history".<sup>153</sup> Fukuyama once aligned himself with the neo-conservative project, but left it in bitter

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148 J. Harrison, *Pluralism and Disagreement*. In *Post-Liberal Religious Liberty: Forming Communities of Charity*, Cambridge University Press, Cambridge (UK), 2020.

149 Rosenfeld, *supra* 143 at 2.

150 I. T. Benson, 'The Attack on Western Religions by Western Law: Re-framing Pluralism, Liberalism and Diversity', in *International Journal for Religious Freedom*, vol. 6, no. 1-2, pp. 111-125 (2013), pp. 111-112 and 121.

151 V. Bader 'Constitutionalizing secularism, alternative secularism or liberal democratic constitutionalism? A critical reading of some Turkish, ECtHR, and Indian Supreme Court cases on secularism', in *Utrecht Law Review*, vol. 6, no. 3, pp. 8-35 (2010), p. 35.

152 H.M.Th.D ten Napel, 'The European Courts, Secularism, And Religious Groups: The Recent Ruling On Ritual Slaughter As A Case In Point', in *International Journal of Religious Freedom* forthcoming, p. 1

153 F. Fukuyama, *The End of History and the Last Man*, The Free Press New York (USA), 1992.

disappointment for its rejection of the values he adhered to. In his 2022 book he argued convincingly that classical liberalism is distinct from the politics of rightwing neo-liberalism and leftwing populism, which push(ed) its principles to the extreme. He defines classical liberalism in terms of tolerance, protection of human dignity and protection of property rights. He argues that classical liberalism's (once) unfulfilled promises towards enslaved people and indigenous peoples, colonized peoples, ethnic and racial minorities, the working classes, women and LGBTQ+ people do not disqualify classical liberalism, but only the people and governments, which applied it selectively.<sup>154</sup> He proposes for classical liberalism to address its discontents, while promoting it to be continued as a form of government, because its core principles have continued value, especially for today's diverse societies.<sup>155</sup>

One of the writers cited by ten Napel is Joel Harrison. Harrison positions a post-liberal account of religious liberty "focused on personal relationships for forming communities of solidarity, fraternity and charity oriented to God and neighbor" against the liberal egalitarian account which understands religious liberty as signifying "respect for conscience, identity, or authenticity". "These competing accounts present two different political and social imaginaries". Yet "even the 'secular' logic is not divorced from religion". "Liberal egalitarian scholars tend to argue that non-religious convictions should be treated equally to religious claims, or else that religious claims are a species of a more capacious category. But this is better characterized as a new, competing religiosity." Harrison's alternative religious liberty is grounded in the Christian tradition as "an alternative and persevering tradition that emphasizes plural sites of authority". It would protect "the free creation of communities of solidarity, fraternity and charity". These would be semi-autonomous, but the state would intervene when a religious community is clearly acting outside the common good.<sup>156</sup>

Harrison positions himself within the greater transcultural and transhistorical endeavor of challenging the constraints put to the definition of religion and consequently religious liberty from undue constraints of the secular self-understanding of liberal democratic constitutionalism.<sup>157</sup> Others, possibly more at home in that very tradition, share the perspective of the quasi-religious nature of modern constitutionalism and constitutional law. In his interesting work on constitutional theocracy, Hirschl analyzes how the constitutionalization of religion leads to very similar outcomes as the constitutionalization of secularism. "Constitutional law and courts owe their existence to the body politic not to a divine authority". When all is said and done, "there is not much

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154 F. Fukuyama, *Liberalism and its Discontents*, Profile Books, London (UK), 2022, chapters 1, 2-3, and 5-6.

155 *Ibid.*, chapters 8 and 10.

156 Harrison, *supra* n. 148, at 225-226, 228-229 and 230-232.

157 *Ibid.*, p. 234.

qualitative difference between how courts in France (with its assertive form of secularism) and in Morocco (where Islam is a pillar of the state) view symbols of theocratic governance as a threat to the modern state and its overreaching constitutional supremacy". In his view, the judicialization of mega-politics everywhere in the world shows that any simplistic assumption about the "differences between democratic and authoritarian settings is questionable" (see also section 2.1).<sup>158</sup>

Hirschl's analysis of secularization through law even argues that modern law always leads to secularization, even in constitutional systems committed to upholding (partly) religious systems of governance and law. Constitutions are man-made and create a system of institutions governing the entire spectrum of society and a normative order from which no one can withdraw. They advance the rule of law by definition, sometimes in "lieu and at times in tandem with the rule of God".<sup>159</sup>

Within the liberal-democratic constitutionalist paradigm, even courts which are committed to accommodation will fend off claims by believers made for alternative sources of law, as they are seen as potentially threatening. Hirschl points to the CCSA and SCC as examples of the efforts made to "subject traditional law to the general principles of law". But the explanation for this, according to Hirschl, is not the totalizing nature of liberal-democratic constitutionalism and by consequence secularism. Courts, never mind the state-religion setting, are always stakeholders in the "civil religion" of the state. In liberal democratic constitutional orders, this is liberalism; in orders of constitutionalized religion, it is a religion orientated constitutionalism. Nevertheless, courts feel obliged to take action to "restore the superiority of its sources of legitimacy, rules of engagement methods and style of reasoning that are state driven". In liberal democratic states these are "entrenched in the secular constitution." But "Western secularism [...] has never eradicated religion, is in fact inseparable from religion and may never be fully understood without appreciating that it grew out of religion".<sup>160</sup> Indeed not only in the West, but across our multi-religious globe and history, constitutional law and religious law show great similarities. This may be one reason why at times they have a difficult relationship with one another.<sup>161</sup>

An-Na'im has a different take on the inter-related relationship between law and religion. Whatever the claim is that a state makes towards itself and the law being religious, law loses its religious character, once it becomes state law, because its authority no longer depends on the beliefs of the believers,

158 Hirschl, *supra* n. 6, at 247-249.

159 R. Hirschl, 'The Secularist Appeal Of Constitutional Law And Courts: A Comparative Account', *Keynote address for the ReligioWest Kick-off Meeting, Robert Schuman Centre for Advanced Studies, European University Institute, Florence, 14-15 October 2011*, pp. 1-3.

160 Hirschl, *supra* n. 6, at 203-204 and 249.

161 See *ibid.*, ch. 6.



but on enforcement by state power and institutions. Hence when Hirschl claims that judges favor secular law, even in strong establishments, this may be because speaking from An-Na'im's perspective that all the state judge is applying in the first place is secular law, even when it claims to be religious law.<sup>162</sup>

In his monumental work on our "Secular Age", Charles Taylor, a prominent Canadian philosopher, supporter of multi- and interculturalism and himself a Catholic, challenges dominant narratives about the secularization in the West. Both the past and the present are far more diverse, complex, multi-polar and intertwined than common hypotheses about science and reason slowly but steadily diminishing religion and belief. While the belief in God has become an option in our secular age, as opposed to past eras, it is one of many different options. Unbelief is far from being the only or dominant alternative.<sup>163</sup> In their interesting trio-article, Lombaard, Benson and Otto point to the fact that atheistic, agnostic and even unconcerned positions are as much a "belief" as religious belief is. The momentum provided by post-secularism is to correct modernism's and post-modernism's exclusion of faith from the larger perspective, the public domain and subsequently protection by law. The door is open for a "more inclusive" liberalism.<sup>164</sup>

While the post-secular discourse may be as internally diverse as the secular and/or liberal-democratic one, the common denominator seems to be the search for a new pluralism in which religion and belief are no longer just a private matter and faith-based communities enjoy autonomy to conduct themselves in accordance with a holistic understanding of their tradition. Bader proposes "Associational Governance of Religious Diversity" as a realist utopia and alternative to other models tied to liberal-democratic constitutionalism. It would require only a minimalist secular state, the recognition of the state's autonomy from organized religion and organized religion from the state.<sup>165</sup>

The post-secular project is related to the larger endeavor of post-liberalism. As early as 1996, philosopher John Gray proposed a new pluralism in which "liberal forms of life enjoy no special privileges of any kind".<sup>166</sup> But recent political history, in the West and elsewhere in the world, seems to indicate that there is another post-liberal scenario. A collapse of the liberal *status quo* might not always bring about new pluralism, but "xenophobia, pride, lying,

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162 See A. A. An-Na'im, *supra* n. 18 at 1235.

163 Taylor, *supra* n. 145.

164 C. Lombaard, I.T. Benson and E. Otto, 'Faith, society and the post-secular: Private and public religion in law and theology', in *HTS Teologiese Studies/Theological Studies*, vol. 75, no. 3, a4969 (2019), pp. 8 and 11-12.

165 V. Bader, 'Post-Secularism or Liberal Democratic Constitutionalism', in *Erasmus Law Review*, vol. 5, no. 1, pp. 5-26 (2012).

166 J. Gray, 'From Post-Liberalism to Pluralism', in *NOMOS: American Society for Political and Legal Philosophy*, vol. 38, pp. 345-362 (1996), p. 345.



irrationality, hate, greed, anger, and naked ambition”<sup>167</sup> become unleashed as illiberal forces which try to (re)gain spaces they supposedly lost to a liberal-egalitarian elite, intolerant of all serious challenges to their hegemony. Post-liberal theorists view this as evidence of liberalism’s current meta-crisis.<sup>168</sup> For some liberals, however, the populist challenges, (resurgence of) radical religious fundamentalism, and increasing “constitutional theocracy” (Hirschl) may be the “devil on the wall”. The instinctive reaction may be to defend the liberal-democratic *status quo* concerning the freedom of religion and belief and, more broadly, to shut out all possibility of further evolution.

#### 2.6.4 Some Canadian views on the freedom of religion and belief

The Canadian Charter of Rights and Freedoms has had an enormous impact on Canadian constitutional law in practice and the role that human rights play in society at large. As Manfredi notices, the phenomenon he calls the paradox of liberal constitutionalism, the emergence of judicial supremacy out of the process of enforcing constitutional supremacy, has become one of the dominant features of Canadian politics.<sup>169</sup> However, there was opposition to the Charter, and the heirs of this opposition continue to challenge as judicial activism “every ruling that departed from the pre-Charter status quo”.<sup>170</sup> Canadian critics of the liberal constitutional paradox and the alleged over-emphasis on individualism sometimes draw inspiration from another dominant political tradition in Canada, communitarianism, and point to the Charter itself, in which communitarian principles are embedded.<sup>171</sup>

The Charter clearly envisions a “non-assimilationist model of citizenship, one aimed at promoting equality and multiculturalism”.<sup>172</sup> “It offers an organic, dynamic mode of rights protection, which is receptive to active government, respectful of diversity and pluralism which is receptive to active government, respectful of diversity and pluralism, and detached from any traditional conservative moral code based on shared culture, history, religion, or ethnicity.”<sup>173</sup> Weinrib responds to claims that a rights-based approach

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167 M. Northcott, discussion of J. Milbank and A. Pabst, *The Politics of Virtue: Post-Liberalism and the Human Future*, Rowman and Littlefield, London (UK)/New York (USA), 2016, in *Radical Orthodoxy: Theology, Philosophy, Politics*, vol. 3, no. 2, pp. 42-49 (2017), p. 42.

168 *Ibid.*, p. 48.

169 C.P. Manfredi, *Judicial Power and the Charter, Canada and the Paradox of Liberal Constitutionalism*, Oxford University Press, Don Mills (Canada), 2001, p. 196.

170 See L. E. Weinrib, ‘The Canadian Charter’s Transformative Aspirations’, in *Supreme Court Law Review*, vol.19, pp. 17-37 (2003), p. 29.

171 Manfredi, *supra* n. 169, at 197.

172 B. Ryder, ‘The Canadian Conception of Equal Religious Citizenship’, in R. Moon (ed.), *Law and Religious Pluralism in Canada*, UBC Press, Vancouver/Toronto (Canada), 2008, p. 106.

173 Weinrib, *supra* n. 170, at 23.

is the “enemy of faith and faith communities because large and powerful religious communities tend to lose their historical privileges over the population at large”. While this has been true for the Charter, she accepts the complaint “presupposes that the power and benefits were justly acquired and in accord with current political norms”, both of which is not the case. Instead, the Charter led to a more equal treatment of all religions in the public sphere.<sup>174</sup>

Moon seems to argue that totally banishing the dominant religious tradition from the public sphere is neither possible nor desirable, while at the same time this does not preclude the recognition of the equal dignity of religious minorities or non-religious citizens. Moon argues that the “cultural identity component” of the freedom of religion and belief should be synchronized with the “personal autonomy component”. According to the “cultural identity component”, religion is not so much a choice, but a “deeply rooted part” of identity that deserves equal protection, because of the equal worth of human dignity. According to Moon, this ambiguity is also manifest in the case law of the SCC.<sup>175</sup>

Berger argues that the “cohesive and particular theory of religion” that emerges from the Charter interpretation of the SCC consists of the following three elements that mutually support each other: (1) religion is essentially individual; (2) religion is centrally addressed to autonomy and choice; (3) religion is private. This follows from legal liberalism and is the logical consequence of religion being viewed from the plane of legal liberalism’s law and legal institutions. Yet Berger accepts Moon’s assertion that in the “equality” rulings there is a tension with autonomy, because they are informed by “cultural identity”. But even cultural identity can be seen as an expression of autonomy which remains the dominant feature in the jurisprudence. Analyzing *Children’s Aid Society of Metropolitan Toronto* (see section 11.4.4), Berger argues that an identity approach removed from “autonomy” is explicitly rejected when the religious identity of the infant (as opposed to the parents) is rejected in a matter of life and death. Two judges explicitly claim she needs to live long enough to make her own choices.<sup>176</sup>

Sharma, cited above in section 2.6.1, argues for a concept of freedom of religion and belief which would include the realities of non-Western experience.<sup>177</sup> As Weinrib notes, pre-Charter politics were characterized by a cultural bias towards Christian religion as one of the foundations of society

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174 See L. E. Weinrib, ‘Ontario’s Sharia Law Debate: Law and Politics under the Charter’, in R. Moon (ed.), *Law and Religious Pluralism in Canada*, UBC Press, Vancouver/Toronto (Canada), 2008, pp. 246-250.

175 R. Moon, ‘Government Support for Religious Practice’, in Moon, *supra* n. 174, pp. 217-218.

176 See B.L. Berger, ‘Law’s Religion: Rendering Culture’, in Moon, *supra* n. 174, pp. 268, 272 and 276-278.

177 Sharma, *supra* n. 136, paraphrased by van der Braak, *supra* n. 131, at 212.

and Canadian law. The Charter introduced a rights-based notion of democracy and the rule of law, which led to the disestablishment of legally required observance of the "Lord's Day" (*Big M*, see section 11.3), religious "indoctrination" and prayers in public schools. However, this has not lead to a banishment of religion from the public sphere, but to a more equal treatment of religious beliefs and practices in the public sphere.<sup>178</sup> But Berger attributes this to a "general transforming ideology" with "individualism as a hallmark".<sup>179</sup> The Charter clearly envisions a "non-assimilationist model of citizenship, one aimed at promoting equality and multiculturalism".<sup>180</sup> "It offers an organic, dynamic mode of rights protection, which is receptive to active government, respectful of diversity and pluralism which is receptive to active government, respectful of diversity and pluralism, and detached from any traditional conservative moral code based on shared culture, history, religion, or ethnicity."<sup>181</sup>

Borrows, a member of the Anishinabek nation in Canada, notes that the misunderstanding of Aboriginal spiritual belief has resulted in court rulings inhibiting religious freedom. Such misunderstanding is generated by both the liberal bias of the law, and the Christian bias in understanding religion in general. It leads to a continuation of the colonial past which "imposed cruel restrictions on Aboriginal spiritual beliefs". Borrows suggests as a remedy that "indigenous legal traditions should stand besides Canada's Constitution to organize and structure society's relationships". He also argues for more knowledge of indigenous spirituality amongst judges.<sup>182</sup>

Canada's First Nations are not the only ones experiencing the bias of the law. Esau, himself an Anabaptist, is critical of Canadian jurisprudence when it comes to "illiberal religious groups". These communities are "illiberal" in the sense that they adhere to an "inside law" aimed at enforcing the community mores and hence keeping the community homogeneous. The state's law then is "outside law", the use of which is discouraged or even prohibited by the "inside law". Esau argues that standing case law has not adequately enabled legal pluralism in Canada, by recognizing illiberal inside law of distinct communities. This is because the inside law is drawn into, measured according to and validated only in conformity with state law. Outside law concepts like natural justice, make it impossible for inside law to operate in absolute freedom.<sup>183</sup>

While there is accommodation, Esau bemoans that according to state law, a religious community is no different than a sports club or other (secular)

178 See Weinrib, *supra* n. 174, at 244-250.

179 Berger, *supra* n. 176, at 271.

180 Ryder, *supra* n. 172, at 106.

181 Weinrib, *supra* n. 170, at 23.

182 J. Borrows, 'Living Law on a Living Earth: Aboriginal Religion, Law, and the Constitution', in Moon *supra* n. 174, p. 176.

183 See A. Esau, 'Living by Different Law: Legal Pluralism, Freedom of Religion and Illiberal Religious Groups', in Moon *supra* n. 174, p. 117.

voluntary organizations. But the separation of church and state should give rise to “recognition”. “As it now stands, freedom of religion and belief seems to be tied up with state law *accommodation*, not with state law *recognition* of an independent jurisdictional sphere arising from the separation of church and state.”<sup>184</sup>

Esau is skeptical of the potential of the Canadian Charter of Rights and Freedoms to guarantee the freedom which distinct faith-based communities are looking for. It seems “unlikely that a liberal constitutional document requiring subjective balancing of interests by the judiciary will help the cause of religious communities that want to live by illiberal norms”. Despite the absence of an anti-establishment clause in the Charter, he laments it has been “primarily used to advance the interest of non-religionists to be free of any religion in the public sphere”.<sup>185</sup> But he concedes that “religionists have not always lost”,<sup>186</sup> citing *Amselem* and *Multani*, and the Alberta court judgment that struck down the license requirement in *Hutterite Brethren v. Alberta* (the SCC on the other hand upheld the requirement, see sections I1.4.10 and I1.4.13). Even *Chamberlain* (section I1.4.13) in his view signifies the recognition of religious considerations in the public sphere. Yet he will not accept this as proof that there is a rising endorsement of freedom of religion and belief, because in all these cases the countervailing interest was “minimal or even trivial”. “When robust religion sufficiently offends liberalism in the public square, the outcome may be less certain.”<sup>187</sup>

Hence, Esau advocates for a common law doctrine of separation of church and state that would enable a hands-off approach, irrespective of whether the Charter is applicable. He sides with the minority opinion in *Bruker and Hofer* (sections I1.4.11 and I1.4.2), claiming that Courts should not enforce private law agreements which enforce inside law, nor evaluate inside law procedures as private law agreements. Admittedly, the inside law may conflict with liberal norms but “to accommodate only what we regard as liberal religion means that the freedom of religion amounts to nothing. It is like tolerating speech with which we agree.” But on the other hand, this requires “reciprocal pluralism”. Faith-based communities should defend the right to their “inside law” and give reciprocal respect to other groups “living by different laws”. They should not try to extend their inside law beyond their group, because that would involve “harming” others, rather than “harming” only their own (voluntary) members. Hence, they should support same-sex marriage as a matter of equality within public law, even if maintaining a rejection of it in

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184 *Ibid.*, pp. 110-139.

185 *Ibid.*, p. 118.

186 *Ibid.*

187 *Ibid.*, p. 119.

the inside law. They should be “liberals in the public sphere and illiberals in the church sphere”.<sup>188</sup>

Does the inside law concept also address the grievances of aboriginal communities? Borrowes supports the “equal religious citizenship” and personal autonomy trend he sees in *Amselem* and *Multani*. So, unlike Esau, his view of liberal concepts is positive. The greatest challenge will be how the limitations clause will be interpreted in regard to aboriginal religious concepts. If the spiritual concepts are negated every time they conflict with non-aboriginal economic interests, then there will be no substantive freedom of religion and belief.<sup>189</sup> Here, Esau’s assertion of the recognition of “inside law” may help. Under the inside law concept, judges would have to be alive to inside law aboriginal concepts like “spirit dance” in the case of a Salish man who was “grabbed” contrary to his will but for the purpose of healing.<sup>190</sup> The challenge would be to define the voluntary boundaries of inside law, once it is a believer who challenges the community as in that case, but also in *Hofer*. Will “outside law” not always have to determine the boundaries of the “inside law”? Beaman, while (constructively) critical of the “sincerity” and “personal autonomy” approaches, recognizes how they do enable a focus on “lived religion”,<sup>191</sup> which provides leeway for minority groups to contest misunderstandings and biases towards their religion, spirituality and culture, and to show how they are lived. Schneiderman’s concept of associative rights may provide a remedy for “vulnerable” communities and subcultures, like the Anabaptist communities or the aboriginal peoples and help to accommodate their group aspirations.<sup>192</sup>

Ryder suggests the conception of “equal religious citizenship” for the authentically Canadian appreciation of religious freedom and religious diversity in a liberal democracy. In “equal religious citizenship”, religious freedoms and religious equality rights are allied with the right of religious persons to participate equally in Canadian society without abandoning the tenets of their faith. The core idea is that society must accommodate religious beliefs, expression and practices “unless doing so would interfere with the rights of others or with compelling social interests”.<sup>193</sup> According to Ryder, this conception is manifest not only in the constitutional and legal (human rights) instruments, but also in the case law of the SCC, particularly in judg-

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188 *Ibid.*, pp. 124-132.

189 Borrowes, *supra* n. 182, at pp. 171-174.

190 *Ibid.*, p. 182, referring to British Columbia Supreme Court, *Thomas v. Norris*, [1992] 2 C.N.L.R. 139, 5 February 1992.

191 L.G. Beaman, ‘Defining Religion, the Promise and the Peril of Legal Interpretation’, in R. Moon (ed.), *Law and Religious Pluralism in Canada*, UBC Press, Vancouver/Toronto (Canada), 2008, p. 213.

192 D. Schneiderman, ‘Associational Rights, Religion and the Charter’, in Moon *supra* n. 174, p. 80.

193 Ryder, *supra* n. 172, at 87.

ments like milestone case *Big M*, and selected cases *Amselem*, *Multani*, *TWU* and *Chamberlain*.

Ryder acknowledges that while as such the legal protection of religious freedom in Canada is not unique in liberal democracies, the conception of “equal religious citizenship” is an authentically Canadian more robust approach than can be found in the human rights jurisprudence of other liberal democracies. Equal religious citizenship combines substantive equality with not enclosing religious life in the private sphere. This requires accommodation of those adversely affected by otherwise neutral rules. Yet albeit the concept having been developed with clarity within human rights law, Ryder notes equal religious citizenship remains “fragile and contested”.<sup>194</sup>

#### 2.6.5 Some South African views on the freedom of religion and belief

The South African Bill of Rights was a response to a history of suppression, exclusion, and fragmentation. Before 1994, South African law showed a distinct Christian bias for the Afrikaner Calvinism associated with Afrikaner nationalism. This was manifest amongst others in a constitutional confession of faith in the Constitution, Sunday observance and blasphemy laws, as a criterion for censorship and allowance for only the Christian form of the oath in criminal proceedings.<sup>195</sup> The Constitution introduced an extensive catalogue of human rights constitutional review, horizontal application of human rights and it ended the doctrine of sovereignty of parliament. In short, it introduced the entire package of liberal constitutional thought. Yet, commentators view it as a compromise between the liberation movements, the English speaking South African liberals and the growing number of Afrikaner advocates of human rights. It also relied heavily on foreign influence. “Indeed the Final Constitution ended up relying on the German Basic Law, the Canadian Charter of Rights and Freedoms and international human rights principles.”<sup>196</sup> Currie and De Waal note that the Canadian Charter of Rights and Freedoms was the principal model for the South African Bill of Rights.<sup>197</sup> It is therefore not surprising that foreign, and especially Canadian (and US) case law is often cited, though not always followed in the selected cases (see Appendix I1).

194 See *ibid.*, pp. 87-89, 91-92 and 100.

195 See L. du Plessis, ‘Freedom of or Freedom from Religion? An Overview of Issues Pertinent to the Constitutional Protection of Religious Rights and Freedom in “the New South Africa”’, in *Brigham Young University*, vol. 2001, no. 2, pp. 439-466 (2001), p. 443.

196 M.S. Kende, *Constitutional Rights in Two Worlds – South Africa and the United States*, Cambridge University Press, New York (USA) et al., 2009, p. 31.

197 I. Currie and J. de Waal (in association with Lawyers for Human Rights and the Law Society of South Africa), *The Bill of Rights Handbook*, 6<sup>th</sup> ed. Juta & Co, Cape Town (South Africa), 2006, p. 152.

All “segments of South African society” were required by the Constitution to “fundamentally revise their perceptions of the law applicable to them” and to accept that the Constitution would bring “the divergent approaches to life of a pluralistic society under the discipline of one overarching set of entrenched legal norms”.<sup>198</sup> Hence, South African constitutionalism has been called “transformative constitutionalism”, which “connotes an enterprise of introducing large-scale social change through nonviolent political processes grounded in law”.<sup>199</sup> It is not a (politically) neutral concept. It assumes that a “large scale, egalitarian social transformation is desirable”. In that sense, the South African Constitution is “post-liberal”.<sup>200</sup> Post-liberal constitutionalism is, however, not more or less political or legal than classical liberal constitutionalism. Unlike liberal constitutionalism, it envisions an “‘empowered’ model of democracy”.<sup>201</sup> This does not mean that there is less legal constraint than in liberal legalism, but legal constraint is always “culturally construed”.<sup>202</sup>

The CCSA has never explicitly referred to a conception of “transformative constitutionalism”. It has, however, including in the selected case, referred to the new ethos of the Rainbow nation and to the underlying values. Time and time again, the Constitution has been portrayed as guiding an ongoing project to right historical wrongs of apartheid and its colonialist predecessors. In one case, Justice Kriegler argued that the Constitution is not classical liberal, but “unabashedly egalitarian and libertarian”.<sup>203</sup> De Vos has said that the Court “pragmatically developed a jurisprudence that often relies on a specific version of South Africa’s recent past in order to justify a specific textual interpretation of the new Constitution”, the “grand narrative” of the Constitution. It distinguishes “between a dark, apartheid past and a bright, human rights-based future”.<sup>204</sup>

Nevertheless, according to Lenta, the South African judiciary, including the CCSA, is more naturally inclined to restraint than to activism.<sup>205</sup> Commentators also observe that “[t]he Court has, in the past, been willing to defer to legislative bodies to come up with solutions to constitutional problems that better reflect the will of the South African people; if it can

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198 See F. Venter, ‘The Emergence of South African Constitutionalism: From Colonial Constraints to a Constitutional State’, in G. van der Schyff (ed.) *Constitutionalism in the Netherlands and South Africa, A Comparative Study*, Wolf Legal Publishers, Nijmegen (Netherlands), 2008, p. 31.

199 K. E. Klare, ‘Legal Culture and Transformative Constitutionalism’, in *South African Journal on Human Rights*, vol. 14, no. 1, pp. 146-188 (1998), p. 150.

200 *Ibid.*, pp. 150-151.

201 *Ibid.*, pp. 151-152.

202 *Ibid.*, p. 161.

203 See J. Kriegler, in CCSA, *Du Plessis and Another v. De Klerk and Others*, Case CCT 8/95, 15 May 1996, paras 125-126, paraphrased by Klare, *supra* n. 85, at 168.

204 de Vos, *supra* n 58. pp. 837 and 846.

205 Lenta, *supra* n. 59, at 546.



continue to do so, South Africa can continue to work toward ideals of individual rights while preserving the customs and cultures of its people."<sup>206</sup> Yet, while not deviating from traditional method, the "Court has also developed what can loosely be termed a 'contextual' or 'teleological' approach to Constitutional interpretation".<sup>207</sup> Roux notices that the Chaskalson Court in the first ten years failed to "construct a comprehensive political theory of the post-apartheid Constitutions" (interim and current version) which was "disappointing to some". But instead, it developed an "authentically South African style of moral reasoning that was arguably more appropriate".<sup>208</sup>

Many of the cases, amongst which selected cases like *Fourie* and the Muslim marriage cases (see sections I2.4.5, 5.4.8, I2.4.10 and I3.4.12), suggest that "the Constitutional Court views its relationship with the legislature as a collaborative one, giving respect to the legislature's interpretations of rights [...]".<sup>209</sup> Yet on the other hand, while some call for increased activism, cases like *Fourie* and *Pillay* (section I2.4.11) have also provoked criticism for greater restraint. These "calls for increased activism and greater restraint place the Court in a difficult position, particularly since it cannot (candidly) justify its decisions as being required by the constitutional text itself, and because the reasons it offers in support of its verdicts are the subject of reasonable disagreement".<sup>210</sup>

According to Du Plessis, section 15(1) of the Constitution suggests a lean, minimalist and especially individualistic right to religious freedom of religion and belief, at least at first glance. Added to this, the Constitutional Court has "cited (with approval) the Supreme Court of Canada's narrow understanding of the right [...]". On the other hand, he notes that for the majority of adherents in South Africa, religious freedom is naturally connected to a communal aspect.<sup>211</sup> However, "racial and ethnic conflict (including tensions between modernism and traditionalism), class tension, and political strife have found expression in the religious life of a nation where the vast majority professes some kind of religious affiliation."<sup>212</sup>

Striking a balance, to facilitate the transition to the Rainbow nation, without seeming overtly biased against the privileged of the past, must have been the CCSA's greatest challenge in the beginning. According to some commentators, the Court has actually applied too much restraint "where it should have more

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206 Goodsell *supra* n. 60, at p. 150.

207 de Vos, *supra* n. 58, at 838-839 and 843.

208 T. Roux, *supra* n. 52, p. 391.

209 Lenta, *supra* n. 59, at 575.

210 *Ibid.*, p. 545.

211 L. du Plessis, 'Current Problems Concerning Church and State Relationships and Religious Freedom in South Africa', in H. Warnik (ed.), *Legal Position of Churches and Church Autonomy*, Uitgeverij Peeters, Leuven (Belgium), 2001, pp. 14-15.

212 du Plessis, *supra* n. 195, at 440.



effectively protected the [...] right to freedom of religion".<sup>213</sup> Upholding the Sunday limitations on liquor sales in supermarkets in *Lawrence* and the cannabis ban against Rastafari in *Prince*, are cited by Lenta here (see sections I2.4.4 and I2.4.7).<sup>214</sup> For example, Lenta notes that "[b]y criminalizing a practice at the heart of the Rastafarian religion" the law forces the Rastafari to choose between obedience to the law and adherence to his religion. The majority does not mandate a solution to this unacceptable choice and does not ask the state to walk an extra mile (as dissenting Justice Ngcobo put it).<sup>215</sup> Mark Kende draws attention to the race and culture factor on the Court itself, at least when it comes to *Prince*.<sup>216</sup> The majority in *Prince* was white, except for one Indian, the black justices and Justice Sachs who dissented. Yet, religion itself might also be an explanation: "most Justices were not that religious anyway."<sup>217</sup>

Others critique that some of the new rights redressing past injustices met criticism from religious groups because some of these "new" rights are in conflict with their belief system or that of the indigenous African population, because they conflict with the traditional practices.<sup>218</sup> "As the courts continue to develop South Africa's constitutional jurisprudence they should also consider the impact of their decisions on local customs and culture, and should be mindful that those, too, are important rights." For example, *Fourie* (see section I2.4.10), introducing same-sex marriage, has faced wide criticism from large (and diverse) sections of society.<sup>219</sup>

Moreover, the concept of the "individual" underlying modern human rights is "not a natural concept for some South African cultures, which emphasize the group over the individual and focus on community, mediation, and consensus in order to express their commitment to human worth".<sup>220</sup> While universality of human rights might be considered "just a Western ideology camouflaging an underlying neo-colonialism", a "secular African spirituality" is argued as "the best way to accommodate a human rights discourse" in South Africa. The term "secular religion" "refers to the integral nature of African traditional values and morality that are part of everyday life and not confined to religious or denominational compartments".<sup>221</sup>

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213 Lenta, *supra* n. 59, at 576.

214 *Ibid.*, p. 565.

215 *Ibid.*, p. 566, citing Sachs, in CCSA, *Prince v. President of the Cape Law Society*, Case CCT 36/00B, 25 January 2002, para. 149.

216 Kende, *supra* n. 196, at 240.

217 *Ibid.*

218 C.W. du Toit, 'Religious Freedom and Human Rights in South Africa After 1996: Responses and Challenges', in *Brigham Young University Journal of Public Law*, vol. 2006, no. 3, pp. 677-698 (2006), p. 681.

219 Goodsell, *supra* n. 60, at 151.

220 *Ibid.*, pp. 151, 109-110 and 113-114.

221 du Toit, *supra* n. 2018, at 687 and 691.

Some religious groups, such as the "South African Reformed churches [...] opposed the promotion of human rights." Yet in a secular society, "religion has no monopoly on value systems fundamental to human rights; hence, different people can honor and hold the same value without basing it on similar religious principles. For example, the basic value of respect for human life can be inferred from different religious texts as well as from secular, philosophical, or sociological premises." "This secular discourse is appropriate to the South African context given that few black people make the holy/secular distinction."<sup>222</sup> According to Du Toit, the Constitution "institutionalizes the moral and judicial rights of human beings in a way that makes far better sense in an African context than the standard Western approach adopted by the South African mainline churches. The approach in the bill of rights is more appropriate in South Africa since African morality and belief systems are essentially secular."<sup>223</sup>

While traditional African modes of thinking come from the culture of its original inhabitants, Du Toit is of the opinion that "dialogue about human rights will be productive if it focuses on a secular African spirituality that is common to all South Africans."<sup>224</sup> Erin Goodsell, another advocate for an African perspective, agrees: this connection between religion or traditional African culture and the Constitution is essential and possible.<sup>225</sup> Goodwill thinks that "broad autonomy to local and provincial legislatures and councils to enable them to work out the problems in customary and religious law and help to reconcile those with the Constitution" is the solution.<sup>226</sup> "Similar to what the Court did in *Prince*, it can identify constitutional problems but allow time for local governments to remedy those problems instead of imposing its own solution."<sup>227</sup> She admits that there must be a constitutional check to ensure that human rights are complied with, but "the Constitutional Court should be reluctant to impose Western values in its interpretation of human rights and should leave more room for group cultural and religious rights to factor into any test balancing the interests at stake in a conflict."<sup>228</sup>

This, however, does not mean that there is no basis for individual or human rights in South African culture. Goodsell suggests that courts and lawmakers should examine the sources of social justice in customary law and "combine human rights aims with traditional modes of thinking". "This would help to make human rights a concept that better resonates with the South African people."<sup>229</sup> Also religious freedom, "at least for minority groups like Muslims

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222 *Ibid.*, pp. 683-685.

223 *Ibid.*, p. 677.

224 *Ibid.*, p. 698.

225 Goodsell, *supra* n. 60, at 146.

226 *Ibid.*, p. 143.

227 *Ibid.*

228 *Ibid.*

229 *Ibid.*, p. 111.

and Hindus, may also become an empty shell if nothing is done to reconcile the Western-style protections of individual rights with non-Western cultural and religious practices".<sup>230</sup> Indeed according to some, the protection of groups has "not yet been realized to the fullest possible extent, though the jurisprudence of the Constitutional Court seems to be moving in that direction".<sup>231</sup>

Goodsell even thinks that the benefits of group autonomy and rights are great, even when those groups may infringe on individual rights through discriminatory practices.<sup>232</sup> "Although such a practice may be repugnant to the majority, the very existence of such counter-majoritarian groups is helpful for the flourishing of democracy."<sup>233</sup> Yet, customary and religious law will have to develop as well and she is confident they will because the fact "that customary law now discriminates against women is a result of the codification of 'official' customary law, and changing circumstances that rendered that law useless".<sup>234</sup> Meyerson and Smith also believe that even harmful behavior does not set a proper limit for the freedom of religion. Some harmful conduct is constitutionally protected. Harm, after all, is not always neutral, but often what we see as harm is determined by our (religious and/or secular) value system. Therefore, only a concept of "neutral harm" which does not require the acceptance of controversial beliefs not shared by all reasonable persons, can function as a constitutional concept acceptable to all. Legitimate reasons for limiting rights will thus be "public reasons" (Rawls) as opposed to sectarian.<sup>235</sup>

Du Plessis also agrees that tolerance of religious diversity goes beyond putting up with the free exercise of divergent religious beliefs and practices. It also entails the evenhanded treatment of diverse religions and of religious groups, communities, and institutions with potentially conflicting interests.<sup>236</sup> He believes that in *Christian Education* (section I2.4.6), dealing with Christian schools wishing to be exempted from the ban on corporal punishment, the Court should have made clear what exactly is the scope of free exercise for a religious institution. This would have taken the jurisprudence beyond the "strictly libertarian, and individualistic" approach.<sup>237</sup>

The correct approach according to Du Plessis is that of "affirmative tolerance" which the 1996 Constitution was designed to instill in South Africans.

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230 *Ibid.*, p. 142.

231 du Plessis, *supra* n. 211, at 17.

232 Goodsell, *supra* n. 60, at 144.

233 *Ibid.*, p. 145.

234 *Ibid.*, p. 146.

235 N. Smith, 'Freedom of Religion in The Constitutional Court', in *The South African Law Journal*, vol. 118, no. 1, pp. 1-9 (2001), borrowing the argument from D. Meyerson, *Rights Limited: Freedom of Expression, Religion and the South African Constitution*, Juta, Cape Town (South Africa), 1997.

236 du Plessis, *supra* n. 195, at 450.

237 du Plessis, *supra* n. 211, at 26.

While passive tolerance means “that people bear or put up with one another; affirmative tolerance means that they understand, accept, and appreciate one another”.<sup>238</sup> He sees evidence for this in the preamble which highlights the history of suffering and injustice, “thereby connoting the political necessity of positive tolerance”.<sup>239</sup> The protection of the right to freedom of religion and the right to religious equality must be understood as part of this ambition to cultivate positive tolerance. “As a result, an era of privileging certain understandings of the Christian faith has most certainly come to an end.”<sup>240</sup> While affirmative tolerance is certainly present in the Court’s judgments, Du Plessis sees the court as overemphasizing “freedom” in its jurisprudence to the detriment of “equality”: “An evenhanded treatment of religions as well as of religious groups, communities, and institutions presupposes the absence of the proverbial wall of separation between church and state. Some positive action on the part of the state is called for to officially vouch for evenhandedness without, however, sacrificing impartiality.”<sup>241</sup>

“Religious individuals, institutions, groups, and communities”, on the other hand, “have a vital role to play in addressing and redressing inter-individual and inter-group intolerance and conflict.” Jurisprudence can be but a “roadmap of how to address religious liberty issues in accordance with the high demands of positive tolerance”.<sup>242</sup> And though he faults Justice Sachs for missed chances in *Christian Education*, Du Plessis credits him as an advocate of an authentic South African approach, which is born out of the Constitution’s transformative *telos*: “Given our dictatorial past [...], it is no accident that the right to be different has emerged as one of the most treasured aspects of our new constitutional order. [...] Religious tolerance is [...] deeply meaningful to all of us because religion and belief matter, and because living in an open society matters.”<sup>243</sup>

In *Fourie*, it is also Sachs who carefully explains that sincerely held religious views opposing same-sex marriage should not be equated with bigotry. Nevertheless, constitutional values and not these religious values guide the interpretation of the Constitution. The Constitution itself must mediate between (competing) religious and non-religious value systems, which are all protected, but not the source of the Constitution. This is what enables peaceful coexistence.<sup>244</sup>

While the grand narrative might secure legitimacy amongst most South Africans, there is also a substantial number of South Africans, “particularly

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238 du Plessis, *supra* n. 195 at 442.

239 *Ibid.*

240 *Ibid.*

241 *Ibid.*, pp. 450-451.

242 *Ibid.*, p. 465.

243 *Prince v. President of the Cape Law Society*, Case CCT 36/00B, *supra* n. 101, paras 164-170.

244 Roux, *supra* n. 94, pp. 254-255.

right-wing individuals harboring nostalgia for the apartheid” who “bemoan the transition to democracy as a catastrophic tragedy and criticize the Constitution for ringing in a new and unfair dispensation to white South Africans”. There are also those who “do not view the political compromise reached during the transition as fair or just and consider the Constitution as a stumbling block – not a vehicle – in the transformation of South Africa to a truly just society”.<sup>245</sup>

### 2.6.6 Some European views on the freedom of religion and belief

The European Convention on Human Rights and Fundamental Freedoms signified an important new trend in not only European, but global (legal) history. “For the first time, sovereign states accepted legal obligations to secure the classical human rights for all persons within their jurisdiction and to allow all individual including their nationals, to bring claims against them leading to legally binding judgment finding them in breach.” Until that time, international law had been characterized by a state centric focus, “with no role for individuals as subjects of that law”. Compared to most international human rights instruments, the Convention has very strong enforcement mechanisms through the individual right of access to a Court which is the guardian of the Convention, and which renders binding judgments. The ECHR increasingly evolved into a European “Bill of Rights” with the European Court of Human Rights functioning as a supra-national Constitutional Court. The national law and legal orders of the member states has also been fundamentally influenced and effected by the Convention and the judgments of the Convention bodies.<sup>246</sup>

In early case law, the Court repeated time and time again that in interpreting the rights of the Convention it would choose meaning that would contribute to realizing the aim and achieving the objective of the Convention, and to ensure that the rights would be practical and effective and not merely theoretical and illusory.<sup>247</sup> While commentators on the Court’s case law regarding Article 9 may differ greatly in opinion when it comes to concrete cases and may differ in their general view, many have argued that the ECtHR has not realized the full potential of Article 9. On the other hand, there is also

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<sup>245</sup> de Vos, *supra* n. 58, at 851.

<sup>246</sup> Harris, O’Boyle and Warbrick, *supra* n. 62 at 2, 4 and 30-32; K. Boyle, ‘The European Experience: The European Convention on Human Rights’, in *Victoria University Wellington Law Review*, vol. 40, no. 1, pp. 167-175 (2009), p. 174.

<sup>247</sup> See Evans, *supra* n. 10, at 52.

criticism that religion has become “excessive weight [...] when in conflict with other ECHR rights, notably that of freedom of expression”.<sup>248</sup>

Evans attributes to the Convention institutions “a generally liberal approach”, when it comes to defining religion and belief.<sup>249</sup> Rainey, McCormick and Ovey also note the broadness of the Court’s definition of religion,<sup>250</sup> which has had an inclusive effect. However, when it comes to the question of interference and justifiability of the limitations clause, Evans is critical of the Court’s jurisprudence. She argues that the Court has failed to recognize the importance of the right.<sup>251</sup> Stavos argues that although the definition of the freedom of religion and belief has been liberal, the scope is more conservative. Article 9 has primarily been interpreted to be directed against “old fashioned religious persecution”.<sup>252</sup>

Indeed, one could argue that “fresh imagination and boldness”<sup>253</sup> are especially required given recent demographic and social developments in the Convention jurisdiction. Westphalia has been the philosophical and historical backdrop of a European understanding of the freedom of religion and belief for long (see section 2.2.1). But the European encounters with the rest of the world, as well as the demographic, sociological, and historical development of Europe itself over the last two centuries, may require a new narrative about the freedom of religion and belief.

Subsequent to Westphalia, diversity of religion and belief is often still seen as a problem rather than a cause for celebration.<sup>254</sup> The legal concept of a minority is hardly developed in Europe and only one Western European nation has an officially recognized religious minority.<sup>255</sup> A particular challenge seems to be posed by the accommodation of new religions, originally foreign to the countries where they are now practiced. Another challenge is posed by the different attitudes of states to religion and secularism.<sup>256</sup> To create a new and fresh approach, the Strasbourg institutions may have to borrow from elsewhere in the world, rather than the courts of the member states, in order

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248 N. Bratza, ‘The “Precious Asset”: Freedom of Religion Under the European Convention on Human Rights’, in *Ecclesiastical Law Review*, vol. 14, no. 2, pp. 256-271 (2012), p. 257.

249 Evans, *supra* n. 10, at 53-54, citing ECtHR (C), *Campbell and Cosans v. the United Kingdom*, app. nos. 7511/76, 7743/76, 25 February 1982.

250 B. Rainey, P. McCormick and C. Ovey (eds.), *Jacobs, White & Ovey: The European Convention on Human Rights*, 8th ed., Oxford University Press, Oxford (UK), 2021, pp. 462-464.

251 Evans, *supra* n. 10, at 200 ff.

252 S. Stavros, ‘Freedom of Religion and Claims for Exemption from Generally Applicable, Neutral Laws: Lessons from Across the Pond’, in *European Human Rights Law Review*, no. 6, pp. 607-627 (1997), p. 626.

253 Harris, O’Boyle & Warbrick, *supra* n.62, at 441.

254 See M. S. Berger, ‘Legal Trends in Western Europe Related to Freedom of Religion’, in *Religion and Human Rights*, vol. 4, no. 1, pp. 1-6 (2009), p. 1.

255 *Ibid.*, pp. 3-4.

256 Harris, O’Boyle & Warbrick, *supra* n.62, at 441.

to create new authentically European understandings more rooted in the present than the past.

Tahzib-Lie argues that even the Court's internal dimension also requires a more systematic approach. In her opinion, the internal dimension is interfered with by definition in, amongst others, situations of discrimination or revelation of one's beliefs without consent or upon coercion.<sup>257</sup> Evans regards the "relatively liberal approach" taken by the Court and the Commission at the definition stage "subtly undermined at the manifestation stage". Manifestations that have been protected are all "highly analogous to Christian beliefs". The conceptualization of religion as a "voluntary club" has worked to the detriment of many claimants. She suspects that this might be due to the fact that in many of the individual cases, especially those regarding Muslim believers, religion is actually regarded by the Court to be more "of a threat than an asset".<sup>258</sup>

Evans notes that when Article 9 was drafted, this was done mindful of a "Christian/liberal homogeneity of Europe" which may explain that a certain mainstream Christian and Christian liberal bias is reflected in the case law. Interestingly, initial opposition against perceived implications of Article 9 came from amongst others the ardently secular Turkish republic and the Kingdom of Sweden with its historical state-church relationship with the Lutheran Church. Turkey was wary that Article 9 might inhibit the attempts of the Kemalist republic to "reform and modernize" society and to this end counter opposition from "Moslem orders and their archaic institutions". Sweden, on the other hand, feared that the prominent role of the Lutheran Church would have to be reviewed. In the end, neither Turkey nor any of the member states with a state religion entered any reservations to Article 9, arguably because the common ground was that it was neither fundamentally opposed to a separation of religion and state nor did it require such separation. Concerns were also raised from both the secular and the religious perspective regarding the impact of education policies in light of First Protocol, Article 2. While some dismissed the Article as a secularist intrusion into religious education, others were wary that respect for the beliefs of the parents would lead to "moral and spiritual ghettos" for their children.<sup>259</sup>

President Bratza of the ECtHR defends the case law of the Court regarding Article 9 in reference to the religiously diverse make-up of Europe and the variety of church-state relationships of the member states as follows: "It is [...] impossible for the Court to provide an all-encompassing answer to these

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257 See B.G. Tahzib, 'Freedom of Religion or Belief: Ensuring Effective International Legal Protection' (PhD Thesis Leiden, 1996), Kluwer Law International, The Hague (Netherlands), 1996, p. 26.

258 C. Evans, 'Individual and Group Religious Freedom in the European Court of Human Rights: Cracks in the Intellectual Architecture', in *Journal of Law and Religion*, vol. 26, no. 1, pp. 321-343 (2010), pp. 132 and 341.

259 Evans, *supra* n. 10, at 39, 43, 47 and 49, referring also to statements made in the travaux préparatoires.



challenges [...]. Instead, it is perhaps more useful to ask how the Court, in its case law to date, has tried to secure proper respect for a variety of faiths and beliefs in a religiously diverse continent [...].” According to the President, this requires a case-by-case approach.<sup>260</sup>

Europe’s demographics in terms of religion and belief have consistently changed since the beginning of the 20<sup>th</sup> century. While some traditional religions are losing members, they are also growing through immigration and conversion of new followers. While some turn away from traditional religions in their member states and choose an a-religious life, others turn to religions originally foreign to their native land as well as new religions or new or individualized forms of spirituality. Many immigrants have brought their religions with them, including the many theological and cultural differences within every faith. Second generation immigrants are observed to have retained a faith-based lifestyle or assimilate to a more secular lifestyle or more (neo) orthodox interpretations of their faith than the ones they were brought up with. In former communist countries, many have embraced the new freedom to return to the religions of their ancestors, while others have turned to other religions or forms of spirituality. While in recent discussions religious minorities may be perceived as the source of a new problem, they actually trigger the questions that have long existed.<sup>261</sup>

One of these is the aforementioned attitude towards diversity. “Western European societies know ethnic, linguistic and religious differences, but with a few exceptions these differences are not manifestly celebrated.” This is different in many non-Western societies, but also in Western societies like Canada, USA, and Australia. The second difference between Western Europe and other parts of the world is the relative absence of religion from the public sphere (secularization). However, this secularized *status quo* is disrupted by the mentioned new religions and religiosity. This is met by a renewed interest in issues concerning religion by the state.<sup>262</sup>

Several commentators note that the Commission and the Court have shown European Christian bias. Evans, for example, notes that both have been more protective of “traditional Christian practices” than they have of “non-Christian practices”.<sup>263</sup> Boyle argues that the Court makes no effort in its thinking or language to separate the vast majority of Muslim people and their religious practices from extremists. “A major problem for the world is the stereotyping of religious believers as well as ethnic groups. This applies to Christians in Islamic countries as much as to Muslims in Christian countries”.<sup>264</sup>

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260 Bratza, *supra* n. 248, at 257-258.

261 See Berger, *supra* n. 254 at 1-2.

262 *Ibid.*, pp. 1-3

263 Evans, *supra* n. 10, at 196.

264 K. Boyle, ‘Human Rights, Religion and Democracy: The Refah Party Case’, in *Essex Human Rights Review*, vol. 1, no. 1, pp. 1-16 (2004), p. 12.



Danchin notes that critics view the Court's interpretation of religious norms and practices as grounded in very Christian notions of what constitutes religion and religious practices.<sup>265</sup> The Court, he says, has "constructed narratives of secularism, freedom and equality which by tacitly subsuming or incorporating Christian or post-Christian norms into the meaning and scope of Article 9, has placed in jeopardy and marginalized the religious freedom claims of Muslim and other religious communities". Distinguishing for example between conscience which is free and unestablished versus religion as custom or tradition which is unchosen, shows the "deep historical and normative connections in the liberal imagination between Christianity and the right to religious freedom".<sup>266</sup>

There is a strand of authors who severely criticize what they believe to be a bias of the Court towards institutionalized secularism, or secularism as a state ideology. Amongst the member states, France and Turkey are most probably the prime examples of a state's official ideological commitment to secularism. In other member states secularism has the status of a constitutional principle. Bader argues to "drop secularism from our constitutional language and to replace it by liberal-democratic constitutionalism".<sup>267</sup> While liberal-democratic constitutionalism values individual religious freedom, secularism has an emancipatory mission to protect people from superstition and tradition, which is hard to reconcile with individual religious freedom. Hence, secularism tends to neglect or severely curtail religious manifestation.<sup>268</sup> Maris notes that liberal neutrality requires the rejection of religious arguments from public reason as well as secular metaphysics,<sup>269</sup> implying that they are equally subject and thus not neutral. Danchin notes in this regard that in Europe, neutrality should be understood as non-discrimination rather than non-establishment, given the deep history of church-state entanglements and religious sentiments.<sup>270</sup>

Ten Napel mentions that official recognition by a state of a religion or denomination, and regulation, public financing, and control of such a religion or denomination, does not automatically mean that the state does not respect the freedom of religion of its citizens; nor does a strict separation guarantee the freedom of religion of citizens.<sup>271</sup> As Boyle observes, the cases supporting a rigid secularism, suggesting that religion belongs solely in the private sphere,

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265 P.G. Danchin, 'Islam in the Secular Nomos of the European Court of Human Rights', in *Michigan Journal of International Law*, vol. 32, no. 4, pp. 663-747 (2011), p. 672.

266 *Ibid.*, pp. 39 and 46.

267 Bader, *supra* n. 41, at 9-10.

268 *Ibid.*, p. 20.

269 C. Maris, 'Laïcité in the Low Countries? On Headscarves in Neutral State', Jean Monnet Working Paper 14/07, 2007, p. 17.

270 Danchin, *supra* n. 256, at p. 671.

271 H.M.Th.D ten Napel, 'Noot bij EHRM 29 juni 2007, no. 15472/02' in *European Human Rights Cases*, 08/2007, Sdu Uitgevers, p. 6.

will induce alienation amongst most believers of most religions, and may feed religious extremism rather than preventing it.<sup>272</sup> While not criticizing the case law of the ECtHR, Adams and Overbeeke call for a re-evaluation of the Lockean approach to state-religion relationships, rather than the Hobbesian doctrine of secular state control of religion as a potential danger to society.<sup>273</sup>

Instead of the pragmatic, historical and/or religious perspective, Evans proposes arguing religious freedom from the perspective of pluralism and autonomy, based on the political and legal theory of liberalism as formulated amongst others by modern theorists such as Raz, Dworkin and Rawls. This perspective starts from the recognition of human beings as autonomous beings (capable of free will) who deserve equal dignity and respect. If people are allowed to make their own decisions, this will necessarily lead to (at least a weak degree of) pluralism. Uniformity essentially requires coercion in order to ensure the continuance of uniformity. Coercion in matters “of fundamental importance” is fundamentally antithetical to autonomy. A government which interferes without strong reason in a person’s religious freedom does not show appropriate concern and respect for that person.<sup>274</sup> An-Na’im while agreeing with Rawls in most aspects, points to his essentialist understanding of religion based on just one religion and context: western Christianity<sup>275</sup> (see above section 2.6.1).

In this light, another relevant point is the fact that the Court has up to now not considered cases dealing with so-called neutral and generally applicable laws which restrict the freedom of religion and belief as a conceptually specific issue.<sup>276</sup> While in theory not ruling that generally applicable and neutral laws can violate Article 9 rights, a right to be exempted from such laws because of religious belief has never been accepted.<sup>277</sup> As Lerner and Rabello note, a principle of neutrality which implies that no regard whatsoever is paid to consequences for religious groups, as long as the law does not explicitly target them, violates the “basic values of multiculturalism”. Yet “multiculturalism does not grant a license for any and all behaviors of religious minorities, and any particular society is not obliged to accept all the values of other cultures that contribute to its population.”<sup>278</sup>

An autonomy-based approach must thus not be confused with the “voluntary model” sometimes used by the Convention bodies for situations

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272 Boyle, *supra* n. 264, at 16.

273 Adams & Overbeeke, *supra* n. 19, at 24.

274 Evans, *supra* n. 10, at 29-33, referring to and quoting J. Raz, *The Morality of Freedom*, Oxford University Press, Oxford (UK), 1986 and Dworkin, *supra* n. 81.

275 An-Na’im, *supra* n. 139.

276 Evans, *supra* n. 10, at 168.

277 Stavros, *supra* n. 252, at 622.

278 P. Lerner and A. M. Rabello, ‘The Prohibition of Ritual Slaughtering (Kosher Shechita and Halal) and Freedom of Religion of Minorities’, in *Journal of Law and Religion*, vol. 22, no. 1, pp. 1-62 (2006), p. 30.

where believers find themselves confronted with the painful choice between deeply held beliefs and other compelling rules and interests, such as law, internal regulations of organizations or social positions and jobs. Evans is highly critical of the simplistic idea that people can make a free choice when faced with such moral dilemmas, especially when these dilemmas disproportionately affect minorities.<sup>279</sup> Rather, an autonomy-based approach would regard it as a *telos* of the freedom of religion and belief to prevent that people are put in such painful situations unless absolutely necessary to prevent serious harm to the rights and freedoms of others or general interest. The autonomy-based approach will not draw an indefinite scope for the *forum internum*, but it will recognize that at some point state coercion does interfere with the internal dimension, and thus such coercion cannot be justified. Also, it will appreciate that the *forum externum* contains a right to create self-identity and to live autonomously, and hence to themselves define the importance of a certain practice.<sup>280</sup>

This approach would also shift away from the Christian bias supposedly characterizing the current jurisprudence.<sup>281</sup> This approach would necessarily accept that neutral and generally applicable laws can interfere with freedom of religion and belief and would formulate some remedy for believers against this, ensuring that states take the interests of religious groups into account at the legislating stage.<sup>282</sup> Finally, such an approach would accept that religious practices may very well collide with the rights and freedoms of others, but address and balance these collisions, instead of employing “voluntarism” to evade them.<sup>283</sup>

While Evans builds her argument to embrace pluralism and autonomy, van den Brink and ten Napel question the adequacy of autonomy as a basis for more religious freedom.<sup>284</sup> Inferring that the theory of autonomy will irrevocably lead to voluntarism (see above), they instead build the conception of religious freedom on the division between state power and robust civil society and on the inviolability of individual conscience. They draw on Catholic “doctrine of subsidiarity” and the Calvinist doctrine of “sovereignty in the own circle”.<sup>285</sup> The exercise presents an excellent example of how religious groups can participate in the public discourse on religion and state within their own theoretical foundations, hence enabling a “incompletely theorized” agreement.

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279 Evans, *supra* n. 10, at 131.

280 See *ibid.*, pp. 201 and 205.

281 *Ibid.*, p. 205.

282 *Ibid.*, p. 206.

283 *Ibid.*

284 J. van den Brink and H.M. Th.D. ten Napel, ‘The State, Civil Society and Religious Freedom’, in *Oxford Journal of Law and Religion*, vol. 2, no. 2, pp. 354-370 (2012), p. 370.

285 *Ibid.*, pp. 358-369.

Calo begins with the Court's explicit commitment to pluralism in *Kokkinakis*, repeated many times since.<sup>286</sup> The Court regards freedom of religion and belief as a prerequisite for pluralism. Hence, a pluralistic approach requires going beyond secular universalistic logic. The secular logic of the Court has also led to incoherent jurisprudence. A pluralistic approach requires a focus on how pluralism can flourish, rather than on the acceptable limits to pluralism as the Court may have done. Various religious and secular readings of human rights which can overlap and collide must be drawn into the human rights discourse. Such is the real meaning of pluralism.<sup>287</sup> Commenting on *Konrad*,<sup>288</sup> ten Napel points to the fact that the Court supports the German constitutional court's findings that the state must prevent "parallel societies" in the name of integration. Yet such an enterprise is hardly representative of pluralism, as ten Napel notes.<sup>289</sup> Pluralism requires accepting that people withdraw from mainstream society, as long as they do not violate the rights of others or harm other compelling interests. Forging a certain type of society is not one of those interests.

Calo's proposition seems to echo what Habermas calls "multiple modernities". He wonders whether the resurgent religious movements are "inconspicuously changing the liberal agenda from the bottom up". Habermas acknowledges the secular reason behind liberal reason. However, he also realizes the logic that those who are founded in a religious tradition cannot simply adhere to this secular reason. While the liberal state, in Habermas' opinion, must hold on to the institutional separation of religion and politics and a public discourse to which all have equal access, he proposes that this not enough. Not only must the liberal state give effective religious freedom to all, "it must not transform the requisite institutional separation of religion and politics into an undue mental and psychological burden for those of its citizens who follow a faith." After all, "true belief is not only a doctrine, believed content, but a source of energy that the person who has a faith taps performatively and thus nurtures his or her entire life". Yet, on the other hand, those who follow a faith must realize that they form a political community with others who may adhere to another faith or no faith at all. Yet they should be able to engage in the public discourse with others, without having to translate their ambitions and values into the secular parlance of the liberal state, while accepting that others will argue from this angle.<sup>290</sup>

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286 Calo, *supra* n. 41, at 261.

287 *Ibid.*, pp.261-265 and 275-276.

288 ECtHR (C), *Konrad et al. v. Germany*, app. no. 35504/03, 11 September 2006.

289 H.M.Th.D ten Napel, 'Noot bij EHRM 11 september 2006, no. 35504/03', in *European Human Rights Cases*, 01/2007, Sdu Uitgevers, pp. 3-4.

290 J. Habermas, 'Religion in the Public Sphere', in *European Journal of Philosophy*, vol. 14, no. 1, pp. 1-25 (2006), pp. 1-10.

In an interesting interpretation of the 2004 UNDP report on cultural liberty<sup>291</sup> from the renewed angle of Kuyperian constitutional theory, ten Napel puts pluralism beyond secular reason into practice. While conceding that in multicultural democracies, religions need to view themselves as specific utterances of a universal truth, rather than universal utterances of a specific truth, they can develop their own theory of acceptance of the multicultural democracy of which they are part. Applying this from the angle of Protestantism and Anti-Revolutionary constitutionalism, he argues for state-nation rather than a nation state, which grants cultural liberty to all who live in it.<sup>292</sup>

## 2.7 POSITIONING THIS STUDY RELATIVE TO VIEWPOINTS REGARDING THE FREEDOM OF RELIGION AND BELIEF

In the previous section 2.6, we saw the variety of viewpoints in the discourse concerning the freedom of religion and belief. While it was not possible to incorporate all the newest materials into this dissertation, I argued that the viewpoints discussed, are still representative of the positions held in the current discourse. In the interest of transparency and clarity, however, it is desirable to position this study within the wider discourse on the freedom of religion and belief and the related jurisprudence. To this end, the existing discourse can be categorized within a spectrum of four positions, partly overlapping, often mutually exclusive, all of them internally diverse.

In the following the four positions shall be sketched (section 2.7.1) and elaborated upon (sections 2.7.2 – 2.7.5). Finally, the study is positioned in the spectrum of these positions (section 2.7.6).

### 2.7.1 Four positions regarding the freedom of religion and belief

Section 2.6 shows a variety of opinions and viewpoints regarding the current *status quo* of codification of the freedom of religion and belief. This includes the codification in Article 18 of the Universal Declaration of Human Rights and in many national, international, and supranational human rights instruments, including the Canadian Charter of Rights and Freedoms, the South African Bill of Rights and the European Convention on Human Rights and Fundamental Freedoms. Moreover, there is an even greater variety of views

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291 UNDP, 'Human Development Report, Cultural Liberty in Today's Diverse World', New York (USA), 2004.

292 See H.M.Th.D. ten Napel, 'De publieke rol van religie in Nederland', in M. ten Hooven and T.W.A. de Wit, *Ongewenste goden*, Boom, Amsterdam (Netherlands), 2006, pp. 276 and 279-284. Anti-Revolutionary constitutional theory here applies to the thought of 19<sup>th</sup> and 20<sup>th</sup> century Dutch Reformed Politician Abraham Kuyper.

and opinions regarding the jurisprudence of judicial tribunals interpreting the freedom of religion and belief in concrete cases. This includes the jurisprudence of the Canadian Supreme Court, the South African Constitutional Court and the European Court of Human Rights. While it is impossible to include all opinions and viewpoints globally or even within the three jurisdictions; or at least this would mandate a separate dissertation; there are reoccurring themes.

There are those who are content with the freedom of religion and belief being embedded in LDC generally and the current *status quo* generally, even if they feel that it can be improved, in accordance with the values of LDC. I shall call this the classical-liberal understanding of the freedom of religion and belief.

There are those who, are critical of LDC's (assumed) bias towards secularism and the current *status quo*, and who wish to return to or propose a new religious exclusivism, in which the mainstream religion is a source of authority for law, government and society and may dominate minority religions and beliefs or even replace existing pluralism. I shall call this religious (neo-) exclusivism.

There are those who are critical of the *status quo* because it undermines the project of an ideological secularism. Some of them might be critical of LDC for the same reason, others will read LDC to imply strict separation and rigid secularism. I shall call this position ideological secularism.

Finally, there are those, who are critical of the *status quo*, because it fails to recognize existing pluralism and has a bias towards Western, mainstream and/or organized religion concepts of religion and beliefs. Some of them might be critical of LDC for the same reason, others will read LDC to imply a holistic understanding of freedom, equality and thus of pluralism.

When the various opinions and viewpoints regarding the freedom of religion and belief are plotted in this spectrum, it becomes clear that the four positions are partly overlapping, sometimes mutually exclusive, all of them internally diverse. Not all commentators fit neatly into one of the categories, just like not all thinkers on interpretation fit into just one of Sunstein's categories. That does not disqualify the distinction, but rather shows its usefulness when comparing individual theories.

## 2.7.2 Classical-liberal understanding of freedom of religion and belief

The "default option" which generally supports the *status quo* of codification and judicialization of the freedom of religion and belief, may be called the "classical-liberal understanding of freedom of religion and belief". As sketched in sections 2.2 and 2.6.1, the current codification in the majority of human rights and constitutional instruments, globally speaking, can be traced back to mainstream liberal Enlightenment thought. The "classical-liberal understand-

ing of freedom of religion and belief” sees no fault therein. Its supporters will usually acknowledge the Western origins but will also point to a universalist potential that can and/or will transcend cultural differences. They might point to modernity as a process of progress and emancipation, which carries great benefits for all cultures. Other more particularistic interpretations will point to the overall harmonization of Western culture with regard Enlightenment thought and argue that non-Western perspectives are not relevant to determine Western values.

The “classical-liberal understanding of freedom of religion and belief” is adhered to by many worldviews, religious, non-religious or a-religious, and can be based on pragmatic and or idealistic foundations. It will often be critical of “religious (neo-)absolutism” as well as many strands of “ideological secularism” for their failure to respect individual liberty and choice. It will often be critical of other strands of “ideological secularism” and of “(neo) pluralism in freedom of religion and belief” as deviations of mainstream liberal thought, too entangled in an emancipatory projects and social engineering. Contemporary examples for this position can be found amongst many “mainstream” liberal and or democratic (including progressive and conservative) movements and individuals.

### 2.7.3 Religious (neo-)exclusivism

“Religious (neo-)absolutism” is generally opposed to the *status quo* of codification and judicialization of the freedom of religion and belief. An important reason is that, as sketched in sections 2.2 and 2.6.1, the current codification in the majority of human rights and constitutional instruments, globally speaking, can be traced back to mainstream liberal Enlightenment thought. “Religious (neo-)absolutism” departs from the notion that a state or political entity may recognize but one religion, creed or belief as the one true binding faith of all its inhabitants. It may be founded on a belief of “true religion” or a pragmatic consideration that only uniformity can bring about social stability. Depending on the strand of “(neo-)absolutism”, it will be overtly critical of the “Western” and/or “Enlightenment” origins of the *status quo* and favor particularistic notions of “own” religious and/or cultural understanding of universalism.

Different religions, creeds, beliefs and cultures have produced “religious absolutism”, past and present. They are likely to equate “classical-liberal understanding of freedom of religion and belief” and “(neo) pluralism in freedom of religion and belief” with “ideological secularism” and all of these with atheism and “godlessness” or at least primacy of man-made law over religious law. Contemporary examples for this position can be found amongst radical religious fundamentalist, radical (ethnic) nationalist and ultra-conservative movements and individuals. Moderated religious-absolutist positions are



also defended by more “mainstream” religious, nationalist and conservative movements and individuals.

#### 2.7.4 Ideological secularism

Ideological secularism is generally critical of the *status quo* of judicialization of the freedom of religion and belief and sometimes also of its codification. Ideological secularism departs from the notion that a state or political entity should ban from the public sphere the presence of any and all religion(s) and beliefs or at least seriously restrict this. The state must and can, in accordance with this position, assume a neutral position. When based in radical Enlightenment, it finds no fault in the fact that as sketched in sections 2.2 and 2.6.1, the current codification in the majority of human rights and constitutional instruments, globally speaking, can be traced back to mainstream liberal Enlightenment thought. But it will urge for a more rigid interpretation which clearly distinguishes between the religious and the secular. If based on other modern ideologies, it may find fault in mainstream liberal Enlightenment thought roots of the *status quo* and base the rejection of the *status quo* partly on the rejection of liberalism. Ideological secularism is likely to view universalism as being attainable only by transcending religious belief.

Different radical Enlightenment and modernist ideologies have produced ideological secularism past and present. Some of them self-identify as liberal or “republican”. In this case they may view themselves as the “true” classical liberals and reject the *status quo* and “(neo)pluralism in freedom of religion and belief” as decadent, relativistic, vulnerable to abuse by religious believers. They may also view all, most or many religious believers as absolutists. If Ideological secularists identify with a modernist ideology which rejects classical liberalism, the same will apply, but they will view the “classical-liberal understanding of freedom of religion and belief” as the root problem of both the *status quo* and of “(neo)pluralism in freedom of religion and belief”. Contemporary examples of ideological secularism are different strands of new atheism, secularist republicanism, (secular) nationalism, secularist conservatism, and (neo-)Marxism. Extreme strands may even propose state-sponsored social engineering of the cultures of faith-based (minority) communities, discrimination based on religion and/or a legal ban of all or some religious beliefs.

#### 2.7.5 (Neo-)pluralism in freedom of religion and belief

“(Neo-)pluralism in freedom of religion and belief” is generally critically friendly towards the *status quo* of codification and judicialization of the freedom of religion and belief. It departs from the view that the *status quo* of codification and judicialization of the freedom of religion and belief has a Western and/or



liberal bias, which is undesirable because of its lack of inclusiveness. It finds that although as sketched in sections 2.2 and 2.6.1, the current codification in the majority of human rights and constitutional instruments, globally speaking, can be traced back to mainstream liberal Enlightenment thought, it needs to be further evolved towards more understanding(s) which include(s) those of historically marginalized groups, religions, beliefs and cultures. Its supporters will usually view universalism as being attainable by finding common values in different cultural and/or religious traditions. Its supporters are also the least likely to differentiate between religious, cultural and other beliefs for the purpose of human rights protection and are likely to have a positive view of individuals and communities defining their own identities.

Different religions, creeds, beliefs and cultures as well as non-religious or a-religious worldviews have produced “(neo-)pluralism in freedom of religion and belief” based on pragmatic and or idealistic foundations. It will often be critical of the lack of universal appeal of “classical-liberal understanding of freedom of religion and belief”. Some strands of “(neo-)pluralism in freedom of religion and belief” may view themselves as essentially classical liberal, others as improvements of the same or as (more pluralist) alternatives to classical liberalism. “(neo-)pluralism in freedom of religion and belief” will often be critical of “religious (neo-)absolutism” and “ideological secularism” for their failure to respect liberty, choice and diversity. Contemporary examples for this position can be found amongst many progressive, emancipatory, liberationist, reformist, and spiritual movements and individuals, faith-based, interfaith based or non-faith based.

### 2.7.6 Positioning this study

This study departs from, among other things, the purpose to find out whether a comparative study of selected cases from three tribunals can help to teach us something about optimally enhancing the protection of the freedom of believers. The underlying assumption is that courts can learn from one another to be more protective of believers. This study is positioned within the endeavor of “(neo) pluralism in freedom of religion and belief” to find and compare interpretations which enhance a broader protection of a broader group of believers, including more associational freedom. It is interested in cross-cultural, holistic and inclusive understandings of religion and belief and consequently of legal protection of individual and collective rights in this regard.

This study is also positioned within the framework of liberal-democratic constitutionalism, and thus the “classical liberal understanding of freedom of religion and belief”. While I do not agree with every analysis and argument

put forward by Fukuyama in his latest book,<sup>293</sup> I do agree with his general argument that the principles of classical liberalism, manifest in LDC continue to be of great value for modern pluralist societies. While the *status quo* of freedom of religion and belief in many systems of liberal democratic constitutionalism may on (several) occasion(s) be insufficient and suffer from eternal paradoxes, the foundational elements need not to be rejected in order to find more pluralism. To the contrary, they may serve as (one of the) meta-narrative(s) towards a new pluralistic understanding of the freedom of religion and belief, which is embracing of all manifestations of religion and belief, even those which could be considered illiberal. Indeed, I regard the project of LDC to be unfinished when it comes to the recognition and protection of groups historically and/or contemporarily marginalized in liberal societies, amongst them many believers.

Given this, I vehemently reject both religious (neo-)exclusivism and ideological secularism. Both, in my view will always result in the marginalization of individuals and groups, believers and/or non-believers. They aspire a totalizing system in which one worldview, their own is allowed to dominate, exclude and (militantly) convert others. I concede, that under the umbrella of LDC this has also taken place, although in many cases by ideological secularism, religious (neo-)exclusivism or even a combination of both, acting under the mask of LDC. In my view, (neo-)pluralism serves well to keep classical liberalism on track towards unfulfilled promises of freedom and equality towards marginalized individuals and groups. I trust, that minimalism has a role to play in this, for the interpretation of constitutional and human rights, amongst which the freedom of religion and belief. In this dissertation I try to contribute to this direction.

While I strongly support the idea, put forward by amongst others An-Na'im that religious traditions have to find their internal justifications for human rights and the freedom of religion and belief specially and subscribe to the arguments, he and Soroush make from an Islamic perspective,<sup>294</sup> this study has a different focus. Presupposing the legal existence of the freedom of religion and belief (which is the case in all three instruments) and its application by (institutionally) secular courts (which is also the case for all three courts), I focus on how these courts interpret the universal right and the consequence this has for believers. My perspective is that of a believer, who also believes in human rights.

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293 *Supra* n. 145.

294 See *inter alia* An-Na'im *supra* n. 18, 136, 138 and 139 and Soroush *supra* n. 18.

## 2.8 INTERMEDIATE CONCLUSIONS AND THE NOTION OF “OPTIMAL PROTECTION OF BELIEVERS”

The freedom of religion and belief is one of the oldest classical human rights. In its current form it originates from the Peace of Westphalia, together with the modern law of nations and modern constitutionalism. But depending on the perspective we take; its origins go much further and into various cultural and religious traditions. Indeed, while it can be argued from a historical, practical, or secular perspective it can also be argued from a faith-based, interfaith or pluralist perspective.

Most of the world's constitutions and human rights instruments recognize the freedom of religion and belief, while adjudication shows, there is always need and room for judicial interpretation. The interpretation, as with any right matters for the outcome. The principles of interpretation of the freedom of religion and belief, which the various members of a court agree upon, make up the standard interpretation, which can be reconstructed by analyzing the case law.

There are many theories of judicial interpretation. Cass Sunstein has developed a categorization for these theories and developed a theory of interpretation he calls judicial minimalism, which is quite common amongst judges. It is rooted in liberal-democratic constitutionalism and aimed at keeping the political costs of adjudication of rights low in pluralist societies. This study follows Sunstein's argument and regards minimalism as the preferable theory of interpretation above its competitors, namely originalism, perfectionism and majoritarianism.

There currently is and has been for quite some time a discourse about the freedom of religion and belief and its adjudication in various jurisdictions. While some of the newest materials were not incorporated into this dissertation, it still has a place in the current debate, because it relates to the various positions. They can be categorized into classical liberalism, religious (neo-) exclusivism, ideological secularism and (neo-)pluralism in freedom of religion and belief. This study combines a classical liberal outlook as a meta-narrative enabling peaceful co-existence of different worldviews, with a pluralist outlook that seeks to revert Western, mainstream and secularist biases in the *status quo*.

The position in the discourse on freedom of religion and belief and the choice for minimalism as a preferred theory of interpretation is indicative for how I see “optimal protection” throughout the study: a broad and liberal concept and scope of religion and belief, the right being easily triggered. This means absolute protection of believers in holding beliefs. It means as much as possible protection of believers in manifestation of their religion or belief either alone or in community with others and in public or private in teaching, practice, worship, and observance. The limits should only lie, in concrete cases, in the rights of others or compelling specified purposes, when required in a

LDC system and prescribed by law. Optimal protection thus, is a form of maximum protection, which also includes maximum protection of other human rights and compelling general interests. It thus assumes an optimum where all of these are carefully balanced.



### 3 Codification of the freedom of religion and belief in the three instruments and methodology of human rights cases for the three tribunals

#### 3.1 INTRODUCTION TO THIS CHAPTER

This chapter deals with the codification of the freedom of religion and belief in the three instruments and the methodology of human rights cases for the three tribunals. This is relevant background information for the case studies of the selected cases presented in Appendix II. Note, however, that this chapter may contain information which is known to readers who are familiar with one or more of the instruments and tribunals. If this is the case, selective reading is recommended: skipping the parts which contain information about the familiar instrument and reading only those which contain new information. Nevertheless, it is recommended that all readers read the preliminary conclusions in sections 3.3 and 3.7 on the relevance of codification and human rights cases methodology for the interpretation. These preliminary conclusions are relevant for the line of argument put forward in Chapter 4 and thereafter.

Section 3.2 focuses on the codification of the freedom of religion and belief as a human right in the three instruments, and the similarities and differences. A preliminary conclusion regarding the significance of these similarities and differences for interpretation is drawn in section 3.3. Then the methodology of solving human rights is discussed, starting with Canada, in section 3.4, South Africa in section 3.5, and the Convention system in section 3.6. Finally, in section 3.7, a conclusion is drawn regarding the relevance of the similarities and differences in solving human rights cases for the interpretation of the freedom of religion and belief.

#### 3.2 CODIFICATION OF THE FREEDOM OF RELIGION AND BELIEF

The three instruments – the Canadian Charter of Rights and Freedoms, the South African Bill of Rights, and the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) – have codified the freedom of religion and belief in different ways. The three instruments differ in the formulation and definition of the right to freedom of religion and belief, as well as its integration with other universal freedom rights.

The following subsections show that the codification of the freedom of religion and belief in the three instruments has interesting parallels, but also noteworthy differences. The most important parallel is that within the core

of the right as codified, there is a strong common denominator. All three instruments protect religious beliefs as well as other beliefs. They all protect the internal dimension, an external dimension and a collective dimension. They all allow for limitation of the right under similar circumstances.

The differences between the three instruments are, for example, the grouping of freedoms into one or more rights, the elaborate or minimalistic character of formulating these, the wording of the limitation clause and equality provisions, or the explicit or implicit reference to certain (constitutional) values.

### 3.2.1 Freedoms and freedom rights in the different instruments

In the three instruments, the freedom of religion and belief, the subject of this study, is composed of some or all of the following six elements: the freedoms of conscience, religion, thought, belief, opinion, and expression. Where these elements are grouped as one legal right, they are also mentioned as one (singular) freedom.

The Canadian Charter is the most integral when it comes to these six elements. The Charter distinguishes between two freedoms: the freedom of conscience and religion (subsection 2a), and freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication (subsection 2b). Section 2, called “fundamental freedoms” further includes the freedoms of peaceful assembly and of association.

The South African Bill of Rights assembles five of the six elements in one freedom right, namely the freedom of thought, opinion, religion, belief and conscience (section 15). The freedom of expression is codified in a separate and different right (section 16) and includes *inter alia* the right to receive information, academic, scientific and media freedom.

The ECHR also creates two different freedom rights from these six elements. The freedom of thought, conscience and religion, in one Convention right (Article 9) and the freedom of expression (Article 10). Freedom of opinion is grouped with expression, while the other four elements are grouped together in Article 9. The freedom of expression includes freedom to “hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers”.

Article 9 of the ECHR also implies a freedom of belief when it speaks of changing and manifesting “religion or belief”. When looking at the structure of Article 9, it is noticeable that the first part guarantees a freedom of “thought, conscience and religion”, whereas “belief” is mentioned in the second part, which stipulates that the right includes the right to “change one’s religion and belief”. Some wonder whether there is a distinction between “thought and conscience” on the one hand and “religion and belief” on the other, especially

since the expression of “thought and conscience” is protected explicitly by Article 10.<sup>1</sup>

Some of the selected cases illustrate that while the case was primarily decided under a different right than the freedom of religion and belief, it was still highly relevant to the interpretation of that right. For example, in the ECtHR case *Mouvement Raëlien Suisse v. Switzerland* (section I3.4.12), the complaints by the movement against the banning of a poster advocating their core beliefs were dealt with by the Court primarily as a freedom of expression case. In the ECtHR case *Refah* (section I3.4.5), about the banning of a faith-based party, the freedom of association was most prominent. In the South African case *DE v. RH* (section I2.4.14), the core issue was whether the change in socio-religious norms concerning adultery still justified legal action against those accused of adultery. But the prime freedom right cited was the right to private life. The Canadian case *Sioui* (section I1.4.1) concerning the rights of native Canadians to practice their religion and culture in a national park, was not dealt with under the Charter at all. It was dealt with under a historical treaty between a chapter of the Hurons and the British colonizers. Section 3.2.2 illustrates that often the equality dimension will be dominant, which is why in many of the selected cases, the judges interpret equality provisions rather than the freedom of religion and belief as such.

While the differences in codification may be regarded as pure semantics or taste, the formulations and grouping of elements most certainly influence interpretation. While not all interpretation is textual, textual analysis is often a part of judicial interpretation. Thus, the question is are there differences in interpretation which can be explained by the difference in codification?

The Canadian Charter’s codification is the most minimal. It recognizes the two aforementioned freedom rights without any further specification. The ECHR states explicitly that the right to freedom of thought, conscience and religion, includes a right to change one’s religion and belief. The Convention is also the most specific of the three instruments with regard to manifestation. It states that the right includes the right to manifest, collectively or individually, one’s religion in acts of “worship, teaching, practice and observance”.

The South African Bill of Rights specifically mentions religious observance in state or state aided institutions. It is also the only instrument to refer to religious marriages and family law. Finally, it is the only instrument to pair religion with tradition and with culture. While subsection 15(1) includes conscience, thought, belief and opinion besides religion, the protection of subsection 15(2) is confined to “religious observances” and the protection of subsection 15(3) and of section 31 focuses on “religion and tradition” and “religion and culture” respectively.

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1 See D. Harris, M. O’Boyle and C. Warbrick (eds.), *Law of the European Convention on Human Rights*, 2nd ed., Oxford University Press, Oxford (UK) et al., 2009, p. 427.



### 3.2.2 Equality and collective dimension

All three instruments explicitly prohibit discrimination on the grounds of religion and belief, amongst other things. The Canadian Charter and the South African Bill of Rights also provide for affirmative action on grounds of religion, amongst other things. While the Canadian Charter refers to Canadian multicultural heritage in general, the South African Bill of Rights is the only instrument to codify a collective right as such, as well as provide explicitly for the recognition of religious marriages and family law.

The ECHR, being a supranational instrument, has the most restricted anti-discrimination provision, protecting equal treatment interdicting discrimination only with respect to the application of the Convention rights (Article 14). However, Protocol 12 extends the protection from discrimination to all rights “set forth by law”.<sup>2</sup> As the Protocol has not been signed by all High Contracting Parties, the impact on the case law has been limited.

The Canadian Charter protects the right to equality in section 15. The first subsection provides for equality under the law, equal protection and equal benefit of the law and prohibits discrimination. Subsection 15(2) allows for affirmative action. Both subsections explicitly refer to *inter alia* religion as a ground for equal treatment, albeit prohibited discrimination and/or possible affirmative action. The South African Bill of Rights, in section 9, also explicitly mentions *inter alia* religion as a ground for prohibited discrimination by the state or any private party (subsections 3 and 4). The freedom of expression in section 16 explicitly does not include the “advocacy of hatred” based on *inter alia* religion. In the Canadian *Multani* case (section I1.4.10), equal treatment of an Orthodox Sikh schoolboy, who wished to carry a metal kirpan (ceremonial dagger) to school as he felt his religion prescribed, was central in the judicial analysis. In the *TWU* case (section I1.4.5), the collective freedom of religion and belief of a faith-based university had to be balanced with equality rights, to answer whether the graduates of the school, which prohibits same-sex relationships, were eligible to become teachers in the public school system.

The Canadian Charter makes no explicit mention of a collective dimension of rights. Yet, collective rights are implied. For example, subsection 15(2) refers to affirmative action programs and section 27 prescribes that the Charter as a whole must be interpreted in a way consistent with “preservation and enhancement of the multicultural heritage of Canadians”. This is important in the aforementioned *Multani* case. The South African Bill of Rights in section 31 recognizes *inter alia* a collective freedom of religion as distinct from the individual freedom of religion recognized in section 15(1). Amongst other things, it provides for a right to practice one’s religion and to enjoy one’s culture with other members of the same “community”, to form, join and

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2 Council of Europe, Protocol 12 to the European Convention on Human Rights and Fundamental Freedoms on the Prohibition of Discrimination, 4 November 2000, Art.1.1.

maintain religious and cultural associations. This was important in the *Christian Education* case (section I2.4.6), launched by a faith-based school against the general prohibition of corporal punishment.

The ECHR mentions a collective dimension in Article 9, “either alone or in community with others”. This features, for example, in the *Hasan and Chaush* case (section I3.4.4), brought to Strasbourg by a former Grand Mufti of Bulgaria, who was ousted by a competitor with the aid of the government. Forming, joining and maintaining religious associations, which is explicitly mentioned by the Bill of Rights, is implied in the collective dimension and when Article 9 of the ECHR is read in conjunction with Article 11. The difficult question the ECtHR had to answer in *Sindicatul “Păstorul Cel Bun”* (section I3.4.13), was whether or not the freedom of association entitled priests and non-clerical employees of the Romanian Orthodox Church to set up a trade union to represent their interests.

The Bill of Rights, in section 15, is the only instrument to explicitly recognize “marriages concluded under any tradition, or a system of religious, personal or family law”. The Convention, while recognizing the right to marry in Article 12, does not contain a right to recognition of religious, personal or family law. The Canadian Charter does not mention the institution of (religious) marriage and/or religious family law. Nevertheless, the selection contains interesting religious marriage cases under all three instruments. Three cases from South Africa feature the rights of widows in unregistered Muslim religious marriages for the purpose of inheritance, insurance (*Amod*, section I2.4.5) and inheritance (*Daniels and Hassam*, sections 5.4.8 and 5.4.12). A similar question was put before the ECtHR in *Yiğit* (section I3.4.9). In *Bruker* (section I1.4.11), the SCC had to answer whether it could enforce a contractual agreement between a divorced Jewish couple, which obliged the ex-husband to divorce his ex-wife in accordance with Jewish religious law.

As far as religious education is concerned, the three instruments all stipulate that education in state schools must respect the (religious) beliefs of students and their parents. In the first place, this means non-intervention. State education must not interfere with the religious and philosophical beliefs of students and parents. The right to education in Article 2 of the 2<sup>nd</sup> Protocol of the ECHR says as much. It stipulates that the state must respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions. However, this may also imply positive obligation. Are parents entitled to ensure that their children receive instruction in their religious or philosophical tradition in state-run educational institutions? Must the state allow for separate schools based on religious or philosophical traditions? The (in)famous *Lautsi* case (section I3.4.10) before the ECtHR was launched by parents and students opposed to the Italian duty to display a crucifix in every school classroom. In the Canadian *Chamberlain* case (section I1.4.6), the kindergarten board prohibited instruction material displaying same-sex families in light of some parents’ religious objections.

The South African Bill of Rights in subsection 15(2) stipulates, that religious observances may be conducted in state or state aided institutions, provided that the rules by the competent authorities are followed, they are conducted on an equitable basis, and attendance is free and voluntary. The Canadian Charter in section 29 provides that nothing in the Charter “abrogates or derogates from any rights or privileges guaranteed by or under the Constitution of Canada in respect of denominational, separate or dissentient schools”. In the Strasbourg case *Folgerø* (section I3.4.8), the question was whether the procedure to be exempted from obligatory religion and worldview classes was too burdensome. As mentioned, *Christian Education* before the CCSA raised the rights of a faith-based school against a general ban of corporal punishment, and *TWU* before the CCSA the rights of a university which bans same-sex relationships.

### 3.2.3 Limitation

The freedom of religion and belief is not absolute in any of the instruments. It can be limited by the state under certain conditions, just as other rights in the Canadian Charter, the South African Bill of Rights and the ECHR. They all include that the limitation must be prescribed by law, and that the limitation must be reasonably justifiable in a democratic society. Legitimate aims, proportionality and subsidiarity all play important roles in all three of the limitation tests due to explicit codification and/or standing jurisprudence.

The Bill of Rights has the most qualified codified limitation clause of the three in section 36. The law by which the rights may be limited must be of general application, the limitation must be “reasonable and justifiable” in a democratic society which is based on “human dignity, equality and freedom”. Finally, all relevant factors including the following must be taken into account:

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

The selected cases illustrate the use of the limitation clause. In the Canadian *Multani* case mentioned above (section 3.2.2), the SCC ruled that the blanket ban of the *kirpan* by the school served the legitimate interest of protecting the safety of others, but was not proportional. In the South African *Prince* case (section I3.4.7), the CCSA decided that the limitation clause allowed for enforcing the ban of illicit drugs even against Rastafarians, who smoke *ganja* for religious reasons. Administering an exemption was unworkable because it would have undermined the purpose of the prohibition and even the freedom of religion and belief of the Rastafari community. In the Strasbourg *S.A.S.*

case (section I3.4.15), the ECtHR found that the French ban on face-concealing garments was justified by the limitation clause, although the somewhat abstract purpose was not explicitly mentioned as a legitimate aim for the purpose of the limitation. The majority found a connection to the rights and freedoms of others, which is a legitimate aim.

The Canadian Charter has the most minimalistic formulation. The Charter rights in general may be limited if the limit is “prescribed by law”, is reasonable and can be “demonstrably justified” in a democratic society (section 1).

The ECHR has no general limitation clause like the other two instruments, but specific limitations. They all include that the rights can only be limited if prescribed by law, and “necessary in a democratic society” in light of specified interests. The interests for which the freedom of religion and belief as protected in Article 9 may be limited are as follows:

- public safety;
- the protection of protection of public order, health or morals; and
- protection of the rights and freedoms of others.

Interestingly, section 2 of Article 9, which includes the limitation clause, refers only to the freedom to manifest one’s religion or beliefs, which may be limited. Consequently, the freedom to hold beliefs as well as the freedom of thought and the freedom of conscience are absolute. As explained above, the absolute character of these elements might also be the reason for the very narrow scope. It is also interesting to note that the list of legitimate aims which justify the interference with the right is also shorter in Article 9 of the Convention than it is in Articles 8, 10 and 11 (freedoms of private life, expression and association).

While there is no general limitation clause, there is a general prohibition to use the limitation clauses for other purposes than those they were intended for, in order to safeguard against abuse of legitimate limitation by a state. The right to education as protected in Article 2 of the 1<sup>st</sup> Protocol guaranteeing the right to education, including the right to have religious and philosophical convictions respected, has no limitation clause at all.

All three instruments do contain provisions safeguarding against abuse of the rights contained therein. These provisions are important for the interpretation of the material rights. The South African Bill of Rights has no general provision for this purpose. Instead, specific safeguards against abuse are contained in the formulation of the rights as for example in the aforementioned sections 15 and 26. The Charter provides in section 26 that the Charter shall not be construed as denying the existence of any other rights or freedoms that exist in Canada. The ECHR has by far the most extensive formulation of a provision against abuse in Article 17. It is a general provision making explicit that states, groups or individuals whose actions or activities are directed at undermining the rights guaranteed in the Convention, or their limitation to a greater extent than provided for in the Convention, cannot draw on the

Convention to protect themselves. In Article 18, the Convention contains another safeguard – the aforementioned provision that the limitations may only be used for the purpose for which they have been prescribed.

### 3.2.4 Individual rights and group rights

Also relevant for the limitation of freedom of religion and belief rights are the guidelines for interpretation and inherent limits which the instruments contain. As far as the Canadian Charter is concerned, it is relevant that it is the only of the three instruments that explicitly mentions preservation and enhancement of the multicultural heritage (of Canadians) as a legal aim of the human rights instrument. Subsequently, Charter interpretation must be consistent with said aim (section 27). Canada's obligations towards its Aboriginal citizens and peoples is manifest in the fact that the Charter can never be "construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada" (section 25).

The South African Bill of Rights does not mention multiculturalism nor obligations towards aboriginal or indigenous minority populations, but as said before does recognize the rights of cultural, linguistic, and religious communities (section 31). Also, as mentioned above, the Bill of Rights provides explicitly for the recognition of traditional and religious marriages and family and personal law (subsection 15(3)). Yet, neither of these must be used to undermine the Charter rights in general. Subsection 15(3b) specifies that the recognition of *inter alia* religious marriages, personal or family law must "be consistent with this section and the other provisions of the Constitution". The same applies to the collective dimension protected in section 31. Subsection 31(2) provides that the right to *inter alia* practice one's religion and to form, join, and maintain religious and linguistic associations and other organs of civil society, "may not be exercised in a manner inconsistent with any provision of the Bill of Rights".

Both the Charter and the Bill of Rights thus strike a balance between individual and group rights; yet they do so by employing opposite directions. The Charter does not contain specific collective rights or provisions for legal pluralism, but makes explicit that interpretation of the individual rights must take into consideration a communitarian value (multicultural heritage) and the group rights of the indigenous population. The Bill of Rights formulates specific group rights, but makes explicit that these must not be used to undermine other provisions of the constitution, including the individual rights. The ECHR contains no comparable elements; neither a reference to (a) communitarian value(s) nor specific collective rights.

In several selected cases, the balancing between group rights and individual rights is of importance. The Canadian *TWU* case and the South African *Christian*

*Education* case have already been mentioned above (section 3.2.2). In *Fernández Martínez* (section I3.4.14), the ECtHR had to decide whether an agreement between the Spanish state and the Catholic Church justified the non-prolongation of a teacher of religion who had become unfit for the job in the eyes of the Church.

### 3.3 INTERMEDIATE CONCLUSION REGARDING THE PARALLELS AND DIFFERENCES IN CODIFICATION

The previous subsections showed that there are important parallels in codification between the three instruments with regard to the core of the right and the conditions for limitation. There are also differences with regard to the grouping of freedoms as rights, the elaborate or minimalistic formulations of rights and limitations, the absolute or relative characters of elements of the freedom of religion and belief (while the non-absolute character as such is a common feature), equality provisions or the explicit or implicit reference to certain constitutional values.

The comparison allows for a preliminary conclusion. While there are differences in the codifications, the similarities are quite strong, indicating a very similar scope, meaning, and content of the right. Indeed, as we shall see in Chapter 4, there are strong similarities in the standard interpretations. For example, the broad character which leads to the protection of many religious and a-religious beliefs and unbelief, the difference between an internal dimension and the dimension of manifestation, the individual and collective dimensions, the line of argumentation when it comes to limitation and so forth. These similarities in interpretations can be explained to a great degree in reference to the similarities in codification.

We will also encounter differences of standard interpretations of the freedom of religion and belief by the three tribunals in Chapters 4 and 5. As will be seen, not all these differences can be derived from the differences in codification. As a matter of fact, the majority of differences in interpretation have very little to do with the differences in codification.

In the following three sections, the general methodology of solving human rights cases by the three tribunals shall be discussed. Readers familiar with the methodology of solving human rights cases by either of the three tribunals can skip the respective section without any negative consequence for understanding the discussion in Chapter 4 and beyond.

In sections I1.2, 5.2 and I3.2, the three legal systems are further introduced in terms of history and institutions for those readers less familiar with either of them.

### 3.4 SOLVING HUMAN RIGHTS CASES IN CANADA

#### 3.4.1 Introduction to solving human rights cases in Canada

This section examines the methodology of solving human rights cases as applied by the Supreme Court of Canada. The first section begins with the discussion of the concept of judicial review under the Charter. The following subsections discuss the elements of the methodology applied by courts in solving human rights cases.

In section 3.4.2 we look at the concept and institution of constitutional review in Canada. In section 3.4.3, we look into the *Oakes* test which was applied to analyze whether or not impairment is justified under the limitation clause. Then in section 3.4.4, we consider the particularities of administrative review cases. In section 3.4.5, the notions are examined of “minimal impairment” and “reasonable accommodation” which are relevant to the difference between constitutional and administrative. Then in section 3.4.6, direct and indirect infringements are discussed. Finally, section 3.4.7 addresses the issue of whether internal limits and a hierarchy of rights are to be considered elements of Canadian human rights law and Supreme Court methodology.

#### 3.4.2 Judicial and constitutional review

The basic legitimacy of judicial review has been less controversial in Canada than for example in the United States, for both historical and structural reasons. Although Canada did inherit the doctrine of parliamentary supremacy from its British past, Canadian courts adopted an approach which followed the doctrine advanced by John Marshall in the famous US case of *Marbury v. Madison*,<sup>3</sup> holding that legislation in violation of the Constitution Act was invalid.

The 1960 Bill of Rights had certain inherent limitations<sup>4</sup> which led some, including Supreme Court Justice Bora Laskin, to call for an extension of judicial power. By the end of the 1970s, as Manfredi observes, it had become clear that even the 1960 Bill of Rights had not served to bring about a more bold and substantive judicial review of legislation on civil rights grounds.<sup>5</sup>

The Court's approach to human rights cases became clear in a case concerning the freedom of religion, the case of *Robertson and Rosetanni v. Queen*.<sup>6</sup> The

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3 Supreme Court of the United States, *Marbury v. Madison*, 5 US (1 Cranch) 137, 24 February 1803.

4 F. Venter, *Constitutional Comparison; Japan, Germany, Canada and South Africa as Constitutional States*, Juta & Co Ltd, Cape Town (South Africa), 2000, p. 138.

5 C.P. Manfredi, *Judicial Power and the Charter, Canada and the paradox of liberal constitutionalism*, Oxford University Press, Don Mills, Ontario (Canada), 2001, p. 15.

6 SCC, *Robertson and Rosetanni v. The Queen*, [1963] SCR 651, 18 October 1963.



issue was whether the Sunday-closing provisions of the federal Lord's Day Act conflicted with the freedom of religion as provided for by the Bill of Rights. The Court ruled that it did not. Referring to the clause recognizing the rights as those that "have existed and shall continue to exist", the Court ruled that the protection of Sunday had never conflicted with the freedom of religion before the Bill and therefore did not conflict with it at the time of the case. Interestingly, the landmark case of the Supreme Court under the Charter concerning the freedom of religion, *Big M Drug Mart*, also concerned the protection of Sunday. Now, 20 years later and under the Charter, the SCC did find that a law protecting Sunday interfered with the freedom of religion and belief.

The Constitution Act of 1982 was the first Canadian Constitution to be adopted by the Canadian legislature, as opposed to the British Parliament. It explicitly included a provision on judicial enforcement of constitutional rights (section 24(1) of the Charter).<sup>7</sup> Because the Charter is included in the supreme laws of both the federal and the provincial legislatures are subjected to rights scrutiny.<sup>8</sup>

The Charter is Part I of the Constitution Act 1982. It consists of 34 sections. The Charter contains the following rights and freedoms:<sup>9</sup>

- Fundamental freedoms: freedom of conscience and religion; freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication; freedom of peaceful assembly; and freedom of association (section 2);
- Democratic rights (sections 3–5);
- Mobility rights (section 6);
- Legal rights (section 7–14);
- Equality rights (section 15);
- Provisions on the official languages and minority language rights, (sections 16–23);
- Aboriginal rights and recognition of the multicultural heritage of Canadians (sections 25 and 27).

In accordance with section 1, these rights may be subject to reasonable limits, prescribed by law and demonstrably justifiable in a free and democratic society.

The Charter is applicable on the national level as well as in provinces and the territories (section 32). It applies vertically to the relationships between government institutions and bearers of rights (section 24). Yet because the federal government and the provinces and territories have their own human rights acts which also address private discrimination and the necessity of

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7 Manfredi, *supra* n. 5, at 11-12.

8 See Venter, *supra* n. 4, at 74.

9 See *ibid.*, p. 139.



accommodation, individuals have the chance to also claim their rights in individual legal relationships.<sup>10</sup>

While the Charter cannot be raised in private litigation, the Court can out of its own motion test the actions of government bodies and institutions. Also, with regard to administrative action, as Venter notes, the Court is not deterred from testing the constitutionality of any government action, whatever the political nature of this action. The Constitution, including the Charter, represents the absolute standard for the government. The introduction of the Charter thus represents a major shift in Canadian constitutional law from common law judicial review to full-fledged constitutional review on the basis of human rights as is common in the United States, Germany and South Africa.<sup>11</sup>

Laws enacted outside the authority granted by the Constitution, including the Charter, are *ultra vires* and hence void.<sup>12</sup> However, section 33 provides that federal Parliament and/or the provincial or territorial legislatures may temporarily override certain sections of the Charter, including the fundamental freedoms and some of the rights (excluding democratic rights). The “override clause” was included in the Charter to accommodate the opponents of the Charter who feared judicial activism and departure from the British doctrine of “sovereignty of parliament”. They included both conservative groups who feared the erosion of social mores and progressive groups who feared the impossibility of social engineering. The override clause has never been used.<sup>13</sup>

Non-Canadian law can have persuasive value in Canadian legal proceedings.<sup>14</sup> It is not uncommon for the Supreme Court to refer to important cases from other nations or even the European Court of Human Rights.

– *Canadian Human Rights Act*

In 1977, five years before the adoption of the Charter, federal Parliament passed the Canadian Human Rights Act. The Canadian Human Rights Act protects people that are lawfully present in Canada or legally entitled to return to Canada against discrimination by federal departments, agencies and Crown corporations and several federally regulated employers or service providers. The Act also instituted the Canadian Human Rights Commission.

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<sup>10</sup> *Ibid.*

<sup>11</sup> *Ibid.*, pp. 117, 95 and 138.

<sup>12</sup> See *ibid.*, p. 96, citing P.W. Hogg, *Constitutional Law of Canada*, Carswell, Toronto (Canada), 1998, at 8-14 – 8-15. See also P. W. Hogg, *Constitutional Law of Canada*, 2012 student ed., Carswell, Ontario (Canada), 2012, para. 35.3

<sup>13</sup> See L.E. Weinrib, ‘The Canadian Charter’s Transformative Aspirations’, in *Supreme Court Law Review* (2nd), vol. 19, pp. 17-37 (2003), pp. 23-29.

<sup>14</sup> Venter, *supra* n. 4, at 117.

– *Provincial human rights legislation*

Each province and territory has its own human rights law, usually called a Code or an Act (or in Quebec, a Charter), and a provincial or territorial human rights commission. Notably, the Quebec Charter of Human Rights and Freedoms was passed in 1975 by the National Assembly and the Saskatchewan Human Rights Code entered into force in 1979. The Quebec Charter has been amended several times since 1975. In light of section 26 of the Charter of Rights and Freedoms, the (1975 version of the) Quebec Charter will therefore prevail if applicable alongside the Charter in the event of any conflict. In many of the selected cases, like the *Multani* case mentioned in section 3.2.1 the provincial human rights codes are the primary source of the rights in question.

### 3.4.3 The *Oakes* test

In the *Oakes*<sup>15</sup> case, the Supreme Court for the first time established the general methodology of assessing constitutionally sanctioned limitations of human rights under section 1 of the Charter. This is referred to as the *Oakes* test.<sup>16</sup> The *Oakes* test consists of the following elements, which are applied in a subsequent manner. If the answer to one of the questions is negative, there is no need to continue the test; but the interference is a violation of the right.<sup>17</sup>

The first step (1) is establishing whether the interference is prescribed by law. A law in this regard can be a statute or regulation. The interference does not have to follow from the statute or regulation<sup>18</sup> directly, but it has to have some basis in a statute or regulation, but “[w]hether the impugned measure was passed into law by statute or regulation is usually of no consequence for the s. 1 analysis.”<sup>19</sup>

The second test is the proportionality analysis (2), which consists of the following elements: the interference must have a purpose which is both pressing and substantial (2a); the limit on the constitutional right is rationally connected to the purpose (2b); the limit minimally impairs the right (2c); and the law is proportionate in its effect also (2d).

In order to establish a rational connection (2b), the government “must show a causal connection between the infringement and the benefit sought on the basis of reason or logic [...]. The rational connection requirement is aimed at preventing limits being imposed on rights arbitrarily. The government must

15 SCC, *R. v. Oakes*, Case 17550, [1986] 1 SCR 103, 28 February 1986.

16 See Venter, *supra* n. 4, at 139.

17 *R. v. Oakes*, Case 17550, *supra* n. 15, paras 69-72.

18 As in other common law countries, Statutes or Acts are laws adopted by Parliament or a Provincial Legislature. and are also known as Acts. Regulations are usually based on an Act and contain administrative procedure.

19 SCC, *Alberta v. Hutterian Brethren of Wilson Colony*, Case 32186, [2009] 2 SCR 567, 24 July 2009, para. 40.

show that it is reasonable to suppose that the limit may further the goal, not that it will do so.”<sup>20</sup>

The *Oakes* test is prominent in many of the selected cases like *Multani* and *Brucker* mentioned above in section 3.2.1 and the cases of *Alberta v. Hutterian Brethren of Wilson Colony* (section I1.4.12), *R. v. N.S.* (section I1.4.14) and *A.C. v. Manitoba* (section I1.4.12). In the first case, the SCC had to assess whether the withdrawal of the province of a previous exemption for the colony from the required photo on a driver’s license was a proportional limitation of a right. In *R. v. N.S.* the critical question was whether the judge’s order to a sexual assault victim to remove her face-veil in court, was a minimal impairment and proportional to the fair trial rights of the accused. In *A.C.* the Court had to answer whether not taking 14 year old AC’s personal wishes into consideration when she refused a potentially life-saving blood transfusion was a limit on a constitutional right which minimally impaired a right and was proportionate in effect. On all questions there was no unanimity in the Court.

#### 3.4.4 Is there a difference between administrative and constitutional review?

While the *Oakes* is the applicable standard in constitutional cases, administrative cases involving rights must be solved with a different standard, the so-called functional and pragmatic approach of administrative law,<sup>21</sup> which consists of three standards for judicial review:

- correctness;
- patent unreasonableness; and
- the intermediate standard of reasonableness.<sup>22</sup>

The standard of “correctness” involves minimal deference and implies that there is just one correct answer and that the administrative body’s decision must reflect it. “Patent unreasonableness”, involves a deferential standard, permits the “decision to stand unless it suffers from a defect that is immediately apparent or is so obvious that it demands intervention by the court upon review”.<sup>23</sup> “The intermediate standard of “reasonableness” allows for somewhat more deference: the decision will not be set aside unless it is based on an error or is “not supported by any reasons that can stand up to a somewhat probing examination”.<sup>24</sup>

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<sup>20</sup> *Ibid.*, para. 48.

<sup>21</sup> SCC, *Multani v. Commission scolaire Marguerite-Bourgeoys*, Case 30322, [2006] 1 SCR 256, 2 March 2006, para. 85-86.

<sup>22</sup> See SCC, *Chamberlain v. Surrey School District No. 36*, Case 28654, [2002] 4 SCR 710, 20 December 2002, paras 5-6.

<sup>23</sup> *Ibid.*, para. 6.

<sup>24</sup> *Ibid.*

Yet the line is not always beyond dispute as many of the cases show. In *Multani* cited before, the majority of the judges applied the *Oakes* test. The justices Deschamps and Abella reached the same conclusion as the majority, but argued that the *Oakes* test is not suited for the review of the decisions of administrative bodies and applied the administrative standard instead.<sup>25</sup> Similarly, the minority in *Chamberlain*, mentioned in section 3.2.2, felt that the majority had wrongly applied the *Oakes* test, while the school board's decision to disapprove the books depicting same-sex families was not "patently unreasonable".

#### 3.4.5 Reasonable accommodation and minimal impairment

The difference between "reasonable accommodation" and "minimal impairment" is the subject of a thorough examination conducted by former Chief Justice Beverly McLachlin in the case *Alberta v. the Hutterite Brethren* discussed above (section 3.4.3). "Reasonable accommodation is a concept drawn from human rights statutes and jurisprudence. It envisions a dynamic process whereby the parties [...] adjust the terms of their relationship in conformity with the requirements of human rights legislation, up to the point at which accommodation would mean undue hardship for the accommodating party. [...] This dialogue enables them to reconcile their positions and find common ground tailored to their own needs."<sup>26</sup>

"A very different kind of relationship exists between a legislature and the people subject to its laws. By their very nature, laws of general application are not tailored to the unique needs of individual claimants. [...]. It cannot be expected to tailor a law to every possible future contingency, or every sincerely held religious belief. [...]" Minimal impairment is used to determine "whether the goal of the measure could be accomplished in a less infringing manner. The balancing of effects takes place at the third and final stage of the proportionality test" under the *Oakes* analysis.<sup>27</sup>

In her reasoning in *Alberta v. the Hutterite Brethren*, McLachlin pointed to *Multani* (mentioned above), in explaining that the doctrine of reasonable accommodation must only be used when applying human rights, not when analyzing the constitutionality of a law.<sup>28</sup> Indeed, in *Multani* the majority opinion also looked at "minimal impairment" in correlation with the doctrine of "reasonable accommodation", while the concurring judges believed this to be wrong.

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25 *Multani v. Commission scolaire Marguerite-Bourgeoys*, Case 30322, *supra* n. 21, paras 121 and 125.

26 *Alberta v. Hutterian Brethren of Wilson Colony*, Case 32186, *supra* n. 19, para. 68.

27 *Ibid.*, paras 69-71.

28 *Ibid.*, para. 61.

In the *R. v. N.S.* case also mentioned above (section 3.4.3), McLachlin iterated how Canadian jurisprudence, courtroom practice, and the tradition of requiring state institutions and actors “to accommodate sincerely held religious beliefs insofar as possible, has served Canada well for over half a century”.<sup>29</sup> In *Chamberlain*, also mentioned above, the notion of reasonable accommodation was linked to “the fact that Canada is a diverse and multicultural society, bound together by the values of accommodation, tolerance and respect for diversity”.<sup>30</sup> In *Amselem* (section I1.4.7), the discussion between majority and dissenters focused on whether the obligation to accommodate, or something similar may exist in the private law: in this case, relationships between the Jewish tenants and the organization of tenants.

In their report on interculturalism in Quebec, Bouchard and Taylor make note of the fact that only very few requests for accommodation or adjustment (not only in religion-related cases) come before courts. Most are dealt with in the citizen’s sphere. Some adjustments, which are made voluntarily, might not even be legally required.<sup>31</sup> The report was triggered by heated discussions in Quebec regarding the desirability, extent and impact of accommodation of minorities and interculturalism. The *Multani* case, mentioned above, in which the SCC found in favor of the Sikh student was one of the catalyzers of this heated debate.

The duty of accommodation presupposes discrimination (adverse effect or otherwise, see below). “The duty of accommodation is limited by the realism of the request, i.e. by the ability of the organization to accommodate. The notion of undue hardship is decisive in this instance.”<sup>32</sup> The criteria used to ascertain undue hardship must take into account the particularity of the situations. Nevertheless, certain guidelines apply generally.<sup>33</sup>

### 3.4.6 Direct and indirect infringement of rights

Freedom of religion and belief cases, in Canada and elsewhere in the world, often involve the claim of unjustified (indirect) discrimination on the part of the believer. In subsection 18(2), the Human Rights Act explicitly prohibits adverse effect discrimination. If private arrangements result in adverse effect discrimination, and cannot be justified under the act, the provision in the arrangement is void.<sup>34</sup>

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29 SCC, *R. v. N.S.*, Case 33989, [2012] 3 SCR 726, 20 December 2012, para. 51.

30 *Chamberlain v. Surrey School District No. 36*, Case 28654, *supra* n. 22, para. 21.

31 G. Bouchard and C. Taylor, *Building the future, A time for reconciliation*, Government of Quebec, 2008, pp. 64-65.

32 *Ibid.*, p. 63.

33 See *ibid.*, pp. 64-63 and 163.

34 See SCC, *Central Okanagan School District No. 23 v. Renaud*, Case 21682, [1992] 2 SCR 970, 24 September 1992, p. 21.

The duty of accommodation, as discussed above, only exists if the detrimental effect of a general rule amounts to discrimination against the individual in question. Whether or not there is discrimination is determined in accordance with Charter standards. Discrimination which triggers the duty to accommodate can be circumstantial, such as pregnancy or marital status, or permanent traits such as sex, skin color or a disability, or sociocultural traits such as religion.<sup>35</sup>

In the case *Alberta v. Hutterian Brethren of Wilson Colony* mentioned above (section 3.4.3), the initial policy of the province to introduce an obligatory photograph on drivers licenses was not aimed at interfering with the rights of the community members. The interference was indirect. However, they were opposed to photographs of themselves for religious reasons. The province granted an exemption. When this exemption was revoked with the introduction of a new policy, the community members challenged this decision in court.

### 3.4.7 Internal limits and hierarchy of rights

As Bouchard and Taylor mention in their report on interculturalism: “[r]ights, even the most basic ones, are not absolute. Under certain circumstances, they can be limited”. The SCC has time and time again reasserted that the freedom of religion is not an absolute right and can conflict with other rights.<sup>36</sup>

The Canadian Charter allows for limitations of its rights, on the condition that they are reasonable, prescribed by law and necessary in a democratic society.<sup>37</sup> “When rights conflict or when statutes with legitimate purposes impinge on individual rights, the courts seek to hand down decisions in which the level of infringement of the curtailed rights is minimal. The courts have thus developed legal techniques and tests that allow them to ascertain whether the infringement of a right is reasonable and acceptable.”<sup>38</sup>

If rights are not absolute but do collide, the subsequent question is whether such collision should be legally resolved by construing internal limits to those rights. The SCC consistently rejects construing internal limits as the appropriate fashion of reconciling rights. For example, in the case of *AC v. Manitoba* mentioned above (section 3.4.3), the majority does not accept internal limits to the freedom of religion and belief in a medical decision of life-importance for

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35 Bouchard & Taylor, *supra* n. 31, at 64-63.

36 See *Multani v. Commission scolaire Marguerite-Bourgeoys*, Case 30322, *supra* n. 21, para. 30; *Syndicat Northcrest v. Amselem*, Cases 29252 and 29253, [2004] 2 SCR 551, 30 June 2004, para. 1; *P. (D.) v. S. (C.)*, Case 22296, [1993] 4 SCR 141, 21 October 1993, p. 5; *Congrégation des témoins de Jéhova de St-Jérôme-Lafontaine v. Lafontaine (Village)*, Case 29507, [2004] 2 SCR 650, 30 June 2004, para. 69.

37 See Canadian Charter of Rights and Freedoms, s. 7, Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, s. 1.

38 Bouchard & Taylor, *supra* n. 31, at 106.

minors, arguing instead that the state must justify its interference under the limitation clause.<sup>39</sup>

However, in *Multani* the majority does consider that in cases of conflicting rights, a proper delineation of rights can be useful and hence no balancing between rights will be necessary.<sup>40</sup> But is this not a general delineation of rights but a concrete one, in the specific case before the Court? In Canadian legal doctrine, as in international law,<sup>41</sup> a hierarchy of rights has been rejected. After all "[t]he links in the chain of rights must all be equally strong, since the exercising of rights and freedoms is intended to protect the dimensions of existence that we value the most."<sup>42</sup>

Bouchard and Taylor argue that generally and abstractly speaking, even the right to life, in Canadian doctrine, is not superior to other rights. They refer to cases where the claimant argues a right to refuse medical treatment or chose to die. In these cases, the freedom of religion and of conscience as well as individual autonomy can outweigh the right to life, which the state may wish to protect.<sup>43</sup> They point to *Multani* and *A.C.* in this regard, which "reveal that the absence of a hierarchical ordering of rights does not leave the courts without resources in the arbitration of conflicting rights. Indeed, the courts can attempt to obtain the means favorable to the maximum reconciliation of the competing rights and reject requests that impose an overly heavy toll on certain of the parties involved."<sup>44</sup>

### 3.5 SOLVING HUMAN RIGHTS CASES IN SOUTH AFRICA

#### 3.5.1 Introduction to solving human rights cases in South Africa

This section examines the methodology of solving human rights cases as applied by the Constitutional Court of South Africa. Section 3.5.2 looks at the concept and institution of constitutional review in South Africa. Section 3.5.3 looks into judicial review under the Bill of Rights. Section 3.5.4 then considers the limitations of human rights in general and constitutional standards. In section 3.5.5 some specific limitation clauses and suspension of rights are discussed. Then, in section 3.5.6 administrative action is discussed. Section 3.5.7 discusses direct and indirect application and horizontal application. The following section 3.5.8 discusses direct and indirect infringement of rights and

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39 *SCC, B. (R.) v. Children's Aid Society of Metropolitan Toronto*, Case 23298, [1995] 1 SCR 315, 27 January 1995, paras 109-110.

40 *See Multani v. Commission scolaire Marguerite-Bourgeoys*, Case 30322, *supra* n. 21, para. 28.

41 UN General Assembly, Vienna Declaration and Programme of Action, 12 July 1993, A/CONF.157/23, art. 5.

42 *See Bouchard & Taylor, supra* n. 31, at 107.

43 *See ibid.*, p. 107.

44 *See ibid.*, p. 174.



reasonable accommodation. Finally, section 3.5.9 addresses the issue of whether internal limits and a hierarchy of rights are to be considered part of South African human rights law.

### 3.5.2 Constitutional review

The selected cases feature several types of constitutional review belonging to South African constitutional law. In the *Final Certification of the Constitution of 1996* (section I2.4.1), the current national Constitution had to be certified and in *Certification of the Constitution of the Western Cape* (section I2.4.3), the constitution of a province had to be certified. In *Constitutionality of Certain Provisions of the Gauteng School Education Bill* (section I2.4.2), some provincial legislators requested constitutional review of an Act adopted by a provincial legislature. In *Christian Education*, mentioned before in this chapter (section 3.2.2), individuals and organizations challenged the constitutionality of an Act. This is also true for a great many other cases in the selection.

In accordance with section 167(4) of the South African Constitution, it is the Constitutional Court's exclusive task to review legislation before it is officially signed into law by the President. The same goes for provincial legislation before being signed into law by the Premier. Section 79 provides for constitutional review within the legislative process. If the president has reservations about the constitutionality of a Bill, he must refer it back to the National Assembly. If, after renewed consideration, the President still has reservations, he refers the bill to the Constitutional Court. If the Court then finds that the bill is indeed constitutional, the President has no option but to sign it into law.

In the *Final Certification of the Constitution of 1996*, the Constitutional Court held that also adherence to the constitutional rules for the conduct of parliament, including in regard to the legislative process, is fully judiciable. In instances where parliament and the provincial legislatures have discretion in the way they must give effect to a constitutional duty, the CCSA applies a reasonableness test.<sup>45</sup>

As noted, the Constitution presents a departure from the political past of apartheid rule and from elements of the pre-constitutional legal order. Whereas apartheid was founded on the doctrine of sovereignty of parliament, now the Constitution is supreme. Legislation and conduct of state organs must be in

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45 See CCSA, Ex parte Chairperson of the Constitutional Assembly: In *Certification of the amended text of the Constitution of the Republic of South Africa*, Case CCT37/96 – Final Certification, 4 December 1996, para. 224. See also I.M. Rautenbach, 'Constitutional Review by the Judiciary in South Africa', in G. van der Schyff (ed.) *Constitutionalism in the Netherlands and South Africa, A Comparative Study*, Wolf Legal Publishers, Nijmegen (Netherlands), 2008, p. 145.



conformity with the human rights assembled in the Bill of Rights. Because of the past, the South African doctrine of human rights in the democratic era could not draw on a homegrown tradition. Instead, it tried to assemble elements from other liberal democracies and attune them to South African conditions.<sup>46</sup>

Venter notes that the value-oriented approach the Constitutional Court adopted for rights review, was inspired by the approach of the Supreme Court of Canada.<sup>47</sup> The value-based approach is also provided for in section 39, dealing with the interpretation of the Bill of Rights. It prescribes that such interpretation:

- a. must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
- b. must consider international law; and
- c. may consider foreign law.

It also provides that when interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum “must promote the spirit, purport and objects of the Bill of Rights”. The Bill of Rights does not deny the existence of any other rights or freedoms that are recognized or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill. There are four types of constitutional remedies:<sup>48</sup>

- Declarations of invalidity;
- Declarations of rights: differ from declarations of invalidity because they may be given even if no law or conduct is found to be inconsistent with the Bill of Rights;
- Prohibitory or mandatory interdicts; and
- Awards of constitutional damages.

Declarations of invalidity can have several elements:<sup>49</sup>

- Severing the bad from the good: invalidity must only effect the parts of the statute that actually violate the Constitution;
- Reading into the challenged legislation: this must be distinguished from “reading down” interpreting a statute in conformity with the Constitution;

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46 See F. Venter, ‘The Emergence of South African Constitutionalism: From Colonial Constraints to a Constitutional State’, in G. van der Schyff (ed.) *Constitutionalism in the Netherlands and South Africa, A Comparative Study*, Wolf Legal Publishers, Nijmegen (Netherlands), 2008, p. 34.

47 Venter, *supra* n. 4, at 140.

48 See Constitution of the Republic of South Africa, 10 December 1996, s. 172. See also I. Currie & J. de Waal (in association with Lawyers for Human Rights and the Law Society of South Africa), *The Bill of Rights Handbook*, Juta & Co, Cape Town (South Africa), 2006, pp. 183-205.

49 Currie & de Waal, *supra* n. 48, at 183-195.

- Retrospective effect of orders of invalidity; and
- Suspension of orders of invalidity.

An interdictory relief may also be an interim relief, pending the adjudication of a dispute or pending new legislation.<sup>50</sup> Section 8(3) lays down guidelines for application of remedies when private violations of the rights are found. However, it does not prescribe any particular kind of relief.<sup>51</sup>

### 3.5.3 Judicial review under the Bill of Rights

Whereas most of the South African cases actually involve constitutional review of legislation, there are also cases which involve judicial review of other actions of governmental institutions, educational institutions, and private organizations, in light of the Bill of Rights and other human rights legislation. In the *Pillay* case (section I2.4.11), a claim was brought against the code of conduct of a school which had adverse effects on a schoolgirl who wore a nose stud for religious and cultural reasons. In *De Lange* (section I2.4.15), a former minister of the Episcopal Church challenged her dismissal subsequent to her private law marriage to a same-sex partner.

Chapter 2 of the Constitution contains the Bill of Rights. It is a comprehensive catalogue containing 32 sections (sections 7–39). The first provision of that chapter states that the Bill of Rights is a “cornerstone of democracy” which “affirms the democratic values of human dignity, equality and freedom” and that “the state must respect, protect, promote and fulfill” the rights in the Bill of Rights. Hence, there can be no doubt that there is a positive obligation on the state under section 7. The Bill of Rights was required by Constitutional Principle II, which stipulated that everyone shall enjoy all universally accepted rights, freedoms and civil liberties. The Bill of Rights can be said to include the standards of all modern human rights catalogues.<sup>52</sup>

Besides containing a number of classical individual rights, the South African Constitution also makes reference to socio-economic and collective rights, such as the right to have the environment protected, the right to access to housing, health care, food and social security and the right to basic and further education.<sup>53</sup> Indeed, some argue it may be one of the most progressive contemporary texts in the field of the promotion of socio-economic rights, which in turn has given rise to remarkable Court judgments.<sup>54</sup>

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<sup>50</sup> *Ibid.*, p. 216.

<sup>51</sup> *Ibid.*, p. 226.

<sup>52</sup> Venter, *supra* n. 4, at 140.

<sup>53</sup> See Constitution of the Republic of South Africa, 10 December 1996, ss 24–29.

<sup>54</sup> Venter, *supra* n. 46, at 38.

The Bill of Rights contains the following rights and freedoms

|                                                  |                                                        |
|--------------------------------------------------|--------------------------------------------------------|
| 9. Equality                                      | 22. Freedom of Trade, Occupation and Profession        |
| 10. Human Dignity                                | 23. Labor Relations                                    |
| 11. Life                                         | 24. Environment                                        |
| 12. Freedom and Security of the Person           | 25. Property                                           |
| 13. Slavery, Servitude and Forced Labor          | 26. Housing                                            |
| 14. Privacy                                      | 27. Health Care, Food Water and Social Security        |
| 15. Freedom of Religion, Belief and Opinion      | 28. Children (rights of)                               |
| 16. Freedom of Expression                        | 29. Education                                          |
| 17. Assembly, Demonstration, Picket and Petition | 30. Language and Culture                               |
| 18. Freedom of Association                       | 31. Cultural, Religious and Linguistic Communities     |
| 19. Political Rights                             | 32. Access to Information                              |
| 20. Citizenship                                  | 33. Just Administrative Action                         |
| 21. Freedom of Movement and Residence            | 34. Access to Courts                                   |
|                                                  | 35. Arrested, Detained and Accused Persons (rights of) |

As mentioned above, the legal supremacy of the Constitution and thus judicial review, embedded in section 2, were issues that were readily agreed on in the negotiating process.<sup>55</sup> Individuals may challenge the constitutionality of legislation or conduct of state organs in any court. Orders made in this regard by a lower Court must be affirmed by the Constitutional Court before having any force. Yet, temporary relief may be granted. Any person or organ of state with a sufficient interest may appeal, or apply, directly to the Constitutional Court to confirm or vary an order of constitutional invalidity. Courts must declare any law or conduct that is inconsistent with the Constitution invalid to the extent of its inconsistency. There are also special procedures for the Constitutional Court to directly hear cases and for appeal directly to the Constitutional Court from any lower court.<sup>56</sup>

In light of section 2, the rights contained in the Bill of Rights can be applied to “any conduct”, hence also to horizontal relationships between individuals, including indirect application to private law.<sup>57</sup> Not unsurprisingly then, section 8(2) states explicitly that a “provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right”. Yet section 8(4) provides for the enjoyment of the rights in the Bill of Rights by juristic persons along the same line.

<sup>55</sup> Rautenbach, *supra* n. 45, at 143.

<sup>56</sup> Constitution of the Republic of South Africa, 10 December 1996, ss 167(5) and (6); 172(2b), (2d); and (1a).

<sup>57</sup> See Venter, *supra* n. 4, at 121.

The Constitutional Court is the highest court in constitutional matters, and as such the final court of appeal in constitutional matters. As mentioned above, it also has exclusive jurisdiction in some matters. The lower courts may consider all constitutional matters not falling within the exclusive jurisdiction of the CCSA.<sup>58</sup>

The general positive obligation of the state to respect, protect, promote, and fulfill the rights in the Bill of Rights, is contained in section 7(2) of the Constitution. More specific obligations are contained in some of the specific rights, ordering the state to take such “reasonable legislative and other measures” to ensure the realization of a right.<sup>59</sup> The Constitution establishes the following human rights watchdogs:<sup>60</sup>

- the Public Protector;
- the Human Rights Commission;
- the Protection of the Rights of Cultural, Religious and Linguistic Communities Commission;
- the Commission Gender Equality;
- the Auditor General; and
- the Electoral Commission.

The main purpose of the Commission for the Protection of the Rights of Cultural, Religious and Linguistic Communities, in accordance with section 185, is to promote respect for all cultures languages and religions. To that end, it shall monitor, investigate, research, educate, lobby, advise and report on issues concerning the rights of cultural, religious, and linguistic communities. The commission can also refer cases to the Human Rights Commission.<sup>61</sup>

– *Other instruments*

Besides the Bill of Rights, the other two major national instruments for human rights protection and equal treatment are the Employment Equality Act (EEA)<sup>62</sup> and the Promotion of Equality and Prevention of Unfair Discrimination Act (Equality Act).<sup>63</sup> The EEA provides for protection against unfair discrimination at the workplace and for affirmative action based on race, gender and disability. The Equality Act protects against unfair discrimination in the public and private spheres, except for where the EEA is applicable. The *Pillay* case, mentioned above, was heard first by an Equality Court.

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<sup>58</sup> Rautenbach, *supra* n. 45, at 143.

<sup>59</sup> See Constitution of the Republic of South Africa, 10 December 1996, ss 25-27.

<sup>60</sup> See J. C. Mubangizi, *The Protection of Human Rights in South Africa – A legal and Practical Guide*, Juta & Co, Lansdowne (South Africa,) 2005, pp. 66-70.

<sup>61</sup> See *ibid.*, p. 68. See Constitution of the Republic of South Africa, 10 December 1996, s. 185(3).

<sup>62</sup> Employment Equity Act [No. 55 of 1998], 19 October 1998.

<sup>63</sup> Promotion of Equality and Prevention of Unfair Discrimination Act [No. 4 of 2000], 1 September 2000.

The Equality Act provides for claims of unfair discrimination to be brought before Equality Courts. These are Courts within the Magistrates and High Courts, with the presiding officer being qualified in equal treatment law.<sup>64</sup> The CCSA ruled that litigants cannot circumvent the Equality Act by relying directly on a constitutional right, while the Equality Act may not be applied in any manner inconsistent with section 9 of the Constitution.<sup>65</sup>

The provinces can adopt provincial bills of rights. Such provincial human rights legislation must not be inconsistent with the Constitution. Provisions in a provincial bill of rights can only be inconsistent with the Constitution in two ways:<sup>66</sup>

- the provision falls outside the scope of provincial competence/jurisdiction according to the constitution;
- the provision is inconsistent with the Bill of Rights in the Constitution.

### 3.5.4 Limitations and constitutional standards

Justifiable limitations as opposed to unjustifiable limitations are at the center of some of the selected cases. In *Pillay* mentioned above (section 3.5.3), the Court had to assess whether it was acceptable to restrict a schoolgirl from wearing a nose stud consequent to her culture. In *Prince* (section 3.2.3), the question was whether the impact the general prohibition of illicit drugs had on the Rastafarian community was an acceptable limit. The claimant in the case, like other Rastafarians, used *ganja* for religious purposes.

Limitation of rights must be distinguished from interpretation of rights. Once the preliminary issue of the applicability of the right to a certain situation has been addressed, the CCSA follows a two-stage approach:<sup>67</sup>

1. Has the right been limited and/or was there failure to comply with the duties imposed by a right? If so;
2. Is there any justification for such limitation or non-compliance?

In the first stage, the person claiming that his constitutional right was limited / not complied with has the burden of proof, having to show that this was factually the case. In the second stage, the one who has limited the right bears

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64 See C. Albertyn, 'South African Equality Law', in *European Anti-discrimination Review*, no. 9, pp. 11-20 (2009), p. 15.

65 CCSA, *MEC for Education: KwaZulu-Natal and Others v. Pillay*, Case CCT 51/06, 5 October 2007, paras 40 and 43.

66 See CCSA, *Ex Parte Speaker of the KwaZulu-Natal Provincial Legislature: In Re Certification of the Constitution of the Province of KwaZulu-Natal*, Case CCT 15/96, 6 September 1996, paras 17-26.

67 Rautenbach, *supra* n. 45, at 151. See also Currie & de Waal, *supra* n. 48, at 152-155.

the burden of proof for any possible justification. The justification can only be given by reference to a limitation clause.<sup>68</sup>

The general limitation clause as stipulated by section 36 of the Constitution stipulates that the rights may only be limited:

- by a law of general application;
- to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom;
- taking into account all relevant factors, including
  - the nature of the right;
  - the importance of the purpose of the limitation;
  - the nature and extent of the limitation;
  - the relation between the limitation and its purpose; and
  - less restrictive means to achieve the purpose.

– *By law of general application*

Law in this context includes legislation, common law, customary law and international law as far as the law is applicable to a number of persons and not just an individual case or group of cases.<sup>69</sup> The law must be sufficiently clear, accessible and precise, that “those who are affected by it can ascertain the extent of their rights and obligations”. In this the CCSA, from an early stage followed the approaches taken by the ECtHR and SCC.<sup>70</sup> In most of the selected cases, the constitutionality of an Act is challenged. The status as law of general application is not an issue in any of the selected cases.

– *Reasonable and justifiable*

While section 36(1) refers explicitly to the values of human dignity, equality, and freedom, the list is not limitative. Other values included in the Constitution (e.g. non-racialism, non-sexism, supremacy of the Constitution and the rule of law), as well as values and principles found in democratic societies, must also be considered.<sup>71</sup> As the Constitutional Court explains in the *Solberg* case (section I2.4.4), “[t]he requirement that limitations on section 14 rights must be not only reasonable and justifiable, but also necessary, clearly identifies section 14 as one of the core provisions of the Bill of Rights requiring special solicitude by this Court.” According to the Court, a test of reasonableness on its own would allow the legislature more margin of appreciation. By adding “necessity” the Constitution places “special emphasis” on “options which are clearly not unduly burdensome, overbroad or excessive”.<sup>72</sup>

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68 Rautenbach, *supra* n. 45, at 151.

69 Y. Burns, *Administrative Law under the 1996 Constitution* (Revised Reprint), Butterworths, Durban (South Africa), 1999, p. 30.

70 Currie & de Waal, *supra* n. 48, at 1.

71 Burns, *supra* n. 69, at 30.

72 CCSA, *S v. Lawrence*; *S v. Negal*; *S v. Solberg*, Cases CCT38/96; CCT39/96; CCT40/96, 6 October 1997, para. 166.

Burns, however, notes that the standard of necessity, while it applied under the interim constitution, no longer applies. According to her, limitations must be reasonable and justifiable alone.<sup>73</sup> In applying the clause, the CCSA has cited Canadian and US case law and literature regarding the “rational connection”/“rational basis” tests for the relation between the limitation and its purpose.<sup>74</sup> Venter notes that the Court’s approach to the limitations test is in fact an incorporation of the Canadian Supreme Court’s approach to proportionality in South African law.<sup>75</sup>

– *The nature of the rights*

The nature of the rights must be considered. For example, interference with socio-economic rights through positive action is unconstitutional unless it complies with the general limitation clause of section 36.<sup>76</sup>

*The importance and purpose of the limitation*

A limiting measure must serve a purpose that “all reasonable citizens would agree to be compellingly important. For this reason, the purpose of protecting the personal morality of a sector of society will not qualify as justification for the limitation of rights.” This criterion requires the balancing of interests; on the one hand the right limited, on the other hand the interest served by the limitation. If the limitation’s sole purpose is to limit a right, the limitation is unconstitutional. Some general interest which is connected to the constitutional values and/or other rights must be served.<sup>77</sup>

The following purposes have been identified in South African jurisprudence and academic literature as valid purposes for the limitation of rights:<sup>78</sup>

- Protecting the administration of justice at its broadest;
- The prevention, detection, investigation and prosecution of crime;
- Reduction of unemployment among South African citizens;
- Inspection and regulation of health undertakings;
- Protection of the rights of others;
- Compliance with constitutional obligations;
- Promoting healing of the divisions of the past and the building of a united society;
- Complying with South Africa’s international obligations; and
- Preventing people from gaining entry to the country illegally.

In *Christian Education* mentioned above (section 3.5.2), the government argued that the blanket ban of corporal punishment even for private faith-based

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<sup>73</sup> Burns, *supra* n. 69, at 31.

<sup>74</sup> See *S v. Lawrence et al.*, Cases CCT38/96 et al., *supra* n. 72, paras 42-44.

<sup>75</sup> Venter, *supra* n. 4, at 145.

<sup>76</sup> Rautenbach, *supra* n. 45, at 150.

<sup>77</sup> Currie & de Waal, *supra* n. 48, at 166-167; Burns, *supra* n. 69, at 32.

<sup>78</sup> Currie & de Waal, *supra* n. 48, at 167-168.

schools served the protection of the rights and freedoms of children. In *Prince*, the legitimate interest raised was the prevention and prosecution of crime.

– *The nature and extent of the limitation, the relation between the limitation and its purpose and less restrictive means*

This element includes the principle of proportionality. If the limitation is not proportional to the purpose, it is unconstitutional. If the limitation is not fit to fulfill the purpose, it will not meet the standards of reasonableness and justifiability. The question is not if there are other means to achieve the objective or purpose, but whether less restrictive means are fit to achieve the purpose of the limitation.<sup>79</sup> For example, legislation must be narrowly tailored and not “use a sledgehammer to crack a nut”.<sup>80</sup>

In *DE v. RH* mentioned in this chapter (section 3.2.1), a central balancing exercise dealt with the constitutional obligation of the state to protect marriage, and whether this criminalizing adultery was proportional to this goal under current circumstances. In *Prince*, the majority of the Court, even after careful balancing, saw no less restrictive means vis-à-vis the Rastafarians than the total ban of *ganja* given that any exemption would undermine the purpose.

### 3.5.5 Specific limitation clauses and suspension of rights

Besides this general limitation clause, there may also be specific limitations which are included in the formulation/definition of the right itself. For example, through specifications on how, when and by whom the right may be limited.<sup>81</sup>

In applying the limitation clauses, the courts will regard the extent of a discretion to limit the right as a matter which related to the nature and extent of the limitation.<sup>82</sup>

In a state of emergency, fundamental rights may be suspended by an Act of Parliament if the life of the nation is threatened by *inter alia* war, natural disaster, or public emergency. A competent court may decide on the validity of a state of emergency, a prolongation of the state of emergency or any legislation or action in connection with it.<sup>83</sup>

Section 35 of the Constitution includes a table of non-derogable rights, containing the rights which may not be suspended even in cases of emergency. For example, the right to equality is non-derogable with respect to unfair discrimination solely on grounds of race, color, ethnic or social origin, sex, religion or language. The same goes for the right to life, human dignity,

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79 Burns, *supra* n. 69, at 32.

80 Currie & de Waal, *supra* n. 48, at 168.

81 Rautenbach, *supra* n. 45, at 151-152.

82 *Ibid.*, pp. 152-153.

83 See Burns, *supra* n. 69, at 37.



prohibition on slavery. In *Final Certification of the Constitution of 1996* mentioned above (section 3.5.2), interveners had raised the question of whether the omission of the freedom of religion and belief from the list of non-derogable rights was not actually a constitutional error.

### 3.5.6 Administrative action

Section 33 of the Constitution contains the right to administrative action that is lawful, reasonable and procedurally fair. “At a minimum this right entrenches a common law entitlement to natural justice, without being confined to it”.<sup>84</sup> Yet, section 33 “introduces different levels of scrutiny for laws which cause an infringement of rights. The requirement of reasonableness and justifiability [...] clearly envisages a less stringent constitutional standard than does the requirement of necessity” which must be followed in legislation.<sup>85</sup>

This was also the issue in the *Solberg* case mentioned above (section 3.5.4), in which Sachs, referring to Canadian theorist Hogg in his separate opinion, also argued that a “trivial breach of a specially protected right might be easier to justify in terms of section 33 than a grievous infringement of an ‘ordinary’ right. The intensity or severity of the breach must accordingly be a highly relevant factor in any proportionality exercise; the more grievous the invasion of the right, the more compelling must be its justification.”<sup>86</sup>

Hence, even in administrative law “[s]imple logic dictates that only conduct which is constitutionally irrelevant can be immune from the test of constitutionality”. Hence, the judiciary cannot refuse to adjudicate even policy determinations, “acts of state” or political questions.<sup>87</sup> However, the Constitutional Court has found its own system of inter-institutional dialogue when dealing with such questions, creating room and possibilities for Parliament and/or other state organs to address the issue as well.

### 3.5.7 Direct and indirect application, horizontal application

While section 8(1) provides that the Bill of rights is applicable to “all law, and binds the legislature, the executive, the judiciary and all organs of state”, section 8(2) provides for horizontal application. A provision of the Bill of rights binds natural and juristic persons “if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed

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84 Currie & de Waal, *supra* n. 48, at 672.

85 CCSA, *S v. Makwanyane and Another*, Case No. CCT/3/94, 6 June 1995, para. 104.

86 *S v. Lawrence et al.*, Cases CCT38/96 et al., *supra* n. 72, para. 168. See P.W. Hogg, *Constitutional Law of Canada*, 2012 student ed., Carswell, Scarborough (Canada), 2012, para. 38.6.

87 Venter, *supra* n. 4, at 121.

by the right.” The subsection speaks of a provision and not an entire right. Hence, it is possible that a certain provision of a right does apply horizontally while another provision of the same rights does not.<sup>88</sup>

In accordance with section 8(2), provisions have direct horizontal application under the considerations:<sup>89</sup>

- The context of the situation requires or makes possible the application of a provision;
- the purpose of the provision mandates the application in the concrete circumstances;
- the nature of the duty imposed by the provision is taken into account;
- indications can be found in the provision itself (for example “no person”).

In respect of vertical application, the Bill of rights applies:<sup>90</sup>

- to common law and legislation of the central, provincial and local government legislatures as well as to the non-legislative conduct of these legislatures;
- to administrative action;
- to the conduct of organs of the state, as defined in section 239;
- to conduct of the central, provincial or local executive (as in party political appointees), while deference will be shown to political decisions, particularly when exercising the constitutional executive and head of state powers;
- to non-lawmaking conduct of the judiciary.

The Bill of Rights requires the state to respect, protect and promote the rights of all people under South African jurisdiction, including foreigners. The state is also required to respect, protect and promote the rights of foreigners when they lose the benefits of the Bill of Rights if they leave the country. However, the obligation of the state to respect, protect and promote the rights of South Africans when they are in foreign countries was rejected.<sup>91</sup>

The Bill of Rights also applies indirectly both vertically and horizontally. As of 1996, the South African law no longer separates the constitutional jurisdiction and the ordinary jurisdiction. Hence the Bill of Rights applies indirectly in what was previously the non-constitutional jurisdiction. Indirect application to legislating requires “reading down”, that is interpreting legislation in conformity with the Bill of Rights.<sup>92</sup>

As far as judicial decisions in common law conflicts are concerned, post-constitutional decisions of higher courts are binding, whether they are on constitutional issues or not. Pre-1994 decisions of higher courts are binding

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88 Currie & de Waal, *supra* n. 48, at 48-49.

89 See *Ibid.*, pp. 48-50.

90 *Ibid.*, pp. 42-45.

91 *Ibid.*, p. 63.

92 *Ibid.*, pp. 43, 51 and 64-65.

except in cases of direct conflict with the Constitution or in cases involving open standards such as *boni mores*. In common law horizontal conflicts, indirect application must be considered before direct application (principle of avoidance).<sup>93</sup> In the three Muslim marriage cases (see above section 3.2.2), the evolution of common law *boni mores* under the “new ethos” of the Constitution was a determining factor in departing from precedents regarding the character of Muslim marriages. They were regarded under apartheid common law to be repugnant to *boni mores* because of their potentially polygamous character. The new ethos was respectful of minority traditions.

### 3.5.8 Indirect infringement of rights and reasonable accommodation

In *Pillay*, mentioned above, the CCSA explained that fairness in some situations demands reasonable accommodation. In determining whether or not reasonable accommodation is required, the Court will take two factors into consideration:<sup>94</sup>

1. Reasonable accommodation is appropriate when a rule or practice that is neutral on the face of it and is designed to serve a valuable purpose, nevertheless, has a marginalizing effect on certain portions of society.
2. The principle is particularly appropriate in specific localized contexts, such as an individual workplace or school, where a reasonable balance between conflicting interests may more easily be struck.

However, even where fairness requires a reasonable accommodation, the other factors listed in section 14 of the Equality Act will remain relevant.<sup>95</sup> In *Solberg*, mentioned above, the Court referred to “mutual accommodation” as one of the underpinnings of the constitutional order together with tolerance.<sup>96</sup>

Affirmative action is explicitly made possible by the Constitution in said section to correct historical disadvantage. Thus, unlike some might be inclined to argue, affirmative action is not regarded as contrary to, but positively mandated by, the right to equality. Positive action is regarded as lawful if:<sup>97</sup>

1. the measure targets persons of categories of persons who have been disadvantaged by unfair discrimination;
2. the measure is designed to protect target persons of categories of persons who have been disadvantaged by unfair discrimination, and;
3. the measure promotes the achievement of equality.

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<sup>93</sup> *Ibid.*, pp. 71 and 75.

<sup>94</sup> *MEC for Education: Kwazulu-Natal and Others v. Pillay*, Case CCT51/06, *supra* n. 65, para. 78.

<sup>95</sup> *Ibid.*

<sup>96</sup> *S v. Lawrence et al.*, Cases CCT38/96 et al., *supra* n. 72, para. 147.

<sup>97</sup> *Albertyn*, *supra* n. 64, at 12.

### 3.5.9 Internal limits and hierarchy of rights

In South African legal literature, there is a tendency to regard the specific limitations included in the articles stipulating the rights, as “internal modifiers”. The general limitation clause is seen as an external limitation.<sup>98</sup> Other than the wording of the text of the right, internal limitations following from the logic or nature of the rights are not assumed.

The Court has clearly rejected a hierarchy of rights. In one case, *Mamabolo*, the CCSA compared South African jurisprudence to that of the US in this regard. The US Supreme Court has developed a jurisprudence ranking the freedom of speech amongst all others; the South African Constitution envisions inter-linked rights to be carefully balanced and equally protected.<sup>99</sup> While in the *Certification of the Constitution* case mentioned above (section 3.5.2), the Court ruled that the fact that a distinction between rights was made in the case of an emergency does not imply a hierarchical distinction, let alone in situations outside of an emergency.<sup>100</sup>

In *Christian Education*, mentioned above (section 3.2.2), the Minister of Education argued that the freedom of religion and belief was not breached by the prohibition of corporal punishment in schools, because the practice could not be administered consistent with the rights of student.<sup>101</sup> Rather than accepting a complicated and controversial argument of internal limits, the Court assumed the breach of the freedom of religion by the prohibition of corporal punishment in schools and then explored the justifiability under the limitation clause.

However, commentators seem divided on whether the core foundational values – human dignity, equality and freedom – weigh equally in constitutional law. Venter suggests that the Court is leaning towards an interpretation in which human dignity is the strongest interpretational determinant. Underpinned by dignity, equality and freedom then serve as cornerstones for the constitutional rights. The mention of “inherent dignity” in section 10 may be interpreted to underpin this view. Also, equality and freedom may be said to be “pillars upholding human dignity and not *vice versa*”.<sup>102</sup>

The socio-economic rights contained in the Constitution are just as judiciable according to South African jurisprudence, as are the classical rights.<sup>103</sup> Indeed, the Constitutional Court has held that “all the rights of the Bill of

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98 Venter, *supra* n. 4, at 189.

99 See CCSA, *State v. Mamabalo*, Case CCT44/00, 11 April 2001, para. 41.

100 Ex parte Chairperson of the Constitutional Assembly: In re *Certification of the amended text of the Constitution of the Republic of South Africa*, Case CCT37/96 – Final Certification, *supra* n. 45, para. 37.

101 CCSA, *Christian Education South Africa v. Minister of Education*, Case CCT4/00, 18 August 2000, para. 17.

102 Venter, *supra* n. 4, at 35-36 and 142.

103 See Rautenbach, *supra* n. 45, at 143.

Rights are interrelated and mutually supporting” [emphasis added].<sup>104</sup> The South African Constitution does not contain an eternity clause. However, it does contain a table of non-derogable rights in section 35(5) as mentioned above (section 3.5.5).

South African constitutional law permits the waiver of constitutional rights under certain conditions. However, a waiver cannot turn something which is otherwise unconstitutional into a constitutional situation. For example, the prohibition of slavery cannot be waived. One can, however, waive protection of a right, to exercise the right negatively. While freedom rights such as free speech, free movement or freedom of association qualify for waiver, the rights to human dignity, life, not to be discriminated against, and fair trial, cannot be waived. For a waiver to have effect it must be a fully informed consent which clearly shows that the applicant was aware of the exact nature and extent of the waiver regarding the rights concerned. In a concrete case, the length of the period of the waiver and the danger of abuse and position of the beneficiary may be decisive.<sup>105</sup>

### 3.6 SOLVING HUMAN RIGHTS CASES UNDER THE CONVENTION SYSTEM

#### 3.6.1 Introduction to solving human rights cases under the Convention system

This section examines the methodology of solving human rights cases as applied by the ECtHR. Section 3.6.2 looks at some general aspects relevant to interpreting the ECHR. Section 3.6.3 examines state sovereignty, “living instrument doctrine” and the margin of appreciation. In section 3.6.4, the limitations of human rights under the Convention are considered. Section 3.6.5 discusses direct and indirect application and horizontal application. Finally, section 3.6.6 addresses the issue of whether internal limits and a hierarchy of rights are to be considered part of the Convention system.

#### 3.6.2 Interpreting the ECHR

The Convention is a treaty between the High Contracting Parties. As a treaty, the Convention must be interpreted in accordance with the international rules of treaty interpretation, as laid down in the *Vienna Convention on the Laws of Treaties*. According to Article 31 of the Vienna Convention, treaties must be

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104 CCSA, *Government of the Republic of South Africa v. Grootboom*, Case CCT11/00, 4 October 2000.

105 See Currie & de Waal, *supra* n. 48, at 39- 4, referring to CCSA, *Mohamed and Another v. President of South Africa and Others*, Case CCT17/01, 28 May 2001.

interpreted in “good faith in accordance with the ordinary meaning given to the terms of the treaty in their context and in the light of its object and purpose”. The Court has applied this principle consciously and faithfully. Nevertheless, some critics have called the method of interpretation applied by the Court incoherent and unstructured.<sup>106</sup>

Rainey, McCormick and Ovey suggest that the following propositions should be used for interpretation:<sup>107</sup>

1. Terms used in the treaty should be given their ordinary meaning.
2. Regard can be given to the context in which they appear.
3. Regard can be given to the object and purpose of the treaty.
4. The *travaux préparatoires* can be used to resolve ambiguity.
5. The treaty is equally authentic in English and French and differences in meaning should be resolved by adopting the meaning that best solves the object and purpose.

As far as the equal authenticity in English and French is concerned, where the connotation of the two languages is different, the Convention institutions have frequently used the “ordinary” meaning of words or sentences in order to determine the meaning of Convention rights. For example, the Court has held, that the right to marry does not include the right to divorce.<sup>108</sup> In the case *Cha’are Shalom* (section I3.4.3), a Jewish community in France challenged the refusal of the government to provide them with a license so they could slaughter meat in accordance with their religious precepts. The Court took into consideration that ritual slaughter constitutes what is called a “rite” in French. This is synonymous with the English word “observance”. Hence, ritual slaughter was covered by a textual interpretation of the freedom of religion and belief in Article 9.

Many terms, such as “degrading”, have been understood in their “dictionary sense”. However in the *Golder* case, which still serves as an important precedent, the majority of the Court explicitly rejected the “cautious and conservative approach” proposed by one of the judges, and instead chose “the interpretation that is the most appropriate in order to realize the aim and achieve the object of the treaty and not that which would restrict to the greatest possible degree the obligations undertaken by the parties.”<sup>109</sup> Many Convention terms have been given autonomous meaning in light of the object and purpose of the Convention and the differences in national law.<sup>110</sup> Terms such

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106 B. Rainey, P. McCormick, & C. Ovey (eds.) *Jacobs, White and Ovey?: the European Convention on Human Rights* 8<sup>th</sup> ed., Oxford University Press, Oxford (UK), 2021, p. 64.

107 *Ibid.*, pp. 65-71.

108 ECtHR (C), *Pretty v. United Kingdom*, app. no 2346/02, 29 July 2002; White & Ovey, *supra* n. 106, at 67.

109 See Harris, O’Boyle & Warbrick, *supra* n. 1, at 5; ECtHR, *Golder v. the United Kingdom*, app. no. 4451/70, 21 February 1975.

110 White & Ovey, *supra* n. 106, pp. 70-71.

as “criminal charge”, “civil rights and obligations”, and “tribunal” are examples. “Law” and “lawful” have a mixed Convention law and national law meaning for the same reason.<sup>111</sup>

According to Rainey, McCormick and Ovey, the “context” interpretation has frequently been used where a protocol governs a certain issue in detail and the respondent state has not ratified the protocol. In such cases, the state will often try to argue that the entire matter is governed by the protocol alone. The Court has found that the existence of specific rules does not bar the application of general principles to a case where the specific rules do not apply. However, if a right is not part of a specific provision, it cannot be part of the general provision.<sup>112</sup> In the case of *Folgerø*, mentioned above (section 3.2.2), the Court assessed the complaints of the parents against the procedure of exemption from the class under the Protocol covering freedom of education, which includes provisions regarding education in religious and philosophical beliefs. The Court found therefore that a separate analysis under the freedom of religion and belief was not necessary.

“In practice the Court, and formerly the Commission, has made only occasional use of the *travaux préparatoires*.”<sup>113</sup> Rainey, McCormick and Ovey argue that as a matter of fact, the preparatory work is “notoriously unreliable”. It should only be invoked as to provide explanations regarding party intent rather than to delimit strictly the scope of articles. Also, the dynamic interpretation of the Convention as a “living instrument” conflicts with a fixation in time by reference to preparatory work. Where the Court used the *travaux préparatoires*, it used them not as something decisive, but to construe a “working hypothesis”. In recent years, they have been used more frequently in dissenting opinions than in the majority opinions of the Court.<sup>114</sup>

### 3.6.3 State sovereignty, “living instrument doctrine” and margin of appreciation

Harris *et al.* argue that the theory of interpretation which emphasizes state sovereignty which can only be limited in accordance with the explicit consent to such limitation given by the Member States, has “now totally given way to an approach that focuses instead upon the Convention’s law making character and its role as a European human rights guarantee that must be interpreted as to permit its development with time”.<sup>115</sup> The dynamic or evaluative

111 Harris, O’Boyle & Warbrick, *supra* n. 1, at 16.

112 White & Ovey, *supra* n. 106, pp. 68–69. See as example for the third point reference to ECtHR (GC), *Maaouia v. France*, app. no. 39652/98, 5 October 2000.

113 Harris, O’Boyle & Warbrick, *supra* n. 1, at 17.

114 White & Ovey, *supra* n. 106, pp. 65–66, referencing a.o. ECtHR, *Young, James and Webster v. the United Kingdom*, app. nos. 7601/76 and 7801/77, 13 August 1981.

115 Harris, O’Boyle & Warbrick, *supra* n. 1, at 6. See also White & Ovey, *supra* n. 106, p. 70.



interpretation referred to as the “living instrument doctrine” mandates that the Convention not be interpreted in accordance with the social standards adopted when the Convention was adopted, but reflective of the policy of the law in European states. Examples are the cases dealing with, amongst others, treatment of prisoners, children born out of wedlock, homosexuals, the death penalty and conscientious objectors to military service. Yet, if the issue at hand is a controversial one, the Court will also often revert respect to national institutions under the margin of appreciation.<sup>116</sup>

The evaluative and dynamic approach, called “living instrument”, can be derived from what is called the principle of effectiveness. The Convention rights were designed to provide individuals with protection of their rights and freedoms. Hence, in accordance with the object and purpose, the Convention rights must be interpreted in light of present day circumstances in order to be effective.<sup>117</sup> The Court has consistently held that the Convention is intended to guarantee practical and effective rights and not rights that are theoretical and illusionary.<sup>118</sup>

There is no doctrine of binding precedent according to the Convention or the Court’s jurisprudence. However, for reasons of legal certainty and an orderly development of international law, the Court usually follows and applies its own precedents, unless the living instrument doctrine commands a critical review of the precedents.<sup>119</sup> In the case of *Bayatyan* (section I3.4.11), an Armenian Jehovah’s Witness challenged his imprisonment for refusing military service. Eleven years before, the case of *Thlimmenos* (section I3.4.2), a Jehovah’s Witness from Greece, had challenged his ineligibility as an accountant due to his prison term which he had served for being a conscientious objector to military service. Then, due to the textual exclusion of military service from the definition of forced labor in the Convention, the Court had not deemed the prison term as such to be violative of the freedom of religion and belief. Eleven years later, however, the great majority of High Contracting Parties had abolished obligatory military service and/or introduced alternative military service. The Court concluded that the “living instrument” must now be read to proscribe criminal punishment for conscientious objectors.

The margin of appreciation doctrine plays a crucial role in the interpretation of the Convention.<sup>120</sup> While not explicit in the text, the doctrine was first explained by the Court in *Handyside*. Here, the Court reasoned that “Article 10 para. 2 leaves to the Contracting States a margin of appreciation. This margin is given both to the domestic legislator (‘prescribed by law’) and to the bodies, judicial amongst others”. Nevertheless, this does not “give the

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116 White & Ovey, *supra* n. 106, pp. 70-71.

117 *Ibid.*, pp. 75-76.

118 See Harris, O’Boyle & Warbrick, *supra* n. 1, at 15.

119 *Ibid.*, pp. 17-18.

120 See *ibid.*, p. 11.



Contracting States an unlimited power of appreciation. The Court, [...] is empowered to give the final ruling [...]. The domestic margin of appreciation thus goes hand in hand with a European supervision.”<sup>121</sup>

In *Şahin* (section I3.4.7), in which a Turkish university student challenged her exclusion from classes for wearing a headscarf, the Court considered that due to the margin of appreciation Member States must work out the relationship between religion and state themselves. There is no European consensus on the matter. This was reiterated in many of the other selected cases, amongst which *Lautsi* (see section 3.2.2), concerning the Italian law which ordained that crucifixes be present in every classroom. Whether or not there is a European consensus is analyzed in many other selected cases, amongst which *S.A.S.* (see section 3.2.3), concerning the French ban on all face covering attire. Cases like *Hasan and Chaush* also mentioned above (section 3.2.2), illustrate the European supervision with which the margin of appreciation goes hand in hand.

Both the Court and formerly the Commission made clear that the Convention bodies do not constitute a fourth instance in the sense of a further judicial tribunal. Claimants must argue a breach of their Convention rights and more than a mere error of law by the domestic tribunals. A claim that such an error is a breach of Article 6 will usually not succeed. The Court does not, however, consider itself bound by the determination of the facts on the national level if there is reason to doubt them. While the Court will not supervise the correct application of national law, if necessary, it will assess whether the application was arbitrary.<sup>122</sup>

### 3.6.4 Limitations

The Convention does not contain one single approach to limiting the scope of the rights it protects. Instead, there are several mechanisms:<sup>123</sup>

- Article 15 provides for derogation of some of the protected rights in times of war or public emergency, which threaten the life of the nation.
- Some of the articles define conduct outside of protection. For example, Article 2(2) defines deprivations of life which do not fall under the protection of the right to life. Article 4(3) specifies situations that do not fall under “forced labor”.
- Articles 8-11 contain a detailed limitation clause, with parallel but also specific elements.

Rainey, McCormick and Ovey distinguish two principles concerning the restriction of the rights guaranteed. The first principle is that only the restric-

121 ECtHR, *Handyside v. the United Kingdom*, app. no. 5493/72, 7 December 1976, paras 48-49.

122 Harris, O’Boyle & Warbrick, *supra* n. 1, at 14-15.

123 White & Ovey, *supra* n. 106, pp. 347-348.

tions expressly authorized by the Convention are allowed. Although this principle is not stated as such in the Convention, it is presupposed by the entire system. Also, it is presupposed by the second principle which is expressly included in the Convention in Article 18 and stipulates that “restrictions permitted under this Convention [...] shall not be applied for any purpose than those for which they have been prescribed.”<sup>124</sup>

There are judgments which suggest that the limitation clause must be applied restrictively and narrowly. The legitimate aims for which the rights can be protected can be divided into public interests (order, security, public health, morals etc.) and private interests (maintaining the impartiality of the judiciary, rights and freedoms of others etc.).<sup>125</sup> In *Soering*, the Court said that “inherent in the whole of the Convention is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual’s fundamental rights.”<sup>126</sup> This expresses the principle of proportionality which is a “reoccurring theme in the interpretation of the Convention”. The principle stipulates that any restriction of a right and freedom guaranteed in the Convention must be legitimate to the aim pursued. Yet, proportionality also sets limits to implied restrictions read into the Convention guarantees.<sup>127</sup>

Whenever there is no evidence that the relevant authorities have balanced the competing individual and public interests when deciding in limiting a right, whether in terms of positive or negative application, proportionality is not met. Similarly, when the requirements to be met to benefit from application or to avoid restriction of a right are so high as to not permit meaningful balancing, the measure is disproportionate. While the margin of appreciation applies in the instances as mentioned, the margin of appreciation cannot do away with the disproportionality.<sup>128</sup> The Court adopted a three-part inquiry regarding limitations:<sup>129</sup>

1. First, the Court will inquire into the legal basis for the limitation (“prescribed by law”);
2. Second, the Court will establish whether the limitation is justified by one of the specific “legitimate aims” mentioned in the article (“in the interest of”); and
3. Third, the Court will look into the question whether the limitation is “necessary in a democratic society”. In the third step, the principle of proportionality is applied.

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124 *Ibid.*, p. 348.

125 *Ibid.*, p. 349.

126 ECtHR, *Soering v. the United Kingdom*, app. no. 14038/88, 7 July 1989, para. 89.

127 See Harris, O’Boyle & Warbrick, *supra* n. 1, at 10.

128 See *ibid.*

129 White & Ovey, *supra* n. 106, p. 349.

However, the Court will not always follow this three-step approach in detail in its reasoning. In some cases it goes directly to the third step, indicating that if this is not the case, it is irrelevant whether or not the limitation was prescribed by law or in support of a legitimate aim.<sup>130</sup>

– *Prescribed by law*

Although the Convention uses two different formulations “in accordance with the law” and “prescribed by law”, the difference between these two is irrelevant for the first step. Three elements are necessary to determine that the criterion was fulfilled. The latter two have been described as the “quality of law” test. The three criteria are:<sup>131</sup>

1. There must be “some basis in national law”.
2. The law must be “accessible”.
3. The law must be formulated in a way that people can “reasonably foresee” its application in the circumstances and the consequences that this entails.

There is no requirement that the law must be statutory or indeed written. In the famous *Sunday Times*<sup>132</sup> case, the unwritten common law of contempt was accepted as qualifying as “law” for the purpose of the limitation clause.<sup>133</sup> Yet precisely because of this, the elements of the quality of law test are significant. The element of “foreseeability” does not require absolute certainty, as to imply that no interpretation may be used to determine the scope of the law. However, a “certain level of clarity” or precision is required to allow those whose human rights can be limited, to reasonably anticipate that this may be the case. If there is discretion on the part of the executive, the law must indicate this discretion. Broad general terms can at times be too vague as to provide the required level of predictability.<sup>134</sup>

– *Legitimate aims*

The Convention contains the following legitimate aims in the following articles, for the purpose of limiting the rights as specified in the articles.

There is considerable overlap between some of the legitimate aims, while there are also differences in wording. According to Rainey, McCormick and Ovey, these differences are not significant. One of these insignificant differences in wording is the difference between “prevention of disorder and crime” common to Articles 8, 10 and 11 and “protection of public order” in Article 9.<sup>135</sup>

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130 *Ibid.*

131 *Ibid.*, pp. 350.

132 ECtHR, *Sunday Times v. the United Kingdom*, app. no. 6538/74, 26 April 1979.

133 White & Ovey, *supra* n. 106, p.350.

134 *Ibid.*, pp. 351-354.

135 *Ibid.*, pp. 354-355 and 359-60.

|                                                                    |                    |
|--------------------------------------------------------------------|--------------------|
| Interests of national security                                     | Arts. 8,10, 11.    |
| Interest of territorial integrity                                  | Art. 10.           |
| Interest of public safety                                          | Arts. 8, 9, 10,11. |
| Economic wellbeing of the country                                  | Art. 8.            |
| Prevention of disorder or crime                                    | Arts. 8, 10, 11.   |
| Protection of public order                                         | Art. 9.            |
| Protection of health or morals                                     | Arts. 8,9, 10, 11. |
| Protection of the reputation of others                             | Art. 10.           |
| Protection of the rights and freedoms of others                    | Arts. 8,9,11.      |
| Prevention of the disclosure of information received in confidence | Art. 10.           |
| Maintenance of the authority and impartiality of the judiciary     | Art. 10.           |

According to Rainey, McCormick and Ovey, once the Court is satisfied that any restriction has a legal basis it will be quite easy for the member state to bring its action within one of the stated exceptions. The Court has “seldom [...] spend much time analyzing the nature of the limitations to satisfy itself that it falls within the scope of them”.<sup>136</sup>

In the *Şahin* case mentioned above (section 3.6.3), the Turkish government raised the rights and freedoms of others as a legitimate aim to restrict the wearing of religious apparel in educational institutions. The restriction was necessary to create an environment in which different groups respected each other. In *S.A.S.*, also mentioned above (section 3.6.3), the French government justified the ban of face concealing clothes by amongst other things the notion of “living together”. The majority Court accepted that this notion was tied to the rights and freedoms of others. In the Turkish *Yiğit* case, also in the selection (section 3.4.9), a widow in a purely religious marriage claimed that excluding her from inheritance and pension and social security just because her husband and her were not officially married, is contrary to her Convention rights. The Court followed the government’s argument that such restrictions are necessary for maintaining public order and the rights and freedoms of others.

– *Necessary in a democratic society*

The classic formulation of the third requirement was given by the Court in the *Silver* case:<sup>137</sup>

- “necessary” is not synonymous with indispensable, but neither has the flexibility of “admissible”, “ordinary”, “reasonable” or “desirable”;

<sup>136</sup> *Ibid.*, p. 355.

<sup>137</sup> *Ibid.*, p. 366. ECtHR, *Silver v. the United Kingdom*, app. nos. 5947/72; 6205/73; 7052/75; 7061/75; 7107/75; 7113/75; 7136/75, 25 March 1983.

- states enjoy a certain, though not unlimited, margin of appreciation;
- the interference must correspond to a “pressing social need” and must be proportionate to the legitimate aim pursued, albeit the interference must not be greater than required by the pressing social need; and
- exceptions to a right must be narrowly construed.

The scope of the margin of appreciation is sometimes broad and sometimes narrow, depending on the nature of the rights and facts at issue. Rainey, McCormick and Ovey note that it is difficult to provide a definition which would apply in every case, as the concept is “indeterminate and the application difficult to predict”.<sup>138</sup> Leta distinguishes two meanings of the margin of appreciation.<sup>139</sup>

- the substantive concept addresses the relationship between individual freedom and communitarian interests; and
- the structural concept addresses the intensity of review by the Strasbourg Court.

The substantive margin of appreciation thus applies to a proportionality analysis in balancing the involved individual and public interests, the necessity to interfere and the intensity of the interference required by the aim pursued.<sup>140</sup> The discretion is arguably widest in cases of:<sup>141</sup>

- public emergency arising under Article 15;
- some national security cases;
- protection of morals;
- social and economic policies/ town and country planning; and
- the interest of children.

Rainey, McCormick and Ovey argue that while on first sight the margin is broader in positive obligations, this impression must be nuanced, as “it will oft be the case that the nature of the right in respect of which positive obligations are argued is finely balanced against the wider interests of the whole community”.<sup>142</sup>

On the other hand, the margin is most limited when an individual’s identity or existence is at stake. Yet this is not always the case. In the *Dudgeon* case, the margin was narrow although homosexual conduct was prohibited in reference to “health and morals”, because the interference also concerned the “most intimate aspects of private life”. The early transsexual cases, which

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<sup>138</sup> White & Ovey, *supra* n. 106, at 366.

<sup>139</sup> G. Leta, *A Theory of Interpretation of the European Convention of Human Rights*, Oxford University Press, Oxford (UK), 2007, chapter 4.

<sup>140</sup> See Harris, O’Boyle & Warbrick, *supra* n. 1, at 12.

<sup>141</sup> *Ibid.*, p. 13. See also White & Ovey, *supra* n. 106, at 367-373.

<sup>142</sup> White & Ovey, *supra* n. 106, at 369.

clearly concerned “identity” were nevertheless characterized by a broad margin in absence of a European standard. Possibly in these cases, the communitarian interests called for the wide margin.<sup>143</sup>

It can be derived from the case law that the “democratic society” in which the interference must be necessary is characterized by the Convention rights themselves. Hence “democratic society” encompasses pluralism, tolerance, broadmindedness, respect for human rights and the rule of la. equality.<sup>144</sup> As shall be seen in the case studies of the selected cases, in freedom of religion and belief cases the Court will often emphasize a role for the state to make sure that different groups in society tolerate each other. This is the case in *Şahin* and *S.A.S.* mentioned above, as well as *Hasan and Chaush* mentioned earlier (section 3.6.3). In *Folgerø*, also mentioned above (section 3.6.2), the Court considers the nature of a democratic society to determine whether the burdens to request exemption from religious instruction class are too severe for parents and students. In *Buscarini*, also included the selected cases (section I3.4.1), “democratic society” is also the measure to determine whether the state of San Marino may require all legislators to swear the “republican oath” on the Gospels.

### 3.6.5 Direct and indirect application, horizontal application

From early case law onwards, the Convention bodies have distinguished between negative and positive obligations. While the “classical” negative obligation (freedom from) on the part of the state can be derived from the Convention, the Convention also holds positive obligations for the Member States corresponding with a “freedom to” from individuals. The positive obligation requires the state to act, while the negative obligation requires the state to refrain from certain acts.<sup>145</sup>

While *Cha’are Shalom* (section 3.6.2) illustrates a claim concerning a positive obligation (i.e. providing a permit to slaughter in accordance with religious law and custom), *Hasan and Chaush*, mentioned several times before (section 3.6.4), illustrates a claim concerning primarily a negative obligation (i.e. refraining from interfering in and taking sides in leadership disputes in a faith-based community).

As Article 34 makes claims possible only where a Member State has breached its obligations, its jurisdiction does not extend to human rights violations between individuals proper. However, the obligation in Article 1, for Member States to ensure “within their jurisdiction” the application of the

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143 White & Ovey, *supra* n. 106, at 368-369; ECtHR, *Dudgeon v. the United Kingdom*, app. no. 7525/76, 24 February 1983.

144 See White & Ovey, *supra* n. 106, pp. 79-89.

145 See Harris, O’Boyle & Warbrick, *supra* n. 1, at 19-21.

Convention, holds a positive obligation to ensure that individuals do not breach each other's human rights and/or to provide remedies if this has happened.<sup>146</sup>

The horizontal application of the Convention is a consequence of the positive obligation. If individuals are not hindered by law, state authority and court rulings to infringe each other's human rights, the state may have violated its positive obligation under the Convention.<sup>147</sup> This has been called the "indirect horizontal" application and is derived from Article 1 of the Convention. As only states can be respondents under the Convention, this interpretation is the only feasible way to construe horizontal application.

In several of the selected cases, the horizontal obligation is of relevance. In *Fernández Martínez* (section I3.4.14), the dissenting judges felt that the state had tried to discharge itself of its positive obligations by giving the Church too much liberty to decide on the continuation of the employment of a religious instruction teacher. In accordance with an agreement between the government and the church, the Catholic Church had to recommend employees for this function and its prolongation. Mr. Fernández Martínez was deemed no longer eligible, as more about his personal life as a married former priest and theological positions became publicly known.

### 3.6.6 Internal limits and hierarchy of rights

The Court has not rejected the theory of inherent limits outright. Wherever an internal limit was accepted, this was done on the basis of the wording in the Convention.<sup>148</sup> This is illustrated by the initial cautiousness of the Convention bodies regarding the rights of conscientious objectors to military service, as illustrated by the selected case *Thlimmenos*, mentioned above (section 3.6.3). In *Cha'are Shalom*, mentioned above (section 3.6.4), the government asserted that the freedom of religion and belief had not been interfered with because, amongst other things, the freedom right does not include the rights to operate community-owned slaughterhouses and the ultra-orthodox Jews of France could import *glatt kosher* meat from Belgium. While this is not referred to as an internal limit, the reasoning comes close to the idea that the slaughter in accordance with religious precepts could fall within the ambit of the right, without being covered by it.

At times, the Court will also go against the clear wording of the Convention in order to achieve a restrictive result, in reference to the intention of the drafting states (even where there was no clear sign in the *travaux préparatoires*).

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146 See White & Ovey, *supra* n. 106, p. 88.

147 See Harris, O'Boyle & Warbrick, *supra* n. 1, at 19-21.

148 See *ibid.*, p. 15.

toires).<sup>149</sup> Yet in the *Golder* case, the Court rejected implied limitations in reference to the limitation clause in Article 8(2), saying that the clause left “no room for implied limitations”.<sup>150</sup> The Court has thus far rejected a hierarchical order of rights as well as of the principles of interpretation it uses.<sup>151</sup>

### 3.7 INTERMEDIATE CONCLUSION REGARDING THE PARALLELS AND DIFFERENCES IN SOLVING HUMAN RIGHTS CASES

The previous subsections showed that there are important parallels in the approach or method of solving human rights cases. These can partly be derived from the parallels in codification. All three courts follow a number of steps to determine whether there has been interference with a right which amounts to a violation. With regard to the limitation clause and the related approach, the system as such is very similar: there must be a legal basis for interference, a legitimate aim followed and a justifiability of the measure. The latter includes “democratic society” to determine whether an interference fits with the entirety of the human rights-based legal order and elements like “proportionality”, “least restrictive” and “rational connection” to determine whether the interference is the proper restriction.

Being national rather than international legal orders, the distinction between administrative law and constitutional law, and between constitutional, judicial and administrative review, is relevant only for the SCC and the CCSA. Doctrines of direct and indirect application, including horizontal application, and positive and negative obligations are, however, very similar. The ECtHR seems most inclined to accept internal limits on rights, yet only if included in the codification. All tribunals reject a hierarchy of rights. In sections I1.2, I2.2 and I3.2, the three legal systems are further introduced, in terms of history and institutions for those readers less familiar with either of them. Sections I1.4, I2.4 and I3.4 provide the case studies of the selected cases.

The comparison allows for a preliminary conclusion. While there are differences in the methodology, the similarities are quite strong. This indicates that the approaches followed will be similar, to say the least. The important nuance in this regard is the relevance of procedural aspects resulting from the national law differences between constitutional, administrative, and private law in South Africa and Canada on the one hand, and the relevance of the margin of appreciation for the ECtHR on the other hand.

Indeed, as we shall see in Chapter 4, there are strong similarities in the standard interpretations, for example in the procedural methodology of applying the limitation clauses, though not necessarily in the substantive analyses.

149 *Ibid.*, p. 16, referring to ECtHR, *Preto and Others v. Italy*, app. no. 7984/77, 8 December 1983.

150 *Golder v. United Kingdom*, app. no. 4451/70, *supra* n. 109, para. 44.

151 *White & Ovey*, *supra* n. 106, at 65.



We will also encounter differences of standard interpretations of the freedom of religion and belief by the three tribunals in Chapter 4. As will be seen, not all these differences can be derived from the differences in the methodology of solving human rights cases as discussed in this chapter. Some of the differences are a result of differences in substantive interpretation.

Hence, due to the similarities in codification, and the modest impact the differences have, there is no reason to assume that the differences in codification alone account for any differences between the standard interpretations.

## 4 | Comparative analysis of the selected cases

### 4.1 INTRODUCTION TO THIS CHAPTER

In this chapter, all selected cases (Appendix I) of the three Courts will be comparatively analyzed in order to find the standard interpretations and the similarities and differences between them within the six dimensions of the freedom of religion and belief mentioned in paragraph 1.5.3. These six dimensions are: the individual dimension (section 4.2); the family and family law dimension (section 4.3); the collective and group autonomy dimension (section 4.4); the dimension of the educational system (section 4.5); the dimension of balancing with other rights (section 4.6); and, finally, the dimension of secularism (section 4.7). Many of the cases feature in several sections. While the relevant facts of the cases are incidentally repeated, knowledge of the case studies provided in Appendix I is presupposed in this chapter.

### 4.2 FREEDOM OF RELIGION AND BELIEF AND PERSONAL FREEDOM

The first dimension to consider is personal freedom of individual believers and the individual manifestations of their beliefs. While the term manifestation can suggest a conscious decision to make the religious beliefs known to the greater public, most of the believers in the selected cases go about their ordinary lives as students, employees, tenants and so forth, without any concrete desire to make their beliefs known to others. What they wish is to manifest their beliefs while leading their everyday lives: eat/consume, dress, worship, celebrate and work according to their beliefs. This is what brings them into collision with authorities or fellow citizens.

#### 4.2.1 Neutral laws of general applicability

Neutral laws of general applicability can nevertheless impair believers in their beliefs. Gurbaj Multani Singh was unduly affected by the general rule against dangerous objects in school (section II.4.10). As an orthodox Sikh, he believed he had to wear a metal *kirpan* at all times. Other Sikhs in Canada perhaps did not adhere to this requirement and/or wore a wooden *kirpan* instead. But the

practices of others were irrelevant to Gurbaj – his school was interfering with his personal freedom.

Mr. Amselem observed the holiday of *Sukkot* by erecting a *succah* on his balcony (section I1.4.7). The other inhabitants of the apartment complex relied on neutral rules against decorating the balconies and for keeping the fire exits safe. Other Canadian Jews with similar living conditions might dwell in *succahs* erected in communal gardens or elsewhere. To Mr. Amselem and his co-claimants, this was irrelevant. The homeowners' syndicate was trying to interfere with their personal freedom to erect personal dwellings on their own balconies.

The claimant in *R. v. N.S.* wore a face-covering veil in accordance with her Islamic beliefs (section I1.4.14). She wore it at all times and would certainly like to wear it in the courtroom where the person who had abused her as a child was the defendant. Ordering her to remove the veil was not only an interference with her personal freedom as a believer, but it also intersected with her freedom of personal space as a victim.

In the first two Canadian cases referred to above, the SCC found in the interest of the believer. In the latter case, it found against the believer. The SCC's definition of religion and belief is broad, and the protection generated by the freedom right is bold. Impairment must be justifiable in accordance with the limitations clause. Necessity for limitation is not easily assumed and if less restrictive alternatives are conceivable, they must be applied. There is an administrative law obligation to create reasonable accommodation for believers. Gurbaj and Amselem profited from the jurisprudence. N.S. found her sincerely held beliefs interfered with in accordance with the limitations clause. The rights of the accused provided for the legitimate interference.

The *Multani* case is perhaps the second Canadian milestone freedom of religion and belief case after *Big M*. The judgment guaranteed Gurbaj the personal autonomy to work out for himself what the *kirpan* rule meant for him. The judgment, however, was controversial in Canada and especially Québec. There was even hateful protest at the school doors.<sup>1</sup> These events, among other things, led to the Bouchard/Taylor Commission reviewing interculturalism in Quebec.<sup>2</sup>

Clashes between Chasidic Jews and the secular francophone inhabitants in Outremont had occurred before *Amselem*. However, the *Amselem* case was the first to reach the SCC. The earlier instances concerned the building of a

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1 See B. Ryder, 'The Canadian Conception of Equal Religious Citizenship', in R. Moon (ed.), *Law and Religious Pluralism in Canada*, UBC Press, Vancouver/Toronto (Canada), 2008, p. 104.

2 See G. Bouchard & C. Taylor, *Building the future, A time for reconciliation*, Government of Quebec, 2008, p. 242.

synagogue, the erection of strings in public streets (*eruv*<sup>3</sup>) and the location of bus stops for a private transport service to Brooklyn.<sup>4</sup> The SCC established that under the Charter's freedom of religion and belief, the individualized beliefs of Amselem cs. to dwell in one's own *succah* instead of a communal one – men as well as women – were all protected. Limitations must be in conformity with the limitations clause. The SCC concluded that an absolute prohibition of succahs on balconies was unnecessary and unjustified in order to safeguard the legitimate interests and rights of other tenants.

According to a majority on the SCC, N.S.'s freedom to wear a *niqab* when testifying in court, was legitimately interfered with in the criminal case against her uncle. While her sincere beliefs were protected in principle, his rights as a defendant would be impaired too much if she could testify wearing the *niqab*. The majority tailored a specific justification. A clear rule that would either "always" or "never" allow for ordering the removal of the *niqab* when testifying, was not compatible with the engaged rights. Assessing possible accommodation was considered the starting point.<sup>5</sup>

Mr. Prince, much like our Canadian claimants, adhered to a practice which was controversial (section I2.4.7). Prince was a candidate attorney in South Africa and as a practicing Rastafarian he consumed marihuana. To Mr. Prince, *dagga* was a "holy herb", but he was exposed to the "manifest and hidden prejudices of [the] majority" population which condemned the use of *dagga* which, in turn, had led to its criminalization.<sup>6</sup> While the Court was sympathetic to Mr. Prince, the majority considered an exemption for the Rastafarians too great a risk for the state interest of preventing illicit drug use. Although his sincere beliefs were protected by freedom of religion and belief, the interference was justified by the legitimate aim pursued.

Sunali Pillay was a South African of Tamil-Hindu background (section I2.4.11). Like many women of her creed, she wore a nose stud. Her school's dress code prohibited this. The CCSA, however, recognized that indisputably the norm embodied in the code "is not neutral, but enforces mainstream and historically privileged forms of adornment [...] at the expense of minority and historically excluded forms". The history of exclusion and discrimination against minorities was invoked to show that an exemption for minorities from a neutral rule could be required by equality. The CCSA found in Pillay's favor,

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3 The erection of such strings marks the public space as private/domestic (*eruvim*) to allow for goods to be carried there on religious holidays, when such carrying would be prohibited in external/public spaces.

4 See Quebec Superior Court, *Forget v. Outremont (Ville)*, 2000 CanLII 19415 (QC CS), 23 February 2000 and Quebec Superior Court, *Rosenberg v. Outremont (Ville)*, 2001 CanLII 25087 (QC CS), 21 June 2001.

5 SCC, *R. v. N.S.*, Case 33989, [2012] 3 SCR 726, 20 December 2012, paras 47-48 and 54.

6 L. Du Plessis, 'Current Problems Concerning Church and State Relationships and Religious Freedom in South Africa', in H. Warnik (ed.), *Legal Position of Churches and Church Autonomy*, Uitgeverij Peeters, Leuven (Belgium), 2001, p. 28.

even though the nose stud had no religious significance as such but was inspired by culture and/or religion which together “sing with the same voice”.<sup>7</sup>

Nine of the selected cases of the ECtHR involved personal freedom: *Buscarini*, *Maestri*, *Şahin*, *S.A.S.*, *Thlimmenos*, *Batayan*, *Cha’are Shalom*, *Folgerø* and *Lautsi*. In five cases the Court found against, in four it found in favor of the believer. *Cha’are Shalom* is better discussed under freedom of religion and belief and autonomy, and *Folgerø* and *Lautsi* are better discussed under the dimension with regard to the educational system. The other six cases will be discussed in this section. The Court itself, however, does not regard cases dealing with neutral and generally applicable laws as a conceptually distinct category, as Evans notes.<sup>8</sup>

In *Buscarini* (section I3.4.1) the rule was neutral, yet only at first sight. All parliamentarians were required to swear on the Christian Gospels. This caused problems of conscientious nature for people who believed in other holy books, no holy books, or for whom swearing on this, or any holy book went against their conscience. For these people, the choice was between not becoming parliamentarians, or violating their conscience. In a democratic society, parliament should potentially represent all walks of life. The Court found the interference unjustifiable.

The *Maestri* case (section I3.4.6) concerned the intended explicit and legally mandated exclusion of Freemasons from the office of judge. But the legal basis was weak – a general provision regarding rules on proper conduct for judges. To interpret this to imply that Mr. Maestri had to choose between his profession and his beliefs was unforeseeable in terms of “provided by law”.

The rule in *Şahin* (section I3.4.7) was also only neutral at first sight. All visible religious attire was prohibited in Turkish state-run universities for everyone. Leila claimed that at her university it was only enforced against Muslim women like her who wore headscarves. The mere fact that religious attire was prohibited already affected some students more than others, she argued. Non-religious students, or students whose beliefs did not include the wearing of such attire, were not affected. Amongst believers, carrying external signs of their religion, it would depend on how “neutral” they looked. Leila’s headscarf would always appear as a religious symbol, a fellow student’s beard or dreadlocks may not. Yet the ECtHR granted a broad margin of appreciation to Turkey and accepted that the interference was justified to achieve harmony between competing groups. The pluralism that the state claimed to protect was thus eliminated, with reference to the rights and freedoms of others.

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7 CCSA, *MEC for Education: Kwazulu-Natal and Other v. Pillay*, Case CCT51/06, 5 October 2007, paras 44 and 60.

8 C. Evans, *Freedom of Religion under the European Convention of Human Rights*, Oxford University Press, Oxford (UK) et al., 2001, p. 168.

In *S.A.S.* (section I3.4.15), the Court found that interference with the face-veil wearing believers was justified. Because the ban was general and unlimited, it failed to be proportionate to the public safety aim.<sup>9</sup> But the majority found that the ban was justified by the aim of protecting the rights of freedoms of others. Given the wide margin of appreciation, Parliament could give great weight to “living together”. The ban did, however, have a disproportional effect on Muslim women.<sup>10</sup>

*Thlimmenos* and the other conscientious objection case *Bayatyan* (sections I3.4.2 and I3.4.11) may be considered the more activist judgments of the Strasbourg Court when it comes to freedom of religion and conscience. *Bayatyan* is also the only Article 9 case in which the “living instrument” doctrine was applied.<sup>11</sup> Yet, the ten-year period between them also highlights the caution the ECtHR will apply when handling controversial issues. In *Thlimmenos*, the Court was confronted with the “*stare decisis*” of the Commission in combination with the still widely practiced and accepted military duty of many member states. After that, most member states introduced alternative service and/or abandoned military duty.

#### 4.2.2 The obligation to accommodate

While believers may be adversely affected by neutral rules, one way of preventing this is to exempt them. The notion of reasonable accommodation calls for measures which reconcile general rules with the practices of believers affected. In Canada “reasonable accommodation” exists under that name purely within administrative law. However, “minimal impairment”, used in constitutional law, shows similarities. In South Africa and the European Convention jurisdiction there is no equivalent to “reasonable accommodation” as a formulated rule.

The notion of reasonable accommodation as such can, however, be discussed more broadly. Reasonable accommodation as discussed here shall refer to a general positive obligation to accommodate believers, whenever such accommodation is to be considered reasonable. The interaction between government body and believers is subsequently subject to legal scrutiny. It also implies that the positive obligation resting on government bodies or public institutions *vis-à-vis* private individuals or organizations is different from positive obligations which might exist in civil law interaction. This is something the South African and Convention legal orders can relate to. If religious manifestation and customs are not accommodated in the public sphere,

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9 ECtHR (GC), *S.A.S. v. France*, app. no. 43835/11, 1 July 2014, paras 137-142.

10 *Ibid.*, para. 151.

11 ECtHR (GC), *Bayatyan v. Armenia*, app. no. 23459/03, 7 July 2011, para. 109.

“neutral” rules effectively render some religious citizens second class citizens, because they place a heavier burden on them than on all others.<sup>12</sup>

Nevertheless, the administrative law context in Canadian law is relevant to a more general discussion. Administrative organizations may be regarded to be better equipped to preview and/or review the effects of rules on specific groups. The legislature will usually decide on legislation more abstractly and generally. In private law, however, reasonable accommodation would require citizens to accommodate each other. In *Amselem*, the discussion between majority and dissenters focused on whether the obligation to accommodate, or something similar, may exist in the private law – in this case, relationships between the Jewish tenants of the building and the organization of all tenants.

The duty to accommodate will usually benefit minorities albeit the “historically unprivileged” groups. As we saw in the *Pillay* case, the CCSA refers explicitly to “minority and historically excluded forms” of adornment which are prohibited, unlike “mainstream and historically privileged” forms.<sup>13</sup> While popular conception often equates equality with identical rules for all, the history of exclusion and discrimination is invoked to show that an exemption from a neutral rule can be required by equality: “What is relevant is the symbolic effect of denying her the right to wear it for even a short period; it sends a message that Sunali, her religion and her culture are not welcome.”<sup>14</sup> Ergo, Sunali must be accommodated by being exempted from the rule, even if the rule remained intact for other students who might want to wear nose studs for esthetic reasons only.

Naturally, some people belonging to the mainstream will feel disadvantaged when (minority) people are accommodated. They will feel that minorities have privileges that they do not have. This was the case with some of the students in Multani’s school. However, as the SCC explained, this line of thinking is ill-informed.<sup>15</sup> Through accommodating, the unfair disadvantage the rule has for the believer who belongs to a minority is taken away. It is not a privilege for the believer, *vis-à-vis* others. The accommodation is necessary to recreate equal conditions for everyone.

Both Mr. Thlimmenos and Mr. Bayatyan were Jehovah’s Witnesses, and thus belonged to small minorities in Greece and Armenia. They believed that serving in the army violated the pacifist precepts of their religion. Both were punishable with prison for acting in accordance with the dictates of their conscience. Mr. Thlimmenos’ claim was directed against the fact that his criminal record now prevented him from acquiring accreditation as an accountant in his native Greece. The Court carefully maneuvered the legal grounds

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12 Evans, *supra* n. 8, at 170.

13 MEC for Education: *Kwazulu-Natal and Other v. Pillay*, Case CCT51/06, *supra* n. 7, para. 44.

14 *Ibid.*, para. 85.

15 See SCC, *Multani v. Commission scolaire Marguerite-Bourgeoys*, Case 30322, [2006] 1 SCR 256, 2 March 2006, paras 74 and 76.

in a period when many member states still had a mandated military service, while the Convention explicitly excluded this from the prohibition of forced labor.

In Mr. Batyan's case, 11 years later, all member states, except Armenia, had abandoned mandated military service and/or had introduced an alternative service for conscientious objectors and/or exempted conscientious objectors from military service. Armenia itself had changed the law, but it had not come into effect yet. The Court formulated a bold protection for conscientious objectors from military service. Not providing an alternative other than serving a prison sentence was in violation of the freedom of religion and belief according to the Court at that point in time.

The European Commission of Human Rights had ruled before *Thlimmenos* that as the Convention explicitly excluded obligatory military service from forced labor, Article 9 should not be read to prohibit such obligatory military service – even if no alternative “civil” duty was made possible. In *Thlimmenos*, the Court formulated a different accommodation. Leaving the most fundamental issue aside, it focused narrowly on the issue of the criminal record preventing the conscientious objector from entering the profession of his choice. Equality mandated that he be treated differently from other criminals. After all, in a democratic society there was no reason to prevent pacifists from becoming accountants.<sup>16</sup>

In *Bayatyan*, a decade later, the Court saw reason to revise the Commission jurisprudence regarding military duty and conscientious objection. Given that most member states had abolished obligatory military service and/or had introduced alternative civilian service and given that Armenia itself had vowed to abolish the obligatory military duty, the conviction and subsequent prison sentence of Mr. Bayatyan constituted an unjustifiable breach of Article 9.<sup>17</sup> Now the accommodation was to make an alternative possible and/or relieve a conscientious objector from mandatory military duty.

While the CCSA was sympathetic to Mr. Prince's plight in its argument and analysis, the majority considered an exemption from the general prohibition of the possession and use of cannabis for Rastafarians too great a risk for the overall state interest of preventing drug use. Comparison was made to legal medical use of cannabis. But unlike the medical system, the Rastafarian community was very loosely organized. Also, such a system would require authorities to establish when *bona fide* Rastafari use was at stake and when it was not. This was inconsistent with the freedom of religion.<sup>18</sup>

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16 ECtHR (GC), *Thlimmenos v. Greece*, app.no. 34369/97, 6 April 2000, paras 35-47. See Evans, *supra* n. 8, at 179.

17 *Bayatyan v. Armenia*, app. no. 23459/03, *supra* n. 11, paras 101-125.

18 CCSA, *Prince v. President of the Cape Law Society*, Case CCT36/00B, 25 January 2002, paras 131-138.



The accommodation, which was never discussed in the *Prince* case, is whether Mr. Prince's ambition to become a lawyer should also suffer from the criminalization of his religious practice. Why not do away with just that consequence? Now Mr. Prince was "prevented from practicing the profession of his choice. The impact of the limitation is profound indeed."<sup>19</sup> The careful approach of the ECtHR in *Thlimmenos* could have also helped Mr. Prince. It is one thing if there can be no exemption from the ban on the consumption of *dagga* for Rastafarian's. But in a democratic society, there is no reason why dagga-smoking Rastafarians should not be attorneys at law.

Mr. Prince's spiritually motivated fighting spirit did not stop there. In 2018, he was one of the parties of a CCSA case in which the Court declared legislation criminalizing the use, possession, purchase, and cultivation of cannabis unconstitutional, given the unjustified interference with the right to privacy.<sup>20</sup>

#### 4.2.3 Personal beliefs and other views

In *Amselem*, as in *Multani*, the SCC dismissed testimonies of religious "officials" of the religion in question and co-religionists. The Charter rights could not be construed as to protect only or specifically mainstream religious dogma. The very essence of the freedom of religion and belief was that it entitles individuals to create their own personal religious lifestyle out of existing doctrines – adhering to some, altering some, abandoning others.

The *Amselem* case was a sequel in a row of cases involving clashes between Chasidic Jews and the secular francophone inhabitants in Outremont.<sup>21</sup> *Amselem* was the first of these cases to "reach" the SCC. Did the inhabitants of an apartment building have a right to erect personal *succahs* on their balconies when celebrating the religious holiday of *Succoth*? The Court defined the freedom of religion and belief broadly. It reasoned that for the applicants, alternatives for the personal *succahs* would have resulted in distress which would "constitute a non-trivial interference" with their rights, whereas the impact on the other owners' rights, in allowing the *succahs* was at best minimal.<sup>22</sup> Hence, the ban was not justified.

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19 *Ibid.*, para. 51.

20 CCSA, *Minister of Justice and Constitutional Development and Others v. Prince (Clarke, Stobbs and Thorpe Intervening)* (Doctors of Life International Inc as Amicus Curiae); *National Director of Public Prosecutions and Others v Rubin*; *National Director of Public Prosecutions and Others v. Acton and Others*, Case CCT108/17, 18 September 2018.

21 See S. Van Praagh, 'View from the Succah', in R. Moon (ed.), *Law and Religious Pluralism in Canada*, UBC Press, Vancouver/Toronto (Canada), 2008, pp. 30-35. See *Forget v. Ville d'Outremont*, 2000 CanLII 19415 (QC CS and *Rosenverg v. Ville d'Outremont*, 2001 CanLII 25087 (QC CS) *supra* note 4.

22 SCC, *Syndicat Northcrest v. Amselem*, Case 29252, 29253, [2004] 2 SCR 551, 30 June 2004, para. 64.

The difference between majority and minority in this case was not only the difference regarding “reasonable accommodation” in a private law context (see section 4.2.2), but the sincerity of belief in question. The dissenting judges suspected that Mr. Amselem was looking for the protection of his personal preferences rather than his sincere religious beliefs. The argument that claimants may dishonestly allege sincere belief, where the matter was actually one of preference, had been raised before.<sup>23</sup> On the other hand, it was not a secular Court’s place to dig too deeply in the individual conscience of a believer or to accept only the testimony of religious officials. In both cases, the Court would be violating the freedom of religion and belief. The SCC’s concept of freedom of religion and belief enabled Mr. Amselem to have his personal beliefs, regarding the protection of a widely known Jewish religious tradition. Hence, the practice was obviously connected to the faith he adhered to. The vehemence and commitment shown in pursuing the legal protection demonstrated sincerity.<sup>24</sup>

While sympathetic to the situation of the Rastafarians, in *Prince* the Court found that an exemption was impossible to execute without compromising the state’s legitimate interest of preventing drug abuse and/or infringing the freedom of religion of Rastafarians. After all, an exemption modeled along the lines of the medical exemption would require the authorities to establish when *bona fide* Rastafari use was at stake and when it was not. Here, much like with the question of when a court should draw in doubt the sincerity of a believer, the dimension of personal freedom touched on the dimension of secularism and freedom of religion and belief (see section 4.7)

Leila Şahin was also forced to make a painful choice: continuing her education or removing the headscarf which was important to her in conducting her life in accordance with her faith. The same goes for the claimant in *S.A.S.* She ran the risk of being repeatedly fined, as the dissenting judges pointed out, or refraining from her religious practice. It was these “extremely painful and intensely burdensome choices of either being true to their faith or else respectful of the law” which according to the CCSA the “state should, wherever reasonably possible, seek to avoid”<sup>25</sup> placing before believers.

Prior to *Şahin*, the Strasbourg institutions had already decided cases involving the Islamic headscarf. At first, the Court was reluctant to even acknowledge that prohibition of the Islamic headscarf interfered with Article 9; first denying it, then assuming it,<sup>26</sup> and only in *Dogru*<sup>27</sup> finally accepting it.<sup>28</sup> Part of the

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23 See Bouchard & Taylor, *supra* n. 2, at 176.

24 *Syndicat Northcrest v. Amselem*, Case 29252, 29253, *supra* n. 22, paras 45-56.

25 CCSA, *Christian Education South Africa v. Minister of Education*, Case CCT4/00, 18 August 2000, para. 35.

26 C. Evans, ‘The Islamic Scarf in the European Court of Human Rights’, in *Melbourne Journal of International Law*, vol. 72, no. 7, pp. 52-73 (2006), p. 55, referring to *Dalhab* and *Şahin*.

27 ECtHR (C), *Dogru v. France*, app. no. 27058/05, 4 December 2008.

reluctance to protect the wearing of the headscarf by Muslim women, seemed to arise from a particular view regarding the Islamic headscarf. In so many words the majority in *Dalhab* and later in *Şahin* argued that the headscarf was at odds with gender equality, being “imposed on women by a religious precept”.<sup>29</sup>

This viewpoint was received with criticism. Dissenting judge Tulkens argued that the views of the majority regarding gender equality and the headscarf were at odds with the concept of human autonomy and showed intrusive paternalism.<sup>30</sup> Evans alleged that the judgment symbolized the Court’s general “reluctance to acknowledge the value and religious importance of many key religious practices outside of Christianity”.<sup>31</sup> Whether it was the criticism or just the passing of time, the ECtHR’s view has evolved. While finding against S.A.S., the Court took a different approach that was much more similar to the SCC: “What matters is how a believer, or a group of believers understand the conduct or symbol themselves.”<sup>32</sup>

While Leila Şahin’s headscarf was to be considered quite a mainstream practice among many Muslim women, S.A.S.’s *niqabs* and *burqas* were worn only by small groups of women in France and elsewhere in the world. Yet, the Court made it very explicit that respect for human dignity cannot be raised to justify a blanket ban for face coverings in public places. While face coverings may be perceived as strange by some, they were “the expression of a cultural identity which contributes to the pluralism that is inherent in democracy”.<sup>33</sup> While France was given a broad margin of appreciation by the majority to determine that rights and freedoms of others to mandate limitation of the practice to ensure “living together”, the dissenting judges Nussberger and Jäderblom saw it differently. They agreed with the careful balancing of the majority opinion. Nevertheless, they felt it “sacrifices concrete individual rights guaranteed by the Convention to abstract principles”.<sup>34</sup> The very attempt of the ban was to restrict pluralism based on “selective tolerance”.<sup>35</sup>

In *N.S.*, the question was not a general ban of the face veil in public, but an order to remove it when testifying in a criminal case. The majority in *N.S.*

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28 C. Evans, ‘Individual and Group Religious Freedom in the European Court of Human Rights: Cracks in the Intellectual Architecture’, in *Journal of Law and Religion*, vol. 26, no. 1, pp. 321-343 (2010), p. 330.

29 ECtHR (GC), *Leyla Şahin v. Turkey*, app. no. 44774/98, 10 November 2005, para. 111.

30 See ECtHR (GC), *Leyla Şahin v. Turkey*, app. no. 44774/98, 10 November 2005, *Dissenting opinion of Judge Tulkens*, para. 12.

31 Evans, *supra* n. 26, at 56.

32 Compare this to the discussion between the majority and dissenting Judge Tulkens: *Leyla Şahin v. Turkey*, app. no. 44774/98, *supra* n. 29, para. 111 and *Dissenting opinion of Judge Tulkens*, para. 12.

33 *S.A.S. v. France*, app. no 43835/11, *supra* n. 9, para. 120.

34 *S.A.S. v. France*, app. no 43835/11, *supra* n. 9, *Joint partly dissenting opinion of Judges Nussberger and Jäderblom*, para. 2.

35 *Ibid.*, para. 14.

rejected a “secular response that requires witnesses to park their religion at the courtroom door”. This “is inconsistent with [...] the Canadian tradition, and limits freedom of religion where no limit can be justified”.<sup>36</sup> Neither was there always a right to wear a religious garment when testifying. Concurring Judges LeBel and Rothstein, on the other hand, did favor a clear rule: they proposed to never allow a witness to wear a *niqab*.<sup>37</sup> Dissenting Justice Abella regarded forced removal of the *niqab* while testifying far greater harm, than the harm done to the accused if she were able to wear it while testifying.<sup>38</sup> She wanted to prevent a message that they were not welcome. If that was the message they heard, they might not turn to the criminal justice system if they had been victimized.<sup>39</sup> Forcing victims to choose between justice and their sincere beliefs was “no meaningful choice at all”.<sup>40</sup>

Abella’s view was identical to that of the CCSA in *Pillay*: what must be prevented is the message that “your religion and your culture (i.e. the way you practice it) are not welcome”.<sup>41</sup> In *Şahin*, a Muslim practice was banned in a Muslim majority country. While the claimant did not belong to a historically excluded religious minority, the message was identical to that in *Pillay*: you and your practice do not belong in this educational institution. That message is always hurtful, never mind the historical, political or sociological context.

#### 4.2.4 The obligation to promote tolerance

Over decades, conscientious objectors to military service have won increasing sympathy from human rights scholars and practitioners, as the evolving ECHR case law in *Thlimmenos* and *Bayatyan* has shown. Yet conscientious objection to military service is but an “ideal type” of conscientious objection to “neutral rules of general applicability”. As seen above, many conscientious individuals clash with seemingly neutral laws of general applicability because they mandate action or prohibit action which is of contentious significance to them. Gurbaj Singh with his metal kirpan and Moïse Amselem with his personal succah on the balcony, are such people – just like Sunali Pillay, Leyla Şahin, S.A.S., Garreth Anver Prince and N.S.

When general rules are made, especially in very pluralistic societies, the adverse effects on specific (religious) individuals are often difficult to assess. These adverse effects often materialize at a later point in individual cases. But in concrete administrative cases, where the legal framework merely provides

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36 *R. v. N.S.*, Case 33989, *supra* n. 5, para. 2.

37 *Ibid.*, para. 69.

38 *Ibid.*, para. 86.

39 *Ibid.*, para. 94.

40 *Ibid.*, paras 86, 94 and 96.

41 See *MEC for Education: Kwazulu-Natal and Other v Pillay*, Case CCT51/06, *supra* n. 7, para. 85.

a basis for a certain decision, but does not strictly demand it, the consequences for the individual are known. Thus, reasonable accommodation can be applied in such cases.

Both the *Multani* and the *Amselem* cases caused controversy. Bouchard and Taylor note that there was strong opposition to the *Multani* judgment in Quebec, including amongst 79% of the non-French speaking community in Montreal.<sup>42</sup> Gurbaj had to be escorted to school by the police because of hateful protest at the school gates, and articles were published in newspapers which described the judgment as “multiculturalism gone mad”.<sup>43</sup> Bouchard and Taylor were asked to advise the Quebec Government on interculturalism. What seems to matter is that Gurbaj was an orthodox believer from a minority religion which was relatively new in Canada, while mainstream society was largely secularized and culturally less familiar with his religion. The misunderstanding of a religious or cultural practice is also more likely if the said practice is (intentionally) misrepresented by others (belonging to the majority).<sup>44</sup>

Bouchard and Taylor propose the dissemination of “civic virtues” based on mutual understanding and respect as a solution.<sup>45</sup> The Court in *Multani* basically referred to these civic virtues when it iterated that indeed educators needed to install the values of tolerance and pluralism in students to counter the feelings of unfairness. One could argue that the installment and dissemination of civil virtues of mutual understanding and respect should be part of the basic toolkit of the “impartial organizer of pluralism”, a concept repeatedly applied by the ECtHR.

The inability to identify with “the other” led to large parts of the society viewing Gurbaj’s kirpan first and foremost as a weapon. The Court addressed this, rejecting the presentation of the kirpan as a symbol of violence as “disrespectful” and contrary to “Canadian values based on multiculturalism”.<sup>46</sup> What mattered is how a believer or a group of believers understand the conduct or symbol themselves.<sup>47</sup> An absolute prohibition of the kirpan would make orthodox Sikhs like Gurbaj unwelcome, forcing them to make a painful choice between their religion and the benefits of receiving an education in a public school.

The CCSA’s *Prince* and *Pillay* cases are also illustrative of what one could call the minority dimension of the freedom of religion. To Mr. Prince, *daggā* is a “holy herb”. However, he was exposed to the “manifest and hidden

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42 Bouchard & Taylor, *supra* n. 2, at 66.

43 See Ryder, *supra* n. 1, at 104.

44 See *ibid.*, p. 89.

45 See Bouchard & Taylor, *supra* n. 2, at 242.

46 *Multani v. Commission scolaire Marguerite-Bourgeoys*, Case 30322, *supra* n. 15, para. 71.

47 Compare this to the discussion between the majority and dissenting Judge Tulkens: *Leyla Şahin v. Turkey*, app. no. 44774/98, *supra* n. 29, para. 111 and *Dissenting opinion of Judge Tulkens*, para. 12.

prejudices of [the] majority” which condemned the use of dagga and which, in turn, had led to its criminalization.<sup>48</sup> “There can be no doubt” says Justice Ngcobo, “that the existence of the law which effectively punishes the practice of the Rastafari religion degrades and devalues the followers of the Rastafari religion [...]. It is a palpable invasion of their dignity. [...] It says that their religion is not worthy of protection. The impact of the limitation is profound indeed.”<sup>49</sup>

The *Multani* judgment argued that in an open society, we sometimes need to accept a certain degree of risks in order to enable people with different beliefs and customs to live together and afford everyone the same protection of his or her (religious) identity. When the only risk is the confrontation with others who do not share the same beliefs or might interpret some symbols differently, one court argued, there is no reason at all to limit the freedom to act upon beliefs. Rather, the state institutions should spread the message of tolerance and respect for diversity.

Part of that message was for teachers to explain to other children that the accommodation of Gurbaj’s religious beliefs was not “unfair” but mandated by tolerance for his beliefs, culture, and way of life. As the Canadian Supreme Court noted: “Tolerance is always age-appropriate.”<sup>50</sup> Properly worded, a message of tolerance would surely have been age-appropriate for Ms. Şahin’s fellow students and educators at the university. As the majority in *S.A.S.* noted, when a state legislates specifically to address practices motivated by belief it “takes the risk of contributing to the consolidation of the stereotypes which affect certain categories of the population and of encouraging the expression of intolerance, when it has a duty, on the contrary, to promote tolerance”.<sup>51</sup>

In *Şahin* and earlier cases, the ECtHR noted a “proselytizing effect” of the Islamic headscarf on other Muslim women. Religious symbols and practices will always have this effect to a certain degree. But in *Kokkinakis*, the ECtHR also said that the state must be totally indifferent to proselytism.<sup>52</sup> After all, as the SCC noted in *Big M*: “A truly free society is one which can accommodate a wide variety of beliefs, diversity of tastes and pursuits, customs and codes of conduct. What may appear good and true to a majoritarian religious group, or to the state acting at their behest, may not, for religious reasons, be imposed upon citizens who take a contrary view.”<sup>53</sup> The minority in *S.A.S.* echoes this,

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48 Du Plessis, *supra* n. 6, at 28.

49 *Prince v. President of the Cape Law Society*, Case CCT36/00B, *supra* n. 18, para. 51.

50 See majority opinion in SCC, *Chamberlain v. Surrey School District No. 36*, Case 28654, [2002] 4 SCR 710, 20 December 2002, para. 69.

51 *S.A.S. v. France*, app. no 43835/11, *supra* n. 9, para. 149.

52 ECtHR (C), *Kokkinakis v. Greece*, app. no. 14307/88, 25 May 1993, *Partly dissenting opinion of Judge Martens*.

53 SCC, *R. v. Big M Drug Mart Ltd.*, Case 18125, [1985] 1 SCR 295, 24 April 1985, pp. 336-337.

when reminding us that “[p]luralism, tolerance and broadmindedness” even includes everyone’s right to “shock, offend and disturb”.<sup>54</sup>

#### 4.3 FREEDOM OF RELIGION AND BELIEF AND FAMILY LAW/FAMILY RELATIONS

Freedom of religion and belief in the family and family law context relates to the intimate relationships believers have and the role their beliefs have therein. The cases studied deal more than once with the issue of a religious marriage, the right to get married for same-sex partners, and the distinction between marriage and other relationships. They also deal with the authority of parents with regard to their children and with personal law and individual autonomy. Here again, like with the individual dimension, the prime concern of the believers in question is not making their beliefs known, but to be able to live their personal, private, and family lives in accordance with their beliefs.

##### 4.3.1 Parents and children, medical autonomy and marriage

Five of the Canadian cases can be discussed under this dimension. *P.(D)*, (section I1.4.3) concerned a mother who was the custodian and still feared religious indoctrination of her child by the Jehovah’s Witness father who had access rights. In *Children’s Aid Society of Metropolitan Toronto* (section I1.4.4), the Jehovah’s Witness parents refused a blood transfusion for their new-born on religious grounds. Jehovah’s Witness’ beliefs regarding blood transfusion also feature in *A.C. v. Manitoba* (section I1.4.12). But *A.C.* is a mature 14-year-old, not an infant. The fourth case was initiated by a Jewish divorcé against her former husband (*Bruker* see section I1.4.11) for not fulfilling his contractual obligation to divorce her in accordance with Jewish religious law (*get*). Pursuant to the Supreme Court Act, the SCC can be asked to give advisory opinions concerning the constitutionality of proposed legislation. In 2003, the Governor referred the questions regarding proposed legislation to legalize same-sex marriage to the Court (*Same-Sex Marriage*, section I1.4.9).

Seven of the South African cases in this dimension challenge the existing exclusiveness of civil law marriage. Three of the cases deal with the recognition of women married only in accordance with Muslim rites as “spouse” for the purpose of insurance (*Amod*, section I2.4.5) and inheritance (*Daniels*, *Hassam*, sections I2.4.8 and I2.4.12). The *Fourie* case (section I2.4.10) was initiated by same-sex couples to challenge the exclusion of same sex from the institute of civil law marriage. *De Lange* (section I2.4.15) also deals with a same-sex union. Only this time, one of the partners was a minister for the South African

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54 *S.A.S. v. France*, app. no 43835/11, *supra* n. 9, *Joint partly dissenting opinion of Judges Nussberger and Jäderblom*, paras 6-10.



Methodist Church who had been dismissed because of this. The case is better discussed under freedom of religion and belief and group autonomy. *Robinson* (section I2.4.9.) concerned a life partnership and whether the surviving life partner should not have the same rights as a spouse. The sixth South African case, *Women's Legal Centre Trust*, (section I2.4.13) was about the question whether the failure to regulate Muslim marriages in a Muslim marriage Act amounted to a breach of constitutional obligations by parliament and executive. Finally, the eighth case in this dimension, *DE* (section I2.4.14), concerned existing provisions making it possible for a partner to take legal action against their adulterous spouse.

Just two of the Strasbourg cases are best discussed under the theme religion in the family and family law context. In *Yiğit* (section I3.4.9), similarly to the South African Islamic marriage cases, the widow of a purely religious marriage aspired to inherit from her deceased husband and to benefit from social security. *Refah* (section I3.4.5) was not about religious aspects of family law in practice, but about hypothetical legal pluralism, allowing for religious family law. The *Refah* party was prohibited because, among other things, it advocated such legal pluralism. This case is better discussed under the topic of freedom of religion and belief and secularism.

#### 4.3.2 The best interest of the child and freedom of religion and belief

The Canadian cases in this dimension show that the best interest of the child can limit the parent's and/or the minor child's freedom of religion. Where custody has been awarded to one parent, following a divorce, the other parent's freedom of religion and belief can be an issue. The "best interest of the child" can mandate a restriction of the right to disseminate the religion to the children. However, we also see debate on the bench on whether the proper standard for limiting parental rights should not be "harm" instead of best interest. There is also discussion as to whether the Charter applies with regard to family relations.

In *P. (D.) v. S. (C.)* the relationship between the little girl's separated parents had deteriorated. The Jehovah's Witness father challenged the existing access arrangement with the custodian mother, who was a Catholic. The mother was concerned about the intensity of the father's proselytism towards the child and the fact that the child actually accepted and repeated what she had heard. The majority dismissed the father's appeal and found that the Charter did not apply in the family context. Yet the majority was also of the view that there would be no infringement of the freedom of religion and belief, even if it did apply in the case. As the freedom of religion and belief was not absolute, it may be restricted in the child's best interest which was at stake.

In *Children's Aid Society of Metropolitan Toronto*, Jehovah's Witness parents had a seriously ill prematurely new-born child. While the parents' belief



prohibited blood transfusions, the child had no chance of survival without one. The SCC unanimously upheld the judgment which found that ordered transfusion did not violate the freedom of religion and belief of the child and parents.

In *A.C. v. Manitoba* it was the young teenager, a devout Jehovah's Witness like her parents, who initiated the case. The appellant was admitted to hospital when she was 14, almost 15 years old, suffering from Crohn's disease. Although the doctor believed that without a blood transfusion, she would run serious risks to her health and her life, she refused on the basis of her beliefs. A.C. wanted to show that she was mature like a 16-year-old, because that was the legal age at which her decision would have to be taken into consideration. Because she was not given this chance, she argued that her freedom of religion and belief had been violated. The majority found no violation, while two judges sympathized with the teenager in their separate opinion. One judge disagreed with the majority and found a violation.

*Children's Aid Society* showed the hard limit of the freedom of religion and belief in the Canadian approach. There was a medical emergency regarding an infant who could not speak for itself. Authorities may limit the rights of the parents in matters of life and death. The parents could not claim that the child's beliefs were also violated when her life was at stake as well.<sup>55</sup> Two judges argued that the freedom rights of the parents were also not interfered with. They did not extend to taking decisions which could harm the child. This line of reasoning may appeal to some, but arguably the reasoning of the majority was more consistent with the overall jurisprudence of the SCC. The freedom of religion and belief has a broad scope but can be limited, when (serious) harm is present: in this case the infant's life. After all, the decision of the parents would be irreversible in the most absolute sense. This prevents a *carte blanche* for state paternalism, even in matters of medical emergency.

The fundamental difference between the *Children's Aid Society* and *A.C.* is the age of the child. *A.C.* was old enough to have developed a consciousness and beliefs of her own. Nevertheless, the majority found against her. The law was clear and the official institutions had acted in accordance with it. *A.C.* was not yet 16. All judges acknowledged that in such situations, the maturity of minors should be taken into account more substantially than was the case here. Two judges even found a violation of the freedom of religion and belief, but also found a justification.

Binnie, the dissenting judge, went further. The Act as it stands violated the Charter rights of young people like *A.C.* The Act should provide for a procedural guarantee that allows for rebuttal of assumed immaturity. "[S]trong as is society's belief in the sanctity of life, it is equally fundamental that every competent individual is entitled to autonomy to choose or not to choose

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55 SCC, *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, Case 23298, [1995] 1 SCR 315, 27 January 1995, para. 103.

medical treatment [...].” The freedom of religion and belief “is given to everyone, including individuals under 16 years old”.<sup>56</sup> Binnie was honest about the fact it “is entirely understandable that judges, as in this case, would instinctively give priority to the sanctity of life. Religious convictions may change. Death is irreversible.”<sup>57</sup> But nevertheless, his views regarding the Charter demanded a bold stand, even where the outcome did not coincide with his own moral preferences.

*P. (D.) v. S(C.)* involved a non-custodian Jehovah’s Witness father who wished to teach his daughter about his religion. The mother feared “indoctrination”. Bearing witness to their religion is a fundamental element of the belief system of Jehovah’s Witnesses. They are known to “spread the word” by approaching strangers. Even more so, teaching their children about their faith will be important to them, as it would be for any believer of any religion, denomination, and confession.

Evidence of detrimental effects was the issue in *P. (D.)* Was the child’s father indoctrinating her and if so, did this create any kind of adverse effects on C? The difficulty here was when does the teaching of a devoutly religious parent become “indoctrination”, and when was such “indoctrination” harmful or not in the best interest? A majority of the Court here found against the father. Possibly the evidence had convinced them that he was a little too “fanatic” and that the mother was justified in being worried. But taking a look from behind the “veil of ignorance” does not support that view.

The child seemed to repeat quite frequently the creationist doctrine that her father had taught her: the world and all that lives in it was made by Jehovah. This view is representative for a great many religions and beliefs the world over, including the mother’s own Catholic faith. In itself, this shows no sign of fanaticism. One must be careful to assume “indoctrination” or “fanaticism” just because the behavior in question is connected to a religious belief.

Obviously there is a natural conflict here. The mother wanted to celebrate Christmas with her child and her father taught her that it was not good to do so. It is even more complicated when they are separated and especially if the difference of belief had led to conflict before the separation. But judges should not become arbiters in parental wars of religion. There is bound to be some confusion for the child. And, as the dissenting Justices McLachlin and Sopinka noted, “confusion” is not the same as “harm”.<sup>58</sup> Confusion is not enough to justify interference with the freedom of religion and belief.

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56 SCC, *A.C. v. Manitoba (Director of Child and Family Services)*, Case 31955, [2009] 2 SCR 181, 26 June 2009, para. 192.

57 *Ibid.*

58 SCC, *P. (D.) v. S (C.)*, Case 22296, [1993] 4 SCR 141, 21 October 1993, p. 65.

### 4.3.3 Religious marriage

Five cases deal with religious marriage. In *Bruker*, a Jewish divorcee took legal action to acquire the *get*, the divorce agreement which her husband had promised her. The three South African cases *Daniels*, *Hassam* and *Amod* were all initiated by widows of purely religious Muslim marriage, who challenged the disadvantageous legal consequences of not being considered “spouses”. The Convention case, *Yiğit*, was similarly initiated by the widow of a purely religious Muslim marriage in order to challenge disadvantageous inheritance and social security consequences from not being considered a spouse.

Jewish religious law requires the husband to initiate a religious law divorce, the *get*. In the present day, contractual agreements are used to provide women with the possibility of obtaining the divorce, i.e. obliging the husband to cooperate and to provide the *get*. Mr. Markovitz raised the freedom of religion and belief in his defense. A secular court could not oblige him to perform any act of religious law. As far as the state was concerned, Mrs. Bruker was divorced in civil law and free to marry anew. The majority of the Courts found with the ex-wife.

The majority considered that Mr. Marcovitz did not argue the existence of any sincere beliefs which prevented him from providing the *get*. As he himself claimed to be a practicing Jew, going to a rabbinical court to realize the *get* could not be considered interference. Had accepting the authority of a rabbinical court been counter to his beliefs, the situation might have been different.<sup>59</sup> Mrs. Bruker, however, was impaired by not obtaining a divorce in ability to live her life as a Jewish woman in Canada.<sup>60</sup> She would continue to be married in accordance with religious law, which would make it impossible to remarry and any new romantic relationship would automatically be adultery according to the religious law.

Two of nine judges dissented from the majority, because they believed that secular courts should not enforce an agreement stipulating any religious activity – this would violate the principle of secularity. The dissenting judges acknowledged that not enforcing the agreement would impair Mrs. Bruker. Yet they believed that the cost was too high. In their view, the freedom of religion was “negative”. Comparing it to the freedom of expression, the two argued that the state may not interfere, but does not “have to provide preachers with megaphones [...]”.<sup>61</sup> In 2008, Bouchard and Taylor seem to have advised the province of Quebec against such a purely negative reading of freedom of religion and belief. They favored an inclusive notion of “open

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59 D. Schneiderman, ‘Associational Rights, Religion and the Charter’, in R. Moon (ed.), *Law and Religious Pluralism in Canada*, UBC Press, Vancouver/Toronto (Canada), 2008, p. 77.

60 See SCC, *Bruker v. Marcovitz*, Case 31212, [2007] 3 SCR 607, 14 December 2007, para. 93.

61 *Ibid.*, para. 121.

secularism"<sup>62</sup> instead of exclusivist and rigid *laïcité*. The majority opinion seemed more embedded in the notion of "open secularism". This did not preclude the enforcement concepts of religious law by secular law, as long as they were translated into legal obligations. As for any legal obligation, the limits were set by human rights and public order amongst others.

The three South African religious marriage cases were all initiated by widows in Muslim marriages that had never been solemnized or registered as civil marriages. However, South African law made it possible to have a religious official be licensed as a civil marriage officer. Nevertheless, there was a strong practice of engaging in solely religious and/or traditional marriage.

Marriage as legal concept in South Africa must be understood in light of the political turnaround from an apartheid state to the Rainbow Nation. The apartheid era law equated European Christian understanding with civilization, degrading all other concepts to being uncivilized or at odds with good morals or *boni mores*. While apartheid era law made it possible to convert a religious marriage into a civil one, many African, "Colored" and Asian South Africans opted for traditional, Muslim or Hindu marriages, instead of civil ones. This left their unions to be regarded as not legally married and their offspring to be regarded as "illegitimate" by the state.<sup>63</sup> Subsequently, the new Rainbow Nation was committed to "the rights of ethnic, religious, and linguistic communities to promote their indigenous culture, to practice their religion, and to speak their language without undue state interference".<sup>64</sup>

Polygamy, however, recognized in Islamic and traditional African customary law remained a controversial issue. Van der Vyver notes that "affording full recognition to multi-tiered marriages was problematic from the outset due mainly to the persistence of a typically Western perception of marriage and the dictates of predominantly Christian principles relating to matrimonial affairs".<sup>65</sup> Legal and political discussion thus focused on the (alleged) conflict between religious law and equality.<sup>66</sup> Advocates of the new constitutional order differed in their appreciation of polygamous marriage. For some, it represented patriarchal norms which were at odds with gender equality. Others argued that if correctly understood in its own cultural context, it was not at odds with gender equality; on the contrary, it may even further equality. The pragmatic middle ground would be to acknowledge the social reality of

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62 Bouchard & Taylor, *supra* n. 2, at 20.

63 I. Currie & J. de Waal (in association with Lawyers for Human Rights and the Law Society of South Africa), *The Bill of Rights Handbook*, Juta & Co, 6<sup>th</sup> ed. Cape Town (South Africa), 2013, p. 333.

64 J. D. van der Vyver, 'Multi-Tiered Marriages in South Africa', in J. A. Nichols (ed.), *Marriage and Divorce in a Multicultural Context Multi-Tiered Marriage and the Boundaries of Civil Law and Religion*, Cambridge University Press, Cambridge (UK), 2012, p. 200.

65 *Ibid.*

66 Currie & de Waal, *supra* n. 63, at 333-334.

polygamous marriage.<sup>67</sup> It was the latter approach which the Court gradually adopted.

In *Amod* and *Daniels*, the CCSA highlighted the monogamous religious marriage. The only difference between the couples in question and common law couples was the certificate. If this led to detriment of the widows, they would be effectively discriminated against as women on the basis of religion and belief. In the *Amod* Supreme Court case, Chief Justice Mahomed refuted the apartheid era precedent which called Islamic marriage contrary to *boni mores* because of its (potentially) polygamous nature. He referred to the “new ethos” of “tolerance, pluralism and religious freedom”. This passage was repeated in *Daniels*. It symbolized the equation of cultural biases with apartheid era discrimination and the desire to break with that legacy. However, the Court reemphasized in *Daniels* that its ruling did not “foreshadow any answer on the question as to whether polygynous marriages are themselves consistent with the Constitution”.<sup>68</sup>

Finally, *Hassam* made it necessary to decide whether the equality argument also applied for a polygamous Islamic marriage. As her husband had married a second wife (without her knowledge or consent), the dilemma was either to acknowledge her rights as spouse in a polygamous marriage or to leave her empty-handed after his passing. The CCSA ruled in her favor. Mrs. Hassam was a spouse for the purpose of inheritance and in this case the Court made sure to mention it did not want to interfere in the discussion about the adoption of a Muslim Marriage Act. The Recognition of Customary Marriages Act 120 of 1998 sought to offer official status to customary marriages while retaining protection of equality.<sup>69</sup> However, recognition of Muslim marriages and personal and family law by legislation provoked so much debate inside and outside the Muslim community that it had prevented the passing of legislation thus far.

The 2004 *Bhe* case, not amongst the selected cases, concerning traditional African law and marriage, also made clear that the Constitutional Court had a double equality commitment, much like in the religious liberty cases. The first commitment was then towards equal treatment of cultural and religious identities. The second was to equal treatment of individuals, including equal treatment of men and women, in equal circumstances. The Court was cautious of “slippery slopes” and promoted “living customary law”, which was an acknowledgement of the rules that are adapted to fit in “with changed circumstances”.<sup>70</sup> There are human rights scholars and advocates, outside of the

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67 J. Sinclair, ‘Family Rights’, in D. Van Wyk, J. Dugard, V.B. de Villiers, D. Davis (eds.), *Rights and Constitutionalism, The New South African Legal Order*, Clarendon Press, Oxford (UK), 1996, pp. 561-565.

68 CCSA, *Hassam v. Jacobs NO and Others*, Case CCT83/08, 15 July 2009, paras 24, 30 and 35.

69 See van der Vyver, *supra* n. 64, at 201.

70 CCSA, *Bhe and Others v. Khayelitsha Magistrate and Others*, Case CCT49/03, 15 October 2004, para. 87.

religious minorities in question, who believe in a synthesis of the two equality promises. Eventually “freedom of religious exercise” in South Africa may “empower a pious Muslim man to take four wives into his loving permanent care”.<sup>71</sup>

In 2009, the Women’s Legal Centre Trust sought direct access to the Constitutional Court to declare that the failure of Parliament to enact a Muslim Marriage thus far, which would have remedied uncertainties, constituted a breach of constitutional obligations. In accordance with the Constitution, the Constitutional Court can make such a declaration. However, the CCSA in the *Women’s Legal Centre Trust* case specified that the provision was to be interpreted narrowly while constitutional review (of proposed or existing legislation) must be interpreted broadly to guarantee protection of constitutional rights. Finally, the Court considered that given the many interests and choices involved in adopting legislation recognizing Muslim marriages, it would not be appropriate to decide as a Court of first and final instance. Quite recently the Women’s Legal Centre Trust brought a case to the CCSA to invalidate the Marriage Act and Divorce Act, for amongst others not recognizing marriages conducted under *Shari’a*. The CCSA declared in 2022 that the challenged Acts were indeed with the Constitution in that they fail to recognize such marriages, marriages which have not been registered as civil marriages, as valid marriages for all purposes in South Africa, and to regulate the consequences of such recognition.<sup>72</sup>

Just like the South African widows, Mrs. Yiğit was only married in accordance with Islamic law in Turkey. National law recognized only civil law marriage. Hence, after her husband’s passing Mrs. Yiğit had no pension, social security, or inheritance rights. Mrs. Yiğit never raised the freedom of religion and belief in her plight. After all, the declared state doctrine of *laïcité* was the reason for the insistence on civil law marriage. She raised her rights under private and family life. At the ECtHR, the majority found against Mrs. Yiğit. Inheritance and social security law differentiated between married and unmarried couples. Mrs. Yiğit was not married, while there was no legal obstacle to getting married. So, she was no widow in the eyes of the law. But was the differentiation as such justified? The concurring Judge Rozakis drew attention to the social fact of lasting unions and families outside marriage in many member states. The “living instrument” doctrine did not yet mandate

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71 J. Witte Jr. and J.A. Nichols, ‘The Frontiers of Marital Pluralism- An Afterword’, in J. A. Nichols (ed.), *Marriage and Divorce in a Multicultural Context Multi-Tiered Marriage and the Boundaries of Civil Law and Religion*, Cambridge University Press, Cambridge (UK), 2012, p. 366.

72 CCSA, *Women’s Legal Centre Trust v. President of the Republic*, Case CCT13/09, July 2009, paras 11-12 and 23. See CCSA, *Women’s Legal Centre Trust v President of the Republic of South Africa and Others*, Case CCT 24/21, 28 June 2022.

that all lasting unions and families were treated equally in all cases.<sup>73</sup> What was implied, was that in the future it might.

The Turkish Government took the position that differentiation between legal marriage and other unions had the purpose to “protect the most important building block of society, the family”.<sup>74</sup> Mrs. Yiğit and her husband might not have disagreed. For their own purposes, most probably they were married, and the civil marriage most likely represented nothing more than a formality. Arguably, inspiration from the CCSA cases on Islamic marriages would have led to a different outcome. One which have done more to protect the equality of Mrs. Yiğit *vis-à-vis* other widows in Turkey.

#### 4.3.4 Same-sex marriage

The issue of same-sex marriage often raises controversy. Some of the arguments on either side are inspired by religion and belief. This was and is no different in Canada, before and after the amendment to the Marriage Act<sup>75</sup> or in South Africa before and after *Fourie*.

The four questions put to the Supreme Court of Canada in *Same-Sex Marriage* regarded the jurisdiction of the national Parliament to change the law in this regard, whether the proposed legalization was consistent with the Charter, whether officials who did not want to participate in such marriages for religious reasons would be protected, and whether legislation in the provinces at the time, restricting marriage to be eligible for different-sex couples only, was consistent with the Charter.<sup>76</sup>

The Court concluded that the national parliament could change the law so as to extend the right to marry to same-sex couples. It found that the act, rather than being in opposition to the Charter, furthered the Charter values. The SCC proposed that officials who did not want to be involved in the execution of such marriages for religious reasons, could claim conscientious objection on basis of the freedom of religion and belief. Finally, the Court deemed the fourth question, regarding the situation before the amendment, irrelevant, since the Act proposed to alter the legal situation.

The CCSA in *Fourie* ordered the legislator to accommodate same-sex couples wishing to enter into a legally recognized union. Consequently, the Civil Union

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73 ECtHR (GC), *Terife Yiğit v. Turkey*, app.no. 3976/05, 2 November 2010, *Concurring opinion of Judge Rozakis*.

74 ECtHR (GC), *Terife Yiğit v. Turkey*, app.no. 3976/05, 2 November 2010, para. 61.

75 For a discussion of the internal debate within the United Church of Canada see J. Nedelsky and R. Hutchinson, ‘Clashes of Principle and the Possibility of Dialogue: A Case Study of Same-Sex marriage in the United Church of Canada’, in R. Moon (ed.), *Law and Religious Pluralism in Canada*, UBC Press, Vancouver/Toronto (Canada), 2008.

76 See SCC, *Reference re Same-Sex Marriage*, Case 29866, [2004] 3 SCR 698, 9 December 2004, para. 2.



Act 17 of 2006 provided official legal status, either as a civil union or marriage, for same-sex couples.<sup>77</sup> Mrs. Fourie and Mrs. Bonthuys had been a couple for more than a decade and wanted to get married. In 2002, they asked the Pretoria High Court to declare their right to get married.<sup>78</sup> While the *Fourie* case was being heard in the Supreme Court of Appeal, the Lesbian and Gay Equality Project launched an application with the same ambition.<sup>79</sup> The judgment without any doubt was part of the formulation of the new ethos<sup>80</sup> which characterized South Africa as post-apartheid Rainbow Nation, as relied on by Justice Mohamed in *Daniels*.

In the *boni mores* of the new ethos, marriage as an institution was seen as one of great social, cultural, and emotional relevance. In 2005, a majority of the Court still held that the distinction between married and unmarried couples in the Maintenance of Surviving Spouses Act was justified, mainly because the law attributed many kinds of special privileges to married couples as opposed to unmarried couples.<sup>81</sup> Same-sex couples however were excluded, literally “by definition”. They could never claim to be married. “The position of partners married according to Muslim rites in this respect is different. They fall under the ordinary meaning of ‘spouse’”.<sup>82</sup> It was the categorical exclusion of same-sex couples which violated the new ethos.

Both the SCC and the CCSA showed that a free and open society required mutual respect and a balance to be struck between the rights of different people and groups. Their reasoning implicitly and explicitly touched on fundamental issues to do with the freedom of religion and belief.

The exclusion of same-sex couples from the institution of marriage in Canada and South Africa, as elsewhere in the world, was rooted in the past. The marriage which the state recognized was the “civil marriage”, which may or may not coincide or be identical to a religious or cultural marriage. Civil marriage as a state institution afforded couples some kind of state or societal recognition of their bond, often with legal consequences.<sup>83</sup> If the state limited the civil marriage because of the beliefs of one part of society, it put their beliefs above those who believe differently.

The South African Constitutional Court said in another of the selected cases (*Solberg c.s.*, section I2.4.4) that parliament “[b]y endorsing a particular faith as a direct and sectarian source of values for legislation binding on the whole

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77 See van der Vyver, *supra* n. 64, at 201.

78 CCSA, *Minister of Home Affairs and Another v. Fourie and Another; Lesbian and Gay Equality Project and Others v. Minister of Justice and Constitutional Development*, Cases CCT60/04 and CCT10/05, 1 December 2005, para. 1.

79 *Ibid.*, para. 34.

80 See CCSA, *Daniels v. Campbell NO and Others*, Case CCT40/03, 11 March 2004, para. 30.

81 See CCSA, *Volks v. Robinson*, Case CCT12/04, 25 February 2005. See also van der Vyver, *supra* n. 64, at 213.

82 *Daniels v. Campbell NO and Others*, Case CCT40/03, *supra* n. 80, para. 30.

83 See Schneiderman, *supra* n. 59, at 74.



nation, it exceeds the competence granted to it by the Constitution". This was because it divided the nation into "insiders who belong, and outsiders who are tolerated". "This is impermissible in the multi-faith, heterodox society contemplated by our Constitution."<sup>84</sup> The SCC in *Same-Sex Marriage* referred to a past when "marriage and religion were thought to be inseparable". "This is no longer the case. Canada is a pluralistic society. Marriage, from the perspective of the state, is a civil institution."<sup>85</sup>

In Canada and South Africa, as elsewhere in the world where the issue of same-sex marriage is raised in courts, there are always constitutional issues regarding the power of courts and/or legislatures in defining the concept, foundation, or institution of marriage. The arguments and counterarguments are very relative to the respective constitutional orders. Yet from the perspective of the freedom of religion and belief, a state recognizing just one concept, foundation and definition of marriage will always be infringing the freedom of those who hold another concept, foundation, or institution of marriage to be true. Such infringement must be justified under a limitations clause. And the relevant question is if this is possible as a matter of principle. The distinction between the "sacred and the secular" must be maintained in a constitutional state in a truly free society, the CCSA said in *Fourie*. Forcing one into the other was contrary to it.<sup>86</sup>

For those who on the basis of sincere beliefs refuse to actively participate in the performance of a same-sex marriage, both the SCC and the CCSA acknowledged "conscientious objection" on the basis of freedom of religion and belief.<sup>87</sup> According to Ryder's "conception of equal religious citizenship", freedom of religion requires the accommodation of religious objectors as long as equal access to same-sex marriage is guaranteed.<sup>88</sup> After the introduction of same-sex marriage in Canada, civil servants who had religious objections to performing such marriages relied on the freedom of religion and belief. This issue has been resolved in different fashions by the provincial governments:<sup>89</sup>

- three provinces issued statements to marriage commissioners saying they must resign if unwilling to perform same-sex marriage and be given other posts;
- four provinces allowed conscientious refusal for civil servants, as they took the position that this would not compromise equal access to same-sex marriage;

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84 CCSA, *S v. Lawrence*; *S v. Negal*; *S v. Solberg*, Cases CCT38/96; CCT39/96; CCT40/96, 6 October 1997, para. 179.

85 *Reference re Same-Sex Marriage*, Case 29866, *supra* n. 76, para. 22.

86 *Minister of Home Affairs and Another v. Fourie et al.*, Cases CCT60/04 and CCT10/05, *supra* n. 78, para. 94.

87 *Reference re Same-Sex Marriage*, Case 29866, *supra* n. 76, paras 58-59.

88 See Ryder, *supra* n. 1, at 101-102.

89 See *ibid.*, pp. 100-101.

- in Nova Scotia, Ontario and Quebec, the issue has not arisen, because legal marriage can be performed by judges and justices of the peace or even any individual chosen by parties (Quebec).

After all, the freedom of religion does not include the right to violate the equality rights of others. This places on the provincial governments the burden to demonstrate “undue hardship” when allowing conscientious objection. Furthermore, now that same-sex marriage is legal, it is not discriminatory for governments to require new civil servants to accept performing same-sex marriage. The freedom of religion issue is relevant mainly for those civil servants who applied for their jobs at a time when it was not foreseeable that this would ever be the case.

From a more fundamental point of view, the question is whether the freedom of religion and belief should not always oblige the state to accommodate civil servants, who are conscientious objectors, by allowing them from refraining from being engaged in the performance of marriages at odds with their beliefs. The obvious limit is of course that the accommodation may not negatively affect the possibility of the state to conduct those marriages, because that would violate the equality rights of the candidate spouses.

The CCSA, while ruling that the absence of a possibility for same-sex couples to get married constituted a violation of the constitutional rights, did not fill the “constitutional vacuum” itself. It “cast the ball” towards the legislator. The Civil Union Act 17 of 2006 provided official legal status, either as a civil union or marriage, for same-sex couples.<sup>90</sup>

#### 4.3.5 The importance of the issue of marriage

But did the *boni mores* of the new ethos also include co-habitants next to religious and traditional marriages, as well as same-sex marriages? All marriage cases show that people themselves are the authors of the “mores” according to which they shape their intimate and family relations. In *Robinson*, a majority of judges on the CCSA found the differentiation between married and unmarried opposite-sex partners in inheritance to be constitutional. There is a choice to get married and to not get married. Both must be respected.<sup>91</sup> The dissenting judges disagreed. The privilege given to marriage was unfair discrimination. Why should marriage “inevitably remain privileged”? All lasting partnerships play a very similar role in society to marriages.<sup>92</sup>

For many ECHR member states, for many years the position of the Turkish Government in *Yiğit* was natural and logical. It also justified unequal treatment

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<sup>90</sup> See van der Vyver, *supra* n. 64, at 201.

<sup>91</sup> *Volks v. Robinson*, Case CCT12/04, *supra* n. 81, paras 90-96.

<sup>92</sup> *Ibid.*, paras 118 and 122.

against children born out of wedlock,<sup>93</sup> unequal treatment of same-sex couples in the possibility of obtaining a legal marriage, and unequal treatment of unmarried couples. Some of these differences over time failed to stand the test of necessity in a democratic society. Are not all families and lasting relationships “building blocks”?

In his separate dissenting opinion in *Robinson*, Sachs argued for a situational assessment of all relationships and families.<sup>94</sup> He stressed the value given to marriage by cultural and religious groups. Based on their freedom of religion and belief, these groups also retained a right to “condemn those who are guilty of what they may regard as fornication and adultery”. But their beliefs could not be considered a source of the law. Protection of marriages did not require the protection to be exclusive to marriages.<sup>95</sup> Indeed his argument heralded the unanimous decision in, which did away with still existing legal action against adultery. The roots of the claims directed against adultery, so Madlanga argued, lay in patriarchy.<sup>96</sup> Chief Justice Mogoeng, in his separate concurring opinion, stressed that marriage is a human institution. The law regulated it, enforced obligations which flow from it and must take away obstacles which interfere with it. All the rest was the obligation of the spouses. The law cannot rescue an otherwise ailing marriage.<sup>97</sup>

The current legal concept of (civil) marriage, as applied in many parts of the world, is a consequence of the modern state born out of Enlightenment and the French Revolution. Prior to this, the state had no role in forging marriages.<sup>98</sup> While for mainly Catholic France, state marriage was an instrument of separating church and state, for many Protestant nations the civil marriage was a beneficial way of containing the minority Catholic communities. These concepts informed the member states of the Council of Europe (CoE), Canada and South Africa. Interestingly nowadays, the issue of religious personal and marriage law is not just important for religious and cultural minorities in Western liberal democracies, but “increasingly relevant for more traditional Christian communities”.<sup>99</sup> Not only in Canada, South Africa and Europe, but elsewhere in the world amongst “various Christians, Jews, Muslims, Hindus, and others [there] is a call to withdraw from the state family law system and to operate their own internal religious legal systems”.<sup>100</sup>

In *Fourie*, the CCSA said that a truly free society distinction between the “sacred and the secular” must be maintained. “Forcing one into the other”

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93 ECtHR, *Marckx v. Belgium*, app. no 6833/74, 13 June 1979 and *Dudgeon v. the United Kingdom*, app. no.7525/76, 22 October 1981.

94 *Volks v. Robinson*, Case CCT12/04, *supra* n. 81, paras 147-149 and 151.

95 *Ibid.*, paras 204 and 206-208.

96 CCSA, *DE v. RH*, Case CCT182/14, 19 June 2015, para. 14.

97 *Ibid.*, paras 67-71.

98 See Witte and Nichols, *supra* n. 71, at 362.

99 *Ibid.*, p. 358.

100 *Ibid.*, p. 365.

was contrary to the principles of a free society and a constitutional state.<sup>101</sup> The argument can work both ways. Sunstein and Thaler challenge us to imagine a society without civil marriage. Faith-based and secular institutions would be free to define marriage as they see fit, thereby accommodating all various views on marriage. Couples choose themselves. The state regulates only inheritance, taxation, pensions, insurance and bans incestuous relationships, (sexual) violence and marriage of minors.<sup>102</sup> The idea might seem radical from a current perspective, but before the modern state so did civil marriage.

Witte and Nichols note that liberalism's contractarian logic supports a pluralist personal and marriage law system, in which couples and faith-based communities can govern their own domestic lives instead of the state. While some may want to opt out of state law, others could choose to opt in. Obviously, the system of manifold accommodation would require all to tolerate all the diverging choices. It also requires the acceptance that at some level, the state has the power to intervene and regulate. A legal pluralism based on liberalism's values can never become a claim to absolute legal autonomy and a wholly independent parallel legal order.<sup>103</sup>

#### 4.4 THE FREEDOM OF RELIGION BELIEF AND GROUP AUTONOMY

Communities of believers create infrastructures which consist, for example, of places of worship, religious schools and religious organizations. This enables their members to take part in rituals, sacrosanct activities and other relevant practices.<sup>104</sup> Dinstein explains that "freedom of religion, as an individual right, may be nullified unless complemented by a collective human right of the religious group to construct the infrastructure" for the individual enjoyment of the right.<sup>105</sup> This is echoed in many of the selected cases by all three tribunals. The Canadian Charter, the South African Bill of Rights and the European Convention each explicitly or implicitly recognize a collective dimension of freedom of religion and belief.

Individuals and groups rely on the collective dimension when the state or others interfere with the group autonomy created by the freedom right. Sometimes, individuals claim that the group autonomy's scope is too broad

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101 *Minister of Home Affairs and Another v. Fourie et al.*, Cases CCT60/04 and CCT10/05, *supra* n. 78, para. 94.

102 C. R. Sunstein and R. H. Thaler, 'Privatizing Marriage', in *The Monist*, vol. 91, nos. 3 and 4, pp. 377-87 (2008), pp. 377-387.

103 Witte and Nichols, *supra* n. 71, at 364-371.

104 See Evans, *supra* n. 8, at 103.

105 Y. Dinstein, 'Freedom of Religion and Religious Minorities', in Y. Dinstein (ed.) *The Protection of Minorities and Human Rights*, M. Nijhoff, Dordrecht (Netherlands), 1992, p. 152, cited by Evans, *supra* n. 8, at 103.

and infringes on individual rights. Sometimes, difficult questions have to be answered about the coexistence between state law and “own law” of communities.

#### 4.4.1 Different aspects of group autonomy for faith-based groups

The collective dimension of freedom of religion and belief features in a total of 13 of the case studies. Six of these cases were decided by the ECtHR, five were decided by the SCC, two were decided by the CCSA. However, in one other South African case, the collective dimension plays a major “support role”.

The Canadian *Sioui* case (section I1.4.1) was not decided under the Charter but concerned treaty-rights for members of a First Nation to roam freely in their ancestral hunting grounds, now a national park. *Hofer* (section I1.4.2) was about a contractual conflict between a Hutterian community and one of its members. In *Trinity Western University (TWU)* (section I1.4.5), the issue was whether a Christian university which had banned homosexual relations could nevertheless pre-educate teachers for the public educational system. The Jehovah’s Witnesses congregation in *Lafontaine* (section I1.4.8) wanted to establish a place of worship, but remained unsuccessful because of municipal zoning. The *Alberta v. Hutterian Brethren* case (section I1.4.13) was about the withdrawal of an exemption for the Anabaptist brethren, regarding the obligatory photograph on drivers licenses.

In the South African case *Christian Education* (section I2.4.6), an educational association resisted the national ban on corporal punishment in schools. Corporal punishment was considered part of its faith-based educational approach. *De Lange* (section I2.4.15) was about a Methodist minister who was dismissed when she married her same-sex partner in a civil procedure. In *Prince* (section I2.4.7), already discussed in sections above, the collective dimension played a major “support role”, as the CCSA assessed the workability of an exemption from illicit drug law for the Rastafarian community.

*Cha’are Shalom* (section I3.4.3) decided by the ECtHR was about the permit the group wanted to acquire so it could slaughter in accordance with Jewish ultra-orthodox precepts. *Hasan v. Chaush* (section I3.4.4) dealt with a conflict between two leaders and factions within the Muslim community of Bulgaria. The question was whether the government’s official recognition of one of the two was interference with the collective dimension. *Refah* (section I3.4.5) was about a faith-based political party, declared unconstitutional by the Turkish Constitutional Court while in government.

The *Mouvement Raëlien* case (section I3.4.12) concerned a new religious community which advertised with posters. In one Swiss canton, the posters were banned. *Sindicatul Păstorul Cel Bun* (section I3.4.13) was about the question whether the clerical and lay employees of the Orthodox Church in Romania may organize themselves in a new trade union. The sixth Strasbourg case,

*Fernández Martínez* (section I3.4.14), like *De Lange* concerned a dismissal. The claimant was a “married priest” who taught Catholic religion in the public school system. When the Church no longer regarded him fit to do so, he was not prolonged as a teacher.

In *Sioui, Alberta v. Hutterian Brethren, Lafontaine, Cha'are Shalom, Mouvement Raëlien* and with regard to the community aspect in *Prince*, the collective dimension relates primarily to collective practice and manifestation. In *Hofer, Trinity Western University, Christian Education, De Lange, Hasan v. Chaush, Sindicatul Păstorul Cel Bun* and *Fernández Martínez*, the collective dimension translates to organizational autonomy. *Refah* features a different aspect, namely political freedom for faith-based communities to influence the political process within the nations they live in. One of the central ideas advocated by the *Refah* party is legal pluralism. This relates to cases of religious and/or traditional family law, discussed elaborately in section 4.3. It also relates to freedom of religion and belief and secularism discussed in section 4.7. In this section, it will be discussed from the angle of the “own law” of faith-based communities.

#### 4.4.2 Collective practice and manifestation

Collective worship may very well be at the center of communal practice and manifestation. The Jehovah's Witness community of Lafontaine, Quebec, was looking for a lot to build a place of worship. Unfortunately, wherever there were lots for sale, the zoning plan did not allow for places of worship. On three occasions, the congregation applied after it had found buildings/land in areas where there were also other places of worship. Three times, the applications were denied.<sup>106</sup>

The majority and the minority on the SCC agreed that the municipality did not live up to required transparency and procedural fairness. What they disagreed on, was whether this amounted to a breach of a positive obligation. The majority found a positive obligation of cooperation which followed from the freedom of religion and belief. Denial without reason amounted to a breach of procedural fairness.<sup>107</sup> The minority found that state neutrality prevented a municipality from actively assisting a congregation in finding a lot to build a house of worship.<sup>108</sup> The dissenting judges did not answer how prejudice hiding under neutrality could be prevented.

In *Sioui*, the invoked rights did not follow from the Charter, but from a treaty concluded long before the existence of contemporary Canada between a British officer and the Huron nation. The treaty guaranteed freedom to “carry

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106 SCC, *Congrégation des témoins de Jéhova de St-Jérôme-Lafontaine v. Lafontaine (Village)*, Case 29507, [2004] 2 SCR 650, 30 June 2004, paras 18-27.

107 *Ibid.*, paras 1-9.

108 *Ibid.*, para. 71.

on their customs and their religion" in the area. The rights were invoked by members of a present-day Huron band. To adhere to ancestral customs, they had camped in a national park and cut down trees to make a fire. According to existing laws, the Hurons were punishable. The treaty, however, covered the area in the park.<sup>109</sup>

The SCC first established that the treaty still had legal force under Canadian law. But this did not automatically mean that practice of ancestral customs in the park was protected. After all, the treaty did not specify any area. Yet "for a freedom to have real value and meaning, it must be possible to exercise it somewhere." A "liberal and generous approach [...] must be adopted towards Indians' rights".<sup>110</sup> Hence, the claimant's rights must lead to an exemption from the generally applicable Act (see section 4.2). The SCC found the interests of the Park Act to be reconcilable with the treaty rights. The Huron practiced to not compromise the overall purpose of preservation of nature. "Exclusive use is not an essential aspect of public ownership."<sup>111</sup>

While the generous and liberal approach in *Sioui* led to an exemption from generally applicable laws, in *Alberta v. Hutterian Brethren*, the SCC found in favor of the province which revoked an exemption. The province used to allow the Hutterians to hold drivers licenses without photographs. For the Hutterians, photographs were contrary to their belief that no images of humans must be made. Yet the transport of people and goods was essential to their life as a community, isolated from others in the countryside. For the majority, however, the Hutterians still had a meaningful choice. Not driving themselves, but hiring drivers with a photograph license, would make the rural lifestyle more costly but not impossible, while they could adhere to their rejection of photographs.<sup>112</sup>

The minority disagreed. Because the very requirement of the photo "offends the religious beliefs of the Wilson Colony members", Justice Abella explained, it was "difficult to conclude that it minimally impairs the Hutterites' religious rights".<sup>113</sup> With regard to the salutary effects, she noted that the system with the non-photo licenses had worked without incident in the past. Not including them now would only have minimal effects for the province.<sup>114</sup>

In *Prince*, the CCSA was also looking to reconcile the purpose of a general prohibition with minority rights. It concluded that a general exemption for the Rastafarian community was unworkable because of the loose organizational structure. Exemption would also imply that state institutions would have to decide when *bona fide* Rastafari use was at stake and when it was not. This

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109 SCC, *R. v. Sioui*, Case 20628, [1990] 1 SCR 1025, 24 May 1990, pp. 8-13.

110 *Ibid.*, pp. 45-47.

111 *Ibid.*, p. 53.

112 SCC, *Alberta v. Hutterian Brethren of Wilson Colony*, Case 32186, [2009] 2 SCR 567, 24 July 2009, paras 93 and 97-98.

113 *Ibid.*, paras 147-148.

114 *Ibid.*, paras 157-158.



was inconsistent with the freedom of religion<sup>115</sup> (see further section 4.2.2). The South African Constitution explicitly acknowledges collective rights. In this regard the term “communities” is used. Community is neutral as far as numerical relations are concerned and still signifies “non-dominance”.<sup>116</sup> South African history teaches that communities outnumbered by others can be the dominant and excluding party.

Community also connotes voluntarism: individuals who feel connected by beliefs, practices, customs and rites which they share. However, O'Reagan, the dissenting judge in the South African *Pillay* case, pointed to a danger of a society of the atomized communities rather than a unified diverse society.<sup>117</sup> This echoes a commonly heard criticism of group rights. The question is whether a truly open society is conceivable without some communities which wish to withdraw from general society? (see further section 4.4.5).

The ECtHR has explicitly and vividly acknowledged the “indispensable” nature of “autonomous existence of religious communities” for “pluralism in a democratic society”.<sup>118</sup> While giving bold protection to organizational autonomy (see section 4.4.3), in two cases in the selection in which collective practice and manifestation features, the Court found against the communities. The ultra-orthodox Jews of France could not rely on the majority of the Court for a permit to slaughter *glatt kosher*. Nor could the Raëlien Movement of Switzerland rely on the majority to protect them to spread their message by poster. Some have criticized that the Strasbourg institutions have neglected this element of the collective dimension, unlike the organizational autonomy since the days of the Commission. For example, in one Commission case a Muslim teacher requested time off to pray at the local mosque. The Commission found that since he had a prayer room in school, there was no interference. Yet taking part in the communal nature of Friday Prayers is of special significance to many Muslims.<sup>119</sup> “Whether a belief is practiced ‘alone or in community with others’ and in ‘public or in private’ is a matter of choice for the believer”<sup>120</sup> Evans explains.

Cha'are Shalom Ve Tsedek is an organization representing ultra-orthodox Jews in France. The community's standard of *kosher* meat differs from main-

115 CCSA, *Prince v. President of the Cape Law Society*, Case CCT36/00B, 25 January 2002, paras 131-138.

116 Currie & de Waal, *supra* n. 63, at 628-629.

117 MEC for Education: KwaZulu-Natal and Other v. Pillay, Case CCT51/06, *supra* n. 7, paras 154-156.

118 See Z. R. Calo, ‘Pluralism, Secularism and the European Court of Human Rights’, in *Journal of Law and Religion*, vol. 26, no. 1, pp. 261-280 (2010), p. 262. See B. Rainey, P. McCormick and C. Ovey (eds.), *Jacobs, White & Ovey: The European Convention on Human Rights*, 8th ed., Oxford University Press, Oxford (UK), 2021, p. 461. See, e.g., ECtHR (C), *Metropolitan Church of Bessarabia and Others v. Moldova*, app. no. 25781/94, 13 December 2001.

119 EComHR, *X v. the United Kingdom*, app. no. 8160/78, 12 March 1981.

120 Evans, *supra* n. 8, at 103.



stream orthodoxy and is called *glatt kosher*. The Government had refused a permit for the community, as the mainstream orthodox community already possessed permits. Also, the ultra-orthodox community already imported *glatt kosher* meat from Belgium. This is why the ECtHR found against the community.<sup>121</sup> The judgment fails to explain conceptually how one member state can rely on the policies of another to discharge itself of obligations under the Convention.

The majority accepted that slaughter in accordance with religious law was covered by Article 9. However, it found that selling such meat was not protected by Article 9.<sup>122</sup> Critics like Learner and Rabello have asserted that the Court failed to take into consideration that slaughter in accordance with Jewish law “is not simply a way to provide permitted food but a manifestation of a religious belief and a way of life”.<sup>123</sup> The majority instead insisted that selling *glatt kosher* meat was essentially commercial and only religious “in an accessory way”. The Government had raised the same argument.<sup>124</sup> But does the reasoning not sound more logical the other way around? Whoever sells food to a minority (within a minority) faith-based group, cannot have departed from commercial considerations first. It is the commercial nature, which is an accessory, while the religious nature is dominant.

Both the majority and minority opinions in *Cha'are* cited earlier jurisprudence about the state as impartial organizer of pluralism. Lerner and Rabello suggest that the Government's purpose was to eliminate pluralism within the Jewish community.<sup>125</sup> Indeed the minority stressed that the state may not eliminate pluralism to eliminate communal tension. In their opinion, the denial of the application constitutes an interference which cannot be justified under the limitations clause. They find a violation of the freedom of religion and belief in conjunction with the right to non-discrimination.<sup>126</sup>

The Movement Raëlien established in the 1970s was a new religion. The Swiss canton of Neuchâtel prohibited posters of the movement which referred to the website. On the website, which was legal, the core beliefs were explained. They included human cloning “geniocracy” and “sensual awakening”. “Geniocracy” is based on the idea that only the most competent and intelligent (geniuses) should rule. “Sensual awakening” infers that sexual liberty is to be enjoyed by everyone, including minors. The website also

121 ECtHR (GC), *Cha'are Shalom Ve Tsedek v. France*, app.no. 27417/95, 27 June 2000, paras 80-82.

122 *Ibid.*, paras 74 and 82-83

123 P. Lerner and A. M. Rabello, ‘The Prohibition of Ritual Slaughtering (Kosher Shechita and Halal) and Freedom of Religion of Minorities’, in *Journal of Law and Religion*, vol. 22, no. 1, pp. 1-62 (2006), p. 20.

124 *Cha'are Shalom Ve Tsedek v. France*, *supra* n. 121, paras 68-69.

125 *Cha'are Shalom Ve Tsedek v. France*, *supra* n. 121, *Joint dissenting opinion of Judges Sir Nicolas Bratza, Fischbach, Thomassen, Tsatsa-Nikolovska, Panțiru, Levits and Traja*, para. 1, referring to ECtHR (Second Section), *Serif v. Greece*, app. no. 38178/97, 14 December 1999, para. 53,

126 *Ibid.*

contained links to other related websites, for example a company offering human cloning services. The local authorities argued that the poster offended the “religious and moral feelings of the public”. They also pointed to pedophilia cases against members of the movement.<sup>127</sup>

The ECtHR allowed for the prohibition relying on a large margin of appreciation. In the majority’s view, the message was essentially commercial. The dissenting judges believed that the margin should have been narrow because the speech was only commercial in an accessory way. Just like in *Cha’are*, the difference of opinion at the Court revolved around commercial aspects of the manifestation. The minority found that the essence of the posters and website was to disseminate beliefs. In their view, the “state as impartial organizer” should not have assessed the content of the poster and website ideologically. While one may have personal opinions about the concepts of the Raëlians, it was not for the state to exercise “content-based expression control” which “ends up as pure speaker-based discrimination”.<sup>128</sup>

This minority view resembled the assessment of the majority in *TWU*: “For better or for worse, tolerance of divergent beliefs is a hallmark of a democratic society.”<sup>129</sup> If tolerance only stretched to the beliefs we find agreeable, acceptable or logical, this would render tolerance empty. As Justice Sachs, discussing the South African *Prince* case in his Free Diary, explained, “[t]he true test of tolerance comes when the practice exist on the margins of society and appear bizarre, even threatening to the mainstream”.<sup>130</sup> His colleague Ngcobo, who was willing to find in Mr. Prince’s favor, said “beliefs that believers hold sacred and thus central to their religious faith may strike non-believers as bizarre, illogical or irrational”. “Yet, [this] does not detract [from] the protection guaranteed by the right to freedom of religion.”<sup>131</sup>

#### 4.4.3 Organizational autonomy

Organizational freedom, being another aspect of the freedom of religion and belief as group autonomy, is the freedom of faith-based communities to operate their organizational structures as freely as possible, without interference by

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127 ECtHR (GC), *Mouvement Raëlien Suisse v. Switzerland*, app. no. 16354/06, 13 July 2012, paras 34-41.

128 *Mouvement Raëlien Suisse v. Switzerland*, app. no. 16354/06, *supra* n. 127, *Dissenting opinion of Judges Sajó, Lazarova Trajkovska and Vučinić*, para. II.1; *Dissenting opinion of Judges Tulkens, Sajó, Lazarova Trajkovska, Bianku, Power-Forde, Vučinić and Yudkivska*, para. 11; *Dissenting opinion of Judge Pinto de Albuquerque*, p. 67.

129 SCC, *Trinity Western University v. College of Teachers*, Case 27168, [2001] 1 SCR 772, 17 May 2001, para. 36.

130 A. Sachs, *The Free Diary of Albie Sachs*, Random House, Johannesburg (South Africa), 2004, p. 67.

131 *Prince v. President of the Cape Law Society*, Case CCT36/00B, *supra* n. 18, para. 42.

the state or by others. Justice Sachs explained to us in *Christian Education*, discussed below, that “religious bodies play a large part in public life, through schools, hospitals and poverty relief. They command ethical behavior from their members. [T]hey promote music, art and theatre [...]. They are part of the fabric of public life, and constitute active elements of the diverse and pluralistic nation contemplated by the Constitution. Religion is not just a question of belief or doctrine. It is part of a way of life, of a people’s temper and culture.”<sup>132</sup>

Indeed, depending on their own size, tenets and context, faith-based communities operate schools and universities, social organizations, care or cure organizations. Some would also argue that enterprises with an explicit faith-based identity fall under the organizational freedom.<sup>133</sup> The ECtHR in *Hasan and Chaush* explained that an organizational structure is “not simply a form of their existence but [has] a substantive meaning”. “[R]eligious communities traditionally and universally exist in the form of organized structures.”<sup>134</sup>

In *TWU*, a Christian university obliged its students and staff to sign an agreement to refrain from same-sex relationships. According to the British Columbia College of Teachers (BCCT), this implied that the graduates of TWU would hold views on same-sex relationships which disqualified them from becoming good teachers in the public school system. LGBTQ+ students must be able to count on teachers to be supportive of their situation as a minority. The SCC, however, decided that simply assuming that graduates of TWU would behave in a discriminatory fashion towards these students was not called for. The freedom of religion and belief guaranteed TWU autonomy to engage in agreements with faculty and students which reflected their ethical beliefs. It was not for the BCCT to enforce a view of homosexuality on a religious minority.<sup>135</sup> As long as there was no evidence that the students were unfit to be teachers, there was no reason to exclude them from becoming teachers. If discrimination was found in the case of individual teachers, disciplinary measures were called for.<sup>136</sup> The SCC, thus, reconciled the rights to equal treatment and the collective freedom of religion and belief.

In 2018, the SCC had to decide a new case which involved the TWU’s covenant. This time it was the Law Society of British Columbia (LSBC) which had denied accreditation of the TWU’s law school. The decision followed a

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132 *Christian Education South Africa v. Minister of Education*, Case CCT4/00, *supra* n. 25, para. 33.

133 Compare US Supreme Court, *Burwell v. Hobby Lobby Stores*, 573 US 682 (2014), 14 June 2014. See the discussion in J. L. Cohen, ‘Freedom of Religion, Inc.: Whose Sovereignty?’, *Netherlands Journal of Legal Philosophy*, vol. 43, no. 3, pp. 169-210 (2015).

134 ECtHR (GC), *Hasan and Chaush v. Bulgaria*, app.no. 30985/96, 26 October 2000, paras 56 and 62.

135 *Trinity Western University v. College of Teachers*, Case 27168, *supra* n. 129, paras 25 and 28.

136 *Ibid.*, paras 13 and 35- 37.

referendum amongst the members of LSBC which the responsible body had decided would be binding. A majority of 5:2 found that the decision struck the appropriate balance between the freedom of religion and belief and the equality rights the LSBC was pursuing.<sup>137</sup>

In *Hofer*, Daniel Hofer, a member of the Lakeside Colony, had been expelled by the leadership of his community due to a conflict. Mr. Hofer had not abided by the decision of the community leadership. According to the majority, the community's internal procedures did not stand the test of procedural fairness mandated by civil law. Dissenting Chief Justice McLachlin tried to understand the procedures as the community itself understood them. She concluded that they were "open and eminently fair". She concluded that the problem was not with procedural fairness, but the fundamental conflict of views. Mr. Hofer did not accept the decision taken by the community leadership. Yet as a member of the community, he had vowed to do so.<sup>138</sup>

In South African law, churches are viewed as voluntary associations. They are thus judged in terms of contractual law and can assert rights and have legal obligations to other legal subjects.<sup>139</sup> There is at least some debate as to whether juristic persons fall under the meaning of "everyone" in Section 15 of the Bill of Rights.<sup>140</sup> The Constitution protects both individual freedom of religion and belief and group rights of religious communities (see section 3.2). They are seen as two sides of the same coin, as the Constitutional Court recognized in *Christian Education*. Individuals often participate in collective activities as a manifestation of their individual faith. Communities depend on individuals to survive, and vice versa. According to the Constitutional Court, diversity can only be protected "through the double mechanism of positively enabling individuals to join with other individuals of their community, and negatively enjoining the state not to deny them the rights collectively to profess and practice their own religion (as well as enjoy their culture and use their language)".<sup>141</sup>

The case in *Christian Education* was launched by an organization which operates Christian schools. Parliament had only recently outlawed corporal punishment in education, including privately-run schools. Christian Education maintained that corporal punishment was an integral part of the Christian ethos adhered to by the schools and the parents who sent their children to

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<sup>137</sup> SCC, *Law Society of British Columbia v. Trinity Western University*, Case 37318, [2018] 2 SCR 293, 15 June 2018.

<sup>138</sup> SCC, *Lakeside Colony of Hutterian Brethren v. Hofer*, Case 22382, [1992] 3 SCR 165, 29 October 1992, pp. 73-83.

<sup>139</sup> P. Coertzen, 'The Position of Churches in South Africa under a New Constitution', in H. Warnik (ed.), *Legal Position of Churches and Church Autonomy*, Uitgeverij Peeters, Leuven (Belgium) 2001, pp. 45 and 50.

<sup>140</sup> Du Plessis, *supra* n. 6, at 18.

<sup>141</sup> *Christian Education South Africa v. Minister of Education*, Case CCT4/00, *supra* n. 25, paras 19 and 23.

school there.<sup>142</sup> The Constitutional Court unanimously found in favor of the Minister of Education in this case. The majority was sympathetic to the claimant's reasoning, but the rights to physical integrity of schoolchildren outweighed the rights engaged under the freedom of religion and belief.

The child, the CCSA argued, was "probably a believer, and a member of a family and a participant in a religious community". Yet, at the same time, the child was also an individual who could rely on constitutional protection.<sup>143</sup> The freedom of religion and belief included the "right to be different" which encompassed "space for members of communities to depart from a general norm". But the democratic process had weighed the interests and had concluded that children should not endure corporal punishment in their education, no matter if the school was state-run or privately-owned.<sup>144</sup>

The logic of the right to be different was that "members of large groups can more easily rely on the legislative process than can those belonging to smaller ones". These small communities must be protected even if the majority regards their beliefs as "unusual, bizarre or even threatening". Nevertheless, Sachs explained in the majority opinion, "the interest protected by section 31 is not a statistical one dependent on a counter-balancing of numbers, but a qualitative one based on respect for diversity". The right to be different does not require "treating everyone in the same way, but in treating everyone with equal concern and respect".<sup>145</sup> This signifies the South African emphasis on "community" explained above. The ECtHR in *Thlimmenos* also explored how equal concern and respect sometimes requires different instead of identical treatment (see section 4.2.2).

The "right to be different" entitled believers, where possible, to not have to be put to extremely painful and burdensome choices between respecting the law and the articles of their faith. But they could not claim an automatic right to be exempted from the laws of the land. The blanket ban of corporal punishment in all schools could be justified under the limitations clause. Anything else but a blanket ban would undermine the goal of preventing that all juveniles undergo the painful and degrading experience of corporal punishment in school. Parents were still free to incorporate corporal correction into education at home. They were only prevented from delegating it to teachers. Hence, not providing for an exception was proportional.<sup>146</sup> Sachs' careful maneuvering in *Christian Education*, explained here, has earned him the compliment that he is "alive to the communal dimension". More generally Du

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142 See *ibid.*, para. 2.

143 *Ibid.*, para. 15.

144 *Ibid.*, paras 24-25.

145 *Ibid.*, paras 24-25 and 42.

146 *Ibid.*, paras. 35 and 43-51.

Plessis finds that the Court signaled a “profound awareness of the group orientation inherent in the exercise of religious freedom”.<sup>147</sup>

While *TWU* and *Christian Education* exemplify conflicts between state institutions and faith-based communities, involving organizational freedom, *Hofer* showed us the complications involved in conflicts within the organizational structures of a community. The South African *De Lange* case, much like the ECtHR’s *Fernández Martínez* and *Sindicatul Păstorul Cel Bun*, also involved such internal conflicts. What makes *De Lange* and *Fernández Martínez* even more complicated is that on the one hand they involve privacy/family life rights of church officials, while on the other hand they also involve (deviation from) church doctrine.

It seems that it is exactly the solving of this puzzle on which majority and dissenting judges disagreed in the ECtHR’s *Fernández Martínez* case. The majority found an interference which was justified. The “principle of religious autonomy prevents the State from obliging a religious community to admit or exclude an individual or to entrust someone with a particular religious duty”. Faith-based organizations could also demand “a certain degree of loyalty from those working for them or representing them”.<sup>148</sup> The dissenting judges did not disagree. But they believed that the state had its own obligations, and that the state could not absolve itself of its obligations by delegating decisions to non-state bodies (in this case the Catholic Church).<sup>149</sup>

Mr. Fernández Martínez was no longer considered eligible to be a religion teacher by the Catholic Church. While the state was the employer, an agreement between Holy See and the Spanish Government mandated that the Church had the last word on teachers of religion. But for the dissenters, the assessment by the Church was not the essence. It was the ministry’s decision which finally impacted the claimant.<sup>150</sup> While the Church may claim autonomy rights, courts must not review the content of a decision by a faith-based organization. They must, however, “verify that such a decision does not produce effects that constitute a disproportionate interference with the fundamental rights of those affected by the decision”.<sup>151</sup>

*Fernández Martínez* shows us the complicated nature of church-state relationships, when the state desires to be neutral and accommodationist simultaneously. The CCSA in *De Lange* predicted Solomonic wisdom to be necessary. Is there Solomonic wisdom in the approach of the majority or minority in *Fernández Martínez*? Arguably, the dissenting opinion leaves an opening for reconciling organizational autonomy and individual human rights. Had the state not

147 Du Plessis, *supra* n. 6, at 26 and 32.

148 ECtHR (GC), *Fernández Martínez v. Spain*, app. no. 56030/07, 12 June 2014, paras 126-131.

149 *Fernández Martínez v. Spain*, app. no. 56030/07, *supra* n. 148, *Joined dissenting opinion of Judges Spielmann, Sajó, Karakas, Lemmens, Jäderblom, Vehabović, Dedov and Saiz Arnaiz*, paras 5-7.

150 *Ibid.*, paras 5-7.

151 *Ibid.*, paras 21-22.



dismissed Mr. Fernández Martínez, but given him a different job, or enabled him to find different work the minority is likely to have voted differently. Like the SCC in *TWU*, the minority opinion suggests that sometimes it requires pragmatism to honor all principles.<sup>152</sup>

While many authors focus on minority religions when it comes to accommodation and establishment issues, Evans and Thomas note that in nations with an established church/religion, there is always a specific autonomy issue for the established church. After all, the establishment almost automatically implies more state control of the internal affairs of such a church.<sup>153</sup> Any attempt to control minority religions will be met with close scrutiny by the ECtHR. One could even argue that this is the Article 9 area where the Court is most consistently and ardently protective of believers. The case of *Hasan and Chaush* exemplifies this.

While the applicant, Mr. Hasan, was elected as Grand Mufti by the National Conference of Muslims, the Government supported his predecessor and ultimately recognized him as Grand Mufti for all Muslims in Bulgaria.<sup>154</sup> The Grand Chamber found unjustified interference with Articles 9 and 13. Revisiting considerations from the earlier case *Serif v. Greece*,<sup>155</sup> the Court set a standard in which interference of the government to remove tension between rival factions within a religious community, by choosing sides was deemed violative of freedom of religion and belief. Instead the state's role is to ensure that rival factions tolerate each other.<sup>156</sup> What makes the situation more troublesome was that the meddling concerned not just any organizational issue, but the leadership of the Muslim community of Bulgaria. "The personality of the religious ministers is undoubtedly of importance to every member of the community."<sup>157</sup> The Government had attempted to unify the entire community under its candidate of choice.

Repeated many times over, the concept of the state as impartial organizer of religious freedom<sup>158</sup> was given a robust fundament in the *Hasan and Chaush* case. Hands-off impartiality was the bare minimum of organizational autonomy. Pluralism was a direct result of (the) freedom (of religion and belief)<sup>159</sup> and therefore the attempt to eliminate the pluralism by trying to bring a

152 *Trinity Western University v. College of Teachers*, Case 27168, *supra* n. 129.

153 C. Evans and C.A. Thomas, 'Church-State Relations in the European Court of Human Rights', in *Brigham Young University Law Review*, vol. 2006, no. 3, pp. 699-725 (2006), p. 717.

154 *Hasan and Chaush v. Bulgaria*, app.no. 30985/96, *supra* n. 134, paras 10-38.

155 *Serif v. Greece*, app. no. 38178/97, *supra* n. 125.

156 See Rainey, McCormick & Ovey, *supra* n. 118, at 485. See also Evans, *supra* n. 8, at 86.

157 *Hasan and Chaush v. Bulgaria*, app.no. 30985/96, *supra* n. 134, para. 62.

158 See, e.g., *Leyla Şahin v. Turkey*, app. no. 44774/98, *supra* n. 29, para. 107. *Bayatyan v. Armenia*, app. no. 23459/03, *supra* n.11, para. 120; *Mouvement Raëlien Suisse v. Switzerland*, app. no. 16354/06, *supra* n. 127, *Joint dissenting opinion of Judges Sajó et al.*, para. II.2.1.

159 See *Hasan and Chaush v. Bulgaria*, app.no. 30985/96, *supra* n. 134, para. 60. Compare *Leyla Şahin v. Turkey*, app. no. 44774/98, *supra* n. 29, para. 104 and *Cha'are Shalom Ve Tsedek v. France*, *supra* n. 121, *Joint dissenting opinion of Judges Sir Nicolas Bratza et al.*, para. 1.

religious community into one organizational structure was antithetical to freedom. If the state tried this, it acted contrary to both negative and positive obligations under Article 9.

While the state may officially recognize a certain religious leader or group, it may not prevent the exercise of unofficial religious leadership or ensure or enforce unity within a religious denomination.<sup>160</sup> The Court was ready to accept that some legal requirements for registration were permissible and must be complied with by religious groups, “but the State must discharge a significant burden in order to justify interference with associational rights or to deny registration”.<sup>161</sup>

We learn from *Hasan and Chaush* that organizational autonomy encompasses a “hands off” approach in organizational conflicts. We learn from *Fernández Martínez* that a broad margin of appreciation allows the state to go along with the recognized church’s assessment of suitability for state employees engaged in religious matters. What can we learn from *Sindicatul “Păstorul Cel Bun”*?

The Romanian Government’s refusal to register a trade union of clergy and laymen employed by the Romanian Orthodox Church, was aimed at protecting the autonomy rights of the Church. Both the majority and minority on the Grand Chamber agreed that the right of association had been infringed. The majority found a legitimate aim, which could be justified. But the dissenters were not convinced that the refusal was necessary or proportionate.<sup>162</sup> Labor relationships which involve faith-based organizations have led to interesting case law and discussions in many places in the world.<sup>163</sup> Obviously, if secular equal treatment law were to be applied, the faith-based character of many such organizations would be undermined. But does this require that secular labor law be shut out entirely as opposed to those provisions which would undermine a faith-based principle, doctrine or view? I think not, a pragmatic approach, which combines autonomy with collective rights of the employees is feasible.

For every view one can take regarding *De Lange* or *Fernández Martínez*, the employees in these two cases represent obvious deviation from declared theological views of their respective communities/churches. But the members of “*Păstorul Cel Bun*” just wanted a union. What was unclear was why they had not obtained permission from the bishop as required by internal procedure. But can the autonomy of the church only be protected if registration is

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160 *Hasan and Chaush v. Bulgaria*, app.no. 30985/96, *supra* n. 134, para. 78. See also Evans & Thomas, *supra* n. 153, at 720. See also Evans, *supra* n. 28, at 321-329.

161 Evans, *supra* n. 28, at 327-329, citing amongst others ECtHR (C), *Moscow Branch of the Salvation Army v. Russia*, app. no. 72881/01, 5 October 2006, para. 61.

162 ECtHR (GC), *Sindicatul “Păstorul Cel Bun” v. Romania*, app. no. 2330/09, 9 July 2013, *Partly dissenting opinion of Judges Spielmann, Villiger, López Guerra, Bianku, Møse and Jäderblom*.

163 Compare US Supreme Court, *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission*, 565 US 171 (2012), 11 January 2012 and *Burwell v. Hobby Lobby Stores*, 573 US 682 (2014), *supra* n. 133.



refused? The majority extended “hands-off” to the labor relations of the church. Echoing Justice Sachs in *Fourie* the secular and the sacred must coexist peacefully. Courts must “recognize the sphere which each inhabits, not to force the one into the sphere of the other.”<sup>164</sup> Justice Van der Westhuizen in the South African *De Lange* case warned of creating a “Constitution free zone”.<sup>165</sup> Organizational freedom for faith-based organizations is based on human rights instruments. There must be mutual respect, but it must certainly not lead to “free zones” which exist entirely outside these instruments’ spectra.

#### 4.4.4 Political freedom

Faith-based political parties exist in many countries with very different institutional arrangements. Even more than other aspects related to group autonomy, they involve the consequences of the autonomy for non-members of the community. Faith-based decisions in national politics may impact many who do not identify with the underlying rationale. Obviously, this also works vice versa as we saw in section 4.2. Indeed, we may identify the very purpose of human rights is to ensure “minority rights” counterbalance “majority rules”.

In all the selected cases of all three courts, *Refah* is the only one concerning a faith-based political party. *Refah*, to a certain degree, represents a deviation from the Court’s firm line on organizational freedom of religion and belief, while some call it consistent with the case law on political parties.<sup>166</sup> The Court was sympathetic to the notion of the “vigilant democracy” which must “combat” political parties that seek to undermine the democratic society envisioned by the Convention. The *Refah* party was seen as seeking to drastically reshape the constitutional order into a religious system of some kind.<sup>167</sup> The Court went along with the Turkish Constitutional Court in using the party’s program for legal pluralism as evidence. Yet, as we will see below (section 4.4.5) different views are reasonably possible, regarding compatibility of legal pluralism and human rights.<sup>168</sup>

The dual test for “vigilant democracy” is if the party is committed to peaceful means and the change itself “is compatible with fundamental democratic principles”. The *Refah* party set out to reinterpret “secularism” in the Turkish constitutional system. Evidence was submitted in the case which

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164 CCSA, *Minister of Home Affairs and Another v. Fourie (e.a)*, Cases CCT 60/04 & 10/05, 1 December 2005, paras 93-94.

165 CCSA, *De Lange v Presiding Bishop of the Methodist Church e.a.* Case CCT 223/14 [2015] ZACC 35, paras. 69-74.

166 See Rainey, McCormick & Ovey, *supra* n. 118, at 543-544.

167 See *ibid.*

168 See H.M.Th.D. ten Napel, ‘The ECHR and Political Rights: The Need For More Guidance’, in *European Constitutional Law Review*, vol. 5, no. 3, pp. 464-480 (2009), p. 477.

seemed to suggest ambiguity with regard to violence or illegal action.<sup>169</sup> But as Boyle notes, the “evidence brought before the Constitutional Court did not include the statute of the Party, its election manifesto or the program for government agreed with its coalition partner.” Nothing supported any concern that the “party intended to undermine democracy or violate the constitutional principle of secularism, such as through the advocacy of a theocratic state”. “Nor was evidence adduced” that “members of the party had espoused or encouraged violence while in government”. Also, the evidence showed no intention to replace the existing legal and political order with any other, while being outspoken about creating possibilities for faith-based “subcultures”.<sup>170</sup>

The Chamber later relied on *Refah* in the Dutch *SGP* case, not included in the selected cases. The orthodox Dutch Reformed party did not allow female membership and was outspoken at the time about the undesirability of women in state affairs from a theological viewpoint.<sup>171</sup> The state had denied the party all funds for political organizations following a national judgment. The Chamber found the application manifestly ill founded, as the viewpoints of the party were deemed opposed to Convention values. Ten Napel notes that the Court has until now only found against political parties in Article 11 cases, when the party concerned was a faith-based party.<sup>172</sup> Interestingly, shortly before *Refah* the Court had dismissed the prohibition of the Turkish Communist Party earlier, exactly because of the absence of any evidence in the program or statutes of the party regarding their anti-democratic ambitions.<sup>173</sup>

We will never know what turn Turkish politics would have taken if *Refah* had not been prohibited. Some of its members regrouped and founded the current government party AKP. We will never know if misconceptions about political Islam and Turkey played a major role in the reasoning as some suggested. While “the importance of political parties in a democracy requires that a narrow margin of appreciation” be applied, “the Grand Chamber gave a rather wide margin of appreciation to the Turkish authorities, including the legitimacy of pre-emption”.<sup>174</sup> While the risk of waiting too long may be that nothing further can be done, a logic of pre-emption with regard to political parties is certainly troublesome for organizing pluralism.

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169 ECtHR (GC), *Refah Partisi (The Welfare Party) and Others v. Turkey*, app. nos. 41340/98, 41342/98, 41343/98 and 41344/98, 13 February 2003, paras 98 and 31.

170 K. Boyle, ‘Human Rights, Religion and Democracy: The Refah Party Case’, in *Essex Human Rights Review*, vol. 1, no. 1, pp. 1-16 (2004), p. 5.

171 ECtHR (Third Section), *Staatkundig Gereformeerde v. the Netherlands*, app. no. 58369/10, 10 July 2012, paras 58-65 and 9.

172 See ten Napel, *supra* n. 166, at 475.

173 See Boyle, *supra* n. 170, at 10.

174 *Ibid.*, p. 10.

#### 4.4.5 Living by their own law: Subculture and legal pluralism

In section 4.4.3, the ECtHR was cited as saying that “[R]eligious communities traditionally and universally exist in the form of organized structures.” The Court added to this that “[T]hey abide by rules which are often seen by followers as being of a divine origin.”<sup>175</sup> Indeed, faith-based communities will usually uphold certain customs, rites, rituals, and rules. Sometimes these are revered as (sacred and/or religious) law.

One of the hot issues in the *Refah* case was the proposed legal pluralism in personal and family law. The Turkish Government contended that such legal pluralism would lead to discrimination. The Court agreed. *Refah* contended that the voluntarism inherent in its proposal prevented discrimination.<sup>176</sup> The assumptions made by both the national courts and Strasbourg did not take this into consideration.<sup>177</sup> However, concurring Judge Kovler did not agree with the negative view of legal pluralism. The concept was “well-established in ancient and modern legal theory and practice. [M]odern constitutional law accepts that under certain conditions members of minorities of all kinds may have more than one type of personal status [...]”.<sup>178</sup>

The “own law” of faith-based communities also appears in other cases in this Chapter. In *Sioui*, there is no legal pluralism exactly, but the Treaty once concluded between the British colonizers and the First Nations serves as a source of law for the rights of indigenous Canadians even today. In *TWU*, we see the autonomy of a faith-based educational institution to engage in agreements with students and staff, which outside the “own law” would be discriminatory. Alberta no longer facilitates the “own law” of their Hutterite community in *Alberta v. Hutterian Brethren* by disallowing photograph-less drivers licenses. In *Hofer*, a majority on the SCC believes that “own law” procedures, do not stand the test of national law standards for fairness.

*Christian Education*, like *Hofer*, showed how national law can overrule “own law” even within the community; in this case when national law explicitly enforces human rights standards even in faith-based educational institutions. In *De Lange*, the CCSA saw no reason why the internal arbitration procedure should be mistrusted. In *Cha’are Shalom*, difference in interpretation of “own law” within a religion was no reason to grant a small minority its own exemption from secular law. However, in *Hasan v. Chaush* we learn that the state may not prevent “dissenters” within a religious group from setting up their own group. In accordance with *Sindicatul Păstorul Cel Bun*, such dissenters

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175 *Hasan and Chaush v. Bulgaria*, app. no. 30985/96, *supra* n. 134, paras 56 and 62.

176 *Refah Partisi (The Welfare Party) and Others v. Turkey*, app. nos. 41340/98, 41342/98, 41343/98 and 41344/98, *supra* n. 167, paras 28 and 80.

177 *Evans & Thomas*, *supra* n. 153, at 710.

178 *Refah Partisi (The Welfare Party) and Others v. Turkey*, app. nos. 41340/98, 41342/98, 41343/98 and 41344/98, *supra* n. 167, para. 119.

cannot rely on state-recognition when setting up organizations within the “own law”. Finally, *Fernández Martínez* showed the complexity involved when “own law” and state law were applicable simultaneously.

Bader enlightens us that a liberal-democratic constitutional view on religion, state and freedom is not fundamentally at odds with legal pluralism as long as it is characterized by:<sup>179</sup>

1. Freedom of entry and exit and choice of law;
2. The scope being limited for example to private or personal law; and
3. The state being guarantor of individual rights and freedoms.

The *Refah* judgment provided evidence that Refah respected these three principles in its proposal.<sup>180</sup> The South African marriage cases discussed in section 4.3.3 provided illustration of how the acceptance of a certain degree of legal pluralism may even be mandated by non-discrimination, rather than causing discrimination. A thick notion of democracy based on pluralism<sup>181</sup> may require accommodation of those who are adversely affected by the so-called neutral rules of the state (see section 4.2.2).

In 2004, a debate concerning the recognition of religious law based arbitration emerged in the Canadian province Ontario. The Jewish orthodox and conservative and reform communities had for a long time made use of the Arbitration Act to operate the *Beis Din* of Ontario. It was mainly used for divorces under *Halakhah* (Jewish religious law) and the related property issues. The outcome of the arbitration was binding under the Arbitration Act, but could be challenged, as any agreement or contract, in a court of law.<sup>182</sup> Inspired by this, Syed Mumtaz Ali, a lawyer from Ontario, tried to establish the “Islamic Institute of Civil Justice” (IICJ) as an Islamic equivalent. The initiative led to heated debate, both inside and outside Canada. Given the uproar, the Ontario Government asked Marion Boyd, a former attorney general and former provincial minister of women’s issues, to report on the matter. She heard experts and laypeople, advocates and opponents of religious arbitration. She concluded that Ontario should allow for religious arbitration but also provide human rights checks. Not coincidentally, her report features the words “choice” and “inclusion”.<sup>183</sup>

179 V. Bader ‘Constitutionalizing secularism, alternative secularism or liberal democratic constitutionalism? A critical reading of some Turkish, ECtHR, and Indian Supreme Court cases on secularism’, in *Utrecht Law Review*, vol. 6, no. 3, pp. 8-35 (2010), p. 26.

180 Evans & Thomas, *supra* n. 153, at 710.

181 See ten Napel, *supra* n. 166, at 477.

182 See M. Boyd, *Dispute Resolution in Family Law: Protecting Choice, Promoting Inclusion*, Government of Ontario, 2004, pp. 11-12 and pp. 40-41. Rabbinical courts are referred to as *Beis Din*, *Beit Din*, *Beth Din* or *Bet Din*. Boyd uses the first term.

183 *Ibid.*, pp. 3-4; p. 42 ff and s. 8. Compare H.M. Vroom, ‘Church – State relations in the Public Square: French Laicism and Canadian Multiculturalism’, in W.B.H.J.v.d. Donk et al. (eds), *Geloven in het publieke domein*, Amsterdam University Press, Amsterdam (Netherlands), 2006, pp. 300-301.

Boyd eloquently explains how the supposedly neutral secular laws encompass cultural and religious norms which may in certain cases negatively affect cultural and religious minorities. Regulated arbitration ensures that religious arbitration functions within the scope set by Charter values and norms. Boyd acknowledges the vulnerability of women, who may be put under pressure to agree to religious arbitration. This, however, must not be used to prevent voluntary arbitration. The state must safeguard voluntarism, not prevent it out of paternalism.<sup>184</sup> Until 2005, the Government seemed to follow the Boyd report. But then the Premier of Ontario decided to abolish the possibility of religious family law arbitration, not only for Muslims, but for all religious groups. However, the possibility to choose religious principles for binding agreements remains. Hence, the decision is a matter of "legal form rather than of normative substance".<sup>185</sup>

An-Na'im, arguing that within the Islamic context, the notion of the "Islamic state" should be abandoned, because no state can ever rightly claim to be religious, nevertheless points out that the relationship between law and religion is never one in abstract. It is always "a specific view of particular legal and religious traditions, as viewed through the inherently limited experience of human beings. Since this cannot be exhaustive or conclusive of all religious and legal traditions, we should accept the possibility of alternative views of the relationship between law and religion in different contexts." Hence we should be open different conceptions of the relationship between law and religion, acknowledge that both are dynamic and be aware of the human agency in both. On the other hand he argues for the possibility of a coexistence between state law and religious law, in separate spheres, and to explore and further develop the possibilities of legal pluralism.<sup>186</sup>

Lerner and Rabello note that the "rule-and-exception system is part of what might be called the multicultural concept of social life". Whenever "society's fundamental principles and critical concerns, such as public order, are not seriously affected" the law should provide "an exception which permits the minority to deviate from the ideal practice in order to recognize the minority's interests, beliefs or cultural background".<sup>187</sup> While "rule and exception" serves well to impartially organize pluralism from a "liberty" and/or "dignity" standpoint, the issue of minorities inside minorities always deserves special attention. As can be learned from *Cha'are*, sometimes a minority within a minority should be treated as a separate minority.

Individuals wanting to leave religious communities or structures are another issue which requires special attention. Hence, the state must safeguard

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184 Boyd, *supra* n. 180, at 45, 52-53 and s. 3, p. 66 ff.

185 Ryder, *supra* n.1, at 105.

186 A. A. An-Na'im, 'Complementary, Not Competing, Claims of Law and Religion: An Islamic Perspective', *Pepperdine Law Review* vol 39, no. 5 (2013), pp. 1248, 1232; and 1250-1252.

187 Lerner & Rabello, *supra* n. 123, at 27.

that no one is subjected to faith-based rules against their will.<sup>188</sup> Boyd speaks of the “basic tension inherent in multiculturalism”.<sup>189</sup> However, in her opinion this tension must not be solved by applying (secular) absolutism, nor by non-interventionism, but within the tradition of liberal democratic multiculturalism which reconciles democratic public policy, with communal self-determination and individual rights.<sup>190</sup> In Evan’s commentary on *Refah*, another interesting viewpoint is added. Revitalizing religious law within a modern constitutional context also provides the chance that the norms develop further within that framework: “the Court ignored the notion of *ijithad* (Islamic legal reasoning) that many more progressive Muslims see as a way of injecting a dynamic element into *sharia*.”<sup>191</sup>

Whether the legal pluralism proposed by the Refah party resembled the *millet* system<sup>192</sup> as the Turkish Constitutional Court and the ECtHR assumed, or whether was inspired by notions like those put forward by Boyd, Bader and/or Lerner and Rabello, cannot be known, because the party was preemptively prohibited.

#### 4.5 THE FREEDOM OF RELIGION AND BELIEF AND EDUCATION

Religion in the educational system often raises discussions. While some parents and educators hold that knowledge of religion(s) and belief(s) is part of a well-rounded education, others fear that religion in class and indoctrination are never far apart, and that religious education may create sectarian sentiments. While for many years religious education was on the retreat, it is currently gaining support in Europe. This is because religion is of increasing importance to society; the number of students, parents and educators with a religious background is increasing. Many believe that socially-fit citizens need the knowledge to be able to tolerantly interact with others.<sup>193</sup>

South Africa and Canada both have a public school educational system and privately-run educational institutions, some of which are faith-based. In South Africa, complaints regarding the relationship between education and religion are more likely to come from believers than from unbelievers. Many believers desire that their children are educated in the value system of their

188 See Evans, *supra* n. 8, at 128-129. See also Evans & Thomas, *supra* n. 153, at 708.

189 Boyd, *supra* n. 182, at 89.

190 *Ibid.*, pp. 89-94.

191 Evans & Thomas, *supra* n. 153, at 712. Compare *inter alia* A.A. An-Na’im, ‘Islamic Politics and the Neutral State, A Friendly Amendment to Rawls?’, in T. Bailey, and V. Gentile (eds.), *Rawls and Religion*, Columbia University Press, New York (USA), 2014, p. 250.

192 See *Refah Partisi (The Welfare Party) and Others v. Turkey*, app. nos. 41340/98, 41342/98, 41343/98 and 41344/98, *supra* n. 167, para. 126.

193 C. Evans, ‘Religious Education in Public Schools: An International Human Rights Perspective’, in *Human Rights Law Review*, vol. 8, no. 3, pp. 449-473 (2008), pp. 450 and 458-459.

religious group. But the Government is reluctant to establish fully state-subsidized denominational schools (like in the Netherlands), partly because racial and religious lines very often overlap.<sup>194</sup> In Canada, state-financing of faith-based schools is not required by the Constitution.<sup>195</sup> In the CoE member states, the organization of the educational system differs greatly, and so does the relationship between education and the freedom of religion and belief. The so-called Toledo Guidelines, adopted by the Organization for Security and Cooperation in Europe (OSCE), illustrate the various systems of religious instruction found amongst the member states.<sup>196</sup>

#### 4.5.1 Issues of religion, belief and the educational system

In a total of nine of the reviewed cases, there are elements of religion and belief in regard to the educational system. The European Court of Human Rights, the Supreme Court of Canada and the Constitutional Court of South Africa each decided three such cases. All these cases are also discussed elsewhere in this chapter from different angles.

In the SCC *Multani* case (section I1.4.10), discussed several times above, the central question was whether a schoolboy should be accommodated in wearing his metal *kirpan* to school. In *Chamberlain* (section I1.4.5), a decision of the governing board of a public school was assessed. Can religious and/or belief-based objections of parents towards depicting same-sex families justify disapproval of such material for educational use? In *TWU* (section I1.4.6), the policy of a private faith-based university was central. The board of education of the province held that the existence of a code of conduct interdicting same-sex romantic relationships, was a reason not to accredit the teacher program of the university. This case is also discussed under group autonomy in section 4.4.

The South African *Christian Education* case (section I2.4.6) also discussed under group autonomy in section 4.4, featured the requested exemption of certain Christian schools from the national ban on corporal punishment in schools. *Pillay* (section I2.4.11), much like *Multani*, was about an individual student. The case also features in section 4.2. Sunali Pillay was disproportionately affected by the school regulation relating to jewelry. As a South African Hindu of South Indian Tamil background, she wore a nose stud, as many women of her religion and culture do. In *Gauteng School Education Bill* (section I2.4.2), some members of the provincial parliament of Gauteng challenged the

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194 Currie & de Waal, *supra* n. 63, at 332.

195 SSC, *Adler v. Ontario*, Case 24347, [1996] 3 SCR 609, 21 November 1996.

196 ODIHR Advisory Council of Experts on Freedom of Religion or Belief, *Toledo Guiding Principles on Teaching about Religions and Beliefs in Public Schools*, Organization for Security and Cooperation in Europe, 2007.



constitutionality of a Bill which required public schools to accept speakers of several languages and prohibited compulsory religious instruction.

Leyla Şahin's case (section I3.4.7) also features in section 4.2. Her personal practice of wearing a headscarf collided with the general prohibition of all religious attire at the university where she was a student. The Strasbourg *Folgerø* and *Lautsi* cases (sections I3.4.8 and I3.4.10) were analyzed in the same section. In *Folgerø*, some parents believed that the exemption procedure for the subject of Christian religion and ethics was too burdensome and infringing. In *Lautsi*, one family confronted a law obliging all (public) schools to hang crucifixes in the classroom. *Fernández Martínez* (section I3.4.14) discussed above in section 4.2 featured a teacher of religious instruction, whom the Catholic church no longer regarded as representative of its institution. But it is not about the educational system as such and therefore the case is not discussed in this section.

#### 4.5.2 The public school system

*Chamberlain* dealt with a decision by an elected school board. Obviously, members of a school board may have religious views on what is appropriate in the curriculum. In this case, a majority of the members believed that books depicting same-sex families were inappropriate for Kindergarten-Grade One (K1). Some of the religious views prevailing in some of the families regarded marriage and family to be reserved for opposite-sex couples. Therefore, the board feared cognitive dissonance. A majority of the SCC found the decision to be at odds with the applicable standard of "reasonableness". While the school board was correct to consider the possible religious objections of parents, it did not consider the interests of LGBTQ+ parents equally. Nor did it consider that children needed to know about the diversity in Canadian society.<sup>197</sup> As Woehrling notes, in Canadian and American literature, a distinction is made between exposure to ideas deemed reprehensible from a religious standpoint and having to act contrary to a religious conviction or confirm a religious conviction.<sup>198</sup> According to this distinction, there can only be infringement of the freedom of religion and belief in the second and third case, not when there is only exposure to opposing ideas.

However, one might have to make a distinction between children and adults here. If ideas are presented to children in school, they are inclined to

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197 SCC, *Chamberlain v. Surrey School District No. 36*, Case 28654, [2002] 4 SCR 710, 20 December 2002, paras 47 and 1-3.

198 J. Woehrling, 'Appendix G: Examination and analysis of jurisprudence pertaining to reasonable accommodation in the schools', in Advisory Committee on Integration and Reasonable Accommodation in the Schools, *Inclusive Quebec Schools: Dialogue, Values and Common Reference Points*, Quebec Ministry of Education, Leisure and Sport, 2007, p. 116.



think that the school approves them and experience a conflict between values taught in school and values taught at home. Woehrling, while noting that it is the task of public schools to bring different groups within society together and to install in them some sense of common and shared values, does not reject the possibility of granting exemption to children from parts of the curriculum that their parents find problematic in accordance with sincere beliefs. Yet, he also draws attention to the possibility of private denominational schools and homeschooling for those families who cannot identify with the curricula of public schools.<sup>199</sup>

Yet *Chamberlain* is not about exemption, but about the disapproval which affected all children in the school. Such a rejection could only be reasonable if all interests involved were balanced properly (see section 4.6). The book in question depicted on a factual level the diversity of family structures present in Canadian society. "The only additional message of the materials appears to be the message of tolerance. Tolerance is always age-appropriate." The books might cause some cognitive dissonance, but "cognitive dissonance is arguably necessary if children are to be taught what tolerance itself involves."<sup>200</sup> The dissenting judges in the case believed that the case was less clear. Any decision by the school board would have been constitutional under the Charter,<sup>201</sup> because the collision of two Charter rights was involved: the freedom of religion and belief and the right to equality.

The South African cases need to be understood in light of the constitutional change between the apartheid era and the constitutional era. During apartheid, South Africa understood itself to be a Christian nation and provided for single tradition Christian education. With the transition to democracy, South Africa came to understand itself as a neutral state.<sup>202</sup> Section 15(2) of the Bill of Rights clearly states that "religious observances" may be conducted in "state-aided institutions" if they are "voluntary and conducted on an equitable basis". Currie and De Waal note that as South Africa knows no "wall of separation", Section 15(2) is not to be regarded as an exception to the protection of the freedom of religion and belief in the Bill of Rights.<sup>203</sup> Maestry notes that the Ministry of Education interprets the provision in as skepticism "towards 'single faith' religious observances".<sup>204</sup>

While the text of the Bill of Rights refers to "state-aided institutions", it was clearly intended for government schools. There are, however, also private

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199 *Ibid.*, pp.116 and 118.

200 *Chamberlain v. Surrey School District No. 36*, Case 28654, *supra* n. 197, paras 69 and 66.

201 *Chamberlain v. Surrey School District No. 36*, Case 28654, *supra* n. 197, *Dissenting opinion of Judges Gonthier and Bastarache*, para. 122.

202 R. Maestry, 'The Constitutional Right to Freedom of Religion in South African Primary Schools', in *Australia and New Zealand Journal of Law and Education*, vol. 12, no. 2, pp. 57-68 (2007), p. 57.

203 Currie & de Waal, *supra* n. 63, at 331.

204 Maestry, *supra* n. 202, at 58.

schools which receive substantial aid from the state. Yet, Currie and De Waal conclude on the basis of High Court Case *Wittmann*<sup>205</sup> that private schools fall outside the spectrum of “state-aided institutions”. However, private schools are also prevented from compelling students into religious observance, because of the horizontal application of the right. While subsequent to *Wittmann* “religious observance” must be understood as a rite of obedience and worship, religious instruction, whether of a confessional or informative nature, is not covered by “religious observance”. State schools, however, may compel students to attend multi-faith informative instruction and parents may compel their children to attend single faith instruction, without infringing the freedom of religion and belief.<sup>206</sup>

In *Gauteng School Education Bill*, besides the language aspect, religious instruction was the major issue. During the apartheid era, many whites-only Afrikaans language schools which featured Calvinist religious instruction had become affluent. The Education Bill was designed to make these public schools more inclusive, for example by making instruction in several languages obligatory, prohibiting language testing and mandatory religious instruction, without opt-out possibility. Some members of the Afrikaner community feared that the Bill would endanger the preservation of their “common culture, language or religion”. But the Court found that there was no positive obligation to provide for Afrikaans language Christian public schools. While there was a negative obligation to not interfere with the establishment or maintenance of such private schools, this must not be read to resist the Bill. Compelling students to attend religious instruction classes would be a violation of the negative obligations under these rights.<sup>207</sup>

In his separate opinion, in Afrikaans, Justice Kriegler was quick to point out that racial prejudice could never claim protection, even if presented as an element of a community’s understanding of its own culture, language and religion.<sup>208</sup> Sachs, in his separate opinion, pointed to the underlying purpose of the Bill: to end existing inequality in access to education. While continuation of Afrikaans education in these public schools could be constitutionally enforced, it could not remain an exclusively Afrikaans educational environment.<sup>209</sup> The state had no obligation to facilitate and/or finance the existence of religious schools, but it may also not interfere with the establishment of independent schools.<sup>210</sup>

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205 High Court of South Africa, *Transvaal Provincial Division, Wittmann v. Deutscher Schulverein, Pretoria and Others*, Case 95/10017, 4 May 1998.

206 Currie & de Waal, *supra* n. 63, at 331-333.

207 CCSA, *In Re: Dispute Concerning The Constitutionality of Certain Provisions of The School Education Bill of 1995*, Case CCT39/95, 4 April 1996, paras 1-7 and 21.

208 *Ibid.*, paras 38-43.

209 *Ibid.*, paras 52-53 and 80-81.

210 See Du Plessis, *supra* n. 6, at 22, referring to *In Re: Dispute Concerning The Constitutionality of Certain Provisions of The School Education Bill of 1995*, Case CCT 39/95, *supra* n. 204.

Doubtlessly, Article 9 of the ECHR applies, among other areas, to the educational environment. Yet, Article 2 of Protocol 1 applies specifically. The ECtHR has made clear that the instruction meant in said article is not merely religious instruction. The respect for parents' religious and philosophical convictions thus relates to the entire curriculum.<sup>211</sup> Evans and Thomas conclude from the existing case law that states enjoy a wide margin of appreciation when it comes to which religion or religions, is/are taught in schools. "This has the potential to shore up to the dominant religion."<sup>212</sup>

The Court's findings in *Folgerø* deviated somewhat from earlier Commission case law in which it found in favor of Poland in a case where the parents of a young schoolgirl alleged that psychological pressure had led her to join Catholic religious instruction classes at her public school, while being the only non-Catholic in the class.<sup>213</sup> Yet in *Folgerø*, the reason to find a violation was exactly the pressure put on parents in having to justify the need for exemption from KRL (Norwegian abbreviation for Christianity, religion and philosophy), which can stimulate argument and even conflict. The fact that the subject is taught in public schools was significant. While the Norwegian Government raised the argument that non-Lutheran parents could send their children to private schools, the Court did not see why the toleration and thus existence of private schools would somehow relieve the state of its obligation to ensure pluralism in the public school system. Interestingly, if all this could be derived from Article 2 of Protocol 1, a separate or conjunct application of Article 9 was not necessary.<sup>214</sup>

While there are many good reasons to support religious education, even in public schools, caution is essential because, Evans warns, these are necessarily places of coercion. Not only will students be required to pay attention in class or do their homework, but education also necessarily involves exerting some kind of pressure to accept what is being taught. Yet with regard to religion, this coercion must be restrained in order to safeguard students not feeling compelled to have or not have to change their religion. "The fact that a school can force the reluctant math student to study algebra does not mean that it can require the committed atheist to take religious instruction." Yet the caution must apply in different ways. Not only can secular or atheist proselytism in the school system be as intrusive as religious instruction, many subjects, like biology, sports, literature and sex education, may trigger conflicts about

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211 ECtHR (C), *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, app. nos. 5095/71; 5920/72; 5926/72, 7 December 1976, para. 121.

212 Evans & Thomas, *supra* n. 153, at 715.

213 EComHR, *C.J., J.J. and E.J. v. Poland*, app. no. 23380/94, 16 January 1996.

214 ECtHR (GC), *Folgerø and Others v. Norway*, app.no. 15472/02, 29 June 2007, paras 98, 102-105.

the beliefs of parents and children. Respect for the beliefs of parents and children should apply “throughout the entire State education program”.<sup>215</sup>

Obviously, education in itself is a right guaranteed by the Convention. For children with religious backgrounds, a school environment perceived as hostile or disrespectful will impact not only their freedom of religion, but also their right to education. For children without a religious background, a place for religion in the curriculum may seem hostile and dangerous. Finally, for children from minority religions, a strong emphasis on the dominant religion may make them feel like outsiders. While parents ought to have substantial influence in what is taught to their children, it is impossible to give parents the right to decide or veto what their children are taught. The state must strike a proper balance between legitimate majority and minority concerns, without subjecting one to the other. This balance includes that children have a right to learn about other groups and beliefs with which they co-exist in society. This creates a “religious literacy”, which will counteract bigotry, intolerance, and discrimination.<sup>216</sup>

The case, when seen in its entirety, portrays a conceptual view of the relationship between freedom of religion and belief and the educational system under the Convention.<sup>217</sup> While states are free to have a state religion as well as a state church and to promote, protect and enhance both by means of legislation, the Convention obliges them to create an educational environment free of proselytism. This does not mean that the state’s promotional, protective, and enhancing activities regarding the state-sponsored religion and religious organization have to end in the public school system. But parents and students who do not wish to participate, must be able to opt out without hinderance that is unreasonably burdensome. In *Folgerø*, the majority and the dissenting judges essentially disagreed on two things: whether the classes qualified as pluralist or unitary education, and whether or not the procedure for exemption was too burdensome.

The dissenting judges in *Folgerø* did not perceive the existence of the procedure to justify the opting out as *a priori* burdensome. While the majority seemed to suggest that state proselytism in public schools must go hand in hand with a general exemption for those wishing to opt out, the minority regarded an individual procedure in which the opting out has to be justified as feasible under Article 2, of Protocol 1.<sup>218</sup>

A general exemption cannot be derived directly from Article 2 of Protocol 1. Yet *Folgerø* seems to suggest that religion can never be taught in such an

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215 Evans, *supra* n. 190, at 453, 463, 469 and 456, referring to Article 2 of Protocol 1 and relevant case law.

216 *Ibid.*, pp. 454-459.

217 See *Folgerø and Others v. Norway*, app.no. 15472/02, *supra* n. 214, para. 56.

218 *Folgerø and Others v. Norway*, app.no. 15472/02, *supra* n. 214, *Joint dissenting opinion of Judges Wildhaber, Lorenzen, Birsan, Kovler, Steiner, Borrego Borrego, Hajiyev and Jebens*, p. 52.

objective and neutral way to justify the absence of an “opt out” possibility. This is supported by Chamber case *Zengin v. Turkey*.<sup>219</sup> Furthermore, if exemptions require parents and students to disclose personally held beliefs and or discuss them with officials, freedom of religion is infringed. Yet these cases also “signal a possible shift from the rather formalistic approach that had previously been taken to exemptions with greater consideration of the practical and emotional burden that they can place on students and parents”. On the other hand, exemptions can also lead to a “ghetto approach”.<sup>220</sup>

The Toledo Guidelines deal with the relationship between the freedom of religion and belief and public education. However, the place of religion and belief in the public school system is also always related to the alternatives when it comes to education. In some states, private schools (some of them faith-based) account for a large part of the education. In the Netherlands, so-called special schools (some of them faith-based) receive public funding. In Germany, denominational schools exist as part of the public school system. Another issue in this regard is homeschooling. Commenting on *Konrad*,<sup>221</sup> a Chamber case about homeschooling, Ten Napel points to the fact that many nations accept homeschooling by religious communities and have granted a constitutional opting-out right for homeschooling parents. Yet clearly, both issues are covered by the margin of appreciation in standing case law.<sup>222</sup>

Opting out is not possible if the parents and students take issue with the way in which the public school presents itself with regard to preference for a certain religion. This is what *Lautsi* was about. The Lautsi children could not opt out. The crucifix was hung in every classroom. To majority in the classroom, it symbolized faith and belonging. To the Lautsis as agnostics it symbolized that they did not belong. The judgment noted that schools in Italy, without being specific on the school in question, pay much attention and respect to the practices and holidays of minority religions. But for the Lautsi family, this was insignificant. It did not contribute to their feeling of acceptance as agnostics. Yet the crucifix was mandated by law, to be hung in every public school classroom in Italy. No exemption or exception procedure was provided.

The Chamber first unanimously found in favor of the Lautsi family, then the Grand Chamber by 15:2 found no violation at all. The Chamber judgment sent “a shockwave through Europe”.<sup>223</sup> The Grand Chamber judgment ended a case which had “dragged on for almost 10 years”.<sup>224</sup> A high amount of

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219 ECtHR (C), *Hasan and Eylem Zengin v. Turkey*, app. no. 1448/04, 9 October 2007.

220 Evans, *supra* n. 190, at 465 and 466-470.

221 ECtHR (C), *Konrad et al. v. Germany*, app. no. 35504/03, 11 September 2006.

222 H.M.Th. D ten Napel, ‘Noot bij EHRM 11 September 2006, no. 35504/03.’, in *European Human Rights Cases*, 01/2007, Sdu Uitgevers, pp. 3-4.

223 N. Bratza, ‘The “Precious Asset”: Freedom of Religion Under the European Convention on Human Rights’, in *Ecclesiastical Law Review*, vol. 14, no. 2, pp. 256-271 (2012), p. 269.

224 F. Cortese, ‘The Lautsi Case: A Comment from Italy’, in *Religion and Human Rights*, vol. 6, no. 3, pp. 221-230 (2011), p. 221.

pressure was put on the Grand Chamber to overturn the Chamber judgment.<sup>225</sup> This came not only from Italy, but also a “number of Eastern-European countries – with their own historical reasons”.<sup>226</sup> The campaign was also supported by known critics of the Strasbourg Court elsewhere in Europe, many aligned with right-wing, nationalist or populist agendas and/or parties.<sup>227</sup>

In the past, the Court had been skeptical with regard to arguments centered on the historical links between the state and a particular religion.<sup>228</sup> While the Chamber still followed this line, the Grand Chamber deviated from it. It accepted that such links can even lead to a situation in which the religious symbols lose their exclusive religious meaning. While this earned the Grand Chamber praise from critics in the Government of Italy and the Vatican,<sup>229</sup> it was also criticized. The Chamber judgment had developed a controversial, yet “fairly straightforward argument against the display of a crucifix in public schools on the grounds that the state should not favor any particular religion”. From this perspective, the Grand Chamber judgment might be called convoluted.<sup>230</sup>

The Grand Chamber accepted that the crucifix had somehow attained a post-religious meaning. By doing so, it took into account criticism of the Chamber judgment which pointed out that given the contribution of Christianity to democratic Europe’s development, the crucifix as such could never be at odds with a democratic society based on human rights. Rather, the symbol was made to be not only a symbol of a particular religion, but rather a meta-religious symbol for European values and civilization.<sup>231</sup>

Yet from a more traditional Christian viewpoint, this is offending. As Zucca explains: “Jesus Christ would be deeply disappointed to learn that the last chapter of his life does not move people”. As to the impact of the symbol on the educational environment, nobody would argue that the presence of the crucifix is neutral. Indeed, putting *Lautsi* and *Dalhab* together would suggest that minority religion’s symbols are powerful and hence compromise neutrality, while the symbols of the mainstream religion are passive and therefore do

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225 See case note on the Chamber judgment by H.M.Th. D ten Napel, ‘Noot bij EHRM 3 November 2009, no. 30814/06’, in *European Human Rights Cases*, 08/2010, Sdu Uitgevers, p. 1.

226 W. de Been, ‘Lautsi: A Case of “Metaphysical Madness”?’, in *Religion and Human Rights*, vol. 6, no.3, pp. 231–235 (2011), p. 233.

227 See, e.g., T. Baudet ‘Het Europees Hof voor de Rechten van de Mens vormt een ernstige inbreuk op de democratie’, in NRC, 13 November 2011.

228 Evans, *supra* n. 8, at 147, referring to ECtHR (C), *Manoussakis and Others v. Greece*, app.no. 18748/91, 26 September 1996.

229 L. Zucca, ‘Lautsi: A Commentary on a decision by the ECtHR Grand Chamber’, in *International Journal of Constitutional Law*, vol. 11, no. 1, pp. 218–229 (2013), p. 218.

230 See de Been, *supra* n. 226, at 231.

231 *Ibid.*, p. 232.



not impact neutrality.<sup>232</sup> Obviously, that is an indefensible position. Yet it is important to note that the Grand Chamber does not accept that the crucifix has somehow become a symbol of Italian republicanism and religious pluralism.<sup>233</sup>

Like Zucca, Weiler also believes that such an assessment of the crucifix as a-religious is actually disrespectful to believing Christians. Like the Chamber, he would have rejected the neutrality argument.<sup>234</sup> Yet according to him, it was indeed the Chamber who did not do justice to the complexity and importance of the question before it, but resolved the case impatiently and apodictically. The Court, in Weiler's opinion, should be watchful to ensure that school environments are not religiously coercive (pro- or contra religion) and not take sides in the cleavage between believers and non-believers. He reiterates the many state-religion constitutional arrangements found in the Convention area. Since the ECtHR is not a constitutional court, it should not assess the legitimacy of constitutional arrangements.<sup>235</sup>

In *Lautsi*, the Italian Government, most probably still offended by the Chamber judgment, argued that the state "should refrain from promoting not only a particular religion but also atheism, 'secularism' on the State's part being no less problematic than proselytizing by the State".<sup>236</sup> Without any doubt, the statement is true. The Italian Government put forward this argument presumably because *Refah*, *Şahin*, *Folgerø*, the *Lautsi* Chamber judgment and other cases, may be interpreted to show a preference for state-sponsored secularism. However, the ordained display of a religious symbol in every classroom is not the only way in which not to sponsor secularism. Zucca is of the opinion that two different notions of secularism were mixed up in the judgment. Mrs. Lautsi's secularism is a philosophical belief. State secularism must be neither preferential nor opposed to such philosophical secularism, nor any religious or other philosophical belief. It requires the state to be the "impartial organizer of religious pluralism"<sup>237</sup> (see further section 4.7).

While Evans notes that the Grand Chamber employed the margin of appreciation to solve the conflict, like in many freedom of religion and belief cases,<sup>238</sup> in Zucca's opinion the use of the margin in the judgment is circular. "If a wide margin of appreciation is based on lack of consensus, it should not come as a surprise that there is no consensus on the prohibition of religious

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232 See Zucca, *supra* n. 229, at 220-221.

233 Cortese, *supra* n. 224, at 226.

234 J.H.H. Weiler, 'Lautsi: Crucifix in the Classroom Redux', in *The European Journal of International Law*, vol. 21, no. 1, pp. 1-6 (2010), p. 5.

235 *Ibid.*, pp. 1 and 5. See also J.H.H. Weiler, 'Lautsi: A reply', in *International Journal of Constitutional Law*, vol. 11, no. 1, pp. 230-233 (2013), pp. 231-232.

236 ECtHR (GC), *Lautsi and Others v. Italy*, app.no. 30814/06, 18 March 2011, para. 35.

237 Zucca, *supra* n. 229, at 222.

238 M. D. Evans, 'Lautsi v. Italy: An Initial Appraisal', in *Religion and Human Rights*, vol. 6, no. 3, pp. 237-244 (2011), p. 237.

symbols.” “It all sounds like a tautology.”<sup>239</sup> Yet, as Ten Napel rightly notes, what is surprising in the Chamber judgment is that the margin of appreciation is hardly mentioned, while in *Şahin* and elsewhere,<sup>240</sup> states with secularist state philosophy were given a wide margin to implement it in the public education system.<sup>241</sup>

Evans suggests that the Grand Chamber’s appraisal of the entire educational environment rather than the isolated symbol fits within Strasbourg jurisprudence. Also, as in earlier judgments, the Court stresses that respect for the convictions of the parents does not imply their right to have a determinative say. This, in his opinion, mandates revisiting some earlier case law which seemed to suggest that the public schoolroom needs to be religiously neutral.<sup>242</sup>

The opportunity missed in *Lautsi* may have been to approach the issue from the other angle. How could Catholics have been accommodated, other than the obligatory display of the crucifix in every public school classroom? Such a judgment might have found the legislation to be antithetical to Article 9, without having to find that the presence of the symbol as such is. The solution might have been the approach taken by the German Constitutional Court in the Bavarian crucifix case. As Luca points out, the German Constitutional Court stipulated a case-by-case approach. Only when students express that the symbol sends a message of inequality to them, is there a need to remove it. Rather than a blanket ban or a finding of systematic violation, such an approach does justice in concrete cases.<sup>243</sup>

#### 4.5.3 Faith-based educational institutions

Canada has a public school and university system as well as private educational institutions, some of which are denominational. Unlike in the United States, the constitutional question in relation to the financing of denominational schools is not whether state financing is permitted, but whether it is required. The Supreme Court answered this question in the negative.<sup>244</sup> In *TWU*, the Court dealt with a religious institution. While in the public school system religious beliefs which may exist in the population could be taken into consideration, the religious educational institutions were founded as denominational structures. While public institutions need to be pluralist, the denomina-

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239 Zucca, *supra* n. 229, at 226.

240 *Dogru v. France*, app. no. 27058/05, *supra* n. 27; ECtHR (C), *Kervanci v. France* 31645/04 app. no. 42393/98, 4 December 2008.

241 See ten Napel, *supra* n. 225, at 5.

242 Evans, *supra* n. 238, at 241-243.

243 See Zucca, *supra* n. 229, at 228-229.

244 *Adler v. Ontario*, Case 24347, *supra* n. 192.



tional institutions by definition are not. TWU was not for everyone; it was a school for people who shared its religious views.<sup>245</sup>

TWU's policy on same-sex relationships was doubtlessly contrary to the Charter's equality promise to LGBTQ+ citizens. The SCC, however, concluded that the BCCT was wrong in denying the application of TWU solely on that basis. Once the graduates were teachers in the public educational system, they were required to conduct themselves in a non-discriminatory manner. But this did not mean that TWU was unfit to educate teachers. Denominational schools and universities had a freedom to create a learning environment which suited them in a pluralist society. This did not mean they have absolute freedom to create a homogenous environment, in which they could reject the principles and values of that same pluralist society. For example in 2005, the *Commission des droits de la personne et des droits de la jeunesse* of Quebec ruled that private denominational establishments were bound to accommodate students of other faiths, for example by allowing the wearing of a headscarf, unless they could show that the confessional status of these establishments demanded certain exclusions or preferences.<sup>246</sup>

The Constitutional Court of South Africa may have leaned on Canadian and American approaches in deciding *Christian Education*. According to Smith, *Christian Education* "was not a good case to develop a theory of the scope of religious freedom", "because the freedom to act in terms of one's religious convictions had clearly been infringed". Sachs applied the harm principle developed in, amongst others, American and Canadian jurisprudence. Consequently, freedom of religion and belief was held not to allow for over-riding the best interests of the child. As corporal punishment is harmful "the state must be allowed to impose some limits". But harm, in Smith's opinion, does not set a proper limit for the freedom of religion. What is harm and what is not, is often determined by our (religious and/or secular) value system. Therefore only "neutral harm" should serve as a limit.<sup>247</sup>

Another reading of *Christian Education* is also possible. Not harm as a negative limit, but the human dignity purpose of the Constitution mandates a limitation. After all, the Constitution mandates that all rights are interpreted in conformity with "human dignity".<sup>248</sup> But human dignity is arguably also determined by a value system, underlying the South African Constitution. Either way, given that no right is absolute and corporal punishment by definition causes "neutral harm", I cannot see how the CCSA could have decided any other way in *Christian Education*.

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245 See *Trinity Western University v. College of Teachers*, Case 27168, *supra* n. 129, para. 25.

246 See Bouchard & Taylor, *supra* n. 2, at 51.

247 N. Smith, 'Freedom of Religion in The Constitutional Court', in *The South African Law Journal*, vol. 118, pp. 1-9 (2001), pp. 5 and 7-8. See *Christian Education South Africa v. Minister of Education*, Case CCT4/00, *supra* n. 25, para. 51.

248 See Currie & de Waal, *supra* n. 63, at 322, referring to s. 39(1)(a) of the Bill of Rights.

#### 4.5.4 Students with sincere beliefs

Gurbaj Singh Multani was an orthodox Sikh schoolboy who always wore a metal *kirpan* that was sheathed and worn underneath his clothes. Leyla Şahin was an orthodox Muslim female university student who wore a headscarf at all times. Sunali Pillay was a schoolgirl of South Indian Tamil Hindu background who wore a nose stud, like many women of her religion and culture. All three were impaired by rules prohibiting them from wearing these attributes and/or attire in their educational institutions. As a consequence, Gurbaj switched to a private school and Leyla left her country to study abroad. Sunali finished her high school in the same institution. The judgment was rendered after she had graduated.

Gurbaj was a student in the public educational system. Being a state institution, the Charter applied to dealing with accommodation issues of religious students. The school had unjustifiably infringed the student's right to freedom of religion, because the three criteria formulated by Bouchard and Taylor for accommodation requests did not apply.<sup>249</sup> Gurbaj's request did not:

1. violate the student's other rights or the rights of other students;
2. run counter to the Education Act, program organization or other statutes;
3. impose undue hardships on the school with regard to its operations and budget.

The SCC argued that an "absolute prohibition would stifle the promotion of values such as multiculturalism, diversity, and the development of an educational culture respectful of the rights of others". Such a prohibition would send "students the message that some religious practices do not merit the same protection as others". Accommodating Gurbaj, on the other hand, "demonstrates the importance that our society attaches to protecting freedom of religion and to showing respect for its minorities. The deleterious effects of a total prohibition thus outweigh its salutary effects."<sup>250</sup>

The *Multani* decision thus sends a powerful signal regarding the educational system. It is the duty of the educational system to not only create an environment which is welcoming and supportive of diversity, but also to communicate this message to those who might not understand at first hand, and who might initially feel treated unfairly, because the member of a minority is accommodated.<sup>251</sup> The CCSA's Pillay judgment echoes this powerful signal.

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249 Bouchard & Taylor, *supra* n. 2, at 163, referring to M. McAndrew, 'L'Accommodement raisonnable dans une perspective d'intégration: fondements, mise en contexte et questionnements', Université de Montréal, 2006, p. 16.

250 *Multani v. Commission scolaire Marguerite-Bourgeoys*, Case 30322, *supra* n. 15, paras 78-79.

251 Compare Bouchard & Taylor, *supra* n. 2, at 179. See also Advisory Committee on Integration and Reasonable Accommodation in the Schools, *supra* n. 195.

The school code of the Durban Girls High School prohibited all jewelry except for ear studs and wristwatches and Sunali Pillay was ordered not to wear the nose stud in school. She did not comply with the order and claimed that not allowing her to wear the nose stud violated her constitutional right to practice her cultural and religious traditions.<sup>252</sup>

Ms. Pillay first took her case to the Equality Court which found that the school regulations were in fact discriminatory, yet that the discrimination was not unfair. The High Court, however, found in favor of Pillay.<sup>253</sup> The Constitutional Court affirmed this. Chief Justice Langa's majority opinion illustrated the importance of religious freedom in the South African constitutional order. It also illustrated the departure from exclusion of otherness towards the "new ethos". The judgment shows the correlation between culture and religion. Both are strongly linked to a person's identity. Whereas cultural identity is related to identification with a community, religious identity is often related to the metaphysical. Yet neither are monolithic and interpretation differs between individuals.

Sunali admitted that the nose stud was not a "mandatory tenet of her religion or culture, it is a voluntary expression of her South Indian Tamil Hindu culture that is strongly intertwined with the Hindu religion". The school never contested the cultural relevance of the nose stud, but denied it had religious significance. Langa, however, found that Sunali's persistence in continuing her practice in spite of the school's orders and in standing up for her belief in court and the media provided enough proof of the sincerity her belief. In this case he reasoned "culture and religion sing with the same voice".<sup>254</sup> As the norm embodied by the code was not neutral, but "enforces mainstream and historically privileged forms of adornment at the expense of minority and historically excluded forms", it discriminated in an unjustifiable manner.<sup>255</sup>

In the *Şahin* case, the Turkish Government took a completely different view of the state's role to guarantee pluralism. They considered it "contrary to such values [i.e. pluralism, equality] to allow religious attire to be worn".<sup>256</sup> This view was then supported by the ECtHR in its judgment. The line of reasoning in *Şahin* seems to be: "(1) There are extremist political movements in Turkey. One of their demands is the freedom of women to wear Islamic *hijab* in public places. (2) Any measure preventing students from wearing headscarves is therefore in line with the Convention."<sup>257</sup> Yet the Court also never found

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252 MEC for Education: Kwazulu-Natal and Other v. Pillay, Case CCT51/06, *supra* n. 7, paras 3-10.

<sup>253</sup> *Ibid.*, paras 14-18.

254 *Ibid.*, paras 53-55, 58 and 60.

<sup>255</sup> *Ibid.*, para. 44.

256 Leyla Şahin v. Turkey, app. no. 44774/98, *supra* n. 29, para 116.

257 K. Altıparmak and O. Karahanoğulları, 'After Şahin: The debate on headscarves is not over, Leyla Şahin v. Turkey', Case note in *European Constitutional Law Review*, vol. 2, no. 2, pp. 268-292 (2006), p. 280.

that Ms. Şahin was an extremist who sought to impose the headscarf on all women. "The only evidence before the Court was that she had actively sought to resist the ban against voluntary wearing of the head-scarf."<sup>258</sup> What would have happened in *Şahin*, if the line of reasoning in *Multani* and *Pillay* had been adopted? The Canadian and South African judges seem to suggest that diversity must be embraced by allowing its display and instilling understanding of diversity in students.

#### 4.5.5 Guidelines for education and religion and belief

Evans points to the six different possibilities in regard to religious education, given by the Toledo Guidelines adopted by the OSCE in relation to freedom of religion and belief in education:<sup>259</sup>

1. Strict secularism: there is no discussion of religion at all in the classroom.
2. Incidental religious education: religion is taught only to the extent necessary for other subjects.
3. Plural religious education: students learn about a variety of religions and non-religious world views without any claims as to the (un)truth of these.
4. Sectarian religious instruction: students receive it in their religion or alternatively non-religious world view in (sectarian) groups.
5. Unitary religious education: instruction in the dominant religion of the State. Teachers do not claim truth, but the classes deal either exclusively or predominantly with a single religion.
6. Religious or ideological instruction: instruction only in the dominant religion. The religion is taught as true. Instruction prepares for participation in religious rituals. Exemptions may be granted.

These possibilities actually represent the diversity of approaches towards religion and education in the Convention area. Evans discusses all six possibilities from the viewpoint of the criteria of "objectivity", "neutrality", "critical" and "pluralistic" given by the ECtHR in *Folgerø* and other cases such as *Zengin v. Turkey*.<sup>260</sup> In the *Zengin* case, the Court found that the failure to provide exemption for a minority Muslim Alevi sect from religious instruction classes, based on Sunni Islam, while Christians and Jews were given automatic exemption, violated the respect for the parent's religious views as protected by the Convention (see also below in section 4.7).

While the first option may easily create a hostile environment for religious students, thus not being pluralistic, the second option does also not produce students with adequate religious literacy. The fourth option may also be seen

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<sup>258</sup> *Ibid.*, p. 282.

<sup>259</sup> Evans, *supra* n. 190, at 461.

<sup>260</sup> *Hasan and Eylem Zengin v. Turkey*, app. no. 1448/04, *supra* n. 219.

not to enhance pluralism, while also not qualifying as objective and critical, yet is to be seen as preferable to the first and second options. The last option is only acceptable from the pluralist viewpoint if an exemption is given, and even then, it cannot be seen as enhancing pluralism. This leaves unitary and pluralistic education (options 3 and 5) as the two feasible options for education to the whole class.<sup>261</sup>

Obviously, any method chosen must also take into account a teacher's freedom of religion and belief. If the teaching material creates problems of consciousness for her or him, there should be no compulsion. Yet this may not be seen as a right by teachers to actively share or discuss their beliefs with the students. Finally, teaching methods must also be critically reviewed: "Jewish parents may object to their children taking part in a nativity play; Christian parents to their children visiting a mosque; and atheist parents to their children singing religious songs." "The Toledo Guidelines also underline the importance of education that is 'inclusive, fair and respectful' to both religious and non-religious views and suggest that 'care should be taken to avoid inaccurate or prejudicial material, particularly when this reinforces negative stereotypes' (principle 7)."<sup>262</sup>

The Canadian Supreme Court noted in *Chamberlain* that "tolerance is always age-appropriate".<sup>263</sup> In a pluralist society, in which many individuals and groups profess a religion or other beliefs, tolerance arguably requires the "religious literacy" Evans talks about. It is the task of the education system to provide children with this literacy while counteracting "bigotry, intolerance and discrimination".<sup>264</sup> It is the task of courts to balance when conflicts arise between the pluralist cleavages.

#### 4.6 FREEDOM OF RELIGION AND BELIEF AND BALANCING WITH OTHER RIGHTS

Harris, O'Boyle and Warbrick note "[o]n occasion there are conflicts between Article 9 and other rights."<sup>265</sup> This of course is not particular to Article 9. Human rights are bound to collide. After all, they protect the freedom of individuals and groups, whose choices are bound to differ, even more so when they are truly free to choose. Quoting the landmark case *Big M*, the Canadian Supreme Court has reiterated many times that "[a] truly free society is one which can accommodate a wide variety of beliefs, diversity of tastes and

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261 Evans, *supra* n. 193, at 463.

262 *Ibid.*, pp. 464, 466 and 471.

263 See majority opinion in *Chamberlain v. Surrey School District No. 36*, Case 28654, *supra* n. 197, para. 69.

264 Evans, *supra* n. 193, at 454-459.

265 D. Harris, M. O'Boyle and C. Warbrick (eds.), *Law of the European Convention on Human Rights*, 2nd ed., Oxford University Press, Oxford (UK) et al., 2009, p. 439.

pursuits, customs and codes of conduct. A free society is one which aims at equality with respect to the enjoyment of fundamental freedoms.”<sup>266</sup>

Legal theorists have provided us with theorems to ensure the equal freedom while freedom rights collide. Legal theorist Ronald Dworkin sees no competition between freedom and equality, but co-dependency instead.<sup>267</sup> This notion is very similar to Rawls’ “justice as fairness”.<sup>268</sup> So when diverse beliefs, opinions, preferences, traditions, and rituals collide, courts must balance the conflicting rights in order to ensure the equilibrium of pluralism. This section discusses the balancing in the selected cases.

#### 4.6.1 Issues of balancing the freedom of religion and belief with other rights

Almost all the selected cases involve, to a certain degree, judicial balancing between the freedom of religion and belief and some other right or compelling interest. Hence, in the previous sections we have already encountered various aspects of judicial balancing when it comes to the freedom of religion and belief. In this section, the focus is on the equilibrium of equal concern and respect: how do the three tribunals maintain this equilibrium in solving the freedom of religion and belief cases?

In at least a total of 18 of the reviewed cases, the equilibrium of equal concern and respect for all rights and interests involved is central to the judicial reasoning. Eight of these were decided by the SCC. The CCSA decided six of these cases. Four were decided by the ECtHR. All these cases have already been analyzed in previous sections, but from another angle. The issues of balancing, discussed here, are best subdivided in the following topics:

- The balance of pluralism: (religious) beliefs and LGBTQ+ equality rights (section 4.6.2);
- Preventing elimination of pluralism: individual rights and communitarian interests (section 4.6.3);
- The balance between individuals and communities of faith (section 4.6.4);
- Balancing parental authority and the rights of children (section 4.6.5);
- What is balancing? (section 4.6.6).

In a total of five cases, LGBTQ+ equality rights collided with the freedom of religion and belief. Both, in the Canadian *Reference Same-Sex Marriage* case

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266 *Chamberlain v. Surrey School District No. 36*, Case 28654, *supra* n. 197, para. 135 and *Trinity Western University v. College of Teachers*, Case 27168, *supra* n. 129, para. 28, quoting *R. v. Big M Drug Mart Ltd.*, Case 18125, *supra* n. 53, at 336-337.

267 R.M. Dworkin, *Taking Rights Seriously*, Duckworth, London (UK), 1991 Ch. 10

268 J. Rawls, *A Theory of Justice*, Revised Edition, Oxford University Press, Oxford (UK) et al., 1999. See for the comparison A. J. Kwak, ‘Equal concern and respect, Ronald Dworkins gelijkheidsbeginsel’, in J. Doomen & A. Ellian, *De strijd van gelijkheid en vrijheid*, Boom Juridische Uitgevers, Den Haag (Netherlands), 2015, pp. 69-86.

(section I1.4.9) and in the South African *Fourie* case (section I2.4.10), the highest tribunal had to decide whether same-sex couples had a right to get married before the law. Both cases were also analyzed in section 4.3.

Two other Canadian cases involved the collision between LGBTQ+ equality rights and the freedom of religion and belief. In *Chamberlain* (section I1.4.6), the SCC had to find the balance between the rights of LGBTQ+ families to be shown in study material in the *Kindergarten* class, and the rights of other families who believed that marriage and family are exclusively opposite-sex. In *TWU* (section I1.4.5), the balance must be struck between the rights of a Christian university to educate future teachers and the interest put forward by the British Columbia College of Teachers, to create an educational environment supportive of LGBTQ+ students. Both cases were also examined in section 4.2.4. The fifth case involving LGBTQ+ equality rights and the freedom of religion and belief is the South African *De Lange* case (section I2.4.15). The case was brought by a minister dismissed by her church when she entered into a civil marriage with another woman. This case was also featured in section 4.4.

Some cases required the balancing of individual freedom and communitarian interests in a democratic society. In the cases *Şahin* (section I3.4.7) and *S.A.S.* (section I3.4.15), the ECtHR had to find a balance between religious attire worn by individuals and the interests of general society as viewed by institutions. In *R. v. N.S.*, the Canadian case, it was the victim of sexual assault who wore a *niqab*. All three cases were also discussed in section 4.2.

The Canadian *Multani* (section I1.4.10) and South African *Prince* (section I2.4.7) cases have been examined several times in the previous sections. They also require the balancing between individual practices and communitarian interests. In *Multani*, the interest was the safety of the other school children. In *Prince*, it was public health and safety underlying the national policy of combating illicit drugs. In *Gauteng School Education Bill* (section I2.4.2), the CCSA had to decide on the constitutionality of a Bill which required schools to accept speakers of several languages and prohibited compulsory religious instruction. This case was also discussed in section 4.5.

The balancing between community rights and rights of individuals belonging to the community was a central issue in two ECtHR cases also examined in section 4.4. In *Fernández Martínez* (section I3.4.14), the claimant's rights as a state employee had to be balanced with the rights of the Catholic Church to endorse those seen fit for (prolongation of) employment as teachers of religion. In *Sindicatul "Păstorul Cel Bun* (section I3.4.13), the collective rights of the Church collided with the rights of its employees to set up a union. In the Canadian *Hofer* case (section I1.4.2), the SCC had to decide whether the internal procedure of dismissal of an individual from a Hutterite community fulfilled procedural fairness.



The freedom of religion and belief can also collide with the rights of children. All of the cases have been analyzed in previous sections. In the South African case *Christian Education* (section I2.4.6) we saw the Government's attempt to protect children against pain and humiliation by corporal punishment in school. This collided with parents and an educational institution, who identified corporal punishment as an article of faith. In the Canadian *Children's Aid Society* (section I1.4.4), the infant's right to life collided with the parents' freedom of religion and belief right to refuse blood transfusions. In the other Canadian blood transfusion case, *AC vs. Manitoba* (section I1.4.12) it was the young believer herself who experienced the collision between the protection of her right to life and her own religious liberty. Finally in *P.(D)*, (section I1.4.3), also before the SCC, the balancing was between the freedom of religion and belief of the father with access rights and the child's best interest.

The legal frameworks which protect the right to freedom of religion and belief in Canada, South Africa and the Convention, allow for the limitation of said right in view of the rights and freedoms of others.<sup>269</sup> The concrete balancing stays true to the notion that rights are engaged in non-hierarchical relations towards one another and that each right is in itself an incompletely theorized agreement. The principles of balancing shall be discussed in section 4.6.6, by way of summary of section 4.6.

#### 4.6.2 The balance of pluralism: (Religious) Beliefs and LGBTQ+ equality rights

Many systems of religion and belief touch on (assumed proper) gender roles and sexual morality. In accordance with (a certain interpretation of) a creed, certain roles and conduct are deemed in accordance with religious law or rules and others are not. For some believers, inclusive views on gender equality and LGBTQ+ equality collide with their faith-based views. Hence, equality claims will trigger responses based on the freedom of religion and belief. Similarly, claims based on the freedom of religion and belief to create personal or group freedom are sometimes met by equality responses, arguing that a human right must not be used as a license to discriminate.

Baroness Hale of Richmond, Deputy President of the UK Supreme Court, explained in her annual human rights law lecture in 2014: "the integrity of religious motivation in moral assessment of gender roles or sexual conduct should not be drawn into doubt if the balance to be struck should be perceived as fair by all."<sup>270</sup> This does not mean that religion or belief is a *carte blanche* for gender and/or sexual orientation discrimination. It does, however, mean

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<sup>269</sup> Compare The Right Hon the Baroness Hale of Richmond, Deputy President of the UK Supreme Court, 'Freedom of Religion and Belief', *Annual Human Rights Lecture*, Law Society of Ireland, 13 June 2014, pp. 5-7.

<sup>270</sup> See *ibid.*, p. 8.



that the balance must always be found in concrete cases rather than a general equilibrium.

In *Chamberlain*, the school board declined to approve a book for a Kindergarten-Grade One (K-1) class requested by a teacher. The book depicted the variety of family types which occur in Canadian society, including same-sex parent families. Some parents had voiced religious objections. The superintendent expressed in court that he thought the books were not necessary for learning objectives and that they were controversial.<sup>271</sup> The majority of the SCC decided the board's refusal to approve the books violated "reasonableness". While the school board was correct to consider the possible religious objections of parents, it did not consider the possible interest of LGBTQ+ parents and the fact that children need to know about the diversity in Canadian society.<sup>272</sup> The ruling reflected the pluralist balance struck between the conflicting views and rights.

The dissenting judges considered the equal constitutional value of freedom of religion and belief and equality. Because the two rights collided, any decision by the board would have been constitutional.<sup>273</sup> The dissenters' viewpoint was both pragmatic and principled. They implied that sometimes, in cases of resolving collision, more than just one decision was defensible. After all, pluralism by its very definition implies difference. Yet, the majority in *Chamberlain* considered that equilibrium of pluralism starts with procedural fairness. The board should have considered the religious concerns of some families equally to those of same-sex families.<sup>274</sup>

Factual information about the many choices people make in a pluralist society could very well co-exist with differing normative preference based on religious considerations, the SCC reasoned. The message of tolerance also sent by the books, "does not require that we agree with the other". Tolerance required us to "treat others with equal respect", "regardless of whether they are right". Children could not learn this unless they are exposed to views that differ from those they are taught at home. This may involve some cognitive dissonance for the children. But this was necessary in order to teach them tolerance. "Tolerance is always age-appropriate." Parental views could not override the imperative placed on the public school system "to mirror the diversity of the community and teach tolerance and understanding of difference".<sup>275</sup>

TWU, on the other hand, was a religious educational institution. The prevailing theological view at the university was that only opposite-sex relationships

271 *Chamberlain v. Surrey School District No. 36*, Case 28654, *supra* n. 197, Introduction, para. 47.

272 *Ibid.*, paras 1-3.

273 See *Chamberlain v. Surrey School District No. 36*, Case 28654, *supra* n. 197, *Dissenting opinion of Judges Gonthier and Bastarache*, para. 122.

274 See *Chamberlain v. Surrey School District No. 36*, Case 28654, *supra* n. 197, para. 61.

275 *Ibid.*, paras 66-69 and 33.

were in accordance with Christian doctrine. Hence, faculty and students were obliged to enter into agreements with the school, declaring amongst others abstinence from same-sex relationships. However, simply assuming that TWU graduates would discriminate against LGBTQ+ students, as the British Columbia College of Teachers had done, was uncalled for. Such an assumption was intolerant in itself. It failed to treat different viewpoints regarding sexual orientation with equal concern and respect. "It would undermine the Charter's stipulation of pluralism in the public school classroom to curtail the accreditation and employment possibilities of persons of faith any more than strictly necessary."<sup>276</sup> Moreover, any such assumption failed to take the individual and his or her own opinions and conduct into consideration. A TWU graduate may or may not hold the same views as his *alma mater*. And whether the individual graduate held these views or not, he or she may very well be more tolerant than graduates from other universities.

A good 10 years after the case, the SCC struck a different balance in another TWU case. This time it was the Law Society of British Columbia (LSBC) that denied accreditation of the TWU's law school. The decision followed a referendum amongst the members of LSBC which the responsible body had decided would be binding. A majority of 5:2 found that the decision struck the appropriate balance between the freedom of religion and belief and the quality rights the LSBC was pursuing. The fact that the referendum had taken place was deemed relevant to the outcome.<sup>277</sup>

Dissenting Justice L'Heureux-Dubé would have decided differently in 2007. She warned that to wait until discrimination actually materializes is taking a risk. She noted that especially for LGBTQ+ students, an educational environment based on support was essential. After all, these students may also experience distress from "coming out" to their parents, family and friends. The denial of the accreditation would imply that TWU graduates would have to obtain a degree from a different institution before being allowed to become teachers. This ensured a year of reflection. The majority also saw the risk, but considered it in a different light. "The BCCT, rightfully, does not require public universities with teacher education programs to screen out applicants who hold sexist, racist or homophobic beliefs. For better or for worse, tolerance of divergent beliefs is a hallmark of a democratic society."<sup>278</sup>

L'Heureux-Dubé compared the case to the case of Bob Jones University before the US Supreme Court.<sup>279</sup> This American university had discouraged interracial dating on religious grounds. The US Supreme Court ruled that because this policy violated the Constitution, the federal Government could

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276 L.E. Weinrib, "This New Democracy ..." Justice Iacobucci and Canada's Rights Revolution', *University of Toronto Law Journal*, vol. 57, no. 2, pp. 399-413 (2007), p. 407.

277 *Law Society of British Columbia v. Trinity Western University*, Case 37318, *supra* n. 137.

278 *Trinity Western University v. College of Teachers*, Case 27168, *supra* n. 129, paras 36.

279 See US Supreme Court, *Bob Jones University v. United States*, 461 US 574 (1983), 24 May 1983.

not financially aid institutions which acted contrary to the constitution. Similar considerations were used in the Dutch *SGP* case discussed briefly in section 4.4.4. The Dutch Government withdrew the funding for political parties because the party excluded women from becoming members on religious grounds. But *TWU* is not about financial aid by the Government. The key balancing issue was whether or not the graduates must be considered unfit as teachers.

The Charter creates equal liberty for groups with (seemingly) opposing interests. The “truly free society” envisaged by the Charter accommodates the freedom of LGBTQ+ Canadians to be who they are and want to be, as much as for Canadians who believe that marriage and parenthood should be reserved for opposite-sex couples. One could even argue that in this vision of a truly free society, there are no longer opposing interests because of the “great variety of beliefs, diversity of tastes and pursuits, customs and codes of conduct”<sup>280</sup> which can be accommodated. “The Charter safeguards religious minorities from the threat of ‘the tyranny of the majority’”, so says the SCC explicitly.<sup>281</sup> Naturally it also safeguards the LGBTQ+ communities.

The balancing applied by the SCC in *TWU* is echoed in *Same-Sex Marriage*. This referral case was initiated when the Canadian federal Parliament proposed legislation to amend the federal Marriage Act. Following earlier provincial Acts, Parliament wanted to introduce same-sex marriage. As elsewhere in the world, amending the legal marriage caused heated debates between opponents and advocates of the proposal. However, not all opponents were driven by beliefs motivated by religion, while there were also religious advocates of same-sex marriage.<sup>282</sup>

Faith-based feelings, regarding marriage and family, had been considered in drafting the Act. Besides introducing a gender-neutral definition of marriage for civil purposes, the Act also specified that nothing shall affect “the freedom of officials of religious groups to refuse to perform marriages that are not in accordance with their religious beliefs”. This is relevant, because under Canadian law religious institutions can perform legal marriages and there is thus no separation between civil and religious marriage as in many European countries. Significantly, the SCC already noted that it could not foresee at this point that any such compulsion could be justified under the limitations clause.<sup>283</sup>

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280 *Chamberlain v. Surrey School District No. 36*, Case 28654, *supra* n. 197, para. 135; and *Trinity Western University v. College of Teachers*, Case 27168, *supra* n. 129, para. 28, quoting *R. v. Big M Drug Mart Ltd.*, Case 18125, *supra* n. 53, at 336-37.

281 *Trinity Western University v. College of Teachers*, Case 27168, *supra* n. 129, para. 28, citing *R. v. Big M Drug Mart Ltd.*, Case 18125, *supra* n. 53, at 336-37.

282 For a discussion of the internal debate within the United Church of Canada, see Nedelsky & Hutchinson, *supra* n. 75.

283 *Reference re Same-Sex Marriage*, Case 29866, *supra* n. 76, para. 58.

The SCC considered the proposed Act to be very much in line with the Charter's vision of a pluralist inclusive society.<sup>284</sup> The same vision also affords protection to those who hold views on marriage which exclude same-sex couples from the concept. What the Act does is recognize all different conceptions, preferring none to the other. Alvin Esau, himself an Anabaptist, calls this being "liberals in the public sphere and illiberals in the church sphere".<sup>285</sup> Hence, such recognition cannot be said to violate their freedom of religion.

The introduction of same-sex marriage also raised the issue of civil servants who had religious objections to performing such marriages. Could they rely on the freedom of religion and belief to be exempted from performing these marriages? The provinces resolved the issue differently<sup>286</sup> (see further section 4.3.4).

According to Ryder's concept of "equal religious citizenship", the freedom of religion and belief requires the accommodation of conscientious objectors as long as equal access to same-sex marriage is guaranteed. In his opinion, provinces that do not allow for conscientious objection for marriage commissioners, must demonstrate that this is necessary to ensure the rights of those wishing to be married. Furthermore, after the introduction of same-sex marriage, it is not discriminatory to require that new civil servants accept performing same-sex marriage. Conscientious objection is relevant for those civil servants who applied for their jobs when same-sex marriage was not foreseeable.<sup>287</sup>

The reconciliatory approach of equal liberty was also employed by the South African Constitutional Court in *Fourie*, one year after *Same-Sex Marriage*. Here, there was no proposed or existing legislation, provincial or national. In the case, which actually merged two different claims by same-sex couples, a unanimous Constitutional Court ruled that the exclusion of same-sex marriage from the common law definition of marriage and the Marriage Act was a breach of constitutional equality rights. The CCSA's reasoning echoed many of the considerations in *Same-Sex Marriage*. The Constitution protects those with beliefs opposing same-sex marriage equally as those same-sex couples who wish to have their unions legally recognized. The freedom of religion and belief does not make religious beliefs a source of interpreting the Constitution; neither can such beliefs be reason to withhold rights of others.<sup>288</sup>

Sachs' majority judgment approached the question of freedom and equality from the angle of the "right to be different". The right entails in this context: (1) that no one family form may be entrenched as the only legally and socially

284 See *ibid.*, paras 1-7.

285 Schneiderman, *supra* n. 59, at 74.; A. Esau, 'Living by Different Law. Legal Pluralism, Freedom of Religion and Illiberal Religious Groups', in *idem*, p. 133.

286 See Ryder, *supra* n.1, at 100-101.

287 See *ibid.*, pp. 101-102.

288 *Minister of Home Affairs and Another v. Fourie et al.*, Cases CCT60/04 and CCT10/05, *supra* n. 78, paras 91-92.

acceptable one; (2) the acknowledgment of the history of persecution and exclusion on the basis of sexual orientation, nationally and internationally; (3) the realization that although legal protection of sexual orientation equality has improved, there is no comprehensive legal regulation of the family law rights of same-sex couples; and (4) the appreciation of the radical break with the history of intolerance and exclusion which the Constitution represents, moving towards a society “based on equality and respect for all”.<sup>289</sup>

Sachs’ careful reasoning explains how “equal concern and respect” creates a “right to be different”. Equal concern and respect mandated “an acknowledgement and acceptance of difference”. In the “democratic, universalistic, caring and aspirationally egalitarian society” thus created, all are accepted and embraced “for who they are”.<sup>290</sup> Sachs’ reasoning reads almost as Solomonic wisdom. His colleague Moseneke, many years later, predicted in *De Lange* that Courts will “require all the judicial, if not Solomonic, wisdom we Judges can muster”,<sup>291</sup> to decide the merits of such a case. *De Lange* itself offers the escape of a procedural decision.

Mrs. De Lange was dismissed as a minister by her church after she had made use of the right recognized in *Fourie*. She had married another woman. But because Mrs. De Lange had not raised the equality claim consistently and had failed to take the case to the Equality Court first, the CCSA dismissed her case on procedural grounds. Justice Van der Westhuizen in his separate concurring opinion warned that the free spaces created by the Constitution for faith-based communities, must never become Constitution free zones.<sup>292</sup>

#### 4.6.3 Preventing elimination of pluralism: Individual rights and communitarian interests

Finding the pluralist balance with freedom of religion and belief and other rights is of course not confined to LGBTQ+ equality. *Şahin, R. v. N.S. and S.A.S.* illustrate how personal attire worn for religious reasons can become the central issue of balancing, because it is viewed as problematic by others. In Leyla Şahin’s case, the university was wary of the message sent by Leyla’s headscarf to other Muslim students who chose not to wear a headscarf and to students of other or no religious affiliation. For N.S., her face covering was a matter of personal piety and identity. To remove it while testifying against the culprit who had violated her, was a great interference. But the defendant felt that

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289 *Ibid.*, para. 59.

290 *Ibid.*, para. 60.

291 CCSA, *De Lange v. Presiding Bishop of the Methodist Church of Southern Africa for the Time Being and Another*, Case CCT223/14, 24 November 2015, paras 65-66.

292 *Ibid.*, paras 69-74.

his fair trial rights would be violated if he and his attorney could not see the facial expression of the accuser when testifying.

The applicant in *S.A.S.* also wore her face covering as a matter of personal piety and identity. She took legal action against the new legislation in France outlawing face coverings in public places. The majority of the French legislature was convinced that face coverings were at odds with the French concept of “living together”.

The ECtHR time and time again reiterated that “pluralism, tolerance and broadmindedness are hallmarks of a ‘democratic society’”.<sup>293</sup> This connects to the messages of equal concern and respect identified in the jurisprudence of the SCC and the CCSA. There is also a recurring communitarian theme in the ECtHR’s jurisprudence on pluralism. In its interpretation of “democratic society” which must necessitate restrictions of individual or group freedom, the state is often called the “neutral and impartial organizer of pluralism”.<sup>294</sup> Furthermore, the interpretation also suggests that on occasion particularistic (individual or group) interests must be subordinated to those of society at large. Yet the Court does not adhere to a majoritarian version of democracy: “a balance must be achieved which ensures the fair and proper treatment of people from minorities and avoids any abuse of a dominant position.”<sup>295</sup>

The relationship between democracy and human rights is as often stained as it is mutually enhancing. Taking into account the “will of the people” is important in the reasoning in both *Şahin* and *S.A.S.* Obviously, the ECtHR is not the only one of the three courts to take the democracy element of constitutionalism into consideration. In *Christian Education*, the fact that the democratic process led to outlawing corporal punishment was essential in the reasoning. In the new *TWU* case against the British Colombia Law Society mentioned in section 4.5.1, the fact that the Law Society held a referendum was deemed relevant. It is clear that the balancing with regard to “democracy” is closely related to the fact that in all three systems, interferences must be justified by reference to a “democratic society”.

Some critics have lamented that where Article 9 collides or overlaps with other rights, the Court tends to benefit the other rights or to focus entirely on those, at the expense of Article 9. This is voiced alongside the related criticism that it has interpreted Article 9 too restrictively.<sup>296</sup> However, there is one (in)famous case, which illustrates the opposite. In *Otto Preminger*,<sup>297</sup> the Court memorably allowed for a restriction of the freedom of speech in

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293 *Bayatyan v. Armenia*, app. no. 23459/03, *supra* n.11, para. 126 and *Leyla Şahin v. Turkey*, app. no. 44774/98, *supra* n. 29, para. 108.

294 See, e.g., *Leyla Şahin v. Turkey*, app. no. 44774/98, *supra* n. 29; *Bayatyan v. Armenia*, app. no. 23459/03, *supra* n.11; *Mouvement Raëlien Suisse v. Switzerland*, app. no. 16354/06, *supra* n. 127.

295 *Leyla Şahin v. Turkey*, app. no. 44774/98, *supra* n. 29, para. 108.

296 Harris, O’Boyle & Warbrick, *supra* n. 265, at 440-441.

297 ECtHR (C), *Otto-Preminger-Institut v. Austria*, app no. 13470/87, 20 September 1994.

order to protect the prevailing religious sentiments in one of the Austrian states. It upheld a ban against the showing of a satirical film which was deemed blasphemous by many Catholic organizations.

*Otto Preminger* showed in accordance with communitarian views that social tension can be a reason to limit freedom rights. The Turkish Government in *Şahin* pointed to social tension and argued that especially because the majority of Turkey was Sunni Muslim like Leyla, restrictions must be administered to prevent abuse of the dominant position. The Court did not inquire whether there were specific tensions at the actual campus, or if there were concrete tensions at universities elsewhere in Turkey. There was no iteration as to whether other reasonable and less infringing measures to ease these tensions and pressure had been tried without success. The line of reasoning in *Şahin* seems to be that because the demand that women be allowed to wear Islamic *hijab* in public places was voiced by movements with an allegedly extremist agenda, upholding the prohibition was necessary. But there was no evidence that Ms. Şahin sided with extremist movements and sought to impose the headscarf on all women. The only evidence before the Court was that she had “actively sought to resist the ban against voluntary wearing of the headscarf”.<sup>298</sup>

Turkey’s official state ideology (at least during the selected cases) was one of rigid as opposed to “open” secularism (see further section 4.7). The Convention, of course, is not preferent to any religion/state relationship, state ideology or lack thereof. Yet the role of impartial organizer of pluralism can mean nothing different than that the state refrains from imposing any world view on the public. Its role is to organize to ensure protecting the rights of everyone. The Turkish authorities considered it contrary to the values of pluralism equality “to allow religious attire to be worn”. But while the Court warned that social tension must never be a justification to eliminate pluralism,<sup>299</sup> it seems that this is exactly what the university was doing. This is what Judge Tulkens noted in her opinion.<sup>300</sup> The ban may also prevent religious women from studying, which would effectively be detrimental to pluralism, let alone the “serious ramifications for the advancement of Muslim women”.<sup>301</sup>

Ms. Şahin argued that states must be measured against the demands of liberal democracy.<sup>302</sup> Her implicit argument was that rigid secularism as maintained by the Turkish state was contrary to these demands. Her position was that the Convention was intended to alter policies of the High Contracting Parties through European judicial intervention. The Court did not find in her

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298 Altiparmak & Karahanoğullari, *supra* n. 257, at 280 and 282.

299 *Leyla Şahin v. Turkey*, app. no. 44774/98, *supra* n. 29, paras 107 and 116.

300 *Leyla Şahin v. Turkey*, app. no. 44774/98, *supra* n. 29, *Dissenting opinion of Judge Tulkens*, para. 6.

301 D.C. Decker and M. Lloyd, ‘Case Comment Leyla Sahin v Turkey’, in *European Human Rights Law Review*, vol. 6, pp. 672-678 (2004), p. 677.

302 See *Leyla Şahin v. Turkey*, app. no. 44774/98, *supra* n. 29, para. 100.



favor and there is yet to be a Strasbourg case which proclaims secularist policies too intrusive on individual liberty. However, in *S.A.S.* it came close. The majority did afford France a broad margin of appreciation and found the ban to be justified. It also acknowledged that face coverings were “the expression of a cultural identity” and were therefore a natural feature of “the pluralism that is inherent in democracy”.<sup>303</sup> In addition, it showed much more sensitivity towards the position of the individual believer and her self-understanding than in *Şahin*. Similarly in *N.S.*, the SCC majority rejected a “secular response that requires witnesses to park their religion at the courtroom door”. Such secularism “limits freedom of religion where no limit can be justified”.<sup>304</sup>

The dissenting judges in *S.A.S.* lamented the fact that the majority did find a justification for the ban. The notion of “living together”, apart from being too abstract, was no “right” or “freedom” or any other and therefore could not carry the ban as a “legitimate aim”. As it was the ban’s purpose to restrict pluralism, its aim was not reconcilable with the Convention.<sup>305</sup> Two of the dissenting judges in *N.S.* did argue that a *niqab* should never be allowed in a courtroom. The other dissenting judge would allow the *niqab*, at least in this case. She wanted to prevent a message that women like *N.S.* were not welcome, especially after they had already been victimized by sex offenders.<sup>306</sup>

Unlike in *Şahin*, *S.A.S.* and *N.S.*, in *Multani* the object of personal religious observance was concealed. Yet because the *kirpan* could be dangerous (if unsheathed), the school banned it from the school grounds. *Prince* showed a majority which assessed that granting an exemption for *dagga* use for the Rastafari community would endanger the overall policy of preventing illicit drug use. The *Gauteng School Education Bill* illustrated how the CCSA had to balance the ambition of legislatures to further the rights of others and pluralism, with the resistance of faith-based communities against such plans.

Gurbaj Singh Multani insisted that his sincere belief as a Sikh required him to wear a metal *kirpan* (traditional dagger) at all times, including to school. While initially accommodating Gurbaj, the school then banned the *kirpan*. It is this blanket ban, which the SCC finds disproportionate.<sup>307</sup> Between the extremes of total security and total lack thereof lies “a concern to ensure a reasonable level of safety”.<sup>308</sup> This was the balance that had to be struck. A blanket ban sent a message that Gurbaj and his religion were not welcome. That was at odds with Canadian multiculturalism. As “[r]eligious tolerance

303 *S.A.S. v. France*, app. no 43835/11, *supra* n. 9, para. 120.

304 *R. v. N.S.*, Case 33989, *supra* n. 5, para. 2.

305 *S.A.S. v. France*, app. no 43835/11, *supra* n. 9, Joint partly dissenting opinion of Judges Nussberger and Jäderblom, paras 2 and 14.

306 *R. v. N.S.*, Case 33989, *supra* n. 5, para. 94.

307 *Multani v. Commission scolaire Marguerite-Bourgeoys*, Case 30322, *supra* n. 15, paras 52-54.

308 *Ibid.*, para. 45.



is a very important value of Canadian society" educators must instill this value in their students to explain why the accommodation is not unfair.<sup>309</sup>

Indeed, the message of tolerance which says that we treat others with equal respect, is that message, which according to the SCC in *Chamberlain* is always age-appropriate.<sup>310</sup> It necessitated agreement with the other's position but did require to acknowledge the equal freedom in the public sphere. In *Prince*, the majority was eager to show positive tolerance towards Mr. Prince and his right to be different and the Rastafarians, even though there would be no exemption for them. The majority suggested that if only the exemption could have been administered without undermining the purpose of combating illicit drug use and without compromising the freedom of religion and belief of everyone claiming to be Rastafari, it would have been granted. For dissenting Justice Ngcobo, positive tolerance mandated an exemption from the general prohibition for the Rastafari community.

The *Gauteng School Education Bill* is a reference case. A substantial number of legislators in the Gauteng provincial parliament questioned the constitutionality of the new Gauteng School Bill. The bill was designed to even out apartheid era consequences. Whites-only Afrikaans language schools which featured Calvinist religious instruction were once the prime beneficiaries of Ministry of Education funding. Post-apartheid, these schools were still affluent. The Bill prohibited language competence testing in public schools and provided that they should encourage use of several official languages. It also provided that the religious policy of a school was to be reviewed by administrative bodies and that exemptions from religious instruction classes must be granted. Some members of the Afrikaner community feared that the Bill would endanger the continued existence of Afrikaans language Christian public schools. They pointed to the right to have schools based on "common culture, language or religion, provided that there shall be no discrimination on the ground of race".<sup>311</sup>

The CCSA found no positive constitutional obligation on the part of the province to provide for Afrikaans language Christian public schools. The obligation was for the state not to interfere with establishing or maintaining such schools, but not to establish or maintain them itself. However, compelling students to attend religious instruction classes would be a violation of the negative obligations under this same right.<sup>312</sup>

In his separate opinion, in Afrikaans, Justice Kriegler reemphasized that racial prejudice as an element of a community's understanding of its own culture, language and religion could not claim any constitutional protection

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309 *Ibid.*, paras 74 and 76.

310 *Chamberlain v. Surrey School District No. 36*, Case 28654, *supra* n. 197, para. 69.

311 See *In Re: Dispute Concerning The Constitutionality of Certain Provisions of The School Education Bill of 1995*, Case CCT39/95, *supra* n. 207, paras 1-6.

312 *Ibid.*, paras 7 and 21.

whatsoever.<sup>313</sup> Sachs noted that the principle of equality must be operated to end existing inequality in access to education. Yet in a pluralist society based on democratic values, equality and diversity should not compete. Instead, cultural diversity should be “accomplished on the secure basis of justice and equity”. Given the existence of Afrikaans medium schools, the continuation of Afrikaans education in these public schools could be constitutionally enforced. This did not apply to an exclusively Afrikaans educational environment.<sup>314</sup>

#### 4.6.4 The balance between individuals and their faith-based group

The Canadian case *Hofer*, and the ECtHR cases *Fernández Martínez* and *Sindicatul “Păstorul Cel Bun”* all require the balancing of a collective right of a community and/or church structure against that of individual believers who are part of the same community or structure.

Mr. Hofer felt that the authorities of his Hutterite community had unduly compromised his intellectual property rights. While he had invented a technique, his community now paid another Hutterite community patent rights. Because of this, Mr. Hofer felt he could no longer obey the authorities of his community, as he had vowed to do. The SCC had to decide whether it could apply secular law of procedural fairness to a community’s internal procedure to dismiss Mr. Hofer. The majority of the court found in his favor. His right of procedural fairness in the light of the state’s secular law had been breached. This outweighed autonomy considerations. According to dissenting Chief Justice McLachlin, the balance swung to the side of the community. She concluded that Hofer was not willing to accept the decision taken by the community leadership. This touched on the very essence of their autonomy.<sup>315</sup>

In *Sindicatul “Păstorul Cel Bun”*, the autonomy rights of the Church had to be balanced against those of church employees to start a trade union like any other employees. The Romanian authorities refused the registration of a trade union. The Grand Chamber considered the decision to be accurate in accordance with the ECHR. They considered, among other things, that the church employees had not requested or received the permission by the archbishop to set up a union as required by the internal rules.<sup>316</sup> But the dissenters were not convinced that the refusal was necessary or proportionate. Careful balancing required careful assessment and finding middle ground

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313 *Ibid.*, paras 38-43.

314 *Ibid.*, paras 52-53 and 80-81.

315 *Lakeside Colony of Hutterian Brethren v. Hofer*, Case 22382, *supra* n. 138, p. 83.

316 *Sindicatul “Păstorul Cel Bun” v. Romania*, app. no. 2330/09, *supra* n. 162, paras 168-169.

between the autonomy rights of the Church and the “ordinary” rights of the church employees.<sup>317</sup>

In *Fernández Martínez*, the balance required also involved the state and the Church. This time, the claimant was just one employee who had been working as a religious instruction teacher for many years without complaints. However, there was then media coverage about his life and opinions. He had once been ordained as a priest and had then requested dispensation from celibacy. But before this was granted, he had got married in accordance with state law. He and his wife had been blessed with children. He was also an active member of a movement which challenged some of the official doctrines of the Church.<sup>318</sup>

In accordance with its autonomy rights, the Church had the right to determine who was suitable to teach Catholic religion in the public school system.<sup>319</sup> When Mr. Fernández Martínez’s contract was up for renewal, the Church considered him no longer suitable. The state then did not prolong the contract. This was an accurate balance according to the majority on the ECtHR. Through the publicity, attention had been drawn to the discrepancies between Church dogma and his personal opinions. While he was legally an employee of the state, this did not discharge him from the heightened loyalty towards the Church. While the sanction of the non-prolongment was severe, Fernández Martínez had knowingly placed himself in the situation which triggered the decision. Finally, the majority found that the domestic courts had taken all these factors into proper consideration. Given the margin of appreciation in such cases, the conclusion was that the interference was justified and not disproportionate.<sup>320</sup>

But the minority felt that the interests of the claimant had not been taken into proper consideration. While the state might be obliged to let the Church decide who teaches Catholic religion in a public school, it must not let the Church decide who is suited or not to be on the payroll of the education system. Was there a possibility to honor Mr. Fernández Martínez’s rights as state employee while also honoring the rights of the Church? Could other (teaching) jobs have been found, could some kind of transitional arrangement have been made? The dissenting judges believed that careful balancing required the state to look into this. The state could not absolve itself of its obligations by delegating decisions to non-state bodies.<sup>321</sup>

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317 *Sindicatul “Păstorul Cel Bun” v. Romania*, app. no. 2330/09, *supra* n. 162, *Joint Partly Dissenting Opinion of Judges Spielmann et al.*, paras 5 and 8.

318 *Fernández Martínez v. Spain*, app. no. 56030/07, *supra* n. 148, paras 14-20.

319 *Ibid.*, paras 11-13 and 48-57.

320 *Ibid.*, paras 133-152.

321 *Fernández Martínez v. Spain*, app. no. 56030/07, *supra* n. 148, *Joined dissenting opinion of Judges Spielmann et al.*, paras 5-7, 10 and 21.

#### 4.6.5 Balancing parental authority and the rights of children

Parents are bound to raise their children in accordance with their beliefs. As we saw above in the discussion of *Chamberlain* (section 4.6.2), children may experience strain when confronted with the beliefs of others which do not match or contradict those they are raised with. There are also situations in which state institutions overrule parental authority to serve the interests of the children themselves. These are always situations that are painful for the parent and possibly also for the children.

In *P. (D.) v. S. (C.)*, a majority was convinced that the best interest of the child required limits to the father's access to the child. While C. lives with her mother, her Jehovah's Witness father took her to community events when visiting him. He also taught her about the tenets of his faith. The little girl repeated what she had learned when at home: "Jehovah [who] made [C.], [who] made [...] everything".<sup>322</sup> The facts, as stated in the judgment, show that the father was a devoted member of his congregation. While some, much like the mother, may feel that the frequency and intensity of the transmission of the articles of his faith to his child are high, is there really something that might harm the child? A majority on the SCC saw reasons to uphold a limitation of access rights.

The dissenting judges agreed with the majority that the best interest of the child was the right and constitutional standard. But they disagreed that the complexity caused by the situation was automatically harmful. The child, they reasoned, had a right to get to know her father, "including his religious values". While the mother wished for C. to enjoy Halloween and Christmas, this was "insufficient to support an order forbidding the father to impart his views on such holidays".<sup>323</sup> According to the dissenting judges, the balance was thus to let C. grow up to know both her parents as they are. The differences may cause some cognitive dissonance. But as we learn from *Chamberlain*, cognitive dissonance may be necessary to develop a tolerant outlook, in addition to one's personal beliefs.

In *Children's Aid Society of Metropolitan Toronto and A.C. v. Manitoba*, the physical health (i.e. life) of children was involved. In *A.C. v. Manitoba*, the balancing was intellectually and emotionally challenging. AC was 14 years old and a devout Jehovah's Witness just like her parents. She opposed blood transfusions, but the doctors believed she needed one to save her life from a potentially life-threatening disease. Had she been 18, her decision would have counted. Had she been 16, her decision would have been determinative in the medical decision to be taken. But AC was just 14.

The judgment shows us three different attempts to balance the best interests of the child against her rights as an autonomous human being to act in accord-

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322 *P. (D.) v. S. (C.)*, Case 22296, *supra* n. 58, p. 58.

323 *Ibid.*, pp. 64-68.

ance with her faith and conscience. Four judges reached the conclusion that constitutionally speaking, it was wrong not to give A.C. the chance to prove that she had the capacity to take a mature, well-informed decision. However, under the age of 16, these wishes would not have been determinative. As it was no longer possible to determine whether A.C. was indeed capable at the time of taking a decision as a 16 or 18-year-old (the emergency was long since over and A.C. had reached the age of 16), the majority found no interference. Because A.C. never got the chance for rebuttal of the psychiatric assessment, the majority awarded her all costs throughout the judicial proceedings.<sup>324</sup>

Two other judges concurred with the outcome, but took a different approach. They stressed that whether or not a minor was capable of taking a decision which was determinative or influential in matters of life and death should be determined by a “case by case analysis with a review to the relevant statutory criteria”. The distinction between age categories as such was justifiable, including limitations on the outcome of the decision. These two judges accepted that A.C. had a sincere belief against receiving blood transfusions and that this right had been interfered with. However, they believed that the interference was proportionate to the pressing and substantial objective of ensuring the health and safety of minors.<sup>325</sup>

Dissenting Justice Binnie did find a violation. The Act as it stood violated the Charter rights of teenagers under the age of 16. The Act prevented them from rebutting the presumption of immaturity. This interfered with their Charter rights, because these rights “are given to everyone, including individuals under 16 years old”. It was not known whether rebuttal would have led to a different outcome in the case at hand. Yet, Binnie still believed that judges, as well as other persons, do not have the right to substitute the choices of an individual with theirs. While most of us would “instinctively recoil from the choice made by A.C. because of our belief (religious or otherwise) in the sanctity of life. But it is obvious that anyone who refuses a potentially lifesaving blood transfusion on religious grounds does so out of a deeply personal and fundamental belief about how they wish to live, or cease to live, in obedience to what they interpret to be God’s commandment.”<sup>326</sup>

The balancing in *Children’s Aid Society of Metropolitan Toronto* is far more straightforward than in *A.C. v. Manitoba*. Again, Jehovah’s Witness beliefs regarding blood transfusions were the central belief. The child, however, was a newborn. The SCC unanimously upheld the lower court’s judgment which found that the surgeon who overruled the parental authority and ordered the transfusion had not violated the freedom of religion of the child and parents.<sup>327</sup> Two separately concurring judges even believed that the freedom

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324 *A.C. v. Manitoba (Director of Child and Family Services)*, Case 31955, *supra* n. 56, paras 120-122.

325 *Ibid.*, paras 128, 134-156.

326 *Ibid.*, paras 192, 213-214 and 219.

327 *B. (R.) v. Children’s Aid Society of Metropolitan Toronto*, Case 23298, *supra* n. 55, para. 103.

of religion and belief was not even engaged. Therefore, balancing was not called for. They believed that because the Act was instrumental to securing the life, liberty and security of the child, the parental decision to withhold treatment was outside the sphere of "liberty". With regard to the freedom of religion and belief, they argued that this freedom "should not encompass activity that so categorically negates the 'freedom of conscience' of another".<sup>328</sup>

In the South African *Christian Education* case, the Government overruled parental authority in general, in all cases of delegating the right to administer corporal punishment to schools. The new law adopted by Parliament outlawed this practice for public and private schools. Christian Education, an organization which ran faith-based schools, and some of the parents believed that this unjustifiably interfered with their parental authority. Justice Sachs, writing for the majority, balanced the involved rights. While honoring the sincere beliefs of Christian Education, he explained that an exemption could not be granted. That would automatically undermine the stated purpose of the Act: to ensure that all children in public and private schools are protected from the potentially harmful and humiliating experience of corporal punishment.<sup>329</sup>

Du Plessis applauded Sachs' careful maneuvering in *Christian Education*, especially with regard to outlining a jurisprudence of the communal dimension of the freedom of religion and belief.<sup>330</sup> The judgment included quotes, repeated in later judgments, such as the acknowledgement of the many social contributions of religious bodies to ethical, social and cultural life: "They are part of the fabric of public life, and constitute active elements of the diverse and pluralistic nation contemplated by the Constitution. Religion is not just a question of belief or doctrine. It is part of a way of life, of a people's temper and culture."<sup>331</sup>

#### 4.6.6 What is balancing?

Evans notes that "the problem with competing or conflicting rights is that in many instances it is not easy to determine which should take priority over the other under the circumstances and why".<sup>332</sup> The discussion and analysis of the balancing cases above shows us a few balancing principles that could apply to the balancing cases.

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328 *Ibid.*, paras 213-221 and 224-230.

329 Currie & de Waal, *supra* n. 63, at 322.

330 Du Plessis, *supra* n. 6, at 26 and 32.

331 *Christian Education South Africa v. Minister of Education*, Case CCT4/00, *supra* n. 25, para. 33.

332 Evans, *supra* n. 8, at 164.

In the cases in which balancing of religious beliefs and LGBTQ+ equality was required, we saw that where possible it is preferable not to prioritize one right over the other. The introduction of same-sex marriage to guarantee the rights of such couples, does not mean that those who hold (religious) beliefs against same-sex marriage must submit to it. They have a constitutional right not to be an accessory or facilitating in the legal realization and ceremonies of such unions. We also saw that the tolerance in a pluralist society does require acknowledging the existence of the other, even if we do not agree with them.

In balancing individual rights and communitarian interests, the cases showed that it is not always easy to uphold individual choice and liberty where the practice is deemed at odds with mainstream views, especially once these have been expressed through democratic procedure. But equally, the mainstream must not have the privilege to have its views enforced through law. After all, the principle is “majority rules, minority rights”. Sometimes we must even accept a certain risk of harm, to enable all of us to live in accordance with our sincere beliefs and truly respect difference. It is for public officials (such as teachers) to instill tolerance in others. Where the individual rights must submit to the overriding interest, the balance-full approach is to make an effort to explain at length why and how the individual right in question is engaged. This shows that the claim is taken seriously and that under slightly different circumstances, the outcome could be different.

We also saw that balancing requires not to generalize and assume. The case at hand should be solved. If there is no evidence of a certain danger, risk and/or collision of rights, then in the case in question there is no necessity to choose to limit a right.

The cases in which the balancing requires equilibrium between individuals and their communities seem complex with regard to equal concern and respect. The challenge is to leave the “inside law” as untouched as possible, without leaving individual rights unprotected. The state may not delegate its authority to non-state bodies. Finding an angle which does not make the decision zero-sum, as the dissenters in *Fernández Martínez* suggested, creates opportunities for such a balance.

The cases show that balancing between the rights of parents and their children is complex. *Christian Education* shows that similar to the individual/communitarian cases, giving detailed attention to the right of the parents, which is overridden, helps to achieve the balance. In many cases in which the interests of parents and children collide, the interest of children will prevail because they are less able to look out for their own interests. Nevertheless, interfering with parental authority is always serious state interference and must be justifiable by a high-stake interest.

Critics of the Strasbourg jurisprudence have argued that by balancing, the “Strasbourg organs have blurred the freedom of religion into a general mélange of mutual respect not only between the religions but between the freedom



of religion and other rights.”<sup>333</sup> Many of the cases discussed above show that balancing does not necessarily blur the meaning of the freedom of religion and belief at all. On the contrary, in many of the cases we see that the freedom of religion and belief is first given robust content before being balanced with the other rights and interests in question. This contributes to an outcome of equal concern and respect. Neither of the Courts has accepted internal limits as a principle of balancing. However, in their separate concurring opinion in *Children’s Aid Society*, Justices Iacobucci and Major concluded that they believe that the parental decision to withhold treatment is outside the sphere of liberty.<sup>334</sup> Yet the approach taken by the majority achieved more of a balance.

#### 4.7 THE FREEDOM OF RELIGION AND BELIEF AND SECULARISM

Secularism is commonly understood to be a constitutional principle which prescribes the separation of state authority and religious authority, i.e. institutional secularism (see further section 2.6.2). It comes in many different shapes and forms, much like the interdependence of religious and state authority. Obviously, secularism and the right to freedom of religion and belief have a relationship – sometimes mutually supportive, sometimes strained. Secularism plays a role in many of the selected cases. This section analyzes the relationship between secularism and the right to freedom of religion and belief.

States can choose from a variety of models when it comes to the relationship with religion and belief. In Hirschl’s view, the ways in which a state can relate to religion and belief can be divided into: (1) a separationist model; (2) an accommodationist model; and (3) a strong establishment or theocratic model. While France, the United States and Turkey are assembled under “separationist”, multicultural democracies such as Canada, South Africa or India are “accommodationist”, whereas countries from the traditional Kingdom of Saudi Arabia to the revolutionary Islamic Republic of Iran portray the “strong establishment”.<sup>335</sup> Within any of these categories, there is also a high degree of diversity. Two of the tribunals which feature in this study, the SCC and the CCSA, function within national contexts with their own models of the state-religion relationship. The ECtHR is a supranational court which has to deal with a variety of models between the member states.

The preamble of the Canadian Charter reads: “Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law”.

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333 Harris, O’Boyle & Warbrick, *supra* n. 265, at 440, paraphrasing M.D. Evans, *Religious Liberty and International Law in Europe*, Cambridge University Press, Cambridge (UK) 1997, p. 365.

334 *B. (R.) v. Children’s Aid Society of Metropolitan Toronto*, Case 23298, *supra* n. 55, paras 213-221.

335 R. Hirschl, ‘The Secularist Appeal Of Constitutional Law And Courts: A Comparative Account’, *Keynote address for the ReligioWest Kick-off Meeting*, Robert Schuman Centre for Advanced Studies, European University Institute, Florence, 14-15 October 2011, pp. 3-4.

While the principle of the rule of law can be adjudicated, there is doubt as to whether the same can be said for the supremacy of God.<sup>336</sup> Ryder suggests reading the clause as “secular humility towards religion and the recognition that the Charter as the nation’s new secular religion” recognizes that “there are other truths [...] that are profound sources in people’s lives that ought to be nurtured as counterbalance to state authority.”<sup>337</sup>

The South African Constitution has a preamble which refers to the South African struggle for freedom and the respect for the country’s diversity and the ambition to build a democratic South Africa. The preamble to the Constitution closes in four of the nation’s languages:

*May God protect our people.  
Nkosi Sikelel’ iAfrika. Morena boloka setjhaba sa heso.  
God seën Suid-Afrika. God bless South Africa.  
Mudzimu fhatutshedza Afurika. Hosi katekisa Afrika.*

Currie and de Waal argue that the drafters of the Constitution must have had the “cozy relationship that existed between the apartheid regime and the three Afrikaans churches in South Africa” as much on their mind as the problems that could be caused by insisting on a strict separation. The compromise reached in the Constitution, however, is not unique: the state is not prevented from recognizing or supporting religion, but equal treatment is required. Furthermore, all individuals but also communities are free to exercise their religion. When the subsections are read together, a strong equal treatment component besides a freedom component within the right becomes manifest.<sup>338</sup>

The European Convention of Human Rights does not deal directly with the relationship between church and state. Like all international human rights treaties, it is instead limited to freedom of religion and belief and non-discrimination thereof. From this reference point, there are permissible and non-permissible state actions with regard to faith-based organizations and communities, as we saw in the selected cases. If the state respects the freedom of religion and belief, the ECHR neither prohibits or prescribes any of the three, separation, accommodation or establishment in religion-state relations.<sup>339</sup> The contracting states vary greatly in their state-religion models. Some have one or more established religions. Some distinguish between recognized religions and non-recognized religions. Some are officially implicitly pluralist

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336 See L. Sossin, ‘The “Supremacy of God”, Human Dignity and the Charter of Rights and Freedoms’, in *University of New Brunswick Law Journal*, vol. 52, no. 227, pp. 227-241 (2003), p. 232.

337 Ryder, *supra* n.1, at 94.

338 See Currie & de Waal, *supra* n. 63, at 315.

339 Evans & Thomas, *supra* n. 153, at 699-700.

and/or secular.<sup>340</sup> Evans and Thomas position Turkey and France at one end with secularism as official doctrine and state policy. Germany also belongs on this end of the spectrum. But while its constitution prohibits establishment, the preamble refers to “responsibility before God” and the Catholic and Evangelical (i.e. Protestant) Churches are public law bodies. At the other end of Evans’ and Thomas’ spectrum are member states with strong establishment, such as Greece, Iceland, Italy, and the United Kingdom. Yet a “country such as the United Kingdom, it might be argued, has a great deal of religious freedom and religious tolerance – more than many secular countries – despite its established church”. A state not distinguishing between state and religious authority at all, would clearly violate the Convention. Short of this extreme, the Strasbourg case law shows that those states with established churches will at times intrude into the religious freedom of their citizens.<sup>341</sup> Yet also in secularist states, the principle of secularism will often outweigh the freedom of religion and belief.<sup>342</sup>

#### 4.7.1 Issues of freedom of religion and belief and secularism

Many of the selected cases involve to a certain degree issues of secularism and the freedom of religion and belief. In many of the selected cases, the theme is even central. Hence, the state’s relationship with religion and belief is elaborately discussed in many of the above sections. Here, therefore, we can draw on many of the previous observations. Indeed, Evans and Thomas stipulate that church-state relationships are not only defined by the freedom of religion and belief, but also by the freedoms of expression, privacy, assembly, and marriage. “In most religion cases, however, the Court treats the religion-specific provisions outlined above as the *lex specialis* – the law that is most appropriate to the particular legal problem – and tends to focus on those provisions.”<sup>343</sup>

In a total of at least 25 cases, the state’s relationship towards religion and belief is central. Five of these were decided by the SCC, 10 each were decided by the CCSA and ECtHR. A few topics are central to the discussion. One of these topics is the exclusiveness of state marriage. This topic correlates with the discussion of marriage in sections 4.4.3–4.4.5 and raises the following questions:

- Must state institutions recognize religious marriage under some circumstances (South African cases *Amod*, *Daniels*, *Hassam* (sections I2.4.5, I2.4.8 and I2.4.12) and the Strasbourg case *Yiğit* (section I3.4.9))?

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340 See Rainey, McCormick & Ovey, *supra* n. 118, at 478.

341 Evans & Thomas, *supra* n. 153, at 699, 705 and 707-708.

342 Lerner & Rabello, *supra* n. 123, at 18.

343 Evans & Thomas, *supra* n. 153, at 705.

- Can secular courts enforce a contractual obligation to provide for a religious divorce (Canadian case *Brucker*; section I1.4.11)?
- Is there an obligation for Parliament to regulate religious marriages of a minority religion (South African case *Women's Legal Centre Trust*; section I2.4.13)?

Another topic is the relationship between state institutions and religion. This correlates with the discussion of political freedom of faith-based communities in 4.4.4 and raises the following questions:

- Can legislators be required to swear a religious oath and can legislative meetings be started with a collective prayer (Strasbourg case *Buscarini*; section I3.4.1 and Canadian case *Mouvement laïque québécois*; section I1.4.15)?
- Can faith-based political parties which oppose the current form of secularism be prohibited? (Strasbourg case *Refah*; section I3.4.5)?
- Can a state dismiss a judge for being a member of a faith-based community (Strasbourg case *Maestri*; section I3.4.6)?
- Can secular courts apply secular law to procedures in a faith-based community (Canadian case *Hofer*; section I1.4.2)?

Religious education is also a topic in this section. This topic correlates with the discussion of religious education in state schools in section 4.5.2 and raises the following question: may the state order the display of religious symbols in state schools and/or order the compulsory character of a religious instruction class (South African case *Gauteng School Education Bill*; section I2.4.2 and Strasbourg cases *Lautsi* and *Folgerø*; section I3.4.8 and 6.4.10)?

The final topic is religious and secular beliefs as a source of law and policy. This topic relates to many of the other themes discussed in the previous sections and raises the following questions:

- Can religious or secularist beliefs be sources of interpretation of legal concepts? Canadian case *Reference Same-Sex Marriage* (section I1.4.9) and South African *Fourie* case (section I2.4.10).
- Can religious or secular beliefs be a source of legislation to enforce certain behavior? South African cases *Solberg* and *DE v RH* (sections I2.4.4. and I2.4.14) and Strasbourg cases *Şahin* (section I3.4.7) and *S.A.S.* (section I3.4.15).
- What does state neutrality require? Canadian case *Lafontaine* (section I1.4.8), South African cases *Final Certification* and *Certification Western Cape* (sections I2.4.1 and I2.4.3), and Strasbourg cases *Hasan v. Chaush* and *Fernández Martínez* (sections I3.4.4 and I3.4.14).

#### 4.7.2 Exclusiveness of state marriage

The Muslim marriage cases *Amod*, *Daniels*, and *Hassam*, as we saw in sections 4.4.3-4.4.5, show that according to the CCSA a purely religious marriage must sometimes be seen as a legal marriage in spite of the lack of legal formalization. Not doing so would seriously disadvantage the widows of such marriages to a discriminatory degree. In all the cases, the claimants are widows. The cases do not indicate if such a marriage must also be recognized under certain circumstances, when both spouses are alive.

In *Yiğit*, it is clear that the Turkish authorities take a much more binary approach to marriage than the CCSA, even though the claimant was also a widow. The ECtHR affirmed this approach. Mrs. Yiğit and her husband did not acquire a formal status as a married couple which led to social security, pension and inheritance disadvantage after her husband had passed. The fact that many couples in Turkey (like in South Africa for that matter), like Mrs. Yiğit, do not have their marriages registered for financial reasons did not change the judicial evaluation. The CCSA, on the other hand, regarded such personal factors and consequences as dominant, rather than the risk of people no longer registering their marriages.

In the Canadian *Bruker* case, the ex-husband claimed that the secular courts could not enforce a clause in the divorce agreement which obliged him to give his wife a *get* (Jewish religious law divorce). The dissenting judges on the SCC agreed. State neutrality in matters of religion made it impossible to enforce it. The majority, however, found in her favor. Not honoring the agreement inhibited her freedom as a Jewish woman in Canada.<sup>344</sup>

The South African Muslim marriage cases were decided against the backdrop of an ongoing debate in South Africa over the regulation of Muslim marriages. The Constitution actually makes this possible. The Women's Legal Centre Trust relied on a provision in the Constitution according to which the CCSA can declare that a state organ has forsaken its constitutional duties. But in *Women's Legal Centre Trust*, the CCSA found that said provision did not apply in this case. There were many interests and choices involved in adopting legislation recognizing Muslim marriages. Hence, the absence of an Act could not be attributed to mere negligence of constitutional obligations. Furthermore, it would not be appropriate for the CCSA to decide as a Court of first and final instance.<sup>345</sup>

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<sup>344</sup> See *Bruker v. Marcovitz*, Case 31212, *supra* n. 60, paras 121 and 93.

<sup>345</sup> *Women's Legal Centre Trust v. President of the Republic*, Case CCT13/09, *supra* n. 72, paras 11-12 and 23.

### 4.7.3 State institutions and religion

The *Buscarini* case was brought to Strasbourg by legislators from San Marino. They objected to being required to swear on the Christian Gospels in order to formalize their status as Members of Parliament. The Court found an unjustifiable interference. There was no legitimate aim for such a rule. This is noteworthy, seeing whenever the government can point to any of the mentioned aims in the Convention, the Court will usually assume the legitimate aim and continue the analysis by looking into the necessity component. According to the Court, the oath effectively represented exclusion. Potential parliamentarians who because of their own beliefs were unable to swear an oath on the Christian Holy Book were kept from entering Parliament, whereas in a democratic society there should be no barrier to keeping people from taking elected office.<sup>346</sup>

Mr. Simoneau regularly attended the public meetings of the municipal council of Saguenay, in Quebec. He also felt excluded as an atheist because each meeting started with a prayer and related religious symbolism. After Mr. Simoneau had made his concerns known and had applied to the Human Rights Tribunal with the support of the *Mouvement laïque québécois* (MLQ), the City adopted a by-law regulating the prayer, which changed the wording of the prayer and provided for a two-minute delay between the end of the prayer and the official opening of council meetings. The mayor and the councilors did show religious affiliation during the prayer and the opening, pointing to their rights under the freedom of religion and belief.<sup>347</sup> With the help of the movement, Mr. Simoneau took his case up to the SCC.

The SCC was unanimous in finding in favor of the claimants. “Sponsorship of one religious tradition by the State in breach of its duty of neutrality amounts to discrimination against all other such traditions.”<sup>348</sup> The Canadian concept of neutrality “requires that the state neither favor nor hinder any particular belief” and this included non-belief, atheism and agnosticism. A neutral public space, free from coercion, pressure and judgment on the part of public authorities in matters of spirituality protected every person’s freedom and dignity, and it helped preserve and promote the multicultural nature of Canadian society.<sup>349</sup>

The SCC found that the recitation of the prayer at the council’s meetings was more than anything else a use of public powers to manifest and profess one religion to the exclusion of all others. This was true regardless of the

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346 ECtHR (GC), *Buscarini and Others v. San Marino*, app. no. 24645/94, 18 February 1999, paras 38-40. See also Rainey, McCormick & Ovey, *supra* n. 118, at 477.

347 SCC, *Mouvement laïque québécois v. Saguenay (City)*, Case 35496, [2015] 2 SCR 3, 15 April 2015, para. 2.

348 *Ibid.*, para. 64.

349 *Ibid.*, paras 70-75.

traditional character. The evidence even showed that the mayor and council members had explicitly referred to the conflict as a quest for their religion. The prayers and religious symbolism were very much denominational, in spite of claims to the contrary. While non-believers could refrain from participating, the price for doing so would be exclusion. This is what state neutrality was meant to prevent.<sup>350</sup>

Not reciting a prayer or displaying religious affiliations, on the other hand, did not amount to giving atheism and agnosticism prevalence over religious beliefs. The SCC was aware that “secularism” was not more neutral than other positions regarding belief and religion. “True neutrality” presupposed abstention, but it did not amount to a stand favoring one view over another.<sup>351</sup> As the opponent had also cited the constitutional preamble, the SCC explained that it could not lead to an interpretation of freedom of conscience and religion that authorized the state to consciously profess a theistic faith. Hence, it could not be used to justify the prayer in question.<sup>352</sup>

Whereas the MLQ advocated more laicism and restraint of state-sponsored religion in Quebec, the Refah party’s quest was to restrain state-sponsored laicism and to create more liberty for believers to conduct their lives in accordance with their faith. They even proposed legal pluralism, so believers could have their religious traditions govern their family relations. But the Turkish authorities were convinced that Refah’s plans went much further. In their view, the party’s criticism of Kemalist laicism implied the goal to establish a theocracy.

The Refah Party had won 22% and thus by far the largest part of the popular vote in the 1995 elections in Turkey. It had formed a coalition government with another party (non-controversial by Turkish standards), headed by a Refah prime minister. Prior to Refah, a total of fourteen other political parties had been dissolved in Turkey, three of which had previously challenged the prohibition in Strasbourg. In the three earlier cases, the Court had found violations of the guarantees of the Convention on freedom of association and freedom of expression. All these parties adhered to secular ideologies and had little electoral success. Refah was faith-based and had won the elections. “However, the European Court decided not to second-guess the Turkish authorities in the Refah case and upheld the dissolution as compatible with the Convention”. As Boyle notes, this took the notion of “militant democracy” and the actions permissible under this concept to a whole new level.<sup>353</sup>

In *Refah*, the Government argued that theocracy by definition rules out democracy. It accused Refah of wanting to return to the theocratic past of

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350 *Ibid.*, para. 87.

351 *Ibid.*, paras 120-126 and 130-133.

352 *Ibid.*, paras 144-149.

353 Boyle, *supra* n. 170, at 2.



Ottoman rule.<sup>354</sup> The Court went along. But the argument misrepresented both the stated goals of Refah and Turkey's history. Democracy as understood in the Convention system does not rule out the various models described in the introduction to this section. Refah did try to introduce public law, which would accommodate the majority religion. But given the existence of Sabbatarian laws in many of the other member states, both secular and establishment, this can hardly be seen as "subversive of democracy or human rights". Was "it not perfectly legitimate for a political party such as Refah, which represented millions of Muslim voters, to introduce [...] varying working hours in the public service during Ramadan?"<sup>355</sup>

In light of this modern notion of democracy, the faults of the Ottoman Empire at the time it ceased to exist, lay not with the status given to religion but with the (material) lack of rule of law and human rights. It was not in any proper understanding a "theocracy", ruled by religious authorities, comparable to contemporary Iran or the Vatican state. Indeed, An-Na'im calls the very idea that a state enforce *Shari'a* a "historical fallacy, inconsistent with *Shari'a* itself".<sup>356</sup> The Kemalist single party republic was modelled on the Ottoman Empire, with Turkish nationalism replacing the Ottoman inter-communalism and the all-powerful president replacing the omnipotent sultan. Leyla Şahin, in her case discussed elaborately above, suggests many elements of Kemalist secularist state ideology might be at odds with modern notions of liberal democracy. This is a legitimate view within a pluralist understanding of democracy.

The *Refah* case did not only represent a slippery slope when it comes to understanding Turkish history. Justice Kovler warned in *Refah* and *Yiğit*, that interpreting the meaning of terms, concepts and practices originating from a certain religion is dangerous for a court, especially when the religion in question is wholly unfamiliar to most of the judges. It might get an international human rights court "entangled in Eurocentrism".<sup>357</sup> He also warned that the jurisprudence of the Court must not dismiss all political movements that seek to assert the tenets of Islam in a political fashion as *a priori* anti-democratic and not deserving of human rights protection.<sup>358</sup>

*Maestri* also illustrated that sometimes judges are not immune to uniformed stereotypes. While the majority ruled in favor of the Freemason judge who was dismissed in absence of a clear, undisputable and predictable rule,<sup>359</sup> the dissenting judges saw the dismissal as justified. They believed that the

354 *Refah Partisi (The Welfare Party) and Others v. Turkey*, app. nos. 41340/98, 41342/98, 41343/98 and 41344/98, *supra* n. 167, paras 82 and 125.

355 Boyle, *supra* n. 170, at 14.

356 An-Na'im, *supra* n.186, at. 1242.

357 See *Terife Yiğit v. Turkey*, app.no. 3976/05, *supra* n. 74, *Concurring opinion of Judge Kovler*.

358 *Refah Partisi (The Welfare Party) and Others v. Turkey*, app. nos. 41340/98, 41342/98, 41343/98 and 41344/98, *supra* n. 167, *Concurring opinion of Judge Kovler*.

359 ECtHR (GC), *Maestri v. Italy*, app. no. 39748/98, 17 February 2004, paras 41-43.

loyalty which Freemasons promise to their Lodge and brethren is incompatible with the office of a judge.<sup>360</sup> But do the Freemasons truly categorically differ in this from many organized faith-based groups the world over?

In *Hofer*, the central question was whether the standards of civil law applied to a procedure regulated by “own law” of a community. Mr. Hofer did not abide by the decision of the community leadership. According to the majority, the community’s internal procedures did not stand the test of procedural fairness mandated by civil law. Dissenting Chief Justice McLachlin concluded that the procedures were “open and eminently fair”. She concluded that the problem was not with procedural fairness, but the fact that Mr. Hofer did not accept the decision taken by the community leadership, although as a member of the community he had vowed to do so.<sup>361</sup>

The cases *Refah* and *Hofer* and especially the discussion between the judges touch on another important issue for the relationship between state and religion. This is the relationship between the secular judiciary and secular law, and concepts, rules and behavior originating from religion and/or belief. Section 4.7.5 deals with religion and beliefs as sources of law and policy. But how should judges approach the concepts which the believers hold dearly? In *Amselem* (section II.4.7), also discussed in section 4.2, the SCC preferred approaching beliefs as personal sincerity. Judicial neutrality demands that judges do not interpret religious concepts. As justice Iacobucci explained for the majority, the state was not fit to be “the arbiter of religious dogma”. Accordingly, courts should avoid judicially interpreting the content of a subjective understanding of “religious requirement, obligation, precept, commandment, custom or ritual”. “Secular judicial determinations of theological or religious disputes”, “unjustifiably entangle the court in the affairs of religion.”<sup>362</sup>

In *Multani*, also discussed in section 4.2, the SCC dismissed the declarations made by Sikh officials that replica kirpans could be worn to honor the religious precept as irrelevant.<sup>363</sup> What mattered were the sincere personal religious beliefs of Gurbaj.<sup>364</sup> In *Bruker*, discussed above in section 4.7.2, the Court dismissed the ex-husband’s declaration that his wife did not live a particularly religious life as irrelevant. It was not for the Court to judge how Mrs. Bruker should practice her religion.<sup>365</sup> The CCSA reasoned along the same lines when in *Pillay*, discussed in section 4.2 as elsewhere in this chapter, it said that questioning the importance or centrality of a practice “would require them

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360 *Maestri v. Italy*, app. no. 39748/98, *supra* n. 358, *Joint dissenting opinion of Judges Bonello et al.*, para. 15.

361 *Lakeside Colony of Hutterian Brethren v. Hofer*, Case 22382, *supra* n. 138, pp.73-83.

362 *Syndicat Northcrest v. Amselem*, Case 29252, 29253, *supra* n. 22, para. 50.

363 *Multani v. Commission scolaire Marguerite-Bourgeoys*, Case 30322, *supra* n. 15, para. 39.

364 *Ibid.*, paras 32-33, quoting *R. v. Big M Drug Mart Ltd.*, Case 18125, *supra* n. 53.

365 *Bruker v. Marcovitz*, Case 31212, *supra* n. 60, para. 113, quoting the Superior Court Judge.

to substitute their judgment of the meaning of a practice for that of the person before them and often to take sides in bitter internal disputes".<sup>366</sup>

ECtHR judge Kovler, as we saw, was bound to agree with McLachlin (*Hofer*) and the majority in *Amselem*, *Multani* and *Pillay*. Secular judges are not trained in religious doctrine and looking at another (sub-) culture from one's own always contains a risk of bias. This is why they tried to raise awareness among their colleagues in *Refah* and *Yiğit*. Literature has been critical of the ECtHR's tendency to evaluate religious doctrine.<sup>367</sup> Martínez-Torrón and Navarro-Valls, warn of the dangers involved if judges substitute their assessment of what is reasonable for an individual to believe, for the individual's own belief system.<sup>368</sup> Lerner and Rabello are also of the opinion that courts should avoid "interpretations of religious precepts which are really the province of the religious authorities and not the Government".<sup>369</sup> The Arrowsmith test, once developed by the European Commission of Human Rights, seems to have gone out of use in recent years.<sup>370</sup> The test was once used in order to determine "objectively" whether a certain practice or manifestation is actually linked to a religious or other belief and covered by Article 9.

In *Refah*, one of the doctrines evaluated by the ECtHR was a concept from Islamic jurisprudence, the term *jihad*. The Court, much like we often see in Western media, referred to the term as meaning "holy war" for "total domination of Islam in society".<sup>371</sup> But as Kevin Boyle notes, "the definition [the Court] gives to jihad as 'Holy War' represents a false interpretation to millions of Muslims." The proper meaning of the word is "struggle". "The concept has been expropriated by extreme believers to mean religiously-sanctioned killing. But the majority of Muslims see this as a grave distortion of what is in actuality the spiritual idea of personal struggle for piety." In *Refah*'s case, the use of the term may have referred to a political struggle, but there was no evidence of any violent connotation. Boyle and Bader note that the approach

<sup>366</sup> *MEC for Education: Kwazulu-Natal and Other v. Pillay*, Case CCT 51/06, *supra* n. 7, para. 87.

<sup>367</sup> E. Brems, 'Above Children's Heads. The Headscarf Controversy in European Schools from the Perspective of Children's Rights', in *The International Journal of Children's Rights*, vol. 14, no. 2, pp. 119–136 (2006). Important also are Evans, *supra* n. 26; S. Langlaude, 'Indoctrination, Secularism, Religious Liberty, and the ECHR', in *International and Comparative Law Quarterly*, vol. 55, no. 4, pp. 929–944 (2006); Boyle, *supra* n. 170, at 14; J. Gunn 'Fearful Symbols: The Islamic Headscarf and the European Court of Human Rights in *Sahin v. Turkey*', in *Droit et Religion*, pp. 339–367 (2008).

<sup>368</sup> See J. Martínez-Torrón and R. Navarro-Valls, 'The Protection of Religious Freedom in the System of the Council of Europe', in T. Lindholm, W.C. Durham and B.G. Tahzib-Lie (eds.), *Facilitating Freedom of Religion or Belief: A Deskbook*, Martinus Nijhoff Publishers, Leiden (Netherlands), 2004, p. 234.

<sup>369</sup> Lerner & Rabello, *supra* n. 123, at 43.

<sup>370</sup> Harris, O'Boyle & Warbrick, *supra* n. 265, at 433.

<sup>371</sup> *Refah Partisi (The Welfare Party) and Others v. Turkey*, app. nos. 41340/98, 41342/98, 41343/98 and 41344/98, *supra* n. 167, para. 130.

taken in Strasbourg would not have passed the strict scrutiny test of US “clear and present danger” jurisprudence.<sup>372</sup>

#### 4.7.4 Religion and public education

The essence of the conflict in *Gauteng School Education Bill* was whether the state must provide for educational institutions based on a single common culture, language or religion. The South African constitution protects the right to participate in the cultural, linguistic and religious communities of one’s choice. It also allows for religious observances at state-run or state-aided educational institutions. However, all this does not infer a positive obligation on the part of the state to actually provide for state-run educational institutions specifically for every cultural, linguistic or religious group.<sup>373</sup> The CCSA also made it very clear that compelling students “to attend religious classes and religious practices at the school” is a direct violation of the freedom of religion and belief as guaranteed by the Constitution.<sup>374</sup>

In *Folgerø*, there was a compulsory subject which taught Christianity, religion and philosophy. While exemptions were possible, according to a majority on the Court, the procedure created such high burdens that parents and children effectively felt coerced into following the subject. The majority considered it relevant that this all applied in the state schools. Hence, the argument that non-Lutheran parents could send their children to private schools was deemed irrelevant. States have an obligation to ensure pluralism in the public school system, irrespective of the possibility to have a state religion as well as a state church and to promote, protect and enhance both by means of legislation.<sup>375</sup>

The majority also took into consideration that schools were necessarily places of coercion. Yet with regard to religion, this coercion must be restrained in order to safeguard, that students did not feel compelled to have or not have to change their religion. The necessary restraint applies equally to religious, secular and atheist proselytism in the school system. They can all be intrusive. In the state educational system, minorities must not be made to feel like outsiders. The state must balance legitimate majority and minority concerns, without subjecting one to the other. Ideally, the state provides for “religious literacy” which will also counteract bigotry, intolerance and discrimination.<sup>376</sup>

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372 Boyle, *supra* n. 170, at 13 and 11. See also Bader, *supra* n. 179, at 30- 31.

373 Constitution of the Republic of South Africa, 10 December 1996, art. 31.

374 *In Re: Dispute Concerning The Constitutionality of Certain Provisions of The School Education Bill of 1995*, Case CCT39/95, *supra* n. 204, para. 21.

375 *Folgerø and Others v. Norway*, app.no. 15472/02, *supra* n. 214, paras 98 and 102.

376 Evans, *supra* n. 193, at 453, 469, 455, 457-459.

The dissenting judges in *Folgerø* did not perceive the procedure as burdensome. As there was an opt-out option, the Norwegian state had struck the right balance. It was natural for the procedure to create some obstacles as to prevent abuse.<sup>377</sup> But what if there is no 'opt-out' option? The claimants in *Lautsi* objected to the obligatory nature of the crucifix in every classroom in Italy. The Lautsi family could not opt out from attending class, and neither could the class or the school accommodate the Lautsi family's agnosticism. The chamber followed the jurisprudence that historical ties between the state and a particular religion do not justify deviation from the principle of a pluralist educational environment.<sup>378</sup>

The Grand Chamber took complicated twists and turns to argue why the symbol which is at the heart of Catholic Christianity was still neutral enough not to display favoritism of the mainstream religion. Although the Lautsi family had attested that they felt unwelcome, the Grand Chamber still felt that the obligatory display of a religious symbol in every Italian classroom could go hand in hand with the state's role as impartial organizer of pluralism. The lack of coherence and logic in this reasoning invited speculations that politics, more than law had guided the reasoning.

#### 4.7.5 Religious and secularist beliefs as sources of law and policy

In both the Canadian *Same-Sex Marriage* case and the South African *Fourie* case, interveners raised arguments proclaiming that marriage had been fixed by culture and religion to bonds between opposite-sex couples. But both Courts warned not to confuse two types of marriage: the legal concept which the state administers and the cultural concept which faith-based communities may determine and alter in their own right.

In *Same-Sex Marriage*, the SCC explained that "even if in the past religion and marriage were seen as inseparable by courts", nowadays it could not be interpreted from the point of view of a particular religious tradition as it had become a civil institution.<sup>379</sup> In *Fourie*, the CCSA said that while religious beliefs and practices may be supported by the state in an even-handed manner, they were no source for legislation nor were they a source for interpreting the Constitution. After all, if judges "were called upon to construe religious texts and take sides" this would place them in an impossible and undesirable situation.<sup>380</sup> As discussed in section 4.7.3, such a situation is impossible and

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377 *Folgerø and Others v. Norway*, app.no. 15472/02, *supra* n. 214, Joint dissenting opinion of Judges Wildhaber, Lorenzen, Birsan, Kovler, Steiner, Borrego Borrego, Hajiyeve and Jebens, p. 52.

378 Evans, *supra* n. 8, at 147, referring to *Manoussakis and Others v. Greece*, app.no. 18748/91, *supra* n. 228.

379 *Reference re Same-Sex Marriage*, Case 29866, *supra* n. 76, para. 22.

380 *Minister of Home Affairs and Another v. Fourie et al.*, Cases CCT 60/04 and CCT10/05, *supra* n. 78, paras 91-92.

undesirable because secular judges are not trained in religious doctrine, and should avoid “interpretations of religious precepts which are really the province of the religious authorities”.<sup>381</sup> Therefore, the distinction between secular law and religious “own law” protects the citizens who do not wish to be bound by certain religious rules as much as those who hold them sacred.

But even when faith-based precepts are not to be considered sources for interpreting legislation, a constitution or a human rights document, we can hardly deny that many secular legal rules are inspired by religion, belief or a secularist world view. What does this say about the legality of such rules, vis-à-vis those who believe differently? In *Solberg*, the claimant challenged the prohibition of liquor sales on Sundays because they enforced a religious norm. In *DE v RH*, the former wife of the claimant and her new partner believed they should not suffer legal consequences for adultery. The legal rule, which was inspired by moral considerations of the past, illegitimately interfered in private and family affairs. The claimants in *Şahin* and *S.A.S.* felt inhibited by the secularist mainstream rules which limited their freedom as women of faith to make personal choices in their attire.

In *Solberg*, the owner of a supermarket was charged for violating the Liquor Act. The Act prohibited the sale of liquor, including table wine, in supermarkets on Sundays and public holidays. Liquor could be bought in bars and restaurants on such days. Supermarkets could also be open in order to sell other goods. A majority of the CCSA found that the Liquor Act did not infringe constitutional rights. The majority argued that the Constitution (in this case the interim constitution which was still in place during the case) did not include an “anti-establishment clause”.<sup>382</sup> Hence, such a clause should not be read into the Constitution. The South African Constitution and thus the Court approached the relationship between religion and state from the equality angle.<sup>383</sup>

The Canadian milestone case *Big M* played an important role of reference in the case. Generally, the CCSA is very open to judicial borrowing. Also, this case was also decided very early on in the constitutional era and any judicial inspiration from a liberal constitutional order would have been foreign. According to the majority, South African law, unlike the Lord’s Day Act in *Big M*, did not compel supermarkets to be closed on closed days, neither did it make it impossible to consume liquor elsewhere on those days. Hence, Chief Justice Chaskalson, writing for the majority, could not see why the Liquor Act would compel people to act or refrain from acting in a manner contrary to their religious beliefs. But even if the Act was seen to interfere with the freedom of religion and belief, the majority argued, the interference would be reasonable

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381 Lerner & Rabello, *supra* n. 123, at 43.

382 *S v. Lawrence et al.*, Cases CCT38/96 et al., *supra* n. 84, paras 1-2.

383 *Ibid.*, paras 99-101. See also Currie & de Waal, *supra* n. 63, at 329.



and justifiable in an open and democratic society. After all, the closed days nowadays did not necessarily serve religious purposes.<sup>384</sup>

Justice Sachs in his separate opinion took another route. He did see an interference with the freedom of religion and belief, which must be read from an equality angle. The Act had an impact on the choice of non-Christian liquor sellers, who because of their religion kept a different Sabbath and thus had a competitive disadvantage. Secondly, it had an impact by symbolically endorsing the Christian religion to the exclusion of all others.<sup>385</sup> While the days have Christian origins, from the perspective of the “reasonable South African” – who could be of any religion or of none – the public holidays (as such) no longer represented state endorsement of religion. On the other hand, the prohibition of the sale of liquor on these public holidays did represent state endorsement of religion.<sup>386</sup> However, Sachs concluded that the economic disadvantages involved for non-Christians, or non-observers of Sabbath temperance, were very marginal. The message of favoritism towards Christianity was also reduced by the marginal economic effects and the possibility of consuming liquor elsewhere.<sup>387</sup> Hence, there was no violation.

The dissenting judges were inspired by the nation’s break with the past to take a more critical look. Given South Africa’s (until then recent) history of exclusive support for white Afrikaner Protestantism, it was unavoidable to conclude that the selection of closed days was “inspired by their significance for Christians”. Inevitably, the effect was that Christianity to the exclusion of other religions had been endorsed by legislative measures. Such favoritism was clearly contradicted with the Constitution’s duty of equal treatment of all religions and beliefs. Treating the obligation as a negative duty only failed to see the full spectrum. The positive obligation was breached by a regulation about closed days which favored one religion to the exclusion of all others. The purposes of the Liquor Act must surely be to restrict liquor consumption on the closed days as compared to other days. This displayed an endorsement of Christianity and hence constituted an unjustifiable, though not severe or egregious, infringement.<sup>388</sup>

By holding that the connection between the Christian Sabbath and the prohibition of liquor sale on a Sunday was too tenuous, Chaskalson tried to reconcile the prohibition with the equal treatment of all religions.<sup>389</sup> Yet as O’Reagan observed in the dissenting opinion, not only the “wall of separation” jurisprudence, but indeed also accommodationist jurisprudence would have required the striking down of this prohibition.<sup>390</sup> The real freedom of religion

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384 *S v. Lawrence et al.*, Cases CCT38/96 et al., *supra* n. 84, paras 90-97.

385 *Ibid.*, paras 136-138.

386 *Ibid.*, paras 156 and 163.

387 *Ibid.*, paras 169-173.

388 *Ibid.*, paras 116-122 and 125-132.

389 See Currie & de Waal, *supra* n. 63, at 327.

390 *S v. Lawrence et al.*, Cases CCT38/96 et al., *supra* n. 84, para. 122.



issue in *Solberg*, Du Plessis argued, should have approached the question from exactly the opposite angle: how to accommodate certain Christians' objection to the sale of liquor on their holy day.<sup>391</sup> In Smith's opinion, the freedom of religion and belief in the Bill of Rights required striking down old favoritism towards (Protestant) Christianity.<sup>392</sup>

In *DE v RH*, the claimant was the ex-husband who made use of existing law that allowed him to sue his ex-wife and her partner for adultery which took place while he was still married to her. According to the claimant, adultery had caused the break-up. His ex-wife claimed that the relationship had begun to deteriorate two years prior to the split.<sup>393</sup> A unanimous CCSA found the legal provisions the ex-husband based his claim on to be invalid for constitutional reasons.

The roots of the legal provision, Madlanga argued for the unanimous Court, lay in patriarchy. Case law then created the possibility for women to use them. Common law has always required the development of law by courts. Hence, now the law must be developed further based on the constitutional values which form an important and integral part of the *mores* of society. Long before the current constitutional order, societal views on adultery as well as divorce had changed. Many legal systems related to South Africa had abolished the legal claims against adultery.<sup>394</sup> The constitutional norms also informed present-day attitudes towards adultery, which in turn informed the *boni mores* of the new ethos. The former wife and the partner could rely on their rights to freedom and security of the person, privacy and freedom of association. Legal proceedings invaded the most intimate part of their private lives.<sup>395</sup>

Even if the fault for a failing marriage clearly lay with the adulterous party and the partner, their rights still mattered. Upholding liability towards the non-adulterous spouse would restrict the rights of consenting adults to make their own choices in sexual relations. On the other hand, the non-adulterous party's right to dignity was also engaged. The changing social attitudes did not change this. Yet weighing all the rights involved, in light of social change, must lead to the conclusion that legal liability for adultery could not be upheld. While marriage was still an important cornerstone of society, the law could not rescue a marriage.<sup>396</sup>

The ECtHR cases *Şahin* and *S.A.S.* both deal with secularist beliefs which were the source of official government policy and legislation. *Laïcité* is a constitutional principle developed during the French Revolution, usually

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391 L. du Plessis, 'Freedom of or Freedom from Religion? An Overview of Issues Pertinent to the Constitutional Protection of Religious Rights and Freedom in "the New South Africa"', in *Brigham Young University*, vol. 2001, no. 2, pp. 439-466 (2001), p. 453.

392 Smith, *supra* n. 247, at 5.

393 *DE v. RH*, Case CCT182/14, *supra* n. 96, paras 6-7.

394 *Ibid.*, paras 14-38.

395 *Ibid.*, paras 51-52 and 54.

396 *Ibid.*, paras 55-61, 64, 67-71.

interpreted as a strict separation between the domain of religion and state. Both the French and the Turkish constitutions include provisions on the laic nature of the state. The *Şahin* case was set in the 1990s in Turkey. Leyla was a medical student who wore the Islamic headscarf. University regulations prescribed, that students not show any signs of religious affiliation in their attire. But for Leyla, who sincerely believed she had to wear the headscarf at all times, this connoted a painful choice between continuing her studies and following her religious beliefs.

*S.A.S.*, set a good 20 years later in France, was launched right after the French Parliament adopted a new law prohibiting face coverings in public. While formulated in a religiously neutral way, the debates concerning the law in the French Parliament made it very clear that the law targeted the (revitalized) traditional face coverings worn by a small group of French Muslim women. The law drew on the notion of “living together” as reason to prohibit the face coverings. Both governments, Turkey in *Şahin* and France in *S.A.S* cited the rights and freedoms of others to curtail the freedom of religion and belief of the women who were affected. In both cases, the Court had to assess whether the attempt by a government to eliminate concrete pluralism, was somehow for the better of pluralism in general.

In *Şahin*, the majority opinion did not indicate a dilemma. While the measure surely limited the freedom rights of Ms. Şahin and other women like her, the Government argued that its purpose was to create an educational environment in which religious minorities and Muslims who do not believe that women are required to wear the *hijab* would not be confronted with the “powerful external symbol” which “might have some kind of proselytizing effect” and seems to be “imposed on women by a religious precept that [is] hard to reconcile with the principle of gender equality”. Therefore it concluded that it could not “easily be reconciled with the message of tolerance, respect for others and, above all, equality and non-discrimination”.<sup>397</sup> Judge Tulkens noted in her separate opinion, that the Court should not have repeated the unfortunate passages from *Dalhab* regarding the “powerful external symbol”. She failed to see “how the principle of sexual equality can justify prohibiting a woman from following a practice which, in the absence of proof to the contrary, she must be taken to have freely adopted”.<sup>398</sup>

Twenty years later, the majority was much more cautious in making statements about individual choices in following religious rules and customs. The majority found that the ban was justified by the aim of protecting the rights of freedoms of others, because Parliament could give great weight to “living together”, given the wide margin of appreciation. The ban did, however, have a disproportional effect on Muslim women and Islamophobic

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<sup>397</sup> *Leyla Şahin v. Turkey*, app. no. 44774/98, *supra* n. 29, para. 111.

<sup>398</sup> *Leyla Şahin v. Turkey*, app. no. 44774/98, *supra* n. 29, *Dissenting opinion of Judge Tulkens*, paras 11-13.

remarks which featured in the national debate were unreconcilable with the Convention.<sup>399</sup> The dissenting judges in *S.A.S.*, Nussberger and Jäderblom, lamented the fact that the majority did find a justification for the ban. The notion of “living together” apart from being too abstract was no “right” of “freedom” of any other and therefore could not carry the ban as a “legitimate aim”. As it was the ban’s purpose to restrict pluralism, based on “selective tolerance”, its aim was not reconcilable with the Convention.<sup>400</sup>

From a Canadian perspective Ryder notes, “the result of the *Şahin* case is destructive of religious harmony and tolerance, for it forces her (*Şahin*) to choose between observing the tenets of her faith and fully participating in higher education.”<sup>401</sup> Indeed, Judge Tulkens lamented how the majority in *Şahin* easily accepted that the role of impartial organizer required the state to ban the headscarf at university.<sup>402</sup> She noted: “freedom and equality for women cannot mean depriving them of the chance to decide on their future. Bans and exclusions echo that very fundamentalism these measures are intended to combat. When rejected by the law of the land, young women are forced to take refuge in their own law. As we are all aware, intolerance breeds intolerance.”<sup>403</sup>

Tulkens argued, unlike the majority’s assessment, that the headscarf had no single meaning but meant something else to women who wore it, or did not wear it. It was these women’s opinions that should have been central in the debate. For courts to make appraisals was uncalled for. After all, “equality and non-discrimination are subjective rights which must remain under the control of those who are entitled to benefit from them”. Paternalism is contrary to the personal autonomy jurisprudence developed under Article 8.<sup>404</sup> Not coincidentally, the claimant in *S.A.S.* accused the French Government of paternalist and culturally biased notions. Still, Judge Tulkens may have planted a seed which paid off in the cautious analysis of the majority in *S.A.S.*

While *Şahin* and *S.A.S.* show that for the Strasbourg bench secularist state policies deserve a certain benefit of doubt when it comes to their pluralist credentials, the Court has been known to be quite strict when it comes to the state’s mingling in the internal affairs of a faith-based community. In *Hasan v. Chaush*, hands-off impartiality was the Court’s bare minimum of organizational autonomy. Pluralism was a direct result of (the) freedom (of religion and belief). Therefore, the attempt to eliminate pluralism by trying to bring a religious community into one organizational structure was antithetical to

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399 *S.A.S. v. France*, app. no 43835/11, *supra* n. 9, para 151.

400 *S.A.S. v. France*, app. no 43835/11, *supra* n. 9, Joint partly dissenting opinion of Judges Nussberger and Jäderblom, paras 2 and 14.

401 Ryder, *supra* n.1, at 99.

402 *Leyla Şahin v. Turkey*, app. no. 44774/98, *supra* n. 29, Dissenting opinion of Judge Tulkens, para. 6.

403 *Ibid.*, para. 19.

404 *Ibid.*, paras 10-12.

freedom. While the state may officially recognize a certain religious leader or group, it may not prevent the exercise of unofficial religious leadership or ensure or enforce unity within a religious denomination.<sup>405</sup>

Obviously, the ECtHR's interpretation of secularism depends on the various meanings given to the concept by the member states and so the Court grants establishment systems the same benefit of doubt it grants the secularist systems. In *Fernández Martínez*, the majority was accepting of the dismissal of a public servant who was no longer suitable as a religious instruction teacher, because his non-conformism *vis-à-vis* Catholic Church doctrine had become public knowledge.<sup>406</sup> He had, however, never been accused of any negligence regarding his teaching position. This is why the minority on the Court believed that while the state had to honor its agreement with the Church, the dismissal of Mr. Fernández Martínez showed that the state had wrongly delegated its obligations to the Church.<sup>407</sup>

Whether state neutrality requires a passively neutral hands-off approach, or an actively neutral helpful approach was the essence of the difference of opinion on the bench in the SCC case *Lafontaine*. The congregation of Jehovah's Witnesses in the Quebecois village felt that the municipality had applied the zoning regulations to their detriment. They had found several lots for their church in areas with other houses of worship, but the municipality maintained that the zoning regulations did not allow for the church to be built there. The majority and the minority of the SCC agreed that the municipality had not acted to the best of its abilities in providing for the required transparency and the appearance of procedural fairness. What they disagreed on was whether this amounted to a breach of fairness and good faith and whether the municipality was under a positive obligation to assist the congregation. The majority thought it did. The minority found no breach of the freedom of religion.

According to one of the two dissenting judges, LeBel, state neutrality even prevented the municipality from actively assisting the congregation. He asserted that this neutrality was embedded in the freedom of religion and belief.<sup>408</sup> The interpretation of state neutrality, which LeBel derived from the freedom of religion and belief echoes the interpretation of the minority opinion of Deschamps and Charron in *Bruker*. They believed that state neutrality prevented secular courts from enforcing an agreement to grant a religious divorce.

According to the majority, the municipality's second and third decision regarding proposed lots was arbitrary because no reasons were given and no

405 See *Hasan and Chaush v. Bulgaria*, app.no. 30985/96, *supra* n. 134, paras 60 and 78.

406 *Fernández Martínez v. Spain*, app. no. 56030/07, *supra* n. 148, paras 126-131.

407 *Fernández Martínez v. Spain*, app. no. 56030/07, *supra* n. 148, *Joined dissenting opinion of Judges Spielmann et al.*, paras 5-7.

408 *Congrégation des témoins de Jéhova de St-Jérôme-Lafontaine v. Lafontaine (Village)*, Case 29507, *supra* n. 106, paras 18-21.

alternatives were communicated. This “breached the duty of procedural fairness”. The duty existed, among other reasons, because of “the importance of the decision to the Congregation, impacting as it did on the right of the Congregation to practice the religion of its choice”.<sup>409</sup> LeBel disputed this but conceded that “more detailed reasons would have given the appellants a better understanding of the municipality’s decision”.<sup>410</sup> Justice Major agreed with LeBel in result, but only agreeing with the reasons concerning the finding of facts, and absence of any infringement to freedom of religion and belief. He distanced himself from the reasoning that the state’s neutrality prevented a more constructive attitude by the Municipality.<sup>411</sup>

In their report on interculturalism in Quebec, Bouchard and Taylor distinguish between liberal open secularism and republican rigid secularism. According to liberal open secularism, “[a] democratic, liberal State cannot be indifferent to certain core values, especially basic human rights, the equality of all citizens before the law, and popular sovereignty. [...] A democratic, liberal State cannot remain neutral toward them and has no choice but to assert and defend them”. This seems in line with the majority opinion in *Lafontaine*. The municipality had the positive obligation to make sure the congregation could build its house of worship somewhere in the town. Republicanism, on the other hand, required a system “by a secularist, indeed antireligious, moral philosophy”. “Such a moral and political philosophy becomes a civil religion.” Such a “system that replaces religion as the foundation of its action by a comprehensive moral and political philosophy makes those who embrace any sort of religion second-class citizens since their fundamental reasons are not enshrined in the officially recognized philosophy.”<sup>412</sup> Forced compliance with such secularism, like *laïcité* in France, will lead to “the marginalization of religious minorities from French public life”.<sup>413</sup>

Even in the *Chamberlain* case discussed before (section 4.6.2), where the state neutrality stood in the way of religious moral considerations preventing a book on same-sex families for a kindergarten class, the interpretation of state neutrality was the open secularism. The majority considered that “secular” did not mean “non-religious” because “nothing in the Charter, political or democratic theory, or a proper understanding of pluralism demands that atheistically based moral positions trump religiously based moral positions on matters of public policy”.<sup>414</sup> However, “decisions based solely on religious reasons will not survive the s.1 justification test”.<sup>415</sup> Bouchard and Taylor conclude that rigid secularism is rejected by the Supreme Court because: a) it

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409 *Ibid.*, para. 30.

410 *Ibid.*, para. 92.

411 *Ibid.*, para. 36.

412 Bouchard & Taylor, *supra* n. 2, at 135.

413 Ryder, *supra* n.1, at 94.

414 *Chamberlain v. Surrey School District No. 36*, Case 28654, *supra* n. 197, para. 137.

415 See Schneiderman, *supra* n. 59, at 79.

does not truly link institutional structures to the outcomes of secularism; b) an emancipatory mission directed against religion is not compatible with the principle of state neutrality in respect of religion and non-religion; c) the integration process in a diversified society is achieved through exchanges between citizens, who thus learn to get to know each other and not by relegating identities to the background.<sup>416</sup>

The relationship of state and faith in the new Rainbow Nation was an issue in two very early cases of the CCSA. In *Final Certification*, one of the questions put forward was why the freedom of religion and belief were derogable in cases of public emergency, while other rights were non derogable. In *Certification Western Cape*, there was an objection to the preamble of the province's Constitution, which included a religious reference.

In the certification of the national Constitution, the province of KwaZulu Natal had raised questions as to the possibility to derogate from some rights, including the freedom of religion and belief, while others were non-derogable. The province raised the question of whether this was not contrary to Constitutional Principle II which stipulated that everyone shall enjoy all universally accepted rights, freedoms and civil liberties.<sup>417</sup> The Constitutional Principles had been agreed upon earlier in the process, to provide guidelines for the drafting of the Constitution. The CCSA concluded that the distinction between non-derogable rights and derogable rights in case of emergency as drafted was not in violation of Constitutional Principle II, as the Bill of Rights may be said to include the standards of all modern human rights catalogues.<sup>418</sup>

Not only the national Constitution had to be certified, but also the provincial ones. The legislature of the province of the Western Cape adopted a provincial constitutional text with a preamble which commenced "In humble submission to Almighty God". The case *Certification of the Western Cape* had to answer, among other questions, whether the preamble of the Western Cape constitution was consistent with the constitutional freedom of religion and belief. The Court highlighted the similarities with the "ceremonial deism" in the national Constitution. As "ceremonial deism", an "honored means of adding solemnity used in many cultures and in a variety of contexts", had no particular (legal) constitutional significance, there could be no violation of the freedom of religion and belief.<sup>419</sup>

However, some believe the Court should not have ignored the fact that the reference to God in the preamble of the Western Cape constitution was

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416 Bouchard & Taylor, *supra* n. 2, at 30.

417 F. Venter, *Constitutional Comparison: Japan, Germany, Canada and South Africa as Constitutional States*, Juta & Co Ltd, Cape Town (South Africa), 2000, p. 140.

418 CCSA, Ex parte Chairperson of the Constitutional Assembly: *In re Certification of the amended text of the Constitution of the Republic of South Africa*, Case CCT37/96, 4 December 1996, para. 40. See also *ibid.*, p. 140.

419 CCSA, *Certification of the Constitution of the Western Cape*, Case CCT6/97, 2 September 1997, para. 28

worded exactly like the reference in the pre-1994 South African constitution of the apartheid era. Hence, the wording “verbalized Afrikaner-Calvinist monotheism”<sup>420</sup> and was fit to provoke associations with the apartheid government, especially since the (new) National Party formed the government in the Western Cape. In this regard, it should be noted that the pre-1994 Cape Province was split into three provinces: Western Cape, Northern Cape and Eastern Cape. The Western Cape set itself apart by being one of the two provinces to have rejected an ANC mandate (the other being KwaZulu-Natal) by electing former South African Law and Order minister Hernus Kriel (NP) as the first premier of the Western Cape.

In Du Plessis’ opinion, the preamble, while it can be seen to favor monotheistic beliefs, is not necessarily a “gesture of intolerance towards polytheists and atheists”. However, he sees it as “inconsiderate nonetheless”. Du Plessis argues that the Court should not have disposed of the matter by reference to ceremonial deism, but by acknowledging that “the contested phrase expresses religious sentiments” and that these are consistent with guarantees of religious freedom in the national Constitution. “Such a finding would still have been open to criticism, but at least it would not have been ridiculous.”<sup>421</sup> Sunstein, on the other hand, discussing ceremonial deism in the American context believes there should be a heavy burden on striking down ceremonial deism in light of this diversity. After all, it usually refers to God and religious symbolism in a non-denominational and thus inclusive way, and does not harm anyone.<sup>422</sup>

Justice Sachs may have summarized the CCSA’s approach to secular/religious relations in *Fourie* “[T]here must be mutually respectful co-existence between the secular and the sacred. The function of the Court is to recognize the sphere which each inhabits, not to force the one into the sphere of the other.”<sup>423</sup> According to An-Na’im secular institutions in general should not claim any religious authority, as religious truth cannot be determined by means of the modern state.<sup>424</sup>

#### 4.7.6 The many faces of secularism

In his discussion of *Lautsi*, Zucca points out that two different notions of secularism were mixed up in the judgment. Mrs. Lautsi’s secularism is a philosophical belief, which opposes religious beliefs. The secularism that the

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420 du Plessis, *supra* n. 388, at 454.

421 *Ibid.*, pp. 444-445 and 454.

422 C.R. Sunstein, ‘Celebrating God, Constitutionally’, in *University of Detroit Mercy Law Review*, vol. 83, pp. 567-578 (2005), pp. 567-568.

423 CCSA, *Minister of Home Affairs and Another v. Fourie (e.a)*, Cases CCT 60/04 &10/05, 1 December 2005, paras 93-94.

424 An-Na’im, *supra* n. 186, pp. 1234-1235.



state should apply must be neither preferential nor opposed to such philosophical secularism, nor any religious or other philosophical belief. It requires the state to be the “impartial organizer of religious pluralism”.<sup>425</sup> Justice Abella in the first paragraph of the *Braker* case noted the “evolutionary tolerance for diversity and pluralism” and the “growing appreciation for multiculturalism, including the recognition that ethnic, religious or cultural differences will be acknowledged and respected”.<sup>426</sup> Secularism understood in this sense means that the state should neither favor nor disfavor any particular religion, denomination or belief.<sup>427</sup>

This Canadian view seems to coincide with the South African view. The South African Constitution, as explained by Chaskalson in *Solberg*, does not regard a wall of separation necessary to protect religious freedom. To the contrary, the Bill of Rights seems to express a view that religious freedom requires an “open secularism” that embraces all religions and non-religious world views equally, instead of limiting freedom in order to block everything religious from the public sphere. Hence, the South African state can be “‘accommodationist’ in its approach to religious groups: it may support such groups, as long as its support is fair and even”.<sup>428</sup>

The European Commission of Human Rights which once assessed all cases prior to submission to the Court, explicitly stated that establishment itself is no violation of the ECHR.<sup>429</sup> Harris et al. distinguish five areas in which the state must be wary in church-state relationships according to the Court’s case law:<sup>430</sup>

1. The state must not interfere with the autonomy of religious communities when it comes to choosing their leaders (*Hasan and Chaush*).
2. When a state accords official recognition to certain faiths under national law, due regard must be paid to the Convention.<sup>431</sup>
3. The state must comply with the Convention when it comes to the regulation of places of worship.<sup>432</sup>
4. The education of children and young people as far as provided in the public school system must be conducted with due regard to existing pluralism and without indoctrination (*Folgerø*).
5. The state must not ignore the communal nature of Article 9.<sup>433</sup>

425 Zucca, *supra* n. 229, at 222.

426 *Braker v. Marcovitz*, Case 31212, *supra* n. 60, para. 1.

427 Compare *Chamberlain v. Surrey School District No. 36*, Case 28654, *supra* n. 197, para. 21.

428 E.E. Goodsell, ‘Constitution, Custom, and Creed: Balancing Human Rights Concerns with Cultural and Religious Freedom in Today’s South Africa’, in *Brigham Young University Law Review*, vol. 21, no. 1, pp. 111-154 (2007), pp. 126-127.

429 See Evans & Thomas, *supra* n. 153, at 706, referring to EComHR, *Darby v. Sweden*, Darby v. Sweden, app. no. 11581/85, 23 October 1990.

430 Harris, O’Boyle & Warbrick, *supra* n. 265, at 430-432.

431 *Metropolitan Church of Bessarabia and others v. Moldova*, app. no. 45701/99, *supra* n. 118.

432 *Manoussakis and Others v. Greece*, app. no. 18748/91, *supra* n. 228.

433 ECtHR (CG), *Cyprus v. Turkey*, app. no. 25781/94, 10 May 2001.

Clearly, secularism comes in different shapes and forms. Rosenfeld, as explained in paragraph 2.6.2 distinguishes between institutional secularism and ideological secularism. Institutional secularism mandates “the public sphere should warrant neutrality among religions and among the latter and non-religious ideologies in order to provide an optimal setting for the realization of freedom of religion as well as of freedom from religion.” Ideological secularism is a “conception of the good”. It relates to notions of human happiness, freedom and therefore public policy and the “common good”. Therefore, ideological secularism is in direct competition with religious theological and ethical views and or religious ideologies.<sup>434</sup>

Rosenfeld acknowledges that modern constitutionalism’s adherence to institutional secularism has put ideological secularism in a privileged position. It is this privilege that has come under attack, as we can see from the discussions mentioned above. “Proponents of religious views have thus accused secularism of bias in favor of atheism or of the ‘religion’ of ‘secular humanism’. On the other hand, postmodernism has built upon the ‘disenchantment of reason’ to question secularism’s coupling with reason and distancing from faith, which were meant to lend the principal support to secularism’s claim to neutrality.”<sup>435</sup> Bader, for example, calls the Kemalist *laïcité* a threat to both freedom of religion and democracy.<sup>436</sup> Adams and Overbeeke suggest that rather than Turkey’s Islamic character and culture, the authoritarian political culture introduced by Atatürk is what divides Turkey from Europe.<sup>437</sup> Altıparmak and Karahanoğullari suggest that the Government during *Şahin* was actually hoping for Strasbourg to crush the Constitutional Court’s judgment. It would have made it easier for the Government to convince the unelected elites of the military and civil service of the need for reforming the Turkish rigid secularism in light of human rights demands.<sup>438</sup>

Yet the ECtHR quite easily accepted Kemalist secularism not only as legitimate to create an atmosphere of inter-religious tolerance in a Muslim majority nation, it also seems to suggest that (Kemalist) secularism is the only valid interpretation of secularism compatible with the Convention: “An attitude which fails to respect [secularism] will not necessarily be accepted as being covered by the freedom to manifest one’s religion and will not enjoy the

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434 M. Rosenfeld, ‘Recasting Secularism as One Conception of the Good Among Many in a Post-Secular Constitutional Polity’, in S. Mancini and M. Rosenfeld (eds.), *Constitutional Secularism in an Age of Religious Revival*, Oxford University Press, Oxford (UK), 2014, pp. 1 and 5 ff (pages of paper).

435 *Ibid.*, p. 2.

436 Bader, *supra* n. 179, at 15.

437 M. Adams and A.J. Overbeeke, ‘The Constitutional Relationship between Law and Religion in the History of Ideas: A Contemporary European Perspective’, in *Global Jurist*, vol. 8, no. 3, pp. 1-24 (article 4) (2008), pp. 1-2 and 20.

438 Altıparmak & Karahanoğullari, *supra* n. 257, at 269. *Leyla Şahin v. Turkey*, app. no. 44774/98, *supra* n. 29.

protection of Article 9 [...].<sup>439</sup> Yet the same Court also asserts that the “autonomous existence of religious communities is indispensable for pluralism”.<sup>440</sup>

Ideological secularism, however, tends to want to control religious communities. In his case note on the Chamber case of *Zengin v. Turkey*,<sup>441</sup> ten Napel draws attention to this feature. The state had made it mandatory for Muslim pupils to follow religious instruction classes in public schools. Non-Muslims were not required to take the class, which was based on a Sunni interpretation of Islam. But *Alevis*, a minority sect in Turkey, showing similarities to the Shia tradition and adhering to heterodox practices from a Sunni perspective, were not exempted. Ten Napel applauds the finding of a violation, as clearly the mandatory nature violated the religious freedom of both the Alevi children and their parents.<sup>442</sup>

Yet in two French cases,<sup>443</sup> the Chamber reiterated the support for rigid secularism, reasoning once again that “[A]n attitude which fails to respect that principle [secularism] will not necessarily be accepted as being covered by the freedom to manifest one’s religion and will not enjoy the protection of Article 9 of the Convention [...]”. However, it also conceded “having regard to the margin of appreciation which must be left to the member states with regard to the establishment of the delicate relations between the Churches and the State”. The Chamber found accepted that the penalty imposed on a Muslim schoolgirl for wearing her headscarf during physical education classes “is merely the consequence of the applicant’s refusal to comply with the rules applicable on the school premises” – “not of her religious convictions, as she alleged”.<sup>444</sup> This is even more surprising since here the rule is not “indirect effect” but as the Court itself acknowledges, the French policy is directed against religious attire in schools, fully conscious that this policy effects some religions more than others, and within a certain religion one of the sexes disproportionately (e.g. Muslims, Jews and Sikhs more than Christians, Muslim girls and Sikh boys more than Muslim boys and Sikh girls).

Without any doubt, the principles established in the *Dalhab* and *Şahin* cases – “in particular the importance of secularism in state educational institutions – have continued to be applied to reject claims relating to the disciplining or expulsion of pupils from schools in Turkey and France for refusing to remove

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439 *Refah Partisi (The Welfare Party) and Others v. Turkey*, app. nos. 41340/98, 41342/98, 41343/98 and 41344/98, *supra* n. 167, paras 93-95.

440 *Metropolitan Church of Bessarabia and others v. Moldova*, app. no. 45701/99, *supra* n. 118, para. 58.

441 *Hasan and Eylem Zengin v. Turkey*, app. no. 1448/04, *supra* n. 219.

442 H.M.Th.D. ten Napel, ‘Noot bij EHRM 9 oktober 2007, no. 1448/04’ in *European Human Rights Cases*, 08/2007, Sdu Uitgevers, p. 4.

443 *Dogru v. France*, app. no. 27058/05, *supra* n. 27; *Kervanci v. France*, app. no. 31645/04, *supra* n. 240.

444 *Dogru v. France*, app. no. 27058/05, *supra* n. 27, paras 72-73. See also *Kervanci v. France*, app. no. 31645/04, *supra* n. 240.

headscarves".<sup>445</sup> Yet, rigid secularism also has boundaries in the Strasbourg case law. In a case in Turkey in which the members of a religious group had assembled in the streets of Ankara dressed in their religious attire, their prosecution and conviction was found by the Court to have violated their rights under Article 9.<sup>446</sup> The Court distinguished this case from the earlier ones on the grounds that the applicants were ordinary citizens and had no public functions, that they posed no threat to public order and that their presence alone could not be said to put pressure on passers-by or to amount to improper proselytism.<sup>447</sup>

Nevertheless, any acceptance or even defense of rigid secularism is dangerous for liberal-democratic constitutionalism and social cohesion, because it instrumentalizes the judiciary in ideological and political conflicts and thus threatens the impartiality of the judiciary and the legal system as such.<sup>448</sup> Altıparmak and Karahanoğullari question whether the principle of secularism should be referred to by the ECtHR. After all, "secularism has not been enumerated as a legitimate aim to restrict a right in the Convention".<sup>449</sup> Evans believes that the Court should indeed question the elevated status of secularism and probe for an anti-Muslim agenda.<sup>450</sup>

Rosenfeld explores the option of post-secular polity in secularism surrendering its privileged position and becoming one of the conceptions of the good, competing with religious world views in the completion of ideas, while the rules of competition are set by a polity inspired by pluralist as opposed to liberal constitutionalism. While liberal constitutionalism has a bias for ideological secularism, pluralism accepts all notions of the good as *prima facie* equal in worth and protection.<sup>451</sup> Liberalism may in the end have more than just the two identified faces,<sup>452</sup> but Benson argues that it is important to choose those that "respect and encourage diversity and as far as possible independence". This will enable a holistic pluralism.<sup>453</sup>

"Secularism", Rosenfeld argues, "is an essentially contested concept both in the context of philosophy or ideology and in that of constitutional law." Secularism, however, like religion is neither total nor monolithic. It is compatible with many different philosophical approaches, "such as monism, pluralism and relativism" and with political theories "such as liberalism, republicanism,

445 Bratza, *supra* n. 220, at 267.

446 ECtHR (C), *Ahmet Arslan and Others v. Turkey*, app. no 41135/98, 23 February 2010.

447 Bratza, *supra* n. 223, at 267.

448 Bader, *supra* n. 177, at 34.

449 Altıparmak & Karahanoğullari, *supra* n. 254, at 278.

450 Evans, *supra* n. 28, at 336.

451 Rosenfeld, *supra* n. 433, at 2 and 4.

452 J. Gray, *Two Faces of Liberalism*, Polity Press, Cambridge (UK), 2004.

453 I. T. Benson, 'The Attack on Western Religions by Western Law: Re-framing Pluralism, Liberalism and Diversity', in *International Journal for Religious Freedom*, vol. 6, no. 1-2, pp. 111-125 (2013), p.118 ff.

and communitarianism". According to Rosenfeld, secularism needs guarantees in a constitutional democracy if it should let go of the privileged position.<sup>454</sup> What Rosenfeld basically argues for are the basic freedom of religion and belief rights for secularists.

Rosenfeld proposes what he calls "comprehensive pluralism" as the facilitator of peaceful coexistence between ideological secularism and its competitors. Comprehensive pluralism will entail shifting from situations of factual inequality to counterfactual equality. In Justice Sachs words "mutually respectful co-existence between the secular and the sacred. The function of the Court is to recognize the sphere which each inhabits, not to force the one into the sphere of the other."<sup>455</sup> Comprehensive pluralism engages pluralist norms as mediator between competing norms of the various conceptions of the good. Pluralist norms are essentially based on reversible reciprocity.<sup>456</sup> Esau concept of "reciprocal pluralism" entails that individuals and communities grant each other the freedom to make different choices..<sup>457</sup>

The pluralist approach taken by the SCC and the CCSA may very well fit into the description of a comprehensive and holistic pluralism. The cases may serve as inspiration for the ECtHR if it wishes to expand the jurisprudence started with *S.A.S.* However, the differences between the member states and the margin of appreciation also require a vision on the meta-pluralism between the various state-religion models of the member states.

#### 4.8 INTERMEDIARY CONCLUSION: BEST PRACTICES IN THE SIX DIMENSIONS OF THE FREEDOM OF RELIGION AND BELIEF

##### 4.8.1 Revisiting the six dimensions of the freedom of religion and belief

In section 4.2 we saw that seemingly neutral laws, can have grave impact on the personal freedom of believers because of adverse affect discrimination. This leads to a feeling of being unwelcome at least and in the worst case, a painful choice. In such situations, the believer has to decide between following the law, an education, a job, their home, preventing a fine or imprisonment etc. and their beliefs. In a free and open society, such choices should be prevented were possible. Acknowledging the impact of such neutral laws on believers, is a necessary step in protecting their freedom of religion and belief. If the assessment is, that somehow the freedom of religion and belief is not

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<sup>454</sup> Rosenfeld, *supra* n. 433, at 5-6 and 10-11.

<sup>455</sup> CCSA, *Minister of Home Affairs and Another v. Fourie (e.a)*, Cases CCT 60/04 &10/05, 1 December 2005, paras 93-94.

<sup>456</sup> *Ibid.*, pp. 25-29.

<sup>457</sup> A. Esau, 'Living by Different Law: Legal Pluralism, Freedom of Religion and illiberal Religious Groups', in R. Moon (ed.), *Law and Religious Pluralism in Canada*, UBC Press, Vancouver/Toronto (Canada), 2008, p.132.

engaged, or does not protect the practice, insult is added to injury. In adjudication this means, that the interference with the freedom of religion and belief has to be recognized, even if for whatever reason they cannot be accommodated.

Often enough accommodation of the practices of believers is possible, without undermining the general purpose of the law or regulation in question. Sometimes this can be easily done by exempting the believers from (certain aspects of) the law. Sometimes a more detailed arrangement is necessary, as we saw in *Multani*, to ensure that the purpose of the rule (safety for all students) and the practice (wearing the metal *kirpan*) can be reconciled. In other cases, where the interference cannot be prevented, unnecessarily heavy consequences can be taken away, like in *Thlimmenos*. If conscientious objection to military service cannot be allowed, and the objector goes to prison, there is no need to hold the criminal record against them in their choice of job.

Exemption or other means of accommodation will sometimes meet criticism from the mainstream. The selected cases highlight the need for public institutions to promote and instill tolerance and for courts to point to this. Especially when the initial reaction is to rather curtail the freedom of believers in order to seemingly protect the mainstream against the assumed deviance by believers.

Protection of the personal freedom of religion and belief, always requires taking the sincere individual beliefs of believers as starting points, rather than practices “objectified” by expert opinions or statistics.

In paragraph 4.3 we saw how parental authority and the best interests of the child can collide, especially where medical decisions are concerned, how religious marriage and state marriage can collide and how the rights of same-sex partners to get married have a specific relationship with the freedom of religion and belief. Parents are the natural authority of children. Whatever parents believe or not believe is bound to impact the children. If parents believe differently and separate, this can cause conflicts in the upbringing. When parental authority is limited by state institutions, judicial review is necessary to assess the impact on the freedom of religion and belief of the parents and the children.

The selected cases show clearly that one case at a time review is necessary because of the thorny issues involved. Where parental decisions impact health or continuation of life of minors, adjudication must find limits to the parental freedom of religion and belief under the limitation clause. Where the child is a mature minor, their own freedom of religion and belief is engaged. I am bound to agree with Justice Binnie in *AC*, this mandates that they be given a chance to prove, that they are capable of a mature informed decision.

In parental conflicts of religion, confusion is unavoidable. I side with the dissenters in *P. (D.)* that confusion and even cognitive dissonance are themselves not enough to conclude that it is in the best interest of the child not to know one of the parents as they are. Also, caution requires that we acknow-

ledge that many articles of faith we regard as normal in our own beliefs, may come across as indoctrination in other beliefs.

Religious marriage has existed longer than civil marriage/state marriage. It continues to exist alongside civil or state marriage and is for many people an alternative for state orchestrated marriage like other lasting relationships which form the foundations of families. Treating social reality as fact and preventing inequality in areas of inheritance, social security, insurance and so forth, can be mandated by the freedom of religion and belief, as we saw in the selected cases. In order for the judiciary to respect the domain of the legislative, this requires a case-by-case contextual approach. Courts should not be as the CCSA rightly observed in *Women's Legal Centre Trust*, be the first and last instance to regulate the institution of marriage for a faith-based community.

Upholding an exclusive and privileged position for state marriage on the other hand, seems difficult to reconcile with the freedom of religion and belief, while at times religious marriage and private law are bound to interact in a pluralist society governed by liberal democratic constitutionalism. Upholding a strict separation approach whereby private law agreements cannot be enforced, just because they relate to religious family law and/or relations, is antithetical to the freedom of religion and belief.

Both the South African and Canadian same-sex marriage cases show, how equality rights make it difficult to uphold an exclusive opposite-sex requirement, when it comes to civil/state marriage. In fact, while this did not play any role in the evaluation, same-sex couples could rely on the freedom of religion and belief to claim the right to marry. After all, the opposite sex requirement gives privilege to the belief that marriage is for opposite sex partners only, over all other beliefs. Both judgements do mention however, that the faith-based views on marriage cannot be a source of interpreting state-law or the constitution.

The other side of the coin concerns the rights of those who believe that marriage should only be an opposite-sex requirements. They can rely on the freedom of religion and belief to demand exemption from facilitating or aiding in same-sex unions. As long as the state is capable of ensuring the right to marriage for all same sex couples, I cannot see, why faith-based exemptions should not be granted to civil servants.

Marriage is so essential to the freedom of religion and belief and other human rights, and the analysis of the selected cases leads me to support a dynamic non-hierarchical co-existence of state marriage with faith- or culture-based marriage and other practiced forms of lasting relationships.

In section 4.4 we saw the relationships between the individual and communal dimension of the freedom of religion and belief. "Whether a belief is practiced 'alone *or* in community with others' and in 'public *or* in private' is



a matter of choice for the believer".<sup>458</sup> The SCC found the interests of the Park Act to be reconcilable with the treaty rights in *Sioui*. The Huron practices did not compromise the overall purpose of preservation of the park. Like *TWU* the case suggests that sometimes it requires pragmatism to honor all principles.<sup>459</sup> An if tolerance only stretched to the beliefs we find agreeable, acceptable or logical, this would render tolerance empty. I agree with Justice Sachs, "[t]he true test of tolerance comes when the practice exist on the margins of society and appear bizarre, even threatening to the mainstream".<sup>460</sup>

The state should not try to eliminate pluralism, either within society or within a religious community, but even-handedly protect all. A thick notion of democracy based on pluralism (ten Napel) requires enabling and balancing voluntarism of communities and abstaining from paternalism. "Own law" or legal pluralism which is compatible with liberal multicultural democracy may very well be an important answer to the demand for pluralism. The choice is to be made by communities and the national legislator, not by judges, but they should be open and embracing to towards it, instead of dismissing it. Yet on the other hand autonomy is not absolute. There can be no constitution/human rights free zones, in which the own law is absolute. The dynamic engagement between state law and own law works both ways.

In section 4.5 we saw that freedom of religion and belief in the educational system relates to the believers in the public education system, religious instruction in the public education system and faith-based education.

The public educational system should ensure the exposure to all of society, diversity on display, including idea's different from the own family. This might cause some cognitive dissonance, but that is no reason to limit this. To the contrary, some cognitive dissonance is necessary for tolerance, something children should learn in the educational system in an open society based on human rights. The state's responsibility to ensure pluralism cannot be organized away by pointing to non-state schools. Part of the task of ensuring pluralism is to ensure religious literacy. When there is instruction, which collides with beliefs, the possibility to opt out, is one way to ensure pluralism. Opting out should not be too burdensome or include having to discuss one's beliefs with state officials.

It can easily be assumed that religious symbols displayed in schools or classrooms do not have a neutral meaning. A situational opting out possibility, where those who believe differently or not at all, can initiate that symbols are removed (Bavarian approach), reconciles majority and minority interests. Also here opting out, requires one case at a time. There a several possibilities for organizing religious instruction in the public education system in a way which

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458 Evans, *supra* n. 8, at 103.

459 *Trinity Western University v. College of Teachers*, Case 27168, *supra* n. 129.

460 A. Sachs, *The Free Diary of Albie Sachs*, Random House, Johannesburg (South Africa), 2004, p. 67.

reconciles majority and minority interests. Adjudication should take into consideration the effect of peer pressure and subtle forms of pressure on children (and their parents). Religious institutions on the other hand are not for everyone and follow a less pluralistic logic, but should be inclusive, if this does not conflict with their beliefs.

In section 4.6, balancing, which plays an important role in all the other dimensions, was revisited as a separate issue. Balancing is first and foremost achieving equal concern and respect through a procedural fairness, that gives all sides equal recognition in their rights and concerns. This implies that it is better to decide a case under the limitations clause than to argue that a certain position or desire is not protected by the freedom of religion and belief at all, or must be put aside *a priori*. The recognition of a right to be different (CCSA), helps to make the point, that no one is just subjugated to a mainstream preference, as believers and/or because of their sexual orientation or gender identity. Equal religious citizenship (Ryder) also underscores this point. Believers are citizens as believing individuals. They should not be required to park their beliefs “inside” before they enter the public domain. Finally, a thick notion of democracy (ten Napel), which underscores the minority rights in balance with majority rules, also supports this point.

Balance requires the acceptance that mainstream society will have to sometimes give equal concern and respect to beliefs and practices that strike them as bizarre, illogical or irrational, or even shocking and offensive. Complexity is no reason not to accommodate. Cognitive dissonance is no reason to restrict a right. Tolerance in an open society even requires some cognitive dissonance.

Balance can sometimes be achieved by leaving the hot topic undecided, by finding purely procedural grounds to decide the case. This is not an invitation to not decide cases. But a decision on procedural grounds may sometimes have to potential to be viewed as acceptable by opposing sides. Yet judges, nor other state organs, while they should not force secular law logic on faith-based institutions, should also not discharge themselves, by delegation of the responsibility to protect human rights to others, be they faith-based or non-faith-based actors. On the other hand, judges nor other institutions should make assumptions or generalizations about beliefs and practices and certainly not substitute the choices of the believer(s) with their own.

Balance can most easily be achieved in a case-by-case fashion. Deciding all future cases immediately, will always cause someone to lose for all future.

The final dimension discussed in section 4.7 was that of secularism. This again makes it necessary to distinguish between institutional and ideological secularism. While institutional secularism can be an aide of the freedom of religion and belief to ensure evenhandedness towards different religions and beliefs, ideological secularism if adopted by the state forms a risk for the freedom of religion and belief. Like (strong) establishment it can lead to preferential treatment of one group, secularists, above others. Open secularism

on the other hand, accepts that ideological secularism is not at all more neutral than (religious) beliefs and tries to emphasize non-preferential treatment of all religions, beliefs and worldviews through a combination of institutional secularism and pluralist accommodation.

The exclusiveness of state marriage, while not uncommon in many liberal-democratic constitutional orders, has a relationship with ideological secularism. Upholding it, will often interfere with the rights of believers. On the other hand, it leads to believers mistaking state marriage to be identical to their religious institution, and thus opposing its evolution, when it collides with their ideas about marriage. A more pluralistic and accommodating approach, which allows for the co-existence of several religious and cultural forms of marriage next to state marriage, enables a reconciliatory protective approach towards faith based and LGBTQ+ communities.

When state institutions adopt a preference towards a certain faith, ideological secularism or any secular ideology, discrimination against all others is often the automatic result. It begins with these others receiving a message of being unwelcome, second class or merely tolerated strangers. It can lead to painful choices for them between following their conscience and other important benefits in life or even partaking in the public institutions themselves. Opting out of the practice or ritual in question, is not always a solution as it can underscore the feeling of not belonging, like for example in the situation of a prayer of all parliamentarians, which gives those who do not wish to participate the option to leave the room and return.

In public education, as also mentioned above, several models are conceivable, which respect the freedom of religion and belief of all students (and teachers). They must respect individual choices and accommodate the pluralism present in the student body. They should allow for flexibility in the necessary steps to accommodate, amongst which the option to adapt symbolism which sends a message of favoritism and opting out, where lesson's conflict with the conscience of students.

Freedom of religion and belief naturally leads to situations where beliefs, practices and religious precepts are part of the legal conflict. Consistent with institutional secularism, secular judges should not interpret the religious or belief-based practice, let alone substitute the understanding of the believer in question. Doing so, is a grave violation of the freedom of religion and belief. Obviously the same goes for other state-institutions. Moreover state paternalism is always violative of freedom of religion and belief and/or freedom of choice generally.

In line with the above, neither religion, any other belief, nor ideological secularism can serve as sources of interpreting human rights or constitutional law (in the accommodationist or separationist model). A rigid form of state-secularism, based on ideological secularism, with its often missionary agenda is not compatible with state-neutrality and freedom of religion and belief and

effectively relegates identities to the background instead of inviting them into a inclusive process of dynamic citizenship (Compare Taylor and Bouchard<sup>461</sup>).

#### 4.8.2 Best practices in adjudicating the freedom of religion and belief

In light of the intermediary conclusions drawn in the previous section, conclusions regarding the adjudication of the freedom of religion and belief can be formulated. The following best practices were present in the selected cases:

1. Recognition of all sincere religious, cultural, or other beliefs as triggering protection without prior exclusion, limiting them where necessary under the limitations clause. No objectivation by dogma, officials, or statistics.
2. Preventing painful choices and allowing for or ordering accommodation and/or exemption, where reconciliation between freedom of religion and belief and other rights or important aims of public policy is needed. Where this is impossible, taking of the sharp edges of enforcing a law against conscientious objectors.
3. Absence of value judgement from any other perspective than the believers' own perspective. No substitution of the own understanding believers have of a belief or practice with that of judges or other state officials. Being weary of all forms of paternalism, directed at believers.
4. Inclusive protection: preventing division into insiders who belong, and outsiders who are tolerated. Recognition that all official state policies inspired by state religion and/or state secularism are potentially intrusive to all outside the mainstream. Concepts like the "right to be different", equal "religious citizenship" or a pluralist understanding of democracy aid in this.
5. Promoting tolerance and providing that other state institutions do so; tolerance requires some cognitive dissonance and always extends to the beliefs others find bizarre and even threatening.
6. Protecting human rights and pluralism, never delegating, or letting other state institutions delegate the responsibility to private institutions, faith-based or otherwise.
7. Being reflective of social reality and allowing for a flexible co-existence between state law and "own" law. Allowing for communities to govern themselves, while autonomy is never absolute.
8. Equal concern and respect for all sides, taking the losing party's point of view seriously: showing real understanding for their point of view.
9. Balancing under the limitations clause: rather than finding no interference at all or *a priori* justifications of limits. If necessary, using judicial assumption.

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461 Bouchard & Taylor, *supra* n. 2, at 30.

10. Deciding one case at a time, especially with thorny issues, embracing contextualism, deciding only what needs to be decided to solve the case, making use of procedural considerations, where possible.
11. Being conscious of the inter-institutional dialogue with the executive and legislative powers, but resolute protection of human rights: no state or state institution or legislative body has a natural inclination to protect human rights; it is the judiciary's role to check and balance.



## 5 Comparative analysis of the concepts of the freedom of religion and belief and the standard interpretations

### 5.1 INTRODUCTION TO THIS CHAPTER

Based on the comparative analysis of the selected cases in Chapter 4, this chapter systematically derives the standard interpretation of the freedom of religion and belief by the three courts. The case studies of the selected cases in Appendix I and the analysis in Chapter 4, show that each of the three courts has certain (guiding) principles for the interpretation of freedom of religion and belief case law. These are discussed in section 5.2. The concept of religion and belief used by each of the courts as featured in the selected cases is examined in section 5.3. Next, in section 5.4, the content of the right is considered: what does the right entail in the selected cases? Subsequently, in section 5.5, we explore how the freedom of religion and belief is triggered in the jurisprudence of the three courts as evident in the selected cases. Finally in section 5.6 there is a discussion of whether human rights adjudication necessarily leads to the furtherment of secularization as some commentators hold. The chapter closes with preliminary conclusions regarding the best practices when it comes to the standard interpretation of the freedom of religion and belief.

### 5.2 GUIDING PRINCIPLES FOR INTERPRETATION

In his 1961 classic work *The Concept of Law*, H.L.A. Hart argued that laws “require interpretation if they are to be applied to concrete cases, and once the myths which obscure the nature of the judicial processes are dispelled by realistic study, it is patent [...] that the open texture of law leaves a vast field for a creative activity which some call legislative”. He further argued that the interpretation of laws as conducted in judicial activity ought to be guided by certain virtues which are “impartiality and neutrality”, consideration of all affected interests and a concern to deploy some “acceptable general principle as a reasoned basis for decision”.<sup>1</sup>

The studied case law by the three courts shows that when interpreting the freedom of religion and belief, each of the courts actually follows a certain general principle, or principles, as a reasoned base. The main principles shall

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1 H.L.A. Hart, *The Concept of Law*, 2nd ed., Oxford University Press, Oxford (UK), 1994.



hereafter be called the guiding principles. They are founded in what may be called the theoretical foundations of the respective constitutional documents. The guiding principles are supported by what will be called supporting principles. They support the “creative activity” on the basis of the guiding principles, providing direction and substance. The main guiding principles and supporting principles form the prism through which the right is interpreted in every case, while the facts of every case also influence the (further development of the) guiding principles. Hence the main guiding and supporting principles are not static, but dynamic, being continuously amended and adjusted over time.

The main guiding principle applied by the SCC in the freedom of religion and belief cases is “individual liberty”. The “harm principle”, “religion à la carte” and “sincerity of belief” are informing principles. They inform what individual liberty implies for solving the selected cases. The judicial reasoning starts with the freedom of the individual to work out religious obligations for themselves. These obligations can differ from other individuals professing the same faith or beliefs. There is complete freedom for religion à la carte, the personal beliefs of the individual. They are protected, as long as they are sincere. If this is shown, the freedom to act or to refrain from action can only be limited in the interest of preventing harm. Harm must always be concrete in this regard. If the harm is not done to the rights and freedoms of others, but to some overriding public interest, this interest must be concrete and in the great majority of the selected cases, directly linkable to the rights of others; *Alberta v. Hutterian Brethren* (Appendix I1.4.13) being the only exception in this regard. In that case, the countervailing interest was an abstract concern of identification of individuals licensed to drive a motorized vehicle.

“Human dignity” is the main guiding principle applied by the CCSA in the freedom of religion and belief cases. Human dignity has three components: an individual freedom right component, a communitarian component and a constitutional principle component. These components inform what human dignity implies for solving the cases. Which of the three is most present in the reasoning, depends on the circumstances of the case. The freedom right component is informed by the “right to be different”. The communitarian component is informed by the “respect for diversity”. The constitutional principle is informed by “positive tolerance”. These three components are the informing principles.

The main guiding principle of the ECtHR for the freedom of religion and belief cases is “pluralism”. Pluralism, according to the ECtHR, depends on freedom of religion and belief. Therefore, the freedom of religion and belief is important for religious believers, other believers, non-believers and the unconcerned.<sup>2</sup> It is the state’s role to organize this pluralism and to do so (as

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2 ECtHR (C), *Kokkinakis v. Greece*, app. no. 14307/88, 25 May 1993, para. 31.

much as possible) in an impartial way. The state’s role as “organizer of pluralism” and the impartiality of this organizer are therefore the informing principles which inform what pluralism implies for solving the cases.

The above can be summarized as follows:

| FREEDOM OF RELIGION AND BELIEF    |                                                                            |                                                                                                                                                            |                                                                                     |
|-----------------------------------|----------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------|
|                                   | <i>Canadian<br/>Supreme Court</i>                                          | <i>South African Constitutional<br/>Court</i>                                                                                                              | <i>European Court of<br/>Human Rights</i>                                           |
| <i>Main guiding<br/>principle</i> | <i>Individual<br/>liberty</i>                                              | <i>Human dignity</i>                                                                                                                                       | <i>Pluralism</i>                                                                    |
| <i>Informing<br/>principles</i>   | Harm principle<br><br>Religion a la<br>carte<br><br>Sincerity of<br>belief | Freedom right: right to be<br>different<br><br>Communitarian<br>component: respect for<br>diversity<br><br>Constitutional principle:<br>positive tolerance | State as organizer<br>of pluralism<br><br>Impartial<br>organization of<br>pluralism |

Figure 2: Guiding and informing principles standard interpretations

The three guiding principles as applied by the three different courts in interpreting the freedom of religion and belief are neither opposing nor mutually exclusive. They do, however, differ in their emphasis and internal logic. This, in turn, can lead to very different outcomes in similar cases. Hence, these different guiding principles can create opposing or colliding outcomes, as well as parallel and even identical outcomes.

5.3 THE CONCEPT OF THE FREEDOM OF RELIGION AND BELIEF

This section looks at the concept of the freedom of religion and belief, adjudicated by each of the three courts and evident in the selected cases.

5.3.1 Objective standards for what constitutes religion?

The Canadian main guiding principle of individual freedom and informing principles are best summarized in the following *Big M Drug Mart* quote

“With the Charter, it has become the right of every Canadian to work out for himself or herself what his or her religious obligations, if any, should be and it is not for the state to dictate otherwise.”

Because of the strong emphasis on freedom, there is no need to objectify adherence to (external) obligations, dogma, the position of religious official or social convention. An individual's sincere belief, having a nexus with religion or a system of belief, which mandates action or inaction is enough to trigger protection.<sup>3</sup> This is because individual conscience and individual choice form a core of the Canadian constitutional tradition.<sup>4</sup> The Canadian constitutional tradition emphasizes a positive freedom which enables the individual to "live his or her own life and to make decisions that are of fundamental personal importance".<sup>5</sup>

For example, the fact that Sikhs other than Gurbaj Singh Multani (see section 4.4.10) wear no kirpan at all, or a wooden kirpan as surrogate, does not matter, because Gurbaj sincerely believes that he has to wear a metal one. Similarly, it is not relevant whether other Jews believe that women do not have to dwell in a *succah*<sup>6</sup> or dwell in a communal one; because he and the other claimants in *Amselem* sincerely believe that they must have their own *succah* on their own property and thus on their balcony (see section 4.4.7).

Whereas the SCC focuses on the subjective sincerity, purposely avoiding the "objective" evidence of dogma, experts or officials of the faith, the ECtHR struggles with "jurisprudential dogma" once created by the European Commission of Human Rights, which seeks objective evidence of a belief. The Commission created the Arrowsmith test<sup>7</sup> for freedom of religion and belief cases. The test's purpose was none other than to objectify the practice or manifestation in question, as a first step to determine whether it fell under the protection of Article 9. A person's belief must, according to this test, have a certain level of cogency, seriousness, cohesion and importance. Once this threshold is met, it is not for the state to determine whether the belief is legitimate.<sup>8</sup>

The Court has since abandoned the Arrowsmith test.<sup>9</sup> It is, however, still prone to objectify whether the manifestation in question is part of a set of

3 *Ibid.*

4 See, e.g., SCC, *Alberta v. Hutterian Brethren of Wilson Colony*, Case 32186, [2009] 2 SCR 567, 24 July 2009, para. 127, quoting *R. v. Big M Drug Mart Ltd.*, Case 18125, *supra* n. 3 and *Chamberlain v. Surrey School District No. 36*, Case 28654, [2002] 4 SCR 710, 20 December 2002, para. 135.

5 SCC, *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, Case 23298, [1995] 1 SCR 315, 27 January 1995, para. 80.

6 SCC, *Syndicat Northcrest v. Amselem*, Cases 29252, 29253, [2004] 2 SCR 551, 30 June 2004.

7 See EComHR, *Arrowsmith v. United Kingdom*, app. no. 7050/75, 12 October 1978.

8 D. Harris, M. O'Boyle and C. Warbrick (eds.), *Law of the European Convention on Human Rights*, 2nd ed., Oxford University Press, Oxford (UK) et al., 2009, p. 427, citing ECtHR (C), *Campbell and Cosans v. the United Kingdom*, app. nos. 7511/76, 7743/76, 25 February 1982 and ECtHR (GC), *Hasan and Chaush v. Bulgaria*, app. no. 30985/96, 26 October 2000. See also B. Rainey, P. McCormick and C. Ovey (eds.), *Jacobs, White & Ovey: The European Convention on Human Rights*, 8th ed., Oxford University Press, Oxford (UK), 2021, p. 462.

9 Harris, O'Boyle & Warbrick, *supra* n. 9, at 433.

objective manifestations that are core to the claimed (religious) belief. Previously, some critics have argued that in some instances the Court made the dangerous mistake of “substituting its judgment for the conscience of the persons involved, defining what was ‘reasonable’ for them to believe”.<sup>10</sup> The current approach has thus moved in the direction of the Canadian approach which also contains the element of the “certain nexus” as a more objectifying feature. Yet, the ECtHR has still not embraced a fully “sincerity” focused approach until now.

“Sincere belief”, as judicially borrowed from the SCC, can be said to feature in CCSA cases like *Christian Education, Prince and Pillay*, (section I2.4.6, I2.4.7 and I2.4.11). In the Constitutional Court’s jurisprudence, however, any definitional dispute as to what (objectively) constitutes “a religion” or “the religious” is superfluous, because the right in subsection 15(1) of the Bill of Rights combines the freedom of religion with the freedom of conscience, thought and opinion. It therefore “protects an extremely wide range of world views”. Yet for the other two subsections of section 15 it does matter, at least in theory, what defines religion and tradition. Subsection 15(2) is limited to “religious observances” and subsection 15(3) to “tradition” and “religion”.<sup>11</sup> This invites, at least in theory, the application of objective standards. Nevertheless, the CCSA has not tried to create anything close to an objective standard.

### 5.3.2 Protecting individuals, communities and difference

The development of South African jurisprudence has been clearly inspired by the Canadian experience,<sup>12</sup> which becomes explicit in the reference the CCSA makes in its first freedom of religion cases to Canadian case law.<sup>13</sup> “Sincere belief” can be said to feature in CCSA cases as mentioned above. This results in taking very seriously and treating with respect any assertion of the claimant with regard to personal beliefs. For example, in *Christian Education* the sincere belief of the parents in the necessity of corporal punishment is treated with the utmost respect, while it is still seen as colliding with the freedom rights of the children. Mr. Prince’s belief in consuming an marihuana

10 J. Martínez-Torrón and R. Navarro-Valls, ‘The Protection of Religious Freedom in the System of the Council of Europe’, in T. Lindholm, W.C. Durham and B.G. Tahzib-Lie (eds.), *Facilitating Freedom of Religion or Belief: A Deskbook*, Martinus Nijhoff Publishers, Leiden (Netherlands), 2004, p. 234.

11 I. Currie and J. de Waal (in association with Lawyers for Human Rights and the Law Society of South Africa), *The Bill of Rights Handbook*, Juta & Co, Cape Town (South Africa), 2006, p. 316.

12 See *ibid.* See also N. Smith, ‘Freedom of Religion in The Constitutional Court’, in *The South African Law Journal*, vol. 118, pp. 1-9 (2001), p 2.

13 See, e.g., CCSA, *Christian Education South Africa v. Minister of Education*, Case CCT4/00, 18 August 2000, para. 18, quoting *R. v. Big M Drug Mart Ltd.*, Case 18125, *supra* n. 3.

for religious reasons is treated with the same respect, while according to the court the prevention of abuse of the same substance by others is an overriding public interest. Yet while the sincerity of the belief mandates respect, the “right to be different” is the actual informing principle in these cases. The “right to be different” follows directly from human dignity as the main guiding principle in the South African freedom of religion and belief jurisprudence. The right to be different is also strongly anchored in the “equal freedom” notion derived from “human dignity”. The CCSA makes it clear that treating believers with equal concern and respect is to be distinguished from treating everyone exactly the same way.<sup>14</sup>

The jurisprudence of the ECtHR clearly shows that objectification is used as a prerequisite against abuse. Yet the sincere belief standard cannot easily be abused. The believer has to show that he or she is sincere. Also, while the Canadian emphasis on individual freedom gives Canadians the liberty to work out their own personal concept of their religion without any interference by the state, this does not mean that religion or belief becomes a purely individual affair. According to the SCC, religion “is a matter of faith, intermingled with culture. It is individual, yet profoundly communitarian. Some aspects of a religion may be so sacred that any significant limit verges on forced apostasy. Other practices may be optional or a matter of personal choice. Between these two extremes lies a vast array of beliefs and practices, more important to some adherents than to others.”<sup>15</sup> R.W. Bibby speaks of “religion à la carte”.<sup>16</sup> In a free and open society, different believers, even if they adhere to the same religion and or belief, will make different choices. The Charter enables and protects this.

From the perspective of the Canadian jurisprudence, one could argue that it is the search for objectivity which enables abuse. Do state and/or “official” religious institutions not acquire the possibility to make choices for individuals assisted by the courts in this way? What a human rights instrument must protect in the words of the SCC “is the religious or spiritual essence of an action, not any mandatory or perceived-as-mandatory nature of its observance”. From the perspective of the SCC, “religion is about freely and deeply held personal convictions or beliefs connected to an individual’s spiritual faith and integrally linked to his or her self-definition and spiritual fulfillment[...].”<sup>17</sup>

14 *Christian Education South Africa v. Minister of Education*, Case CCT4/00, *supra* n. 14, para. 42.

15 *Alberta v. Hutterian Brethren of Wilson Colony*, Case 32186, *supra* n. 5, paras 89-90.

16 See R.W. Bibby, ‘Religion à la Carte in Quebec: A Problem of Demand, Supply or Both?’, in *Globe*, vol. 10, no. 2 (Special issue on Religion in Quebec.), pp. 151-179 (2007-2008). See also J. Woehrling, ‘Appendix G: Examination and analysis of jurisprudence pertaining to reasonable accommodation in the schools’, in Advisory Committee on Integration and Reasonable Accommodation in the Schools, *Inclusive Quebec Schools: Dialogue, values and common reference points*, Quebec Ministry of Education, Leisure and Sport, 2007, p. 123.

17 *Syndicat Northcrest v. Amselem*, Cases 29252, 29253, *supra* n. 7, paras 39-42.

The Strasbourg case law on individualized beliefs provides no definite answers. It is doubtful, to say the least, whether individualized beliefs fall within the protection of Article 9 under the Strasbourg jurisprudence. While “religion” in the case law of the ECHR most definitely refers to something transcending merely personal beliefs and convictions, belief surely covers more than only religious beliefs.<sup>18</sup> The freedom of religion and belief entails “inter alia the freedom to hold or not to hold religious beliefs and to practice or not to practice a religion”.<sup>19</sup> The European Court has accepted religious and non-religious or a-religious beliefs and beliefs based on various “world views”.<sup>20</sup> Yet the freedom of religion and belief does not extend to such beliefs, in which an individual dimension as distinct from the collective dimension is absent.<sup>21</sup> Also, the freedom of religion does not cover “mere idealistic activities”<sup>22</sup> in the Strasbourg jurisprudence.

As shown above, the Canadian approach recognizes the profoundly communitarian character of religion and belief. For the South African jurisprudence, the strong focus on cultural and communitarian aspects is even a defining feature. The CCSA explicitly recognizes the collective dimension with “activities that are traditional and structured, and frequently ritualistic and ceremonial”. After all “[r]eligious practice often involves interaction with fellow believers”.<sup>23</sup> Not surprisingly, the Constitutional Court has no interest in making hard distinctions between culture and religion. They “sing with the same voice”.<sup>24</sup> Religion is not only belief, but “a part of a way of life, of a people’s temper and culture”. Religious belief itself is important for the main guiding principle, human dignity: “[r]eligious belief has the capacity to awake concepts of self-worth and human dignity which form the cornerstone of human rights”.<sup>25</sup>

There are critics who seem to argue that the Canadian liberal approach based on individual freedom, sincere belief, and religion à la carte favors “liberal” beliefs. Yet to the contrary, the à la carte concept is beneficiary to believers like Amselem and Gurbaj Multani who attach value to an orthodox understanding of religious precepts of their own religion. The SCC does not

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18 See C. Evans, *Freedom of Religion under the European Convention of Human Rights*, Oxford University Press, Oxford (UK) et al., 2001, pp. 53 and 57-59.

19 *Kokkinakis v. Greece*, app. no. 14307/88, *supra* n. 2, para. 31.

20 See Rainey, McCormick & Ovey, *supra* n. 9, at 462-463.

21 *EComHR, Vereniging Rechtswinkels Utrecht v. the Netherlands*, app. no. 11308/84, 13 April 1986.

22 K. Reid, *A Practitioner’s Guide to the European Convention on Human Rights*, 6th ed., Thomson, Sweet & Maxwell, London (UK), 2019, p. 1053.

23 *Christian Education South Africa v. Minister of Education*, Case CCT4/00, *supra* n. 14, para. 19.

24 *CCSA, MEC for Education: Kwazulu-Natal and Other v. Pillay*, Case CCT51/06, 5 October 2007, para. 60.

25 *Christian Education South Africa v. Minister of Education*, Case CCT4/00, *supra* n. 14, paras 33 and 36.

require them to be “liberal” in adjusting their beliefs to “contemporary” society. It requires public institutions and/or society to be liberal in making adjustments so they can live their lives in accordance with their religion. Because a liberal society cannot allow itself to tolerate only “one relationship to the religious”, but an approach to harmonization that is “contextual, deliberative and reflexive”.<sup>26</sup>

As the SCC reiterates in many instances, the aspiration norm for a liberal approach must be a truly free society which can accommodate a wide variety of differing and opposing beliefs. Such a liberal approach would always guarantee equal freedom to the orthodox believer as to his liberal counterpart. Any approach that would favor “liberal” believers (or non-believers) over orthodox believers does not conform to the Canadian “truly free society” standard. One may therefore also inquire hypothetically whether any approach that favors one group of people over others, can be called liberal at all, even if it favors those people who understand themselves as liberal.

There are clear parallels in effect between the Canadian “religion à la carte” and the South African “right to be different”. It is a principle that entitles people to make their choices which have to be met with “positive tolerance”<sup>27</sup> by others. The Constitutional Court refers to “celebrating diversity” which entails that it must be promoted rather than “permitting it only when no other option remains”.<sup>28</sup> The “right to believe or not to believe, and to act or not to act according to his or her beliefs or non-beliefs”, is also one of the “key ingredients of any person’s dignity”.<sup>29</sup> The components of human dignity and diversity in their synthesis inform the right to freedom of religion and belief to guarantee a “right to be different”.<sup>30</sup> Religious tolerance is accordingly not only important to individuals, it “is deeply meaningful to all of us because religion and belief matter, and because living in an open society matters”.<sup>31</sup>

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26 See G. Bouchard and C. Taylor, *Building the future, A time for reconciliation*, Government of Quebec, 2008, pp. 146 and 168.

27 See L. du Plessis, ‘Freedom of or Freedom from Religion? An Overview of Issues Pertinent to the Constitutional Protection of Religious Rights and Freedom in “the New South Africa”’, in *Brigham Young University*, vol. 2001, no. 2, pp. 439-466 (2001), p. 442.

28 *MEC for Education: KwaZulu-Natal and Other v. Pillay*, Case CCT51/06, *supra* n. 25, paras 64-65.

29 *Christian Education South Africa v. Minister of Education*, Case CCT4/00, *supra* n. 14, para. 36.

30 Currie & de Waal, *supra* n. 12, at 317.

31 *CCSA, Prince v. President of the Cape Law Society*, Case CCT36/00B, 25 January 2002, paras 164-170.



### 5.3.3 Diversity and/or pluralism

While the right to be different may be said to have a similar effect to the individual freedom-centered approach of the Canadian Supreme Court, human dignity is informed by respect for diversity in the more collective dimension and this at least superficially bares resemblance to “pluralism” in the Strasbourg jurisprudence. The selected cases clearly show that the CCSA uses the term “diversity” while the ECtHR uses the term “pluralism”. The ECtHR regards (religious) pluralism as a prism through which to view the freedom of religion. Pluralism in the words of the ECtHR is “indissociable from a democratic society” and depends (amongst others) on the freedom of religion and belief.<sup>32</sup>

Interestingly, while the term “democratic society” plays a role in all three instruments, the term “democratic society” actually features only in the Strasbourg case law in the selected cases. The Canadian equivalent as we have seen is the “truly free society”, whereas the CCSA uses “open society”. While such differences seem purely semantic, these different terms correlate with the different guiding principles.

Essential to the ECtHR’s approach is the role of the state as “neutral and impartial organizer” of pluralism.<sup>33</sup> This means that the state must at times actively intervene in one party’s freedom of religion and belief in order to guarantee the pluralism which is regarded as so essential to democratic society. Arguably, “pluralism” in the Strasbourg case law is used as often to justify state interference as it is to mandate state temperance. In comparison, in CCSA case law, “diversity” is first and foremost an aide of the individual freedom of religion or belief claim. Strasbourg “pluralism”, hence, may be regarded as an “organizational principle” whereas “diversity” in South Africa is a “human dignity”-centered value.

This notion of individual freedom in the Canadian approach which creates protection of individual spiritual self-fulfillment, through possibly but not necessarily voluntary rather than obligatory association with others, also informs the notions of state neutrality and evenhandedness in religious affairs. It affirms the idea that there can be “no faith-based content to public policy and no religious community that commands authority or privilege in the policy-making process”.<sup>34</sup>

The South African approach defines neutrality mainly as “inclusion”. This can be explained by the focus on human dignity-based diversity as guiding principle. The ECtHR’s organizational pluralism seems to assume most strongly

32 *Kokkinakis v. Greece*, app. no. 14307/88, *supra* n. 2, para. 31.

33 ECtHR (GC), *Refah Partisi (The Welfare Party) and Others v. Turkey*, app. nos. 41340/98, 41342/98, 41343/98 and 41344/98, 13 February 2003, paras 93-94.

34 L.E. Weinrib, ‘“This New Democracy ...” Justice Iacobucci and Canada’s Rights Revolution’, *University of Toronto Law Journal*, vol. 57, no. 2, pp. 399-413 (2007), p. 406.

of the three courts, that there is an objectively neutral position in matters of religion and belief, which the state can assume and claim.

#### 5.4 WHAT IS THE SCOPE OF THE FREEDOM OF RELIGION AND BELIEF, AND WHAT DOES IT ENTAIL?

Not surprisingly, the guiding principles greatly influence the scope and content of the freedom of religion and belief in the case law of the three courts.

##### 5.4.1 Expression and relations

All three courts recognize that the freedom of religion and belief entails a right to believe or not to believe. It also entails that religious as well as other beliefs must be respected. According to the Canadian case law, the freedom of religion must be seen as an expression of the right to believe or disbelieve, to manifest one's belief or lack thereof or to express agreement or disagreement with the beliefs of others.<sup>35</sup> It also incorporates a right to establish and maintain a community of faith.<sup>36</sup> The notion of the freedom of religion as interpreted by the SCC, thus, not only stresses individual autonomy, but includes a collective dimension. The collective dimension is based upon the notion that free individuals freely form collectives. Freedom of religion and belief is thus not only about beliefs and choice of action and inaction, but also about relationships.<sup>37</sup>

As both individuals and communities enjoy the right to be different, the CCSA makes no difference between the individual and the collective dimension of the freedom. Freedom of religion and belief is placed in alliance with other provisions "designed to protect the rights of members of communities". Yet CCSA case law also touches on the spiritual dimension of faith. 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".<sup>38</sup> Consequently, state interference with faith-motivated action or inaction, not only impairs the freedom of choice but intrudes on the spiritual identity of people and thus impedes their human dignity.

This spiritual dimension in the South African jurisprudence bares resemblance to the *forum internum* in the Strasbourg case law. The state may

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35 *Alberta v. Hutterian Brethren of Wilson Colony*, Case 32186, *supra* n. 5, para 181.

36 *Ibid.*

37 *See ibid.*, para. 182.

38 *Christian Education South Africa v. Minister of Education*, Case CCT4/00, *supra* n. 14, paras 24 and 36.

never breach the internal dimension of belief.<sup>39</sup> This dimension, however, has a narrow scope, possibly because of the absolute character. The definition may be so narrow, that it is arguably not foreseeable that the Court will ever find a breach unless an individual is threatened explicitly to change his or her belief or face negative consequences.<sup>40</sup> Even the forced swearing of a religious oath for members of parliament was not seen as a breach of the internal dimension. However, it was considered an unjustifiable breach of the external dimension.<sup>41</sup>

As mentioned, Article 9 of the ECHR pairs “thought, conscience and religion” for the scope of the freedom and then pairs “religion and belief” when it comes to the right to change them and the right to manifest them. Irrespective of whether we must assume a distinction between those pairs, the ECtHR jurisprudence makes clear that religious beliefs, beliefs not motivated by religion as such, as well as non-belief are protected by Article 9. Article 9, read in conjunction with Article 14, guarantees equal treatment of religious and non-religious beliefs, thought and conscience, as well non-beliefs and connected conscience and thought. The Convention bodies have accepted claims by individuals, churches, and associations with religious and philosophical objectives.<sup>42</sup> However, Article 9 cannot be invoked<sup>43</sup> by ordinary legal persons,<sup>44</sup> nor by corporate profit-making bodies.<sup>45</sup>

#### 5.4.2 Deviation from general norms?

The SCC’s guiding principle of individual liberty emphasizes a positive freedom, which in turn means that not only coercion or restraint impair individual freedom. Any state action which compels an individual to action or inaction contrary to what he or she would have freely chosen in the absence of the state’s measure, is an intrusion on personal freedom. Any such intrusion can only be justified in regard of legitimate aims as stipulated by the Charter. Unless the state can thus legitimately interfere, everyone is free to act in accordance with his or her own conscience. Well aware that such a broad individual freedom will lead to a situation where the choices of some appall or disturb others, the SCC reiterates time and time again that a “truly free society” can accommodate a wide variety of beliefs, even if they collide and

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39 See Harris, O’Boyle & Warbrick, *supra* n. 9, at 428.

40 Compare Evans, *supra* n. 19, at 78 and Harris, O’Boyle & Warbrick, *supra* n. 9, at 428.

41 See ECtHR (GC), *Buscarini and Others v. San Marino*, app. no. 24645/94, 18 February 1999.

42 See Rainey, McCormick & Ovey, *supra* n. 9, at 462-464.

43 Reid, *supra* n. 23, at 1055.

44 EComHR, *Verein “Kontakt-Information-Therapie” (KIT) and Hagen v. Austria*, app. no. 11921/86, 12 October 1988.

45 EComHR, *Company X. v. Switzerland*, app. no. 7865/77, 27 February 1979.

contradict one another. This is because a truly free society aims at full equality in the enjoyment of freedoms.<sup>46</sup>

Human dignity, the guiding principle of the CCSA, is inspired and informed by the negative experience of exclusion, suppression, and intolerance in South Africa's constitutional and legal history. Freedom of religion and belief in the South African interpretation, protects "the right of people to be who they are without being forced to subordinate themselves to the cultural and religious norms of others". Both individuals and collectives enjoy the "right to be different". In each case, space has been found for members of communities to depart from a general norm.<sup>47</sup> Hence, the state is required by the Bill of Rights "to acknowledge the value of religious diversity and pluralism". It meant for individuals and communities to be who they are and not subordinate themselves to the cultural and religious norms of others.<sup>48</sup>

The CCSA makes it clear that treating believers with equal concern and respect is to be distinguished from treating everyone exactly the same way. Sometimes it implies treating people different, because a rule of general applicability has different effects for them. Believers cannot, however, claim an automatic right to be exempted from rules of general application. But it does mean that the state must "seek to avoid putting believers to extremely painful and intensely burdensome choices of either being true to their faith or else respectful of the law".<sup>49</sup> While holding beliefs, convictions and opinions may not be subjected to limits of any kind, the restriction of manifestations should be avoided and, if they cannot be avoided, the least restrictive means should be sought. Restriction is obviously only legitimate with regard to a legitimate aim. Such an aim follows from the possible harm<sup>50</sup> to identified goals of general interest and, of course, the rights and freedoms of others. For example, the South African Supreme Court of Appeal has held in *Nkosi v Bührmann* that the freedom of religion and belief does not confer the right to choose a grave site without the site owner's consent.<sup>51</sup>

Both the Canadian and the South African interpretations of the freedom of religion and belief entail a general affirmation that deviation from mainstream norms and behavior is to be respected. While the South African "right to be different" may be bolder than its Canadian counterpart based on choice to be respected, both interpretations include in the very essential scope of the

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46 SCC, *Trinity Western University v. College of Teachers*, Case 27168, [2001] 1 SCR 772, 17 May 2001, para. 28, quoting *R. v. Big M Drug Mart Ltd.*, Case 18125, *supra* n. 3, at 336-337.

47 *Christian Education South Africa v. Minister of Education*, Case CCT4/00, *supra* n. 14, para. 24.

48 Currie & de Waal, *supra* n. 12, at 317.

49 *Christian Education South Africa v. Minister of Education*, Case CCT4/00, *supra* n. 14, paras 42 and. 35.

50 See Currie & de Waal, *supra* n. 12, at 322-324.

51 See *ibid.*, p. 343.

right a basic freedom to be exempted from general rules if these breach the freedom of religion and belief unduly.

The ECtHR is certainly more restrained in this regard. With regard to the external dimension, the ECtHR will first determine if, and to what extent, the manifestation is connected to the core internal (religious) belief “in a generally recognized form”.<sup>52</sup> If there is insufficient coherence and connectivity, the individual’s actions are not seen as protected manifestations under the freedom of religion and belief. If the manifestation is too far removed from the core belief, it is also not protected because the (religious) belief as such can be manifested in other ways.<sup>53</sup>

Hence, the ECtHR jurisprudence does not include a general affirmation of individual choice/right to be different. Yet even manifestations in a generally recognized (according to the Court) form may bring the individual in conflict with neutral or general application. In these cases, the ECtHR tries to walk a thin line between protecting the individual while not affirming a right to be different.

The incremental approach the ECtHR took concerning the right to conscientious objection to military service<sup>54</sup> shows the struggle with this matter. First, conscientious objectors could be punished by criminal law and the only right they could claim was to be treated differently from ordinary criminals concerning job requirements. Only after many years, once the majority of parliaments in the member states had recognized a right to alternative service or done away with conscription altogether, did the Court become more affirmative. It recognized then that religious freedom is impaired when individuals are forced to choose between following their conscience or preventing conviction.

#### 5.4.3 What determines what the right entails?

Whereas the ECtHR will try to determine in some objective way the generally recognized form, the highest courts of Canada and South Africa take the subjective standard of the individual as a starting point. Yet it has been said that the broad definition of the right to freedom of religion and belief increases the chance of infringement by the state. Therefore, the limitations clause is crucial in interpreting what the right entails. Consequently in all the selected cases, the CCSA never questions the sincerity of a belief or the centrality of the practice to a believer’s system of beliefs. It has so far always referred to the system as a whole to justify the impairment of any manifestation.<sup>55</sup> In the

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52 Reid, *supra* n. 23, at 1055.

53 See *ibid.*, pp. 1054–1056.

54 ECtHR (GC), *Thlimmenos v. Greece*, app. no. 34369/97, 6 April 2000; ECtHR (GC), *Bayatyan v. Armenia*, app. no. 23459/03, 7 July 2011.

55 See Currie & de Waal, *supra* n. 12, at 320–321.

selected cases, the ECtHR is the Court which most often decides that certain claims are not protected by the freedom of religion and belief at all.

As impartial organizer, the state, in accordance with the ECtHR's approach, may never breach the internal dimension of belief. It may, however, regulate and organize the external and collective dimensions. This may lead to justified interference. Both the objective standard and the limitations clause thus determine what the right entails. The ECtHR's recent case law has gradually moderated the rigidity of the Arrowsmith test.<sup>56</sup> However, the general idea that there must be some objectified and immediate connection between practice and belief has not been terminated. In some cases, there is thus still the risk that the Court will cross a line of "substituting its judgment for the conscience of the persons involved, defining what was 'reasonable' for them to believe".<sup>57</sup>

The objective standard which remains in the Strasbourg jurisprudence, always runs more risk of substituting judicial analysis for the individual's conscience. The South African and Canadian approaches do not run this risk. They try to manage the other risk of too broad freedom via the limitations clause. Yet, arguably, the right to freedom of religion and belief entails more freedom of action and inaction for individuals in Canada and South Africa than in the European Convention area. The same goes for collective freedom although, due to the codification of the collective rights, collective autonomy under the freedom of religion and belief might be broadest in South Africa.

## 5.5 HOW IS THE FREEDOM OF RELIGION AND BELIEF APPLIED, WHEN IS IT TRIGGERED?

The freedom of religion and belief is triggered according to the Canadian case law if a sincere belief was interfered with. The South African case law also uses the interference with sincere belief as a trigger. In the Strasbourg case law, failure to act in accordance with a negative or positive obligation by the state triggers freedom of religion and belief.

In the Canadian case law, the freedom of religion and belief is triggered, as shown in section 5.3.1, if a believer can show that a practice or belief that he or she sincerely believes in is hindered or infringed by a law, regulation or act. It is not necessary, for the practice to be a recognized and objectified religious dogma or practice. While the sincerity test can be derived from *Big M*, it was solidified in *Amselem* and once again applied as a robust notion in *Multani*.<sup>58</sup>

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56 Harris, O'Boyle & Warbrick, *supra* n. 9, at 433.

57 Martínez-Torrón & Navarro-Valls, *supra* n. 11, at 234.

58 L.G. Beaman, 'Defining Religion, the Promise and the Peril of Legal Interpretation', in R. Moon (ed.), *Law and Religious Pluralism in Canada*, UBC Press, Vancouver/Toronto (Canada), 2008, pp. 204-205.

Although in general the South African jurisprudence regarding freedom of religion and belief primarily relies on human dignity, individual autonomy does play an important role in triggering the freedom of religion and belief. In *Pillay*, Langa notes that the applicable test to trigger freedom of religion and belief is “sincerity” in South Africa as well as many foreign jurisdictions.<sup>59</sup> The ECtHR does not have an equivalent of the sincerity test. However, as already mentioned in section 5.3.1, the *Arrowsmith* test, once used to objectively establish the centrality of a practice to a certain belief, has gone out of use.<sup>60</sup> Freedom of religion and belief is triggered in the Strasbourg jurisprudence, when there are measures preventing an individual from manifesting his or her belief or penalizing him or her for acting in accordance with the belief. If said measures are taken by private individuals, the important question in order to trigger the freedom of religion and belief is whether the state violated a negative or positive obligation in this regard.

#### 5.5.1 Sincerity of belief and non-trivial interference

If the freedom of religion and belief is triggered in the SCC’s case law because there is interference with or infringement of a sincere belief, the SCC will first analyze the nature of the interference. If the interference is non-trivial or not insubstantial, the *Oakes* test will be applied to establish whether the interference can be justified.<sup>61</sup> “Trivial or insubstantial” interference is interference that does not threaten actual religious beliefs or conduct. The SCC will not accept “[t]he bare assertion by a claimant that a particular limit curtails his or her religious practice” as evidence of the seriousness. Instead, it will “evaluate the degree to which the limit actually impacts on the adherent”.<sup>62</sup> The degree to which the limit actually impacts on the adherent is part of the analysis which is the *Oakes* test.

The sincerity approach also links the freedom of religion to the broader category of freedom of conscience, “which seeks to ensure that individuals are free to adopt the religious, spiritual or secular beliefs or fundamental reasons of their choice and that they are not compelled to act contrary to their convictions of conscience”. It is for the court to inquire whether the practice in question is one of “conviction of conscience” or mere “personal preference”. “Only the former are likely to underpin a legal duty of accommodation since they are closely linked to what we have called the moral integrity of indi-

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59 *MEC for Education: Kwazulu-Natal and Other v. Pillay*, Case CCT51/06, *supra* n. 25, para. 52.

60 Harris, O’Boyle & Warbrick, *supra* n. 9, at 433.

61 See, e.g., *Multani v. Commission scolaire Marguerite-Bourgeoys*, Case 30322, *supra* n. 3, paras 34-35.

62 *Alberta v. Hutterian Brethren of Wilson Colony*, Case 32186, *supra* n. 5, paras 32 and 89-90.



viduals.”<sup>63</sup> However, the SCC will not establish a hierarchy between convictions of conscience or make distinctions between “core” and “periphery” of the system of belief.

As shown in section 5.3.2, it also takes interference with sincere belief to trigger the freedom of religion and belief in South Africa. In *Pillay*, the sincerity test plays an important role in relation to the religio-cultural use of the nose-stud. The ratio given for the sincerity test is the neutrality of (secular) courts in religious and cultural matters. Questioning the importance or centrality of a practice “would require them to substitute their judgment of the meaning of a practice for that of the person before them and often to take sides in bitter internal disputes. This is true both for religious and cultural practices.”<sup>64</sup>

The ECtHR does not have an equivalent of the sincerity test as mentioned above. On the other hand, the ECtHR is much quicker than the other two courts to assume that a certain law, regulation or government act has not triggered the freedom of religion and belief because the rule is general in this application or because the interference must “objectively” be seen as trivial. Even if the adherent objects to the rule out of a religious principle, the ECtHR may regard the freedom of religion and belief not to be triggered. However, if the act in question itself involves the making of a religious declaration or participation in religious activities, the freedom of religion and belief is always considered compromised. Requiring someone to prove that he or she professes a certain religion, which would be considered unjustified interference elsewhere can, however, be justified in the Strasbourg system.<sup>65</sup> Also, in Strasbourg jurisprudence the “minimal restrictions in which the authorities act within their margin of appreciation in striking the balance” will generally not constitute an interference”.<sup>66</sup> This threshold is similar to the triviality/substantiality test in Canada and South Africa. Unlike in Canada and South Africa, if the threshold is not met, the freedom of religion and belief is not even triggered.

In the ECtHR cases reviewed, there is also evidence that the objections to participate in certain acts stand more chance of being protected under Article 9 if the act the believer is compelled to engage in has a religious character. This can be seen in *Følgero* and *Buscarini* vis-à-vis *Şahin* and *Thlimmenos* (see sections I3.4.1–2 and I3.4.7–8). The attitude or general outlook of the claimant also plays a role. *Refah* (section I3.4.5) suggests that a group holding beliefs that are incompatible or not entirely compatible with the “democratic society” envisioned by the convention cannot claim Convention protection.<sup>67</sup> This is the notion which has been called “vigilant democracy”. The concept has been

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63 Bouchard & Taylor, *supra* n. 27, at 176.

64 *MEC for Education: Kwazulu-Natal and Other v. Pillay*, Case CCT51/06, *supra* n. 25, para. 87.

65 ECtHR (C), *Kosteski v. the Former Yugoslav Republic of Macedonia*, app. no. 55170/00, 13 April 2006.

66 Reid, *supra* n. 23, at 1057.

67 Rainey, McCormick & Ovey, *supra* n. 9, at 543–544 and *Refah Partisi (The Welfare Party)* *supra* n. 34 paras. 92–93.

criticized because it allows for the impairment of rights in concrete situations for the purpose of an abstraction. Boyle, for example, lamented the *Refah* judgment because it allowed for the prohibition of the main government party, without any concrete evidence that the government would indeed violate Convention rights.<sup>68</sup> Similarly, the dissenting judges in *S.A.S.* bemoaned the majority's finding that the freedom of religion and belief of face-veil wearing women was impaired for the sake of "living together". Apart from being abstract, "living together" cannot be translated to concrete rights and freedoms of others. "Selective tolerance" is not reconcilable with the Convention, the dissenters argued in *S.A.S.*<sup>69</sup>

### 5.5.2 Ratio and working of the sincerity approach

Much like in the Canadian cases, the CCSA dismisses all reference to "objective" practices in *Pillay*. Sunali Pillay must not be compared to other South Indian Tamil Hindu girls, because "it is not for the Court to tell her that she is wrong because others do not relate to that religion or culture in the same way."<sup>70</sup> In *Christian Education*, the CCSA takes very seriously the belief of the parents that corporal punishment is important and central to them in their religious beliefs about proper education and upbringing. It does not dismiss the practice as trivial, but accepts a more than trivial interference with the freedom of religion and belief.<sup>71</sup> In the end, the decision is taken by balancing rights.

It could be argued that the South African "sincerity test" is in fact a sincerity assumption: the sincerity is assumed and seldom challenged, because this would involve unconstitutional questioning of personally held beliefs by a court. However evidence may be used to conduct a primary inquiry into the subjective centrality of the practice.<sup>72</sup>

According to the CCSA case law, the sincerity assumption may also follow from the very nature of a belief. The beliefs of one may strike others as "bizarre, illogical or irrational to others or are incapable of scientific proof". Hence, trying to objectify can be seen as an impossible enterprise. Putting believers through such a procedure may in itself involve an infringement of the freedom of religion, conscience, thought, belief and opinion. "Such should

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68 K. Boyle, 'Human Rights, Religion and Democracy: The Refah Party Case', in *Essex Human Rights Review*, vol. 1, no. 1, pp. 1-16 (2004), p. 2.

69 ECtHR (GC), *S.A.S. v. France*, app. no 43835/11, 1 July 2014, *Joint partly dissenting opinion of Judges Nussberger and Jäderblom*, paras 2 and 14.

70 *MEC for Education: Kwazulu-Natal and Other v. Pillay*, Case CCT51/06, *supra* n. 25, para. 87.

71 *Christian Education South Africa v. Minister of Education*, Case CCT4/00, *supra* n. 14, para. 37.

72 See Currie & de Waal, *supra* n. 12, at 341.

be only done in case of a genuine dispute as to the centrality or sincerity of the practice.”<sup>73</sup>

The “sincerity” approach in the Canadian standard interpretation clearly follows from the main guiding principle, individual liberty. If the autonomous individual sincerely believes, the protection of the constitutional rights is triggered. In the *Amselem* case, for example, the Supreme Court stresses the “personal choice”. The freedom of religion and belief does not only protect “those aspects of religious belief or conduct that are objectively recognized by religious experts as being obligatory tenets or precepts of a particular religion”. An adherent should only be asked to show whether his or her belief is sincere, not whether it is “valid”. After all, an inquiry into the validity of the belief would be inappropriate for a (secular) court to make.<sup>74</sup>

Yet besides individual freedom, there might be a second ratio for the sincerity approach which is more practical in nature, though linked to individual autonomy and the notion of religious neutrality of state organs. Finding objective meanings and concepts for religious and other beliefs is difficult if not impossible in a religiously diverse society such as Canada or South Africa. The same certainly goes without a question for the Convention member states. Various religions and beliefs differ from one another, they are internally heterodox as shown by the many different strands under the same religion and/or belief system. Also, each of them evolve and change as they interact with other cultural elements in society. Finally, believers make personal choices. If judges and lawyers are to understand religion and belief in its own terms, they must – at least partly – rely on what the believer attests to being his/her belief.<sup>75</sup>

High level religious and conscientious pluralism also explains why there will always be some interference and infringement, and why some of it has to be considered as justified. After all, “[b]ecause religion touches so many facets of daily life, and because a host of different religions with different rites and practices co-exist in our society, it is inevitable that some religious practices will come into conflict with laws and regulatory systems of general application.”<sup>76</sup> The three courts agree that the freedom of religion and belief, much like all other human rights, is not an absolute right. They also agree that while the freedom of belief may be broad, the freedom to act upon those beliefs is considerably narrower.<sup>77</sup>

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73 *Prince v. President of the Cape Law Society*, Case CCT36/00B, *supra* n. 32, para. 42.

74 *Syndicat Northcrest v. Amselem*, Cases 29252, 29253, *supra* n. 7, para. 43.

75 Beaman, *supra* n. 59, at 193-201.

76 *Alberta v. Hutterian Brethren of Wilson Colony*, Case 32186, *supra* n. 5, paras 89-90.

77 See, e.g., *Trinity Western University v. College of Teachers*, Case 27168, *supra* n. 47, para. 30.

### 5.5.3 Positive and negative obligations

Freedom of religion as guaranteed in Article 9 of the ECHR covers both negative and positive obligations by states. States must refrain from penalizing an adherent for his or her religious beliefs, and must certainly not take active measures to interrupt, disturb or prevent free and equal exercise of religious manifestation. Hence, non-recognition of a religion, church or community, can trigger the protection of Article 9.<sup>78</sup> The failure of the state to provide proper protection to a minority religious community against (physical) attacks by fanatics of the majority group is also seen as an infringement.<sup>79</sup> Also, the state may, under the positive obligation, limit free speech to protect the mainstream religious group against insult.<sup>80</sup> However, the obligation is not so strong that it makes such protection absolutely necessary. Case law shows that when the state fails to protect a minority religion against such insult, no positive obligation is neglected, irrespective of whether the majority is protected by blasphemy laws.<sup>81</sup>

The Canadian and South African case law show that indeed both the non-compliance with negative obligations and the non-fulfillment of positive obligations can trigger the freedom of religion and belief according to the SCC and the CCSA. In *Lafontaine* (section I1.4.8) all judges on the SCC agreed that the municipality did not do its best to assist the congregation of the Jehovah's Witnesses in providing for the required transparency and the appearance of procedural fairness, when it came to finding a place to realize their church. The majority believed that a positive obligation had been neglected because the municipality did not assist enough. The minority found that a positive obligation under state neutrality, derived from the freedom of religion and belief, kept the municipality from assisting more. In *Multani*, however, a unanimous Court believed that the school had been under a positive obligation to find a reasonable accommodation for the practice of wearing the metal *kirpan* rather than issuing a blanket ban.

The CCSA in *Prince* also assessed whether the Government had been under a positive obligation to provide for an exemption for the Rastafarian community from the general ban of marihuana. While the majority found that such an exemption would undermine the very purpose of the general ban, the minority was of the opinion that the freedom of religion and belief mandated a neatly tailored exemption. In *Christian Education*, however, a unanimous Court was of the opinion that any exemption from the general ban of corporal

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78 ECtHR (C), *Metropolitan Church of Bessarabia and Others v. Moldova*, app. no. 25781/94, 13 December 2001.

79 ECtHR (C), *97 Members of the Gldani Congregation of Jehovah's Witnesses and Others v. Georgia*, app. no. 71156/0, 3 May 2007.

80 ECtHR (C), *Otto-Preminger-Institut v. Austria*, app. no. 13470/87, 20 September 1994.

81 ECtHR, *Choudhury v. United Kingdom* (Admissibility decision), app. no. 17439/90, 5 March 1991.

punishment in schools would undermine the purpose of the ban. There was therefore no positive obligation under the freedom of religion and belief, which parliament failed to adhere to.

So, while all three courts recognize the concepts of positive and negative obligations, the application is slightly different. Arguably, the CCSA and SCC are more likely to see them as to sides of the same coin, while the ECtHR primarily looks at the freedom of religion and belief in terms of negative obligations and a higher threshold must be met to assume a positive obligation.

## 5.6 INSTANT SECULARIZATION THROUGH HUMAN RIGHTS CASE LAW?

The comparative analysis of the selected cases and the conceptualization of the standard interpretation show that the three courts are receptive towards the claims of believers. While we may have our own opinions as to which standard interpretation is more preferable, if any, or which case should have been decided differently, we can conclude that the freedom of religion and belief is an important asset for believers in the context of the liberal constitutional state. Nevertheless, some commentators believe that, in the long run, believers have more to fear than to gain from the freedom of religion and belief. Hirschl, for example, argues that courts “reconstruct or format religion in several obvious ways”. In the public mind, religion itself becomes defined by the court cases. Constitutional jurisprudence tends to not consider the “vast historical and sociological background of religion, the incredible richness of beliefs and interpretive nuances”. Furthermore, generally speaking, constitutional law and constitutional courts are often appealing to “secularist, modernist, cosmopolitan, and other anti-religious social forces in politics”. Part of this has to do with the very nature of constitutions and constitutional law. Constitutions are man-made and create a system of institutions governing the entire spectrum of society and a normative order from which no one can withdraw. They advance the rule of law by definition, sometimes in “lieu and at times in tandem with the rule of God”.<sup>82</sup>

Hirschl regards the highest courts in South Africa and Canada as prime examples of a deified constitutionalism as an all-encompassing, overreaching civil religion.<sup>83</sup> Yet in his opinion in any state-religion system, even strong establishment, judges will always be found to enhance secular law at the expense of religion. While judges in strong establishment settings find interpretative solutions to facilitating the growth of the domain of public law at

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82 R. Hirschl, ‘The Secularist Appeal Of Constitutional Law And Courts: A Comparative Account’, *Keynote address for the ReligioWest Kick-off Meeting, Robert Schuman Centre for Advanced Studies, European University Institute, Florence, 14-15 October 2011*, pp.1-3.

83 *Ibid.*, p. 5. See also R. Hirschl, *Constitutional Theocracy*, Harvard University Press, Cambridge (USA), 2010, pp. 187 and 203.

the expense of religion/religious law, in the accommodationist model the competing claim of religious law is rejected, while in separationist states, the public sphere is by definition secular. As stakeholders in the civil religion of the state, courts feel obliged to take action to “restore the superiority of its sources of legitimacy, rules of engagement, methods, and style of reasoning that are state-driven and entrenched in the secular constitution”. Hence, he concludes, a-religious or anti-religious forces, when faced with divides along religious or secular/religious lines will favor constitutional law and courts as the instrument and fora for such divides. After all, irrespective of the socio-cultural context, they show a tendency towards secularization.<sup>84</sup>

While in the premodern age legal, political, and social structures gave “religious legal regimes” an advantage, they now give states an advantage in their effort to “contain religion”. Courts, Hirschl concludes, are “inherently unsympathetic toward alternative hierarchies of authority and adjudication, which they constantly strive to bring under check”.<sup>85</sup> He is not the only one with a critical view of the impact of judicialization on religion and belief. Reuter observes that modernity’s main tendencies, individualization and pluralization, have led to a “far-reaching diversification of the religious-denominational field”. Amongst “other things” he attributes this to “the acceleration of globalization processes and increasing inter- and transnational migration”. Parallel to that, the human rights culture developed which led to a juridification: moral claims are converted into legal human rights claims. This is why in today’s religious cultural climate, human rights legal conflicts about religion seem to dominate.<sup>86</sup>

In Reuter’s view, the modern state, unlike its predecessors, entered into domains previously not governed by the state like marriage, schooling, welfare and so forth. Previously, these belonged to the domain of faith-based communities, organizations, and structures. Many of the current legal conflicts decided under the freedom of religion and belief, still result from this “hostile takeover”.<sup>87</sup> The freedom of religion and belief as a human right has automatically led to an individualization and “juridification”. Because human rights are first and foremost individual rights, individualization is enhanced. Because rights must be claimed and enforced through legal procedures, “juridification” is accompanied by “justicialization” and “judicialization”. Courts decide on what constitutes “religion” within the scope of the human right.<sup>88</sup>

However, Reuter argues that the self-understanding of religious communities should be essential in defining “religion” and “belief”. After all, the state

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84 Hirschl, *supra* n. 83, at 4-25.

85 *Ibid.*, p. 25.

86 A. Reuter ‘Charting the Boundaries of the Religious Field: Legal Conflicts over Religion as Struggles over Blurring Borders’, in *Journal of Religion in Europe*, vol. 2, no. 1, pp. 1-20 (2009), pp. 1-4.

87 *Ibid.*, p. 15.

88 *Ibid.*, pp. 15 and 7-10.

would violate the independence of religious communities and churches if it did not take the self-understanding into consideration. On the other hand, this self-understanding cannot be absolute because that would lead to a “dis-solution of the religious” and to an “erosion of this fundamental right”. Therefore, “those who claim freedom of religion must make a plausible case” that what they are claiming is indeed covered by an understanding of “religious” “in the sense of what law and jurisdiction define as religion”. The state must then determine the scope of the freedom of religion. However, this immediately implies that the secular domain seizes control over the religious domain. According to Reuter, this makes it necessary for the liberal constitutional state to be self-critical and acknowledge the dilemma.<sup>89</sup>

Benson views secularism primarily as a movement directed at minimizing the relevance of religion and its role in the public sphere. Secularism understood in this way is an anti-religious ideology, which increasingly seeks to employ law to fulfill the function of a religion with one moral viewpoint. “By doing so, these approaches attack religious associations themselves and usurp the proper social roles that religions play including diversity in relation to moral debates of the day.” Benson, like Hirschl, sees tendencies of a reductive definition of the freedom of religion in the jurisprudence and legal literature of particularly Canada and South Africa.<sup>90</sup>

In Benson’s view, while legal debates about religious freedom use terms such as “pluralism” and “diversity”, their very meaning is different from what believers might imagine them to mean. He associates them with “Pseudo-Liberalism”, “Civic Totalism”, “Egalitarian Absolutism” and “Making Law into a Religion”. Law is being used to make a set of beliefs on, among other things, gender roles and sexual conduct to be dominant. But the threat comes not only from the divinization of law but also from a “diminution of the protections that exist in law for religious diversity”. Part of the problem seems to be that in media, politics, and law, there is an overrepresentation of people “who have little time for religion at best and actively wish to attack it at worst”.<sup>91</sup>

In Benson’s view, there is an attempt to replace religion by law, by turning the law into the civil religion and “idolatrizing law and human rights”. He views this as dangerous for culture, freedom, and peaceful coexistence. But he also views the project as inherently doomed to fail. Religion’s true nature consists of voluntarism, allegiance by affection, and transcendental rules. The true nature of law and state is the diametrical opposite. The attempts to idolatrize law or human rights are inappropriate usurpations of the role

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89 *Ibid.*, pp. 10-18.

90 I. T. Benson, ‘The Attack on Western Religions by Western Law: Re-framing Pluralism, Liberalism and Diversity’, in *International Journal for Religious Freedom*, vol. 6, no. 1-2, pp. 111-125 (2013), pp. 111-112 and 121.

91 *Ibid.*, pp. 112-114.



properly played by religions in societies. Religions, as diverse as they may be, stand outside the public, political and legal spheres, though they may also overlap with each of these spheres and each other. Yet, because religions believe in different things, they are likely to conflict. This is why associational freedom is necessary for social peace.<sup>92</sup>

True pluralism and accommodation, according to Benson, require the acceptance of co-existence with disagreement instead of the win all/lose all method of rights-based litigation. Benson, therefore, argues for a shift of focus from the courtrooms to the legislative and to civil society itself. As courts will doubtlessly continue to be confronted with legal conflicts related to the issues of freedom and equality, courts must find a way to enable rather than obstruct political and societal discourse.<sup>93</sup>

Hirschl, Reuter and Benson are familiar with the case law generated by the three courts, as present in the selected cases. They know that in a great many cases, the believers are triumphant and if not, there is often a balancing of rights in which the believer's claim is treated with respect. They acknowledge that in the context of the modern state, interests and beliefs can collide and that we need adjudication to solve them. They are united in their assertion of the need to find a new equilibrium for competing normative orders, of which (secular) constitutional law is one and religion and belief are others.

The question is whether the courts, made out to be "high priests of constitutionalism", are not also the ones who created space and opportunity for believers to (re-)claim agency over their lives and to contribute to the holistic pluralism that commentators desire.<sup>94</sup> Is the sincerity approach not designed to let believers themselves determine the essence of a religion or belief? Benson credits Albie Sachs with being a notable exception, a judge who understands religion, like believers do.<sup>95</sup> But does Sachs' clear and profound logic of the "right to be different" not echo in all those majority opinions, which had to relate to his dissenting and separate opinions. Does the echo not continue, even after he left the Court? Is the "right to be different" not the lifeline of all those who feel constrained by the totalism of modern society?

I would answer all these questions affirmatively. I agree with the commentators that the modern state and modern society contain many intrusive elements for believers. But I view the role of human rights and courts in a positive light. Many of the selected cases, especially from the SCC and CCSA showed awareness of the dilemma Benson mentions regarding the secular determining the scope of the religious. I was appreciation for religion and belief and diversity of spiritual life and I saw remedies against civic totalism.

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92 *Ibid.*, pp.114-116.

93 *Ibid.*, p. 117.

94 *Ibid.*, p. 115, quoting R. Hirschl, *Constitutional Theocracy*, Harvard University Press, Cambridge (USA), 2010, pp. 187, 202 and 118-119.

95 Benson, *supra* n. 91, at 120.

In Hirschl's opinion, as we noticed, courts are "inherently unsympathetic toward alternative hierarchies of authority and adjudication"<sup>96</sup> and thus "own law". While this may not be untrue, we also saw room for group autonomy and own law in the selected cases. So even with judicial skepticism towards own law, a dynamic and flexible relationship is conceivable. This may require the acknowledgement of the states "hostile takeover" (Reuter<sup>97</sup>) of many areas in social life and the possibility for communities of faith to reclaim them as alternatives to the state.

Obviously, the selected cases also show us the boundaries of the freedom of believers. Generally speaking, these boundaries seem to be not static, but dynamic, developing as case law shapes and molds the standard interpretation. The boundaries, which have to be motivated under the limitations clause, relate to the rights and freedoms of others, the (risk of) harm to others. Holistic pluralism by definition demands an integral approach to freedom which structurally neither favors nor disfavors any (group of) believers or non-believers. It requires as Sachs said in *Fourie* "mutually respectful co-existence between the secular and the sacred. The function of the Court is to recognize the sphere which each inhabits, not to force the one into the sphere of the other."<sup>98</sup> As far as the constructive role of the courts is concerned to find a way to enable this, Cass Sunstein claims that judicial minimalism is just the instrument. In Chapter 6, we shall see to what extent the selected cases display such judicial minimalism.

## 5.7 INTERMEDIARY CONCLUSIONS: SIMILARITIES, DIFFERENCES AND BEST PRACTICES

According to H.L.A. Hart, it is imminent that judges develop principles which guide their interpretation of the law. All three courts have developed principles which guide their interpretation of the freedom of religion and belief. They are related to in what may be called the theoretical foundations, contexts and/or history of the respective constitutional documents. The guiding principles are supported by what will be called supporting principles.

The main guiding principle applied by the SCC in the freedom of religion and belief cases is "individual liberty". The "harm principle", "religion à la carte" and "sincerity of belief" are informing principles.

"Human dignity" is the main guiding principle applied by the CCSA in the freedom of religion and belief cases. The "right to be different", "respect for diversity" and "positive tolerance" are the informing principles.

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<sup>96</sup> *Ibid.*, p. 25.

<sup>97</sup> *Ibid.*, p. 15.

<sup>98</sup> CCSA, *Minister of Home Affairs and Another v. Fourie (e.a)*, Cases CCT 60/04 & 10/05, 1 December 2005, paras 93-94.

The main guiding principle of the ECtHR for the freedom of religion and belief cases is “pluralism”. The state’s role as “organizer of pluralism” and the impartiality of this organizer are therefore the informing principles which inform what pluralism implies for solving the cases.

The three guiding principles as applied by the three different courts in interpreting the freedom of religion and belief are neither opposing nor mutually exclusive. They do, however, differ in their emphasis and internal logic. This, in turn, can lead to very different outcomes in similar cases. Hence, these different guiding principles can create opposing or colliding outcomes, as well as parallel and even identical outcomes.

The SCC and the CCSA mainly rely on the believers themselves to define their religion and belief and what it entails for them. The believer must show sincerity in the belief and practice which is at stake. Often this will be a sincerity assumption, if there is no evidence to the contrary. This is especially so, before the CCSA. The ECtHR has moved away from trying to objectify beliefs and practices, but cannot be said to have fully embraced a sincerity based approach.

All three courts are alive to the communal dimension as prerequisite for the individual dimension and vice versa. While all three view difference (i.e. pluralism or diversity) in a positive light, the SCC and CCSA take it to be the natural situation in a free and open society, which must be celebrated and the state must leave alone as much as possible. In the ECtHR’s approach, pluralism is something the state needs to organize.

Regarding the scope of the freedom of religion and belief, the three courts recognize that the freedom of religion and belief entails a right to believe or not to believe. It also entails that religious as well as other beliefs must be respected. Unlike the other two courts, the ECtHR is not inclined to read a right to deviate from general norms into the right. Much like with the concept of religion and belief, the CCSA and SCC let the believers themselves decide what the right entails in terms of manifestations. If they are sincere in their belief, the practice is protected, and can only be limited under the limitations clause. The ECtHR is more reserved and likely to try to formulate objective standards. It thereby runs the greatest risk of substituting the beliefs and opinions of believers with its own.

The subjective vs. objective approach also has an influence on how the freedom of religion and belief is triggered, and whether or not an interference is regarded as trivial. All three courts recognize the concepts of positive and negative obligations. However, the CCSA and SCC are more likely to see them as to sides of the same coin, while the ECtHR primarily looks at the freedom of religion and belief in terms of negative obligations and a higher threshold must be met to assume a positive obligation.

The differences in emphasis between the guiding and informing principles and the impact they have on concept, scope and application of the freedom

of religion and belief can partly be explained from the background of the human rights instruments in which the right is codified.

The European Convention was primarily directed against totalitarian ideologies which radically denied and/or undermined even the innermost plane of the *forum internum*. The identity-focused interpretation of elements of the freedom of private and family life only had a modest spillover to the freedom of religion and belief.

The Canadian Charter is closely linked with the repatriation of the Constitution and the ambition of developing a Canadian constitutional narrative. The Canadian values based on multiculturalism clearly influenced the development of the freedom of religion and belief jurisprudence to become an affirmation of individual liberty, association by choice and an inclusive public sphere.

The South African Bill of Rights is set within the new Constitution which held the promise of replacing racialism, exclusion and dominance with the new ethos of the Rainbow nation. The freedom of religion and belief jurisprudence was constructed visibly in the selected cases from this starting point.

The comparative analysis of the selected cases in the six identified dimensions does not support the general viewpoint put forward by some writers that the (adjudication of the) freedom of religion and belief, has contributed to the secularization of society/ societies. The selected cases show attempts to create space and opportunity for believers to (re-)claim agency over their lives and to contribute to a holistic pluralism.<sup>99</sup> The right to be different, being one of the informing principles of the CCSA, provides an escape for those who feel constrained by the totalism of modern society. Obviously, the selected cases also show us the boundaries of the freedom of believers. While these boundaries are static on a general and abstract level, the cases show that there is room for dynamics in specific and concrete situations.

In the next chapter, we look at judicial minimalism as an approach to adjudication that specifically provides for a specific and concrete approach to conflicts. It also claims that it prevents win all/lose all method of rights-based litigation, Benson sees as a danger, as we saw. Instead judicial minimalism is accepting disagreement as a feature of LDC.

In light of the above some of the best practices for optimal protection enumerated in section 4.8 can be reaffirmed, while we can add the following:

12. Applying a broad, liberal, and subjective-based concept of religion and belief that informs the scope of and the trigger points for the protection.
13. Embracing difference as the consequence and perquisite of freedom. Enabling dynamics for a holistic pluralism and awareness of the complex relationship between the secular and the religious in a free, open, and diverse society.

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99 Benson, *supra* n. 21, at 115, quoting R. Hirschl, *Constitutional Theocracy*, Harvard University Press, Cambridge (USA), 2010, pp. 187 and 202; and at pp. 118-119.

14. Allowing faith-based communities to provide alternatives for state institutions like marriage, schooling, welfare and so forth.



## 6 Minimalism in the jurisprudence of the SCC, CCSA and ECtHR

How minimalist are the standard interpretations for the freedom of religion and belief?

### 6.1 INTRODUCTION TO THIS CHAPTER

This chapter analyzes the case law of the three courts on the freedom of religion and belief through the prism of minimalism as developed by Sunstein and introduced in Chapter 2. First, the minimalist elements in each of the court's standard interpretations are discussed (sections 6.2 to 6.4), after which dominant parameters in the selected cases, which tend to trigger minimalist or maximalist reasoning are identified (6.5). The Chapter closes with a comparative analysis and intermediate conclusions (section 6.6).

### 6.2 MINIMALISM AT THE SCC?

Chapter 4 analyzed the jurisprudence of the SCC on the freedom of religion and belief, as manifest in the selected cases, in comparison to that of the other two courts. Chapter 5 identified the main guiding principles of the SCC and the other two courts' approaches to freedom of religion and belief, as well as the informing principles. We also encountered different concepts of religion and belief, the scope of the rights and the ways in which they are triggered. Based on this, which elements of minimalism can we identify in the SCC's case law?

The SCC has a generally consistent methodology concerning freedom of religion cases, which consists of fixed elements and a general view on religion and belief and the freedom granted to them within the context of other constitutional arrangements and constitutional theory. There are also explicit references to philosopher J.S. Mill<sup>1</sup> or the notion of the Constitution as a living tree.<sup>2</sup> Yet this does not make the approach maximalist. On the contrary, the fixed elements, the coherent approach and the integral view, all contain obvious elements of minimalism, as the following subsections demonstrate.

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1 See, e.g., SCC, *Syndicat Northcrest v. Amselem*, Cases 29252 and 29253, [2004] 2 SCR 551, 30 June 2004, para. 61.

2 See SCC, *Reference re Same-Sex Marriage*, Case 29866, [2004] 3 SCR 698, 9 December 2004, para. 22.



### 6.2.1 Personal autonomy, subjective interpretation and sincerity test mandate

As shown, above all, by the *Amselem* and *Multani* cases (sections I1.7 and I1.4.10), the SCC defines religion in light of the freedom of religion and belief. The believer has personal autonomy to construct his or her own religion à la carte. A person's religion and belief are about subjective understanding of a precept, rather than objective evidence like official dogma, statements by official institutions or the practice of other believers. All passing of judgement on the practices by interveners or third parties in the evidence are declared to be out of order, disrespectful and contrary to the Canadian values based on multiculturalism.<sup>3</sup> In the free and pluralist society, everyone works out for themselves what to believe and how to practice those beliefs. As "religious tolerance is a very important value of Canadian society",<sup>4</sup> all choices and practices are greeted with respect, even when interference is justified.

Also, to trigger the freedom of religion and belief, the believer must show "sincere belief". This is because it is the "religious or spiritual essence of an action" and not "any mandatory or perceived as mandatory nature" or "religious dogma", which triggers the freedom of religion and belief.<sup>5</sup> These elements mandate a case-by-case approach, because a focus on the individual believer, his or her belief, and the alleged infringement in the specific case are required. It also prevents a wide and deep analysis or assessment of the belief in question.

### 6.2.2 Balancing under the limitations clauses

The case studies show that the balancing done by the SCC under the limitations clauses is quite narrow. The proportionality test (rational connection, minimal impairment, effects of the measure), the functional and pragmatic approach (correctness, patent unreasonableness, reasonableness), and reasonable accommodation, are all applied by looking closely at the case at hand. Consider, for example, how explicit mention is made in *Multani* of the context of the school environment, Gurbaj's own character, and the reasonable accommodation proposed. Needless to say that in that specific case, the absolute (wide)

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3 SCC, *Multani v. Commission scolaire Marguerite-Bourgeoys*, Case 30322, [2006] 1 SCR 256, 12 March 2006, paras 32-35, 71. SCC, *Braker v. Marcovitz*, Case 31212, [2007] 3 SCR 607, 14 December 2007, paras 36-37 and 93. *Syndicat Northcrest v. Amselem*, Cases 29252 and 29253, *supra* n. 1, paras 50 and 68.

4 *Multani v. Commission scolaire Marguerite-Bourgeoys*, Case 30322, *supra* n. 3, paras 74 and 76.

5 *Syndicat Northcrest v. Amselem*, Cases 29252 and 29253, *supra* n. 1, para. 47 and *Multani v. Commission scolaire Marguerite-Bourgeoys*, Case 30322, *supra* n. 3, para. 32-33, quoting SCC, *R. v. Big M Drug Mart Ltd.*, Case 18125, [1985] 1 SCR 295, 24 April 1985.

prohibition was not justified.<sup>6</sup> In *Amselem*, the majority proceeds similarly concerning the safety interest. As the tenants wishing to erect the *succahs* on their balconies can be accommodated without endangering the safety of other tenants, there is no necessity to limit the right.<sup>7</sup>

### 6.2.3 Sticking to the case at hand

There are several cases in which the SCC assesses only what is necessary in terms of the concrete facts of the case and the legal considerations necessary to solve the case, refraining from speculations or broad future-oriented rulings. For example, in *TWU* (section I1.4.5) it considers that the facts do not show any discrimination by TWU educated teachers. If there is concrete discrimination by individual graduates, there are remedies to address it.<sup>8</sup> This case also shows that the Court will reconcile rights in a specific case and not be tempted to issue a broad ruling on the relationship between equality rights and the freedom of religion and belief.

In *Bruker* (section I1.4.11), the SCC simply notes that Mr. Marcovitz did not show any interference with his sincere beliefs, refraining from assessing whether under similar circumstances a position like his could be fruitful if such sincere belief was proven. The majority in *Bruker* also takes a notably more minimalist approach than the dissenting judges. While the majority argues for a case-by-case approach as far as religious legal concepts in private law instruments are concerned, Deschamps and Charron reject outright a case-by-case approach in favor of a deep and wide ruling against the enforcement of religious concepts by (secular) courts. However, their approach would have created a situation in which Mrs. Bruker loses a great deal, whereas Mr. Marcovitz did not lose anything through the majority's approach. After all, his objections were not so much motivated by religious motives, as by personal bitterness.<sup>9</sup>

In *Lafontaine* (section I1.4.8), the conduct of the municipality is considered a breach of fairness, without spelling out what exactly the municipality should have to fulfill in its positive obligation towards the congregation looking for a place to build the church. Equally in *Chamberlain* (section I1.4.6), what is sanctioned is that the board did not take the equality rights of same-sex parents into consideration, while it did take the concerns of other parents into consideration. There is no wide and deep ruling there, which rejects religious

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6 *Multani v. Commission scolaire Marguerite-Bourgeoys*, Case 30322, *supra* n. 3, paras 39-40, 45 and 56-67.

7 *Syndicat Northcrest v. Amselem*, Cases 29252 and 29253, *supra* n. 1, paras 82-90.

8 SCC, *Trinity Western University v. College of Teachers*, Case 27168, [2001] 1 SCR 772, 17 May 2001, paras 35-38.

9 *Bruker v. Marcovitz*, Case 31212, *supra* n. 3, paras 69 and 182.

considerations, unlike what the dissenting judges allege. However, admittedly the dissenting judges' position is even more minimalist; they believe either decision (to approve or not approve the books) would have been constitutional.

In *Hofer* (section I1.4.2), dissenting (Chief) Justice McLachlin's approach is arguably more minimalist than that of the majority. Instead of approaching the facts merely from the angle of the law, as one would with all kinds of other corporations, she takes the specifics of this community into consideration and reaches the conclusion that the procedures as adopted and applied by them in this case did meet the (minimal) standards required by law.<sup>10</sup> This approach will normally grant religious communities a more meaningful degree of autonomy within the framework of the legal system.

#### 6.2.4 Inter-institutional dialogue and democracy enhancement

Minimalism is said to be democracy enhancing, while unlike majoritarianism not adhering to a notion of democracy that is strictly majoritarian. In *Chamberlain* and *Bruker*, like in *Children's Aid Society, A.C. v. Manitoba* and *Alberta v. Hutterian Brethren* (sections I1.4.4, I1.4.12 and I1.4.13), we see the SCC referring explicitly to the intent of the legislature and the official statements of members of the executive. Hence, the Court attaches great value to the federal and provincial democratic processes.

In *TWU*, the SCC considers, for example, that the British Columbia legislature had passed acts in favor of *TWU*, showing that it did not consider them contrary to public policy.<sup>11</sup> Years later in the case of *TWU* against the Law Society of British Columbia, the SCC considers the referendum held amongst the LSBC members.<sup>12</sup> In *Same-Sex Marriage* (section I1.4.9), the SCC refuses to answer the fourth question on the constitutionality of judgments and provincial legislation allowing for same-sex marriage, prior to the federal law amendment. This exemplifies the democracy-enhancing function of minimalism. The federal Parliament has already adopted a position, and hence this question, while legally interesting, is practically irrelevant in light of democratic developments.<sup>13</sup>

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10 SCC, *Lakeside Colony of Hutterian Brethren v. Hofer*, Case 22382, [1992] 3 SCR 165, 29 October 1992, pp. 78-79.

11 *Trinity Western University v. College of Teachers*, Case 27168, *supra* n. 8, paras 35-38.

12 SCC, *Law Society of British Columbia v. Trinity Western University*, Case 37318, [2018] 2 SCR 293, 15 June 2018.

13 *Reference re Same-Sex Marriage*, Case 29866, *supra* n. 2, paras 64-71.

### 6.2.5 The harm principle

In *Amselem*, the Court cited the utilitarian philosopher John Stuart Mill in formulating the so-called “harm-principle”.<sup>14</sup> This principle is interpreted in many different ways by its protagonists and opponents. The SCC, however, tends to apply the harm principle in the authentic way to limit the freedom of one party – one needs to show that this is done in order to prevent harm to others. This must be actual and concrete harm, not hypothetical or fictional harm. We see this in *Amselem*, *Multani, A.C. v. Manitoba*, and *Children’s Aid Society of Metropolitan Toronto*. Although in the latter case, the actual harm remains a matter of dispute between the dissenting judges and the majority.

We also see the harm principle in *Sioui* (section I1.4.1) and *P.(D.) v. S.(C.)* (section I1.4.3). In the latter case, it remains a matter of dispute between the dissenting judges and the majority whether harm is actually a criterion in the assessment of the “child’s best interest”. Yet, whether it is the security of the tenants (allegedly compromised by the *succahs*), the schoolchildren’s safety (allegedly compromised by the *kirpan*), the infant’s or teenager’s life endangered by the refusal of a blood transfusion, or the preservation of nature in the national park possibly hindered by ritual use, without a thorough analysis of the (possible) harm, the limitation of the freedom of religion and belief cannot be justified.

### 6.2.6 The living tree

In *Same-Sex Marriage*, the SCC rejects a principally originalist “framer’s intent” understanding of the Constitution in favor of the “living tree” concept. Yet the “framer’s intent” is not rejected generally and totally; only for the purpose of interpreting a concept that evolved culturally and democratically, like marriage in this case.<sup>15</sup> The interpretation of Canada’s Constitution as a “living tree” facilitates an incremental development of constitutional law and jurisprudence, providing another element of minimalism, and is far from being a perfectionist “ideal society” concept. The metaphor of the tree is telling. A tree’s branches do not grow linearly in accordance with a plan, but naturally and seemingly unexpectedly in many directions. Yet, they never become detached from the trunk and the roots. The living tree is therefore the ideal metaphor for minimalist interpretation as opposed to originalism/fundamentalism, but also perfectionism (and finally majoritarianism). After all, as Weinrib notes, the Charter was born from the “rejection of the legal theory, ideology

14 See, e.g., *Syndicat Northcrest v. Amselem*, Cases 29252 and 29253, *supra* n. 1, para. 61.

15 *Reference re Same-Sex Marriage*, Case 29866, *supra* n. 2, paras 22 and 25-30.

and the methodology that resort to 'original intent' and 'original understanding' in American constitutional law".<sup>16</sup>

But what to think of the underlying vision of a free and open society governed by the rule of law and human rights, in which multiculturalism is deduced from classical liberalism? Does this not give away a large constitutional theory which undermines all the minimalist elements? In my opinion, it does not for two reasons. First, minimalism is a democracy-enhancing theory. Multiculturalism is an official Canadian policy, enshrined in (constitutional) law by Canada's legislature (see e.g. the reference in the Charter and the Canadian Multiculturalism Act). Also, the SCC does not easily set aside laws or decisions between elected bodies, usually trying to reconcile opposing interests and rights.

Second, minimalism presumes a liberal constitutional government *a priori*. The entire notion of a constitution and judicial decisions as incompletely theorized departs from a theory of individual freedom, the rule of law, separation of powers and human rights. Minimalism is therefore not a theory for just any system, but for a liberal constitutional democracy. Hence, it is not contrary to minimalism to decide cases with reference to the roots of this system, and the (by definition incompletely theorized) ideals envisioned by this system.

If the sole purpose of a constitution is to "impede change" or "obstruct modernity", as Scalia argues,<sup>17</sup> then the SCC has failed. But then again, if the constitutional instrument was designed to further societal change, a Court which impedes or obstructs such change can hardly be called minimalist. The SCC is largely minimalist because it neither tries to impede nor further change, but to solve the cases at hand.

### 6.3 MINIMALISM AT THE CCSA?

Chapter 4 analyzed the jurisprudence of the CCSA on the freedom of religion and belief, as manifest in the selected cases, in comparison to that of the other two courts. Chapter 5 identified the main guiding principles of the CCSA and the other two courts' approaches to freedom of religion and belief, as well as the informing principles. We also encountered the different concepts of religion and belief, the scope of the rights and the ways in which they are triggered. Based on this, which elements of minimalism can we identify in the CCSA's case law?

16 See L.E. Weinrib, 'The Canadian Charter's Transformative Aspirations', in *Supreme Court Law Review* (2nd), vol. 19, pp. 17-37 (2003), p. 22.

17 See A. Scalia, 'Modernity and the Constitution', in E. Smith (ed.), *Constitutional Justice under Old Constitutions*, Kluwer Law International, The Hague (Netherlands), 1995, p. 317.

In the cases discussed, the CCSA is on a jurisprudence journey to discover the meaning of the freedom of religion and belief as guaranteed by the Constitution for the cases at hand. While the approach is visibly a case-by-case approach, consistency in the methodology arguably develops over time, though it is not instantly evident in the first cases. Finding its way between judicial restraint on the one hand and being the guardian of a Constitution which explicitly and intentionally established transformative values and a new ethos on the other hand, the CCSA develops its freedom of religion and belief jurisprudence. This jurisprudence displays clear elements of pragmatic minimalism.

### 6.3.1 Judicial restraint

The CCSA is more inclined to judicial restraint than to judicial overreach.<sup>18</sup> Yet judicial restraint as such does not necessarily lead to minimalism. Klare notes the “conservatism” of South African legal culture, not in the sense of political ideology, but a cautiousness in analysis. Indeed, the cases analyzed in this study show a very contextual approach, consequentialist reasoning, and hesitation to formulate abstract and broad conclusions from specific cases.<sup>19</sup>

### 6.3.2 The minimum necessary

The CCSA clearly has sympathy for judicial minimalism when it comes to constitutional interpretation. Explaining the attitude of the Court in the first certification judgment, which concluded that some provisions had to be redrafted in order to comply with the constitutional principles, Justice Sachs said: “Our basic decision was to give [...] not the full-flowing, sophisticated, precedent-based analysis that an ordinary judgment would have.[...]. [W]e were reluctant to go beyond the absolute minimum necessary to answer the questions that were asked.”<sup>20</sup>

The second *Certification* case (section I2.4.1) also displays minimalism where the Court argues that in concrete cases, the derogation clause should be applied stringently, instead of ruling with the complaint that freedom of religion and

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18 P. Lenta, ‘Judicial Restraint and Overreach’, in *South African Journal on Human Rights*, vol. 20, no. 4, pp. 544-576 (2004), p. 546.

19 See K.E. Klare, ‘Legal Culture and Transformative Constitutionalism’, in *South African Journal on Human Rights*, vol. 14, no. 1, pp. 146-188 (1998), p. 168.

20 A. Sachs, ‘The Creation of South Africa’s Constitution’, in *The New York Law School Law Review*, vol. 41, no. 2, pp. 669-689 (1997), p. 673, cited in M.S. Kende, *Constitutional Rights in Two Worlds – South Africa and the United States*, Cambridge University Press, New York (USA) et al., 2009, p. 37.

belief ought to be put on the list of non-derogable rights.<sup>21</sup> Minimalism is also evident in *Certification of the Western Cape* (section I2.4.3). The CCSA finds the words “[i]n humble submission to Almighty God” in the preamble to be “ceremonial deism”. Ceremonial deism, having no particular (legal) constitutional significance, can be no violation of the freedom of religion and belief.<sup>22</sup> In fact, Sunstein himself argues that the ceremonial deism in the United States conforms to minimalism because it usually refers to God and religious symbolism in a non-denominational and thus inclusive way. In a diverse country, most of whose citizens are believers, there should be a heavy burden on striking down ceremonial deism in light of this diversity.<sup>23</sup>

### 6.3.3 Judicial assumption

*Christian Education* (section I2.4.6) is another example of minimalist interpretation. Here, the CCSA assumes infringement of freedom of religion and belief. It never answers whether the prohibition of corporal punishment in all schools does indeed interfere with the freedom of religion and belief of those Christian schools that see corporal punishment as an essential part of Christian education. Treating the belief in corporal punishment respectfully as essential to the religious self-understanding of the schools and the parents, the CCSA nevertheless finds that the national legislation prohibiting corporal punishment must prevail. After all, the very purpose of the legislation would be undermined if an exception were created for Christian Education. Some commentators have said that the judgment “did not fully resolve the conflict”.<sup>24</sup> This was not necessarily meant as praise. Critics found the hypothetical approach, in which a limitation of religious freedom was assumed, “extremely artificial”.<sup>25</sup>

Yet arguably, the judgment shows essential minimalism as intended by Sunstein. *Christian Education* lost a case, but not the world. It is true that some of the members may have been disappointed, but their belief system was treated with dignity and respect. If the Court had decided in a more drastic fashion, finding for example that corporal punishment is not covered by the

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21 CCSA, *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the amended text of the Constitution of the Republic of South Africa*, Case CCT37/96, 4 December 1996, para. 36.

22 CCSA, *Certification of the Constitution of the Western Cape*, Case CCT6/97, 2 September 1997, para. 28.

23 C.R. Sunstein, ‘Celebrating God, Constitutionally’, in *University of Detroit Mercy Law Review*, vol. 83, pp. 567-578 (2005), pp. 567-568.

24 Kende, *supra* n. 20, at 228.

25 See I. Currie and J. de Waal (in association with Lawyers for Human Rights and the Law Society of South Africa), *The Bill of Rights Handbook*, Juta & Co, Cape Town (South Africa), 2006, p. 153 at note 11.



freedom of religion and belief and/or inherently at odds with the rights of children, the Court may have been considered less artificial and the conflict would have been resolved fully. However, this would have possibly left Christian Education feeling marginalized and misunderstood. By doing what was necessary to solve the case and upholding freedom and diversity of religion and belief, the Court made optimal use of the instrument of incompletely theorized agreements.

#### 6.3.4 Incrementalism in the Muslim marriage cases

Minimalism is furthermore present in many of the South African cases discussed in this study. The Muslim marriage cases *Amod*, *Daniels* and *Hassam* (sections I2.4.5, I2.4.8. and I2.4.12) show a gradual, incremental evolution towards treating the spouses of purely religious marriages as equal to other legal spouses.

The controversial question of whether or not polygamous Muslim marriages must be accepted by the private law system is left unanswered, when deciding that the spouse in a *de facto* polygamous marriage is to be seen as a “spouse” for the purpose of inheritance law. After all, this fundamental question which was also to be decided by Parliament when adopting a Muslim Marriages Act, was not instrumental or necessary to deciding the cases at hand.

#### 6.3.5 Inter-institutional dialogue

Commentators have observed that “the Constitutional Court views its relationship with the legislature as a collaborative one, giving respect to the legislature’s interpretations of rights [...]”.<sup>26</sup> The Muslim marriage cases and *Fourie* (section I2.4.10) are cited in this regard.

In *Fourie*, the Court found that the impossibility for same-sex couples to get married violated the Constitution. The majority suspended its order for 12 months to give Parliament a chance to adopt legislation to address the issue first. If after 12 months there was no such legislation, then the order, making the marriages legally possible, would automatically enter into force. Dissenting Justice O’Reagan would have given immediate effect to the order, rather than

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26 Lenta, *supra* n. 18, at 575.

suspend it for a year.<sup>27</sup> The Civil Union Act 17 of 2006 provides official legal status, either as a civil union or marriage, for same-sex couples.<sup>28</sup>

While *Fourie* serves as a prime example of inter-institutional dialogue, the Constitutional Court giving Parliament a chance to address the inequality before the order comes into force, has of course led to criticism. Goodsell believes that the case was decided without due regard to the local customs and culture which are also protected as rights.<sup>29</sup>

Indeed, one does not have to look hard to discover some perfectionism in the *Fourie* judgment. The Court discovered sexual orientation equality rights embedded in the Bill of Rights, which had not been made explicit. But as we saw, Sunstein himself recognizes that minimalism is not always the best option.<sup>30</sup> He supports “deep” decisions like *Roe v. Wade*<sup>31</sup> and *Brown v. Board of Education*<sup>32</sup> and wide ones like *Miranda*.<sup>33</sup> But even then, courts should proceed in as minimalist a way as possible, like Sandra Day O’Connor did with the “undue burden” in *Roe*.<sup>34</sup> The CCSA did just that when suspending the order in *Fourie*, to give Parliament the possibility to work on a system for same-sex marriage which would honor the rights of same-sex couples and those of other South Africans who believe only in opposite-sex marriages.

Criticism, as we have seen above, is also raised against *Solberg* and *Prince* (sections I2.4.4. and 5.4.7), in which the respective majorities placed much emphasis on the considerations of the legislature.<sup>35</sup> While this is certainly judicial restraint, it can be majoritarian in Sunstein’s theory, rather than minimalist.

The inter-institutional dialogue the CCSA likes to engage in, has rather minimalist features. In the first proceedings in *Prince*, the Court found that in order to determine the constitutional question, it needed more information

27 CCSA, *Minister of Home Affairs and Another v. Fourie and Another; Lesbian and Gay Equality Project and Others v. Minister of Justice and Constitutional Development*, Cases CCT60/04 and CCT10/05, 1 December 2005, paras 161, 168 and 173.

28 See J.D. van der Vyver, ‘Multi-Tiered Marriages in South Africa’, in J. A. Nichols (ed.), *Marriage and Divorce in a Multicultural Context Multi-Tiered Marriage and the Boundaries of Civil Law and Religion*, Cambridge University Press, Cambridge (UK), 2012, p. 201.

29 E.E. Goodsell, ‘Constitution, Custom, and Creed: Balancing Human Rights Concerns with Cultural and Religious Freedom in Today’s South Africa’, in *Brigham Young University Law Review*, vol. 21, no. 1, pp. 111-154 (2007), p. 151.

30 C.R. Sunstein, ‘Beyond Judicial Minimalism’, in *Tulsa Law Review*, vol. 43, pp. 825-842 (2013), p. 837 and C.R. Sunstein, *One Case at a Time*, Harvard University Press, Cambridge (USA)/London (UK), 2001, p. 17. See also pp. 36-38.

31 US Supreme Court, *Roe v. Wade*, 410 US 113 (1973), 22 January 1973.

32 US Supreme Court, *Brown v. Board of Education*, 347 US 483 (1954), 17 May 1954.

33 US Supreme Court, *Miranda v. Arizona*, 384 US 436 (1966), 13 June 1966.

34 C.R. Sunstein, ‘Problems with Minimalism’, in *Stanford Law Review*, vol. 58, no. 6, pp. 1899-1918 (2006), pp. 1901-1902.

35 Goodsell, *supra* n. 29, at 148.

on the Rastafari religion and the significance of *ganja*.<sup>36</sup> Then, in the second case, the majority found that any carefully curtailed exemption for the Rastafari was impossible to administer. Such a system would also require the authorities to establish when *bona fide* Rastafari use was at stake and when it was not. This was inconsistent with the freedom of religion and belief.<sup>37</sup> Chief Justice Ngcobo, who disagreed with the majority, did find a violation but suspended the invalidity for 12 months so that the Government could work out a closely knit exemption.<sup>38</sup>

In *Solberg*, dissenting Judge O'Reagan adheres to minimalism when she says that having established that the purpose of the closed day definition is not a secular one, the overall purpose and effect of the provision with regard to the freedom of religion and belief should be reviewed on a case-by-case basis.<sup>39</sup> In *Christian Education*, much regard is given to the intention of the legislature when issuing a general ban of corporal punishment.<sup>40</sup>

In 2009, the Women's Legal Centre Trust sought a declaration from the Constitutional Court in accordance with section 167(4)(e) of the Bill of Rights that Parliament had breached a constitutional obligation by not enacting a Muslim Marriages Act. Such an Act could have resolved many uncertainties.

The Court argued in minimalist fashion that "'fulfill a constitutional obligation' must be given a 'narrow meaning'". If section 167(4)(e) were to have a broad meaning, it would render constitutional review by other courts of the conduct of the president and of the Acts of Parliament, which are also foreseen by the Constitution, superfluous. The CCSA also paid attention to the fact that because of the many interests and choices involved in adopting legislation recognizing Muslim marriages, it would not be appropriate for a Court of first and final instance to decide.<sup>41</sup>

### 6.3.6 Transformative values and new ethos

*Fourie*, the Muslim marriage cases, *Prince*, but also *Pillay*,<sup>42</sup> are best indicative for the transformative values of the Bill of Rights, which have established a

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36 CCSA, *Prince v. President of the Cape Law Society*, Case CCT36/00A, 12 December 2000, paras 10-18.

37 CCSA, *Prince v. President of the Cape Law Society and Others*, Case CCT36/00B, 25 January 2002, paras 131-138.

38 *Ibid.*, paras 83-90.

39 CCSA, *S v. Lawrence*; *S v. Negal*; *S v. Solberg*, Cases CCT38/96, CCT39/96 and CCT40/96, 6 October 1997, para. 127.

40 CCSA, *Christian Education South Africa v. Minister of Education*, Case CCT4/00, 18 August 2000, paras 39-40.

41 CCSA, *Women's Legal Centre Trust v. President of the Republic*, Case CCT13/09, July 2009, paras 11 and 23.

42 CCSA, *MEC for Education: Kwazulu-Natal and Other v. Pillay*, Case CCT51/06, 5 October 2007.

new ethos. The intention of the Constitution was to change the wrongs of history and to bring about a different kind of society. Hence, one might argue that there is a type of “founders intent” present in the interpretation, which also projects a desired (perfectionated) society.

The CCSA has made explicit or implicit reference to the drafters’ intent and the ambition of dismantling injustices of the past.<sup>43</sup> In Sunstein’s theory, it could be called a fusion between original understanding and perfectionist interpretation. But, does this exclude the possibility that the Court is overall minimalist? The Bill of Rights was the expression of the democratic turning point in South African history, which intended to bring about a society and political-legal order in which the dignity, freedom, and equality of all South Africans would be guaranteed for the first time. The Constitution, which in accordance with constitutionalism’s most popular fiction represents the “will of the people”, is itself quite clear and obvious in the values it represents and the fact that they must be used to interpret the rights contained in the Bill of Rights.

Irrespective of the transformative ambition of the South African Constitution, Currie and De Waal note that a restrained approach is necessary to maintain the checks and balances in a system of constitutional review which is as broad and all-encompassing as the South African one. The legislature must be able to respond to a judgment by amending a statute and even “within the limits of the Constitution undo a court order if dissatisfied with it”. “A court’s role should be confined to eliminating unconstitutional options rather than prescribing the alternatives it regards to be constitutional.” Currie and De Waal conclude that court rulings must be narrow, because broad rulings restrict the legislature’s ability to reform the law. In their eyes, the Constitutional Court seems to have complied with this.<sup>44</sup>

Indeed, one can easily argue that while the CCSA often takes recourse to a value-based approach, which is informed by the perfect society, envisioned by the founders of democratic South Africa to transform into, the rights in the Bill of Rights are generally treated as incompletely theorized agreements, which are incrementally filled with more and more content.

#### 6.4 MINIMALISM AT THE ECtHR?

Chapter 4 analyzed the jurisprudence of the ECtHR on the freedom of religion and belief, as manifest in the selected cases, in comparison to that of the other two courts. Chapter 5 identified the main guiding principles of the ECtHR and the other two courts’ approaches to freedom of religion and belief, as well as the informing principles. We also encountered the different concepts of

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<sup>43</sup> See Klare, *supra* n. 19, at 186.

<sup>44</sup> Currie & de Waal, *supra* n. 25, at 183-185.

religion and belief, the scope of the rights and the ways in which they are triggered. Based on this, which elements of minimalism can we identify in the ECtHR's case law?

Evans notes that with the adoption of Article 9 ECHR, a variety of states agreed to freedom of religion and belief as a principle, while the Convention gives little or no guidance as to what the principle entails.<sup>45</sup> While this is most certainly the case with all human rights catalogues, especially supranational ones, it provides a starting point for minimalism. The freedom right started out as an "incompletely theorized agreement" as envisaged by Sunstein's theory. This, however, does not automatically make the Court a minimalist one.

Some of the ECtHR's case law shows clear elements of minimalism. Yet, there are features which on first sight resemble minimalism, but are not – features often related to the "margin of appreciation". The margin itself is not a minimalist feature, as shall be shown below. Some critics of the Court have lamented the inconsistency in the freedom of religion and belief case law of the Court. Inconsistency is not a feature of minimalism, to the contrary. One case at a time denotes focusing on the case at hand, while a "red thread" should still be visible in hindsight. Finally, there are also obvious maximalist features in some of the cases, as shall be seen.

#### 6.4.1 Margin of appreciation as quintessential minimalism?

The margin of appreciation stipulates that determining facts and even assessing them is best left to the national institutions. This can be the assessment of whether a certain measure is actually taken to serve a legitimate aim, or whether the measure can realistically help achieve the aim. In *Movement Raëlien* (section I3.4.12), for example, the Court argued that the national judges are better equipped to give an opinion on the "necessity" of a specific restriction in order to fulfill the legitimate aims. Hence, only very serious reasons can lead to a reassessment of the national court's analysis.<sup>46</sup>

In *Cha'are, Şahin* and *Sindicatul 'Păstorul Cel Bun'* (sections I3.4.3, I3.4.7 and I3.4.13), the Court asserts that the margin of appreciation is broad in matters of state/religion relationships. In *Lautsi* (section I3.4.10), the GC ruled that the question of whether or not a crucifix is displayed in a classroom falls within the margin of appreciation.<sup>47</sup> Interestingly, the Chamber had previously

45 See C. Evans, *Freedom of Religion under the European Convention of Human Rights*, Oxford University Press, Oxford (UK), 2001, pp. 18 and 31, referring to J. Rawls, *A Theory of Justice*, Revised Edition, Oxford University Press, Oxford (UK) et al., 1999.

46 ECtHR (GC), *Mouvement Raëlien Suisse v. Switzerland*, app. no. 16354/06, 13 July 2012, paras. 63 and 66.

47 ECtHR (GC), *and Others v. Italy*, app. no. 30814/06, 18 March 2011, para. 70.

regarded the margin to be less broad in the exact same case: a state may not order a religious symbol to be hung on every classroom wall. In *Yiğit* (section I3.4.9), the state asserted that the regulation of marriage falls within the margin of appreciation.<sup>48</sup> This was accepted by the Court.

In *Maestri* (section I3.4.6), the dissenting judges disagreed with the majority regarding whether there was a legal basis to discharge a judge who had refrained from ending his membership in a Freemason lodge. The majority saw no legal basis for dismissing the judge. In the dissenting judges' view, the principle of subsidiarity, the "fourth instance" doctrine and the "margin of appreciation" should have guided the Court towards a different assessment – namely that of leaving the assessment of the national authorities intact.<sup>49</sup> In *Bayatyan* (section I3.4.11), the Court rejected the state's assertion that whether or not to make conscientious objection to military service a criminal charge falls within the margin of appreciation, as the state had failed to "provide compelling reasons to justify" the interference. It did not "demonstrate that the interference corresponds to a 'pressing social need'".<sup>50</sup>

The margin of appreciation safeguards the prerogatives of national legislatures and obviously of national courts, being the institutions "closer to the ground". After all, the Court was conceptualized as a supranational institution of human rights supervision and scrutiny. Any overreach would almost automatically trigger not only criticisms of usurpation of legislative power by a court, but of national sovereignty by an international body. Although the Court has structurally applied the margin of appreciation to manage this risk, it was unable to prevent this line of criticism. Indeed, the so-called Brighton process tells a story of the Strasbourg organs revitalizing the elements in the system which contribute to national sovereignty to strengthen support for the institutions amongst the member states.<sup>51</sup>

The margin of appreciation may strike some as a minimalist feature, *par excellence*. Indeed, narrow rulings favored by minimalism should permit inter-institutional dialogue.<sup>52</sup> As the Court is a supranational institution, it is engaged in a dialogue with the national institutions – legislative, executive and judicial – and not so much with its counterparts in the CoE. The Court has stated many times that the margin of appreciation should go hand in hand with European supervision.<sup>53</sup>

48 ECtHR (GC), *Țerife Yiğit v. Turkey*, app. no. 3976/05, 2 November 2010, para. 60.

49 ECtHR (GC), *Maestri v. Italy*, app. no. 39748/98, 17 February 2004, *Joint dissenting opinion of Judges Bonello, Strážnická, Birsan, Jungwiert and del Tufo*, paras 8-9.

50 ECtHR (GC), *Bayatyan v. Armenia*, app. no. 23459/03, 7 July 2011, para. 123.

51 See High-Level Conference on the Future of the European Court of Human Rights, Brighton, United Kingdom, 19 April 2012.

52 See Sunstein, *supra* n. 34, at 1915.

53 See, e.g., *Lautsi and Others v. Italy*, app. no. 30814/06, *supra* n. 47, para. 70 and *Refah Partisi (The Welfare Party) and Others v. Turkey*, app. nos. 41340/98, 41342/98, 41343/98 and 41344/98, 13 February 2003, para. 100.

The degree of supervision is essential to let the “margin” work as a minimalist feature for narrow rulings which enable dialogue, as opposed to a majoritarian feature which wants to prevent interference with the democratic process. Majoritarians are skeptical towards invalidation of legislation by courts, because the democratic process should have primacy. Minimalists favor inter-institutional dialogue and balance adhering to discourse models of democracy, rather than majoritarianism. Leaving the assessment of a “legitimate aim” and “necessity” too much up to national institutions has little to do with “solving one case at a time”. Cases can very often be solved on their own merits without awarding semi-blank checks to other institutions. In any case, Harris et al. are not correct in assuming that the margin of appreciation is most narrow in cases where an individual’s identity is at stake, at least if religious/belief identity is concerned.<sup>54</sup> Cases like *Mouvement Raëlien, Lautsi, Cha’are* and *Şahin* (see above), much like *Fernández Martínez* and *SAS* (sections I3.4.14 and I3.4.15) display this. On the other hand, *Folgerø* (section I3.4.8) shows how the margin can also be narrower where religious/belief identity is concerned.

#### 6.4.2 Making use of procedural review

An example of minimalist credentials can be found in *Maestri* where the majority opinion is focused on the foreseeability of the legal rule in question, reaching the conclusion that it was not foreseeable. Hence, the majority avoided the fundamental question of whether it is permissible under the Convention to categorically exclude members of a certain community from the office of judge.

The analysis of the cases in Chapter 4 shows that the Court treats the legitimate aim as a procedural element, which is procedurally marginally tested. For example, in *Cha’are*, *Şahin*, *Yiğit* (all mentioned above) and *Refah* (section I3.4.5), the Court assumes that the legitimate aim raised by the Government is given, or at least not disputed between parties. It then proceeds to discuss the material dispute under “necessity”. Interestingly, in all these cases the Court happens to find in favor of the state in the end. Hence, the question is whether this kind of procedural review does not make it far too easy for the state, leaving the individual without due protection whenever the true aim is not so legitimate.

Obviously, critically reviewing whether the state indeed serves a legitimate aim would require a substantial and in-depth analysis, which could hardly be called minimalist. But a minimalist approach could be to review critically whether or not the state has provided enough rationally connected arguments,

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54 D. Harris, M. O’Boyle and C. Warbrick (eds.), *Law of the European Convention on Human Rights*, 2nd ed., Oxford University Press, Oxford (UK) et al., 2009, p. 13.



without an in-depth assessment of every argument. If the state has not provided enough rationally connected arguments, a violation can be found based on a minimalist approach.

There are also cases in which the Court takes a minimalist approach to the legitimate aim and still finds in favor of the claimant. In *Buscarini* (section I3.4.1), the GC considered it was unnecessary to look into the legitimacy of the aim. Clearly, the requirement of the oath was incompatible with Article 9 ECHR.<sup>55</sup> In *Thlimmenos* (section I3.4.2), the Court found no legitimate aim in the exclusion from the office of accountant, as the claimant had already served a prison sentence.<sup>56</sup> Yet in these two cases we see that the test, though handled in a minimalist manner, is no longer purely procedural and marginal, but substantiated. Equally in *Bayatyan* (mentioned above), the Court reasoned that the state can no longer rely on public order to justify the imprisonment of conscientious objectors to military service. After all, the same government had already pledged to introduce legislation recognizing conscientious objection.<sup>57</sup>

Gerards proposes that the Court make structural use of a procedural assessment before turning to a substantive review. Her very interesting 2012 article on methodological reform can be read as both a criticism of current minimalism at the Court and a proposition for a new more principled minimalism. She critiques the Court's case-by-case approach, with incremental development of the jurisprudence through analogy as problematic, because it is exactly that, which leads to the ever growing number of rights and interests being covered by the Convention. This is what has triggered debates about the Court's legitimacy. "A step-by-step approach without a clear aim or a clear direction" she argues "can unconsciously lead the judge to a place where he did not want to be, or it can lead to outcomes that the judge would not have reached if he would have been able to foresee the consequences."<sup>58</sup>

Gerards proposes more use of procedural review focus on individual interests in the case at hand instead of weighing the abstract interests claimed by the state against other abstract interests, and being more conscious of norms, principles and legal opinions in the community of law. She adopts the latter view from Dutch legal theorist and judge Wiarda.<sup>59</sup> There is, however, the question of whether such an approach borrowed from private law is useful in the same way in human rights law. Human rights are inevitably anti-establishment. Subsequently, opposition to human rights judgments is sometimes a sign of quality, rather than a sign of a lack thereof. Nevertheless, perhaps

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55 ECtHR (GC), *Buscarini and Others v. San Marino*, app. no. 24645/94, 18 February 1999, para. 38.

56 ECtHR (GC), *Thlimmenos v. Greece*, app. no. 34369/97, 6 April 2000, para. 47.

57 *Bayatyan v. Armenia*, app. no. 23459/03, *supra* n. 50, para. 117.

58 J. Gerards, 'The Prism of Fundamental Rights', in *European Constitutional Law Review*, vol. 8, no. 2, pp. 173–202 (2012), pp. 197–201 and 179–183.

59 *Ibid.*, pp. 197–198, 201, and 170.

Gerards' views on a more consistent and transparent methodology can help the Court to develop a minimalism that leads to a decrease rather than an increase of the "margin of appreciation"<sup>60</sup> in freedom of religion and belief case law.

#### 6.4.3 Fact-based and incremental

Many of the selected cases decided by the ECtHR have obvious minimalist credentials. The Court isolates the facts of the case before proceeding with the judicial analysis and keeps this close to the facts. When having discussed certain matters under one of the Convention rights, it will usually not discuss them again under another right. In addition, when tricky controversial (political or social) questions can be avoided, the Court will avoid them. Harris et al. note in reference to Mahoney that while the Court increasingly adopted an evolutive and dynamic interpretation of the Convention rights, it has been incremental rather than sudden in changing the meaning of terms.<sup>61</sup>

The case law regarding the conscientious objectors in military service possibly serves as the best illustration of "minimalist judicial policy" by the GC. In *Thlimmenos*, the GC carefully avoids the overall question regarding the permissibility of military service in Greece and the criminal punishment of conscientious objectors under the Convention. It also stays away from all facts surrounding the prison term. Instead, it focuses on the facts and merits of the impact of the prison sentence on eligibility to become an accountant. The Court then finds a violation of Article 14 ECHR (in conjunction with Article 9) because of the (in-)difference in treatment between "common criminals" and conscientious objectors instead of discussing the right to conscientious objection as such under Article 9.

In *Bayatyan*, the GC also builds a "narrow and shallow" judgment, which rests mainly on the pledge Armenia itself made to recognize conscientious objection, when joining the Convention. Given the factual situation in Europe, the Court argues, it is no longer feasible to reason that the exclusion of mandatory military service from the prohibition of forced labor also means that Article 9 cannot be invoked against it. A broader, deeper, or bolder judgment was not necessary because of how the situation of conscientious objection had become recognized by legislation in the past decades. Armenia was the last man standing and had already promised to address the situation legally.

In an article written in 2021, President Bratza of the ECtHR argued against defining religion and instead approaching matters on a case-by-case basis,

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60 *Ibid.*, p. 200.

61 See Harris, O'Boyle & Warbrick, *supra* n. 54, at 7, referring to P. Mahoney, 'Judicial Activism and Judicial Restraint in the European Court of Human Rights: Two Sides of the Same Coin', in *Human Rights Law Journal*, vol. 11, pp. 57-88 (1990).

given the huge diversity within the Convention area; not only in religion as such, but also in religion-state relations.<sup>62</sup> Justice Bratza, thus, mirrors the quintessential plea for minimalism as best suited in the context of diversity.

#### 6.4.4 Inconsistencies

Gerards argues that the Court in general “discloses a rather nontransparent use of terminology and a tendency to confuse and mix distinct elements of judicial review”.<sup>63</sup> In Evans’ opinion, the Court uses “commitments to overly generalized principles such as neutrality and pluralism which have the potential to give useful guidance on religious freedom cases, but have not been sufficiently well developed”.<sup>64</sup> Others have echoed that the Court failed to realize the full potential of Article 9.<sup>65</sup>

The following illustrates the point. The references to earlier case law and frequented notions like the state as “impartial organizer of pluralism”, “one of the most important rights”, and “pluralism depends on it” create the impression that the Court has a consistent approach. Yet the application of these concepts in the interpretation of Article 9 makes it difficult to find a red thread. While minimalists would treat any right as incompletely theorized agreements, the ECtHR has almost made the freedom of religion and belief so un-theorized that sometimes the agreement part seems to be missing.

It is extremely easy and therefore a little unfair to name the *Lautsi* Chamber and Grand Chamber judgments as proof of the Court’s inconsistency with regard to state-religion issues and freedom of religion and belief in the educational domain. Yet *Lautsi* is now standing case law and must be read in conjunction with, for example, *Şahin* and *Folgerø* (see above). It is extremely difficult to draw a consistent line from these three cases, even if one focused on the margin of appreciation, which is broad in *Lautsi* and *Şahin*, but substantially less broad in *Folgerø*.

Apart from conscientious objection, the Court is not consistently minimalist with regard to Article 9, nor is it consistent across the dimensions of the freedom of religion and belief as is shown in Chapter 4. “One case at a time”, as the positive example of conscientious objection shows, requires sticking to the facts at hand and consistency across the cases. Inconsistency is antithetical to minimalism. Perhaps the Court’s experience with conscientious

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62 N. Bratza, ‘The “Precious Asset”: Freedom of Religion Under the European Convention on Human Rights’, in *Ecclesiastical Law Review*, vol. 14, no. 2, pp. 256–271 (2012), pp. 258–259.

63 J. Gerards, ‘How to improve the necessity test of the European Court of Human Rights’, in *I•CON*, vol. 11 no. 2, pp. 466–490 (2013), p. 467.

64 C. Evans, ‘Individual and Group Religious Freedom in the European Court of Human Rights: Cracks in the Intellectual Architecture’, in *Journal of Law and Religion*, vol. 26, no. 1, pp. 321–343 (2010), p. 340.

65 See Bratza, *supra* n. 62, at 257; Harris, O’Boyle & Warbrick, *supra* n. 54, at 441.

objection can serve as a guide for more minimalist consistency in state-religion issues and freedom of religion and belief in the educational domain, and elsewhere in the dimensions of the right.

#### 6.4.5 Organizational freedom as substantive criterion

Unlike in some of the cases mentioned above, in *Hasan and Chaush* (section 13.4.4) the assessment of the legitimate aim is all substantial: “[...] the government’s modus operandi in the circumstances attested no legitimate aim”. Yet the facts show that the Government tried to stimulate, pressure, or even establish a religious community under unified leadership. It takes no in-depth analysis to establish that the aim is not legitimate, because it runs contrary to state neutrality. Yet, there is also an element of minimalism in the case. The Court leaves explicitly unanswered the question of whether the requirement of registration of religious denominations as such is a violation of Article 9.<sup>66</sup> The answer is not necessary to solve the case.

Interestingly, in all cases where the Court treats the test substantially, it finds in favor of the claimant in the end. So, the Court will treat the test marginally and procedurally whenever it finds in favor of the state, and in all cases where it treats the test substantially, it finds in favor of the claimant. There are, however, also cases where the test is marginal and yet the Court finds in favor of the claimant.

In *Sindicatul “Păstorul Cel Bun”* (mentioned above), the dissenters apply a decidedly more minimalist approach than the majority, arguing that essentially the refusal to register the trade union is premature.<sup>67</sup> Whether or not the trade union would really interfere with internal structure and authority, thereby threatening the autonomy of the Romanian Orthodox Church, would have to be seen. At that point, other Convention rights could still have been limited in order to protect the Article 9 rights of the Church.

#### 6.4.6 Value judgements and wide rulings

*Şahin*, *Yiğit*, and *Refah* just like *Mouvement Raëlien* and to a lesser extent *Cha’are* (all mentioned above) serve as examples of a very non-minimalist trait of the Court, that of passing value judgements on the precepts, tradition, habitus and world view of a religion or system of beliefs. Whatever one may think

<sup>66</sup> ECtHR (GC), *Hasan and Chaush v. Bulgaria*, app. no. 30985/96, 26 October 2000, paras 68-69 and 77-78.

<sup>67</sup> ECtHR (GC), *Sindicatul “Păstorul Cel Bun” v. Romania*, app. no. 2330/09, 9 July 2013. *Joint Partly Dissenting Opinion of Judges Spielmann, Villiger, López Guerra, Bianku, Møse and Jäderblom*, para. 9.

of these judgements, the language used discloses “completely theorized” notions and sends a message to the claimants and many others much like them that the Convention does not protect them.

In *Şahin*, the majority, in spite of dissenting Judge Tulkens’ warning, called the Islamic headscarf a symbol which is hard to reconcile with gender equality.<sup>68</sup> How can a girl wearing a headscarf still trust in the objectivity of the ECtHR with regards to prohibition of their attire after what the Court said about the headscarf and its symbolic meaning? Luckily, the Convention is a living document (see section 6.4.7), and the judges are alive to reconsiderations of past errors. In *SAS* (section I3.4.15), the majority ruled in favor of France which had banned face coverings, but also acknowledged that religiously motivated face coverings are “the expression of a cultural identity” and are therefore a natural feature of “the pluralism that is inherent in democracy”.<sup>69</sup>

In *Refah*, the majority of the Court suggested that the very idea of legal pluralism is at odds with the Convention, in spite of dissenting Judge Kovler’s iterations.<sup>70</sup> How could a political party advocating legal pluralism ever again feel that the ECtHR is a remedy against obscure and fabricated political arguments used to ban the party? Equally in *Yiğit* (mentioned above), the Court was strict in finding in favor of the member state which does not attribute the widow of a purely religious marriage any rights. The ruling is so wide that a woman who chooses for whatever reason to enter into a purely religious marriage and not also a civil one, could never hope that for some purposes she will be treated legally as a spouse/widow.

Such value judgements and other wide rulings are the very antithesis of minimalism. They send a message that makes the claimants feel like they lost the world, not just a case. Justice Kovler saw this. He warned the Court in *Refah* that its judgments must not imply dismissal of all political movements, which seek to assert the tenets of Islam in a political fashion, as *a priori* anti-democratic and not deserving of human rights protection.<sup>71</sup>

#### 6.4.7 The living instrument

The dynamic or evaluative interpretation referred to as the “living instrument doctrine” mandates that the Convention not be interpreted in accordance with the social standards adopted when the Convention was adopted, but reflective of the policy of the law in European states.<sup>72</sup> Examples are cases that deal,

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68 ECtHR (GC), *Leyla Şahin v. Turkey*, app. no. 44774/98, 10 November 2005, para. 111.

69 ECtHR (GC), *S.A.S. v. France*, app. no 43835/11, 1 July 2014, para. 120.

70 ECtHR (GC), *Refah Partisi (The Welfare Party) and Others v. Turkey*, app. nos. 41340/98, 41342/98, 41343/98 and 41344/98, 13 February 2003, *Concurring opinion of Judge Kovler*.

71 *Ibid.*

72 Rainey, McCormick & Ovey, *supra* n. 64, at 76.

for example, with treatment of prisoners, children born out of wedlock, homosexuals, the death penalty and conscientious objectors to military service.<sup>73</sup> Between *Şahin* and *SAS*, we also witness evolution in the view of the practices of minority religions. The Court, however, tends to emphasize incremental rather than sudden change.<sup>74</sup> Hence, in a very minimalist way the meaning of the Convention rights is not stuck in the past, while precedent is honored.

The incrementalist approach in the conscientious objection cases illustrates this. The Convention leaves it up to the High Contracting Parties' right to introduce military service.<sup>75</sup> In *Thlimmenos*, the Court rules that while this leaves the option to punish those who consciously object to military service, Article 9 read in conjunction with Article 14 still mandates that when it comes to career opportunities, conscientious objectors are treated differently from common criminals.<sup>76</sup>

In *Batayan*, the conscientious objector asserted that over time, the meaning had evolved. By now, all High Contracting Parties except for Armenia had introduced alternative service for military service and/or a right to conscientious objection.<sup>77</sup> The Court agreed that based on the trend among the member states, the meaning had indeed evolved. The "living instrument" doctrine thus made it impossible to uphold the Commission's case law and mandated that Article 9 no longer be read in conjunction with Article 4 §3(b) in this regard.<sup>78</sup> Eleven years had passed between the two decisions.

Yet *Bayatyan* is the only Article 9 case in which the "living instrument" doctrine was applied.<sup>79</sup> Perhaps it is the absence of an "international trend" which commands following as with the recognition of sexual identity of transgender people<sup>80</sup> which explains why the Court's jurisprudence on Article 9 has yet failed to set a standard in accordance with the (dynamic and evolutive) objective and purpose of the Convention. In any case, the way in which the living instrument standard is applied to Article 9 qualifies as minimalist.

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73 See Harris, O'Boyle & Warbrick, *supra* n. 54, at 7 and 33.

74 See Mahoney, *supra* n. 61.

75 *Bayatyan v. Armenia*, app. no. 23459/03, *supra* n. 50, para. 72.

76 *Thlimmenos v. Greece*, app. no. 34369/97, *supra* n. 56, paras 42-47.

77 *Bayatyan v. Armenia*, app. no. 23459/03, *supra* n. 50, paras 73-74.

78 *Ibid.*, para. 109.

79 *Ibid.*, para. 102.

80 ECtHR (GC), *Goodwin v. United Kingdom*, app. no. 28957/95, 11 July 2002.

## 6.5 COMPARING MINIMALISMS IN THE ADJUDICATION OF THE FREEDOM OF RELIGION AND BELIEF

### 6.5.1 Applying incomplete theorization

As shown in the sections above, each of the courts applied minimalist as well as less minimalist features in the selected cases. As explained in section 2.5, judicial minimalism will rely on incompletely theorized agreements, usually on mid-level or low-level principles. Incompletely theorized agreements can be based on abstract principles, a concrete outcome or a rule. Several of the cases illustrate this.

For example, in the balancing between freedom of religion and belief and equality of LGBT people in *TWU, Chamberlain, Same-Sex Marriage* and *Fourie* (see sections 6.2 and 6.3), we see that the abstract principle involved is equal concern and respect for believers (in exclusively opposite-sex relationships) and families and those same-sex couples and families. Without completely theorizing equal concern and respect, the courts solve the cases. The SCC makes use of the informing “harm principle”, while the CCSA employs its guiding principle of human dignity.

The concrete outcome was quite possibly determinative in two SSC cases: *Children’s Aid Society of Metropolitan Toronto* and *A.C. v. Manitoba* (sections I1.4.4 and I1.4.12). A unanimous Court regarded just one outcome possible, when the religious beliefs of the parents prevented a blood transfusion which could potentially save the life of their infant. The parental authority was overruled. When the belief was the same, the medical danger similar, but the child in question was a very mature young teenager, the outcome desired split the Court. A majority found no violation, but still found that her views should have been taken into consideration. One judge went so far as to say that not outcome, but principle should be determinative. A young teenager must be allowed to prove that she is capable of making her own decisions, even if most of us would regard the outcome undesirable. In the South African *Prince* case (see above), a majority found that an exemption from the general prohibition of cannabis for Rastafarians only would be impossible to administer. The outcome clearly determines the judicial appreciation.

In the Canadian *Chamberlain* case (see above), the dissenting judges asserted that the decision of the school board regarding the controversial books would have been constitutional both ways. The school board could have accepted or dismissed the book depicting same-sex families, because the rule was that the board gets to decide. Equally, a majority in the Strasbourg *Fernández Martínez* case (section I3.4.14) relied on the rule that the Catholic Church gets to decide whether a teacher is still eligible to teach Catholic religion in public schools. In *Alberta v. Hutterian Brethren of Wilson Colony* (section I1.4.2), the SCC relied on the rule that reasonable accommodation is not an obligation for



the legislator, when the Alberta Parliament revoked the previous exemption for the Hutterians, allowing them to have drivers' licenses without photos.

*Multani* and *Amselem* (see section 6.2) illustrate a different kind of incomplete theorization of a rule. The rule in *Multani* is that he cover, seethe and secure his *kirpan*, so it will not conflict with the security of his schoolmates. In *Amselem*, the rule is that the *succahs* can be positioned away from the fire escapes to allow for reconciliation of security interests and the freedom of religion and belief.

Minimalist judgments are supposed to treat the opposing viewpoints that may exist with respect, emphasizing the limits of various institutions and operating well for rules and analogies.<sup>81</sup> The balancing cases cited above illustrate the respect shown for the opposing viewpoints. Similarly in *Prince*, all separate opinions illustrate respect for Mr. Prince's situation. Similarly in *A.C. v. Manitoba*, all judges showed deep respect for A.C.'s position as a deeply devout Jehovah's Witness, although they did not find in her favor.

Sometimes the incomplete agreements necessary for judicial minimalism involve certain abstractions which are hollow. The abstraction remains unfilled.<sup>82</sup> Hollowness may be required by lack of information about future developments or by the fact that specification is not feasible or even controversial.<sup>83</sup> The case law of the CCSA on the freedom of religion and belief shows an incremental development from a hollow abstraction towards gradually more specification. As the Bill of Rights had started "from scratch", willingly erasing the precedents of the apartheid era, the Court required cases to fill the hollowness of the constitutional promise. In this sense, the cases illustrate Sunstein's description of how incomplete theorization worked well for building the post-apartheid constitutional order.<sup>84</sup>

The abstraction of the state as impartial organizer of pluralism, employed by the ECtHR as guiding principle, has remained hollow to a certain degree. The abstraction is most specified when it comes to the organizational freedom and the protection Article 9 provides to religious communities and faith-based organization against outside interference or intrusion into their autonomy. In all other cases, the abstraction is first repeated, but seldom engaged in deciding the case. In *Şahin* and some Chamber cases, we even see that the abstraction is used to justify elimination of manifested pluralism in the educational environment in order to ensure abstract pluralism.

Narrow rulings permit inter-institutional dialogue, regarding the constitutional issues addressed in court cases. The "grand narrative" is then written

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81 C.R. Sunstein, 'Incompletely Theorized Agreements in Constitutional Law', in *Social Research: An International Quarterly*, vol. 74, no. 1, pp. 1-24 (2007), pp. 3-4.

82 Sunstein, 'Beyond...', *supra* n. 30, at 828.

83 *Ibid.*

84 See C.R. Sunstein, *Designing Democracy. What Constitutions Do*, Oxford University Press, New York (USA), 2001.

not by the courts alone, but in interaction with the other powers.<sup>85</sup> The selected cases show quite a few examples. In *Fourie*, the court order is withheld in order to enable Parliament to craft legislation for same-sex marriage. In *Prince*, dissenting Chief Justice Ngcobo withholds his order to allow for a legislative scheme for the exemption, while the majority assesses an exemption scheme for the Rastafarians, and finds it to be unmanageable. There is also (room for) inter-institutional dialogue in the CCSA's Muslim marriage cases *Solberg* and *Christian Education* (all cases mentioned in section 6.3).

The SSC explicitly refers to provincial or federal legislation or executive statements and intent in *Chamberlain*, *Bruker*, *A.C. v. Manitoba*, *Children's Aid Society of Metropolitan Toronto*, *Alberta v. Hutterian Brethren of Wilson Colony*, *TWU* and *Same-Sex Marriage* (see section 6.2). There are no examples of suspended court orders, but in *Same-Sex Marriage*, the SCC does not answer whether the Charter actually mandated a possibility for same-sex couples to have their union recognized, because Parliament had already initiated the recognition.

The ECtHR is obviously more engaged in a dialogue with the national courts, legislative and executive institutions, than with the Parliamentary Assembly or the Committee of Ministers. The margin of appreciation is the instrument through which the Court creates *a posteriori* space for the national institutions. Leaving space for the national institutions to react to the ECtHR's judgments is more difficult given the position of the Court as a supranational tribunal. Nevertheless, in *Folgerø* (see section 6.4) the Court, having established that the current exemption procedure creates too high a burden for those parents not wishing their children to take KRL, leaves room for the Norwegian institutions to create a more fitting exemption regime.

The margin of appreciation features, for example, in *Maestri*, *Lautsi*, *Cha'are*, *Şahin*, *Yiğit*, *Mouvement Raëlien* and *Sindicatul "Păstorul Cel Bun"*, *Folgerø* and *Bayatyan* (see section 6.4). In *Lautsi*, the Chamber obviously regarded the margin to be less broad than the Grand Chamber did. In *Maestri*, the dissenting judges believed that the margin of appreciation should have guided the Court to decide in favor of Italy.<sup>86</sup> In *Bayatyan*, the Court rejected the state's assertion that whether or not to make conscientious objection to military service a criminal charge fell within the margin of appreciation.<sup>87</sup>

Finally, an important foundation of minimalism is the conviction that "the spirit of liberty is that spirit which is not too sure that it is right".<sup>88</sup> The spirit of liberty then is cautious not to pass value judgements on religious beliefs

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85 See Sunstein, *supra* n. 34, at 1915-1916

86 ECtHR, *Maestri v. Italy*, app. no. 39748/98, 17 February 2004, *Joint dissenting opinion of Judges Bonello, Stráznická, Birsan, Jungwiert and del Tufo*, paras. 8-9.

87 See *Bayatyan v. Armenia*, app. no. 23459/03, *supra* n. 50, para. 123.

88 C.R. Sunstein, *Radicals in Robes. Why Extreme Right-Wing Courts Are Wrong for America*, Basic Books, New York (USA), 2005, p. 35, quoting Judge Learned Hand.

and practices and to leave it up to believers themselves to determine whether or not a practice is central to their belief system. After all, courts cannot be too sure they are right. As we saw above, the CCSA and SCC have shown to be cautious in this regard in cases such as *Pillay*, *Prince* and *Christian Education* and in *Multani*, *Amsellem* and *Bruker*. The ECtHR, on the other hand, has from time to time been criticized by dissenting judges and scholars for passing value judgements on religious practices and trying to apply “objective” standards.<sup>89</sup>

### 6.5.2 Realizing the purposes of minimalism

As discussed in Chapter 2, the advantages of judicial minimalism are:

- Minimalizing the political cost of a decision;
- Minimalizing error;
- Respect for democratic self-government; and
- Civic respect for people’s differences.

Minimalism, the theory argues, is optimally suited for pluralist societies. All three courts operate in a setting of pluralism. Canada and South Africa, as well as the CoE member states, within and between them are culturally, ethnically and religiously heterogenous. Most of the world’s religions are present in Canada, South Africa and the member states of the CoE. The discussion of the cases in sections 6.2 to 6.4 shows how minimalism applied by the three courts in several cases has indeed realized these advantages in these very cases.

Canada is made up of native Canadians and less native Canadians, Anglophone and Francophone Canadians, Canadians with European, African, South Asian, Southeast Asian, other Asian, Caribbean and Latin American roots. While bilingualism and multiculturalism are official policies, there is still dispute over diversity and secessionism.

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89 ECtHR, *Terife Yiğit v. Turkey*, app.no. 3976/05, 2 November 2010, *Concurring opinion of Judge Kovler*; ECtHR, *Leyla Şahin v. Turkey*, app. no. 44774/98, 10 November 2005, *Dissenting opinion of Judge Tulkens*, paras 11-13. E. Brems, ‘Above Children’s Heads. The Headscarf Controversy in European Schools from the Perspective of Children’s Rights’, in *The International Journal of Children’s Rights*, vol. 14, no. 2, pp. 119–136 (2006); V. Bader ‘Constitutionalizing secularism, alternative secularism or liberal democratic constitutionalism? A critical reading of some Turkish, ECtHR, and Indian Supreme Court cases on secularism’, in *Utrecht Law Review*, vol. 6, no. 3, pp. 8-35 (2010), p. 31; P. Lerner and A. M. Rabello, ‘The Prohibition of Ritual Slaughtering (Kosher Shechita and Halal) and Freedom of Religion of Minorities’, in *Journal of Law and Religion*, vol. 22, no. 1, pp. 1-62 (2006), p. 43; J. Martínez-Torrón and R. Navarro-Valls, ‘The Protection of Religious Freedom in the System of the Council of Europe’, in T. Lindholm, W.C. Durham and B.G. Tahzib-Lie (eds.), *Facilitating Freedom of Religion or Belief: A Deskbook*, Martinus Nijhoff Publishers, Leiden (Netherlands), 2004, p. 234; Rainey, McCormick & Ovey, *supra* n. 64, at 464.

South Africa is made up of many different communities, including the indigenous people (Khoisan, San Khoi, Khoikhhkhoi) and other African peoples like the Zulu, Xhosa, Basotho, Bapedi, Venda, Tswana, Tsonga, Swazi, the Afrikaners, Anglo-South Africans and others of European origin, the Cape Malay, the Cape Colored and other colored communities, and finally different communities originating from the Indian subcontinent and other parts of Asia. While apartheid has been overcome and the Rainbow Nation has been built, racial, linguistic, cultural, religious and political differences are social facts. At times, there is tension along these differences.

The CoE nations range from moderately to relatively diverse, many of them familiar with minorities historically and in the recent past. During the lifetime of the Convention, the Iron Curtain first split Europe and then came tumbling down. As a result, the number of High Contracting Parties expanded drastically. Multi-ethnic nations collapsed, leading to a resurgence of the nation state. Migration to Europe increased; first from nations historically aligned with European nations, then for economic and humanitarian reasons from many places. While European nations and the CoE take pride in a common constitutional tradition of rule of law, democracy and human rights; extremist, xenophobic, racist and populist movements have gained ground in the past and recently.

When the respective courts make decisions which reduce the political costs of the judgment, they contribute to social stability. This requires approaching fundamental disagreements with the constructive use of silence, reconciling opposing interests through balancing, and making sure the losing party loses a case and not “the world”.<sup>90</sup>

The three courts have all found guiding principles (see Chapter 5) that have remained more or less incompletely theorized, but still provide a basis for dynamically evolving standard interpretations of the freedom of religion and belief. The SCC’s individual liberty, the CCSA’s human dignity, and the ECtHR’s pluralism have all been translated into civic respect for people’s differences. Yet the CCSA and the SCC have given more substance to this civic respect for people’s differences than the ECtHR. Since the guiding principles remain incompletely theorized to a great degree, they do not obstruct, but facilitate case-by-case adjudication.

The SCC has on many occasions repeated the *Big M* promise that “a truly free society is one which can accommodate a wide variety of beliefs, diversity of tastes and pursuits, customs and codes of conduct”.<sup>91</sup> Binnie, making the brave choice of finding a violation although the challenged decision saved the challenger’s 14-year-old life in *A.C.*, said: “The Charter is not just about

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90 Sunstein, ‘Beyond...’, *supra* n. 30, at 833.

91 SCC, *Chamberlain v. Surrey School District No. 36*, Case 28654, [2002] 4 SCR 710, 20 December 2002, para. 135; and *Trinity Western University v. College of Teachers*, Case 27168, *supra* n. 8, para. 28, quoting *R. v. Big M Drug Mart Ltd.*, Case 18125, *supra* n. 5, pp. 336-337.

the freedom to make what most members of society would regard as the wise and correct choice. If that were the case, the Charter would be superfluous.”<sup>92</sup>

Justice Sachs explains in *Prince*: “[t]he true test of tolerance comes when the practice exists on the margins of society and appears bizarre, even threatening to the mainstream”.<sup>93</sup> While Chief Justice Ngcobo added in the same case that many “beliefs that believers hold sacred and thus central to their religious faith may strike non-believers as bizarre, illogical or irrational”. “Yet, [this] does not detract from the fact that these are religious beliefs for the purposes of enjoying the protection guaranteed by the right to freedom of religion.”<sup>94</sup> The substance in these cases is thus not given by a complete theorization; the principles formulated remain abstract. The substance is given in the narrowness of the decision. Yet the judgment is certainly not shallow.

The ECtHR has struggled much more with substantiating the pluralism in its guiding principle. Yet in the area of organizational freedom, the Strasbourg case law has set robust protection. States who interfere in religious structures in order to eliminate pluralism and state-sponsored religious indoctrination or forced adherence are out of order. To that extent, the state must respect pluralism. However, states’ attempts to organize pluralism by controlling it in the public sphere or by letting religious structures control it in the community sphere, have been eagerly scrutinized.

Between the three courts, looking at the cases selected, the CCSA has arguably been best at minimalizing the cost of a decision, by showing much respect and understanding for each party’s position. In *Prince* and *Christian Education*, the Court made sure to treat the claimant’s beliefs with almost more concern and respect than the prevailing interest. In *Fourie*, the CCSA showed that state recognition of same-sex marriage and respect for religious objections to same-sex unions can go hand in hand. In *Same-Sex Marriage*, the SCC did the same. It also eliminated collision of interests in *Multani*, *Amselem* and *Chamberlain* as explained above.

Minimalism should enable moral development and progress, by accommodating social change and changing viewpoints.<sup>95</sup> All three courts have allowed for the accommodation of social change and changing viewpoints. In South Africa, the transformative values are seen as inherent in the Constitution which might be the conclusion of the transition from the apartheid system to a democratic order, but also the starting point of a transformation from a divisive to an inclusive society. The transformative values feature strongly in *Fourie*, *Pillay*, *Prince*, the Muslim marriage cases and *Christian Education*.

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92 SCC, *A.C. v. Manitoba (Director of Child and Family Services)*, Case 31955, [2009] 2 SCR 181, 26 June 2009, para. 163.

93 A. Sachs, *The Free Diary of Albie Sachs*, Random House, Johannesburg (South Africa), 2004, p. 67.

94 *Prince v. President of the Cape Law Society*, Case CCT36/00B, *supra* n. 37, para. 42.

95 Sunstein, *supra* n. 82, at 15.

In the Canadian context, the Constitution as a “living tree” is the doctrine which accommodates change. Amongst the selected cases, the doctrine is only mentioned once explicitly, namely in *Same-Sex Marriage*. In that case, the SCC stipulated that frozen concepts are contrary to “one of the most fundamental principles of Canadian constitutional interpretation: that our Constitution is a living tree which, by way of progressive interpretation, accommodates and addresses the realities of modern life”.<sup>96</sup>

The ECtHR employs the figure of the “living instrument”, for “dynamic or evaluative interpretation” which is “reflective of the policy of the law in European states”.<sup>97</sup> It features in the cases of the conscientious objectors to military service, also showing very nicely how with the passing of time the evolution in thinking about conscientious objectors took place. *Refah* and *Şahin*, however, show that the ECtHR was unable to assist the Turkish institutions in accommodating social change by democratic demand, which required more accommodation of religion and less rigid secularism.

All three courts have shown respect for democratic self-government, as we saw. All have sometimes let the legislator’s considerations prevail over minority objections, although the ECtHR is closer to a majoritarian reading of democracy than the CCSA and the SCC, who seem to adhere to more deliberative democracy conceptions. However in *Refah*, the concept of democracy is not the majoritarian one, but “vigilant democracy”, used on several occasions before in other cases.<sup>98</sup> Although the *Refah* party had been the largest in the election (majoritarian democracy) and formed a government with another party (deliberative democracy), the banning of the party was sanctioned by Strasbourg. The Court went along with the national constitutional court in finding that there was enough proof that the party’s agenda and action were opposed to a democratic society envisioned by the Convention.

Judge Kovler who concurs with the judgment<sup>99</sup> because *Refah*’s goals were in contradiction to Turkish secularism, assumed as a democratic pillar, is bothered by some elements of the judgment. In his opinion, there is use of political/ideological language in some of the arguments and legal pluralism and the entire Islamic legal tradition are falsely dismissed as being antithetical to human rights. He warns that the Court must leave room for political movements that seek to assert the tenets of Islam in a political fashion. Boyle, commenting on the judgment, argues that if “pluralism is a defining value of democratic societies, as suggested by the European Court, then there must be ‘pluralism of ideologies’, to include spiritual as well as secular traditions”.

96 Reference re *Same-Sex Marriage*, Case 29866, *supra* n. 2, para. 22.

97 See Harris, O’Boyle & Warbrick, *supra* n. 54, at 7 and 33.

98 V. Beširević, ‘A Short Guide to Militant Democracy: Some Remarks on the Strasbourg Jurisprudence’, in W. Benedek et al. (eds.), *European Yearbook of Human Rights 2012*, Intersentia and Neuer Wissenschaftlicher Verlag, Vienna (Austria) et al., 2012, pp. 248-257.

99 ECtHR (GC), *Refah Partisi (The Welfare Party) and Others v. Turkey*, app. nos. 41340/98, 41342/98, 41343/98 and 41344/98, 13 February 2003, *Concurring opinion of Judge Kovler*.



"It also requires more caution and sensitivity in the Court that is mandated to protect the rights of secularists and religious believers alike."<sup>100</sup>

### 6.5.3 Minimalizing error and the flexibility of minimalism

The application of the vigilant democracy in *Refah* while not being majoritarian, was indeed certainly not minimalist either. Prohibition of a political party, especially one which forms the government, requires disciplined minimalism in order to show respect for democratic self-government and pluralism of ideologies. *Refah*, *Şahin* and other judgments have left an impression amongst the Muslim populations of the CoE states, that the "Court makes no effort, in its thinking or language, to separate the vast majority of Muslim people and their religious practices from extremists".<sup>101</sup>

Minimalism is supposed to decrease error, while it can also increase error.<sup>102</sup> How we define judicial error will often depend on our take on judgments. But when judgments leave the impression of "stereotyping of religious believers as well as ethnic groups",<sup>103</sup> this may objectively qualify as error. Subsequent political developments in Turkey have also shown that ignoring a sentiment amongst the people, and the systematic rejection of a tradition, culture, and religion, may in the end breed a more drastic response. Sunstein admits that disagreement "[i]n law, as in politics, [...] can be a productive and creative force, revealing error, showing gaps [...]. After all democracy requires a degree of turbulence because it is set against the stability produced by repression."<sup>104</sup>

Hence, Sunstein admits to disadvantages of incomplete theorization. Social consensus or stability is not a consideration that outweighs all others.<sup>105</sup> If the existing order is unjust, it is necessary to destabilize and challenge it.<sup>106</sup> What do the selected cases teach us about destabilizing those practices which impair freedom of religion and belief greatly?

In *Cha'are*, the ECtHR suggested no interference with the freedom of religion because *glatt kosher* meat could still be imported from another country. While minimalist in its emphasis on effect, the outcome is undesirable: French citizens depend on third countries to have their human rights respected. In *Sindicatul "Păstorul Cel Bun"*, the Court assumed quite easily that non-recognition of the trade union of priests and laymen was the only way in which to respect the

100 K. Boyle, 'Human Rights, Religion and Democracy: The *Refah* Party Case', in *Essex Human Rights Review*, vol. 1, no. 1, pp. 1-16 (2004), p. 16.

101 *Ibid.*, p. 12.

102 Sunstein, 'Beyond...', *supra* n. 30, at 825.

103 Boyle, *supra* n. 101, at 12.

104 Sunstein, *supra* n. 82, at 21-22.

105 Sunstein, 'Beyond...', *supra* n. 30, at 840 and 341.

106 Sunstein, *supra* n. 82, at 20.



autonomy rights of the Church. Similarly in *Fernández Martínez*, the Court could, as the dissenting judges suggested, have made a difference between the act of the state and the decision of the Church. This would not have required abandoning a procedural approach. In *Yiğit*, the simple acceptance of the state of legislation and application of the margin of appreciation left Mrs. Yiğit without any rights after her husband's death. Equally in *Movement Raëlien*, the majority's application of the margin of appreciation ended up allowing "content-based expression control" which "ends up as pure speaker-based discrimination".<sup>107</sup>

The CCSA's application of the transformative values, in order to realize the promise of social transformation the constitution makes, shows it has avoided the fallacy of providing stability where destabilization is needed. So did the ECtHR in *Bayatyan*, while further evolving the precedent on conscientious objection in light of social and political changes.

In *Solberg*, the CCSA decided that the prohibition for supermarkets to sell liquor on Sundays did not constitute interference with constitutional rights, because liquor could be acquired elsewhere on Sundays. And Sunday had lost its significance as a purely religious day of rest. While one might argue that the reasoning has minimalist traits, O'Reagan found the meaning given to the right to freedom of religion and belief by the majority too narrow. Freedom of religion does not only encompass a negative obligation, but also a positive one. All religions must be treated evenhandedly. As the challenged Act concerning the closed day favors one religion above all others, there was a breach of this obligation and consequently a breach of the freedom of religion and belief.<sup>108</sup>

The Court could also have proceeded in another minimalist fashion. Du Plessis argues that the Court should have made the accommodation of certain Christian's objection to the sale of liquor on their holy day<sup>109</sup> the central question. It could have just found that the chosen accommodation contained too much favoritism, leaving it up to Parliament to find another accommodation.

In *Prince*, the CCSA treated the claimant with much respect, finding in his disfavor in the end because an exemption scheme for Rastafarians from the general prohibition of cannabis possession and consumption would be unworkable. It overlooked the possibility of granting Mr. Prince one minimalist remedy. Like the ECtHR in *Thlimmenos*, the CCSA could have found that treating Mr. Prince like a "common criminal" was uncalled for and therefore at least

107 ECtHR, *Mouvement Raëlien Suisse v. Switzerland*, app. no. 16354/06, 13 July 2012, *Dissenting opinion of Judge Pinto de Albuquerque*, p. 67.

108 *S v. Lawrence*; *S v. Negal*; *S v. Solberg*, Cases CCT38/96, CCT39/96 and CCT40/96, *supra* n. 39, paras 128-130.

109 L. du Plessis, 'Freedom of or Freedom from Religion? An Overview of Issues Pertinent to the Constitutional Protection of Religious Rights and Freedom in "the New South Africa"', in *Brigham Young University*, vol. 2001, no. 2, pp. 439-466 (2001), p. 453.

the restriction preventing him from becoming a lawyer, due to the punishment for cannabis possession, should be quashed.

In the *Women's Legal Centre Trust* case, the Constitutional Court explicitly mentions that "constitutional obligation" in section 167(4)(e) of the Bill of Rights, should be interpreted narrowly. The provision allows for declarations by the CCSA that parliament or the president have breached such obligations. The claimant sought such a declaration for the fact that Parliament had still not enacted a Muslim Marriage Act. The Court could have narrowly and shallowly declared that the non-existence contained a breach, suspending the order until the expiration of a reasonable deadline, which would allow for the adoption of a Muslim Marriages Act.

The SCC in *Hofer* decided in favor of Mr. Hofer, although he had willingly and persistently refused to abide by the decisions of the community's leadership. The majority chose to apply the outside law to the inside conflict, which is understandable because the inside law does not exist in an outside law vacuum. However, in dissenting Judge McLachlin's view "the problem lay not in unfair procedures or lack of opportunities for hearing"; the problem was the "fundamental divergence between the parties" which would have "doomed any proceedings, no matter how just, to failure".<sup>110</sup> In Sunstein's opinion, disagreement is legitimate when people agree on general commitments, but disagree on particular outcomes. It is even legitimate when they agree on mid-level or low-level implications. Such disagreement can be genuine and sincere.<sup>111</sup> Such genuine and sincere disagreement caused the conflict between *Hofer* and his community.

Sincere disagreement is also shown in *A.C. v. Manitoba*, where all on the SCC seem to agree that a 14-year-old girl's conscience and beliefs matter – even when she is faced with potential harm – but seem to disagree as to how and to what extent. Obviously in the selected cases from all three courts, we saw many legitimate disagreements on particular outcomes and mid-level or low-level implications of the guiding principles.

In *Alberta v. Hutterian Brethren*, the provincial government revoked an exemption previously granted to the Hutterians to drive with licenses without photographs. The Court, relying on the absence of a reasonable accommodation duty for the legislator, decided in their disfavor. Minimalism can also raise political costs in some cases, as Sunstein explains. Minimalist rulings make predictability difficult. Predictability is an important value in a system based on the rule of law and democracy. The Alberta legislator had, to say the least, acted unpredictably when revoking the exemption without new reasons. Hence, dissenting Justice Abella found that the "province has therefore not discharged its onus of justifying the imposition of a mandatory photo requirement on the members of the Wilson Colony". Dissenting Justice Le Bel added that the

110 *Lakeside Colony of Hutterian Brethren v. Hofer*, Case 22382, *supra* n. 10, p. 83.

111 Sunstein, *supra* n. 82, at 21. See also Sunstein, 'Beyond...', *supra* n. 30, at 840.

“justification process under s. 1 is not designed to sidestep constitutional rights on every occasion. Rather, it seeks to define and reconcile these rights with other legitimate interests [...] The burden of justification rests on the state [...]”.<sup>112</sup>

Unpredictability may be raised against the incremental approach taken by the CCSA in the Muslim marriage cases. In the periods between the cases, no clear indefinite prediction was possible in which cases the CCSA will rule that purely religious marriages are to be treated identical to private law marriages, in light of dignity and equality. The maximalist ruling in *Fourie*, on the other hand, made it very predictable that it is inherently unequal – to paraphrase *Brown v. Board of Education*<sup>113</sup> (a maximalist ruling Sunstein supports) – to withhold from same-sex couples the opportunity to have their relationships recognized before the law and to be treated legally equal to other families. Sometimes predictability requires a maximalist decision, especially when it relies on previous incrementalistic groundwork.<sup>114</sup>

#### 6.5.4 Triggers or parameters of minimalism and maximalism

The comparison of the minimalist and maximalist elements in the jurisprudence of the three courts discloses that certain parameters trigger minimalism and/or maximalism in the selected cases. These can be conceptualized in the form of two poles, each with continuums between them. The first four of these continuums can be said to be general for many human rights cases. The fifth one is specific to freedom of religion and belief cases and exists between four, not two, parameters.

1. Judicial activism versus judicial restraint;
2. Substantive review versus procedural review;
3. Individual rights versus collective interests (be it the collective interests of society or the collective rights of a group); and
4. Negative obligations versus positive obligations.
5. Establishment versus laïcité (strict secularism) versus accommodation (open secularism), versus neutrality.

The discussion of the cases in the above sections as well as in Chapters 4 and 5, shows that optimal minimalism in freedom of religion and belief cases, requires the court deciding the case to keep the balance in each of these continuums (as far as relevant in the case) at the same time. If the ruling moves noticeably

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112 SCC, *Alberta v. Hutterian Brethren of Wilson Colony*, Case 32186, [2009] 2 SCR 567, 24 July 2009, paras 116 and 187-190.

113 *Brown v. Board of Education*, 347 US 483 (1954), *supra* n. 32.

114 Sunstein, ‘Beyond...’, *supra* n. 30, at 837. Compare Sunstein, *One...*, *supra* n. 30, at 17. See also pp. 36-38.

towards one parameter instead of the other, the balance is lost, and the case shows maximalist features. The continuums are shown in the figure below.

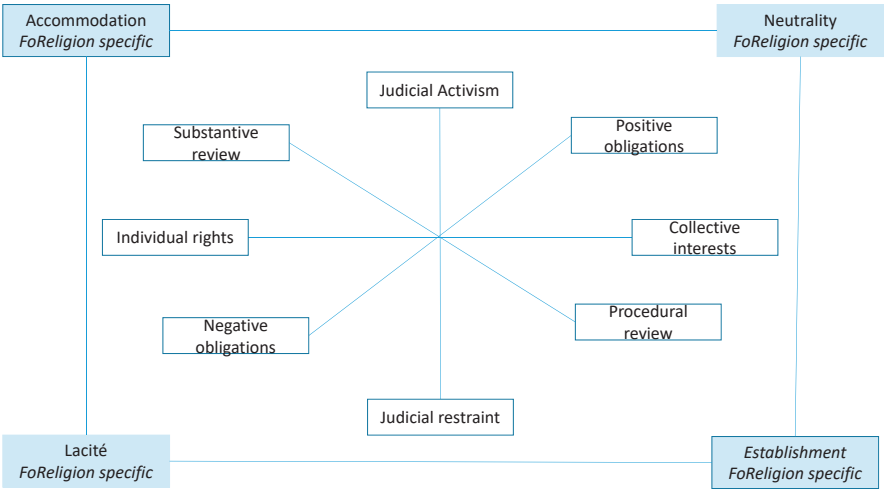


Figure 3: Parameters

The table and the end of this chapter shows the parameters as far as relevant the selected cases.

## 6.6 INTERMEDIARY CONCLUSION: BEST PRACTICES IN MINIMALIST ADJUDICATION OF THE FREEDOM OF RELIGION AND BELIEF

The above paragraphs show that each of the courts applied minimalist as well as less minimalist features in the selected cases. Each has shown that it can stick to the case at hand, leaving larger issues undecided, being focused on the outcome of the case. Each has shown that it will use incomplete theorization and incrementalist building of jurisprudence. Incomplete theorization is sometimes applied to abstract principles, the outcome, or a rule. All guiding principles have been treated as incompletely theorized agreements.

Several of the selected cases, analyzed in this chapter, have shown, each of the courts will at times try to realize the purposes of judicial minimalism, minimalizing the political cost of a decision; minimalizing error; respect for democratic self-government; and civic respect for people’s differences. All three have also used “deep” or “wide” rulings, setting aside the method of minimalism, to attain the purposes. Finally, each of the courts has adopted a notion of human rights and/or the constitutional being ‘alive’ and thus being adaptive

to changing circumstances. Where minimalist elements were present, they have generally aided optimal protection of believers.

The SCC's selected cases show clear elements of minimalism. Sometimes the majority took a more minimalistic approach, sometimes dissenting judges, sometimes the break-line represents genuine and sincere disagreement as envisaged by minimalism. The Charter values while often referred to in a fashion that resembles perfectionism, have remained incompletely theorized. The minimalist elements have aided consistency in the approach to freedom of religion and belief.

Between the three courts, looking at the cases selected, the CCSA has arguably been best at minimizing the cost of a decision, by showing much respect and understanding for each party's position. It has incrementally built a consistent jurisprudence, in which the guiding principles feature as incompletely theorized agreements. There is an ever present perfectionism, when the current constitutional order is placed against the injustices of the past. But this has never undermined minimalist methodology or purposes.

Arguably the ECtHR has most often used majoritarian or maximalist elements in its approach. The way the margin of appreciation is used, has often not aided in sticking to a minimalist method or purposes. Incrementalism is visible, but a times also *incidentalism*, which prevents consistency. However, in the selected cases it is not more originalist, perfectionist or majoritarian, than it is minimalist. Possibly, more focus on minimalist method and purposes, can help to develop more consistency in the approach to the freedom of religion and belief.

The comparison through the prism of minimalism also disclosed certain parameters which trigger minimalism and/or maximalism in the cases.

In light of the above some of the best practices for optimal protection enumerated in sections 4.8 and 5.7 can be reaffirmed, while we can add the following:

15. Making use of incomplete theorization, also with respect to the guiding principles in interpreting the freedom of religion and belief.
16. Incremental development of the jurisprudence, sticking to the case at hand.
17. Adherence to the purposes of minimalism, being flexible with regard to its methodology, going wide or deep where necessary after minimalist groundwork.

| Case                                     | Activism/ restraint                                                                                                                           | Substantive/ procedural review                                                                                                                                                                        | Individual rights/collective interests                                                                                                          | Negative/ positive obligations | Laïcité/ establishment/ neutrality/ accommodation                       |
|------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------|-------------------------------------------------------------------------|
| <b>SCC</b>                               |                                                                                                                                               |                                                                                                                                                                                                       |                                                                                                                                                 |                                |                                                                         |
| <i>Sioui</i>                             |                                                                                                                                               | No need for a total ban, park authority free to set rules.                                                                                                                                            | Interests can be reconciled                                                                                                                     |                                |                                                                         |
| <i>Hofer</i>                             |                                                                                                                                               | Majority: Even in autonomy of community procedural fairness must be upheld.<br>Dissent: The problem was not procedure, but fundamental disagreement. Claimant did not accept authority of leadership. |                                                                                                                                                 |                                |                                                                         |
| <i>P.(D.) v. S.(C.)</i>                  | Majority more activist, distress is harm, harm is not in the child's best interest.<br>Dissent more restraint: actual harm needs to be shown. | Majority: distress caused by religious differences between parents is not in the child's best interest.<br>Dissent: Knowing both parents as they are, causes distress. This is no harm.               |                                                                                                                                                 |                                |                                                                         |
| <i>B. (R.) v. Children's Aid Society</i> |                                                                                                                                               |                                                                                                                                                                                                       | State must regulate/intervene in interest of newborn's life. No internal limits, but limitation of freedom of religion under limitation clause. |                                |                                                                         |
| <i>TWU</i>                               |                                                                                                                                               | No evidence of actual discrimination of graduates                                                                                                                                                     | Interests of TWU and non-discrimination of LGBT students can be reconciled.                                                                     |                                | Faith-based institutions must not be forced to accept mainstream views. |

| Case                     | Activism/ restraint                                                       | Substantive/ procedural review                                                           | Individual rights/collective interests                                                                  | Negative/ positive obligations                                                                                                     | Laïcité/ establishment/ neutrality/ accommodation                                                                                                                                                              |
|--------------------------|---------------------------------------------------------------------------|------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <i>Chamberlain</i>       |                                                                           | The school board needed to take the interests of LGBT families into account. It did not. | Interests of families with beliefs regarding same-sex families and same-sex families can be reconciled. | Positive obligation to instill tolerance.                                                                                          | Tolerance regarding social reality is not identical to instilling moral approval.                                                                                                                              |
| <i>Amselem</i>           |                                                                           | No need for total ban. Regulations regarding safety still possible.                      | Interests of the orthodox Jewish and other tenants can be reconciled.                                   |                                                                                                                                    | Courts should not assess the mandatory nature of a practice.                                                                                                                                                   |
| <i>Lafontaine</i>        |                                                                           | Duty of procedural fairness.                                                             |                                                                                                         |                                                                                                                                    | Majority: Procedural fairness regarding communities' search for place of worship is required by neutrality and freedom of religion and belief. Dissenters: municipality is prohibited from actively assisting. |
| <i>Same-Sex Marriage</i> | Constructive use of silence of obligation to introduce same-sex marriage. |                                                                                          | Rights of same-sex couples and believers can be reconciled.                                             | Positive obligation to accommodate religious feelings. Private law marriage is a state institution, neutral from concrete beliefs. |                                                                                                                                                                                                                |



| Case                            | Activism/ restraint                                                                      | Substantive/ procedural review                                                                                                                                                                                                                                                                                                            | Individual rights/collective interests                                 | Negative/ positive obligations                                                                                                                                            | Laïcité/ establishment/ neutrality/ accommodation                                                               |
|---------------------------------|------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------|
| <i>Multani</i>                  | Earlier agreement disclosed willingness to accommodate. Blanket ban sends wrong message. |                                                                                                                                                                                                                                                                                                                                           | Rights of believer and safety interests of children can be reconciled. | Positive obligation to accommodate. Without accommodation rules are not neutral for believer. Neither school nor courts should assess the mandatory nature of a practice. |                                                                                                                 |
| <i>Bruker</i>                   |                                                                                          | A contract between parties is binding unless there is reason not to uphold.                                                                                                                                                                                                                                                               |                                                                        |                                                                                                                                                                           | Upholding contract regarding religious divorce is not out of order, but secures freedom of religion and belief. |
| <i>A.C. v. Manitoba</i>         |                                                                                          | Some form of rebuttal of presumed immaturity should have been allowed. The more mature, the less far the state must go with paternalism.                                                                                                                                                                                                  | Dissenters find interference with positive obligation.                 |                                                                                                                                                                           |                                                                                                                 |
| <i>Alberta v. Wilson Colony</i> |                                                                                          | Majority: Community cannot claim a right to exemption from a generally applicable rule. As long as the community can continue its lifestyle, there is no violation. It can do so, because other drivers can be hired. Dissenters: For the community it is important to live independent. The interference is substantial and non-trivial. |                                                                        |                                                                                                                                                                           |                                                                                                                 |

| Case                              | Activism/ restraint | Substantive/ procedural review                                                                                              | Individual rights/collective interests | Negative/ positive obligations                                                                                                                                                                                                                                                                                                                                  | Laïcité/ establishment/ neutrality/ accommodation |
|-----------------------------------|---------------------|-----------------------------------------------------------------------------------------------------------------------------|----------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------|
| <i>R. v. N.S</i>                  |                     |                                                                                                                             |                                        | Majority: Depending on the circumstances of the case, a believer can be required to remove the face covering, worn in accordance with beliefs.<br>Concurring: No face covering may ever be worn in a criminal case.<br>Dissenting: Majority judgment forces believers to choose between loyalty to religious beliefs and pursuing justice against sexual abuse. |                                                   |
| <i>Mouvement laïque québécois</i> |                     |                                                                                                                             |                                        | Prayer conducted in the municipal council, never mind how neutral in wording and performance always sends a message to those uncomfortable with participating, that they are less welcome.                                                                                                                                                                      |                                                   |
| <b>CCSA</b>                       |                     |                                                                                                                             |                                        |                                                                                                                                                                                                                                                                                                                                                                 |                                                   |
| <i>Certification Constitution</i> |                     | Meaning of derogation clause cannot be definitely determined in abstract, but will have to be determined in concrete cases. |                                        |                                                                                                                                                                                                                                                                                                                                                                 |                                                   |

| Case                                           | Activism/ restraint | Substantive/ procedural review                                                                                                                                                                                      | Individual rights/collective interests                                                                                                                                                                                                                                                                                              | Negative/ positive obligations | Laïcité/ establishment/ neutrality/ accommodation                                                                                                       |
|------------------------------------------------|---------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------|
| <i>Gauteng Education Bill</i>                  |                     |                                                                                                                                                                                                                     | The right to participate in the cultural, linguistic and religious communities of one's choice does not mean that the state has an obligation to establish or maintain state-funded schools for separate communities. The aforementioned right coexists with the right to education (in a non-discriminatory learning environment). |                                |                                                                                                                                                         |
| <i>Certification Constitution Western Cape</i> |                     | Ceremonial deism does not have constitutional or legal significance.                                                                                                                                                |                                                                                                                                                                                                                                                                                                                                     |                                | Constitutional deism is not contrary to freedom of religion and belief or neutrality.                                                                   |
| <i>Solberg</i>                                 |                     | Majority: The sale of liquor is prohibited on all closed days. Within the current context the rule does not enforce Christian views.<br>Dissent: The rule has basis in Christian views, upholding it, enforces them |                                                                                                                                                                                                                                                                                                                                     |                                | Majority: South Africa has no non-establishment rule.<br>Dissent: Privileging one belief over others always ends a message that others are not welcome. |

| Case                          | Activism/ restraint                                                                                                                  | Substantive/ procedural review                                                                                          | Individual rights/collective interests                                                                                                                                                            | Negative/ positive obligations | Laïcité/ establishment/ neutrality/ accommodation                                                                                                           |
|-------------------------------|--------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <i>Amodi; Daniels; Hassam</i> | Refrained from recognizing (polygamous) Muslim marriages as such, just solving the case for the purpose of insurance or inheritance. | Individual rights of widows, rights of others and general regulation of marriage law can be reconciled.                 |                                                                                                                                                                                                   |                                | Neutrality requires putting the individual dignity first.                                                                                                   |
| <i>Christian Education</i>    |                                                                                                                                      | Parliament had the right to adopt the legislation, also in view of international obligations.                           | Rights to religious education and to corporal punishment in school education can be reconciled.                                                                                                   |                                | Neutrality requires accommodation, but believers cannot be automatically exempted from law.                                                                 |
| <i>Prince</i>                 | Cannabis prohibition left intact, while awarding claimant much respect.                                                              | Majority: Exemption scheme is unworkable.<br>Dissent: suspension of order does leave room to work out exemption scheme. | Majority: The interests of Rastafarians cannot be reconciled with interest of preventing illicit drug use, but they can be treated with respect<br>Dissent: opposing interests can be reconciled. |                                | The state has a positive obligation to accommodate, if this does not undermine the other interest.<br>Neutrality requires accommodation of sincere beliefs. |

| Case          | Activism/ restraint                                                                                                                                                                                                                                                                                                                                                                                              | Substantive/ procedural review                                 | Individual rights/collective interests                                                | Negative/ positive obligations                                                                                                                                                                         | Laïcité/ establishment/ neutrality/ accommodation                                                                                                    |
|---------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------|---------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------|
| <i>Volks</i>  | Majority: The Inheritance Act may distinguish between married and unmarried survivors, given the special obligations to protect marriage under constitutional and international law.<br><br>Dissent: Historical, social, moral and cultural ingredients inform legal concepts a balanced, flexible and nuanced approach is required to correct past discrimination against survivors in unmarried relationships. |                                                                |                                                                                       |                                                                                                                                                                                                        |                                                                                                                                                      |
| <i>Fourie</i> | Absence of legal recognition of same-sex unions is contrary to equal dignity. Order suspended to leave Parliament room to legislate.                                                                                                                                                                                                                                                                             | Interests of same-sex couples and believers can be reconciled. | The state has a positive obligation to recognize same-sex unions under equal dignity. |                                                                                                                                                                                                        | Religious beliefs and traditions must be respected in the constitutional order, but they are not a source of interpretation of (constitutional) law. |
| <i>Pillay</i> |                                                                                                                                                                                                                                                                                                                                                                                                                  | A blanket ban was contrary to rights.                          |                                                                                       | Positive obligation for accommodation of sincere beliefs, even if cultural. Culture and religion sing with the same voice. Neither school nor courts should assess the mandatory nature of a practice. |                                                                                                                                                      |

| Case                              | Activism/ restraint                                                                                                                                                                                                                                                                                      | Substantive/ procedural review                                                                                         | Individual rights/collective interests                                                   | Negative/ positive obligations | Laïcité/ establishment/ neutrality/ accommodation                                                                                           |
|-----------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------|--------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------|
| <i>Women's Legal Centre Trust</i> | See Laïcité/ establishment/ neutrality/ accommodation.                                                                                                                                                                                                                                                   | Narrow interpretation of "constitutional obligation" when assessing whether Parliament had violated it.                |                                                                                          |                                | The Constitution permits regulation of religious, personal and family law, but given all choices, the CCSA should not judicially legislate. |
| <i>DE v. RH</i>                   | Legal action against adultery no longer valid. The interference with the private life of exp-partner and new partner cannot be justified by protection of the dignity of the other partner.                                                                                                              |                                                                                                                        |                                                                                          |                                |                                                                                                                                             |
| <i>De Lange</i>                   | Procedural review: the inconstancy in relying on constitutional arguments and rights in courts below, allows only for dismissal at the constitutional court. The real issue is thorny, and it is preferential for it to be solved by religious institutions and parliament before courts need to decide. |                                                                                                                        |                                                                                          |                                |                                                                                                                                             |
| <b>ECtHR</b>                      |                                                                                                                                                                                                                                                                                                          |                                                                                                                        |                                                                                          |                                |                                                                                                                                             |
| <i>Buscarini</i>                  |                                                                                                                                                                                                                                                                                                          | The legitimate aim does not need to be reviewed as the oath is clearly in violation of freedom of religion and belief. | Pluralism requires that all strands of society are able to be represented in Parliament. |                                | In light of pluralism, making parliamentarians pledge allegiance to a particular religion is unacceptable.                                  |

| Case                            | Activism/ restraint                                                                                                                                                                                                                                                                                                                 | Substantive/ procedural review | Individual rights/collective interests                                                                                                                                                                      | Negative/ positive obligations                                                                                                                            | Laïcité/ establishment/ neutrality/ accommodation                                                                                                                           |
|---------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <i>Thlimmenos/ Bayatyan</i>     | Carefully crafted in order to not mandate a substantive right to conscientious objection.                                                                                                                                                                                                                                           |                                | In <i>Thlimmenos</i> : prison sentence is not faulted, but subsequent job restriction is. In <i>Bayatyan</i> : punishment of conscientious objection contrary to international trend and living instrument. | Do not treat conscientious objectors like common criminals but accommodate. Do not punish conscientious objectors, but allow alternatives to accommodate. |                                                                                                                                                                             |
| <i>Cha'are Hasan and Chaush</i> |                                                                                                                                                                                                                                                                                                                                     |                                | Choosing sides in an inter-community conflict is out of order, never mind the substance. The rights of differing factions within a religious community can be reconciled.                                   | State cannot demand uniformity from a religious community and to enforce this via recognition.                                                            |                                                                                                                                                                             |
| <i>Refah</i>                    | Although the potential risk to democracy may not have materialized, the prohibition of a political party is justified as necessary in a democratic society. The aims of the party amongst which establishing legal pluralism to allow for <i>Shari'a</i> family law for Muslims who follow it, is incompatible with the Convention. |                                |                                                                                                                                                                                                             |                                                                                                                                                           | The Turkish Constitutional principle of laïcité is seen as protecting the freedom of religion and belief. It is coherent with the Convention to maintain it as unalterable. |



| Case           | Activism/ restraint                                                                                                              | Substantive/ procedural review                                                         | Individual rights/collective interests                                                                                                                                                           | Negative/ positive obligations | Laïcité/ establishment/ neutrality/ accommodation                                                                                                                                                                                            |
|----------------|----------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <i>Maestri</i> |                                                                                                                                  | The law in question was not foreseeable enough.                                        | State interest in preventing subversion must be reconciled with individual rights.                                                                                                               |                                |                                                                                                                                                                                                                                              |
| <i>Şahin</i>   | Majority: Islamic headscarf cannot be reconciled with gender equality<br>Dissent: Such value judgment is unbecoming for a court. | Dissent: There is no evidence that the claimant had a political or ideological agenda. | Majority: The state as impartial organizer of pluralism must take measures to ensure peaceful co-existence. Prohibition of religious attire in an educational institution may be such a measure. | <i>Şahin</i>                   | Majority: The Turkish Constitutional principle of laïcité is seen as protecting the freedom of religion and belief. It is coherent with the Convention.<br>Dissent: There is no evidence that the claimant challenged the principle as such. |
| <i>Folgerø</i> |                                                                                                                                  | Opting out of a religion class must not be too burdensome.                             | Rights of children and parents belonging to religious mainstream can be reconciled.                                                                                                              |                                | State can facilitate subject in public school system under auspices of state church if not burdensome opting out is possible.                                                                                                                |

| Case   | Activism/ restraint | Substantive/ procedural review                                                                                                                                                                                                                                                                                                                                      | Individual rights/collective interests | Negative/ positive obligations | Laïcité/ establishment/ neutrality/ accommodation                                                                                                                                                                                                            |
|--------|---------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------|--------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Yiğit  |                     | Regulation of marriage falls within margin of appreciation. Claimant was not married in accordance with state law. Given this in accordance with existing national law she is not treated as spouse in inheritance, pension and social security law. This does not violate the Convention.                                                                          |                                        |                                |                                                                                                                                                                                                                                                              |
| Lautsi |                     | Broad margin of appreciation, due to lack of European consensus. Symbol goes hand in hand with no compulsory religious education and acknowledgement of religious minority holidays and practices. Rigid secularism is not required but the state should not profess a particular religion or belief, because that always sends the message of exclusion to others. |                                        |                                | Majority: The crucifix is a neutral symbol and does not amount to indoctrination.<br>Concurring: a liberal approach is more befitting for the Convention than rigid secularism.<br>Dissent: The symbol is not neutral and highlights preferential treatment. |

| Case                                 | Activism/ restraint | Substantive/ procedural review                                                                                                                                                                                                                                                                            | Individual rights/collective interests                                                                       | Negative/ positive obligations | Laïcité/ establishment/ neutrality/ accommodation                                                                                        |
|--------------------------------------|---------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------|--------------------------------|------------------------------------------------------------------------------------------------------------------------------------------|
| <i>Mouvement Raëlien</i>             |                     | Majority and dissent: no separate Article 9 evaluation needed as all is covered by Article 10 evaluation.<br>Majority: broad margin of appreciation because of commercial speech.<br>Dissent: Narrow margin of appreciation because of non-commercial speech and content based assessment by authorities. | Dissent: State neutrality requires great caution in restriction of group freedom due to the acts of members. |                                |                                                                                                                                          |
| <i>Sindicatul "Păstorul Cel Bun"</i> |                     | Unnecessary to blanketly refuse recognition of labor union of church personnel. Autonomy rights and labor rights of employed clergy and payment can be reconciled.                                                                                                                                        |                                                                                                              |                                | Autonomy rights of church can interfere with labor rights of church personnel but responsibility by delegating power to the Church.      |
| <i>Fernández Martínez</i>            |                     | The state cannot discharge itself of responsibility by delegating power to the Church. Individual interest and church rights could have been reconciled, without interfering in the Church's own assessment.                                                                                              |                                                                                                              |                                | Church approval of teachers of religion possible, but state cannot discharge itself of responsibility by delegating power to the Church. |

| Case | Activism/ restraint                                          | Substantive/ procedural review                                                                                                                                                                                                                               | Individual rights/collective interests                                                                       | Negative/ positive obligations | Laïcité/ establishment/ neutrality/ accommodation                                                                                                                                                      |
|------|--------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------|--------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| SAS  | See under Laïcité/ establishment, neutrality, accommodation. | Majority and minority: although claimant was not charged, the Act interferes with her rights.<br>Majority and minority: State institutions should not assess the meaning of a religious precept as oppressive or make assumptions about those who follow it. | Dissent: majority sacrifices concrete individual rights guaranteed by the Convention to abstract principles. |                                | Majority: The French notion of living together is compatible with the Convention and can serve to justify interference in a democratic society.<br>Dissent: Living together is not a 'legitimate aim'. |

Figure 1: Table of parameters



## Conclusion

Finding common ground and differences – an optimal interpretation of a universal right?

*“The spirit of liberty is that spirit which is not too sure that it is right”.  
Judge Learned Hand<sup>1</sup>*

### 7.1 INTRODUCTION TO THIS CHAPTER

The world is full of examples of individual believers who had to suffer for what they believed in. Mary Dyer, whose statue stands in Boston, Massachusetts, is symbolic in this regard. She gave her life because she refused to give up her Quaker faith. Her persecutors, other Protestant Christians, were once themselves victims of persecution elsewhere in the world. The placard on the statue reads: “My life not availeth me in comparison to the liberty of the truth.” She reminds us not only of the strength of heart sometimes required for conscientious objection, but also of the fact that, unfortunately, those who were once victims of persecution, can themselves become perpetrators of persecution and do unto others as they would not have had others do unto them.

History is also full of examples of religious minorities who could survive only because they pragmatically altered certain customs and rites, in order to live their lives in a way that would not provoke hostility from others. Such pragmatism would sometimes be theologically justified, by attributing the fault for deviations to the oppressors. While we might first think of the covert Jews and Muslims of Inquisition Spain, even today we can unfortunately observe this. For example, LGBTQ+ or gender and sexual orientation minorities who conform to “accepted” roles in order to be “accepted” – they belong in the very same category. Oppression of one’s core identity is always a spiritual confinement.

Even today, unfortunately, believers of many faiths and identities suffer for their beliefs or are forced to choose between obeying the law and what they sincerely believe are precepts of their faiths. But the Sufi wisdom, which inspired Chapter 1, is as old as mankind: each soul follows its own path towards its Maker. While the soul is essentially free, oppression, restriction

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1 Judge Learned Hand in his famous speech ‘The Spirit of Liberty’ in 1944 in celebration of *I Am an American Day*, quoted on the front pages by C.R. Sunstein, *Radicals in Robes. Why Extreme Right-Wing Courts Are Wrong for America*, Basic Books, New York (USA), 2005.

and persecution can make a person suffer on that path. The right which is called the freedom of religion and belief, recognized in a great number of international and national instruments is the guarantor that a person is free to follow his or her soul. As Chief Justice Ngcobo explained so eloquently in *Prince* (section I2.4.7), we should not put believers in a position where they have to make painful choices.<sup>2</sup>

The freedom of religion and belief, the classical universal human right, codified in the Canadian Charter of Rights and Freedoms, the South African Bill of Rights, and the European Convention on Human Rights, makes a promise to all believers – including those who identify themselves as non-believers. The promise that they may search for their own path free of constraints and impairments, by the state or others. This is the “truly free society” envisioned by Chief Justice Dickenson in the Canadian landmark case *Big M* (see section I1.3). Repeated many times in the selected SCC cases, he tells us that “a truly free society can accommodate a wide variety of beliefs, diversity of tastes and pursuits, customs and codes.”<sup>3</sup> This includes those which “may strike non-believers as bizarre, illogical or irrational”,<sup>4</sup> as we may learn again from Chief Justice Ngcobo in *Prince*.

Freedom and pluralism are the different sides of the same coin, as the ECtHR explained in the milestone case *Kokkinakis* (see section I3.3). Free people make different choices, and different people, when equally free will assert what differentiates them from others. When we embrace our freedom, we must embrace the equal freedom of others. The freedom of religion and belief is not only vital to protect the identity of believers, “but it is also a precious asset for atheists, agnostics, skeptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it.”<sup>5</sup>

The three courts have each developed a jurisprudence out of the above considerations. Their standard interpretations each fit neatly into the constitutional chain novel (Dworkin<sup>6</sup>) each of them is writing, while each chain novel subsequently fits into the library of liberal democratic constitutionalism. The constitutional narratives of the three tribunals show parallels, but also stress different elements. Thus, the three jurisprudential narratives regarding the freedom of religion and belief at times coincide, diverge, or collide. This can be conceptualized by employing the guiding and informing principles, which are reconstructed in Chapter 5.

2 CCSA, *Prince v. President of the Cape Law Society*, Case CCT36/00B, 25 January 2002, para. 76.

3 SCC, *R. v. N.S.*, Case 33989, [2012] 3 SCR 726, 20 December 2012, pp. 336-37.

4 *Prince v. President of the Cape Law Society*, Case CCT36/00B, *supra* n. 2, para. 42.

5 ECtHR (C), *Kokkinakis v. Greece*, app. no. 14307/88, 25 May 1993, para. 31.

6 R. Dworkin, *Law's Empire*, Hart Publishing, Oxford (UK), 1998, pp. 228-232. Dworkin argues that constitutional law can be compared to a chain novel in which each chapter is written by others, but must fit with the previous chapters.



Calculated guessing allows conclusions, regarding a different outcome, had one of the selected cases been decided by one of the other two courts. Would the SCC have gone along with allowing for a blanket ban of the hijab in a university (*Şahin*, section I3.4.7)? Would the CCSA have done more to make sure the picture-less drivers of Alberta would not lose the world (*Alberta v. Hutterian Brethren of Wilson Colony*, section I2.4.2)? Would the ECtHR have made sure that a Rastafari who consumes *ganja* for religious reasons, would not suffer consequences for his choice of profession, like any “common criminal” (*Prince*, see above)?

The case studies of 15 cases by each Court, featuring the freedom of religion and belief, the comparative analysis of the cases in light of the six elements dominant in freedom of religion and belief case law, the reconstruction of the standard interpretation and finally identifying their minimalist (and non-minimalist) features, has allowed for answering the research questions. In the following section, the previous chapters will be revisited. Subsequently in sections 7.3, 7.4, 7.5, overall conclusions regarding the standard interpretations of the freedom of religion and belief by the SCC, the CCSA and the ECtHR are drawn. Section 7.6 contains the answers to the research questions. Finally, 7.7 contains the overall conclusions of the study.

## 7.2 REVISITING THE PREVIOUS CHAPTERS

In section 1.7, the research questions for this study were formulated. They can be answered making use of the findings and preliminary conclusions of the previous chapters. The study makes use of 15 cases from each of the three courts. Each features the freedom of religion and belief as the/ one of the central right(s). They are systematically reviewed in Appendix I. It was considered to be the central right, if the interpretation of the freedom of religion and belief was decisive in determining the outcome of the case. Appendix 1 also provides information regarding the workings of each of the legal systems.

Chapter 2 provides the theoretical framework for minimalism as a prism for the analysis. The freedom of religion and belief is a classical human right. It has been recognized in the most important international human rights documents. Its existence can be traced back to modern human rights thought, and further back to a variety of philosophical and religious traditions. Its core is inseparable from the overall modern concept of human rights and vice versa. The purpose of the right is to create not only a protection from persecution or coercion of believers (belonging to minorities), but to create a positive freedom. This positive freedom should enable believers to take agency in their own religious/philosophical identity, which they need not justify before the state or their fellow citizens. Like all human rights, the freedom of religion and belief is not absolute and exists in mutual interdependence with all other human rights.

This study has been positioned within the positions of the “classical liberal understanding of the freedom of religion and belief” and “(neo) pluralism in freedom of religion and belief”, aiming to find space for a more pluralist understanding, interpretation and application of the right, thereby further evolving the classical liberal framework.

Interpretation of constitutional and human rights matters, few would doubt that. While there are a number of interpretation theories, which stipulate what good interpretation is, Cass R. Sunstein has categorized them into four general theories of interpretation. One of them, judicial minimalism is his favored approach. This study follows Sunstein’s categorization and preference for judicial minimalism. Minimalism is not aligned with any particular political agenda or grand political philosophy, but sets itself apart from perfectionism, originalism and majoritarianism. Its aim is to strengthen constitutional checks and balances, the rule of law and social stability in pluralist societies. Minimalism thus adheres to liberal democratic constitutionalism and accepts a living constitutionalism, which fits very well with the aforementioned position combining “classical liberal understanding of the freedom of religion and belief” and “(neo) pluralism in freedom of religion and belief”.

“Optimal protection” was defined as a broad and liberal concept and scope of religion and belief, the right being easily triggered. This includes absolute protection of believers in holding beliefs (internal dimension). This means as much as possible protection of believers in manifestation their religion or belief in teaching, practice, worship, and observance. The limits should only lie in rights of others or compelling specified purposes, when required in a LDC system and prescribed by law. Optimal protection thus, is a form of maximum protection, which also includes maximum protection of other human rights and compelling general interests. It thus assumes an optimum where all of these are carefully balanced.

In Chapter 3, the codification of the freedom of religion and belief in the respective instruments was discussed, as well as the legal and political systems in which they operate, their respective political and legal history and the general methodology of the three tribunals relevant to solving human rights cases. The freedom of religion and belief has similar, though not identical, codification in the three instruments. The right is grouped with other related rights in different ways.

Each of the three human rights instruments has a foundational moment, closely related to some historical momentum, which is important for the interpretation of human rights. The methodologies in solving human rights cases are similar but not identical. They allow for the limitation of human rights in restricted circumstances under similar criteria, which require a legal foundation, a legitimate reason to restrict them, and a restriction which is proportional to the reason for limitation and as limited as possible. Due to the similarities in codification, and the modest impact the differences have,

there is no reason to assume that the differences in codification alone account for any differences between the standard interpretations.

In Chapter 4 the selected cases were discussed in comparison along the lines of the six dimensions of the freedom of religion and belief which can be identified in the case law. These are the individual dimension, the family and family law dimension, the collective and group autonomy dimension, the education dimension, the dimension of balancing with other rights and finally the dimension of secularism (religion/ state relations). The comparative analysis made it possible to reconstruct the standard interpretations of the freedom of religion and belief by each of the courts. This is done by finding the similarities and differences in interpretation in the jurisprudence of each court. The comparative analysis also allowed for a comparison between the standard interpretations of each court, by comparing the solving of similar cases.

In Chapter 5, based on the comparative analysis in Chapter 4, the standard interpretations of the freedom of religion and belief by the three courts were described. For each of the courts, there is a guiding principle of interpretation, while there are informing principles which help to determine meaning, scope, and application of the guiding principle in concrete cases.

The principles between the courts are different in the aspects they stress, but they are not mutually exclusive or generally opposing. They serve to explain similarities and differences between the standard interpretations when it comes to concept, scope and application. Chapter 5 also includes a short discussion of the literature regarding the question whether the (judicialization of) freedom of religion and belief has contributed to secularization of society/ societies. The claim is that secular legal concepts are replacing notions which believers hold dear and are leaving only a shrinking private sphere to believers, while the public sphere shows a growing secularization. There is no support for this claim in the elected cases and the discussion of the six dimensions. Many cases show how adjudication created space for individuals and communities to live their lives in accordance with their beliefs.

In Chapter 6, the case law was reviewed through the prism of minimalism. All three courts have decided cases which qualify as minimalist, as well as cases which do not. Generally, where minimalism was applied, this helped to achieve the objects of minimalism, like minimizing the political costs of the ruling for the losing party and awarding optimal freedom to claimants. Whenever minimalism was not applied, this also showed some of the disadvantages of applying maximalist (perfectionist or originalist) or majoritarian rulings. Some cases also show that sometimes a wide and or deep ruling is needed to further the purposes of minimalism.

### 7.3 CONCLUSIONS REGARDING THE SCC'S STANDARD INTERPRETATION OF FREEDOM OF RELIGION AND BELIEF

The SCC's standard interpretation of the freedom of religion and belief can be reconstructed from the selected cases. Based on the findings in chapters 4 and 5 we concluded that the guiding principle of the SCC in the freedom of religion and belief case law is individual liberty, with the harm principle, religion *la carte* and sincerity of belief being the informing principles, providing for a broad and liberal approach. This approach leaves it up to the individual believer and/or community to define their religion or belief in accordance with their conscience and work out their (religious) obligations for themselves.

What attracts protection is the choice of the individual believer, not a mandatory or perceived as mandatory nature, nor a religious dogma as presented by religious officials. Individual autonomy is central in this approach. Therefore, religion and/or belief need not be distinguished from either "culture" or "personal" identity. Law's definition of religion and belief in the SCC's approach, is not intended to be all-encompassing, rather it is "law's religion" designed to address the legal issues. Essentially, the freedom of religion and belief as a right defines what religion and belief are only for legal purposes.

The collective dimension of the freedom of religion and belief rests upon the individual autonomy of the believers who freely and willingly form communities in accordance with (religious) beliefs. Hence, the freedom of religion and belief cannot easily be turned into the assertion of a group right. In the private realm, religious groups are entitled to their "sub-culture" and may create homogeneity. However, they may not employ the public domain to impose their views on co-religionists or society at large.

In order for the right to the freedom of religion and belief to be triggered in the Canadian standard interpretation, the believer has to show that he sincerely believes in the practice, which they claim is hindered or prevented. If brought into a situation of having to choose between his sincerely held belief and a somehow compelling rule, formulated by the legislature, a government body or a private party, the legal assumption is that there is interference, which has to be justified.

In each of the selected cases, the majority of the SCC is not ready to accept any internal limits to the freedom of religion and belief. Where the freedom of religion and belief collides with other rights, the Court will often try to reconcile them through interpretation rather than assuming internal limits or choosing one right above the other.

In deciding whether an infringement of the freedom of religion and belief is justified, the SCC will perform some balancing act, which differs methodologically depending on whether the constitutional, administrative, or private law approach is followed. In this balancing, the "harm principle" as formulated

by amongst others classical liberal philosophers such as John Stuart Mill play some role of importance. The freedom of religion and belief finds its boundaries where the concrete demonstrable harm of others is concerned. In light of this, the Court reiterates continuously that the freedom of religion and belief is not an absolute right.

In the Canadian interpretation, the freedom to hold beliefs is broader than the freedom to act upon them, while beliefs as such may not be taken to imply any wrongdoing from the perspective of public policy. Equal treatment of religions and religious individuals may require differential treatment in order to enable "equal religious citizenship" (Ryder). Such equal treatment can be mandated by "reasonable accommodation" or minimal impairment/proportionality in effects.

"Open secularism" (Bouchard and Taylor) is mandated by the freedom of religion and belief, equal treatment of religion and the absence of state coercion. Apparently neutral laws with adverse effects on (minority) religions must be justified under the limitations clause. Equally, endorsement of a rigid secularism is contrary to this understanding of open secularism. Open secularism and equal religious citizenship do not prevent (private) religious considerations in the public sphere or fostering religious pluralism as long as the equal treatment of all citizens is not undermined or breached.

The Canadian standard interpretation is rooted in a classical constitutional liberalism. Canadian multiculturalism, as a constitutional concept, while containing a communitarian nuance of classical liberalism, is still very much rooted in the same traditions. It very much draws on classical liberal concepts, such as individual autonomy, freedom, and state neutrality. But on the basis of these notions, a rigid essentialist liberalism is also rejected.

A truly liberal state in accordance with the Canadian jurisprudence, creates an open society which enables identifiable minorities to hold different opinions, make different choices, and live different lives. This should not be regarded as the negative side-effects of freedom, but must be legally recognized and celebrated as a manifestation of freedom. Hence, the state may not even endeavor to "convert" its citizens to liberalism. However, citizens need to adhere to what Esau calls "reciprocal pluralism",<sup>7</sup> and what could be called "meta-level tolerance". It does not require everyone to be tolerant of everyone else in the private sphere, but it does require everyone to accept that society as a whole is tolerant of everyone in the public domain. In *Hofer* (section I1.4.2), a provision of the statutes of the Lakeside Hutterites is cited which exemplifies this. It acknowledges the right of freedom of religion and belief of all Cana-

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7 A. Esau, 'Living by Different Law: Legal Pluralism, Freedom of Religion and illiberal Religious Groups', in R. Moon (ed.), *Law and Religious Pluralism in Canada*, UBC Press, Vancouver/Toronto (Canada), 2008, p.132.

dians, but also requires members of the community to leave the community if they ever change their faith.<sup>8</sup>

The SCC's case law is both praised and lamented in public debates and academic literature. As can be seen from the events that led to the Boyd and Bouchard & Taylor reports,<sup>9</sup> there are those who feel that public policy and courts have gone too far in facilitating religious pluralism. The perceived rise of religious fundamentalism casts religious equality rights in an alleged opposition to LGBTQ+ equality rights and security interests. Moreover, religious equality rights much like sexual orientation equality rights will often be challenged as "special rights" unfair to others.<sup>10</sup> In more ways than one, being religious is the "new gay".<sup>11</sup>

The criticism sometimes casts itself in liberal or secularist cloaks, warning of the dangers of illiberal religion and belief. On the other hand, the criticism of Canadian multiculturalism invokes communalism: the dominant cultural group will lose its cultural identity through harmonization and accommodation policies, Court mandated secularism and the liberal world view of the political elite, and in the case of Quebec, the perceived cultural dominance of English-speaking Canada. Yet below the criticism of harmonization and multiculturalism often lurk, xenophobia, racism, communalism and/or sectarianism.<sup>12</sup> Thus, it is not surprising that such criticisms often misrepresent the underlying values of harmonization and multiculturalism as well as the values employed by such critics for their own ends.

Academic discussion is far more nuanced. The interrelated values underlying the Charter, such as secularism, liberalism and multiculturalism as interpreted by the SCC itself, provide the normative framework for commenting and critiquing the Court's rulings. Various authors have done just that, emphasizing different values in their appreciation of some judgments and their criticism of others. As a matter of fact, the various majority, separate, and dissenting opinions in the cases discussed attest that the judges on the Court do the same.

McLachlin places the Court's rulings within Charles Taylor's theory of normative and hyper-goods:

"The Charter has affected the way in which family units, classrooms and [...] religious communities have talked about the import and purpose of religious

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8 See SCC, *Lakeside Colony of Hutterian Brethren v. Hofer*, Case 22382, [1992] 3 SCR 165, 29 October 1992, p. 23.

9 M. Boyd, *Dispute Resolution in Family Law: Protecting Choice, Promoting Inclusion*, Government of Ontario, 2004 and G. Bouchard and C. Taylor, *Building the future, A time for reconciliation*, Government of Quebec, 2008.

10 See B. Ryder, 'The Canadian Conception of Equal Religious Citizenship', in R. Moon (ed.), *Law and Religious Pluralism in Canada*, UBC Press, Vancouver/Toronto (Canada), 2008, p. 89.

11 See *ibid.*, p. 100.

12 Compare Bouchard & Taylor, *supra* n. 9, at 67.

liberties. Alongside the doctrinal law as delineated by the Court, the language of dignity, freedom, autonomy, and rights has permeated all aspects of the public sphere; each of these conversations impinges upon the next. Casting all of this back into Charles Taylor's theoretical framework, the Charter has articulated and laid bare, for discussion and application, both the good of religious freedom, and the hyper-goods and core values it reflects".<sup>13</sup>

In general, as Manfredi notes, both the public and academia are content with the rulings of the Supreme Court. He considers that this is mainly because its careful balancing and proportional approach made it less vulnerable to accusations concerning democracy-encroaching judges.<sup>14</sup> McLachlin's quote highlights that the Court sees for itself a role in identifying the values and principles underlying the Charter in general, and the freedom of religion and belief in particular. While the Court is an authority in this regard, it is also engaged in an open evolutionary discourse within itself, and with society and the rest of the body politic about the content and the application of these principles and values. This signifies the methodology and purposes of minimalism, and as Manfredi argues, this minimalism is part of the Court's success story.

As a matter of fact, minimalism could be identified as one of the hyper-goods underlying the Charter and the SCC's case law, interrelated with the meta-level tolerance apparent in the rulings and the meta-level liberalism of the Charter. After all, "[t]he development of the constitutional state can be understood as an open sequence of experience-guided precautionary measures against the overpowering of the legal system by illegitimate power relations."<sup>15</sup>

The freedom of religion and belief as interpreted by the SCC provides a procedural guarantee for equal freedom for very different people living together in one society, while it cannot be used to negate the legitimate claims of others under the same or other constitutional rights. We have no right whatsoever, to not encounter the other in the public domain. Tolerance, which is always age appropriate, is a hallmark of a free society and may require our cognitive dissonance, brought about by the encounter of the other. The incremental and cautious approach employed by the SCC allows for further evolution of these concepts with the help of constructive criticism and assertions by believers in concrete cases. To this extent, the SCC's judicial minimalism contributes to the meta-level liberalism of the Charter.

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13 See B. McLachlin, 'Freedom of Religion and the Rule of Law, A Canadian Perspective', in D. Farrow (ed.) *Recognizing Religion in a Secular Society, Essays in Pluralism, Religion and Public Policy*, McGill-Queen's University Press, Montreal/Kingston (Canada), 2004, pp. 32-33.

14 See F. Venter, *Constitutional Comparison: Japan, Germany, Canada and South Africa as Constitutional States*, Juta & Co, Ltd, Cape Town (South Africa), 2000, p. 97.

15 J. Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, MIT Press, Cambridge (USA), 1996, p. 39.



#### 7.4 CONCLUSIONS REGARDING THE CCSA'S STANDARD INTERPRETATION OF FREEDOM OF RELIGION AND BELIEF

The CCSA's standard interpretation of the freedom of religion and belief can be reconstructed from the selected cases. Based on the findings in chapters 4 and 5, we concluded that the guiding principle of the CCSA is human dignity. The three informing principles can be subdivided into a freedom right, a communitarian component and a constitutional principle. The freedom right is the right to be different; the communitarian component is respect for diversity; and the constitutional principle is positive tolerance.

The Constitutional Court's endeavor to develop jurisprudence on the freedom of religion and belief started shortly after the transition to democracy. Given the *apartheid* past, it could not draw on precedent. Rather, in *Amod* (section I2.4.5), it had to refute precedents like *Ismail v. Ismail*,<sup>16</sup> because they had been heavily influenced by *apartheid's* discriminatory outlook on non-European peoples, cultures, and religions. "True to their worldview, judges of the past displayed remarkable ethnocentric bias and arrogance at the expense of those they perceived different" says the CCSA in *Daniels* (section I2.4.8). "They exalted their own and demeaned and excluded everything else."<sup>17</sup>

But it was not always clear whether rules which had existed in the past were remnants of the past ideology, or acceptable from a democratic viewpoint. In *Solberg* (section I2.4.4), rules regulating the sale of liquor were challenged. Was this a remnant of Afrikaner Calvinist nationalism, or perfectly justifiable in a secular "Rainbow Nation"? The CCSA treated the Canadian milestone case *Big M* as near precedent in solving the case. As a matter of fact, there were "high expectations" that *Solberg* could serve as a "benchmark precedent on the protection of religious rights and freedom".<sup>18</sup> On the other hand, many religious groups and freedom of religion and belief advocates treated it as a commercial dispute.<sup>19</sup> While it is undoubtedly true that the commercial undercurrent is strong, this is no different from *Big M* which is doubtlessly the Canadian milestone visible in all the selected Canadian cases.

"Judges in South Africa are just as divided in how one should analyze questions of church/state relations as their counterparts in Canada and the United States".<sup>20</sup> Some readers may feel like agreeing with Beatty after having analyzed the selected cases. Not unlike on the SCC, the judges on the CCSA were sometimes heavily divided on the merits, interpretation, and outcome

16 *Ismail v. Ismail* 1983 (1) SA 1006 (A).

17 CCSA, *Daniels v. Campbell NO and Others*, Case CCT40/03, 11 March 2004, para. 74.

18 L. du Plessis, 'Freedom of or Freedom from Religion? An Overview of Issues Pertinent to the Constitutional Protection of Religious Rights and Freedom in "the New South Africa"', in *Brigham Young University*, vol. 2001, no. 2, pp. 439-466 (2001), p. 452.

19 *Ibid.*

20 D. Beatty, *The Ultimate Rule of Law*, Oxford University Press, Oxford (UK), 2004, p. 64.



of the cases before them, while making use of a common frame of reference for their argument. Yet in comparison to the SCC, the selected cases show that the frame of reference was still “under construction” in the first few cases. Nevertheless, human dignity as a guiding principle was present from the beginning.

In *Christian Education* and in *Prince* (sections I2.4.6–7), the informing principle of the “right to be different” emerged. Further developed in later cases, it led the CCSA to be the most consistent of all three courts in the selected cases in showing equal concern and respect to the losing party. The standard interpretation was created from there, visibly case-by-case, into the arguably consistent methodology which is visible in the later cases. Obviously, Justice Sachs deserves personal credit for developing the right to be different to become an informing principle in the standard interpretation of the freedom of religion and belief. His consideration and persistence have earned him applause even amongst those who are critical of the way in which modern courts treat the freedom of religion and belief.<sup>21</sup>

The CCSA’s soul-search regarding the freedom of religion and belief, conducted in the minimalist one case at a time approach, nevertheless had a clear “soul” to start from. The South African Constitution, the CCSA explained in *Prince*, requires the “maximum harmonization of all competing considerations on a principled yet nuanced and flexible case-by case basis”.<sup>22</sup> The South African “collective soul” was set free when apartheid perished, and the supremacy of the Constitution was installed. “Human dignity” was a promise, for more than just one constitutional right and is certainly the guiding principle for the freedom of religion and belief.

The selected cases show a development of interpretation of the Bill of Rights as transformative values for a new society. Perhaps this value-based interpretation mirrors the influence of German constitutional theory, while the Bill of Rights itself was inspired by the Canadian Charter. In any case, the more value-laden interpretation manifests the post-liberal character of South African constitutionalism as opposed to the more classical liberal Canadian approach. Nevertheless, the outcomes are not entirely different.

The more value-driven standard interpretation of the CCSA has produced more perfectionist elements in the jurisprudence. However, the standard interpretation is also developed in a minimalist process of trying to find what these values mean for concrete rights in concrete cases. Set against the background of South African (political and constitutional) history, the Court is more outspoken about the negative meaning of the constitutional values (what they try to prevent) than on their positive content (what they are trying to achieve).

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21 I. T. Benson, ‘The Attack on Western Religions by Western Law: Re-framing Pluralism, Liberalism and Diversity’, in *International Journal for Religious Freedom*, vol. 6, no. 1-2, pp. 111-125 (2013), p.120.

22 *Prince v. President of the Cape Law Society*, Case CCT36/00B, *supra* n. 2, para. 155.

Perhaps the line of jurisprudence on Islamic marriage is the best example of the combination of incremental minimalism on the one hand, and a fusion of “perfectionist originalism” on the other hand. Given the fact that the Court had to deal with precedent qualifying Islamic marriage as opposed to *boni mores*, and the difficulty of breaking with precedent while preserving the common law system, in this jurisprudence it shows judicial courageousness. Such courageousness is seldomly seen elsewhere in the world, non-Muslim majority country or even Muslim majority country, wherever there is a “state monopoly on marriage”.

In fact, judges the world over from nations that have not (recently) suffered the extreme oppression and exclusion that South Africa endured under apartheid, could very well learn from the CCSA in this regard. The judges are overall very sensitive to avoid ethnocentric bias and arrogance, while sometimes majorities on the Court have to be reminded of this sensitivity by the dissenters, as in *Solberg* and *Prince*. On the other hand, the massive amount of foreign jurisprudence cited in the cases, shows that while this is also a practical necessity because of the recent transition to constitutionalism, South Africa’s highest court is very willing to learn from others. Overall, Justice Sachs’ words in *Prince* describe the Court’s jurisprudence accurately: There is a “heavy responsibility on the courts to be sensitive to considerations of institutional competence and the separation of powers. Undue judicial adventurism can be as damaging as excessive judicial timidity. [...] Both extremes need to be avoided.”<sup>23</sup>

Criticism of the Court comes from many angles; some find it too restrained, others too activist. Libertarians critique its timidity in revoking the pro-religious bias of the past, religionists grieve its libertarianism and individualism. While the advocates of traditional law and religious rights want more sensitivity to culture and religion, others warn of the potential consequences for (gender) equality. But it is hard not to agree with Venter in expecting a synthesis to develop over time in the form of a “uniquely South African understanding”, which will fit “snugly into the mold of classical liberalism”.<sup>24</sup>

## 7.5 CONCLUSIONS REGARDING THE ECtHR’S STANDARD INTERPRETATION OF FREEDOM OF RELIGION AND BELIEF

The ECtHR’s standard interpretation of the freedom of religion and belief can be reconstructed from the selected cases. Based on the findings in chapters 4 and 5, it can be concluded that the guiding principle of the ECtHR is pluralism.

<sup>23</sup> *Ibid.*, para. 156.

<sup>24</sup> See F. Venter, ‘The Emergence of South African Constitutionalism: From Colonial Constraints to a Constitutional State’, in G. van der Schyff (ed.), *Constitutionalism in the Netherlands and South Africa, A Comparative Study*, Wolf Legal Publishers, Nijmegen (Netherlands), 2008, p. 36.

The two informing principles are the state as organizer of pluralism and the impartiality of organizing pluralism.

*Kokkinakis* is acknowledged by scholarly “court watchers” of the ECtHR to be the milestone when it comes to the freedom of religion and belief. The case contains a promise, for those under the Convention member state’s jurisdiction, that the Court will protect freedom of choice in the matters of heart, soul, and mind, and the actions resulting from it, because pluralism depends on this.

Pluralism is always a question of otherness, it requires thinking about political community not from the perspective of solving the matters of content, but relationality, “which is to say love”.<sup>25</sup> Yet the “view from nowhere” might also be employed as the vehicle for empathy. In all societies, the mainstream majorities’ views of minorities can be heavily influenced by bigotry, prejudice, and supremacism. Yet such views may be clad in rational concerns, less suspicious on first glance.

The nations which form the Council of Europe have each known their problematic past with the rejection of pluralism. Even more so, pluralism itself was seen as problematic through much of European history. Colonialism and imperialism were supported by notions of supremacy of European culture, European Christendom, and European statehood. Modern European nation states had official policies of eliminating regional and local languages and dialects for the benefit of a national language, creating a national identity to the detriment of cultural and religious identities, and creating state monopolies on education, welfare, marriage and so forth.

The Convention was adopted in rejection of fascist totalitarianism (which had just been overcome) and Stalinist totalitarianism (which was perceived as a major threat at the time). These regimes had explicitly and implicitly targeted freedom of choice in the matters of heart, soul, and mind, and the actions resulting from it. Freedom with regard to the internal dimension of the freedom of religion and belief was not a given for the High Contracting Parties at the time, as it might be to an extent for the contemporary member states.

Against the backdrop of totalitarian dictatorship, there was arguably not as much focus on the biases, self-evidence and monoculturalism which had taken root in Europe over a much longer period of time. Given the focus on preventing totalitarianism, the Court has been wary of state-meddling in organizational structures of faith-based communities, breach of positive obligations to protect minorities against violence, state sponsored religious proselytism in the public school curriculum and exclusion of “others” from parliamentary office.

On the other hand, on many occasions the ECtHR has not restricted state attempts to hinder practical and effective rights to religious attire, dietary rules,

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25 Z. R. Calo, ‘Pluralism, Secularism and the European Court of Human Rights’, in *Journal of Law and Religion*, vol. 26, no. 1, pp. 261-280 (2010), p. 280.

family and personal law, or identity-related claims as such. In such cases, the Court is more likely to find in favor of the state. In the eyes of some “those who are not Christians but whose rights have been violated can gain no relief from the Court because the Court employs stereotypes and refuses to engage with the complexity of modern religious pluralism” as a consequence “religious freedom and pluralism are undermined and the notion of human rights degraded”.<sup>26</sup>

The ECtHR itself has said that it intended to guarantee practical and effective rights and not rights that are theoretical and illusionary.<sup>27</sup> In order to develop a jurisprudence which gives greater protection against interference to non-Christian religionists like the association Cha’are Shalom Ve Tsedek, Ms. Leyla Şahin, and the claimant in *SAS* (sections I3.4.3, I3.4.7 and I3.4.15) agnostics like the Lautsis and new faiths like the Raélians (see sections I3.4.10 and I3.4.12), a new understanding of pluralism might be required. Such a new understanding would also benefit the evenness of balancing in cases where individual freedom and group autonomy collide, like in *Sindicatul “Păstorul Cel Bun”* and *Fernández Martínez* (sections I3.4.13–14).

The Court’s guiding principle is the “state as impartial organizer of pluralism”. One of the informing principles is that pluralism needs organizing. When we view otherness as problematic, as European societies have tended to do historically, it is understandable to see pluralism as something that requires organization. But is this true? Is pluralism itself not the form of self-organization which results from freedom? Once individuals are free to choose their faith identities and associate themselves into less or more close-knit communities, with or without “own law”, pluralism is the only possible outcome. That is why the Court itself has acknowledged that pluralism depends on the freedom of religion and belief.

However, there are also those who believe the Court has gone too far in many respects. The tension between activism and restraint is visible in many cases and the margin of appreciation serves as the often ill-fitting jacket to dress for the occasion. Some authors note that contemporary criticism that the Court is going too far, also comes from “fundamental rights friendly” states.<sup>28</sup> But this standpoint is debatable. Human rights are by definition directed to protect humans against the state (amongst others). From that perspective, the notion of a “fundamental rights friendly” state is either a paradox or proof that the human rights watchdog has not done enough. In

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26 C. Evans, ‘The Islamic Scarf in the European Court of Human Rights’, in *Melbourne Journal of International Law*, vol. 72, no. 7, pp. 52–73 (2006), p. 73.

27 See D. Harris, M. O’Boyle and C. Warbrick (eds.), *Law of the European Convention on Human Rights*, 2nd ed., Oxford University Press, Oxford (UK) et al., 2009, p. 15.

28 J. Gerards, ‘The Prism of Fundamental Rights’, in *European Constitutional Law Review*, vol. 8, no. 2, pp. 173–202 (2012), p. 176.

other words, as long as there is criticism coming from many different institutions of the member states, the ECtHR must be doing something right.

On the other hand, the judiciary always has its own part to play in order to ensure that interinstitutional dialogue is not silenced by interinstitutional animosity. And for a supranational human rights court like the ECtHR, this part is even more crucial and difficult to play. The very authority of the Court depends on the perception of legitimacy by the national institutions, because it has no other means to ensure compliance and acceptance.

Not coincidentally, the margin of appreciation plays an important role in the Court's methodology. The notion is supposed to create the right amount of national-supranational harmony, by leaving issues on which there is great diversity in the member states to be decided by national instances. Not coincidentally, the "margin" plays quite a prominent role in (some of the) selected cases on the freedom of religion and belief. This is the case where the relationship between state and religion are significant. After all, the great variety of state-religion models amongst the member states shows anything but a "European consensus". Where there is such a consensus, the margin of appreciation will be deemed to be less wide.<sup>29</sup>

Yet the rulings, which touch on the state-religion relationships, possibly due to the margin of appreciation paint a picture which looks confusing, even to some of the more supportive Court watchers. Italy may ordain a religious symbol in every classroom, while in Norway the need to motivate exception from a religious and philosophical instruction class, which is at least superficially pluralistic, creates too great a burden (*Lautsi*, mentioned above and *Folgerø*, section I3.4.8). A Turkish university may refuse students wearing attire closely associated to sincere beliefs, while Spain may discontinue the employment of a state employee after the Church found him to be disqualified as a religious instruction teacher due to his public utterances concerning his sincere beliefs (*Şahin* and *Fernández Martínez*, sections I3.4.7 and I3.4.15).

Arguably, the margin of appreciation fits well where the "pressing social need" concerning limitations of religious practices is involved and the Court is best advised to proceed on a case-by-case incrementalistic fashion so it can strike the necessary balance – being a supranational judicial structure in the pluralist constitutional arrangements of Europe.<sup>30</sup> But instead of weighing the abstract interests claimed by the state against abstract interests, Gerards proposes more use of procedural review focus on individual interests in the case at hand. This could help to develop a more principled and consistent minimalism, while decreasing use of the "margin of appreciation"<sup>31</sup> in freedom of religion and belief case law.

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29 Compare, e.g., ECtHR (GC), *Bayatyan v. Armenia*, app. no. 23459/03, 7 July 2011, paras 101-105.

30 Compare Gerards, *supra* n. 28, at 178.

31 *Ibid.*, pp. 170, 178, 197-198 and 200-201.

Sometimes in a selected case, the supervision is superficial where the legitimate aim is concerned. But close supervision is required. After all, many illegitimate ambitions can be hidden behind aims that will be framed as legitimate. For example, in *Kokkinakis* the Greek government presented the laws against proselytism as aimed at protecting vulnerable people. Door to door proselytism if conducted in an aggressive fashion may very well be intrusive of people's religious and privacy rights. This could justify and even mandate state action. However, evidence suggests that the Greek law in question really served another aim, namely protecting the Orthodox Church against losing followers to the proselytism of other faiths. The law had evidently only been used against minority religions and never against the Orthodox Church.<sup>32</sup> While clad as a legitimate aim, the real aim may not have been legitimate after all.

The selected cases discussed clearly show that challenges to religious freedom come not only from theocracy and totalitarian ideologies, but also from democratic liberal systems with varying degrees of secularism and different church-state relationships. Every time an individual suffers negative consequences from following the commands of their conscience, belief or religion, their freedom is circumscribed. The ideological nature or ratio is irrelevant in this regard.

According to Harris *et al*, the Court is increasingly engaged in judicial borrowing,<sup>33</sup> yet the cases by the highest judicial tribunals of Canada and South Africa are strikingly absent from the comparative law paragraphs in the freedom of religion judgments by the Grand Chamber. Yet these judgments could inspire the ECtHR to develop a new pluralism-guided jurisprudence. This requires first and foremost regarding pluralism less as a problematic social phenomenon which needs "organizing".

## 7.6 ANSWERING THE RESEARCH QUESTIONS

Based on the previous chapters and the above sections, the research questions can be answered as follows.

1. *What are the standard interpretations of the freedom of religion and belief of the Canadian Supreme Court, the South African Constitutional Court, and the European Court of Human Rights; and how are they applied in the six dimensions personal freedom; family law and family relations; group autonomy; education; balancing freedom of religion and belief with other rights; and secularism?*

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32 See C. Evans, *Freedom of Religion under the European Convention of Human Rights*, Oxford University Press, Oxford (UK), 2001, pp. 148 and 163.

33 See Harris, O'Boyle & Warbrick, *supra* n. 27, at 14.

There are recognizable standard interpretations of the freedom of religion and belief present in the selected cases. The consistency between the selected cases by each of the courts varies. The SCC is the most consistent. The CCSA, starting out right after the transition to democracy is searching for a consistent approach, which it seems to have found in the later cases. The CCSA is also most consistent in showing equal concern and respect to the losing party. In the selected cases decided by the ECtHR, consistency is greatest between the cases within one of the six dimensions rather than across the six dimensions. Examples of strong consistency on the ECtHR are organizational freedom and the rights of conscientious objectors to military service. All of the courts apply recognizable and reoccurring guiding principles in their interpretation of the cases.

Sections 7.3 7.4 and 7.5 provide more detailed conclusions regarding the freedom of religion and belief in the six dimensions on each of the courts. The individual dimension is arguably broader in the jurisprudence of the SCC and CCSA than it is in the ECtHR's jurisprudence. The same goes for the family and family law dimension. The CCSA may be said to go the furthest in this regard. It has deduced a right for same-sex couples to get married from the Bill of Rights, when same-sex marriage was not yet recognized. It has also ruled that in cases of insurance and inheritance, the law may not discriminate between those married in accordance with the law and those merely married by religious law/rites.

All three courts recognize a group autonomy and try to accommodate "inside law". All three also make sure that the "inside law" cannot determine its own scope and that human rights law, among other things, determines boundaries. The selected cases also show a great variety of different cases and thus outcomes. The ECtHR is ready to attest a bold group autonomy for faith-based organizations if they have a legal standing in the states' institutional law. They can even take priority over individual rights or other collective rights in such cases.

In the educational dimension, the ECtHR's jurisprudence is complex. The accommodation of the great variety of state-religion models has led to a variety of outcomes which do not easily show consistency. The SCC and CCSA both emphasize that public education must be inclusive and send a clear message of positive tolerance for all walks of life, including non-mainstream beliefs. The freedom for faith-based education is generally broad in both interpretations. The limits of this broad freedom are stipulated in case-by-case analysis.

All three courts try to balance the freedom of religion and belief with other rights and interests. They are led in this process by thoughts of pluralism and equal concern and respect. The ECtHR, however, is most likely to prioritize one right or interest in solving of the case, whereas the other two courts will make a greater effort to accommodate all interests. The CCSA makes the greatest effort to show the party which loses the case that it has lost the case and not the world.



Both the SCC and CCSA explicitly reject a militant or rigid secularism which can be as antithetical to the freedom of religion and belief as outright state preference of a certain faith. The ECtHR has not rejected rigid secularism. It has also supported the notion that the freedom of religion and belief prevents outright state preference of a certain faith. Yet it has also tried to accommodate, at least in one case, a very clear state-mandated preference, by interpreting the religious symbol in question as less faith-specific than most Catholics and non-Catholics would (*Lautsi*, section I3.4.10).

The comparative analysis of the selected cases in the six identified dimensions does not support the general viewpoint put forward by some writers that the (adjudication of the) freedom of religion and belief, has contributed to the secularization of society/societies. The claim is that legal concepts from secular law are replacing notions which believers hold dear and are leaving only a shrinking private sphere to believers, while the public sphere is displaying a growing secularization.

The selected cases show attempts to create space and opportunity for believers to (re-)claim agency over their lives and to contribute to a holistic pluralism.<sup>34</sup> The right to be different, being one of the informing principles of the CCSA, provides an escape for those who feel constrained by the totalism of modern society. Obviously, the selected cases also show us the boundaries of the freedom of believers. While these boundaries are static on a general and abstract level, the cases show that there is room for dynamics in specific and concrete situations.

2. *What concept of the freedom of religion and belief do each of the Courts apply, how broad is the scope of protection and how is the freedom of religion and belief triggered in the three standard interpretations and what are the reoccurring guiding principles within the standard interpretation?*

All three courts recognize that the freedom of religion and belief entails a right to believe or not to believe. It also entails that religious as well as other beliefs must be respected. All three courts recognize an individual and a collective dimension. Both the Canadian and the South African interpretations of the freedom of religion and belief include the right to be exempted from mainstream norms and behavior under certain circumstances. The South African “right to be different” is even more bold than its Canadian counterpart. The ECtHR is certainly more restrained in this regard. Its jurisprudence does not include a general affirmation of a right to be different. In cases where manifestations bring the believers in conflict with generally applicable norms, the ECtHR tries to walk a thin line between protecting the individual while not affirming a right to be different.

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34 Benson, *supra* n. 21, at 115, quoting R. Hirschl, *Constitutional Theocracy*, Harvard University Press, Cambridge (USA), 2010, pp. 187 and 202; and at pp. 118-119.



Whereas the ECtHR will try to determine in some objective way the generally recognized form, the highest courts of Canada and South Africa take the subjective standard of the individual as a starting point. The Canadian concept of “sincere belief” also materializes in the South African case law. Because of the emphasis on the subjective content of “belief”, the right to freedom of religion and belief entails more freedom of action and inaction for individuals in Canada and South Africa than in the European Convention area.

The freedom of religion is triggered according to the Canadian case law if a sincere belief was interfered with. The South African case law also uses the interference with sincere belief as trigger. In the Strasbourg case law, failure to act in accordance with a negative or positive obligation by the state triggers freedom of religion. All three courts recognize positive and negative obligations of the state under the freedom of religion and belief.

The SCC takes individual liberty as its guiding principle, with the harm principle, religion à la carte, and sincerity of belief as informing principles. The guiding principle of the CCSA is human dignity, informed by the freedom right: the right to be different; the communitarian component: respect for diversity; and the constitutional principle: positive tolerance. For the ECtHR, pluralism is the guiding principle. The informing principles are the state as organizer of pluralism and the impartiality of organizing pluralism.

The principles between the courts are different in the aspects they stress, but they are not mutually exclusive or generally opposing. They serve to explain similarities and differences between the standard interpretations when it comes to concept, scope and application.

Sections 7.3, 7.4 and 7.5 provide detailed conclusions regarding the concept, scope, and application of the freedom of religion and belief by each of the courts.

3. *Which elements of minimalism are present in the standard interpretation and in which elements does the standard interpretation contradict minimalism and what is the effect of this on optimal protection for believers?*

Of the three courts, the SCC is most consistent in its interpretation of the freedom of religion and belief. The SCC and the CCSA are more minimalist than the ECtHR. The CCSA is most consistent in showing equal concern and respect, even to the side that loses the case.

Arguably the ECtHR has most often used majoritarian or maximalist elements in its approach. The way the margin of appreciation is used, has often not aided in sticking to a minimalist method or purpose. Incrementalism is visible, but a times also *incidentalism*, which prevents consistency. However, in the selected cases it is not more originalist, perfectionist or majoritarian, than it is minimalist. Possibly, more focus on minimalist method and purposes, can help to develop more consistency in the approach to the freedom of religion and belief.

The selected cases show examples where minimalist methodology must be put aside to allow for a wide or deep element in order to further the purposes of minimalism. The minimalistic elements in the case law have generally contributed to optimal protection of believers, by enabling dynamics of balancing and ensuring that equal concern and respect is given to all interests, even when they lose a case. The analysis also shows that the ECtHR has struggled indeed to find an equilibrium between the varying models of state-religion relationships in the Convention area. Generally, it has tended to be more wary of state-sponsored religious beliefs than state-sponsored official secularism. However, the *Lautsi* case can be used to cast doubt on this. Where minimalist elements were present they have generally aided optimal protection of believers.

4. *What can the Courts learn from each others standard interpretation, when it comes to optimal protection of believers; what are the best practices?*

The guiding principles and informing principles the three courts use to decide the freedom of religion and belief cases before them are different in the aspects they emphasize. Yet, the guiding principles are not mutually exclusive. There are also similarities between the standard interpretations when it comes to concept, scope, and application of the freedom of religion and belief. Moreover, the similarities between the codifications of the freedom of religion and belief and methodologies of solving human rights facilitate judicial borrowing between the courts. Section 7.1 provides examples of cases which might have been decided differently had one of the other standard interpretations been applied.

All three courts have illustrated openness towards judicial borrowing. The CCSA, partly due to missing useful precedents in the early years of the democratic order, has been most active in this regard. In several of the selected cases, case law from the SCC or ECtHR is referred to. The ECtHR does tend to focus on the member states when it comes to judicial borrowing. The selected cases, unfortunately, include no references to case law from the SCC or CCSA.

The differences in emphasis between the guiding and informing principles and the impact they have on concept, scope and application of the freedom of religion and belief can partly be explained from the background of the human rights instruments in which the right is codified, as can be seen in sections 7.3 to 7.5. The European Convention was primarily directed against totalitarian ideologies which radically denied and/or undermined even the innermost plane of the *forum internum*. The identity-focused interpretation of elements of the freedom of private and family life only had a modest spillover to the freedom of religion and belief. The Canadian Charter is closely linked with the repatriation of the Constitution and the ambition of developing a Canadian constitutional narrative. The Canadian values based on multiculturalism clearly influenced the development of the freedom of religion

and belief jurisprudence to become an affirmation of individual liberty, association by choice and an inclusive public sphere. The South African Bill of Rights is set within the new Constitution which held the promise of replacing racialism, exclusion, and dominance with the new ethos of the Rainbow nation. The freedom of religion and belief jurisprudence was constructed visibly in the selected cases from this starting point.

The SCC looks for optimal freedom for the believer unless there is (potential) harm to others. Such harm is not easily assumed, but a concrete analysis is made. In *Multani* (section I1.4.10), we see that even in a school environment, a complete blanket ban of the metal kirpan worn by the Sikh student is not an option. An accommodation which reconciles safety of the other students and the freedom of religion and belief has to be found. Equally, in *Amselem* (section I1.4.7), a ban of the *succahs* on the balcony is deemed disproportional. Safety of the other tenants and personal huts can be achieved simultaneously. In *Şahin* (see section 7.5 above), an SCC-inspired approach may have led the ECtHR to demand reconciliation between Leyla's personal liberty and the need to acknowledge the freedom of all those students who chose not to wear the *hijab*. Similarly, in *SAS* (see section 7.5 above), a Canadian-inspired approach may have led to more resoluteness towards the French government. Had all alternatives besides a blanket ban in public places been considered thoroughly enough?

In *Solberg*, (see section 7.4 above), the CCSA looked towards the SCC for inspiration. The SCC clearly inspired the dissenting judges to disqualify the latent favoritism towards one faith, which hid beneath the seemingly neutral rule against liquor sale in supermarkets on Sundays. Much later in *Mouvement laïque québécois* (section I1.4.15), the SCC called "sponsorship of one religious tradition by the State" a "breach of its duty of neutrality" as it amounts to "discrimination against all other such traditions".<sup>35</sup>

All three courts regard the freedom of religion and belief to be protective of a great variety of religious and philosophical traditions as well as individualized beliefs. The CCSA acknowledged in *Pillay* (section I2.4.11) the strong interdependence between cultural and religious beliefs. These two "sing with the same voice".<sup>36</sup> Leaving believers to define their own identity and world of belief, the CCSA will assume *a priori* that practices, even if controversial like corporal punishment or the use of illicit substances, are covered by the freedom of religion and belief. It depends on the analysis under the limitations clause whether interferences can be justified. The CCSA has aimed for optimal freedom for the believer, doing the utmost is done to ensure that even those believers who lose their cases see that they were treated with equal concern and respect.

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35 SCC, *Mouvement laïque québécois v. Saguenay (City)*, Case 35496, [2015] 2 SCR 3, 15 April 2015, para. 64.

36 CCSA, MEC for Education: Kwazulu-Natal and Other v. Pillay, Case CCT51/06, 5 October 2007, para. 60.

The South African approach could have led to another outcome in SCC case *Alberta v. Hutterian Brethren* (section I1.4.13). The CCSA might have walked the extra mile to look deeper into alternative accommodation, or have done more to ensure that the colony saw that it had not lost the world.

The principled and pragmatic minimalist approach the CCSA took in the Muslim marriage cases, could have inspired a different take on the *Yiğit* case (section I3.4.9). While the CCSA considered whether the difference between religious and state marriage was proportional for insurance and inheritance, the ECtHR only looked at the legal obligation for couples to register their marriages.

With a period of more than 10 years between them, the conscientious objection cases decided by the ECtHR show a principled pragmatism and minimalist approach by the ECtHR. In *Thlimmenos* (section I3.4.2), the unjustifiable interference lies not in the prison sentence for conscientious objection (which had already been completed when the case came to Strasbourg), but in the exclusion from the job of his choice for having served a prison term. In *Bayatyan* (section I3.4.11), political developments allow for a widening of the scope; prison terms for conscientious objectors to military service can no longer be justified. Differentiating between the criminal offense as such, committed for faith-based reasons, and the consequences of the punishment for a profession, would have been useful for the CCSA in *Prince*. While the majority focused on why an exemption from the prohibition of marijuana for the Rastafari is unworkable, it overlooked the possibility. Mr. Prince had been barred from becoming an attorney due to his conviction as a “drug offender”, while he was indeed a conscientious objector.

The organizational freedom for faith-based communities is bold in the jurisprudence of the ECtHR. Not only must the state refrain from taking positions in intra-community disputes and stimulating developments, from time to time, individual members’ freedom may be restricted in order to ensure the freedom of the community. Severely criticized by the dissenting judges, in *Fernández Martínez* (see section 7.5 above) and *Sindicatul Păstorul Cel Bun* (section I3.4.13), the majority found for the state organs which had found for the respective churches. In *Hofer* (see section 7.4 above), the majority on the SCC decided that the Hutterian community had breached procedural fairness with regard to the defiant member. The dissenting judge proposed an approach also visible in the ECtHR majority opinions in said cases: becoming a member of a faith-based organization includes the acceptance of “own law” which in times of dispute, might not work in one’s favor.

In *SAS*, the ECtHR took a very cautious and careful approach to the practice in question, the wearing of a religiously motivated face covering. In earlier cases, the Court had attracted criticism from dissenting and concurring judges concerning value judgements regarding tenets of religious beliefs. The SCC (amongst others in *Multani*) and the CCSA (amongst others in *Pillay*) have explicitly rejected value judgements on religious precepts by secular judges,

who are neither qualified nor authorized to decide matters of “inside law”. State neutrality requires the utmost respect for every believer’s sincere belief, no matter how co-religionists or the mainstream may view them. And it is certainly contrary to the freedom of religion and belief for the judiciary or any other state organ to enforce mainstream views on religious communities.<sup>37</sup>

Obviously, whatever we find more or less desirable in the interpretation of the freedom of religion and belief, depends greatly on individual interpretation and preferences. In section 2.8 optimal protection was defined as a broad and liberal concept and scope of religion and belief, the right being easily triggered. Absolute protection of believers in holding beliefs and as much as possible protection of believers in manifestation their religion or belief either alone or in community with others and in public or private in teaching, practice, worship, and observance. The limits should only lie in rights of others or compelling specified purposes, when required in a LDC system and prescribed by law. Optimal protection thus, is a form of maximum protection, which also includes maximum protection of other human rights and compelling general interests. It thus assumes an optimum where all of these are carefully balanced.

The freedom of believers is inhibited by painful choices, not just outright suppression. Neutral rules of general applicability can seriously interfere with personal beliefs, some more commonly shared by groups of believers, some more individual. Creating exemptions or otherwise accommodating believers, even when the practice is socially controversial, is a solution. Optimal protection is afforded, when exemptions or accommodations are provided – unless the exemption or accommodation would somehow undermine the entire purpose of the rule of general application.

Exemptions or accommodations can, however, require great effort or cause unease in larger society. Such is the price of an open society, in which different tastes and pursuits are accommodated. “Pluralism, tolerance and broadmindedness” even includes everyone’s right to “shock, offend and disturb”.<sup>38</sup> Tolerance consists not only of the acknowledgement of the other’s existence, but also of equal concern and respect for others’ equal freedom. Tolerance does not require agreement with the beliefs of others and their subsequent practices. The promotion of tolerance by state organs in a pluralist setting is an important element of a democratic open society.

In the dimension of family law and family relations, thorny issues can arise when parents and authorities or (separated) parents disagree about beliefs and the best interests of the child. The freedom of religion and belief is certain-

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37 SCC, *Trinity Western University v. College of Teachers*, Case 27168, [2001] 1 SCR 772, 17 May 2001, para. 28, citing SCC, *R. v. Big M Drug Mart Ltd.*, Case 18125, [1985] 1 SCR 295, 24 April 1985, pp. 336-337.

38 ECtHR (GC), *S.A.S. v. France*, app. no. 43835/11, 1 July 2014, Joint partly dissenting opinion of Judges Nussberger and Jäderblom, paras 6-10.

ly not absolute and there are situations where decisions based on beliefs irreversibly jeopardize the health or life of a minor. If courts intervene, this is best done under the limitations clause, acknowledging that the freedom of religion and belief is triggered, but must be limited in light of the rights and freedoms of others. Young individuals like AC in *AC vs. Manitoba* (section I1.4.12) are still minors or have not yet reached the legal age, where their own wishes need to be taken into account, but they have their own beliefs. Adjudication can take these beliefs into account, even though they might not be determinative in the medical case.

Tensions between separated parents regarding proper upbringing and instilling beliefs are bound to happen. This might lead to confusion for the child/children in question. As the dissenting justices McLachlin and Sopinka note in *P. (D.)* (section I1.4.3), “confusion” is not the same as “harm”.<sup>39</sup> Confusion is not enough to justify interference with the freedom of religion and belief, while the freedom of religion and belief protects parents and their children so they can get to know one another as their true selves.

Both (purely) religious marriages and same-sex marriages endure non-recognition in some legal systems. Non-recognition implies the absence of legal benefits and protection. It is tied to the dominant view of marriage which is also dominant within legislation. Adjudication, based on the freedom of religion and belief and equality rights, might require judges to find that non-recognition interferes with freedom rights or that freedom rights require affording non-legal unions certain legal consequences. While the freedom of religion and belief affords protection to many different beliefs on marriage and family, it also requires that none of these may be imposed on others who believe differently.

The freedom of religion and belief naturally has a collective dimension. In fact “freedom of religion, as an individual right, may be nullified unless complemented by a collective human right of the religious group to construct the infrastructure”.<sup>40</sup> Collective practices may collide with seemingly neutral laws of general applicability as in individual cases. Exemptions and accommodation can solve the problem, especially when opposing interests can be reconciled as in *Sioui* (section I1.4.1). Sometimes reconciliation is impossible as in *Christian Education* (section I2.4.6), because accommodation or exemption would undermine a purpose which is directed at the protection of the rights and freedoms of others; in that case, those of all children not to be subjected to corporal punishment.

Organizational freedom often raises complex issues of the relationship between inside and outside law. Whatever the relationship in different legal

39 SCC, *P.(D.) v. S (C.)*, Case 22296, [1993] 4 SCR 141, 21 October 1993, p. 65.

40 Y. Dinstein, ‘Freedom of Religion and Religious Minorities’ in Y. Dinstein (ed.), *The Protection of Minorities and Human Rights*, M. Nijhoff, Dordrecht (Netherlands), 1992, p. 152, cited Evans, *supra* n. 32, at 103.

systems, inside and outside law can never be regarded as totally distinct, and group members may in some cases approach the judiciary of the outside law and rely on their fundamental freedoms. This requires balancing between collective and individual rights and thus of voluntarism and the responsibility of state organs not to delegate their decisions to non-state faith-based bodies. Nevertheless, legal pluralism, whether more organic and informal or conceptual and formal, fits with the logic of human rights and liberal democratic constitutionalism and secular courts have no reason to shy away from it.

The dimension of education relates to both the public educational system and where existent, faith-based institutions. The major difference is that faith-based institutions are not for everyone, they are for people who share the beliefs of the particular institution.<sup>41</sup> Public educational institutions, on the other hand, are for everyone – believers of different creeds, non-religious believers, non-believers and the unconcerned. Optimal protection of the freedom of religion and belief does not deter religious education or religious manifestation in public educational institutions, but it does require inclusive equality in the sense that no belief should be taught or manifested to the detriment of all others. At least those who object must always have a viable opt-out possibility. Trying to neutralize religious symbols by redefining them as “traditional” as in *Lautsi* (section I3.4.10), is neither respectful to those who feel excluded, nor to those who attach important spiritual value to the symbol.<sup>42</sup>

Instilling tolerance is one of the objects of public education under the freedom of religion and belief. Tolerance is appropriate for every age<sup>43</sup> and arguably requires “religious literacy”.<sup>44</sup> It is the task of courts to balance when conflicts arise between the pluralist cleavages. This includes the situations in which sincere believers collide with school rules, which adversely affect their practices. Exemptions and accommodations are part of the judicial “toolkit” for optimal protection as shown in *Multani* (section I1.4.10) and *Pillay*.

Faith-based institutions are often established to create a learning environment based on the beliefs of a faith-based community. Tension can arise when the affirmation of the group values leads to real or perceived rejection of the larger society. Reciprocal pluralism requires reciprocal accommodation: communities benefit from pluralism, but also accept the surrounding pluralism. The selected cases show the fine lines in adjudication. Voluntarism and autonomy need to be respected, but constitution-free or human-rights-free zones cannot be accepted (see the separate opinion of Van der Westhuizen in *De*

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41 See *Trinity Western University v. College of Teachers*, Case 27168, *supra* n. 37, para. 25.

42 J.H.H. Weiler, ‘Lautsi: Crucifix in the Classroom Redux’, in *The European Journal of International Law*, vol. 21, no. 1, pp. 1-6 (2010), p. 5.

43 See SCC, *Chamberlain v. Surrey School District No. 36*, Case 28654, [2002] 4 SCR 710, 20 December 2002, para. 69.

44 C. Evans, ‘Religious Education in Public Schools: An International Human Rights Perspective’, in *Human Rights Law Review*, vol. 8, no. 3, pp. 449-473 (2008), pp. 454-459.



*Lange*, section I2.4.15).<sup>45</sup> Different circumstances lead to different outcomes in a case-by-case approach. Balancing under the limitations-clause iterates that legitimate rights on both sides are involved.

Balancing the freedom of religion and other rights is not a generalist zero-sum game, but determining which should take priority over the other “under the circumstances and why”.<sup>46</sup> LGBTQ+ equality and the freedom of religion and belief are not generally competing rights. To the contrary, in many of the equality cases, LGBTQ+ protagonists could easily rely on the freedom of religion and belief as much as on equality and privacy rights. The introduction of same-sex marriage to guarantee the rights of such couples, does not mean that those who hold (religious) beliefs against same-sex marriage must submit to it. They have a constitutional/human right not to be accessory or facilitating in the legal realization and ceremonies of such unions.

Tolerance in a pluralist society requires reciprocity and does require acknowledging the existence of the other, even if we do not agree with them. This goes for relationships between the mainstream and minorities as well, may they be minorities of believers or sexual orientation and/or gender minorities. After all, the principle is “majority rules, minority rights”. Sometimes we must even accept a certain risk of harm, to enable all of us to live in accordance with our sincere beliefs and truly respect difference. By judicially acknowledging, in cases of competing interests, that constitutional rights have been triggered on all sides, constitutional (or human rights) relevance is given to all. While balancing determines the outcome, no party loses the world, but only a case. Legal assumptions can help to balance under the limitations clause, when not wishing to go into detailed analysis whether or not certain manifestations or practices are actually covered by the right.

Critics of balancing argue that it blurs rights into a general *mélange* of mutual respect.<sup>47</sup> But balancing, as we saw in many of the selected cases, requires giving robust meaning to all rights involved, while the outcome is measured in terms of equal concern and respect.

Where freedom of religion and belief meets secularism, which is in the majority of the selected cases from each of the courts, it is necessary to distinguish between secularism’s many faces. Secularism can be a world view or belief which competes with other world views or beliefs. As such, state neutrality under the freedom of religion and belief requires that neither secularism nor any religious belief be manifested and professed by public institutions to the exclusion of all others.<sup>48</sup> Accommodation of religious and secular beliefs

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45 CCSA, *De Lange v. Presiding Bishop of the Methodist Church of Southern Africa for the Time Being and Another*, Case CCT223/14, 24 November 2015, paras 69-74.

46 Evans, *supra* n. 32, at 164.

47 Harris, O’Boyle & Warbrick, *supra* n. 27, at 440, paraphrasing M.D. Evans, *Religious Liberty and International Law in Europe*, Cambridge University Press, Cambridge (UK), 1997, p. 365.

48 *Compare Mouvement laïque québécois v. Saguenay (City)*, Case 35496, *supra* n. 35, para. 87.



must be fair and even.<sup>49</sup> All believers and non-believers must have equal access to the institutions of the state and be represented in them, if they so wish.

State neutrality as informed by the freedom of religion and belief and to guide adjudication, is best summarized by Justice Sachs' words in *Fourie* (section I2.4.10): "[T]here must be mutually respectful co-existence between the secular and the sacred. The function of the Court is to recognize the sphere which each inhabits, not to force the one into the sphere of the other."<sup>50</sup>

The discussion above shows that neither the courts, nor claimants, nor respondents, can escape a necessity of "law's religion", a definition of religion and belief by secular courts, who necessarily belong to the secular sphere, even in states where state law is greatly influenced by religious law.<sup>51</sup> Some believers may feel unrecognized by the marginal, instrumental, and subjective formulation of their (religious) beliefs in law's religion. But law's religion, depending on how it is defined in concrete cases, can aide optimal protection of believers, to live their lives in accordance with their beliefs, against the state, other societal institutions, and the members of different or the same faith-based community. This potentially opens the door for any endeavor to realize a more holistic pluralism<sup>52</sup> which escapes ideological secularism, totalizing liberalism's and/or modernity's potentially totalizing ambition.<sup>53</sup>

Literature shows that, generally, consistency in the standard interpretation of the freedom of religion and belief is appreciated because it creates transparency, predictability, and the possibility of critical review. Minimalism is helpful to create consistency and also optimal protection. Minimalism, however, does recognize its own limits: it is not always the best option in every case. Courts create a jurisprudence which fits into the legal-political values of the system in which they function; this, as such, is no deviation from minimalism. And if the courts maintain a balance in each of the five continuums mentioned above, minimalism is certainly possible as we see in Chapter 6.

In the jurisprudence, we can identify certain main guiding principles as well as subsequent informing principles for the standard interpretation of the freedom of religion and belief. They are connected to the legal-political values of the system in which they function. Between the courts, the guiding principles are neither opposing nor mutually exclusive. They do, however, differ

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49 E.E. Goodsell, 'Constitution, Custom, and Creed: Balancing Human Rights Concerns with Cultural and Religious Freedom in Today's South Africa', in *Brigham Young University Law Review*, vol. 21, no. 1, pp. 111-154 (2007), pp. 126-127.

50 *CCSA, Minister of Home Affairs and Another v. Fourie (e.a)*, Cases CCT 60/04 & 10/05, 1 December 2005, paras 93-94.

51 Compare Hirschl, *supra* n. 34, at pp. 247-249.

52 Compare Benson, *supra* n. 21, at 115, quoting Hirschl, *supra* n. 34, at 187 and 202; and at pp. 118-119.

53 Compare J. Harrison, *Pluralism and Disagreement*. In *Post-Liberal Religious Liberty: Forming Communities of Charity*, Cambridge University Press, Cambridge (UK), 2020.

in their emphasis and internal logic. This, in turn, can lead to very different outcomes in similar cases. Hence, these different guiding principles can create opposing or colliding outcomes as well as parallel and even identical outcomes.

Given the similarities in codification of the freedom of religion and belief in the three instruments and the similarities between the guiding and supporting principles, judicial borrowing is certainly possible. The three courts could certainly benefit from each other's case law. This should be motivated by awarding individual believers and faith-based groups optimal freedom and protection within a system based on human rights, the rule of law and democracy, situated in pluralist societies.

The best practices established in sections 4.8.2, 5.7 and 6.6 are as follows:

1. Recognition of all sincere religious, cultural, or other beliefs as triggering protection without prior exclusion, limiting them where necessary under the limitations clause. No objectivation by dogma, officials, or statistics.
2. Preventing painful choices and allowing for, or ordering accommodation and/or exemption, where reconciliation between freedom of religion and belief and other rights or important aims of public policy is needed. Where this is impossible, taking of the sharp edges of enforcing a law against conscientious objectors.
3. Absence of value judgement from any other perspective than the believers' own perspective. No substitution of the own understanding believers have of a belief or practice with that of judges or other state officials. Being weary of all forms of paternalism, directed at believers.
4. Inclusive protection: preventing division into insiders who belong, and outsiders who are tolerated. Recognition that all official state policies inspired by state religion and/or state secularism are potentially intrusive to all outside the mainstream. Concepts like the "right to be different", "equal religious citizenship" or a pluralist understanding of democracy aid in this.
5. Promoting tolerance and providing that other state institutions do so; tolerance requires some cognitive dissonance and always extends to the beliefs others find bizarre and even threatening.
6. Protecting human rights and pluralism, never delegating, or letting other state institutions delegate the responsibility to private institutions, faith-based or otherwise.
7. Being reflective of social reality and allowing for a flexible co-existence between state law and "own" law. Allowing for communities to govern themselves, while autonomy is never absolute.
8. Equal concern and respect for all sides, taking the losing party's point of view seriously: showing real understanding for their point of view.
9. Balancing under the limitations clause: rather than finding no interference at all or *a priori* justifications of limits. If necessary, using judicial assumption.

10. Deciding one case at a time, especially with thorny issues, embracing contextualism, deciding only what needs to be decided to solve the case, making use of procedural considerations, where possible.
11. Being conscious of the inter-institutional dialogue with the executive and legislative powers, but resolute protection of human rights: no state or state institution or legislative body has a natural inclination to protect human rights; it is the judiciary's role to check and balance.
12. Applying a broad, liberal, and subjective-based concept of religion and belief that informs the scope of and the trigger points for the protection.
13. Embracing difference as the consequence and perquisite of freedom. Enabling dynamics for a holistic pluralism and awareness of the complex relationship between the secular and the religious in a free, open, and diverse society.
14. Allowing faith-based communities to provide alternatives for state institutions like marriage, schooling, welfare and so forth.
15. Making use of incomplete theorization, also with respect to the guiding principles in interpreting the freedom of religion and belief.
16. Incremental development of the jurisprudence, sticking to the case at hand.
17. Adherence to the purposes of minimalism, being flexible with regard to its methodology, going wide or deep where necessary after minimalist groundwork.

## 7.7 OVERALL CONCLUSION OF THE STUDY

Mary Dryer, mentioned in the introduction to this chapter, was forced to choose between life and liberty. Only truth made her free, and those who executed her asked her to renounce what she held to be the truth. Those who executed her, held a different truth to be true. And so, the essence of feeling unfree is to acknowledge as true what we deem not to be true, and to renounce what we hold to be true.

Societies are only free if no one has to choose between truth or life. However, freedom also requires that everyone can follow their own path to God, as in the proverb used in Chapter 1, in the absence of oppression, restriction and persecution. Even more so, societies can only be said to be truly free, if everyone enjoys a positive spiritual freedom. This freedom includes the freedom to reject the spiritual life.

It took a little more than a hundred years until not far from Mary's place of execution, a number of people (yes, all white and male) announced in the name of the people of the 13 colonies of Britain, that certain truths were "self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the Pursuit of Happiness. That to secure these rights, Governments are instituted

among Men." Any government, argued the Declaration of Independence, which conducted itself in negation of these truths, could be rejected by the people.<sup>54</sup>

The Declaration of Independence is entangled with the narratives of Enlightenment, the modern state, modern constitutionalism and modern law. It has been echoed many times since, not only in the United States, but elsewhere in the world. It changed not only the continent from which the (white Anglo -Saxon Protestant) Founding Fathers had originated. It also inspired the struggles for independence of the Latin American, Asian and African Nations from colonialism and imperialism. It further inspired past and present movements for justice and equality for all, irrespective of race, ethnicity, language, culture, religion, belief, gender, sexual orientation, physical and mental (dis)abilities, and whatever sociological distinction people make.

But the text also shows a clear and evident spiritual foundation. Whether one attributes this foundation to Protestantism, Christianity, Judeo-Christian tradition, Abrahamic faiths, theism, deism, agnosticism, functional religionism or all of the above, the Declaration mentions God, as a force *a priori* to all man-made governments. Indeed, a great variety of religions, denominations, faiths and creeds can identify with this idea, and the three rights mentioned. While militant secularists and some militant religionists are engaged in an eternal battle for legitimacy between state and religion, believers are as much the true heirs of modernity as are unbelievers, agnostics and the unconcerned. In this secular age (Taylor), people have the option not to believe in uncountable ways, but they also have the option to believe in accountable ways.<sup>55</sup> The freedom of religion and belief protects all the options, being quintessential for each and everyone's rights to life, liberty and the pursuit of happiness. This is what we learn from the old Sufi wisdom about the many paths to God and the story of Mary Dryer.

This Chapter began with a quote by Judge Learned Hand, used by Cass Sunstein to illustrate the importance of judicial minimalism. The judge tells us that the spirit of liberty values humility and the acknowledgement of human fallibility. Believers of many faiths as well as a-religious, irreligious, and even anti-religious convictions have, from time to time, accused the kindred spirits of Judge Learned Hand of a destructive moral relativism. But in fact, it is no such thing. Only those who believe in Truth with a capital "T" have reason to believe that they can never be too sure that they are right. For those who believe that they alone are the creators of truth, certainty in matters of truth seems natural.

The Declaration of Independence expresses the notion of human rights as the hyper-goods. We might not be able to agree at all times on ecclesial and metaphysical truths, but we can agree that every one of us would feel

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54 Declaration of Independence of the Thirteen United States of America, 4 July 1776.

55 C. Taylor, *A Secular Age*, The Belknap Press of Harvard University Press, Cambridge (USA)/ London (UK), 2007, pp. 1-4

unfree if given Mary Dryer's choice and that none of us would want to be in her position. The rights of life, liberty and pursuit of happiness are, if you will, a universal incompletely theorized agreement, based on our understanding of human history – ancient and recent, and our present condition.

The freedom of religion and belief is inherently connected to freedom as the incompletely theorized aspiration of individuals, communities, and nations. Because, if like for Mary, others dictate the truth to us and leave us with the choice between obedience and punishment, they assault freedom as such. Freedom of religion and belief has therefore featured in all important human rights documents. Far from being designed to secularize society, the Declaration of Independence makes it perfectly clear, that the freedom of religion and belief can be based on profound religious beliefs.

As the philosopher Abdolkarim Soroush explained eloquently, forced obedience to a religious precept deprives the act of performing the religious precept of its religious essence.<sup>56</sup> Freedom of religion and belief is therefore essential for religion and belief itself. It provides the protection so that all acts of worship, reverence, ritual, manifestation, practice and tradition are essentially religious and/or faithful. Paraphrasing Langa in *Pillay* this is why when it comes to sincere beliefs, "religion and culture sing with the same voice".<sup>57</sup>

Governments, so the Declaration of Independence tells us, have been instituted to protect life, liberty, and the pursuit of happiness. The "spirit of liberty", as said, "is that spirit which is not too sure that it is right".<sup>58</sup> This is why minimalism aims to operationalize caution, humility, and evenhandedness in the interpretation of rights. Equal concern and respect for all sides, including the side that loses a case, is quintessential to preserve the spirit of liberty. It is quintessential for the interpretation of the freedom of religion and belief. Equal concern and respect fits well with the guiding principles of the three courts, individual liberty, human dignity, and pluralism.

Because of the spirit of liberty, governments and courts should deal with the content of the freedom of religion and belief and not so much with the content of the religion or belief itself. In such a way the secular and the sacred can coexist in mutual respect, none forcing itself onto the other.<sup>59</sup> After all, the right to liberty is "self-evident" as the Founding Fathers say. It is self-evident, because it protects all believers in their search for less self-evident truths. Freedom of religion and belief, interpreted in a minimalist way to include equal concern and respect for all, has an innate message of tolerance.

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56 A.K. Soroush, 'Reason and Freedom', in *Reason, Freedom, and Democracy in Islam, Essential Writings of Abdolkarim Soroush*, M. Sadri and A Sadri (eds.), Oxford University Press, Oxford (UK) et al., 2000, pp. 100-105.

57 MEC for Education: KwaZulu-Natal and Other v. Pillay, Case CCT51/06, *supra* n. 36, para. 60.

58 Sunstein, *supra* n. 1, at 35.

59 CCSA, *Minister of Home Affairs and Another v. Fourie (e.a)*, Cases CCT 60/04 & 10/05, 1 December 2005, paras 93-94.

Tolerance does not require us to accept the other's beliefs as true. It requires us to acknowledge the other, their beliefs, and that they are deserving of the same concern and respect as we and our beliefs are. "Tolerance is always age-appropriate."<sup>60</sup>

Minimalism aids to develop a consistent line in interpreting the freedom of religion and belief, while realizing optimal protection for believers. Sometimes this requires sticking to the methodology of minimalism, sometimes keeping the purposes in mind, sometimes being flexible with the methodology in light of the purposes. Minimalism provides the chance to treat the guiding principles as ever evolving incompletely theorized agreements, within the larger framework of human rights and constitutional instruments that are "alive". This enables judicial borrowing. All this allows for the judiciary to fulfill its place in liberal democratic constitutionalism.

Given its inherent relationship with individual liberty, human dignity and pluralism, the freedom of religion and belief is of fundamental importance to all human beings. It contains (in the words of the ECtHR) the "vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, skeptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it."<sup>61</sup>

If adjudicated in this way, the freedom of religion and belief will enable (in the words of the SCC) "a truly free society, which is one which can accommodate a wide variety of beliefs, diversity of tastes and pursuits, customs and codes of conduct".<sup>62</sup> The freedom of religion and belief then entails (in the words of the CCSA) "the right to be different". Someone's beliefs or those of a group of believers, may strike others as "bizarre, illogical or irrational", yet this "does not detract from the fact that these are religious beliefs for the purposes of enjoying the protection guaranteed by the right to freedom of religion".<sup>63</sup> "Religious tolerance is accordingly not only important for some of us, but "deeply meaningful to all of us because religion and belief matter, and because living in an open society matters".<sup>64</sup>

In Chapter 2, I positioned this study within the (neo) pluralist endeavor to find space and underpinnings for a more genuine, broad and meaningful pluralism which would allow a great variety of believers – individuals and communities – to enjoy more freedom to lead every aspect of their lives in accordance with their (religious) beliefs. I also positioned the study in the classical liberal understanding of the freedom of religion and belief, in the

60 See *Chamberlain v. Surrey School District No. 36*, Case 28654, *supra* n. 43, para. 69.

61 *Kokkinakis v. Greece*, app. no. 14307/88, *supra* n. 5, para. 31.

62 *Chamberlain v. Surrey School District No. 36*, Case 28654, *supra* n. 43, para. 135; and *Trinity Western University v. College of Teachers*, Case 27168, *supra* n. 37, para. 28, quoting *R. v. Big M Drug Mart Ltd.*, Case 18125, *supra* n. 37, pp. 336-337.

63 *Prince v. President of the Cape Law Society*, Case CCT36/00B, *supra* n. 2, para. 42.

64 *Ibid.*, paras 164-170.

sense that a more authentic, broad and meaningful pluralism is required by the demands of liberal-democratic constitutionalism and, vice versa, a new more authentic, broad and meaningful pluralism will require many of the achievements of liberal-democratic constitutionalism. Having said this, throughout the study I have been curious about and have embraced all post-liberal and post-secularist concepts and notions which try to evolve, rather than negating the achievements of liberal-democratic constitutionalism while fixing its fallacies.

Along every path dilemmas are encountered, and the greatest dilemma I encountered throughout the study is what I would call the “tolerance paradox”. The selected cases, the related commentaries, and the broader literature used in this study are full of examples and arguments concerning tolerance. Many of the marginal and marginalized believers – individual and collective – request tolerance for their difference. Some may point to the intolerance of the tolerant, who for example attempt to enforce mainstream views about gender, sexual orientation, sexual morality and/or family, on those who hold different beliefs. Yet, some of them may not be as tolerant to others, as they would have others be unto them. The tolerance of an open society must stretch to those who in their “inside law” are less tolerant of difference. But the project of a new pluralism must not be a project to undo existing pluralism, but one that enriches it further. Hence, from time to time we must handle the tolerance paradox in concrete cases, by adopting reciprocal pluralism (Esau).

Believers – orthodox, heterodox, mystical, traditional, reformed or new – seek to carve new space into the building blocks of liberal constitutionalism, to create liberty for themselves. They want to live meaningful lives in accordance with their beliefs, create meaning by living with others, contribute to meaning by being part of a larger society. This is quite similar to others who are also trying to carve new space into the same building blocks: ethnic, cultural and linguistic minorities, indigenous peoples, the gender and sexual identity minorities, those with different physical and mental abilities and all others who have felt that mainstream modernity has thus far stifled their liberty and rejected their identity, who have long suffered from non-recognition and exclusion and sometimes worse.

In an interesting tercet article, devoted to finding post-liberal pluralism for religious worldviews, Ian T. Benson laments the absence of an “argument from a moral framework, based on cogent metaphysical positions and expressed within a clear legal tradition” in cases of current “identity politics”. He tells us that “the assertion, [...] that a man can be a woman because he ‘feels’ like a woman is widely accepted under the plasticity of ‘gender’, and the fact that it cannot be true genetically is largely ignored.”<sup>65</sup> Forget for a

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65 C. Lombaard, I.T. Benson and E. Otto, ‘Faith, society and the post-secular: Private and public religion in law and theology’, in *HTS Teologiese Studies/Theological Studies*, vol. 75, no. 3, a4969 (2019), p. 12



minute how to assess this opinion on a tolerance scale. Mr. Benson is falling into a recognizable trap of the very modernist totalizing worldview he is trying to save his co-religionists (and possibly other believers) from. Just because we cannot make something visible in the material world does not mean that it is not real! Are the (current) limits of modern science to be the hallmarks of what may or may not be ignored?

There is a universe full of wonders out there, some of which have been known throughout eras, only to be forgotten for subsequent epochs. In the rediscovery of our religious and cultural traditions before the dawn of modernity, we may find many things that surprise us.<sup>66</sup> For example, gender fluidity is far from an exclusively post-modern phenomenon. Before modernity forced us to rethink everything within the harsh limits of binary positivism, many of our authentic traditions already recognized a plurality of existences.

Law's religion may not always be the dear, intimate, and close friend we believers instinctively recognize, but it may, nonetheless, be a friend. A friend that enables our (re)connection with that first friend as a holistic system which inspires, challenges, and enlightens us to find new understandings of our lives, our world, and our existence in the very manifestations of our religions or beliefs in teaching, practice, worship and observance we share with many generations before us. It can invite us to free ourselves from those modern projections of our traditions caught up in uninspired institutions, soulless formalism, instruments of power and political ideology. This secular age may after all be our age as believers, because it enables us to let go of the modern desire to control others and our surroundings and instead, in faith create meaningful lives, relationships and communities.

In my personal opinion, the holistic pluralism believers should strive for in their endeavor to achieve further evolution of liberal democratic constitutionalism, should be connected to an understanding of our lives, world, universe and our existence therein as something extremely diverse. Diversity indeed going beyond everything we humans, each of us living as tiny fragments in all eternity, could ever know, conceive or understand. We should be loving wherever we encounter it, amazed by its potential and in awe of its miraculous beauty. Such is, I sincerely believe, to understand our true place in Creation.

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66 Inspiration may be drawn from K. Armstrong, *The Lost Art of Scripture, Rescuing the Sacred Texts*, Vintage Publishing, London (UK), 2019.

# Summary

## 1 CHAPTER 1: GENERAL INTRODUCTION: DIVERSITY OF RELIGION AND BELIEF AND JUDICIAL INTERPRETATION

“There are as many paths to God, as there are souls in this world”. The Sufi wisdom may inspire a lifelong spiritual journey or an array of debates. In a nutshell it also explains why various international and constitutional documents recognize the freedom of religion and belief. This human right protects every believer, which includes those defining themselves as unbelievers, from interference by others and the state.

The Canadian Charter of Rights and Freedoms, the South African Bill of Rights and the European Convention on Human Rights each recognize the freedom of religion and belief. They use partly similar, partly different words and legal concepts, but they share a common core, which may be summarized in Article 18 of the Universal Declaration of Human Rights (freedom of thought, conscience and religion) reads:

“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.”

While the codifications of the right share this common core, cases in which believers, including non-believers, claim that their freedom of religion and belief has been interfered with, may be different in outcome. Differences, which can be understood and analyzed only by looking into the interpretation of the freedom of religion and belief by tribunals in various cases. This study is interested in finding and comparing the standard interpretation of the freedom of religion and belief of the Supreme Court of Canada (SCC), the Constitutional Court of South Africa (CCSA) and the European Court of Human Rights (ECtHR). The comparison should contribute to understanding how judicial interpretation matters for providing for optimal protection for all believers.

Optimal protection, is defined in Chapter 2. This study follows Cass R. Sunstein’s argument, that “judicial minimalism”, is the theory of interpretation best suited for human rights within a pluralist context and within the framework of liberal democratic constitutionalism. The study shall look into the

minimalist elements in the interpretation of the freedom of religion and belief of each court. The following categorization is used to analyze the selected cases:

1. personal freedom;
2. family law and family relations;
3. group autonomy;
4. education;
5. balancing freedom of religion and belief with other rights and;
6. secularism.

These are the not mutually excluding dimensions of the freedom of religion and belief which can be found in actual freedom of religion and belief cases.

Fifteen cases from each of the courts in the period from 1990 until 2015 were selected for this study. However, for reasons particular to each of the jurisdictions for the ECtHR, only cases after 1998 were selected and for the CCSA, only cases after 1996 were selected. The cases were selected as to represent a diverse selection of cases which raise the more difficult questions regarding the freedom of religion and belief as opposed more procedural or formal issues.

After the chosen period, new freedom of religion and belief were decided by the courts. Up to April 2022, these were roughly two more cases by the SCC, seven by the CCSA and three by the ECtHR. As these were not included in the analysis, this study cannot answer whether the current standard interpretation regarding the freedom of religion and belief in each of the courts is different from what was found in the cases. Nevertheless, the analysis and comparison still allows for conclusions regarding the impact of standard interpretations for the outcome, the implications for the concept of the freedom of religion and belief, its scope and when and how it is triggered. Moreover, even if the standard interpretations have changed in later cases, the study allows for the conclusion that the main and supporting guiding principles, found in the selected cases, will have been applied and used in any possible change.

While the ECtHR is the only international tribunal, as compared to the highest tribunals in two national constitutional orders, the comparison is still fair. Each of the jurisdictions has elements of common law and continental law and is characterized by multiple judicial and legislative layers. Even debates pertaining to authority and legitimacy in regard to judicial interpretation are very similar in each of the jurisdictions. The following research questions are answered in this study:

1. *What are the standard interpretations of the freedom of religion and belief of the Canadian Supreme Court, the South African Constitutional Court, and the European Court of Human Rights; and how are they applied in the six dimensions personal freedom; family law and family relations; group autonomy; education; balancing freedom of religion and belief with other rights; and secularism?*

2. What concept of the freedom of religion and belief do each of the Courts apply, how broad is the scope of protection and how is the freedom of religion and belief triggered in the three standard interpretations and what are the reoccurring guiding principles within the standard interpretation?
3. Which elements of minimalism are present in the standard interpretation and in which elements does the standard interpretation contradict minimalism and what is the effect of this on optimal protection for believers.
4. What can the Courts learn from each others standard interpretation, when it comes to optimal protection of believers; what are the best practices?

## 2 CHAPTER 2: THEORETICAL FRAMEWORK: CONCEPTS OF FREEDOM OF RELIGION AND BELIEF AND OF JUDICIAL MINIMALISM

The freedom of religion and belief is one of the oldest classical human rights. Different periods in history and different places in the world are cited for its origin. People from a number of the world's religious and philosophical traditions would argue that the values underlying human rights in general and the freedom of religion and belief stem from these traditions. While the existence and importance of the freedom of religion and belief as a human right can be explained from a historical perspective, several pragmatic, faith-based and pluralist arguments can be given. Either of these will show the importance of the freedom of religion and belief within a framework of several values, rights and or concepts all relating to peace, justice and liberty.

From a perspective of modern international and constitutional law and Western legal history, the Peace of Westphalia in 1648 CE (Common Era)<sup>1</sup> is a feasible starting point for a historical analysis. Modern human rights instruments after World War II, beginning with the Universal Declaration of Human Rights all include the freedom of religion and belief. Regional human rights instruments such as the European Convention of Human Rights and Fundamental Freedoms, the American Declaration of the Rights and Duties of Man, the African Charter on Human and Peoples Rights all include this right.<sup>2</sup> It has been affirmed by faith-based and/or interfaith initiatives like the Cairo Declaration of Human Rights in Islam and the Parliament of the World's Religions. It is included in most of the world's constitutions.

Most of the world's constitutions and human rights instruments recognize the freedom of religion and belief, while adjudication shows, there is always

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1 See M. D. Evans, 'Historical Analysis of Freedom of Religion and Belief as a Technique for Resolving Religious Conflict', in T. Lindholm, W.C. Durham Jr., B. Tahzip-Lie (eds.), *Facilitation Freedom of Religion or Belief, A Deskbook*, Marinus Nijhoff Publishers, Leiden (Netherlands), 2004.

2 See T. Lindholm, W.C. Durham Jr., B. Tahzip-Lie (eds.), *Facilitation Freedom of Religion or Belief, A Deskbook*, Marinus Nijhoff Publishers, Leiden (Netherlands), 2004, Appendix A.

need and room for judicial interpretation. The interpretation, as with any right, matters for the outcome. The principles of interpretation of the freedom of religion and belief, which the various members of a court agree upon, make up the standard interpretation, which can be reconstructed by analyzing the case law.

It is not difficult to make the case that interpretation matters. Generally, in cases of constitutional and/or human rights and specifically with regard to the freedom of religion and belief. Similar situations also lead to different outcomes in some of the selected cases even when only compared superficially. When courts adjudicate these cases, they engage in an internal discourse. With every new case, they continue the discourse. Even when the judges disagree, they make use of the same principles and conceptions, which function as a mid-level agreement between them. While these principles and concepts evolve, one case at a time, they are seldomly aborted completely. I call this the standard interpretation of the freedom of religion and belief.

Scholars of jurisprudence have long distinguished different theories of judicial interpretation. Cass R. Sunstein's typology distinguishes between "perfectionism", "originalism", "majoritarianism" and "minimalism". He positions himself as an advocate of the last, arguing it is most suited for pluralist societies, organized as liberal-democratic constitutional orders.

"Minimalism" is not associated with any particular political and/or philosophical project other than LDC generally. This makes minimalism as suitable standard to compare the three standard interpretations, once they have been reconstructed. This study follows Sunstein's argument and regards minimalism as the preferable theory of interpretation above its competitors, namely originalism, perfectionism and majoritarianism.

Minimalism favors "incompletely theorized agreements", "narrow" and "shallow" rulings and deciding one case at a time. It disfavors value judgments founded in specific traditions, politics and ideologies and "deep" and "wide" rulings. Being based in a principled pragmatism, it does acknowledge that from time to time deep and/or wide rulings can be necessary and useful to resolve a deeper issue and to make a red thread which was developed incrementally explicit.

Cases decided by courts, in which the freedom of religion and belief plays a major role often involve the "judicialization of mega-politics" (Hirschl).<sup>3</sup> This is to say they raise fundamental issues pertaining to constitutional, cultural and religious values, pluralism, social trends, individual and collective identity and so forth. The origins of the predominant codifications and judicializations in Western legal history are cited by some to argue that certain inherent flaws exist within the right and its application. Others will point out that while some flaws may exist as a result of the Western dominance in long

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3 R. Hirschl, *Constitutional Theocracy*, Harvard University Press, Cambridge (USA)/London (UK), 2010.

periods of modern global history and legal development, the Western bias can be fixed.

In a discussion of the relationship between the freedom of religion and belief and liberalism and/or secularism, some will argue that liberal democratic constitutionalism has an inherent secular bias. Hirschl argues that secularization by law even takes place in jurisdictions with strong establishment of religion and belief. The study distinguishes between institutional secularism, which is aimed first and foremost at even handedness, while ideological secularism is a direct competitor for religious and other beliefs. The freedom of religion and belief can aid in securing that institutional secularism is not interpreted as to favor ideological secularism.

Authors, departing from faith-based, pluralist, classical liberal and/or post-modern perspectives point to possibilities which the freedom of religion and belief created to develop genuine understandings of liberty which include a wide scope for believers to conduct themselves, individually and collectively, in accordance with their beliefs. Generally, the discussions of the jurisprudence of the SCC, CCSA and ECtHR include supportive, fairly critical and very critical voices from all the aforementioned positions. Authors tend to take into consideration the foundational values of each of these legal orders. As these are similar, in the sense of being founded in liberal-democratic constitutionalism, any rejection of these as by definition antithetical to religion necessarily includes all the jurisprudence of the three tribunals. More nuanced views tend to focus on the outcomes and analyses in specific cases.

While some of the newest materials in the current debate about the freedom of religion and belief were not incorporated into this dissertation, it still has a place in the current debate, because it relates to the various positions. They can be categorized into classical liberalism, religious (neo-)exclusivism, ideological secularism and (neo-)pluralism in freedom of religion and belief. This study combines a classical liberal outlook as a meta-narrative enabling peaceful co-existence of different worldviews, with a pluralist outlook that seeks to revert Western, mainstream and secularist biases in the *status quo*.

The position in the discourse on freedom of religion and belief and the choice for minimalism as a preferred theory of interpretation is indicative for how "optimal protection" is seen throughout the study: a broad and liberal concept and scope of religion and belief, the right being easily triggered. This means absolute protection of believers in holding beliefs and as much as possible protection of believers in manifestation of their religion or belief. Optimal protection is a form of maximum protection, which also includes maximum protection of other human rights and compelling general interests. It thus assumes an optimum where all of these are carefully balanced.

### 3 CHAPTER 3: CODIFICATION OF THE FREEDOM OF RELIGION AND BELIEF IN THE THREE INSTRUMENTS AND METHODOLOGY OF HUMAN RIGHTS CASES FOR THE THREE TRIBUNALS

The three instruments – the Canadian Charter of Rights and Freedoms, the South African Bill of Rights, and the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) – have codified the freedom of religion and belief in different ways. The three instruments differ in the formulation and definition of the right to freedom of religion and belief, as well as its integration with other universal freedom rights. This leads to interesting parallels, but also noteworthy differences. The most important parallel is that within the core of the right as codified, there is a strong common denominator. All three instruments protect religious beliefs as well as other beliefs. They all protect the internal dimension, an external dimension and a collective dimension. They all allow for limitation of the right under similar circumstances.

The differences between the three instruments are amongst others, the grouping of freedoms into one or more rights, the elaborate or minimalistic character of formulating these, the wording of the limitation clause and equality provisions, or the explicit or implicit reference to certain (constitutional) values. For example, the Charter distinguishes between two freedoms: the freedom of conscience and religion and a freedom of thought, belief, opinion and expression. The Bill of Rights contains a provision which assembles the freedom of thought, opinion, religion, belief and conscience. The freedom of expression is codified in a separate and different right. The ECHR also creates the freedom of thought, conscience and religion, in one Convention right. The freedom of expression is a separate and different right.

There are important parallels in the approach or method of solving human rights cases. These can partly be derived from the parallels in codification. All three will determine whether there is a legal basis for interference, a legitimate aim followed and a justifiability of the measure. The latter includes “democratic society” to determine whether an interference fits with the entirety of the human rights-based legal order and elements like “proportionality”, “least restrictive” and “rational connection” to determine whether the interference is the proper restriction. Doctrines of direct and indirect application, including horizontal application, and positive and negative obligations are similar. The ECtHR seems most inclined to accept internal limits on rights, yet only if included in the codification. All tribunals reject a hierarchy of rights.

The comparison allows for a preliminary conclusion. While there are differences in the methodology, the similarities are quite strong. This indicates that the approaches followed will be similar, to say the least. The important nuance in this regard is the relevance of procedural aspects resulting from the national law differences between constitutional, administrative, and private law in South Africa and Canada on the one hand, and the relevance of the



margin of appreciation for the ECtHR on the other hand. Difference in codification, therefore, is not sufficient to explain differences in outcome of cases.

#### 4 CHAPTER 4: COMPARATIVE ANALYSIS OF THE SELECTED CASES

The selected cases (Appendix I) of the three Courts are comparatively analyzed in order to find the parallels and differences in standard interpretation within the six dimensions of the freedom of religion and belief mentioned in Chapter 1. These six dimensions are: the individual dimension; the family and family law dimension; the collective and group autonomy dimension; the dimension of the educational system; the dimension of balancing with other rights and the dimension of secularism. Many of the selected cases feature several of these dimensions.

In section 4.2. regarding the individual dimension, deals with three of the selected cases by the SCC: *Multani* (I1.4.10), *Amselem* (I1.4.7) en *R v. NS* (I1.4.14). In the first two the SCC decided in favor of the believer, in the latter it decided against the believer. Of the selected cases before the CCSA two belong in this dimension: *Prince* (I2.4.7) en *Pillay* (I2.4.11). In the first, the CCSA after a long analysis if accommodation was possible did not decide in Mr. Prince's favor. Mrs. Pillay however did win her case. Nine selected cases of the ECtHR engaged the individual dimension: *Buscarini* (*Maestri*, *Şahin*, *S.A.S*, *Thlimmenos*, *Batayan*, *Cha'are Shalom*, *Folgerø* and *Lautsi* (sections I3.41; 4.6; 4.7; 4.15; 4.2; 4.11; 4.3; 4.8; 4.10). In five of these, the Court decided in disfavor of the believers in question, in the other four in favor of the believers. *Cha'are Shalom* is discussed under the dimension of freedom of religion and belief and group autonomy. *Folgerø* en *Lautsi* are analyzed in the dimension relating to education.

In section 4.2 we see that seemingly neutral laws, can have grave impact on the personal freedom of believers because of adverse affect discrimination. This leads to a feeling of being unwelcome at least and in the worst case, a painful choice. In adjudication this means, that the interference with the freedom of religion and belief has to be recognized, even if for whatever reason they cannot be accommodated.

Often enough accommodation of the practices of believers is possible, without undermining the general purpose of the law or regulation in question. Sometimes this can be easily done by exempting the believers from (certain aspects of) the law. Exemption or other means of accommodation will sometimes meet criticism from the mainstream. The selected cases highlight the need for public institutions to promote and instill tolerance and for courts to point to this. Protection of the personal freedom of religion and belief, always requires taking the sincere individual beliefs of believers as starting points, rather than practices "objectified" by expert opinions or statistics.

In paragraph 4.3 we see how parental authority and the best interests of the child can collide, especially where medical decisions are concerned, how

religious marriage and state marriage can collide and how the rights of same-sex partners to get married have a specific relationship with the freedom of religion and belief. Parents are the natural authority of children. Whatever parents believe or not believe is bound to impact the children. If parents believe differently and separate, this can cause conflicts in the upbringing. When parental authority is limited by state institutions, judicial review is necessary to assess the impact on the freedom of religion and belief of the parents and the children.

Five Canadian cases are discussed in this dimension: *P.(D)* (I1.4.3), *Children's Aid Society* (I1.4.4), *A.C. v. Manitoba* (I1.4.12), *Bruker* (I1.4.11) en *Same-Sex-Marriage* (I1.4.9). In the first three cases, the majority on the Court decides that restrictions of the freedom of religion and belief are justified. In *Bruker*, the case is decided in favor of the claimant, against her ex-husband. Both rely on their rights under the freedom of religion and belief. *Same-Sex-Marriage* decides that the introduction of same-sex marriage is not contrary to the Charter. Believers opposed to it, may under circumstances rely on the freedom of religion and belief to not participate in such marriages.

Seven of the South African cases in this dimension challenge the existing exclusivity of the civil marriage: *Amod* (I2.4.5), *Daniels* (I2.4.8) *Hassam* (5.4.12), *Fourie* (I2.4.10), *Robinson* (I2.4.9.), *Women's Legal Centre Trust*, (I2.4.13) en *DE v. RH* (I2.4.14). In the first five, the Court decides for a wide scope and against a restrictive reading of 'marriage'. The last two cases show, where the Court sees the limits of judicial interpretation.

The ECtHR decided two cases in this dimension. It decides in favor of the government in *Yiğit* (I3.4.9) en *Refah* (I3.4.5).

The selected cases show clearly that one case at a time review is necessary because of the thorny issues involved. Where parental decisions impact health or continuation of life of minors, adjudication must find limits to the parental freedom of religion and belief under the limitation clause. In parental conflicts of religion, confusion is unavoidable. Confusion and even cognitive dissonance are themselves not enough to conclude that it is in the best interest of the child not to know one of the parents as they are.

Religious marriage has existed longer than civil marriage/state marriage. It continues to exist alongside civil or state marriage and is for many people an alternative for state orchestrated marriage like other lasting relationships which form the foundations of families. Treating social reality as fact and preventing inequality in areas of inheritance, social security, insurance and so forth, limiting can be mandated by the freedom of religion and belief, as we saw in the selected cases. In order for the judiciary to respect the domain of the legislative, this requires a case-by-case contextual approach.

Upholding an exclusive and privileged position for state marriage on the other hand, seems difficult to reconcile with the freedom of religion and belief, while at times religious marriage and private law are bound to interact in a pluralist society governed by liberal democratic constitutionalism.

Both the South African and Canadian same-sex marriage cases show, how equality rights make it difficult to uphold an exclusive opposite-sex requirement, when it comes to civil/state marriage. The opposite sex requirement gives privilege to the belief that marriage is for opposite sex partners only, over all other beliefs. Both judgements do mention that the faith-based views on marriage cannot be a source of interpreting state-law or the constitution. Those who believe that marriage should only be an opposite-sex requirements can rely on the freedom of religion and belief to demand exemption from facilitating or aiding in same-sex unions. Based on the analysis I support a dynamic non-hierarchical co-existence of state marriage with faith- or culture-based marriage and other practiced forms of lasting relationships.

In section 4.4 we see the relationships between the individual and communal dimension of the freedom of religion and belief. Individuals and communities rely on the collective dimension when the state or others interfere with the group-autonomy on the basis of the freedom right. Sometimes individuals will claim that group-autonomy goes too far. Sometimes the dimension is about the co-existence of state law/national law and the “own law” of communities.

The collective dimension features in 13 of the selected cases. Six were decided by the ECtHR, five by the SCC, and two by the CCSA. In another South African case the collective dimension has an important supporting role.

Before the SCC are the *Sioui*-case (I1.4.1), *Hofer* (I1.4.2), *Trinity Western University* (TWU) (I1.4.5), *Lafontaine* (I1.4.8) en *Alberta v. Hutterian Brethren*, (I1.4.13). In two cases the SCC finds a necessary and justified interference with the autonomy of the community in question.

The CCSA in *Christian Education* (I2.4.6) also finds a justified restriction of group-autonomy. In *De Lange* (I2.4.15) the case is decided on procedural grounds. In *Prince* (I2.4.7), already mentioned, the collective dimension had an important “supporting role”, as the CCSA assesses the workability of exemption from the prohibition of illicit drugs for the Rastafari community.

The ECHRm decided *Cha'are Shalom* (I3.4.3), *Hasan v. Chaush* (I3.4.4), *Refah* (I3.4.5) *Mouvement Raëlien* (I3.4.12), *Sindicatul Pastorul Cel Bun* (I3.4.13) en *Fernández Martínez* (I3.4.14). Only in *Cha'are Shalom* and *Refah* did the ECtHR decide against the organization in question. *Sindicatul Pastorul Cel Bun* en *Fernández Martínez* are decided in favor of the churches in question and against the individual believers who have an opposite interest.

If tolerance only stretched to the beliefs, we find agreeable, acceptable or logical, this would render tolerance empty. Hence, the freedom of religion and belief enables communities to conduct themselves within their own law. The state should not try to eliminate pluralism, either within society or within a religious community, but evenhandedly protect all. “Own law” or legal pluralism which is compatible with liberal multicultural democracy may very well be an important answer to the demand for pluralism. Yet on the other

hand autonomy is not absolute. There can be no constitution/human rights free zones, in which the own law is absolute.

Section 4.5 deals with the dimension of freedom of religion and belief and education. The public education system may include education about the prevailing religion or secular ideology. It can also teach about different religions and beliefs. Private institutions may prefer beliefs that clash with those of mainstream society, while the graduates also want to participate in society at large.

In total nine of the cases examined are elements of religion and belief related to the education system. The European Court of Human Rights, the Supreme Court of Canada and the Constitutional Court of South Africa each ruled on three such cases. All these cases are also discussed within at least one other dimension.

Before the SCC were, *Multani* (I1.4.10), *Chamberlain* (I1.4.5) and *TWU* (I1.4.6). The CCSA decided *Christian Education* (I2.4.6), *Pillay* (I2.4.11) and *Gauteng School Education Bill* (I2.4.2). Of the ECtHR cases, *Sahin* (I3.4.7), *Folgerø* (I3.4.8), *Lautsi* (I3.4.10), and *Fernández Martínez* (I3.4.14) fall into this dimension. In the first two cases, the SCC ruled in the best interests of pupils and parents in a public educational institution. In the last case, the SCC ruled in favor of a religious university. The CCSA ruled in *Christian Education* that the religious educational institution could not obtain an exception to a general law. In *Pillay*, a decision was made in favor of the believer of an educational institution. In *Gauteng School Education Bill*, the CCSA upheld a law covering language and religious education in public schools.

The ECHR ruled against the individual (un)believer and in favor of rules for public education in *Sahin*, *Lautsi* and *Fernández Martínez*. In *Folgerø*, however, an infringement of the rights of children and parents was found in rules on religious education within public schools.

This dimension shows that freedom of religion and belief in the educational system relates to the believers in the public education system, religious instruction in the public education system and faith-based education. The public educational system should ensure the exposure to all of society, diversity on display. This might cause some cognitive dissonance, which is necessary for tolerance. The state's responsibility to ensure pluralism cannot be organized away by pointing to non-state schools. Part of the task of ensuring pluralism is to ensure religious literacy.

It can easily be assumed that religious symbols displayed in schools or classrooms do not have a neutral meaning. There are several possibilities for organizing religious instruction in the public education system in a way which reconciles majority and minority interests. Adjudication should take into consideration the effect of peer pressure and subtle forms of pressure on children (and their parents). Religious institutions on the other hand are not for everyone and follow a less pluralistic logic, but should be inclusive, if this does not conflict with their beliefs.

In section 4.6, balancing, which plays an important role in all the other dimensions, was revisited as a separate issue. In at least 18 of the cases examined, the balance between equal care and respect for all the rights and interests involved is central to the legal reasoning. Eight of these were decided by the SCC. The CCSA decided six of these cases. Four were decided by the ECHR. All these cases are also analyzed under some of the other dimensions.

The issues that fall into the dimension of balancing freedom of religion and belief with other rights are best divided into the following topics:

- the balance of pluralism: (religious) beliefs and LGBTQ+ equality rights;
- preventing the elimination of pluralism: individual rights and communitarian interests;
- the balance between individuals and faith communities;
- balance between parental authority and the rights of children.

Balancing is first and foremost achieving equal concern and respect through a procedural fairness, that gives all sides equal recognition in their rights and concerns. This implies that it is better to decide a case under the limitations clause, than to reject the claim as not being covered. Notions like the right to be different, equal religious citizenship and democracy based on pluralism help.

Balance requires the acceptance that mainstream society will have to sometimes give equal concern and respect to beliefs and practices that strike them as bizarre, illogical or irrational, or even shocking and offensive. Complexity is no reason not to accommodate. Balance can sometimes be achieved by finding purely procedural grounds to decide the case. Such rulings have a potential to be acceptable to both sides. Yet judges nor other state organs should discharge themselves, by delegation of the responsibility to protect human rights to others, be they faith-based or non-faith-based actors. On the other hand, judges nor other institutions should make assumptions or generalizations about beliefs and practices and certainly not substitute the choices of the believer(s) with their own. Balance can most easily be achieved in a case-by-case fashion. Deciding all future cases immediately, will always cause someone to lose for all future.

The final dimension discussed in section 4.7 was that of secularism. In a total of at least 25 cases, the state's relationship towards religion and belief is central. Five of these were decided by the SCC, 10 each were decided by the CCSA and ECtHR.

This topic correlates with the discussion of marriage in sections 4.4.3–4.4.5 and raises the following questions:

- Must state institutions recognize religious marriage under some circumstances (South African cases *Amod*, *Daniels*, *Hassam* (sections I2.4.5, I2.4.8 and I2.4.12) and the Strasbourg case *Yiğit* (section I3.4.9))?
- Can secular courts enforce a contractual obligation to provide for a religious divorce (Canadian case *Braker*; section I1.4.11)?

- Is there an obligation for Parliament to regulate religious marriages of a minority religion (South African case *Women's Legal Centre Trust*; section I2.4.13)?

As discussed above, the answers given to the first question by the CCSA is affirmative, while the ECtHR's question in negative. The SCC answers the second question affirmatively. With regard to the third question, the CCSA finds that it is not for the judiciary to force the legislative and executive powers to solve an ongoing debate by adopting a "Muslim Marriages Act".

Another topic is the relationship between state institutions and religion. This correlates with the discussion of political freedom of faith-based communities in section 4.4.4 and raises the following questions:

- Can legislators be required to swear a religious oath and can legislative meetings be started with a collective prayer (Strasbourg case *Buscarini*; section I3.4.1 and Canadian case *Mouvement laïque québécois*; section I1.4.15)?
- Can faith-based political parties which oppose the current form of secularism be prohibited? (Strasbourg case *Refah*; section I3.4.5)?
- Can a state dismiss a judge for being a member of a faith-based community (Strasbourg case *Maestri*; section I3.4.6)?
- Can secular courts apply secular law to procedures in a faith-based community (Canadian case *Hofer*; section I1.4.2)?

The ECtHR and SCC both answer the first question negatively. The ECtHR gives an affirmative answer to the second question. The ECtHR answers the third question to the negative, at least where general and abstract provisions are employed to do so. The SCC gives an affirmative answer to the last question.

Religious education is also a topic in this section. This topic correlates with the discussion of religious education in state schools in section 4.5.2 and raises the following question: may the state order the display of religious symbols in state schools and/or order the compulsory character of a religious instruction class (South African case *Gauteng School Education Bill*; section I2.4.2 and Strasbourg cases *Folgerø and Lautsi*; section I3.4.8 and 6.4.10)? The ECtHR is of the opinion that the ordained display of a religious symbol does not necessarily interfere with state-neutrality, but that religious instruction classes may not be paired with high obstacles for exemption. The CCSA is of the opinion that that religious instruction classes may not be compulsory.

The final topic is religious and secular beliefs as a source of law and policy. This topic relates to many of the other themes discussed in the previous sections and raises the following questions:

- Can religious or secularist beliefs be sources of interpretation of legal concepts? Canadian case *Reference Same-Sex Marriage* (section I1.4.9) and South African *Fourie* case (section I2.4.10).
- Can religious or secular beliefs be a source of legislation to enforce certain behavior? South African cases *Solberg* and *DE v. RH* (sections I2.4.4. and



- I2.4.14) and Strasbourg cases *Şahin* (section I3.4.7) and *S.A.S.* (section I3.4.15).
- What does state neutrality require? Canadian case *Lafontaine* (section I1.4.8), South African cases *Final Certification* and *Certification Western Cape* (sections I2.4.1 and I2.4.3), and Strasbourg cases *Hasan v. Chaush* and *Fernández Martínez* (sections I3.4.4 and I3.4.14).

Both the SCC and the CCSA believe that the freedom of religion and belief does never entitle communities to have their faith-based doctrines be seen as sources of constitutional law or legal concepts like “marriage”. The CCSA is clear that legislation may not enforce faith-based norms. It does recognize that over time a religious norm, embedded in legislation can attain a secular understanding, for example when it comes to the sale of liquor on days of rest and holidays. On the other hand, faith-based norms embedded legislation can also become non-enforceable through changing circumstances, especially the transition towards liberal-democratic constitutionalism. The ECtHR accepts that official laicism may be employed by the state as a source of legislation. It does not see a fundamental collision between such a policy and the equal concern and respect the state must show to all, including religious believers.

With regard to the last question, the SCC answers that state neutrality requires that rituals in a state-legislature be as inclusive as possible towards all (un-)beliefs. According to the CCSA this does not mean that all freedom of religion and belief rights must be non-derogatory in emergencies, or that ceremonial deism is out of order. According to the ECtHR state neutrality requires non-interference by the state in the internal affairs of a minority religious community. State neutrality does not prevent an agreement with the dominant church to let the latter decide about eligibility of state personnel for the position of religious instruction teacher.

The selected cases show, that secularism, as much as religion and/or belief is no monolithic concept. With it many faces it can be both an enemy and a friend of freedom of religion and belief. Some authors propose to abort the term altogether in favor of “comprehensive pluralism” or related terms, based on reversible reciprocity, which signify an inclusive attitude towards religious, non-religious and secular beliefs.

While institutional secularism can be an aide of the freedom of religion and belief to ensure evenhandedness towards different religions and beliefs, ideological secularism if adopted by the state forms a risk for the freedom of religion and belief. Like (strong) establishment it can lead to preferential treatment of one group, secularists, above others. Open secularism on the other hand, emphasizes non-preferential treatment of all religions.

The exclusiveness of state marriage is not uncommon in many liberal-democratic constitutional orders and has a relationship with ideological secularism. Upholding it, will often interfere with the rights of believers. A more pluralistic and accommodating approach, which allows for the co-existence



of several religious and cultural forms of marriage next to state marriage, enables a reconciliatory protective approach towards faith based and LGBTQ+ communities.

When state institutions adopt a preference towards a certain faith, ideological secularism or any secular ideology, discrimination against all others is often the automatic result. In public education, as also mentioned above, several models are conceivable, which respect the freedom of religion and belief of all students (and teachers). They must respect individual choices and accommodate the pluralism present in the student body.

Freedom of religion and belief naturally leads to situations where beliefs, practices and religious precepts are part of the legal conflict. Consistent with institutional secularism, secular judges should not interpret the religious or belief-based let alone substitute the understanding of the believer in question. Doing so, is a grave violation of the freedom of religion and belief. In line with the above, neither religion, any other belief, nor ideological secularism can serve as sources of interpreting human rights or constitutional law (in the accommodationist or separationist model).

In light of the intermediary conclusions drawn in the previous section, conclusions regarding the adjudication of the freedom of religion and belief can be formulated. The following best practices were present in the selected cases:

1. Recognition of all sincere religious, cultural, or other beliefs as triggering protection without prior exclusion, limiting them where necessary under the limitations clause. No objectivation by dogma, officials, or statistics.
2. Preventing painful choices and allowing for or ordering accommodation and/or exemption, where reconciliation between freedom of religion and belief and other rights or important aims of public policy is needed. Where this is impossible, taking of the sharp edges of enforcing a law against conscientious objectors.
3. Absence of value judgement from any other perspective than the believers' own perspective. No substitution of the own understanding believers have of a belief or practice with that of judges or other state officials. Being weary of all forms of paternalism, directed at believers.
4. Inclusive protection: preventing division into insiders who belong, and outsiders who are tolerated. Recognition that all official state policies inspired by state religion and/or state secularism are potentially intrusive to all outside the mainstream. Concepts like the "right to be different", equal "religious citizenship" or a pluralist understanding of democracy aid in this.
5. Promoting tolerance and providing that other state institutions do so; tolerance requires some cognitive dissonance and always extends to the beliefs others find bizarre and even threatening.

6. Protecting human rights and pluralism, never delegating, or letting other state institutions delegate the responsibility to private institutions, faith-based or otherwise.
7. Being reflective of social reality and allowing for a flexible co-existence between state law and “own” law. Allowing for communities to govern themselves, while autonomy is never absolute.
8. Equal concern and respect for all sides, taking the losing party’s point of view seriously: showing real understanding for their point of view.
9. Balancing under the limitations clause: rather than finding no interference at all or *a priori* justifications of limits. If necessary, using judicial assumption.
10. Deciding one case at a time, especially with thorny issues, embracing contextualism, deciding only what needs to be decided to solve the case, making use of procedural considerations, where possible.
11. Being conscious of the inter-institutional dialogue with the executive and legislative powers, but resolute protection of human rights: no state or state institution or legislative body has a natural inclination to protect human rights; it is the judiciary’s role to check and balance.

## 5 CHAPTER 5: COMPARATIVE ANALYSIS OF THE CONCEPTS OF THE FREEDOM OF RELIGION AND BELIEF AND THE STANDARD INTERPRETATIONS

According to H.L.A. Hart, it is imminent that judges develop principles which guide their interpretation of the law. All three courts have developed principles which guide their interpretation of the freedom of religion and belief. The guiding principles are supported by what will be called supporting principles.

The main guiding principle applied by the SCC in the freedom of religion and belief cases is “individual liberty”. The “harm principle”, “religion à la carte” and “sincerity of belief” are informing principles.

“Human dignity” is the main guiding principle applied by the CCSA in the freedom of religion and belief cases. The “right to be different”, “respect for diversity” and “positive tolerance” are the informing principles.

The main guiding principle of the ECtHR for the freedom of religion and belief cases is “pluralism”. The state’s role as “organizer of pluralism” and the impartiality of this organizer are therefore the informing principles which inform what pluralism implies for solving the cases.

The three guiding principles as applied by the three different courts in interpreting the freedom of religion and belief are neither opposing nor mutually exclusive. They do, however, differ in their emphasis and internal logic. This, in turn, can lead to very different outcomes in similar cases.

The SCC and the CCSA mainly rely on the believers themselves to define their religion and belief and what it entails for them. The believer must show sincerity in the belief and practice which is at stake. The ECtHR has moved

away from trying to objectify beliefs and practices but cannot be said to have fully embraced a sincerity-based approach.

Regarding the scope of the freedom of religion and belief, the three courts recognize that the freedom of religion and belief entails a right to believe or not to believe. It also entails that religious as well as other beliefs must be respected. Unlike the other two courts, the ECtHR is not inclined to read a right to deviate from general norms into the right. It also runs the greatest risk of substituting the beliefs and opinions of believers with its own.

All three courts recognize the concepts of positive and negative obligations. However, the CCSA and SCC are more likely to see them as two sides of the same coin, while the ECtHR primarily looks at the freedom of religion and belief in terms of negative obligations and a higher threshold must be met to assume a positive obligation.

The differences in emphasis between the guiding and informing principles and the impact they have on concept, scope and application of the freedom of religion and belief can partly be explained from the background of the human rights instruments in which the right is codified.

The comparative analysis of the selected cases in the six identified dimensions does not support the general viewpoint put forward by some writers that the (adjudication of the) freedom of religion and belief, has contributed to the secularization of society/ societies. The selected cases show attempts to create space and opportunity for believers to (re-)claim agency over their lives and to contribute to a holistic pluralism.<sup>4</sup>

In light of the above some of the best practices for optimal protection enumerated in section 4.8 can be reaffirmed, while we can add the following:

12. Applying a broad, liberal, and subjective-based concept of religion and belief that informs the scope of and the trigger points for the protection.
13. Embracing difference as the consequence and prerequisite of freedom. Enabling dynamics for a holistic pluralism and awareness of the complex relationship between the secular and the religious in a free, open, and diverse society.
14. Allowing faith-based communities to provide alternatives for state institutions like marriage, schooling, welfare and so forth.

## 6 CHAPTER 6: MINIMALISM IN THE JURISPRUDENCE OF THE SCC, CCSA AND ECtHR: HOW MINIMALIST ARE THE STANDARD INTERPRETATIONS FOR THE FREEDOM OF RELIGION AND BELIEF?

Chapter 6 shows that each of the courts applied minimalist as well as less minimalist features in the selected cases. Each has shown that can stick to the

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4 Benson, *supra* n. 21, at 115, quoting R. Hirschl, *Constitutional Theocracy*, Harvard University Press, Cambridge (USA), 2010, pp. 187 and 202; and at pp. 118-119.

case at hand, leaving larger issues undecided, being focused on the outcome of the case. Each has shown that it will use incomplete theorization and incrementalist building of jurisprudence. Incomplete theorization is sometimes applied to abstract principles, the outcome, or a rule. All guiding principles have been treated as incompletely theorized agreements.

Several of the selected cases, analyzed in this chapter, have shown, each of the courts will at times use “deep” or “wide” rulings, setting aside the method of minimalism to attain the purposes of minimalism. Finally, each of the courts has adopted a notion of human rights and/or the constitutional being ‘alive’ and thus being adaptive to changing circumstances. Where minimalist elements were present, they have generally aided optimal protection of believers.

The SCC’s selected cases show clear elements of minimalism. The minimalist elements have aided consistency in the approach to freedom of religion and belief. Between the three courts, looking at the cases selected, the CCSA has arguably been best at minimalizing the cost of a decision, by showing much respect and understanding for each party’s position. It has incrementally built a consistent jurisprudence. Even where the current constitutional order is placed against the injustices of the past, this has never undermined minimalist methodology or purposes. Arguably the ECtHR has most often used majoritarian or maximalist elements in its approach. The way the margin of appreciation is used, has often not aided in sticking to a minimalist method or purpose. Incrementalism is visible, but a times also *incidentalism*, which prevents consistency.

In light of the above some of the best practices for optimal protection enumerated in sections 4.8 and 5.7 can be reaffirmed, while we can add the following:

15. Making use of incomplete theorization, also with respect to the guiding principles in interpreting the freedom of religion and belief.
16. Incremental development of the jurisprudence, sticking to the case at hand.
17. Adherence to the purposes of minimalism, being flexible with regard to its methodology, going wide or deep where necessary after minimalist groundwork.

## 7 CHAPTER 7: CONCLUSION; FINDING COMMON GROUND AND DIFFERENCES – AN OPTIMAL INTERPRETATION OF A UNIVERSAL RIGHT?

### 7.1 Conclusions regarding the standard interpretations of the three Courts

The freedom of religion and belief, the classical universal human right, codified in the Canadian Charter of Rights and Freedoms, the South African Bill of Rights, and the European Convention on Human Rights, makes a promise to all believers – including those who identify themselves as non-believers.

The promise that they may search for their own path free of constraints and impairments, by the state or others. Freedom and pluralism are the different sides of the same coin. Believers have a right to assert their difference from mainstream society.

The three courts have each developed a jurisprudence out of the above considerations. Their standard interpretations each fit neatly into the constitutional chain novel (Dworkin) each of them is writing, while each chain novel subsequently fits into the library of liberal democratic constitutionalism. The constitutional narratives of the three tribunals show parallels, but also stress different elements and thus the three jurisprudential narratives regarding the freedom of religion and belief coincide, diverge, and at times collide. This can be conceptualized by employing the guiding and informing principles, which are reconstructed in Chapter 5.

The Canadian standard interpretation is rooted in a classical constitutional liberalism. Canadian multiculturalism, as a constitutional concept, while containing a communitarian nuance of classical liberalism, is still very much rooted in the same traditions. It very much draws on classical liberal concepts, such as individual autonomy, freedom, and state neutrality. But on the basis of these notions, a rigid essentialist liberalism is also rejected.

A truly liberal state in accordance with the Canadian jurisprudence, creates an open society which enables identifiable minorities to hold different opinions, make different choices, and live different lives. This should not be regarded as the negative side-effects of freedom, but must be legally recognized and celebrated as a manifestation of freedom. Hence, the state may not even endeavor to “convert” its citizens to liberalism. It may however demand reciprocal respect from individuals and communities, in the sense that they all acknowledge that the freedom they demand must also be given to others. This creates tolerance.

The SCC’s case law is both praised and lamented in public debates and academic literature. The criticism sometimes casts itself in liberal or secularist cloaks, warning of the dangers of illiberal religion and belief. On the other hand, the criticism of Canadian multiculturalism invokes communalism. However, the many academic critiques base themselves on the interrelated values underlying the Charter, as interpreted by the SCC itself.

The CCSA’s endeavor to develop jurisprudence on the freedom of religion and belief started shortly after the transition to democracy. The CCSA’s soul-search regarding the freedom of religion and belief, conducted in the minimalist one case at a time approach, nevertheless had a clear “soul” to start from. The selected cases show a development of interpretation of the Bill of Rights as transformative values for a new society. In any case, the more value-laden interpretation manifests the post-liberal character of South African constitutionalism as opposed to the more classical liberal Canadian approach. Nevertheless, the outcomes are not entirely different.

In *Christian Education* and in *Prince* (sections I2.4.6–7), the informing principle of the “right to be different” emerged. Further developed in later cases, it led the CCSA to be the most consistent of all three courts in the selected cases in showing equal concern and respect to the losing party. The standard interpretation was created from there visibly case-by-case, into the arguably consistent methodology which is visible in the later cases.

Criticism of the Court comes from many angles; some find it too restrained, others too activist. Libertarians critique its timidity in revoking the pro-religious bias of the past, religionists grieve its libertarianism and individualism. While the advocates of traditional law and religious rights want more sensitivity to culture and religion, others warn of the potential consequences for (gender) equality. But the jurisprudence of the Court clearly shows a unique and authentic South African understanding of liberal-democratic constitutionalism.

*Kokkinakis* is acknowledged by scholarly “court watchers” of the ECtHR to be the milestone when it comes to the freedom of religion and belief. Pluralism is always a question of otherness. The nations which form the Council of Europe have each known their problematic past with the rejection of pluralism. Even more so, pluralism itself was seen as problematic through much of European history. Colonialism and imperialism were supported by notions of supremacy of European culture, European Christendom, and European statehood.

The Convention was adopted in rejection of fascist totalitarianism (which had just been overcome) and Stalinist totalitarianism (which was perceived as a major threat at the time). Against the backdrop of totalitarian dictatorship, there was arguably not as much focus on the biases, self-evidence and monoculturalism which had taken root in Europe over a much longer period of time. Given the focus on preventing totalitarianism, the Court has been wary of state-meddling in organizational structures of faith-based communities, breach of positive obligations to protect minorities against violence, state sponsored religious proselytism in the public school curriculum and exclusion of “others” from parliamentary office.

On the other hand, on many occasions the ECtHR has not restricted state attempts to hinder practical and effective rights to religious attire, dietary rules, family and personal law, or identity-related claims as such. In such cases, the Court is more likely to find in favor of the state. In order to develop a jurisprudence which gives greater protection against interference to non-Christian religionists like the association *Cha’are Shalom Ve Tsedek*, Ms. Leyla Şahin, and the claimant in *SAS*, agnostics like the *Lautsis* and new faiths like the *Raëlians* a new understanding of pluralism might be required. Such a new understanding would also benefit the evenness of balancing in cases where individual freedom and group autonomy collide, like in *Sindicatul Pastoral Cel Bun* and *Fernández Martínez*.

However, there are also those who believe the Court has gone too far in many respects. The tension between activism and restraint is visible in many cases and the margin of appreciation serves as the often ill-fitting jacket to dress for the occasion. Arguably, the margin of appreciation fits well where the “pressing social need” concerning limitations of religious practices is involved and the Court is best advised to proceed on a case-by-case incrementalistic fashion so it can strike the necessary balance – being a supranational judicial structure in the pluralist constitutional arrangements of Europe. But a more principled and consistent minimalism, may help in decreasing the use of the “margin of appreciation”.

## 7.2 Answering the research questions

### – *Research Question 1*

All three courts recognize a group autonomy and try to accommodate “inside law”. All three also make sure that the “inside law” cannot determine its own scope and that human rights law, among other things, determines boundaries. The ECtHR is ready to attest a bold group autonomy for faith-based organizations if they have a legal standing in the states’ institutional law. They can even take priority over individual rights or other collective rights in such cases.

In the educational dimension, the ECtHR’s jurisprudence has led to a variety of outcomes which do not easily show consistency. The SCC and CCSA both emphasize that public education must be inclusive and send a clear message of positive tolerance for all walks of life, including non-mainstream beliefs. The limits of this broad freedom are stipulated in case-by-case analysis.

All three courts try to balance the freedom of religion and belief with other rights and interests. They are led in this process by thoughts of pluralism and equal concern and respect. The ECtHR, however, is most likely to prioritize one right or interest in solving of the case, whereas the other two courts will make a greater effort to accommodate all interests. The CCSA makes the greatest effort to show the party which loses the case that it has lost the case and not the world.

Both the SCC and CCSA explicitly reject a militant or rigid secularism which can be as antithetical to the freedom of religion and belief as outright state preference of a certain faith. The ECtHR has not rejected rigid secularism.

The comparative analysis of the selected cases in the six identified dimensions does not support the general viewpoint put forward by some writers that the (adjudication of the) freedom of religion and belief, has contributed to the secularization of society/societies.

### – *Research Question 2*

There are recognizable standard interpretations of the freedom of religion and belief present in the selected cases. The SCC is the most consistent. The CCSA



is searching for a consistent approach, which it seems to have found in the later cases. The CCSA is also most consistent in showing equal concern and respect to the losing party. In the selected cases decided by the ECtHR, consistency is greatest between the cases within one of the six dimensions rather than across the six dimensions. Examples of strong consistency are organizational freedom and the rights of conscientious objectors to military service. All of the courts apply recognizable and reoccurring guiding principles in their interpretation of the cases.

The SCC takes individual liberty as its guiding principle, with the harm principle, religion à la carte, and sincerity of belief as informing principles. The guiding principle of the CCSA is human dignity, informed by the freedom right: the right to be different; the communitarian component: respect for diversity; and the constitutional principle: positive tolerance. For the ECtHR, pluralism is the guiding principle. The informing principles are the state as organizer of pluralism and the impartiality of organizing pluralism.

All three courts recognize that the freedom of religion and belief entails a right to believe or not to believe. It also entails that religious as well as other beliefs must be respected. All three courts recognize an individual and a collective dimension. Both the Canadian and the South African interpretations of the freedom of religion and belief include the right to be exempted from mainstream norms and behavior under certain circumstances. The South African “right to be different” is even more bold than its Canadian counterpart. The ECtHR is certainly more restrained in this regard.

The freedom of religion is triggered according to the Canadian case law if a sincere belief was interfered with. The South African case law also uses the interference with sincere belief as trigger. In the Strasbourg case law, failure to act in accordance with a negative or positive obligation by the state triggers freedom of religion and belief. All three courts recognize positive and negative obligations of the state under the freedom of religion and belief.

– *Research Question 3*

Of the three courts, the SCC is most consistent in its interpretation of the freedom of religion and belief. The SCC and the CCSA are more minimalist than the ECtHR. The CCSA is most consistent in showing equal concern and respect, even to the side that loses the case.

The comparison of the minimalist and maximalist elements in the jurisprudence of the three courts discloses that certain parameters trigger minimalism and/or maximalism in the selected cases. These can be conceptualized in five continuums. Optimal minimalism in freedom of religion and belief cases, requires the court deciding the case to keep the balance in each of these continuums (as far as relevant in the case) at the same time.

– *Research Question 4*

The guiding principles and informing principles the three courts use to decide the freedom of religion and belief cases before them are different in the aspects they emphasize. Yet, the guiding principles are not mutually exclusive. There are also similarities between the standard interpretations when it comes to concept, scope and application of the freedom of religion and belief. Moreover, the similarities between the codifications of the freedom of religion and belief and methodologies of solving human rights facilitate judicial borrowing between the courts. All three courts have illustrated openness towards judicial borrowing.

The differences in emphasis between the guiding and informing principles and the impact they have on concept, scope and application of the freedom of religion and belief can partly be explained from the background of the human rights instruments in which the right is codified. All three courts regard the freedom of religion and belief to be protective of a great variety of religious and philosophical traditions as well as individualized beliefs.

Clear elements of minimalism can be found in several cases decided by the three courts. On the other hand, examples of non-minimalistic case-solving can also be observed in the selected cases from each court. Some of the potentials for judicial borrowing are closely related to the parameters for minimalism identified above. For example, the CCSA approach could have led to another outcome in SCC case *Alberta v. Hutterian Brethren*, looking deeper into alternative accommodation, or at least making sure, the colony lost only one case, not the world. Another example is the principled and pragmatic minimalist approach the CCSA took in the Muslim marriage cases, which could have inspired a different take on the ECtHR *Yiğit* case. The method applied by the ECtHR, could have been useful for the CCSA in Prince: when the offense is committed for faith-based reasons, there should be difference regarding the consequences. Thereby differentiating between the criminal and the believing offender.

The freedom of believers is inhibited by painful choices, not just outright suppression. Neutral rules of general applicability can seriously interfere with personal beliefs. Creating exemptions or otherwise accommodating believers, even when the practice is socially controversial, is a solution.

In the dimension of family law and family relations, interventions into the family sphere are best done under the limitations-clause, presupposing the protection of the freedom of religion and belief. Non-recognition of same-sex marriage, purely religious marriage, or cohabitation by the legal system can bring about serious inequalities, which must only be accepted if they endure the test of necessity in a democratic society. Minimalist adjudication leaves room for inter-institutional dialogue, and thus for the legislature to take some subsequent step after courts establish unconstitutional inequality.

The freedom of religion and belief naturally has a collective dimension. The individual and collective dimension depend on one another. Adjudication

must maintain the equilibrium, interpreting both as mutually supportive, not sacrificing either for the benefit of the other. This is especially necessary when it comes to relationship between inside and outside law. Legal pluralism, whether more organic and informal or more conceptual and formal, fits with the logic of human rights and liberal democratic constitutionalism and secular courts have no reason to shy away from it.

Optimal protection of the freedom of religion and belief does not deter religious education or religious manifestation in public educational institutions, but it does require inclusive equality in the sense that no belief should be taught or manifested to the detriment of all others – at least those who object must always have a viable opt-out possibility. Instilling tolerance is one of the objects of public education under the freedom of religion and belief. Reciprocal pluralism requires reciprocal accommodation of faith-based education but also for faith-based communities to accept in some way the surrounding pluralism.

Balancing the freedom of religion and other rights is not a generalist zero-sum game, but requires operationalization of reciprocal tolerance. This requires acknowledging the existence of the other, even if we do not agree with them. This goes for relationships between the mainstream and minorities as well, may they be minorities of believers or sexual orientation and/or gender minorities. By judicially acknowledging in competing interests that constitutional rights have been triggered on all sides, constitutional relevance is given to all. While balancing determines the outcome, no party loses the world, but only a case.

Where freedom of religion and belief meets secularism, which is in the majority of the selected cases from each of the courts, it is necessary to distinguish between secularism's many faces. Secularism can be a world view or belief which competes with other world views or beliefs. State neutrality as informed by the freedom of religion and belief requires that neither secularism nor any religious belief be manifested and professed by public institutions to the exclusion of all others.

Some believers may feel unrecognized by the marginal, instrumental and subjective formulation of their (religious) beliefs in law's religion. But law's religion, depending on how it is defined in concrete cases, can aide optimal protection of believers to live their lives in accordance with their beliefs against the state, other societal institutions and the members of different or the same faith-based community. This potentially opens the door for any endeavor to realize a more holistic pluralism.

The best practices found for optimal protection are the combination of those given in sections 8.4.7, 8.5.5 and 8.6.3.

### 7.3 Overall conclusion

The freedom of religion and belief is inherently connected to freedom as the incompletely theorized aspiration of individuals, groups and nations. As the philosopher Abdolkarim Soroush explained eloquently, forced obedience to a religious precept deprives the act of performing the religious precept of its religious essence.<sup>5</sup> Freedom of religion and belief is therefore essential for religion and belief itself. Governments, so the American Declaration of Independence tells us, have been instituted to protect life, liberty and the pursuit of happiness. The “spirit of liberty”, however, “is that spirit which is not too sure that it is right”.<sup>6</sup> This is why minimalism aims to operationalize caution, humility and evenhandedness in the interpretation of rights. Equal concern and respect for all sides, including the side that loses a case, is quintessential to preserve the spirit of liberty.

The greatest dilemma I encountered throughout the study is what I would call the “tolerance paradox”. The selected cases, the related commentaries, and the broader literature used in this study are full of examples and arguments concerning tolerance. Many of the marginal and marginalized believers – individual and collective – request tolerance for their difference. Some may point to the intolerance of the tolerant, who for example attempt to enforce mainstream views about gender, sexual orientation, sexual morality and/or family, on those who hold different beliefs. Yet, some of them may not be as tolerant to others, as they would have others be unto them. The tolerance of an open society must stretch to those who in their “inside law” are less tolerant of difference. But the project of a new pluralism must not be a project to undo existing pluralism, but one that enriches it further. Hence, from time to time we must handle the tolerance paradox in concrete cases, by adopting reciprocal pluralism.

Law’s religion may not always be the dear, intimate and close friend believers instinctively recognize, but it may, nonetheless, be a friend. A friend that enables (re)connection with religious, cultural and philosophical traditions, which precede our modern understandings. This can indeed feed a dynamic and holistic understanding of pluralism, connected to an understanding of our existence as essentially diverse. This I sincerely believe, is to understand our true place in Creation.

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5 A.K. Soroush, ‘Reason and Freedom’, in *Reason, Freedom, and Democracy in Islam, Essential Writings of Abdolkarim Soroush*, M. Sadri and A Sadri (eds.), Oxford University Press, Oxford (UK) et al., 2000, pp. 100-105.

6 Sunstein, *supra* n. 1, at 35.

# Samenvatting (summary in Dutch)

## OPRECHT GELOVEN IN VRIJHEID

*Een reconstructie en vergelijking van de interpretatie van de vrijheid van godsdienst en geloofsovertuiging bij het Canadese Hooggerechtshof, het Zuid-Afrikaanse Constitutionele Hof en het Europees Hof voor de Rechten van de Mens*

### 1 HOOFDSTUK 1: ALGEMENE INLEIDING: DIVERSITEIT VAN GODSDIENST EN GELOOFSOVERTUIGING EN RECHTERLIJKE INTERPRETATIE

‘Er zijn evenveel wegen naar God, als er zielen in deze wereld zijn’. Deze soefi-wijsheid kan een levenslange spirituele reis of een reeks debatten inspireren. In een notendop verklaart het ook waarom verschillende internationale en constitutionele documenten de vrijheid van godsdienst en geloofsovertuiging erkennen. Dit mensenrecht beschermt elke gelovige, inclusief degenen die zichzelf als ongelovigen definiëren, tegen inmenging van anderen en de staat. Het Canadese Handvest van Rechten en Vrijheden, de Zuid-Afrikaanse Bill of Rights en het Europees Verdrag voor de Rechten van de Mens erkennen elk de vrijheid van godsdienst en geloofsovertuiging. Ze gebruiken deels vergelijkbare, deels verschillende woorden en juridische concepten, maar ze delen een gemeenschappelijke kern, die kan worden samengevat in artikel 18 van de Universele Verklaring van de Rechten van de Mens (vrijheid van gedachte, geweten en religie) die luidt:

‘Eenieder heeft recht op vrijheid van gedachte, geweten en godsdienst; Dit recht omvat de vrijheid om van godsdienst of levensovertuiging te veranderen, en de vrijheid, alleen of in gemeenschap met anderen en in het openbaar of privé, om zijn godsdienst of levensovertuiging te uiten in onderwijs, praktijk, aanbidding en naleving.’

Hoewel de codificaties van het mensenrecht deze gemeenschappelijke kern delen, leidt het in rechtszaken, waarin gelovigen, inclusief niet-gelovigen, beweren dat hun vrijheid van godsdienst en geloofsovertuiging is aangetast, tot heel verschillende uitkomsten. Verschillen, die alleen kunnen worden begrepen en geanalyseerd door te kijken naar de interpretatie van de vrijheid van godsdienst en geloofsovertuiging door tribunalen in verschillende gevallen.

Deze studie is geïnteresseerd in het vinden en vergelijken van de standaardinterpretatie van de vrijheid van godsdienst en geloofsovertuiging van het Hooggerechtshof van Canada (SCC), het Constitutioneel Hof van Zuid-Afrika (CCSA) en het Europees Hof voor de Rechten van de Mens (EHRM). De vergelijking moet bijdragen aan het inzicht in hoe rechterlijke interpretatie van belang is voor het bieden van optimale bescherming voor alle gelovigen. Optimale bescherming wordt gedefinieerd in hoofdstuk 2. Deze studie volgt de argumenten van Cass. R. Sunstein, dat rechterlijk minimalisme de beste interpretatietheorie is voor mensenrechten in een pluralistische context, die valt in een liberaal-democratisch constitutioneel systeem (= liberaal-democratisch en rechtstatelijk).

De volgende categorisatie wordt gebruikt om de geselecteerde zaken te analyseren:

- persoonlijke vrijheid;
- familierecht en familierelaties;
- groepsautonomie;
- onderwijs;
- evenwicht tussen de vrijheid van godsdienst en geloofsovertuiging en andere rechten; en
- secularisme.

Dit zijn geen wederzijds uitsluitende dimensies van de vrijheid van godsdienst en geloofsovertuiging. Zij komen voor in de rechtszaken die door rechterlijke colleges worden beslist met betrekking tot vrijheid van godsdienst en geloofsovertuiging.

Voor dit onderzoek zijn vijftien zaken van elk van de gerechtshoven in de periode 1990 tot 2015 geselecteerd. Om redenen die specifiek zijn de betreffende rechtsgebieden, werden van EHRM echter alleen zaken na 1998 geselecteerd en voor het CCSA alleen zaken na 1996. De zaken werden geselecteerd op basis van gevarieerdheid, waarbij de ingewikkelde vragen over vrijheid van godsdienst en geloofsovertuiging aan bod moesten komen.

Na de gekozen periode werden natuurlijk ook nieuwe zaken beslist die betrekking hadden op de vrijheid van godsdienst en geloofsovertuiging. Tot april 2022 waren dit grofweg nog twee zaken van het SCC, zeven van het CCSA en drie van het EHRM. Aangezien deze niet in de analyse zijn opgenomen, kan deze studie geen antwoord geven op de vraag of de huidige standaardinterpretatie met betrekking tot de vrijheid van godsdienst en geloofsovertuiging in elk van de Hoven verschilt van wat in de geselecteerde zaken is gevonden. Niettemin laat de analyse en vergelijking nog steeds conclusies toe met betrekking tot de impact van de standaardinterpretaties voor de uitkomst, de implicaties voor het concept van de vrijheid van godsdienst en geloofsovertuiging, de reikwijdte ervan en wanneer en hoe deze wordt geactiveerd. Bovendien, zelfs als de standaardinterpretaties in latere gevallen zijn gewijzigd, laat de studie de conclusie toe dat de hoofd- en ondersteunende leidende principes,

die gevonden werden in de geselecteerde zaken, ook bij veranderingen zullen worden toegepast.

Hoewel het EHRM het enige internationale tribunaal is, in vergelijking met de hoogste tribunaal in twee nationale constitutionele ordes, is de vergelijking nog steeds eerlijk. Elk van de rechtsgebieden heeft elementen van gewoonterecht en continentaal recht en wordt gekenmerkt door meerdere gerechtelijke en wetgevende lagen. Zelfs debatten met betrekking tot autoriteit en legitimiteit met betrekking tot rechterlijke interpretatie zijn zeer vergelijkbaar in elk van de rechtsgebieden. De volgende onderzoeksvragen worden in dit onderzoek beantwoord:

1. *Wat zijn de standaardinterpretaties van de vrijheid van godsdienst en geloofsovertuiging van het Canadese Hooggerechtshof, het Zuid-Afrikaanse Constitutionele Hof en het Europees Hof voor de Rechten van de Mens; en hoe worden ze toegepast in de zes dimensies persoonlijke vrijheid; familierecht en familie-relaties; groepsautonomie; onderwijs; het in evenwicht brengen van de vrijheid van godsdienst en geloofsovertuiging met andere rechten; en secularisme?*
2. *Welk concept van de vrijheid van godsdienst en geloofsovertuiging past elk van de hoven toe, hoe breed is de reikwijdte van de bescherming en hoe wordt de vrijheid van godsdienst en geloofsovertuiging geactiveerd in de drie standaardinterpretaties en wat zijn de terugkerende leidende principes binnen de standaardinterpretatie?*
3. *Welke elementen van minimalisme zijn aanwezig in de standaardinterpretatie en in welke elementen spreekt de standaardinterpretatie het minimalisme tegen en wat is het effect hiervan op een optimale bescherming voor gelovigen?*
4. *Wat kunnen de hoven leren van elkaars standaardinterpretatie als het gaat om optimale bescherming van gelovigen; wat zijn de best practices?*

## 2 HOOFDSTUK 2: THEORETISCH KADER: CONCEPTEN VAN VRIJHEID VAN GODSDIENST EN GELOOFSOVERTUIGING EN MINIMALISME

De vrijheid van godsdienst en geloofsovertuiging is een van de oudste klassieke mensenrechten. Verschillende perioden in de geschiedenis en verschillende plaatsen in de wereld worden aangehaald voor zijn oorsprong. Mensen uit een aantal religieuze en filosofische tradities zouden beweren, dat de waarden die ten grondslag liggen aan mensenrechten in het algemeen en de vrijheid van godsdienst en geloofsovertuiging voortkomen uit deze tradities. Hoewel het bestaan en het belang van de vrijheid van godsdienst en geloofsovertuiging als mensenrecht vanuit een historisch perspectief kan worden verklaard, kunnen verschillende pragmatische, op geloof gebaseerde en pluralistische argumenten worden gegeven. Alle argumenten zullen het belang aantonen van de vrijheid van godsdienst en geloofsovertuiging binnen een kader van



verschillende waarden, rechten en of concepten die allemaal betrekking hebben op vrede, rechtvaardigheid en vrijheid.

Vanuit het perspectief van het moderne internationale en constitutionele recht en de westerse rechtsgeschiedenis is de Vrede van Westfalen in 1648 CE (Common Era) een verklaarbaar uitgangspunt voor een historische analyse. Moderne mensenrechteninstrumenten van na de Tweede Wereldoorlog, te beginnen met de Universele Verklaring van de Rechten van de Mens, omvatten allemaal de vrijheid van godsdienst en geloofsovertuiging. Regionale mensenrechteninstrumenten zoals het Europees Verdrag tot bescherming van de rechten van de mens en de fundamentele vrijheden, de Amerikaanse Verklaring van de rechten en plichten van de mens, het Afrikaanse Handvest voor de rechten van de mens en de volkeren omvatten dit recht. Het is bevestigd door op geloof gebaseerde en/of interreligieuze initiatieven zoals de Cairo Verklaring van Mensenrechten in Islam en het Parlement van de Wereldreligies. Het is opgenomen in de meeste grondwetten van de wereld.

De meeste grondwetten en mensenrechteninstrumenten in de wereld erkennen de vrijheid van godsdienst en geloofsovertuiging, terwijl de rechtspraak laat zien dat er altijd behoefte en ruimte is voor juridische interpretatie. De interpretatie is zoals bij elk recht belangrijk voor de uitkomst. De beginselen van interpretatie van de vrijheid van godsdienst en geloofsovertuiging, waarover de verschillende leden van een rechtbank het eens zijn, vormen de standaardinterpretatie die kan worden gereconstrueerd door de jurisprudentie te analyseren.

Het is niet moeilijk om te beargumenteren dat interpretatie ertoe doet. Dit geldt in het algemeen, in gevallen van grondwettelijke en/of mensenrechten en specifiek met betrekking tot de vrijheid van godsdienst en geloofsovertuiging. Vergelijkbare situaties leiden ook tot verschillende uitkomsten in sommige van de geselecteerde zaken, zelfs wanneer ze slechts oppervlakkig worden vergeleken. Wanneer hoven deze zaken behandelen, gaan ze een intern discours aan. Bij elke nieuwe zaak zetten ze het discours voort. Zelfs als de rechters het oneens zijn, maken ze gebruik van dezelfde principes en opvattingen, die functioneren als een overeenkomst op het middenniveau tussen hen. Hoewel deze principes en concepten evolueren, worden ze geval voor geval toegepast en zelden opeens volledig verlaten. Ik noem dit de standaardinterpretatie van de vrijheid van godsdienst en geloofsovertuiging.

Rechtstheoretici hebben sinds lang verschillende theorieën over juridische interpretatie onderscheiden. De typologie van Cass R. Sunstein maakt onderscheid tussen 'perfectionisme', 'originalisme', 'majoritarisme' en 'minimalisme'. Hij positioneert zich als een voorstander van het laatste, met het argument dat dit het meest geschikt is voor pluralistische samenlevingen, georganiseerd als liberaal-democratische constitutionele ordes (LDC). Deze studie volgt het argument van Sunstein en beschouwt minimalisme als de voorkeurstheorie van interpretatie boven zijn concurrenten.

‘Minimalisme’ wordt niet geassocieerd met een bepaalde politieke of filosofische stroming of beweging anders dan LDC in het algemeen. Dit maakt minimalisme geschikt om de drie standaardinterpretaties te vergelijken, zodra ze zijn gereconstrueerd.

Minimalisme is voorstander van ‘onvolledig getheoretiseerde overeenkomsten’, ‘smalle’ en ‘oppervlakkige’ uitspraken en het beslissen van één geval tegelijk. Het zet zich af tegen waardeoordelen die gebaseerd zijn op specifieke tradities, politiek en ideologieën en ‘diepe’ en ‘brede’ uitspraken. Gebaseerd op een principieel pragmatisme, erkent het wel dat van tijd tot tijd diepe en/of brede uitspraken nodig en nuttig kunnen zijn om een diepere kwestie op te lossen en een verhaallijn af te maken die stapsgewijs expliciet is ontwikkeld.

Zaken die door hoven worden beslist, waarin de vrijheid van godsdienst en geloofsovertuiging een grote rol speelt, gaan vaak over de ‘juridisering van megapolitiek’ (Hirschl). Dit wil zeggen dat ze fundamentele kwesties aan de orde stellen met betrekking tot constitutionele, culturele en religieuze waarden, pluralisme, sociale trends, individuele en collectieve identiteit, enzovoort. De westerse oorsprong van het moderne recht en codificaties op grond van de westerse dominantie in de moderne geschiedenis (en dus rechtsgeschiedenis) wordt door sommigen aangehaald, om te betogen dat bepaalde inherente gebreken bestaan binnen het recht en de toepassing ervan. Anderen zullen erop wijzen dat, hoewel sommige tekortkomingen kunnen bestaan als gevolg van de westerse dominantie gedurende lange perioden van de moderne mondiale geschiedenis en juridische ontwikkeling, de westerse *bias* kan worden opgelost.

In een discussie over de relatie tussen de vrijheid van godsdienst en geloofsovertuiging en liberalisme en/of secularisme, zullen sommigen betogen dat liberaal-democratisch constitutionalisme een inherente seculiere vooringomenheid heeft. Hirschl betoogt dat secularisatie door het recht zelfs plaatsvindt in rechtsgebieden met *strong establishment* van godsdienst en geloofsovertuiging (overheersende staatsreligie of theocratie). De studie maakt onderscheid tussen institutioneel secularisme, dat in de eerste plaats gericht is op evenredigheid in het behandelen van geloof en geloofsovertuiging en ideologisch secularisme, dat een directe concurrent is voor religieuze en andere levensovertuigingen. De vrijheid van godsdienst en geloofsovertuiging kan helpen ervoor te zorgen dat institutioneel secularisme niet wordt geïnterpreteerd als een begunstiging van ideologisch secularisme.

Auteurs, vertrekkend van op geloof gebaseerde, pluralistische, klassiek-liberale en/of postmoderne perspectieven, wijzen op mogelijkheden die de vrijheid van godsdienst en geloofsovertuiging heeft gecreëerd om echte opvattingen over vrijheid te ontwikkelen, die ruimte voor gelovigen omvatten om zich individueel en collectief te gedragen in overeenstemming met hun levensovertuigingen. Over het algemeen omvatten de discussies over de jurisprudentie van het SCC, CCSA en EHRM ondersteunende, vrij kritische en zeer kritische stemmen uit alle bovengenoemde posities. Auteurs hebben de neiging om

rekening te houden met de fundamentele waarden van elk van deze rechtsordes. Aangezien deze vergelijkbaar zijn, in de zin van gebaseerd op liberaal-democratisch constitutionalisme, omvat elke afwijzing van deze rechtsordes omdat zij per definitie tegengesteld aan religie zouden zijn, ook automatisch alle jurisprudentie van de drie tribunalen. Meer genuanceerde opvattingen hebben de neiging om zich te concentreren op de uitkomsten en analyses in specifieke gevallen.

Hoewel sommige van de nieuwste literatuur in het huidige debat over de vrijheid van godsdienst en geloofsovertuiging niet in dit proefschrift is opgenomen, heeft het nog steeds een plaats in het huidige debat, omdat het betrekking heeft op de verschillende standpunten in dat debat. Ze kunnen worden onderverdeeld in klassiek liberalisme, religieus (neo-)exclusivisme, ideologisch secularisme en (neo-)pluralisme in vrijheid van godsdienst en geloofsovertuiging. Deze studie combineert een klassieke liberale visie als een meta-narratief dat vreedzame co-existentie van verschillende wereldbeelden mogelijk maakt, met een pluralistische visie die westerse, *mainstream* en secularistische vooroordelen in de *status quo* probeert te ontstijgen.

De positie in het discours over vrijheid van godsdienst en geloofsovertuiging en de keuze voor minimalisme als voorkeurstheorie van interpretatie is indicatief voor hoe 'optimale bescherming' in de hele studie wordt gezien: een breed en liberaal concept en reikwijdte van godsdienst en geloofsovertuiging, waarbij het recht gemakkelijk kan worden geactiveerd. Dit betekent absolute bescherming van gelovigen in het vasthouden aan overtuigingen en zoveel mogelijk bescherming van gelovigen in het uiten van hun religie of levensovertuiging. Optimale bescherming is een vorm van maximale bescherming onder de vrijheid van godsdienst en geloofsovertuiging, waarbij ook andere mensenrechten en dwingende algemene belangen maximaal worden beschermd. Het gaat dus uit van een optimum waarbij deze allemaal zorgvuldig in balans zijn.

### 3 HOOFSTUK 3: CODIFICATIE VAN DE VRIJHEID VAN GODSDIENST EN GELOFS-OVERTUIGING IN DE DRIE INSTRUMENTEN EN DE METHODOLOGIE VAN DE DRIE HOVEN BIJ HET BESLECHTEN VAN MENSENRECHTENZAKEN

De drie instrumenten – het Canadese Handvest van rechten en vrijheden, de Zuid-Afrikaanse Bill of Rights en het Europees Verdrag tot bescherming van de rechten van de mens en de fundamentele vrijheden (EVRM) – hebben de vrijheid van godsdienst en geloofsovertuiging op verschillende manieren gecodificeerd. De drie instrumenten verschillen in de formulering en definitie van het recht op vrijheid van godsdienst en geloofsovertuiging, evenals de integratie ervan met andere universele vrijheidsrechten. Dit leidt tot interessante parallellen, maar ook opmerkelijke verschillen. De belangrijkste parallel is dat er binnen de kern van het mensenrecht, zoals gecodificeerd, een sterke

gemene deler is. Alle drie de instrumenten beschermen zowel religieuze overtuigingen als andere overtuigingen. Ze beschermen allemaal de interne dimensie, een externe dimensie en een collectieve dimensie. Ze maken allemaal een beperking van het recht onder vergelijkbare omstandigheden mogelijk.

De verschillen tussen de drie instrumenten zijn onder meer de groepering van vrijheden in één of meer rechten, het uitgewerkte of minimale karakter van de formulering daarvan, de formulering van de beperkingsclausule en gelijkheidsbepalingen, of de expliciete of impliciete verwijzing naar bepaalde (grondwettelijke) waarden. Zo maakt het Handvest onderscheid tussen twee vrijheden: de vrijheid van geweten en godsdienst en de vrijheid van gedachte, overtuiging, mening en meningsuiting. De Bill of Rights bevat een bepaling die de vrijheid van gedachte, mening, religie, overtuiging en geweten samenbrengt. De vrijheid van meningsuiting is gecodificeerd in een ander apart recht. Het EVRM creëert ook de vrijheid van gedachte, geweten en godsdienst, in één verdragsrecht. De vrijheid van meningsuiting is een ander apart recht.

Er zijn belangrijke parallellen in de aanpak of methode om mensenrechtenzaken op te lossen. Deze zijn deels af te leiden uit de parallellen in codificatie. Alle drie zullen zij bepalen of er een rechtsgrondslag is voor inmenging, een legitiem doel dat wordt nagestreefd en of de maatregel gerechtvaardigd is. Dit laatste omvat 'democratische samenleving' om te bepalen of een inmenging past in het geheel van de op mensenrechten gebaseerde rechtsorde en elementen zoals 'evenredigheid', 'minst beperkend' en 'rationeel verband' om te bepalen of de inmenging de juiste beperking is. Doctrines van directe en indirecte toepassing, met inbegrip van horizontale toepassing en positieve en negatieve verplichtingen zijn vergelijkbaar. Het EHRM lijkt het meest geneigd om interne grenzen aan rechten te accepteren, maar alleen als het in de codificatie is opgenomen. Alle tribunalen verwerpen een hiërarchie van rechten.

De vergelijking laat een voorlopige conclusie toe. Hoewel er verschillen zijn in de methodologie, zijn de overeenkomsten vrij sterk. Dit geeft aan dat de gevolgde benaderingen op zijn zachtst gezegd vergelijkbaar zullen zijn. De belangrijke nuance in dit verband is de relevantie van procedurele aspecten die voortvloeien uit de verschillen in nationaal recht tussen constitutioneel, administratief en privaatrecht in Zuid-Afrika en Canada enerzijds, en de relevantie van de beoordelingsmarge voor het EHRM anderzijds. Verschil in codificatie is daarom niet voldoende om verschillen in uitkomst van zaken te verklaren.

#### 4 HOOFDSTUK 4: VERGELIJKENDE ANALYSE VAN DE GESELECTEERDE ZAKEN

De geselecteerde zaken (Appendix I) van de drie hoven worden vergelijkend geanalyseerd om de parallellen en verschillen in standaardinterpretatie te vinden binnen de zes dimensies van de vrijheid van godsdienst en geloofsovertuiging die in hoofdstuk 1 worden genoemd. Deze zes dimensies zijn: de

individuele dimensie; de dimensie familie- en familierecht; de dimensie collectieve en groepsautonomie; de dimensie van het onderwijsstelsel; de dimensie van het balanceren met andere rechten en de dimensie van secularisme. Veel van de geselecteerde cases hebben meerdere van deze dimensies.

In paragraaf 4.2 over de individuele dimensie komen drie van de geselecteerde zaken voor het SCC aan de orde: *Multani* (I1.4.10), *Amselem* (I1.4.7) en *R v. NS* (I1.4.14). In de eerste twee zaken oordeelde het SCC ten voordele van de gelovigen, in de laatste zaak tegen de gelovige. Voor het CCSA speelden twee van de zaken in deze dimensie: *Prince* (I2.4.7) en *Pillay* (I2.4.11). In de eerste zaak oordeelde het CCSA uiteindelijk niet in het voordeel van dhr. Prince. Mw. Pillay werd wel in het gelijk gesteld. Negen van de geselecteerde zaken van het EHRM hadden betrekking op persoonlijke vrijheid: *Buscarini*, *Maestri*, *Şahin*, *S.A.S*, *Thlimmenos*, *Batayan*, *Cha'are Shalom*, *Folgerø* en *Lautsi*. In vijf van die zaken oordeelde het Hof in het nadeel van de gelovige, in de andere vier in het voordeel van de gelovige. *Cha'are Shalom* wordt besproken onder vrijheid van godsdienst en geloofsovertuiging en autonomie, en *Folgerø* en *Lautsi* worden besproken onder de dimensie met betrekking tot het onderwijssysteem.

In paragraaf 4.2 zien we hoe individuele gelovigen in conflict kunnen komen met neutrale regels van algemene toepasbaarheid, omdat zij door religie of geloof geïnspireerde voorschriften volgen. De regels van algemene toepasbaarheid waren niet bedoeld om tegen bepaalde religieuze of andere overtuigingen te discrimineren, maar ze hebben wel die consequentie. We zien dat schijnbaar neutrale wetten ernstige gevolgen kunnen hebben voor de persoonlijke vrijheid van gelovigen. Dit leidt op zijn minst tot een gevoel van onwelkom zijn en in het ergste geval een pijnlijke keuze. In de rechtspraak betekent dit, dat de aantasting van de vrijheid van godsdienst en geloofsovertuiging moet worden erkend, ook al kunnen die om wat voor reden dan ook niet worden opgevangen.

Vaak is voldoende aanpassing van de praktijken van gelovigen mogelijk, zonder het algemene doel van de wet- of regelgeving in kwestie te ondermijnen. Soms kan dit eenvoudig door de gelovigen vrij te stellen van (bepaalde aspecten van) de wet. Vrijstelling of andere vormen van accommodatie zullen soms op kritiek van de *mainstream* stuiten. De geselecteerde zaken benadrukken de noodzaak voor openbare instellingen om tolerantie te bevorderen en bij te brengen en voor rechtbanken om hierop te wijzen. Bescherming van de persoonlijke vrijheid van godsdienst en geloofsovertuiging vereist altijd dat de oprechte individuele overtuigingen van gelovigen als uitgangspunt worden genomen, in plaats van praktijken die 'geobjectiveerd' zijn door meningen van deskundigen of statistieken.

In paragraaf 4.3 zien we hoe ouderlijk gezag en het belang van het kind kunnen botsen, vooral als het gaat om medische beslissingen, hoe het religieuze huwelijk en het staatshuwelijk kunnen botsen en hoe de rechten van partners van hetzelfde geslacht om te trouwen een specifieke relatie hebben met de vrijheid van godsdienst en geloofsovertuiging.

Ouders zijn het natuurlijke gezag van kinderen. Wat ouders ook geloven of niet geloven, het zal zeker invloed hebben op de kinderen. Als ouders anders en apart geloven, kan dit conflicten in de opvoeding veroorzaken. Wanneer het ouderlijk gezag wordt beperkt door overheidsinstellingen, is rechterlijke toetsing noodzakelijk om de gevolgen voor de vrijheid van godsdienst en geloofsovertuiging van de ouders en de kinderen te beoordelen.

Vijf van de Canadese zaken kunnen onder deze dimensie worden besproken: *P.(D)* (I1.4.3), *Children's Aid Society* (I1.4.4), *A.C. v. Manitoba* (I1.4.12), *Bruker* (I1.4.11) en *Same-Sex-Marriage* (I1.4.9). In de eerste drie zaken oordeelt de meerderheid telkens dat de beperking van de vrijheid van godsdienst en geloofsovertuiging in die gevallen wel geoorloofd is. In *Bruker* wordt in het voordeel van de klager beslist en tegen haar ex-man. Beiden beroepen zich op hun rechten onder de vrijheid van godsdienst en geloofsovertuiging. *Same-Sex-Marriage* beslist dat de invoering van een huwelijk voor mensen van hetzelfde geslacht niet strijdig is met het Handvest. Gelovigen kunnen onder omstandigheden een beroep doen op de vrijheid van godsdienst en levensovertuiging om geen deel uit te maken van de totstandkoming van zo'n huwelijk.

Zeven van de Zuid-Afrikaanse zaken in deze dimensie betwisten de bestaande exclusiviteit van het civielrechtelijke huwelijk: *Amod* (I2.4.5), *Daniels* (I2.4.8) *Hassam* (5.4.12), *Fourie* (I2.4.10), *Robinson* (I2.4.9.), *Women's Legal Centre Trust*, (I2.4.13) en *DE v. RH* (I2.4.14). In de eerste vijf gevallen beslist het Hof voor een ruime interpretatie en/of tegen een beperkende lezing van de voorwaarden van het civielrechtelijk huwelijk. De laatste twee zaken laten de grenzen zien van verruiming door rechtelijke interpretatie.

Het EHRM besliste in twee zaken die onder deze dimensie vallen. Het EHRM oordeelt in het voordeel van de regering in *Yiğit* (I3.4.9) en *Refah* (I3.4.5).

De geselecteerde zaken laten duidelijk zien dat één geval per keer herziening noodzakelijk is vanwege de netelige kwesties die ermee gemoeid zijn. Wanneer ouderlijke beslissingen van invloed zijn op de gezondheid of de voortzetting van het leven van minderjarigen, moet de rechter grenzen stellen aan de ouderlijke vrijheid van godsdienst en geloofsovertuiging op grond van de beperkingsclausule. Bij ouderlijke conflicten van religie is verwarring onvermijdelijk. Verwarring en zelfs cognitieve dissonantie zijn op zichzelf niet voldoende om te concluderen dat het in het belang van het kind is om een van de ouders niet te kennen zoals ze zijn.

Het religieuze huwelijk bestaat al langer dan het burgerlijk huwelijk/het staatshuwelijk. Het blijft bestaan naast het burgerlijk of staatshuwelijk en is voor veel mensen een alternatief voor het door de staat georkestreerde huwelijk, net als andere duurzame relaties die de basis vormen van gezinnen. Door de sociale realiteit als feit te behandelen en ongelijkheid op het gebied van erfenis, sociale zekerheid, verzekeringen enzovoort te voorkomen, kan beperking worden opgelegd van de vrijheid van godsdienst en geloofsovertuiging, zoals we in de geselecteerde zaken zien. Om ervoor te zorgen dat de rechterlij-

ke macht het domein van de wetgevende macht respecteert, vereist dit een contextuele benadering van geval tot geval.

Het handhaven van een exclusieve en bevoorrechte positie voor het staats-huwelijk lijkt daarentegen moeilijk te verzoenen met de vrijheid van godsdienst en geloofsovertuiging, terwijl religieuze huwelijken en privaatrecht soms met elkaar moeten samenwerken in een pluralistische samenleving die wordt geregeerd door liberaal-democratisch constitutionalisme.

Zowel de Zuid-Afrikaanse als de Canadese zaken ten aanzien van het huwelijk voor mensen van hetzelfde geslacht laten zien hoe gelijkheidsrechten het moeilijk maken om een exclusieve eis van het andere geslacht te handhaven, als het gaat om het burgerlijk huwelijk of staatshuwelijk. De eis van het andere geslacht geeft voorrecht aan het geloof dat het huwelijk alleen voor partners van verschillend geslacht is, boven alle andere overtuigingen. Beide arresten vermelden wel, dat de op geloof gebaseerde opvattingen over het huwelijk geen bron kunnen zijn van interpretatie van het staatsrecht of de grondwet. Degenen die geloven dat het huwelijk alleen een voorwaarde van het andere geslacht zou moeten zijn, kunnen zich beroepen op de vrijheid van godsdienst en geloofsovertuiging om vrijstelling te eisen van het faciliteren of helpen bij verbintenissen tussen mensen van hetzelfde geslacht. Op basis van de analyse ondersteun ik een dynamische, niet-hiërarchische co-existentie van staatshuwelijken met op geloof of cultuur gebaseerd huwelijk en andere beoefende vormen van duurzame relaties.

In paragraaf 4.4 zagen we de relaties tussen de individuele en gemeenschappelijke dimensie van de vrijheid van godsdienst en geloofsovertuiging. Individuen en groepen vertrouwen op de collectieve dimensie wanneer de staat of anderen zich bemoeien met de groepsautonomie gecreëerd door het vrijheidsrecht. Soms zullen individuen beweren dat de groepsautonomie te breed is. Soms gaat het om de co-existentie tussen het recht van de staat/nationaal recht en 'eigen recht' van gemeenschappen.

De collectieve dimensie van vrijheid van godsdienst en geloofsovertuiging komt in totaal in 13 van de geselecteerde zaken voor. Zes van deze zaken werden beslist door het EHRM, vijf door het SCC, twee door het CCSA. In een ander Zuid-Afrikaans geval speelt de collectieve dimensie echter een belangrijke 'ondersteunende rol'.

Voor het SCC spelen de *Sioui*-zaak (I1.4.1), *Hofer* (I1.4.2), *Trinity Western University* (TWU) (I1.4.5), *Lafontaine* (I1.4.8) en *Alberta v. Hutterian Brethren*, (I1.4.13). Bij twee ervan vindt het SCC noodzakelijke en gerechtvaardigde beperkingen van de autonomie van een gemeenschap.

Het CCSA vindt in *Christian Education* (I2.4.6) een gerechtvaardigde beperking van de autonomie. In *De Lange* (I2.4.15) wordt de zaak op procedurele gronden beslecht. In *Prince* (I2.4.7), hierboven al besproken, speelde de collectieve dimensie een belangrijke 'ondersteunende rol', aangezien het CCSA de werkbaarheid van een vrijstelling van drugswetgeving voor de Rastafari-gemeenschap beoordeelde.



Het EHRM behandelde *Cha'are Shalom* (I3.4.3), *Hasan v. Chaush* (I3.4.4), *Refah* (I3.4.5), *Mouvement Raëlien* (I3.4.12), *Sindicatul Pastorul Cel Bun* (I3.4.13) en *Fernández Martínez* (I3.4.14). Alleen in *Cha'are Shalom* en *Refah* beslist het EHRM tegen de organisatie in kwestie. In *Sindicatul Pastorul Cel Bun* en *Fernández Martínez* wordt beslist in het voordeel van een betreffende kerk, maar tegen gelovigen die in die gevallen een tegengesteld belang hebben.

Als tolerantie zich alleen uitstrekt tot de overtuigingen die we aangenaam, acceptabel of logisch vinden, zou dit tolerantie een 'lege' tolerantie zijn. De vrijheid van godsdienst en geloofsovertuiging stelt gemeenschappen dus in staat zich binnen hun eigen wet te gedragen. De staat moet niet proberen het pluralisme uit te bannen, noch binnen de samenleving, noch binnen een religieuze gemeenschap, maar iedereen beschermen. 'Eigen recht' of rechtspluralisme dat verenigbaar is met de liberale multiculturele democratie zou heel goed een belangrijk antwoord kunnen zijn op de vraag naar pluralisme. Maar aan de andere kant is autonomie niet absoluut. Er kan geen grondwet/mensenrechtenvrije zone zijn, waarin de eigen wet absoluut is.

Paragraaf 4.5 gaat over de dimensie van vrijheid van godsdienst en geloofsovertuiging en het onderwijs. Het openbare onderwijssysteem kan onderwijs over de heersende religie of de heersende seculiere ideologie omvatten. Het kan ook onderwijzen over verschillende religies en overtuigingen. Particuliere instellingen kunnen de voorkeur geven aan overtuigingen die botsen met die van de reguliere samenleving, terwijl de afgestudeerden ook willen deelnemen aan de maatschappij in den brede.

In totaal negen van de onderzochte gevallen zijn er elementen van godsdienst en geloofsovertuiging met betrekking tot het onderwijssysteem. Het Europees Hof voor de Rechten van de Mens, het Hooggerechtshof van Canada en het Constitutioneel Hof van Zuid-Afrika beslisten elk over drie van dergelijke zaken. Al deze gevallen worden ook besproken binnen andere dimensies.

Voor het SCC spelen *Multani* (I1.4.10), *Chamberlain* (I1.4.5) en *TWU* (I1.4.6). Het CCSA behandelt *Christian Education* (I2.4.6), *Pillay* (I2.4.11) en *Gauteng School Education Bill* (I2.4.2). Van de EHRM zaken vallen *Şahin* (I3.4.7), *Folgerø* (I3.4.8), *Lautsi* (I3.4.10) en *Fernández Martínez* (I3.4.14) in deze dimensie. Het SCC oordeelde in de eerste twee zaken in het belang van scholieren en ouders in een openbare onderwijsinstelling. In de laatste zaak oordeelde het SCC ten voordele van een religieuze universiteit. Het CCSA oordeelde in *Christian Education* dat de religieuze onderwijsinstelling geen uitzondering op een algemene wet kon krijgen. In *Pillay* werd ten faveure van de gelovige en ten nadele van een onderwijsinstelling besloten. In *Gauteng School Education Bill* hield het CCSA vast aan een wet die betrekking had op taal- en godsdienstonderwijs op openbare scholen.

Het EHRM oordeelde in *Şahin*, *Lautsi* en *Fernández Martínez* tegen de individuele (on)gelovige en ten faveure van regels voor het openbaar onderwijs.

In *Folgerø* werd wel een inbreuk op de rechten van kinderen en ouders geconstateerd bij regels over godsdienstonderwijs binnen openbare scholen.

Deze dimensie toont dat vrijheid van godsdienst en geloofsovertuiging in het onderwijssysteem betrekking heeft op de gelovigen in het openbaar onderwijssysteem, godsdienstonderwijs in het openbaar onderwijs en onderwijs op religieuze/levensbeschouwelijke grondslag. Het openbare onderwijssysteem moet ervoor zorgen dat de hele samenleving zichtbaar wordt, dat diversiteit wordt getoond. Dit kan enige cognitieve dissonantie veroorzaken, wat nodig is voor tolerantie. De verantwoordelijkheid van de staat om pluralisme te waarborgen kan niet worden weggenomen door te wijzen op niet-openbare scholen. Een deel van de taak van het waarborgen van pluralisme is het waarborgen van religieuze geletterdheid.

Er kan gemakkelijk worden aangenomen dat religieuze symbolen die op scholen of klaslokalen worden getoond, geen neutrale betekenis hebben. Er zijn verschillende mogelijkheden om het godsdienstonderwijs in het openbaar onderwijs zo te organiseren dat meerderheids- en minderheidsbelangen met elkaar in overeenstemming zijn. Bij de beoordeling moet rekening worden gehouden met het effect van groepsdruk en subtiele vormen van druk op kinderen (en hun ouders). Religieuze instellingen daarentegen zijn niet voor iedereen en volgen een minder pluralistische logica, maar moeten inclusief zijn, als dit niet in strijd is met hun overtuigingen.

In paragraaf 4.6 is het creëren van evenwicht tussen rechten en belangen, wat in alle andere dimensies een belangrijke rol speelt, als aparte kwestie opnieuw bekeken. In ten minste 18 van de onderzochte zaken staat het evenwicht tussen gelijke zorg en eerbiediging van alle betrokken rechten en belangen centraal in de juridische redenering. Acht daarvan werden door het SCC besloten. Het CCSA besliste zes van deze zaken. Vier werden beslist door het EHRM. Al deze gevallen worden ook geanalyseerd onder enkele van de andere dimensies.

De kwesties die vallen in de dimensie van het balanceren van vrijheid van godsdienst en geloofsovertuiging met andere rechten kunnen het beste worden onderverdeeld in de volgende onderwerpen:

- de balans van pluralisme: (religieuze) overtuigingen en LHBTQ+-gelijkheidsrechten;
- het voorkomen van uitbanning van pluralisme: individuele rechten en communitaristische belangen;
- het evenwicht tussen individuen en geloofsgemeenschappen;
- het evenwicht tussen ouderlijk gezag en de rechten van kinderen.

Evenwicht creëren ziet in de eerste plaats op het realiseren van gelijke zorg en respect door middel van een procedurele rechtvaardigheid, die alle partijen gelijke erkenning geeft in hun rechten en belangen. Dit impliceert dat het beter is om een zaak te beslissen op grond van de beperkingsclausule, dan om de vordering af te wijzen als zijnde niet vallend onder de bescherming van het

recht. Begrippen als het recht om anders te zijn, gelijkwaardig religieus burgerschap en democratie op basis van pluralisme helpen.

Evenwicht vereist de acceptatie dat de reguliere samenleving soms evenveel zorg en respect zal moeten geven aan overtuigingen en praktijken die door anderen als bizar, onlogisch of irrationeel of zelfs schokkend en beledigend worden ervaren. Complexiteit is geen reden om die bescherming niet te bieden. Evenwicht kan soms worden bereikt door zuiver procedurele gronden te vinden om de zaak te beslissen. Een dergelijke uitspraak kan voor beide partijen aanvaardbaar zijn. Toch zouden rechters of andere staatsorganen zich niet moeten kwijten, door de verantwoordelijkheid voor de bescherming van de mensenrechten aan anderen te delegeren, of het nu op geloof gebaseerde of niet op geloof gebaseerde actoren zijn. Aan de andere kant moeten rechters of andere instellingen geen aannames of generalisaties maken over overtuigingen en praktijken en zeker niet de keuzes van de gelovige(n) vervangen door die van henzelf. Evenwicht kan het gemakkelijkst per geval worden bereikt. Het onmiddellijk beslissen over alle toekomstige gevallen, zal er altijd voor zorgen dat iemand meteen ook voor alle toekomstige zaken de verliezer is.

De laatste dimensie die in paragraaf 4.7 wordt besproken is die van het secularisme. In totaal staat in minstens 25 zaken de relatie van de staat ten opzichte van godsdienst en geloofsovertuiging centraal. Vijf daarvan werden beslist door het SCC, 10 elk door het CCSA en het EHRM.

Dit onderwerp komt overeen met de bespreking van het huwelijk in de paragrafen 4.4.3–4.4.5 en roept de volgende vragen op:

- Moeten staatsinstellingen het religieuze huwelijk onder bepaalde omstandigheden erkennen (Zuid-Afrikaanse gevallen *Amod*, *Daniels*, *Hassam* (I2.4.5, I2.4.8 en I2.4.12) en de Straatsburgse zaak *Yiğit* (I3.4.9))?
- Kunnen seculiere rechtbanken een contractuele verplichting afdwingen om te voorzien in een religieuze echtscheiding (Canadese zaak *Bruker*; I1.4.11)?
- Is er een verplichting voor het parlement om religieuze huwelijken van een minderheidsreligie te reguleren (Zuid-Afrikaanse zaak *Women's Legal Centre Trust*; I2.4.13)?

Zoals hierboven besproken, is het antwoord op de eerste vraag van het CCSA bevestigend, terwijl de vraag van het EHRM ontkennend is. Het SCC beantwoordt de tweede vraag bevestigend. Met betrekking tot de derde vraag is het CCSA van mening dat het niet aan de rechterlijke macht is om de wetgevende en uitvoerende macht te dwingen een lopend debat op te lossen door een 'Moslimhuwelijkswet' aan te nemen.

Een ander onderwerp is de relatie tussen staatsinstellingen en religie. Dit hangt samen met de discussie over de politieke vrijheid van geloofsgemeenschappen in 4.4.4 en roept de volgende vragen op:

- Kan van volksvertegenwoordigers worden verlangd dat zij een religieuze eed afleggen en kunnen volksvertegenwoordigingsvergaderingen worden

- begonnen met een collectief gebed (Straatsburgse zaak *Buscarini*; I3.4.1 en Canadese zaak *Mouvement laïque québécois*; I1.4.15)?
- Kunnen op geloof gebaseerde politieke partijen die zich verzetten tegen de huidige vorm van secularisme worden verboden? (Straatsburgse zaak *Refah*; I3.4.5)?
  - Kan een staat een rechter ontslaan omdat hij lid is van een geloofsgemeenschap (Straatsburgse zaak *Maestri*; I3.4.6)?
  - Kunnen seculiere rechtbanken seculier recht toepassen op procedures in een geloofsgemeenschap (Canadese zaak *Hofer*; I1.4.2)?

Het EHRM en SCC beantwoorden beide de eerste vraag ontkennend. Het EHRM geeft op de tweede vraag een bevestigend antwoord. Het EHRM beantwoordt de derde vraag ontkennend, althans wanneer daarvoor algemene en abstracte bepalingen worden gebruikt. Op de laatste vraag geeft het SCC bevestigend antwoord.

Godsdienstonderwijs is ook een onderwerp in deze rubriek. Dit onderwerp komt overeen met de bespreking van godsdienstonderwijs op openbare scholen in paragraaf 4.5.2 en roept de volgende vraag op: mag de staat het tonen van religieuze symbolen in openbare scholen bevelen en/of het verplichte karakter van een godsdienstles bevelen (Zuid-Afrikaanse zaak *Gauteng School Education Bill*; I2.4.2 en Straatsburgse zaken *Lautsi* en *Folgerø*; I3.4.8 en I3.4.10)? Het EHRM is van mening dat het gewijde vertoon van een religieus symbool niet noodzakelijkerwijs de staatsneutraliteit aantast, maar dat godsdienstlessen niet gepaard mogen gaan met hoge belemmeringen voor vrijstelling. Het CCSA is van mening dat godsdienstlessen niet verplicht mogen zijn.

Het laatste onderwerp is religieuze en seculiere overtuigingen als bron van recht en beleid. Dit onderwerp heeft betrekking op veel van de andere thema's die in de vorige paragrafen zijn besproken en roept de volgende vragen op:

- Kunnen religieuze of secularistische overtuigingen bronnen zijn van interpretatie van juridische concepten? De Canadese *Reference Same-Sex Marriage*-zaak (I1.4.9) en de Zuid-Afrikaanse *Fourie*-zaak (I2.4.10).
- Kunnen religieuze of seculiere overtuigingen een bron van wetgeving zijn om bepaald gedrag af te dwingen? De Zuid-Afrikaanse zaken *Solberg* en *DE v. RH* (I2.4.4. en I2.4.14) en de Straatsburgzaken *Şahin* (I3.4.7) en *S.A.S.* (I3.4.15).
- Wat vereist staatsneutraliteit? De Canadese zaak *Lafontaine* (I1.4.8), de Zuid-Afrikaanse zaken *Final Certification* en *Certification Western Cape* (I2.4.1 en I2.4.3), en de Straatsburgse zaken *Hasan v. Chaush* en *Fernández Martínez* (I3.4.4 en I3.4.14).

Zowel het SCC als het CCSA zijn van mening dat de vrijheid van godsdienst en geloofsovertuiging gemeenschappen nooit het recht geeft om hun op geloof gebaseerde doctrines te laten zien als bronnen van constitutioneel recht of

juridische concepten zoals 'huwelijk'. Het CCSA geeft duidelijk aan dat wetgeving geen op geloof gebaseerde normen mag afdwingen. Het erkent wel dat na verloop van tijd een religieuze norm, ingebed in wetgeving, een seculiere status kan bereiken, bijvoorbeeld als het gaat om de verkoop van sterke drank op rustdagen en feestdagen. Aan de andere kant kunnen op geloof gebaseerde normen die in wetgeving zijn verankerd, ook niet-afdwingbaar worden door veranderende omstandigheden, met name de overgang naar liberaal-democratisch constitutionalisme. Het EHRM aanvaardt dat het officiële laïcisme door de staat kan worden gebruikt als bron van wetgeving. Het ziet geen fundamentele botsing tussen een dergelijk beleid en de gelijke zorg en respect die de staat moet tonen aan iedereen, inclusief religieuze gelovigen.

Met betrekking tot de laatste vraag antwoordt het SCC dat staatsneutraliteit vereist dat rituelen in een volksvertegenwoordiging zo inclusief mogelijk zijn ten opzichte van alle (on)gelovigen. Volgens het CCSA betekent dit niet dat alle vrijheid van godsdienst en geloofsovertuiging in noodsituaties niet-denigrend moeten zijn, of dat ceremonieel deïsme buiten de orde is. Volgens het EHRM vereist staatsneutraliteit niet-inmenging van de staat in de interne aangelegenheden van een religieuze minderheidsgemeenschap. Staatsneutraliteit staat niet in de weg aan een overeenkomst met de dominante kerk om deze laatste te laten beslissen over de geschiktheid van staatspersoneel voor de functie van leraar godsdienstonderwijs.

Terwijl institutioneel secularisme een hulpmiddel kan zijn van de vrijheid van godsdienst en geloofsovertuiging om te zorgen voor een evenwichtige houding ten opzichte van verschillende religies en overtuigingen, vormt ideologisch secularisme als het door de staat wordt aangenomen een risico voor de vrijheid van godsdienst en geloofsovertuiging. Net als een (sterk) establishment kan het leiden tot een voorkeursbehandeling van de ene groep, secularisten, boven andere. Open secularisme daarentegen legt de nadruk op een niet-voorkeursbehandeling van alle religies en overtuigingen.

De exclusiviteit van het staatshuwelijk is niet ongewoon in veel liberaal-democratische constitutionele ordes en heeft een relatie met ideologisch secularisme. Het handhaven ervan, zal vaak interfereren met de rechten van gelovigen. Een meer pluralistische en accommoderende benadering, die het naast elkaar bestaan van verschillende religieuze en culturele huwelijksvormen naast het staatshuwelijk mogelijk maakt, maakt een verzoenende beschermende benadering van op geloof gebaseerde en LHBTQ+-gemeenschappen mogelijk.

Wanneer staatsinstellingen een voorkeur aannemen voor een bepaald geloof, ideologisch secularisme of een seculiere ideologie, is discriminatie van alle anderen vaak het automatische gevolg. In het openbaar onderwijs zijn, zoals ook hierboven vermeld, verschillende modellen denkbaar, die de vrijheid van godsdienst en geloofsovertuiging van alle leerlingen (en docenten) respecteren. Ze moeten individuele keuzes respecteren en rekening houden met het pluralisme dat aanwezig is in het studentenlichaam.

Vrijheid van godsdienst en geloofsovertuiging leidt natuurlijk tot situaties waarin overtuigingen, praktijken en religieuze voorschriften deel uitmaken van het juridische conflict. In overeenstemming met institutioneel secularisme mogen seculiere rechters het religieuze of op geloof gebaseerde niet interpreteren, laat staan het begrip van de gelovige in kwestie vervangen. Indien zij dat wel doen, is dat een ernstige schending van de vrijheid van godsdienst en geloofsovertuiging. In overeenstemming met het bovenstaande kan noch religie, noch enig ander geloof, noch ideologisch secularisme dienen als bronnen voor de interpretatie van mensenrechten of constitutioneel recht (in het accommodationistische of separatistische model).

In het licht van de tussentijdse conclusies die in het vorige hoofdstuk zijn getrokken, kunnen conclusies worden geformuleerd met betrekking tot de beoordeling van de vrijheid van godsdienst en geloofsovertuiging. De volgende *best practices* waren aanwezig in de geselecteerde cases:

1. Erkenning van alle oprechte religieuze, culturele of andere overtuigingen als bepalend voor bescherming, zonder voorafgaande uitsluiting, waarbij ze waar nodig worden beperkt onder de beperkingsclausule. Geen objectivering door dogma's, ambtenaren of statistieken.
2. Het voorkomen van pijnlijke keuzes en het toestaan of bevelen van accommodatie en/of vrijstelling, waarbij verzoening tussen vrijheid van godsdienst en geloofsovertuiging en andere rechten of belangrijke doelstellingen van de openbare orde nodig is. Waar dit onmogelijk is, het wegnemen van de scherpe kantjes van het handhaven van een wet tegen degenen met gewetensbezwaren.
3. Afwezigheid van waardeoordeel vanuit een ander perspectief dan het eigen perspectief van de gelovigen. Geen vervanging van het eigen begrip dat gelovigen hebben van een geloof of praktijk met dat van rechters of andere overheidsfunctionarissen. Kritisch zijn aanzien van alle vormen van paternalisme, gericht op gelovigen.
4. Inclusieve bescherming: het voorkomen van verdeeldheid in insiders die erbij horen, en outsiders die getolereerd worden. Erkenning dat al het officiële staatsbeleid geïnspireerd door staatsgodsdienst en/of staatssecularisme potentieel opdringerig is voor iedereen buiten de *mainstream*. Begrippen als het 'recht om anders te zijn', gelijk 'religieus burgerschap' of een pluralistisch begrip van democratie helpen daarbij.
5. Het bevorderen van tolerantie en het bepalen dat andere overheidsinstellingen dit doen. Tolerantie vereist enige cognitieve dissonantie en strekt zich altijd uit tot de overtuigingen die anderen bizar en zelfs bedreigend vinden.
6. Het beschermen van mensenrechten en pluralisme, het nooit delegeren of laten delegeren van de verantwoordelijkheid door andere staatsinstellingen aan particuliere instellingen; op geloof gebaseerd of anderszins.
7. Een afspiegeling zijn van de sociale realiteit en een flexibele co-existentie mogelijk maken tussen staatsrecht en 'eigen' recht. Gemeenschappen toestaan om zichzelf te besturen, terwijl autonomie nooit absoluut is.

8. Gelijke zorg en respect voor alle partijen, het standpunt van de verliezende partij serieus nemen: begrip tonen voor hun standpunt.
9. Afweging onder de beperkingsclausule: in plaats van helemaal geen inmeninging of *a priori* rechtvaardigingen van limieten te vinden. Desnoods met behulp van gerechtelijke aannames.
10. Het beslissen van één zaak tegelijk, vooral met netelige kwesties, het omarmen van contextgebondenheid, alleen beslissen wat er moet worden besloten om de zaak op te lossen, waar mogelijk gebruikmaken van procedurele overwegingen.
11. Zich bewust zijn van de inter-institutionele dialoog met de uitvoerende en wetgevende machten, maar resolute bescherming van de mensenrechten: geen enkele staat, staatsinstelling of -orgaan heeft een natuurlijke neiging om de mensenrechten te beschermen. Het is de taak van de rechterlijke macht om te controleren en te balanceren.

## 5 HOOFDSTUK 5: VERGELIJKENDE ANALYSE VAN DE BEGRIPPEN VRIJHEID VAN GODSDIENST EN Geloofsovertuiging EN DE STANDAARDINTERPRETATIES

Volgens H.L.A. Hart is het op handen dat rechters principes ontwikkelen die hun interpretatie van de wet sturen. Alle drie de hoven hebben principes ontwikkeld die hun interpretatie van de vrijheid van godsdienst en geloofsovertuiging sturen. De leidende principes worden ondersteund door wat ondersteunende principes zullen worden genoemd.

Het belangrijkste leidende principe dat door het SCC wordt toegepast in de gevallen van vrijheid van godsdienst en geloofsovertuiging is 'individuele vrijheid'. Het 'schadebeginsel' (*harm principle*), 'religie à la carte' en 'oprechtheid van geloof' (*sincere belief*) zijn informerende principes.

'Menselijke waardigheid' is het belangrijkste leidende beginsel dat door het CCSA wordt toegepast in zaken betreffende de vrijheid van godsdienst en geloofsovertuiging. Het 'recht om anders te zijn', 'respect voor diversiteit' en 'positieve tolerantie' zijn de leidende principes.

Het belangrijkste leidende beginsel van het EHRM voor de vrijheid van godsdienst en geloofsovertuiging is 'pluralisme'. De rol van de staat als 'organisator van pluralisme' en de onpartijdigheid van deze organisator zijn daarom de informerende principes die informeren wat pluralisme inhoudt voor het oplossen van de zaken.

De drie leidende beginselen zoals die door de drie verschillende hoven worden toegepast bij de uitlegging van de vrijheid van godsdienst en geloofsovertuiging zijn niet tegengesteld en sluiten elkaar niet uit. Ze verschillen echter in hun nadruk en interne logica. Dit kan vervolgens leiden tot zeer verschillende uitkomsten in vergelijkbare gevallen.



Het SCC en het CCSA vertrouwen vooral op de gelovigen zelf om hun godsdienst en geloofsovertuiging te definiëren. De gelovige moet oprechtheid tonen in het geloof en de praktijk die op het spel staan. Het EHRM is afgestapt van het proberen te objectiveren van overtuigingen en praktijken, maar er kan niet worden gezegd dat het een op oprechtheid gebaseerde benadering volledig heeft omarmd.

Wat de reikwijdte van de vrijheid van godsdienst en geloofsovertuiging betreft, erkennen de drie hoven dat de vrijheid van godsdienst en geloofsovertuiging een recht inhoudt om te geloven of niet te geloven. Het houdt ook in dat zowel religieuze als andere overtuigingen gerespecteerd moeten worden. Anders dan de andere twee hoven is het EHRM niet geneigd om een recht om van algemene normen af te wijken in het recht te lezen. Het loopt ook het grootste risico om de overtuigingen en meningen van gelovigen te vervangen door die van hemzelf.

Alle drie de hoven erkennen de concepten van positieve en negatieve verplichtingen. Het CCSA en SCC zien hen echter eerder als kanten van dezelfde medaille, terwijl het EHRM vooral kijkt naar de vrijheid van godsdienst en geloofsovertuiging in termen van negatieve verplichtingen en er aan een hogere drempel moet worden voldaan om een positieve verplichting aan te nemen.

De accentverschillen tussen de leidende en informerende principes en de impact die deze hebben op concept, reikwijdte en toepassing van de vrijheid van godsdienst en geloofsovertuiging kunnen deels worden verklaard door de achtergrond van de mensenrechteninstrumenten waarin het recht is gecodificeerd.

De vergelijkende analyse van de geselecteerde zaken in de zes geïdentificeerde dimensies ondersteunt niet het algemene standpunt van sommige schrijvers dat de (berechting van de) vrijheid van godsdienst en geloofsovertuiging heeft bijgedragen aan de secularisatie van de samenleving. De geselecteerde cases tonen pogingen om ruimte en gelegenheid te creëren voor gelovigen om (opnieuw) aanspraak te maken op keuzevrijheid over hun leven en bij te dragen aan een holistisch pluralisme.

In het licht van het bovenstaande kunnen enkele van de in paragraaf 4.8 opgesomde beste praktijken voor optimale bescherming opnieuw worden bevestigd, terwijl we het volgende kunnen toevoegen:

12. Het toepassen van een breed, liberaal en subjectief gebaseerd concept van godsdienst en geloofsovertuiging dat de reikwijdte van en de *triggerpoints* voor de bescherming informeert.
13. Het omarmen van verschil als het gevolg en de voorwaarde van vrijheid. Het mogelijk maken van dynamiek voor een holistisch pluralisme en bewustzijn van de complexe relatie tussen het seculiere en het religieuze in een vrije, open en diverse samenleving.
14. Op geloof gebaseerde gemeenschappen toestaan om alternatieven te bieden voor staatsinstellingen zoals huwelijk, onderwijs, welzijn enzovoort.

## 6 HOOFTSTUK 6: MINIMALISME IN DE JURISPRUDENTIE VAN HET SCC, CCSA EN EHRM: HOE MINIMALISTISCH ZIJN DE STANDAARDINTERPRETATIES VOOR DE VRIJHEID VAN GODSDIENST EN GELOOFSOVERTUIGING?

Hoofdstuk 6 laat zien dat elk van de hoven zowel minimalistische als minder minimalistische kenmerken toepaste in de geselecteerde zaken. Elk heeft laten zien dat het kan vasthouden aan de zaak in kwestie, waardoor grotere kwesties onbeslist blijven, gericht op de uitkomst van de zaak. Elk heeft aangetoond dat het onvolledige theoretisering en incrementalistische opbouw van jurisprudentie zal gebruiken. Onvolledige theoretisering wordt soms toegepast op abstracte principes, de uitkomst of een regel. Alle leidende principes zijn behandeld als onvolledig getheoretiseerde overeenkomsten.

Verschillende van de geselecteerde zaken, geanalyseerd in dit hoofdstuk, tonen aan dat elk van de hoven soms 'diepe' of 'brede' uitspraken zal gebruiken, waarbij de methode van minimalisme opzij wordt gezet om de doelen van minimalisme te bereiken. Ten slotte werkt elk van de hoven met een notie van 'levend' instrument of grondwet waardoor de interpretatie van rechten kan worden aangepast aan veranderende omstandigheden. Waar minimalistische elementen aanwezig waren, hebben ze over het algemeen bijgedragen aan een optimale bescherming van gelovigen.

De geselecteerde cases van het SCC tonen duidelijke elementen van minimalisme. De minimalistische elementen hebben bijgedragen aan de consistentie in de benadering van de vrijheid van godsdienst en geloofsovertuiging. Tussen de drie hoven, kijkend naar de geselecteerde zaken, is het CCSA aantoonbaar het beste geweest in het minimaliseren van de kosten van een beslissing, door veel respect en begrip te tonen voor de positie van elke partij. Het heeft stapsgewijs een consistente jurisprudentie opgebouwd. Zelfs waar de huidige constitutionele orde wordt geplaatst tegen het onrecht uit het verleden, heeft dit nooit de minimalistische methodologie of doelen ondermijnd. Het EHRM heeft waarschijnlijk het vaakst majoritaire of maximalistische elementen gebruikt in zijn benadering. De manier waarop de waarderingsmarge wordt gebruikt, heeft vaak niet geholpen bij het vasthouden aan een minimalistische methode of doel. Incrementalisme is zichtbaar, maar soms ook incidentalisme, wat consistentie in de weg staat.

In het licht van het bovenstaande kunnen enkele van de beste praktijken voor optimale bescherming die in de paragrafen 4.8 en 5.7 zijn opgesomd, opnieuw worden bevestigd, terwijl we het volgende kunnen toevoegen:

15. Gebruikmakend van onvolledige theoretisering, ook met betrekking tot de leidende principes bij de interpretatie van de vrijheid van godsdienst en geloofsovertuiging.
16. Stapsgewijze ontwikkeling van de jurisprudentie, vasthouden aan de zaak.
17. Vasthouden aan de doelstellingen van minimalisme, flexibel zijn met betrekking tot de methodologie, breed of diepgaand waar nodig na minimalistisch grondwerk.

## 7 HOOFDSTUK 7: CONCLUSIE: GEMEENSCHAPPELIJKHEID EN VERSCHILLEN – EEN OPTIMALE INTERPRETATIE VAN EEN UNIVERSEEL RECHT?

### 7.1 Conclusies met betrekking tot de standaardinterpretaties van de drie hoven

De vrijheid van godsdienst en geloofsovertuiging, het klassieke universele mensenrecht, gecodificeerd in het Canadese Handvest van Rechten en Vrijheden, de Zuid-Afrikaanse Bill of Rights en het Europees Verdrag voor de Rechten van de Mens, doet een belofte aan alle gelovigen – inclusief degenen die zichzelf identificeren als niet-gelovigen. De belofte dat ze hun eigen weg mogen zoeken, vrij van beperkingen, door de staat of anderen. Vrijheid en pluralisme zijn de verschillende kanten van dezelfde medaille. Gelovigen hebben het recht om hun verschil met de reguliere samenleving te laten gelden.

De drie hoven hebben elk een jurisprudentie ontwikkeld uit bovenstaande overwegingen. Hun standaardinterpretaties passen stuk voor stuk netjes in de constitutionele ketenroman (Dworkin) die elk van hen schrijft, terwijl elke ketenroman vervolgens past in de bibliotheek van het liberaal-democratische constitutionalisme. De constitutionele verhalen van de drie tribunalen vertonen parallellen, maar benadrukken ook verschillende elementen en dus vallen de drie jurisprudentiële verhalen over de vrijheid van godsdienst en geloofsovertuiging samen, divergeren en botsen ze soms. Dit kan worden geconceptualiseerd door gebruik te maken van de leidende en informerende principes, die worden gereconstrueerd in hoofdstuk 5.

De Canadese standaardinterpretatie is geworteld in een klassiek constitutioneel liberalisme. Canadees multiculturalisme, als een constitutioneel concept, hoewel het een communitaristische nuance van het klassieke liberalisme bevat, is nog steeds sterk geworteld in dezelfde tradities. Het is sterk gebaseerd op klassieke liberale concepten, zoals individuele autonomie, vrijheid en staatsneutraliteit. Maar op basis van deze opvattingen wordt ook een rigide essentialistisch liberalisme verworpen.

Een echt liberale staat in overeenstemming met de Canadese jurisprudentie, creëert een open samenleving die identificeerbare minderheden in staat stelt om verschillende meningen te hebben, andere keuzes te maken en verschillende levens te leiden. Dit moet niet worden beschouwd als de negatieve neveneffecten van vrijheid, maar moet wettelijk worden erkend en gevierd als een manifestatie van vrijheid. Vandaar dat de staat niet eens mag proberen zijn burgers te 'bekeren' tot het liberalisme. Het kan echter wederzijds respect eisen van individuen en gemeenschappen, in die zin dat ze allemaal erkennen dat de vrijheid die ze eisen ook aan anderen moet worden gegeven. Dit creëert tolerantie.

De jurisprudentie van het SCC wordt zowel geprezen als betreurd in publieke debatten en wetenschappelijke literatuur. De kritiek werpt zich soms in liberale of seculiere mantels en waarschuwt voor de gevaren van illiberale

religie en overtuiging. Aan de andere kant beroept de kritiek op het Canadese multiculturalisme zich op het communalisme. De vele academische kritieken baseren zich echter op de onderling samenhangende waarden die ten grondslag liggen aan het Handvest, zoals geïnterpreteerd door het SCC zelf.

Het streven van het CCSA om jurisprudentie te ontwikkelen over de vrijheid van godsdienst en geloofsovertuiging begon kort na de overgang naar democratie. Het zielsonderzoek van het CCSA met betrekking tot de vrijheid van godsdienst en geloofsovertuiging, uitgevoerd in de minimalistische benadering van geval tot geval, had niettemin een duidelijke 'ziel' om vanuit te gaan. De geselecteerde cases tonen een ontwikkeling van de interpretatie van de Bill of Rights als transformatieve waarden voor een nieuwe samenleving. In ieder geval manifesteert de meer met waarden beladen interpretatie het postliberale karakter van het Zuid-Afrikaanse constitutionalisme in tegenstelling tot de meer klassieke liberale Canadese benadering. Toch zijn de uitkomsten niet helemaal anders.

In *Christian Education* en in *Prince* (I2.4.6-7) kwam het informerende principe van het 'recht om anders te zijn' naar voren. Verder ontwikkeld in latere zaken, leidde het ertoe dat het CCSA de meest consistente van alle drie de hoven in de geselecteerde zaken was in het tonen van gelijke bezorgdheid en respect voor de verliezende partij. De standaardinterpretatie is van daaruit zichtbaar geval per geval ontstaan, in de aantoonbaar consistente methodiek die in de latere gevallen zichtbaar is.

Kritiek op het Hof komt uit vele hoeken. Sommigen vinden het te ingetogen, anderen te activistisch. Libertariërs bekritisieren zijn verlegenheid in het herroepen van de pro-religieuze vooringenomenheid van het verleden, religieuzen betreuren zijn libertarisme en individualisme. Terwijl de voorstanders van traditioneel recht en religieuze rechten meer gevoeligheid voor cultuur en religie willen, waarschuwen anderen voor de mogelijke gevolgen voor (gender)gelijkheid. Maar de jurisprudentie van het Hof toont duidelijk een uniek en authentiek Zuid-Afrikaans begrip van liberaal-democratisch constitutionalisme.

De *Kokkinakis*-zaak wordt door wetenschappelijke 'hof-watchers' van het EHRM erkend als de mijlpaal als het gaat om de vrijheid van godsdienst en geloofsovertuiging. Pluralisme is altijd een kwestie van anders-zijn. De naties die de Raad van Europa vormen, hebben elk hun problematische verleden gekend met de afwijzing van het pluralisme. Sterker nog, het pluralisme zelf werd gedurende een groot deel van de Europese geschiedenis als problematisch beschouwd. Kolonialisme en imperialisme werden ondersteund door noties van suprematie van de Europese cultuur, het Europese christendom en de Europese staat.

De Conventie werd aangenomen ter afwijzing van het fascistische totalitarisme (dat net was overwonnen) en het stalinistische totalitarisme (dat destijds als een grote bedreiging werd gezien). Tegen de achtergrond van de totalitaire dictatuur was er waarschijnlijk niet zoveel aandacht voor de vooroordelen,

de vanzelfsprekendheid en het monoculturalisme die in Europa over een veel langere periode wortel hadden geschoten. Gezien de focus op het voorkomen van totalitarisme, is het Hof op zijn hoede geweest voor staatsbemoeienis met organisatiestructuren van op geloof gebaseerde gemeenschappen, schending van positieve verplichtingen om minderheden tegen geweld te beschermen, door de staat gesponsord religieus proselitisme in het curriculum van de openbare school en uitsluiting van 'anderen' uit het parlementaire ambt.

Aan de andere kant heeft het EHRM bij vele gelegenheden de pogingen van de staat om praktische en effectieve rechten op religieuze kleding, dieetregels, familie- en personenrecht of identiteit gerelateerde claims als zodanig te belemmeren, niet beperkt. In dergelijke gevallen zal het Hof eerder in het voordeel van de staat oordelen. Om een jurisprudentie te ontwikkelen die meer bescherming biedt tegen inmenging van niet-christelijke religieuzen zoals de vereniging Cha'are Shalom Ve Tsedek, mevrouw Leyla Şahin en de eiser in *SAS*, agnosten zoals de Lautsis en nieuwe religies zoals de Raëlians, kan een nieuw begrip van pluralisme nodig zijn. Een dergelijk nieuw begrip zou ook de evenwichtigheid ten goede komen in gevallen waarin individuele vrijheid en groepsautonomie botsen, zoals in *Sindicatul 'Pastorul Cel Bun'* en *Fernández Martínez*.

Er zijn echter ook mensen die vinden dat het Hof in veel opzichten te ver is gegaan. De spanning tussen activisme en terughoudendheid is in veel gevallen zichtbaar en de *margin of appreciation* dient als het vaak slecht passende jasje om je voor de gelegenheid te kleden. De beoordelingsmarge past ongetwijfeld goed waar het gaat om de 'dringende maatschappelijke behoefte' met betrekking tot beperkingen van religieuze praktijken en het Hof doet er het beste aan om van geval tot geval incrementalistisch te werk te gaan, zodat het een noodzakelijk evenwicht kan vinden – een supranationale gerechtelijke structuur in de pluralistische constitutionele regelingen van Europa. Maar een meer principieel en consistent minimalisme kan helpen bij het verminderen van het gebruik van de *margin of appreciation*.

## 7.2 Beantwoorden van de onderzoeksvragen

### – Onderzoeksvraag 1

Alle drie de hoven erkennen een groepsautonomie en proberen zich te schikken naar 'binnen het recht'. Alle drie zorgen ze er ook voor dat de 'inside law' zijn eigen reikwijdte niet kan bepalen en dat onder andere het mensenrechtenrecht grenzen bepaalt. Het EHRM is bereid om een gedurfde groepsautonomie voor op geloof gebaseerde organisaties te bevestigen als ze een wettelijke status hebben in het institutionele recht van de staten. Zij kunnen in dergelijke gevallen zelfs voorrang krijgen op individuele rechten of andere collectieve rechten

In de educatieve dimensie heeft de jurisprudentie van het EHRM geleid tot een verscheidenheid aan uitkomsten die niet gemakkelijk consistentie vertonen. Het SCC en CCSA benadrukken beide dat openbaar onderwijs inclusief moet zijn en een duidelijke boodschap van positieve tolerantie moet sturen voor alle lagen van de bevolking, inclusief niet-reguliere overtuigingen. De grenzen van deze ruime vrijheid worden per geval geanalyseerd.

Alle drie de hoven proberen de vrijheid van godsdienst en geloofsovertuiging in evenwicht te brengen met andere rechten en belangen. Zij laten zich in dit proces leiden door gedachten van pluralisme en gelijke zorg en respect. Het EHRM zal echter hoogstwaarschijnlijk prioriteit geven aan één recht of belang bij het oplossen van de zaak, terwijl de andere twee hoven een grotere inspanning zullen leveren om alle belangen te behartigen. Het CCSA doet de grootste moeite om de partij die de zaak verliest te laten zien dat zij de zaak heeft verloren en niet de wereld.

Zowel het SCC als het CCSA verwerpen expliciet een militant of rigide secularisme dat net zo tegengesteld kan zijn aan de vrijheid van godsdienst en geloofsovertuiging als regelrechte staatsvoorkeur van een bepaald geloof. Het EHRM heeft het rigide secularisme niet verworpen.

De vergelijkende analyse van de geselecteerde zaken in de zes geïdentificeerde dimensies ondersteunt niet het algemene standpunt van sommige schrijvers dat de (berechting van de) vrijheid van godsdienst en geloofsovertuiging, heeft bijgedragen aan de secularisatie van de samenleving.

#### – Onderzoeksvraag 2

Er zijn herkenbare standaardinterpretaties van de vrijheid van godsdienst en geloofsovertuiging aanwezig in de geselecteerde zaken. Het SCC is het meest consistent. Het CCSA is op zoek naar een consistente aanpak, die zij in de latere gevallen lijkt te hebben gevonden. Het CCSA is ook het meest consistent in het tonen van gelijke bezorgdheid en respect voor de verliezende partij. In de door het EHRM beoordeelde geselecteerde zaken is de consistentie het grootst tussen de zaken binnen een van de zes dimensies in plaats van tussen de zes dimensies. Voorbeelden van sterke consistentie zijn organisatorische vrijheid en de rechten van gewetensbezwaren tegen militaire dienst. Alle hoven passen herkenbare en terugkerende leidende principes toe in hun interpretatie van de zaken.

Het SCC neemt individuele vrijheid als leidend principe, met het schadebeginsel, 'religie à la carte' en oprechtheid van geloof als informerende principes. Het leidende principe van het CCSA is menselijke waardigheid, ingegeven door het vrijheidsrecht: het recht om anders te zijn; de communautaire component: respect voor diversiteit; en het grondwettelijke principe: positieve tolerantie. Voor het EHRM is pluralisme de leidraad. De informerende principes zijn de staat als organisator van pluralisme en de onpartijdigheid van het organiseren van pluralisme.

Alle drie de hoven erkennen dat de vrijheid van godsdienst en geloofsovertuiging een recht inhoudt om te geloven of niet te geloven. Het houdt ook in dat zowel religieuze als andere overtuigingen gerespecteerd moeten worden. Alle drie de hoven erkennen een individuele en een collectieve dimensie. Zowel de Canadese als de Zuid-Afrikaanse interpretaties van de vrijheid van godsdienst en geloofsovertuiging omvatten het recht om onder bepaalde omstandigheden te worden vrijgesteld van reguliere normen en gedrag. Het Zuid-Afrikaanse 'recht om anders te zijn' is nog gedurfder dan zijn Canadese tegenhanger. Het EHRM is in dit opzicht zeker terughoudender.

De vrijheid van godsdienst en geloofsovertuiging wordt volgens de Canadese jurisprudentie geactiveerd als een oprechte overtuiging wordt aangetast. Ook de Zuid-Afrikaanse rechtspraak gebruikt de inmenging in oprecht geloof als trigger. In de Straatsburgse rechtspraak leidt het niet handelen door de staat in overeenstemming met een negatieve of positieve verplichting tot activering van de vrijheid van godsdienst en geloofsovertuiging. Alle drie de hoven erkennen positieve en negatieve verplichtingen van de staat onder de vrijheid van godsdienst en geloofsovertuiging.

– *Onderzoeksvraag 3*

Van de drie hoven is het SCC het meest consistent in haar interpretatie van de vrijheid van godsdienst en geloofsovertuiging. Het SCC en het CCSA zijn minimalistischer dan het EHRM. Het CCSA is het meest consistent in het tonen van gelijke bezorgdheid en respect, zelfs aan de kant die de zaak verliest.

Uit de vergelijking van de minimalistische en maximalistische elementen in de jurisprudentie van de drie hoven blijkt dat bepaalde parameters in de geselecteerde zaken tot minimalisme en/of maximalisme leiden. Deze kunnen worden weergegeven in vijf schalen tussen twee uitersten. Optimaal minimalisme in zaken van vrijheid van godsdienst en geloofsovertuiging, vereist dat de rechter die de zaak beslist, tegelijkertijd het evenwicht in elk van deze schalen (voor zover relevant in de zaak) bewaart.

– *Onderzoeksvraag 4*

De leidende principes en informerende principes die de drie hoven gebruiken om te beslissen over rechtszaken op het gebied van de vrijheid van godsdienst en geloofsovertuiging, verschillen in de aspecten die ze benadrukken. Toch sluiten de leidende principes elkaar niet uit. Er zijn ook overeenkomsten tussen de standaardinterpretaties als het gaat om concept, reikwijdte en toepassing van de vrijheid van godsdienst en geloofsovertuiging. Bovendien vergemakkelijken de overeenkomsten tussen de codificaties van de vrijheid van godsdienst en geloofsovertuiging en de methoden voor het oplossen van mensenrechten *judicial borrowing* tussen de hoven. Alle drie de hoven hebben blij gegeven van openheid ten aanzien van *judicial borrowing*.

De accentverschillen tussen de leidende en informerende principes en de impact die deze hebben op concept, reikwijdte en toepassing van de vrijheid



van godsdienst en geloofsovertuiging kunnen deels worden verklaard door de achtergrond van de mensenrechteninstrumenten waarin het recht is gecodificeerd. Alle drie de hoven beschouwen de vrijheid van godsdienst en geloofsovertuiging als bescherming van een grote verscheidenheid aan religieuze en filosofische tradities en geïndividualiseerde overtuigingen.

Duidelijke elementen van minimalisme zijn te vinden in verschillende zaken die door de drie hoven zijn beslist. Aan de andere kant kunnen voorbeelden van niet-minimalistische jurisprudentie ook worden waargenomen in de geselecteerde zaken van elke rechtbank. Sommige van de mogelijkheden voor *judicial borrowing* zijn nauw verbonden met de hierboven genoemde parameters voor minimalisme. De CCSA-benadering had bijvoorbeeld kunnen leiden tot een andere uitkomst in SCC-zaak *Alberta v. Hutterian Brethren*. Het Hof had kunnen kijken naar alternatieve accommodatie, of er op zijn minst voor kunnen zorgen dat de kolonie slechts een zaak verloor, niet de wereld. Een ander voorbeeld is de principiële en pragmatische minimalistische benadering van het CCSA in de islamitische huwelijkszaken, die een andere kijk op de EHRM *Yigit*-zaak had kunnen inspireren. De methode die het EHRM toepast, had nuttig kunnen zijn voor het CCSA in *Prince*: wanneer het delict wordt gepleegd om geloofsredenen, moet er verschil zijn bij gevolgen, tussen de 'gewone' crimineel en de gelovige dader.

De vrijheid van gelovigen wordt geremd door pijnlijke keuzes, niet alleen door regelrechte onderdrukking. Neutrale regels van algemene toepasbaarheid kunnen ernstig interfereren met persoonlijke overtuigingen. Het creëren van uitzonderingen of het anderszins tegemoetkomen aan gelovigen, zelfs als de praktijk sociaal controversieel is, is een oplossing.

In de dimensie van het familierecht en de familiere relaties kunnen interventies in de familiesfeer het best worden gedaan onder de beperkingsclausule, die de bescherming van de vrijheid van godsdienst en geloofsovertuiging veronderstelt. Niet-erkenning van het huwelijk voor mensen van hetzelfde geslacht, het zuiver religieuze huwelijk of samenwonen door het rechtssysteem kan leiden tot ernstige ongelijkheden, die alleen moeten worden geaccepteerd als ze de test van de noodzaak in een democratische samenleving doorstaan. Minimalistische rechtspraak laat ruimte voor inter-institutionele dialoog, en dus voor de wetgever om een volgende stap te zetten nadat rechtbanken ongrondwettelijke ongelijkheid hebben vastgesteld.

De vrijheid van godsdienst en geloofsovertuiging heeft natuurlijk een collectieve dimensie. De individuele en collectieve dimensie zijn van elkaar afhankelijk. Rechterlijke interpretatie moet het evenwicht bewaren, beide interpreteren als wederzijds ondersteunend, zonder een van beide op te offeren ten behoeve van de ander. Dit is vooral nodig als het gaat om de verhouding tussen 'eigen recht' en dat van de staat. Rechtspluralisme, of het nu meer organisch en informeel is of meer conceptueel en formeel, past in de logica van de mensenrechten en het liberaal-democratisch constitutionalisme en seculiere rechtbanken hebben geen reden om het uit de weg te gaan.

Optimale bescherming van de vrijheid van godsdienst en geloofsovertuiging wijst religieus onderwijs of religieuze manifestatie in openbare onderwijsinstellingen niet af. Maar het vereist wel inclusieve gelijkheid in die zin dat geen enkel geloof mag worden onderwezen of gemanifesteerd ten nadele van alle anderen. Tenminste moeten degenen die bezwaar maken, altijd een haalbare *opt-out*-mogelijkheid hebben. Het bijbrengen van tolerantie is een van de doelen van het openbaar onderwijs onder de vrijheid van godsdienst en geloofsovertuiging. Wederkerig pluralisme vereist wederzijdse aanpassing van op geloof gebaseerd onderwijs, maar ook voor op geloof gebaseerde gemeenschappen om op de een of andere manier te accepteren dat zij zich bevinden in een pluralistische context.

Het balanceren van de vrijheid van godsdienst en andere rechten is geen generalistisch nulsomspel, maar vereist operationalisering van wederzijdse tolerantie. Dit vereist het erkennen van het bestaan van de ander, zelfs als we het niet met hen eens zijn. Dit geldt ook voor relaties tussen de *mainstream* en minderheden, of het nu gaat om geloofsminderheden of seksuele geaardheid en/of genderminderheden. Door in zaken met tegengestelde belangen rechtelijk te erkennen dat grondwettelijke rechten aan alle kanten zijn geactiveerd, wordt aan iedereen constitutionele relevantie gegeven. Terwijl balanceren de uitkomst bepaalt, verliest geen enkele partij de wereld, maar slechts een zaak.

Waar vrijheid van godsdienst en geloofsovertuiging samenkomt met secularisme, wat in de meerderheid van de geselecteerde zaken van elk van de hoven het geval is, is het noodzakelijk om onderscheid te maken tussen de vele gezichten van secularisme. Secularisme kan een wereldbeeld of geloof zijn dat concurreert met andere wereldbeelden of overtuigingen. Staatsneutraliteit zoals geïnformeerd door de vrijheid van godsdienst en geloofsovertuiging vereist dat noch secularisme, noch enige religieuze overtuiging door openbare instellingen worden gemanifesteerd of beleden op een manier die leidt tot uitsluiting van alle anderen.

Sommige gelovigen voelen zich misschien niet herkend door de marginale, instrumentele en subjectieve formulering van hun (religieuze) overtuigingen in de 'religie van het recht'. Maar de 'religie van het recht', afhankelijk van hoe het in concrete gevallen wordt gedefinieerd, kan helpen bij een optimale bescherming van gelovigen om hun leven te leiden in overeenstemming met hun overtuigingen tegen de staat, andere maatschappelijke instellingen en de leden van verschillende of dezelfde geloofsgemeenschap. Dit opent mogelijk de deur voor alle poging om een meer holistisch pluralisme te realiseren.

De beste praktijken voor optimale bescherming zijn de combinatie van die in de paragrafen 8.4.7, 8.5.5 en 8.6.3.

### 7.3 Algemene conclusie

De vrijheid van godsdienst en geloofsovertuiging is inherent verbonden met vrijheid als de onvolledig getheoretiseerde aspiratie van individuen, groepen en naties. Zoals de filosoof Abdolkarim Soroush welsprekend uitlegde, berooft wettelijk afgedwongen gehoorzaamheid elk opvolgen van een religieus voorschrift van zijn religieuze essentie. Vrijheid van godsdienst en geloofsovertuiging is dus essentieel voor godsdienst en levensovertuiging zelf. Regeringen, zo vertelt de Amerikaanse Onafhankelijkheidsverklaring ons, zijn ingesteld om het leven, de vrijheid en het nastreven van geluk te beschermen. De 'geest van vrijheid' is echter 'die geest die niet al te zeker is dat die gelijk heeft'. Dit is de reden waarom minimalisme gericht is op het operationaliseren van voorzichtigheid, nederigheid en onpartijdigheid bij de interpretatie van rechten. Gelijke zorg en respect voor alle partijen, inclusief de kant die een zaak verliest, is essentieel om de geest van vrijheid te behouden.

Het grootste dilemma dat ik tijdens de studie tegenkwam, is wat ik de 'tolerantieparadox' zou noemen. De geselecteerde zaken, de gerelateerde commentaren en de bredere literatuur die in deze studie wordt gebruikt, staan vol met voorbeelden en argumenten met betrekking tot tolerantie. Veel van de marginale en gemarginaliseerde gelovigen – individueel en collectief – vragen tolerantie voor hun verschil. Sommigen kunnen wijzen op de intolerantie van de tolerantanten, die bijvoorbeeld proberen om *mainstream*-opvattingen over gender, seksuele geaardheid, seksuele moraal en/of familie op te leggen aan degenen die er andere overtuigingen op nahouden. Toch zijn sommigen van hen misschien niet zo tolerant tegenover anderen, als ze zouden willen dat anderen voor hen zijn. De tolerantie van een open samenleving moet zich uitstrekken tot degenen die in hun 'interne wet' minder tolerant zijn voor verschillen. Maar het project van een nieuw pluralisme mag geen project zijn om het bestaande pluralisme ongedaan te maken, maar een project dat het verder verrijkt. Daarom moeten we van tijd tot tijd de tolerantieparadox in concrete gevallen aanpakken, door wederzijds pluralisme te aanvaarden.

De 'religie van het recht' is misschien niet altijd de dierbare, intieme en goede vriend die gelovigen instinctief herkennen, maar het kan niettemin een vriend zijn. Een vriend die (her)verbinding mogelijk maakt met religieuze, culturele en filosofische tradities, die voorafgaan aan onze moderne inzichten. Dit kan inderdaad een dynamisch en holistisch begrip van pluralisme voeden, verbonden met een begrip van ons bestaan als wezenlijk divers. Ik geloof oprecht dat wezenlijke diversiteit de grondslag is van de Schepping waarin wij leven.



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## Appendices



## Appendix I1

### The SCC and case studies of the selected SCC cases

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#### 1 Introduction to this chapter and reading aide

This chapter introduces the Canadian legal system, the SCC, the Charter, as well as the selected cases. Section 2 briefly introduces the Canadian constitutional and legal history. It also gives an impression of the current constitutional and legal system. In section 3, the selected cases are introduced and an overview is provided. Section 4 contains the case studies of the selected cases in chronological order.

## 2 Introducing the Canadian legal system, the SCC and the Charter

This section gives an impression of the constitutional and legal order of Canada and the position of the Supreme Court and the Charter's therein. It provides an overview of Canada's modern constitutional and political history in a nutshell, outlines Canada's contemporary constitutional and legal system and provides an insight into judicial review before the Charter, and the Charter's and the legal impact of other human rights legislation.

Canada has been a pluralist society since colonial times, traditionally consisting of three large groups – the French-Canadians, the English-Canadians and the aboriginal peoples (Inuit and First Nations) – as its constituent population. Ever since colonial times, Canada has also provided a home to several minorities, including people of African/Afro-Caribbean origin, people of Chinese and other East Asian origin, people originating from the Indian sub-continent and various minorities from the Europe and Latin America. Especially since the second half of the 20<sup>th</sup> century, immigrants from all over the world have contributed to the increasingly multicultural, multi-religious and multi-ethnic Canadian society.

The Canadian Multiculturalism Act was adopted in 1985. The preamble of the Act recalls, amongst other things, the constitutional rights of Canadians, including the prohibition of discrimination, the recognition of the multicultural heritage of Canadians in the Charter, the constitutional recognition of the rights of the aboriginals,<sup>1</sup> and the legal recognition of Canada's bilingualism.

The SCC itself has reiterated on several occasions the importance of multiculturalism as a principle: "Canada rightly prides itself on its evolutionary tolerance for diversity and pluralism. This journey has included a growing appreciation for multiculturalism, including the recognition that ethnic, religious or cultural differences will be acknowledged and respected. Endorsed in legal instruments ranging from the statutory protections found in human rights codes to their constitutional enshrinement in the Canadian Charter of Rights and Freedoms, the right to integrate into Canada's mainstream based on and notwithstanding these differences has become a defining part of our national character."<sup>2</sup>

### 2.1 The constitutional and legal history of Canada in a nutshell

For any constitutional order, it is no easy task to determine where to begin a sketch of the (constitutional) history. Depending on preference and context of the overview, in the case of Canada one could for example start with the history of the peoples who inhabited the territory prior to colonization by European powers. One could start with British constitutional legal history prior to the colonization of North America, French Canadian history prior to the 1763 Treaty of Paris. Arguably for the purpose of this study, the earliest relevant event is the British North America Act (BNA).

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1 See Canadian Charter of Rights and Freedoms, s. 7, Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, s. 25.

2 SCC, *Bruker v. Marcovitz*, Case 31212, [2007] 3 SCR 607, 14 December 2007, p. 12.

The BNA was the act that established the Dominion<sup>3</sup> of Canada by the fusion of the North American British colonies. Quebec and Ontario (formerly the subdivisions of the province of Canada) were given equal footing with New Brunswick and Nova Scotia in the Parliament of Canada.<sup>4</sup> This was done to counter the claims of manifest destiny made by the United States of America. The rest of Canada’s current provinces and territories acceded to the confederation between 1870 and 1999, as the table shows.

| Provinces of Canada       | Entered Confederation |
|---------------------------|-----------------------|
| Ontario                   | July 1, 1867          |
| Quebec                    | July 1, 1867          |
| Nova Scotia               | July 1, 1867          |
| New Brunswick             | July 1, 1867          |
| Manitoba                  | July 15, 1870         |
| British Columbia          | July 20, 1871         |
| Prince Edward Island      | July 1, 1873          |
| Saskatchewan              | September 1, 1905     |
| Alberta                   | September 1, 1905     |
| Newfoundland and Labrador | March 31, 1949        |
| Territories of Canada     | Entered Confederation |
| Northwest Territories     | July 15, 1870         |
| Yukon                     | June 13, 1898         |
| Nunavut                   | April 1, 1999         |

Figure 1: Provinces of Canada accession into Confederation

Like other British dominions, Canada achieved full legislative sovereignty with the passage of the Statute of Westminster 1931, which repealed the Colonial Laws Validity

3 In 1926 Lord Balfour, chairman of the inter-imperial relations committee declared famously about dominions: “They are autonomous Communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs, though united by a common allegiance to the Crown, and freely associated as members of the British Commonwealth of Nations.”; F. Venter, *Constitutional Comparison; Japan, Germany, Canada and South Africa as Constitutional States*, Juta & Co, Ltd, Cape Town (South Africa), 2000, p. 72.

4 See further Venter, *supra* n. 3, at 71.

Act and expressly empowered dominion parliaments to amend or appeal British law and legislation.<sup>5</sup>

In 1949, the UK Parliament passed the British North America Act 1949 that confirmed and gave effect to the Terms of Union agreed to between the then-separate Dominions of Canada and Newfoundland on 23 March 1949.

In the early 1960s, the Quiet Revolution, a reawakening of Quebecois identity, changed the face of Quebec's institutions. The federal government feared a possible unilateral declaration of independence. In 1967, a provincial first ministers' conference was held in Toronto to discuss the Canadian confederation of the future. Amongst numerous initiatives, the conference members examined the recommendations of a Bilingualism and Biculturalism Commission, the question of a Charter of Rights, regional disparities, and the timelines of a general review of the Constitution (the British North America Act).

The 1971 Victoria Conference, a meeting between the federal government and the provinces, brought about the Victoria Charter. The provinces were supposed to confirm their acceptance by June 28, 1971, but a change of premiers in Saskatchewan and the reluctance of the federal government to recommend the Charter to Quebec's legislature, led to the failure of this initiative.

In 1976, the Parti Québécois won the provincial election in Quebec, and in the 1980 Quebec referendum it sought a mandate from the people of Quebec to negotiate new terms of association with the rest of Canada. With an 84% voter turnout, 60% of Quebec voters rejected the proposal.

In 1980, the newly reappointed Prime Minister Pierre Elliott Trudeau and the provincial premiers set an agenda and gave their ministers responsibility for constitutional issues and a mandate to proceed with exploratory discussions to create a new Canadian constitution. However, this met resistance from the separatist government of Quebec. Subsequently, an agreement between the federal government and all provincial governments, except that of Quebec, agreed to Canada's assumption of full responsibility for its own constitution in 1982 (formerly the responsibility of the Parliament of the United Kingdom). The agreement was enacted as the Canada Act 1982 (contains the Constitution Act, 1982) by the British Parliament, and was proclaimed into law by Queen Elizabeth II on April 17, 1982. This was called the *patriation of the Constitution*.<sup>6</sup>

The Canadian Constitution Act 1982 adopted consequently (including the creation of a new Canadian Charter of Rights and Freedoms) came from an initiative by Prime Minister Trudeau to create a multicultural and bilingual society in all of Canada.

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5 See *ibid.*, p. 73.

6 For a detailed discussion of the process and the Patriation Reference ruling by the SCC, see P.C. Oliver, *The Constitution of Independence, Development of Constitutional Theory in Australia, Canada, and New Zealand*, Oxford University Press, New York (USA), 2005, pp. 162-184.



## 2.2 Canada's contemporary structure of government

Following the Canada Act 1982,<sup>7</sup> the UK parliament no longer had any powers with regard to Canada whatsoever<sup>8</sup> and the Canadian Constitution as reiterated and amended by the Constitution Act is the supreme law of the land.<sup>9</sup>

According to the Constitution Act 1982, Canada is a federation which is governed as a parliamentary democracy and a constitutional monarchy with Queen Elizabeth II as its head of state. The Queen's representative, the Governor General of Canada, carries out most of the royal duties in Canada. Canada is a bilingual nation with both English and French as official languages at the federal level.<sup>10</sup>

In the Westminster tradition, Canada does not formally distinguish between the head of state and the head of government. All executive power is vested in the Crown,<sup>11</sup> represented in Canada by the Governor General.<sup>12</sup> Yet in practice, the Governor General represents the head of state and government. The executive powers rest in practice with the head of government, the Prime Minister and the cabinet, which consists of the Ministers of the Crown (official title) and is headed by the Prime Minister.

While the Prime Minister is appointed by the Governor General, the Governor General is appointed by the Crown on the advice of the Prime Minister. Traditionally, there is a rotation between Anglophone and Francophone incumbents for the function of the Governor General. The Prime Minister also advises the Crown with regard to the appointment of lieutenant governors, senators, federal court judges, and heads of Crown corporations and government agencies. To ensure the stability of government, the governor general will usually appoint as Prime Minister the person who is the current leader of the political party that can obtain the confidence of a plurality in the House of Commons<sup>13</sup> and the Prime Minister chooses the Cabinet.

The legislative branch consists of the House of Commons and the Senate. There are 105 Senate seats. Seats are assigned on a regional basis. In conformity with the British model, the Senate is not permitted to originate bills imposing taxes or appropriating public funds. In addition, the House of Commons may, in effect, override the Senate's refusal to approve an amendment to the Canadian Constitution; however, they must wait at least 180 days before exercising this override. Other than these two exceptions, the power of the two Houses of Parliament is theoretically equal.

In practice, however, the House of Commons is the dominant chamber of Parliament, with the Senate very rarely exercising its powers in a manner that opposes the will of the democratically elected chamber.

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7 For an interesting discussion of the development of the legal system in Canada in the 20<sup>th</sup> century see P. Girard, 'Who's Afraid of Canadian Legal History?' in *University of Toronto Law Journal*, vol. 57, no. 4, pp. 727-754 (2007).

8 See Canada Act 1982 (UK), 1982, c.11, s.2.

9 See Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c. 11, s. 51(1).

10 See Canadian Charter of Rights and Freedoms, *supra* n. 1, s.16(1).

11 See Constitution Act, 1867 (UK), 30 & 31 Victoria, 1867, c. 3, s. 9.

12 See *ibid.*, s. 10.

13 On the notion of responsible government see Venter, *supra* n. 3, at 117.

### 2.3 Canada's contemporary judicial structure

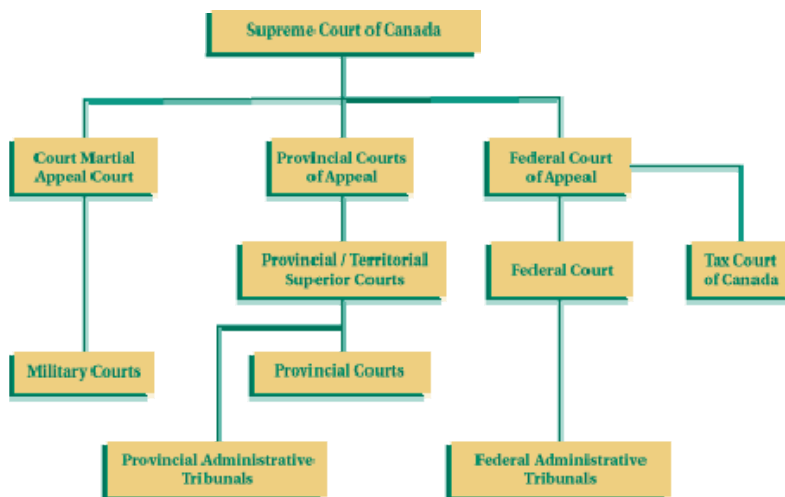


Figure 2: Structure of the Canadian court system

The federal judiciary<sup>14</sup> is formed by the Supreme Court, the Federal Court of Appeal, the Federal Court and the Tax Court of Canada. There are also federal administrative tribunals like the Federal Labour Board.

The Supreme Court of Canada is not established in terms of the Constitution but is a creature of ordinary Federal Statute, namely the Supreme Court Act of 1985.<sup>15</sup> Since 1949, the Court consists of nine judges appointed by the Governor General on the advice of the Prime Minister to be representative of the various provinces; three from Quebec, three from Ontario, two from the western provinces and one from the Atlantic provinces. The Chief Justice is appointed alternately from French and English speaking members of the bench.<sup>16</sup> On appeals, the minimum number of judges is five<sup>17</sup> though more often seven or nine judges hear a case.

The Court has “an appellate, civil and criminal jurisdiction within and throughout Canada”,<sup>18</sup> and is therefore the hierarchically highest court. It can hear appeals from the Federal Court of Appeals as well as the provincial courts of appeal in cases where constitutional law, federal law and/or provincial law is raised.<sup>19</sup> It can also hear

14 For the figure see <https://www.justice.gc.ca/eng/csj-sjc/ccs-ajc/02.html>.

15 Preceded by the Supreme and Exchequer Courts Act of 1875. See further Venter, *supra* n. 3, at 94.

16 See further *ibid.*, p. 95.

17 See Supreme Court Act, R.S.C., 1985, c. S-26, s. 25.

18 *Ibid.*, s. 35.

19 See further P.W. Hogg, *Constitutional Law of Canada*, Carswell, Toronto (Canada), 5th ed., 2007, ss 8-2. – 8-7; Venter, *supra* n. 3, at 95.

constitutional appeals from the Court Martial Appeal Court. Furthermore, under section 53, the Governor in Council may request advisory opinions from the Court.

## 2.4 The provincial and territorial levels

The provinces and territories have their own executives and legislatures. The provincial court systems consist of provincial or territorial courts, superior courts and appeal courts. The territorial courts are only competent where statutes explicitly permitted this.

## 2.5 Legal system

Acts passed by the Parliament of Canada and by provincial legislatures are the primary sources of law in Canada. Sections 91 and 92 of the Constitution Act 1867, enumerate the subject matters upon which either level of provincial legislatures or the federal Parliament may legitimately pass legislation. These include different areas of private and public law. The federal government has exclusive jurisdiction for the federal legislature, like criminal law, except for the constitution of courts of criminal jurisdiction, but including the procedure in criminal matters<sup>20</sup> and acts relating to Indians and Indian land.<sup>21</sup> Law enforcement, however, including the constitution of criminal courts, is a provincial responsibility. However, in rural areas of all provinces except for Ontario and Quebec, policing is contracted to the federal Royal Canadian Mounted Police.

Except for Quebec, where civil law predominates in private law matters, common law prevails in all other provinces and at the federal level. This also goes for the foundations of Canadian administrative law.<sup>22</sup> While the civil law in Quebec is codified in the Civil Code of Quebec, given the legal history of Quebec, common law prevails in public law matters. Therefore, legislation enacted by the provincial legislature of Quebec should be interpreted following the common law tradition. Likewise, legislation enacted by the federal Parliament in matters of private law, such as the Divorce Act, is to be interpreted following the civil law tradition and in harmony with the Civil Code of Quebec.

The role of the treaties as agreed between the Crown and Aboriginal nations was reaffirmed by section 35 of the Constitution Act 1982, which “recognizes and affirms existing Aboriginal and treaty rights”. Section 88 of the Indian Act stipulates that provincial law does not override treaties in force between the government of Canada and any of the First Nations, or the Indian Act and related legislation.

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20 See Constitution Act 1982, *supra* n. 9, s. 91(27).

21 *Ibid.*, ss 91(27) and 91(24) respectively.

22 See Venter, *supra* n. 3, at 114.

### 3 Introducing the selected SSC cases

#### 3.1 Introduction: Big M's promise under the new Charter

The right to freedom of religion in Canada is, as mentioned in the previous chapter, enshrined in the Canadian Charter of Rights and Freedoms as well as in instruments of the various provinces and territories.

The SCC has interpreted the freedom of religion in many cases, some of which are dealt with below. The first landmark case regarding the freedom of religion<sup>23</sup> under the newly adopted Charter was *Big M Drug Mart*.<sup>24</sup> This case dealt with the Lord's Day Act, a federal act, which prohibited most commercial activity and work on Sunday. The same act had been subject to a challenge, once before under the 1960 Bill of Rights, in *Robertson and Rosetanni v. the Queen*.<sup>25</sup> Then, the Supreme Court had ruled in favor of the act. Now, however, it struck down the act as being inconsistent with the religious freedom guaranteed by the Charter.

*Robertson and Rosetanni* was explicitly rejected as a precedent in *Big M*, since otherwise the Charter would be circumscribed by "frozen concepts" which existed before it entered into force. The meaning of Charter rights should be determined in light of a generous rather than legalistic interpretation of their purposes.<sup>26</sup> Instead of "frozen concepts", the SCC adheres to the concept of the Constitution as a "living tree", a concept which appears in several of the selected cases.<sup>27</sup> It allows for "progressive interpretation, accommodates and addresses the realities of modern life".<sup>28</sup>

In *Big M*, the Lord's Day Act had as primary purpose to ensure sabbatical observance. Thus, its very purpose was in violation of the freedom of religion. Yet, in this case the court also accepted that where the purpose of an act itself was not unconstitutional, an act could still be null and void if its effects violated the Constitution.<sup>29</sup>

In words repeated many times in subsequent cases (including those selected), the *Big M* judgment, by the pen of Chief Justice Dickenson, sets the spectrum of freedom of religion and belief in Canada:

"A truly free society is one which can accommodate a wide variety of beliefs, diversity of tastes and pursuits, customs and codes of conduct. A free society is one which aims at equality with respect to the enjoyment of fundamental freedoms and I say this without any reliance upon s. 15 of the Charter. Freedom must surely be founded in respect for the inherent dignity and the inviolable rights of the human person. The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination. [...] What may appear

23 C.P. Manfredi, *Judicial Power and the Charter, Canada and the paradox of liberal constitutionalism*, Oxford University Press, Don Mills, Ontario (Canada), 2001, p. 54.

24 SCC, *R. v. Big M Drug Mart Ltd.*, Case 18125, [1985] 1 SCR 295, 24 April 1985.

25 SCC, *Robertson and Rosetanni v. The Queen*, [1963] SCR 651, 18 October 1963.

26 *Ibid.*, paras 361-362. See also Manfredi, *supra* n. 23, at 54.

27 See SCC, *Reference re Same Sex Marriage*, Case 29866, [2004] 3 SCR 698, 9 December 2004, para. 22.; SCC, *R. v. N.S.*, Case 33989, [2012] 3 SCR 726, 20 December 2012, para. 78.

28 *Reference re Same Sex Marriage*, Case 29866, *supra* n. 27, para. 22.

29 *Robertson and Rosetanni v. The Queen*, *supra* n. 25, paras 352-353, see also para. 372. See further Manfredi, *supra* n. 23, at 55.

good and true to a majoritarian religious group, or to the state acting at their behest, may not, for religious reasons, be imposed upon citizens who take a contrary view. The Charter safeguards religious minorities from the threat of ‘the tyranny of the majority’.”<sup>30</sup>

*Big M* was a milestone which in subsequent judgments was not only cited and reaffirmed, but also further evolved.

### 3.2 Overview of selected cases

In the period from 1990 until 2015, 26 cases regarding the freedom of religion and belief were decided by the Canadian Supreme Court (see section 1.7). From these, the following 15 cases were selected.

|     |                                                                                                                 |
|-----|-----------------------------------------------------------------------------------------------------------------|
| 1.  | R. v. Sioui, [1990] 1 S.C.R. 1025; 24 May 1990                                                                  |
| 2.  | Lakeside Colony of Hutterian Brethren v. Hofer, [1992] 3 S.C.R. 165; 29 October 1992.                           |
| 3.  | P. (D.) v. S (C.), [1993] 4 S.C.R. 141; 21 October 1993.                                                        |
| 4.  | B. (R.) v. Children’s Aid Society of Metropolitan Toronto, [1995] 1 S.C.R. 315; 27 January 1995.                |
| 5.  | Trinity Western University v. College of Teachers, 2001 SCC 31; 17 May 2001.                                    |
| 6.  | Chamberlain v. Surrey School District No. 36, 2002 SCC 86; 20 December 2002.                                    |
| 7.  | Syndicate Northcrest v. Amselem, 2004 SCC 47; 30 June 2004.                                                     |
| 8.  | Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v. Lafontaine (Village), 2004 SCC 48; 30 June 2004. |
| 9.  | Reference same sex marriage, 2004 SCC 79; 9 December 2004.                                                      |
| 10. | Multani v. Commission scolaire Marguerite-Bourgeoys, 2006 SCC 6; 2 March 2006.                                  |
| 11. | Bruker v. Marcovitz, 2007 SCC 54; 14 December 2007.                                                             |
| 12. | A.C. v. Manitoba (Director of Child and Family Services), 2009 SCC 30; 26 June 2009.                            |
| 13. | Alberta v. Hutterian Brethren of Wilson Colony, 2009 SCC 37; 24 July 2009.                                      |
| 14. | R. v. N.S. - 2012 SCC 72 - [2012] 3 SCR 726; 20 December 2012.                                                  |
| 15. | Mouvement laïque québécois v. Saguenay (City) - 2015 SCC 16 - [2015] 2 SCR 3, 15 April 2015.                    |

The selection only includes cases in which the freedom of religion and belief features as the central right. It was considered to be the central right, if the interpretation of the freedom of religion and belief was decisive in determining the outcome of the case. This includes cases in which the freedom of religion is raised as a major

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30 R. v. *Big M Drug Mart Ltd.*, Case 18125, *supra* n. 24, at 336-37.

argument, although the central right is equal treatment of gender of sexual orientation or in which the freedom of religion is raised in combination with equal treatment, freedom of opinion or another right.

#### 4 Case studies of the selected cases

##### 4.1 R. v. Sioui, [1990]

|               |                                                                                                                                                                            |
|---------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Essence:      | Treaty rights of members of First Nations to practice their culture and religion within a protected park area, where their actions are prohibited by the park regulations. |
| Dimension:    | Freedom of religion and belief and group autonomy.                                                                                                                         |
| Lower courts: | First and second instance found against the Hurons, Court of Appeal found in their favor.                                                                                  |
| Majority:     | 9:0. Found in favor of the Hurons. Majority opinion by Lamer.                                                                                                              |
| Dissenting:   | None                                                                                                                                                                       |

In *Sioui*,<sup>31</sup> the invoked rights do not follow from the Charter, but from the freedom of religion as guaranteed by a treaty between the Hurons and General Murray which was signed in the 18<sup>th</sup> century. A couple of members of the Huron band on the Lorette Indian reserve were camping in the Jacques-Cartier Park, had a campfire, and cut down trees for the purpose of the camp and fire. According to the Regulation of the park, adopted in the Quebec Parks Act, this was not allowed. They were convicted by the first instance court<sup>32</sup> for cutting down trees, camping, and making fires in places not designated in Jacques-Cartier Park contrary to the Regulation respecting the Parc de la Jacques-Cartier, adopted pursuant to the Quebec Parks Act. Yet the respondents believed that they were entitled by the aforementioned treaty to act as they had done, in practice of ancestral customs.<sup>33</sup> The respondents appealed to the Superior Court against this judgment by way of trial *de novo*. They admitted committing the acts with which they were charged in the park, which is located outside the boundaries of the Lorette reserve. However, they alleged that they were practicing certain ancestral customs and religious rites which are the subject of aforementioned treaty.<sup>34</sup>

The first and second instance courts did not find in favor of the defendants, because respectively the issue of the treaty had not been raised and because it was not found to be a treaty. The Court of Appeal found in favor of the defendants and considered the treaty to be valid and relevant.

31 SCC, *R. v. Sioui*, Case 20628, [1990] 1 SCR 1025, 24 May 1990.

32 The provincial court of Quebec, the Court of Quebec was formally referred to as the Court of Sessions of the Peace.

33 *R. v. Sioui*, *supra* n. 31, pp. 8-13.

34 *Ibid.*

The SCC unanimously found the treaty to be valid<sup>35</sup> and relevant.<sup>36</sup> It also found unanimously that under the Indian Act and the treaty, the defendants had the right to practice their culture and religion within the boundaries of the park.

The SCC first established that the treaty still had legal force under Canadian law.<sup>37</sup> Pursuant to section 88 of the *Indian Act* and section 35 of the Charter, treaties between the First Nations and the Crown were still binding for the government. Canada respects these treaties as a matter of moral and legal principle. Such treaties can be a source of collective rights. The treaty in question, as many similar ones, explicitly recognizes the rights of the Hurons to practice their ancestral customs.<sup>38</sup>

But the fact that the treaty was still valid, did not necessarily still mean that the conduct in the Park was protected. After all, the treaty did not establish in which territory the rights to freely “carry on their customs and their religion” could be exercised. On the other hand, “[...] for a freedom to have real value and meaning, it must be possible to exercise it somewhere.”<sup>39</sup> Hence, the case touched upon a legal pluralism which followed from the legal recognition of the treaties with Canada’s First Nations.

The “liberal and generous approach that must be adopted towards Indians rights” which the SCC adopted in such matters,<sup>40</sup> and which led to the conclusion that the treaty was still valid, also required taking into account the traditions and the history of the tribe concerned<sup>41</sup> when establishing the scope and meaning of the rights.

Back when the treaty was concluded, it served to reconcile the competing interests of the English to expand and the Hurons to preserve their customs and way of life. Hence, even nowadays it must be interpreted to guarantee the Hurons the free exercise of their culture and religion in the entire territory unless incompatible with the other interests of the state.<sup>42</sup> The interest of the state with regard to the Jacques-Cartier Park was the preservation of nature for the benefit of society as a whole. This interest did not at all collide with the interest of the Hurons.

Absolute prohibition of the exercise of rites and customs could only be justified if they were not only “contrary to the purpose underlying that occupancy, it must prevent the realization of that purpose”. “Exclusive use is not an essential aspect of public ownership.”<sup>43</sup> The SCC concluded that neither the nature nor the purpose of recreational use were threatened or prevented by the use of the site by the members of the Hurons.<sup>44</sup> Hence, the blanket prohibition was unjustified. The purposes of the regulation could be reconciled with the rights of the Hurons to practice their customs. This resulted in a different law to be applied for members of the Huron nation, vis-à-vis all other users of the park.

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35 *Ibid.*, p. 21.

36 *Ibid.*, pp. 39-40.

37 *Ibid.*, pp. 45-46.

38 *Ibid.*, pp. 8-13.

39 *Ibid.*, p. 47.

40 *Ibid.*, pp. 45-46.

41 *Ibid.*, p. 48.

42 *Ibid.*, pp. 50-51.

43 *Ibid.*, p. 53.

44 *Ibid.*



## 4.2 Lakeside Colony of Hutterian Brethren v. Hofer [1992]

|               |                                                                                                                                               |
|---------------|-----------------------------------------------------------------------------------------------------------------------------------------------|
| Essence:      | Legality of the expulsion of a member of a religious community following a conflict, in accordance with the internal rules of that community. |
| Dimension:    | Freedom of religion and belief and group autonomy.                                                                                            |
| Lower courts: | Found in favor of the community.                                                                                                              |
| Majority:     | 6:1. Found in favor of Hofer. Majority opinion by Gonthier.                                                                                   |
| Dissenting:   | McLachlin.                                                                                                                                    |

In *Hofer*,<sup>45</sup> a member of the Lakeside Colony, Daniel Hofer, was expelled by the leadership of his community. The expulsion was triggered by a conflict between Hofer and others with the leadership. Hofer CS were of the opinion that the leadership had wrongly accepted to make payments to another community, as to compensate for a patent-infringement. Hofer himself claimed to be the inventor of the patented mechanism.

The Hutterites are a minority religious sect, a communal branch of Anabaptists who, like the Amish and Mennonites, trace their roots to the Radical Reformation of the 16<sup>th</sup> century. A number of questions arose as to the interaction of the various parts of the church framework. A key question was whether expulsion could be effected by a Board of Managers operating under the church's constitution, or whether it could be effected by a traditional church council not provided for in the constitution.<sup>46</sup>

The matter of expulsion was dealt with explicitly in Article 39 of the statute of the Hutterites which reads:

"Any member of the Colony may be expelled or dismissed from the Colony at any general or special meeting of the Colony upon a majority vote of the voting members thereof for his or her having left or abandoned the Colony or having refused to obey the rules and regulations of the Hutterian Brethren Church or of the Colony.[...] We acknowledge that all Canadians have the right of freedom of religion, but we hereby covenant, promise and agree that if any of us shall change his or her religion and shall cease to be a member of the Hutterian Brethren Church, that he or she shall leave the Colony".<sup>47</sup>

Consequent to the expulsion, the colony went to court and asked that the court order Hofer Sr. and his associates to vacate the colony land permanently and return all colony property to the colony. The colony also asked that the court make a declaration that Daniel Hofer Sr. and his sons were no longer members of the colony. This case was thus not about the freedom of religion proper, but about the autonomy of religious communities and how courts should deal with internal disputes.

45 SCC, *Lakeside Colony of Hutterian Brethren v. Hofer*, Case 22382, [1992] 3 SCR 165, 29 October 1992.

46 *Ibid.*, pp. 2-3.

47 *Ibid.*, pp. 22-23.

The trial judge found in favor of the colony and the judgment was upheld on appeal.<sup>48</sup> The SCC found in favor of Hofer and allowed the appeal, with only justice McLachlin dissenting. The majority opinion was delivered by Gonthier. The majority found in the interest of Hofer and his sons and allies.<sup>49</sup> Mr. Hofer felt his rights were unduly restricted and refrained from obeying the community's authority. The majority of the court found that his right of procedural fairness in the light of the state's secular law had been breached. This outweighed autonomy considerations.

McLachlin found in the interest of the community.<sup>50</sup> She made a great effort to understand the structures and procedures of the Hutterites as they understood them themselves, and considered them "open and eminently fair".<sup>51</sup> She concluded that "the problem lay not in unfair procedures or lack of opportunities for hearing; the problem lay rather in the fundamental divergence between the parties, a divergence which doomed any proceedings, no matter how just, to failure"<sup>52</sup> and that Hofer was not willing to accept the decision taken by the community leadership.<sup>53</sup> This touched on the very essence of autonomy of the community.<sup>54</sup>

#### 4.3 P. (D.) v. S. (C.) [1993]

|               |                                                                                                                                                                                     |
|---------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Essence:      | Criterion of best interests of the child in a dispute between divorced parents over the intensity in which the father may teach their daughter his religion as a Jehovah's Witness. |
| Dimension:    | Freedom of religion and belief, (family law) and family relations.                                                                                                                  |
| Lower Courts: | Found in favor of the mother.                                                                                                                                                       |
| Majority:     | 5:2. Found in favor of the mother. Majority opinion by L'Heureux-Dubé. Separate concurring opinion of Cory and Iacobucci.                                                           |
| Dissenting:   | Sopinka and McLachlin.                                                                                                                                                              |

The parties lived together over a period of three years. In the last year, their daughter C. was born. Upon separation, the parties agreed in writing that the respondent (the mother) would have legal custody of the daughter and that the appellant (the father) would exercise his right to access on 24 hours' notice. This agreement was ratified by judgment of the Superior Court.

Subsequently, relations between the parties deteriorated, mainly because of problems involving the exercise by the appellant of his right to visit C. In particular,

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48 *Ibid.*, p. 13

49 *Ibid.*, p. 73.

50 *Ibid.*, pp. 78-83

51 *Ibid.*, p. 82.

52 *Ibid.*, p. 83.

53 *Ibid.*

54 *Ibid.*

the mother, a Roman Catholic, accused the father of indoctrinating their daughter, who was 3½ years old at the time in the Jehovah's Witnesses religion.

Consequently, the appellant made a motion to the Superior Court to set aside the agreement. He asked for the child's custody or, alternatively, to be given greater access rights. The Superior Court dismissed the appellant's motion and ordered restrictions on request of the mother. That judgment was affirmed on appeal.<sup>55</sup>

The majority of the SCC moved to dismiss the appellant's appeal. L'Heureux-Dubé delivered the majority opinion. Justices Cory and Iacobucci delivered a joint concurring opinion. Beverly McLachlin authored the dissenting opinion for herself and Justice Sopinka.

*P. (D.) v. S. (C.)* in essence was about whether or not C.'s father was (1) indoctrinating the child; and (2) whether this created any kind of adverse effects on C. The child repeated what her father had told her that it was "Jehovah [who] made [C.], [who] made [...] everything". The child also repeated what her father had taught her about the celebration of holidays deemed pagan by Jehovah's Witnesses theology (Christmas). Here, there was a conflict with the upbringing as intended by the mother.

Obviously, the child's utterances reminded the mother of the faith of her ex-partner, and the frequency of the utterances contributed to a certain level of irritation. The order given by the lower courts restricted the appellant in seeing his daughter and teaching her his faith. The appellant argued that the order did not only violate his freedom of religion to propagate his religion to his daughter, but also that of his daughter to be exposed to his propagation of his religion.<sup>56</sup> The respondent held that the appellant could not rely on their daughter's freedom of religion, as one cannot plead in another's name.<sup>57</sup>

In interpreting what the child's best interest was, the majority rejected the notion that harm alone should be the factor, but argued that it was merely one of the factors which a court should take into account when estimating the child's best interest.<sup>58</sup> They believed that the evidence which showed the impact the fathers propagation had on the child, showed that the level of influence was not in her best interest.<sup>59</sup>

According to the majority, there was neither an infringement of the freedom of religion, nor was there any infringement of his freedom of expression as the court orders only prohibited him from indoctrinating the child.<sup>60</sup> The majority also rejected his claim that the lower courts discriminated against Jehovah's Witnesses, and as he had not shown that his freedom of association was infringed, they rejected that claim as well.<sup>61</sup>

The concurring judges, like the dissenting judges, agreed with the majority that the best interest of the child was the applicable standard. However, they were not convinced that differences of opinions of parents regarding religious questions or the frank discussion of their differing religious perceptions by both parents with the

55 SCC, *P. (D.) v. S. (C.)*, Case 22296, [1993] 4 SCR 141, 21 October 1993, pp. 12-17.

56 *Ibid.*, p.19.

57 *Ibid.*, p. 21.

58 *Ibid.*, pp. 47-48.

59 *Ibid.*, p. 51.

60 *Ibid.*, p. 52.

61 *Ibid.*, p. 53.

children would automatically be harmful.<sup>62</sup> Nevertheless, they did not grant the appeal because they believed that in the end the trial judge was best equipped to analyze the evidence.<sup>63</sup>

McLachlin wrote the dissenting opinion for herself and Sopinka. They agreed with the majority that the best interest of the child was the right and constitutional standard.<sup>64</sup> But when applying the best interest based on the facts, McLachlin reached a conclusion that while the situation must have created complexity for the child, this did not mean that there was harm. Ergo, her best interest was not at stake. The evidence did not suggest that she was adversely affected by getting to know “her father fully, including his religious values”<sup>65</sup> “[...] The fact that the mother wanted, as she put it, her child to grow up with the same joy in Halloween and Christmas as she had grown up with [...] is insufficient to support an order forbidding the father to impart his views on such holidays. Nor is the fact that the mother felt the father spoke too much about his religion with the child sufficient in itself to justify an order restricting him from ‘continually’ doing so.”<sup>66</sup>

#### 4.4 B. (R.) v. Children’s Aid Society of Metropolitan Toronto [1995]

|               |                                                                                                                                                                                                                        |
|---------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Essence:      | Criterion of best interests of the child in overruling the parent’s decision to refuse medical treatment for their infant based on objections grounded on religious beliefs.                                           |
| Dimension:    | Freedom of religion and belief, (family law) and family relations.                                                                                                                                                     |
| Lower Courts: | Found against the parents.                                                                                                                                                                                             |
| Majority:     | 9:0. Dismissed the appeal of the parents. Majority opinion by La Forest also on behalf of Gonthier and McLachlin. Joint sperate opinion by Iacobucci and Major. Separate opinion by Lamer. Sperate opinion by Sopinka. |
| Dissenting:   | L’Heureux-Dubé was dissenting on the cross-appeal which was not of relevance for the constitutional questions.                                                                                                         |

In *Children’s Aid Society of Metropolitan Toronto*, Jehovah’s much like *A.C. v. Manitoba* (see below), the central features were the religious objection of Jehovah’s Witnesses to blood transfusions even in emergency cases, on the one hand, and the “best interest of the child” criterion, on the other hand. In this case, Jehovah’s Witness parents had a prematurely newborn who was seriously ill. Within the first few weeks of her life, Sheena exhibited many physical ailments and received a number of medical treatments. At the parent’s request, the doctors avoided the use of a blood transfusion. When Sheena was one month old, the attending physicians believed that her life was

62 *Ibid.*, pp. 62-63.

63 *Ibid.*, p. 64.

64 *Ibid.*, pp. 64-68.

65 *Ibid.*, p. 65.

66 *Ibid.*

in danger and that she might require a blood transfusion to treat potentially life-threatening congestive heart failure.

The Provincial Court (Family Division) granted the Children's Aid Society a 72-hour wardship, based on the Child Welfare Act. A second Provincial Court order then terminated the respondent's wardship, and the child was returned to her parents. The appellants appealed both orders to the District Court, which dismissed the appeal and awarded costs against the Attorney General of Ontario, who had intervened in the proceedings. The Court of Appeal dismissed the appellants' appeal and the Attorney General of Ontario's cross-appeal on the issue of costs.

The SCC unanimously upheld the lower court's judgment, while Justice L'Heureux-Dubé was dissenting on the cross-appeal which was not of relevance for the constitutional questions. The majority opinion was delivered by La Forest, also on behalf of Gonthier and McLachlin. Iacobucci and Major delivered a joint separate opinion, Lamer and Sopinka each delivered a separate opinion.

According to La Forest's majority opinion, the freedom of religion and belief of the parents was legitimately limited under the limitations clause. The majority argued that while the freedom of religion does encompass a right to make choices for the children, the state had to assume a role in protecting the rights of infants who were not yet in a position to speak for themselves. This was especially the case when the decision to be made by the parents might involve the death of the infant. Hence, there was an infringement of the freedom of religion which was justified by the limitations clause.<sup>67</sup>

The majority opinion noted that the Charter did not afford protection to the integrity of the family unit as such. "The Canadian Charter, and s. 7 in particular, protects individuals". The liberty of parents followed from this. From the parental liberty, the concept of integrity of the family unit could be derived. "[L]iberty does not mean mere freedom from physical restraint. In a free and democratic society, the individual must be left room for personal autonomy to live his or her own life and to make decisions that are of fundamental personal importance."<sup>68</sup>

The challenged Act infringed upon the parental "liberty" protected in the Charter.<sup>69</sup> However, the majority was of the opinion that this had been done in accordance with the principles of fundamental justice, because they were entitled to fair and reasonable notice, access and information, with due regard for the nature of the proceedings and the urgency of the medical situation.<sup>70</sup>

With regard to the freedom of religion and belief, the majority reiterated that it did encompass the right of parents to educate their children in accordance with their religious beliefs. Similarly, this freedom included the right to choose medical and other treatments for one's children. While the purpose of the challenged Act did not interfere with said rights of parents, the Act did have effects which could interfere with these rights.

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67 SCC, *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, Case 23298, [1995] 1 SCR 315, 27 January 1995, para. 103.

68 *Ibid.*, para. 72.

69 *Ibid.*, para. 87.

70 *Ibid.*, para. 102.

However, the majority noted that in accordance with standing case law, the freedom of religion was not absolute; it had its limits especially when it comes to acting on the basis of beliefs.<sup>71</sup> Rather than formulating any internal limits to the freedom of religion, the majority deemed it proper to let the state justify its interference under the limitations clause.<sup>72</sup> The necessity of the medical treatment was taken as fact, and the parents conceded that there was a pressing and substantial objective for the Act. Given the fair and reasonable procedure set out in the Act, the interference must also be considered proportional and thus justified under the limitations clause.<sup>73</sup>

The majority rejected the parent's reference to the religious freedom of the child, because S. was not old enough to entertain religious beliefs of her own.<sup>74</sup>

The separate concurring opinion of Justices Iacobucci and Major stated that the parents, who were overruled in accordance with the Children's Welfare Act, could not benefit from the protection of the liberty interest in section 7 or freedom of religion. Hence there was no infringement, and thus no need for justification by the limitations clause.<sup>75</sup> They believed that because the Act was instrumental to securing the life, liberty and security of the child, the parental decision to withhold treatment was outside the sphere of "liberty".<sup>76</sup> This was the limit of the freedom of religion of the parents.<sup>77</sup>

They also believed the freedom of religion could not be invoked on behalf of the child because she had never expressed "agreement with the Jehovah's Witnesses faith" and that her freedom of religion and conscience required that she lived long enough to make her own choices. "Freedom of religion" should not encompass activity that so categorically negated the "freedom of conscience" of another.<sup>78</sup>

Lamer is of the opinion that the liberty interest and the freedom of religion and belief had not been infringed because it included neither the right of parents to choose or refuse medical treatment for their children, nor a general right to bring up or educate their children without interference by the state.<sup>79</sup> In his analysis he explained why, in his opinion, the majority construed the meaning of liberty too broadly.<sup>80</sup>

Sopinka concurred with the majority, yet disagreed with them in one regard. She was of the opinion that it was unnecessary to determine whether a liberty interest was engaged, because in order to do so one must first establish a breach of fundamental justice, which was not the case.<sup>81</sup>

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71 *Ibid.*, para. 107.

72 *Ibid.*, para. 109-110.

73 *Ibid.*, para. 112-113.

74 *Ibid.*, para. 103.

75 *Ibid.*, para. 208.

76 *Ibid.*, paras 213-221.

77 *Ibid.*, paras 224-230.

78 *Ibid.*, paras 224-230.

79 *Ibid.*, para. 1.

80 *Ibid.*, paras 5-39.

81 *Ibid.*, para. 206.

## 4.5 Trinity Western University v. College of Teachers [2001]

|               |                                                                                                                                                                                                                                   |
|---------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Essence:      | Refusal by the British Columbia College of Teachers to accept graduates from a faith-based university which obliged staff and students to sign an agreement, encompassing amongst others to not engage in same-sex relationships. |
| Dimension:    | Freedom of religion and belief and balancing with others' rights. Freedom of religion and belief and education. Freedom of religion and belief and group autonomy.                                                                |
| Lower Courts: | Found that the BCCT had no authority to deny the application of TWU on the basis of discrimination.                                                                                                                               |
| Majority:     | 8:1. Affirmed the challenged judgment and found in favor of TWU. Majority opinion by McLachlin.                                                                                                                                   |
| Dissenting:   | L'Heureux-Dubé.                                                                                                                                                                                                                   |

Trinity Western University (TWU) is a Christian private university, which obliges students to sign a "Community Standards" document. It contains a paragraph in which students declare to refrain from biblically proscribed conduct, including homosexual behavior. Faculty and staff are required to sign a similar document.

TWU offers a teacher training program. In order to assume full responsibility for the teacher education program, TWU applied to the British Columbia's College of Teachers (BCCT). The Council of the BCCT rejected the application on the grounds of discriminatory practices of TWU, among other things. BCCT's denial is based on the argument, that labeling homosexual behavior as sinful has the effect of excluding gay people and therefore amounts to discrimination.

Both the Supreme Court of British Columbia and the Court of Appeal decided that BCCT did not have the authority to deny the application on alleged discriminatory practices.<sup>82</sup> A majority of eight justices in the SCC rejected the appeal by BCCT. Justice L'Heureux-Dubé dissented. Chief Justice McLachlin authored the majority opinion. Essentially, two questions were before the Court: whether BCCT had jurisdiction to take discrimination into account; and if so, given the evidence, whether it had taken the right decision with regard of the application of TWU.<sup>83</sup>

The SCC majority found that "teachers are a medium for the transmission of values"<sup>84</sup> and that it "is obvious that the pluralistic nature of society and the extent of diversity in Canada are important elements that must be understood by future teachers because they are the fabric of the society within which teachers operate and the reason why there is a need to respect and promote minority rights".<sup>85</sup> Hence, BCCT was entitled to take alleged discrimination into account under the reference to public interest.<sup>86</sup>

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82 SCC, *Trinity Western University v. College of Teachers*, Case 27168, [2001] 1 SCR 772, 17 May 2001, paras 1-7.

83 *Ibid.*, para. 8.

84 *Ibid.*, para. 13.

85 *Ibid.*, para. 13.

86 *Ibid.*, paras. 13-14.



The majority was of the opinion that the standard for the second question was “correctness”.<sup>87</sup> At issue was “to determine the scope of freedom of religion and conscience and to weigh these rights against the right to equality in the context of a pluralistic society”. “The Council of BCCT is not a legal body, but the accommodation of beliefs is a legal question.”<sup>88</sup>

Applying this standard, the Court, taking into account that TWU was a private institution and could also rely on the freedom of religion, found that the existence of the code of conduct as such did not provide enough evidence to conclude negatively on the application of TWU. Also, the Canadian Charter was not applicable because TWU was a private institution.<sup>89</sup> In the majority’s assessment, the Community Standards expressed that “TWU is not for everybody; it is designed to address the needs of people who share a number of religious convictions”. “A homosexual student would not be tempted to apply for admission and could only sign the so-called student contract at a considerable personal cost.” “That said, the admissions policy of TWU alone is not in itself sufficient to establish discrimination as it is understood in our s. 15 jurisprudence.”<sup>90</sup>

The Court acknowledged that gays and lesbians “whether as individuals or couples, form an identifiable minority who have suffered and continue to suffer serious social, political and economic disadvantage”,<sup>91</sup> and that it was therefore necessary to take into account whether TWU had an adverse effect on realizing the goal of ensuring equality of this group in the educational environment. However, the Court also noted that BCCT had to take the freedom of religion and the prohibition of discrimination on grounds of religion into account. Enforcing a majority view on same-sex activity onto a religious minority was also not the purpose of the Charter: “The Charter safeguards religious minorities from the threat of the tyranny of the majority.”<sup>92</sup>

Because neither of the two rights was absolute, the correct decision needed to reconcile the “religious freedoms of individuals wishing to attend TWU with the equality concerns of students in B.C.’s public school system”.<sup>93</sup> Reconciliation was possible through “proper delineation of the rights and values involved”.<sup>94</sup> The Court found that BCCT did not take the freedom of religion into account properly. Without concrete evidence, it simply assumed that the religious views held by the institution would limit the consideration with regard to LGBTQ+ students. BCCT thereby placed a burden on the members of a particular religious group. Instead, BCCT should have determined whether in reality there was a conflict between rights.<sup>95</sup>

If individual teachers, whether or not graduates from TWU, were found to discriminate against LGBTQ+ students, disciplinary measures were called for.<sup>96</sup> Also,

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87 *Ibid.*, paras. 15-19.

88 *Ibid.*, para. 19.

89 *Ibid.*, para. 25.

90 *Ibid.*

91 *Ibid.*, para. 27.

92 *Ibid.*, para. 28, citing *R. v. Big M Drug Mart Ltd.*, Case 18125, *supra* n. 24, at 336-37.

93 *Ibid.*

94 *Ibid.*, para. 29.

95 *Ibid.*, paras 31-33.

96 *Ibid.*, paras 35-37.

because TWU was not the only institution supplying graduates to become teachers in British Columbia, there was no risk that their acceptance would negatively impact the number of LGBTQ+ people who become teachers.<sup>97</sup>

Dissenting Justice L'Heureux-Dubé warned that to wait until discrimination actually materialized was taking a risk. Rejecting the application would ensure that TWU graduates had to follow a year at a different institution first. So, one also ensured a period of reflection to a certain degree. She noted that especially for homosexual and bisexual students, an educational environment in which they could rely on support from their teachers was essential. After all, these students might also experience distress from finding a way to “come out” to their parents, family and friends.<sup>98</sup>

She was of the opinion that the proper standard of judicial review was not “correctness” but “patent unreasonableness”.<sup>99</sup> Therefore, she believed that BCCT under the Teaching Profession Act had a wide discretion.<sup>100</sup>

Unlike her colleagues, L'Heureux-Dubé was of the opinion that BCCT did not have to take the freedom of religion into account when making its decisions, because compared to equality, other values, like the freedom of religion, were not germane to the public interest in ensuring that teachers had the requisites to foster supportive classrooms environments in public schools.<sup>101</sup> Equally, BCCT did not have to balance rights, which was the task of a human rights body and not of an institution for the benefit of the public school system.<sup>102</sup>

The religion of TWU did not play a role in the decision, nor should it have, because that would have been discriminatory and an error of law. But BCCT did have to take the impact of a discriminatory practice into account.<sup>103</sup> L'Heureux-Dubé compared this case to the case of Bob Jones University before the US Supreme Court.<sup>104</sup> Bob Jones University discouraged interracial dating on religious grounds. Because this was contrary to the racial equality envisaged by the Constitution, the tax exempt for educational institutions was withdrawn.

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97 *Ibid.*, paras 35-38.

98 *Ibid.*, paras 86-91.

99 *Ibid.*, paras 50-51.

100 *Ibid.*, para. 54.

101 *Ibid.*, para. 60.

102 *Ibid.*, para. 65.

103 *Ibid.*, para. 63.

104 See US Supreme Court, *Bob Jones University v. United States*, 461 US 574 (1983), 24 May 1983.

## 4.6 Chamberlain v. Surrey School District No. 36, [2002]

|               |                                                                                                                                                                                                                                       |
|---------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Essence:      | Refusal by the School Board to approve learning material for Kindergarten 1 (K1) which depicted same-sex families. This was argued on the basis of conflict that children raised in accordance with certain beliefs might experience. |
| Dimension:    | Freedom of religion and belief and balancing with others' rights. Freedom of religion and belief and education.                                                                                                                       |
| Lower Courts: | The British Columbia Supreme Court overruled the School Board. The Court of Appeal overruled this and found the decision within the School Board's jurisdiction.                                                                      |
| Majority:     | 7:2. Overruled the denial. Majority opinion by McLachlin. Justice LeBel separate concurring opinion.                                                                                                                                  |
| Dissenting:   | Justice Gonthier and Bastarache dissented.                                                                                                                                                                                            |

The B.C. School Act confers on the Minister of Education the power to approve basic educational resource materials to be used in teaching the curriculum in public schools and confers on school boards the authority to approve supplementary educational resource material, subject to Ministerial direction. Mr. Chamberlain, a Kindergarten-Grade One ("K-1") teacher twice requested the Surrey School Board to approve three books which depicted same-sex parented families.

The board passed a resolution declining to approve the books. The board's overarching concern was that the books would engender controversy in light of some parents' religious objections to the morality of same-sex relationships. The board also felt that children at the K-1 level should not be exposed to ideas that might conflict with the beliefs of their parents.

The British Columbia Supreme Court found the School Board's resolution violated the School Act, because members of the board who had voted in favor of the resolution were significantly influenced by religious considerations. The Court of Appeal set aside the decision of the BC Supreme Court on the basis that the resolution was within the board's jurisdiction.<sup>105</sup>

A majority of six judges found in favor of the appellants to quash the decision of the School Board, Chief Justice McLachlin writing for the majority. Justice LeBel concurred with the majority. Justice Gonthier and Bastarache dissented.

The majority and the dissenting judges agreed that the proper standard of review was reasonableness and not correctness or patent unreasonableness.<sup>106</sup> They disagreed whether the decision by the School Board was reasonable.<sup>107</sup> The reason the majority regarded the decision as being opposed to the School Act was because the board, while considering the possible religious objections of parents to the books,

105 SCC, *Chamberlain v. Surrey School District No. 36*, Case 28654, [2002] 4 SCR 710, 20 December 2002, Introduction, paras 2-3.

106 *Ibid.*, para. 3.

107 *Ibid.*

did not consider the possible interest of LGBTQ+ parents and the fact that children need to know about the diversity in Canadian society.<sup>108</sup>

While the standard was one of administrative law, the decision to approve or not approve the books clearly had a human rights dimension according to the majority. After all, the “[...] board must decide whether to accommodate certain parents’ concerns about the books at the risk of [...] denying certain children the chance to have their families accorded equal recognition and respect in the public school system”.<sup>109</sup>

The School Act provides that “[a]ll schools [...] must be conducted on strictly secular and non-sectarian principles.” According to the majority, this did not rule out taking religion and belief into consideration, but it did rule out any attempt to use the religious views of one part of the community to exclude from consideration the values of other members of the community. The School Act’s emphasis on secularism reflected the fact that Canada is a diverse and multicultural society, bound together by the values of accommodation, tolerance and respect for diversity.<sup>110</sup>

The School Board’s decision did not pass the standard of reasonableness, because the board had not inquired into the relevance of the books for the curriculum and had not taken the position of children of same-sex families seriously.<sup>111</sup> The majority did not deny that the materials could cause some cognitive dissonance amongst children who grew up in households with morality concerns regarding homosexual relationships.

But, the majority argued, “[e]xposure to some cognitive dissonance is arguably necessary if children are to be taught what tolerance itself involves. [...] [T]he demand for tolerance cannot be interpreted as the demand to approve of another person’s beliefs or practices. When we ask people to be tolerant of others, we do not ask them to abandon their personal convictions. [...] Children cannot learn this unless they are exposed to views that differ from those they are taught at home.”<sup>112</sup>

Besides depicting quite factually the diversity of family relationships in Canada in the books, the “only additional message of the materials appears to be the message of tolerance. Tolerance is always age-appropriate”.<sup>113</sup>

The concurring opinion of LeBel stated that while the majority was right in analysis and outcome, according to him the decision of the board could not even withstand the most deferential of the standards, because it was illegal. The board assumed an authority it did not have, because it stepped outside the secular and non-sectarian confinements of the public school system.<sup>114</sup>

Gonthier and Bastarache agreed with the standard of review as applied by the majority. Yet exactly because of this, they dismissed the appeal. In their opinion, the School Act neither required nor opposed learning material which would teach children about same-sex families. Hence, the School Board was at liberty to decide either way.

108 *Ibid.*, paras 1-3.

109 *Ibid.*, para. 11.

110 *Ibid.*, para. 21.

111 *Ibid.*, para. 55.

112 *Ibid.*, para. 66.

113 *See ibid.*, para. 69.

114 *Ibid.*, paras 188-215.

Parents were the primary actors in education, while the state played a secondary role.<sup>115</sup> Thus, parents had the right to “[...] rear their children according to their conscience, religious or otherwise, as a fundamental aspect of freedom of conscience and religion, protected by s. 2(a) of the Charter”.<sup>116</sup> Both the group which believed that same-sex relationships were morally equivalent to different-sex relationships and the group which rejected same-sex relationships on moral grounds, were protected by the Charter.<sup>117</sup> “A truly free society is one which can accommodate a wide variety of beliefs, diversity of tastes and pursuits, customs and codes of conduct. [...]”<sup>118</sup> “Nothing in the Charter or a proper understanding of pluralism demands that atheistically based moral positions trump religiously based moral positions on matters of public policy.”<sup>119</sup>

Accordingly, the School Board had to strike a balance between the competing rights.<sup>120</sup> Either way, the decision would have been constitutional.<sup>121</sup> In order to prevent cognitive dissonance, the School Board could rightly come to the conclusion that the books were not appropriate given the local context. Even more so, because the school also maintained a staunch anti-discrimination policy.<sup>122</sup>

#### 4.7 Syndicate Northcrest v. Amselem, [2004]

|               |                                                                                                                                                                            |
|---------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Essence:      | Dispute between the syndicate administering an apartment building and Orthodox Jewish tenants over <i>succahs</i> (ceremonial huts for Sukkot holiday) on their balconies. |
| Dimension:    | Freedom of religion and belief and personal freedom.                                                                                                                       |
| Lower Courts: | Superior Court found for the syndicate. The Court of Appeal affirmed.                                                                                                      |
| Majority:     | 5:4. Found for Amselem C.S. (appellants) and overruled the Court of Appeal. Majority opinion by Iacobucci.                                                                 |
| Dissenting:   | Jointly Bastarache, LeBel and Deschamps. Separately Binnie.                                                                                                                |

The appellants in this case were all Orthodox Jews and co-owners of residential units in “Place Northcrest”, a luxury building in Montreal. According to the by-laws, the balconies of the apartments were common property, yet reserved for the exclusive use of the owners. The conflict between the syndicate and the owners involved *succahs* on balconies during the Jewish holiday of *Sukkot*. A *succah* is a small enclosed temporary hut, in which Jews are commanded to “dwell” temporarily during *Sukkot*.

After Mr. Amselem had put up his *succah* on the balcony for the first time, the Syndicat Northcrest requested its removal, claiming it was in violation of the resid-

115 *Ibid.*, para. 102.

116 *Ibid.*, para. 104.

117 *Ibid.*, para. 126.

118 *Ibid.*, para. 135.

119 *Ibid.*, para. 137.

120 *Ibid.*, para. 141.

121 *Ibid.*, para. 147.

122 *Ibid.*, paras 169-185.

ence's by-laws. The year after, Mr. Amselem requested permission from the syndicate to set up a *succah* on his balcony. The syndicate refused. In a letter, the syndicate proposed to allow Orthodox Jewish residents of the building, including the appellants, to set up a communal *succah* in gardens. The appellants declined the offer and promised to set up their *succahs* "in such a way that they would not block any doors, would not obstruct fire lanes, [and] would pose no threat to safety or security in any way". The syndicate refused their request and filed an application for permanent injunction prohibiting the setting up of *succahs* and, if necessary, permitting their demolition.<sup>123</sup>

The application was granted by the Superior Court. The Court of Appeal agreed.<sup>124</sup> The Superior Court based the decision amongst others on a testimony by a rabbi, who explained that Jewish law requires no one to build his own *succah* near his own home.

The SCC by a majority of 5 to 4 decided that the appeal should be allowed. The majority opinion was delivered by Justice Iacobucci. A joint dissenting opinion was authored by Bastarache also on behalf of LeBel and Deschamps. Binnie authored a separate dissenting opinion.

The key questions were:<sup>125</sup> whether the by-laws infringed the appellants' freedom of religion and belief; whether the syndicate could legitimately refuse the request of the appellants; and whether the appellants had waived their rights to freedom of religion by signing the declaration of co-ownership?

The majority begins by defining the freedom of religion and belief as a "personal or subjective conception of freedom of religion, one that is integrally linked with an individual's self-definition and fulfillment and is a function of personal autonomy and choice, elements which undergird the right".<sup>126</sup> Because of this, courts should not choose one rabbinical interpretation over the other. "[T]he State is in no position to be, nor should it become, the arbiter of religious dogma. Accordingly, courts should avoid judicially interpreting [...] the content of a subjective understanding of religious requirement, 'obligation', precept, 'commandment', custom or ritual. Secular judicial determinations of theological or religious disputes, or of contentious matters of religious doctrine, unjustifiably entangle the court in the affairs of religion."<sup>127</sup>

Instead, the proper test was that of "sincerity". "Assessment of sincerity is a question of fact that can be based on several non-exhaustive criteria, including the credibility of a claimant's testimony [...]." "Religious beliefs, by their very nature, are fluid and rarely static. [A] court's inquiry into sincerity, if anything, should focus not on past practice or past belief but on a person's belief at the time of the alleged interference with his or her religious freedom."<sup>128</sup> Any "[...] intrusive inquiry into the nature of the claimants beliefs would in itself threaten the values of religious

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123 SCC, *Syndicat Northcrest v. Amselem*, Cases 29252 and 29253, [2004] 2 SCR 551, 30 June 2004, paras 4-17.

124 *Ibid.*, paras 19-34.

125 *Ibid.*

126 *Ibid.*, para. 42.

127 *Ibid.*, para. 50.

128 *Ibid.*, para. 53.

liberty”.<sup>129</sup> indeed “requiring proof of the established practices of a religion to gauge the sincerity of belief diminishes the very freedom we seek to protect.”<sup>130</sup>

Yet the majority admitted that one person’s freedom cannot be construed so broadly that it embarks on the freedom of others, because (citing J.S. Mill) “the only freedom which deserves the name, is that of pursuing our own good in our own way, so long as we do not attempt to deprive others of theirs or impede their efforts to obtain it.”<sup>131</sup>

The majority believed the evidence supported that the appellant sincerely believed that they had to build their personal *succah*’s even though the position, like others of the applicants, could not be supported by theological doctrine (for example women apparently have no “obligation” to dwell in the *succah*). The freedom of religion and belief protects those individuals who “may personally deny the modern relevance of literal biblical ‘obligation’ [...] despite the fact that for some reason he or she sincerely derives a closeness to his or her God by sitting in a *succah*”.<sup>132</sup>

Alternatives for the personal *succah*s would have resulted in distress which “is even objectively substantial and would undoubtedly, as the appellants assert, detract from the joyous celebration of the holiday and thus constitute a non-trivial interference with and thus an unjustified infringement of their rights to religious freedom”.<sup>133</sup> The reason for this was, amongst others, that because of the prohibition to use electricity and thus elevators, the appellants including elder people would have been forced to take the stairs throughout each meal.

Iacobucci considered the freedom of religion of the appellants to be significantly impaired whereas the impact on the other owners’ rights was at best minimal.<sup>134</sup> Amongst other things, this was because the *succah*s were there only for nine days a year, they had been set up in a way that they did not block emergency routes and it was possible to build *succah*s that conformed with the general aesthetics of the building.<sup>135</sup> Lastly, Iacobucci argued that the appellants did not waive their rights<sup>136</sup> because, amongst other things, there was no explicit, voluntary and freely expressed waiver.

Three dissenting judges, Bastarache, LeBel and Deschamps, believed firstly that freedom of religion was not infringed, as there were other possibilities to eat meals in a *succah* during Sukkot, for example in a communal *succah* or one that belonged to friends or relatives. Secondly, if was sincerely believed that only an own *succah* would do, which had to be erected on the balcony, the freedom of religion conflicted with rights of others (property and life/safety). In this case, the latter rights must prevail.

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129 *Ibid.*, para. 55.

130 *Ibid.*, para. 54.

131 *Ibid.*, para. 61.

132 *Ibid.*, para. 68.

133 *Ibid.*, para. 77.

134 *Ibid.*, para. 64.

135 *Ibid.*, paras 82-90.

136 *Ibid.*, paras 91-102.



The dissenting judges believed that an objective test had to be applied: "a practice must be connected with the religion, the connection must be objectively identifiable."<sup>137</sup> Also, the freedom to manifest one's religion was much narrower than the freedom to hold a religion.<sup>138</sup> In this regard, Bastarache also referred to the two dimensions of the freedom of religion; one being inward and having almost inclusively a private aspect, one regarding manifestation having genuine social significance. While the first is very broad, the second is narrower.

With regard to most of the appellants, the three dissenting judges did not believe that the freedom of religion had been infringed, because the practice they adhered to required them to dwell in a *succah*, not in one built on their own property or near their home. With regard to Mr. Amselem himself, they acknowledged that he had acted on the assumption of a divine commandment to build a *succah* on his own property.<sup>139</sup> Drawing attention to the fact that the Canadian Jewish Congress considered the compromise as suggested by the syndicate of co-owners to be reasonable, they reached the conclusion that Mr. Amselem's freedom of religion could not be exercised in harmony with the rights of others or the general well-being, making the infringement legitimate.<sup>140</sup> Hence, the question of waiver of rights did not need to be addressed.<sup>141</sup>

Binnie's approach differed from that of the other dissenting judges because he attached much value to the private law contractual relationship between the appellants and the respondents.<sup>142</sup> He accepted that Mr. Amselem had at least met the threshold of bringing his claim within the protection granted by the freedom of religion, because he sincerely believed in building his own *succah*.<sup>143</sup> But even Amselem admitted in the proceedings before the trial judge that he would go to friends and family if he was not permitted to build his own *succah* on his balcony. Binnie concluded that rather than speaking of a waiver of rights, the appellants could not insist on their own personal *succahs* on the balconies, because, by signing the declaration, they had assured their co-owners that they would comply.<sup>144</sup>

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137 *Ibid.*, para. 135.

138 *Ibid.*, para. 137.

139 *Ibid.*, paras 162-163.

140 *Ibid.*, paras 176-180.

141 *Ibid.*, para. 181.

142 *Ibid.*, para. 184.

143 *Ibid.*, para. 185.

144 *Ibid.*, para. 206.

#### 4.8 Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v. Lafontaine (Village) [2004]

|               |                                                                                                                                                                                 |
|---------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Essence:      | Municipality refuses request by congregation to allow for place of worship in non-designated area. Congregation experiences lack of cooperation from the municipality.          |
| Dimension:    | Freedom of religion and belief and group autonomy. Freedom of religion and belief and secularism.                                                                               |
| Lower Courts: | Superior Court dismissed the application of the Congregation on factual analysis. The Court of Appeal set aside this finding of fact but dismissed the appeal on legal grounds. |
| Majority:     | 5:4. Found in favor of the congregation. Majority opinion by McLachlin also on behalf of Iacobucci, Binnie, Arbour and Fish.                                                    |
| Dissenting:   | Joint dissenting opinion by LeBel also on behalf of Bastarache, and Deschamps. Separate dissenting opinion by Major.                                                            |

This case concerns a congregation of Jehovah's Witnesses in the town of Lafontaine. They were looking for a lot to establish a place of worship in the municipality. The zoning by-law allowed places of worship to be built in a zone called P-3. There was no lot in P-3, but there was a lot in residential area where the construction of churches was permitted and another place of worship was already in the area.<sup>145</sup> However, the application to build on this land was denied by the municipality with reference to the fact that P-3 lots were available.

The Congregation took up its search for available land in Zone P-3. As the search was unsuccessful, it took the search to other zones and found a lot in a commercial zone that was only 400 meters from another place of worship.<sup>146</sup> The Municipality denied this request without giving reasons for the decision. It also told the Congregation that P3 lots were available.<sup>147</sup> The Congregation then once again renewed its search for a P-3 lot. Having found out that no P-3 lot was available, it filed a third request supported by a written confirmation from P-3 property owners attesting the unavailability of land. Yet the Municipality again denied the request, once again offering no reasons.<sup>148</sup>

The Congregation then started court proceedings under the Charter. The trial judge dismissed the application after finding that lots were still available in P-3. The Court of Appeal set aside this finding of fact, but the majority dismissed the appeal on the grounds that the municipality was not responsible for the unavailability of land and was under no positive obligation to preserve freedom of religion.<sup>149</sup>

A 5:4 majority of the SCC found in favor of the Congregation. McLachlin delivered the majority opinion also on behalf of Iacobucci, Binnie, Arbour and Fish. LeBel

145 SCC, *Congrégation des témoins de Jéhova de St-Jérôme-Lafontaine v. Lafontaine (Village)*, Case 29507, [2004] 2 SCR 650, 30 June 2004, para. 18.

146 *Ibid.*, para. 21.

147 *Ibid.*, paras 22-23.

148 *Ibid.*, paras 26-27.

149 *Ibid.*, paras 17-27.

delivered a dissenting opinion, also in the name of Bastarache and Deschamps. Justice Major delivered a separate dissenting opinion.

According to the majority, the Municipality’s second and third decision amounted to denial in an arbitrary manner, because no reasons were given and no alternatives were communicated.<sup>150</sup> This “breached the duty of procedural fairness it owed to the Congregation – a duty heightened by the expectations established by the Municipality’s own conduct and the importance of the decision to the Congregation, impacting as it did on the right of the Congregation to practice the religion of its choice”.<sup>151</sup>

The minority opinion delivered by LeBel which found in disfavor of the Congregation, contains a much longer discussion of the freedom of religion than the majority’s reasoning. According to him, the state’s neutrality which was required by the freedom of religion, prevented the Municipality from aiding the Congregation in finding a lot which would conform to their wishes.<sup>152</sup> Hence, he fundamentally disagreed with the majority which suggested that a cooperative attitude was required.<sup>153</sup> Yet, LeBel conceded that “more detailed reasons would have given the appellants a better understanding of the municipality’s decision”.<sup>154</sup>

Justice Major agreed with LeBel in result, but only agreed with the reasons concerning the finding of facts, and absence of any infringement to freedom of religion and belief. He distanced himself from the reasoning that the state’s neutrality prevented a more constructive attitude by the Municipality.<sup>155</sup>

4.9 Reference same-sex marriage [2004]

|               |                                                                                                                   |
|---------------|-------------------------------------------------------------------------------------------------------------------|
| Essence:      | Advisory opinion whether the Constitution permits the introduction of same-sex marriage at federal level.         |
| Dimension:    | Freedom of religion and belief and balancing with other rights.<br>Freedom of religion and belief and secularism. |
| Lower Courts: | Not applicable. Advisory opinion directly referred to the SCC by Parliament.                                      |
| Majority:     | 9:0. Found that introducing same-sex marriage is coherent with the Constitution.                                  |
| Dissenting:   | None.                                                                                                             |

Pursuant to section 53 of the Supreme Court Act, the Supreme Court of Canada can be asked to give advisory opinions concerning the constitutionality of proposed legislation. In 2003, the SCC received the questions below which concern proposed legislation introducing same-sex marriage. In Canada, as elsewhere in the world,

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150 *Ibid.*, paras 1-7.  
151 *Ibid.*, para. 30.  
152 *Ibid.*, para. 71.  
153 *Ibid.*, para. 29.  
154 *Ibid.*, para. 92.  
155 *Ibid.*, para. 36

there was/is opposition to the introduction of same-sex marriage, based on religious grounds.

The proposed legislation read as follows<sup>156</sup> and the following questions were put to the SCC by the Governor in Council:<sup>157</sup>

*Sections proposed*

1. Marriage, for civil purposes, is the lawful union of two persons to the exclusion of all others.
2. Nothing in this Act affects the freedom of officials of religious groups to refuse to perform marriages that are not in accordance with their religious beliefs.

*Questions*

1. Is the annexed Proposal for an Act respecting certain aspects of legal capacity for marriage for civil purposes within the exclusive legislative authority of the Parliament of Canada? [...]
2. If the answer to question 1 is yes, is section 1 of the proposal, which extends capacity to marry two persons of the same sex, consistent with the Canadian Charter of Rights and Freedoms? [...]
3. Does the freedom of religion guaranteed by paragraph 2(a) of the Canadian Charter of Rights and Freedoms protect religious officials from being compelled to perform a marriage between two persons of the same sex that is contrary to their religious beliefs?
4. Is the opposite-sex requirement for marriage for civil purposes, as established by the common law and set out for Quebec in section 5 of the Federal Law–Civil Law Harmonization Act, No. 1, consistent with the Canadian Charter of Rights and Freedoms? [...]

The Court concluded that section 1 of the proposed Act was within the exclusive legislative authority of the parliament, while section 2 was not. Section 1 was also held to be consistent with the Charter. With respect to Question 3, the Court concluded that the freedom of religion afforded religious officials protection against being compelled by the state to perform marriages between two persons of the same sex contrary to their religious beliefs. The Court declined to answer the fourth question.<sup>158</sup>

Considering the distribution of legislative powers between the federal parliament and provinces, as envisioned by the constitutional system, the Court reached the conclusion that federal parliament had exclusive legislative authority.<sup>159</sup>

Some interveners had argued that the Constitution Act incorporated the meaning of marriage as understood in common law in 1867. In common law, they argued, the meaning of “marriage” was fixed to refer to opposite sex couples.<sup>160</sup> In support, they cited a case in which the judge referred to the Christian understanding of

<sup>156</sup> See *Reference re Same Sex Marriage*, Case 29866, *supra* n. 27, para. 1.

<sup>157</sup> See *ibid.*, para. 2.

<sup>158</sup> *Ibid.*, paras 4-7.

<sup>159</sup> *Ibid.*, para. 19.

<sup>160</sup> *Ibid.*, para. 20.

marriage as incorporated in common law. Yet according to the SCC, the judge in said case “spoke to a society of shared social values where marriage and religion were thought to be inseparable. This is no longer the case. Canada is a pluralistic society. Marriage, from the perspective of the state, is a civil institution”.<sup>161</sup> According to the SCC, “frozen concepts” reasoning “runs contrary to one of the most fundamental principles of Canadian constitutional interpretation: that our Constitution is a living tree which, by way of progressive interpretation, accommodates and addresses the realities of modern life.” “A large and liberal, or progressive, interpretation ensures the continued relevance and, indeed, legitimacy of Canada’s constituting document [...] in times vastly different from those in which it was crafted.”<sup>162</sup>

Unlike the interveners, the SCC believed that no legal concept can evade legal redefinition. Therefore, it did not accept that redefining marriage should fall outside the natural limits of the federal parliament.<sup>163</sup>

Regarding the second question, the SCC found that the purpose of the proposed legislation was far from violating the Charter because it enhanced the Charter values by extending equal rights to same-sex couples.<sup>164</sup> The recognition of equal rights of same-sex couples could in itself never amount to discrimination of those who for faith-based reasons believed in exclusive opposite-sex marriage.<sup>165</sup> For the same reason, the proposed Act could not be said to violate the freedom of religion.<sup>166</sup>

Regarding the third question, the SCC noted that as the proposed Act was limited in its effect to civil marriage, it could not be interpreted as affecting religious marriage or its solemnization.<sup>167</sup> Freedom of religion included harboring thoughts consistent with one’s religious beliefs, as well as performing religious rites. “It therefore seems clear that state compulsion on religious officials to perform same-sex marriages contrary to their religious beliefs would violate the guarantee of freedom of religion under s. 2(a) of the Charter. It also seems apparent that, absent exceptional circumstances which we cannot at present foresee, such a violation could not be justified under s. 1 of the Charter.”<sup>168</sup> Freedom of religion and belief also protected against the compulsory use of sacred places in the celebration of same-sex marriages. The Court concluded that the freedom of religion also extended protection to these concerns.<sup>169</sup>

The Court found it unwise and inappropriate to answer the fourth question, because the federal government had already decided to redefine marriage and same-sex couples had already relied on lower court judgments to *get* married.<sup>170</sup>

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161 *Ibid.*, para. 22.

162 *Ibid.*, paras 22-23.

163 *Ibid.*, paras 25-29.

164 *Ibid.*, para. 43.

165 *Ibid.*, para. 46.

166 *Ibid.*, para. 48.

167 *Ibid.*, para. 55.

168 *Ibid.*, para. 58.

169 *Ibid.*, para. 59.

170 *Ibid.*, paras 64-71.

## 4.10 Multani v. Commission scolaire Marguerite-Bourgeoys, [2006]

|               |                                                                                                                                                                                                                                                    |
|---------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Essence:      | Governing Board of school's decision to refuse accommodation of a Sikh student, wearing a metal <i>kirpan</i> at all times.                                                                                                                        |
| Dimension:    | Freedom of religion and belief and personal freedom. Freedom of religion and belief and education.                                                                                                                                                 |
| Lower Courts: | Superior Court found in favor of Gubaj Singh Multani. Court of Appeal found in favor of school.                                                                                                                                                    |
| Majority:     | 8:0 (Major, 9 <sup>th</sup> Justice took no part in the judgment). Found in favor of claimant and overruled the Court of Appeal. Majority opinion by Charron. Joint concurring opinion Deschamps and Abella. Separate concurring opinion by LeBel. |
| Dissenting:   | None.                                                                                                                                                                                                                                              |

Gurbaj Sing Multani and his father B are both orthodox Sikhs, who believe that their religion requires them to wear a *kirpan* at all times. A *kirpan* is a metal dagger which is of religious importance to Sikhs. In 2001, when Gurbaj accidentally dropped the *kirpan* he was wearing under his clothes in the schoolyard, the School Board sent the parents a letter in which, as a reasonable accommodation, it authorized their son to wear his *kirpan* to school provided that he complied with certain conditions to ensure that it was sealed inside his clothing. Gurbaj and his parents agreed to this. The Governing Board of the school refused to ratify the agreement on the basis that wearing a *kirpan* at the school violated the school's code of conduct, which prohibited the carrying of weapons. The School Board's council of commissioners upheld that decision, but notified Gurbaj that a surrogate *kirpan*, made from "harmless" material would be acceptable.

Gurbaj's father then filed a Superior Court motion. The Superior Court granted the motion and authorized Gurbaj to wear his *kirpan* under certain conditions. The Court of Appeal set aside the Superior Court's judgment and restored the original decision. It concluded that the decision in question infringed Gurbaj's freedom of religion under the Canadian Charter of Rights and Freedoms and the Quebec Charter of Rights and Freedoms Charter, but that the infringement was justified by the limitations clause.<sup>171</sup>

The Supreme Court unanimously held that Multani's freedom of religion had been unjustifiably infringed. Justice Charron delivered the majority opinion. Deschamps and Abella issued a joint concurring opinion. LeBel delivered a separate concurring opinion.

The school's Governing Board based part of its arguments on internal limits of the freedom of religion. Charron, however, relying on *Children's Aid Society of Metro-*

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171 See for the reproduction of the Superior Court judgment, SCC, *Multani v. Commission scolaire Marguerite-Bourgeoys*, Case 30322, [2006] 1 SCR 256, 2 March 2006, paras 3-12.

*politan Toronto*<sup>172</sup> stressed that reconciling competing rights in light of the limitations clause was to be preferred to reconciling them based on internal limits.<sup>173</sup>

Before arriving at the section 1 test, Charron set out to explain why the decision clearly infringed the freedom of religion, citing earlier cases. The freedom of religion and belief, “is the right to entertain such religious beliefs as a person chooses.” “With the Charter, it has become the right of every Canadian to work out for himself or herself what his or her religious obligations, if any, should be and it is not for the state to dictate otherwise [...]” The fact that different people practiced the same religion in different ways did not affect the validity of the case of a person alleging that his or her freedom of religion has been infringed. “What an individual must do is show that he or she sincerely believes that a certain belief or practice is required by his or her religion”.<sup>174</sup>

Evidence suggested that Gurbaj, like many other orthodox Sikhs, believed that he had to wear the five religious symbols required for Sikh males, including a metal *kirpan* at all times.<sup>175</sup> Gurbaj’s assertion that he sincerely and genuinely believed that he could only comply with the religious precept by wearing a metal *kirpan* was not contested. The fact that other Sikhs compromised and wore a replica instead was not deemed relevant by the Court, as people of the same religion could adhere to dogma and practice in varying degrees of rigor.<sup>176</sup>

Much of the board’s argument is based on its submission that “the *kirpan* is essentially a dagger, a weapon designed to kill, intimidate or threaten others.”<sup>177</sup> Yet the Court argued that “Gurbaj Singh does not have to establish that the *kirpan* is not a weapon. He need only show that his personal and subjective belief in the religious significance of the *kirpan* is sincere.”<sup>178</sup>

Hence, there was an interference which the Court deemed neither trivial nor insignificant, as Gurbaj had to transfer to a private school in order to wear the *kirpan* and was thus denied his right to be educated in the public school system. Therefore, there was an interference, which had to be justified under the limitations clause.<sup>179</sup>

Protecting school safety has a basis in the law and Charron accepted that the board was motivated in its decision by a pressing and substantial objective, namely security. Yet, between the extremes of total security and total lack thereof lies “a concern to ensure a reasonable level of safety”.<sup>180</sup> Hence, the question was which measures were necessary to achieve this reasonable level of safety.

In the proportionality analysis, the SCC accepted a rational connection between the decision and the objective of ensuring a safe school environment.<sup>181</sup> The question of minimal impairment had to be addressed in correlation with the “reasonable

172 *B. (R.) v. Children’s Aid Society of Metropolitan Toronto*, Case 23298, *supra* n. 67.

173 *Multani v. Commission scolaire Marguerite-Bourgeoys*, Case 30322, *supra* n. 171, para. 26.

174 *Ibid.*, paras 32-35.

175 *Ibid.*, para. 36.

176 *Ibid.*, para. 39.

177 *Ibid.*, para. 37.

178 *Ibid.*

179 *Ibid.*, paras 40-41.

180 *Ibid.*, para. 45.

181 *Ibid.*, para. 49.



accommodation" doctrine according to Charron.<sup>182</sup> Statistical evidence pointed out that the *kirpan* had not been used in violent incidents in Canadian schools for 100 years, Gurbaj himself had no violent track record at all, and the analogy with planes and courts disregarded the personal relationships between teachers and students present in a school, absent in the cited situations. Therefore, the assertion that *kirpans* were inherently dangerous had to fail.<sup>183</sup> The assertion that the *kirpan* was a symbol of violence was also "disrespectful to believers in the Sikh religion and does not take into account Canadian values based on multiculturalism."<sup>184</sup>

The school also relied on the affidavit of a psycho-educator who believed that allowing Gurbaj Singh to wear a *kirpan* would engender a feeling of unfairness among the students, who would perceive this permission as special treatment. The Supreme Court argued that "[r]eligious tolerance is a very important value of Canadian society. If some students consider it unfair that Gurbaj Singh may wear his *kirpan* to school while they are not allowed to have knives in their possession, it is incumbent on the schools to discharge their obligation to instill in their students this value that is [...] at the very foundation of our democracy."<sup>185</sup>

Justice Charron noted that assessing the effects of the measures was legally unnecessary as the Court had already established the unreasonableness of the measure. Yet, because of the importance, he assessed them anyway. He considered that "absolute prohibition would stifle the promotion of values such as multiculturalism, diversity, and the development of an educational culture respectful of the rights of others. [It] sends students the message that some religious practices do not merit the same protection as others. On the other hand, accommodating Gurbaj Singh and allowing him to wear his *kirpan* under certain conditions demonstrates the importance that our society attaches to protecting freedom of religion and to showing respect for its minorities. The deleterious effects of a total prohibition thus outweigh its salutary effects."<sup>186</sup>

The separate but consenting opinions of Deschamps and Abella (jointly) and of LeBel (see below) did not deal with the content so much, but more with the methodology as favored by the majority.

Deschamps and Abella, believed the majority had wrongly applied the *Oakes* test and should instead have relied on the administrative review approach. Deschamps and Abella took the view that Courts should only apply the Charter limitations clause if a statute itself infringed the Charter rights, not if a decision based on a statute infringed Charter rights. In their administrative law review, they reached the conclusion that the decision taken was unreasonable, because "[the] *kirpan*, which, while a kind of 'knife', was above all a religious object whose dangerous nature was neutralized by the many coverings required by the Superior Court."<sup>187</sup>

The doctrine of "reasonable accommodation", as applied by Charron in this case, in the opinion of Deschamps and Abella, belonged to the realm of administrative

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182 *Ibid.*, paras 52-53.

183 *Ibid.*, paras 56-67.

184 *Ibid.*, para. 71.

185 *Ibid.*, paras 74 and 76.

186 *Ibid.*, paras 78-79.

187 *Ibid.*, para. 98.

law, while “minimal impairment” was part of the constitutional justification analysis. The distinction must be maintained, although, as the majority stated, the doctrines had a high degree of similarity.<sup>188</sup>

LeBel in his separate opinion argued that a flexible approach concerning the relationship between administrative law and constitutional law should be applied.<sup>189</sup> Hence, methodologically he aimed at the middle ground between the majority and the two concurring judges.

#### 4.11 Bruker v. Marcovitz [2007]

|               |                                                                                                                              |
|---------------|------------------------------------------------------------------------------------------------------------------------------|
| Essence:      | Legal enforceability of provision in divorce agreement, obliging the ex-husband to grant a religious divorce ( <i>get</i> ). |
| Dimension:    | Freedom of religion and belief, (family law) and family relations. Freedom of religion and belief and secularism.            |
| Lower Courts: | The Superior Court found in favor of the wife. The Court of Appeal found in favor of the husband.                            |
| Majority:     | 7:2. Found in favor of the wife. Majority opinion by Abella.                                                                 |
| Dissenting:   | Joint dissenting opinion by Deschamps and Charron.                                                                           |

The case concerns a divorced former couple, who are both of the Jewish faith. Mr. Marcovitz, the husband, and Ms. Bruker, the wife, voluntarily negotiated and signed a divorce agreement. One of the commitments made in the agreement was that the husband would grant the wife a *get*, a Jewish religious divorce, which only the husband can initiate. When he does not, she is without religious recourse.

The husband refused to give the *get* for 15 years. He challenged the very validity of the agreement, claiming that its religious aspect rendered it unenforceable under Quebec law, and arguing that his right to freedom of religion protected him from being compelled to comply.<sup>190</sup>

According to Mr. Marcovitz, Ms. Bruker had repudiated the consent between them, by “[...] continually seeking increases in child support payments” and because he saw his daughters irregularly. He also questioned Ms. Bruker’s devotion to the Jewish faith.<sup>191</sup>

The Superior Court found that the agreement was valid and binding and within the domain of the civil courts. The Court of Appeal allowed the husband’s appeal. It found that because the substance of the obligation was religious in nature, the obligation was a moral one and was therefore unenforceable by the courts.

A majority of seven justices found in favor of Ms. Bruker, Abella delivering the majority opinion. Justices Deschamps and Charron dissented, the former delivering the joint dissenting opinion. The Court had to answer whether the agreement was a valid legal agreement, and if so, if the husband could rely on the freedom of religion

188 *Ibid.*, paras 129-134.

189 *Ibid.*, paras 151-152.

190 SCC, *Bruker v. Marcovitz*, Case 31212, [2007] 3 SCR 607, 14 December 2007, paras 10-11.

191 *Ibid.*, para 27.

to avoid the legal consequences?<sup>192</sup> The majority answered the first question affirmative, and the second question negative.

Abella argued that “agreement between spouses to take the necessary steps to permit each other to remarry in accordance with their own religions constitutes a valid and binding contractual obligation under Quebec law. As the comments of the former Ministers of Justice reveal, such agreements are consistent with public policy, our approach to marriage and divorce, and our commitment to eradicating gender discrimination.” Any harm with the husband’s freedom of religion was outweighed by the harm caused by his unilateral decision not to honor the agreement. Unlike the dissenters, the majority did not regard this “an unwarranted secular trespass into religious fields [...]”.<sup>193</sup>

The dissenting judges disagreed with line of reasoning by the majority, as we shall see below, but deciding in favor of Mrs. Bruker in their opinion required the endorsement of a religious norm by a secular court. The majority countered the allegation, because the “Court is not asked to endorse or apply a religious norm. It is asked to [...] to determine whether the husband is entitled to succeed in his argument that requiring him to pay damages for the breach of a legally binding agreement violates his freedom of religion. No new principle emerges from the result in this case. Courts are routinely asked whether a contract is valid.”<sup>194</sup>

The majority was indeed of the opinion that the Court may not intervene in strictly internal, spiritual, or religious law matters of religious communities. However, when there was a civil or property relationship between followers of a faith, the courts have jurisdiction.<sup>195</sup> As the agreement was “negotiated between two consenting adults, each represented by counsel, as part of a voluntary exchange of commitments intended to have legally enforceable consequences”,<sup>196</sup> courts may legally enforce the agreement.

Mr. Marcovitz, argued that holding him to the agreement would be a violation of his freedom of religion “[...] because it would condemn him ex post facto ‘for abiding by his religion in the first place’.”<sup>197</sup> The majority was not convinced that he “in good faith, sincerely believed that granting a *get* was an act to which he objected as a matter of religious belief or conscience”. Rather, they drew attention to his testimony regarding the alleged alienation of the kids, disputes over money and artifacts. This seemed to affirm that his refusal to provide the *get* was based less on religious conviction than on the fact that he was angry at Ms. Bruker.<sup>198</sup>

The majority also referred to the CCSA case *Christian Education*. Justice Sachs explained in that judgment that an open and democratic society “can cohere only if all its participants accept that certain basic norms and standards are binding”. Hence “believers cannot claim an automatic right to be exempted by their beliefs from the laws of the land”. At the same time, the state should, wherever reasonably

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192 *Ibid.*, para. 12.

193 *Ibid.*, paras 16-18.

194 *Ibid.*, para. 20.

195 *Ibid.*, paras 41-45.

196 *Ibid.*, para. 47.

197 *Ibid.*, para. 65.

198 *Ibid.*, paras 68-69.

possible, seek to avoid putting believers to “extremely painful and intensely burdensome choices of either being true to their faith or else respectful of the law.”<sup>199</sup>

The Divorce Act, which gives a court discretionary authority to rebuff a spouse in civil proceedings who obstructs religious remarriage, is a clear indication that it is public policy in Canada that such barriers are to be discouraged. “Legislative history proves that these amendments received overwhelming support from the Jewish community, reflecting a consensus that the refusal to provide a *get* was an unwarranted indignity imposed on Jewish women.”<sup>200</sup> Hence, “[a]ny infringement of Mr. Marcovitz’s freedom of religion is inconsequential compared to the disproportionate disadvantaging effect on Ms. Bruker’s ability to live her life fully as a Jewish woman in Canada.”<sup>201</sup>

The two dissenting judges, Deschamps and Charron, found that the question of whether or not Mr. Marcovitz was required to do his part so that Ms. Bruker could acquire the *get*, was not within the jurisdiction of a (secular) Court, because courts should not come to the aid of any religious undertaking in a secular state. “Despite the religious foundations of Roman law and French civil law, from which Quebec civil law is derived, there should be no doubt today that in Quebec, the state is neutral where religion is concerned.”<sup>202</sup> “[The Charter] reflects a ‘negative’ view of freedom of religion according to which the state must not infringe a fundamental right any more than is necessary.”<sup>203</sup>

Although Ms. Bruker deviated in many ways from the doctrines and precepts of the Orthodox Jewish Community “her abortion, extra-marital affairs, use of contraceptives, etc.” the dissenting judges were convinced that she was and remained a member of the Orthodox branch of the Jewish community, and “that she therefore had the right to remarry before a rabbi of that community and to do so, would have needed a *get*.”<sup>204</sup>

But on the other hand, the dissenting judges argued, Ms. Bruker, could remarry under civil law, or have children outside of wedlock, which would be equal to children born in wedlock under Canadian law. As a Canadian, she did not depend on a *get*, to effectuate any rights. As a Jewish woman she might, but that should not be an issue in which the government and judges specifically should become involved. “Canada opens its doors to all religions. All of them are entitled to receive the same protection, but not, I believe, to be provided with weapons.”<sup>205</sup>

199 *Ibid.*, para. 74.

200 *Ibid.*, para. 81.

201 *Ibid.*, para. 93.

202 *Ibid.*, para. 120.

203 *Ibid.*, para. 121.

204 *Ibid.*, para. 113, quoting the Superior Court Judge.

205 *Ibid.*, para. 182.

## 4.12 A.C. v. Manitoba (Director of Child and Family Services) [2009]

|               |                                                                                                                                                                                                                                                                                                 |
|---------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Essence:      | Criterion of best interests of the child in overruling the 14-year-old teenager's own decision to refuse medical treatment on objections grounded on religious beliefs.                                                                                                                         |
| Dimension:    | Freedom of religion and belief, (family law) and family relations.                                                                                                                                                                                                                              |
| Lower Courts: | Applications judge and Court of Appeal found against teenager.                                                                                                                                                                                                                                  |
| Majority:     | 6:1. Found against teenager, but also found more consideration should have been given to determine her maturity to make own medical decisions. Majority opinion by justice Abella also on behalf of LeBel, Deschamps and Charron. Joint separate concurring opinion by McLachlin and Rothstein. |
| Dissenting:   | Binnie.                                                                                                                                                                                                                                                                                         |

In this case the appellant was admitted to a hospital when she was 14 years and 10 months old, suffering from Crohn's disease. Being a devout Jehovah's Witness, she had in advance signed a medical directive stating she did not wish to receive a blood transfusion under any circumstances. Her doctor believed that internal bleeding created an imminent, serious risk to her health and perhaps her life. As she still refused to consent to a blood transfusion, a brief psychiatric assessment took place. Later, the Director of Child and Family Services sought a court order for treatment under the Manitoba Child and Family Services Act. Under this Act, a court may authorize treatment that it considers to be in the child's best interests.

However, the Act also presumes that the best interests of a child of 16 years or older will be most effectively promoted by allowing the child's views to be determinative, unless it can be shown that the child does not understand the decision or appreciate its consequences. Where the child is under 16, however, no such presumption exists.

The applications judge ordered that A.C. receive blood transfusions, concluding that when a child is under 16, there are no legislated restrictions of authority on the court's ability to order medical treatment in the child's "best interests". The appellant and her parents appealed. They argued that the Act and subsequent procedure unjustifiably infringed her rights under sections 2(a), 7 and 15 of the Charter. The Court of Appeal upheld the constitutional validity of the impugned provisions and the treatment order.<sup>206</sup>

A majority of six judges decided to dismiss the appeal. The majority opinion was delivered by Justice Abella. McLachlin and Rothstein submitted a joint separate concurring opinion. Binnie dissented.

The appellant in her appeal did not challenge the cut-off age of 16. She did challenge the constitutionality of depriving those under 16 of an opportunity to prove

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206 SCC, *A.C. v. Manitoba (Director of Child and Family Services)*, Case 31955, [2009] 2 SCR 181, 26 June 2009, paras 5-20.

that they are sufficiently mature to decide their medical treatment for themselves. She believed this to be arbitrary and hence discriminatory on the basis of age.<sup>207</sup>

Abella, for the majority, argued that the Act already incorporated the doctrine of “mature minors” by stating that from the age of 16, the wishes of the child were indicative of the “best interest”. Nevertheless, the Act also conferred on institutions the responsibility such is consistent with Canadian and international jurisprudence.<sup>208</sup>

The majority accepted there was no constitutional justification for ignoring the decision-making capacity of a minor under the age of 16. However, unlike the Court of Appeal, the majority was of the opinion that the Act, properly read, already called for due regard of the child’s decision-making capacity, when it was apprehended by the state. However, under 16 the child’s own wishes were not as such determinative.<sup>209</sup> Mature minors were not entitled to make all medical decision themselves because that would stifle the limits on the ability to “accurately assess maturity in any given child”.<sup>210</sup>

The majority then spelled out a few factors which might be of relevance in determining the maturity of an adolescent and the impact his or her wishes should have in medical decision-making. If this careful balancing was applied, as the majority found that it was prescribed by the Act and common law in general, the results could neither be discriminatory nor violative of the freedom of religion.<sup>211</sup> “A child’s ‘religious heritage’ is one of the statutory factors in determining ‘best interests’”. Expanding the deference to a young person’s religious wishes as her maturity increases is a proportionate response to her religious rights and the protective goals of s. 25(8).<sup>212</sup>

In applying this to the case at hand, the majority reached the conclusion that in all proceedings no one had determined whether A.C. was able to make a mature, independent judgment, and the psychiatric report was never submitted to review of any kind. Therefore, the Supreme Court could not evaluate whether she had the capacity or not. Furthermore, the emergency was long since over and A.C. had reached the age of 16.<sup>213</sup> Because A.C. had never had the chance for rebuttal of the psychiatric assessment the majority awarded her all costs throughout the judicial proceedings.<sup>214</sup>

The concurring judges stressed that “[w]hether a child is in need of protection requires a case by case analysis with a review to the relevant statutory criteria [...]”.<sup>215</sup> “It will be apparent that the statutory scheme requires the judge in each case to make an independent analysis of all relevant considerations [...]. For this reason, it is dangerous to speculate on whether a judge would ever [...] decline to

207 *Ibid.*, paras 25-27.

208 *Ibid.*, paras 21-22.

209 *Ibid.*, para. 29.

210 *Ibid.*, para. 47.

211 *Ibid.*, para. 98.

212 *Ibid.*, paras 112-113.

213 *Ibid.*, para. 120.

214 *Ibid.*, paras 121-122.

215 *Ibid.*, para. 128.

order medical treatment for a child under the age of 16 where the result would be probable death [...]"<sup>216</sup>

In McLachlin and Rothstein's opinion it "is common sense to suggest, however, that the more dangerous the situation from the perspective of the child's security of person, the more compelling must be the case that the child is fully mature"<sup>217</sup> to allow the own decision to be determinative. The concurring judges argued that the Act, when making a distinction between minors under and over the age of 16, does not violate the Charter provisions on "life, liberty and security of the person" and "equal treatment".<sup>218</sup>

With regard to the freedom of religion, the concurring judges accepted that A.C. had a sincere belief against receiving blood transfusions and that this right had been interfered with. However, they believed that the interference was proportionate to the pressing and substantial objective of ensuring the health and safety of minors.<sup>219</sup>

The dissenting justice Binnie disagreed with the majority, including the concurring judges. He would have allowed the appeal and argued that A.C.'s autonomous decision based on her religious beliefs should have been respected. After all, the "Charter is not just about the freedom to make what most members of society would regard as the wise and correct choice. If that were the case, the Charter would be superfluous." It gives A.C. the religious freedom to "refuse forced medical treatment, even where her life or death hangs in the balance".<sup>220</sup>

For Binnie, it was evident on the basis of the evidence that A.C. was a mature minor at the time, who could make well-informed mature decisions about her medical treatment.<sup>221</sup> The fact that most in society would put (the sanctity of) life over religious convictions does not take away that Charter rights of freedom of religion and belief and liberty and security of the person "are given to everyone, including individuals under 16 years old".<sup>222</sup> Binnie believed that unlike in *Children's Aid Society*<sup>223</sup> (see above section 4.4), this case concerned the own religious convictions and physical integrity of the child, and not that of her parents. Moreover, there was no evidence that she was somehow acting under parental influence.<sup>224</sup>

Binnie was of the opinion that the Act as it stands did violate the freedom of religion and the liberty and security of the person of A.C. because it did not allow her the rebuttal of the presumption that she was not mature enough to make her own decisions. Under the majority's approach it was still the judge who took the decision. In Binnie's opinion, the Charter mandated that if a young person was able to prove his or her maturity, the decision should be theirs.<sup>225</sup> This was not to say that the judge should not decide the default position. Judges should take the final decision if "there is any doubt, on a balance of probabilities – that the young person

216 *Ibid.*, para. 133.

217 *Ibid.*, para. 133.

218 *Ibid.*, paras 134-152.

219 *Ibid.*, paras 153-156.

220 *Ibid.*, para. 163.

221 *Ibid.*, para. 173.

222 *Ibid.*, para. 192.

223 *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, Case 23298, *supra* n. 67.

224 *A.C. v. Manitoba (Director of Child and Family Services)*, Case 31955, *supra* n. 206, para. 195.

225 *Ibid.*, paras 208, 225, 233-234 and 236-237.



is capable”.<sup>226</sup> What was unfair in his view was “the presumption of incapacity to remain irrebuttable [...]”.<sup>227</sup>

It was the non-rebuttable character of the presumption that constituted an unjustifiable and disproportionate infringement of Charter rights, according to Binnie.<sup>228</sup> He reminded the other judges that the SCC “has long preached the values of individual autonomy. In this case, we are called on to live up to the [...] promise in circumstances where we instinctively recoil from the choice made by A.C. because of our belief (religious or otherwise) in the sanctity of life. But it is obvious that anyone who refuses a potentially lifesaving blood transfusion on religious grounds does so out of a deeply personal and fundamental belief about how they wish to live, or cease to live, in obedience to what they interpret to be God’s commandment. As such, A.C.’s [...] liberty interest is directly engaged.”<sup>229</sup>

4.13 Alberta v. Hutterian Brethren of Wilson Colony [2009]

|               |                                                                                                                                                                                                                                                   |
|---------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Essence:      | An exemption granted by the province to Hutterians to carry drivers licenses without photographs was withdrawn. The Hutterians objected to carrying photographs for religious reasons but depended for their way of life on using motor vehicles. |
| Dimension:    | Freedom of religion and belief and group autonomy.                                                                                                                                                                                                |
| Lower courts: | Found in favor of the community.                                                                                                                                                                                                                  |
| Majority:     | 4:3. Found in favor of province. Majority opinion by McLachlin C.J. also on behalf of Binnie, Deschamps and Rothstein.                                                                                                                            |
| Dissenting:   | Separate dissenting opinion by Abella. Separate dissenting opinion by LeBel. Separate dissenting opinion by Fish.                                                                                                                                 |

In the province of Alberta all drivers of motor vehicles on highways have to hold a driver’s license. Since 1974, a photograph of the license-holder was required. However religious objectors were granted a non-photo license. In 2003, the Province adopted a new regulation and made the photo requirement universal. More than 50% of the non-photo licenses were held by members of Hutterian Brethren colonies. They sincerely believe that the Second Commandment<sup>230</sup> prohibits them from having their photograph willingly taken. The Wilson Colony of Hutterian Brethren maintains a rural, communal lifestyle, carrying on a variety of commercial activities.

The Province proposed two measures to lessen the impact of the universal photo requirement:<sup>231</sup> (1) The license would display a photo, but be carried in a sealed envelope. A digital photo would be placed in the Province’s facial recognition bank;

226 *Ibid.*, para. 225.

227 *Ibid.*, para. 225.

228 *Ibid.*, paras 233-234.

229 *Ibid.*, para. 219.

230 “You shall not make for yourself an idol, or any likeness of what is in heaven above or on the earth beneath or in the water under the earth” (Exodus 20:4).

231 See SCC, *Alberta v. Hutterian Brethren of Wilson Colony*, Case 32186, [2009] 2 SCR 567, 24 July 2009, para. 12.

(2) A digital photo would be placed in the bank, with no photo accompanying the driver's license. But options did include having photos willingly taken. Which is why the Hutterites objected and proposed to continue the existing exemption, while their photo-free licenses would be marked: "Not to be used for identification purposes". When an agreement seemed unreachable, the members of the Wilson Colony challenged the constitutionality of the regulation alleging an unjustifiable breach of their religious freedom.

The claimants asserted that if members could not obtain driver's licenses, the viability of their communal lifestyle would be threatened. The Province, for its part, led evidence that the universal photo requirement was connected to a new system aimed at minimizing identity theft. Both the chambers judge and the Court of Appeal held that the infringement of freedom of religion was not justified under section 1 of the Charter.<sup>232</sup>

The majority of the Supreme Court found a justifiable infringement of religious freedom. The majority opinion was delivered by Chief Justice McLachlin, also on behalf of Binnie, Deschamps and Rothstein. Abella, LeBel and Fish dissented, each issuing their own separate opinion. They each found the infringement was not justified because it was not proportional.

The majority accepted that the Hutterites have a sincerely held belief<sup>233</sup> against having their photo taken, even for official purposes. The new requirement thus interfered with their freedom of religion and belief. Also, for the proportionality analysis the majority took into consideration the impact the requirement had for the lifestyle of the community, which depended on motor vehicles. But "[the]. Community impact does not, however, transform the essential claim – that of the individual claimants for photo-free licenses – into an assertion of a group right."<sup>234</sup>

The majority drew attention in order to trigger the proportionality analysis, actually also the requirement of non-trivial and not insubstantial interference had to be met, while the evidence submitted contained no proof with regard to this criterion.<sup>235</sup> Even so, "[m]uch of the regulation of a modern state could be claimed by various individuals to have a more than trivial impact on a sincerely held religious belief. Giving effect to each of their religious claims could seriously undermine the universality of many regulatory programs [...]"<sup>236</sup>

Yet, the majority also concluded that in this case the interference was proportional to the overall aim of the proposed legislation to prevent identity theft.<sup>237</sup> The measure was rationally connected to the goal. In the majority's opinion, the lower courts and the dissenters on the SCC did not distinguish properly between "rational connection" and an analysis of positive and/or negative effects of the measure.<sup>238</sup>

In the second step of the proportionality analysis, the government had to show that the measures minimally impaired the right (*Oakes test*). However, according to

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232 *Ibid.*, paras 1-26.

233 *Ibid.*, paras 7 and 29.

234 *Ibid.*, para. 31.

235 *Ibid.*, para. 32.

236 *Ibid.*, para. 36.

237 *Ibid.*, paras 41-42.

238 *Ibid.*, paras 48-52.

McLachlin this must not be confused with the doctrine of reasonable accommodation (*Multani*), which must only be used when applying human rights, not when analyzing the constitutionality of a law.<sup>239</sup> The legislator was not required to provide for “reasonable accommodation”, but only to minimally impair the rights in question. The government had offered two measures to decrease the impact. McLachlin concluded that because all other options that would have satisfied the Hutterites, increased the risk of identity theft, the universal photo requirement minimally impaired the section 2(a) right.<sup>240</sup>

When analyzing if the law was also proportionate in its effects, the salutary and negative effects had thus to be weighed against each other. Although there was no proof as of that moment that there would be salutary effects, McLachlin found this a safe assumption.<sup>241</sup> The negative effects had to be viewed in light of the essence of the freedom of religion which “[...] revolves around the notion of personal choice and individual autonomy and freedom”.<sup>242</sup> The question was whether the limit left the adherent with a meaningful choice to follow his or her religious beliefs and practices.<sup>243</sup>

“The incidental effects of a law passed for the general good on a particular religious practice may be so great that they effectively deprive the adherent of a meaningful choice.”<sup>244</sup> “The absence of a meaningful choice in such cases renders the impact of the limit very serious. The limit may impose costs on the religious practitioner in terms of money, tradition or inconvenience. However, these costs may still leave the adherent with a meaningful choice concerning the religious practice at issue.”<sup>245</sup>

The case at bar did not concern a case of direct compulsion. After all, if the Hutterites chose not to drive, they need not comply with the photo requirement. Such a limit “does not preclude choice as to religious belief or practice, but it does make it more costly”.<sup>246</sup> According to the majority, it did not follow from the evidence that the measure would necessarily end the Colony’s rural way of life. They could hire or contract drivers with valid licenses.<sup>247</sup> “Driving automobiles on highways is not a right, but a privilege.”<sup>248</sup> Of course this produced additional costs for the colony and would go against their traditional self-sufficiency. But they still had a choice.

Therefore, according to the majority, the goal of minimizing the risk of fraud associated with driver’s licenses was pressing and substantial. The limit was rationally connected to the goal. The limit impaired the right as little as reasonably possible in order to achieve the goal; the only alternative proposed would significantly

239 *Ibid.*, para. 61.

240 *Ibid.*, para. 62.

241 *Ibid.*, para. 85.

242 This part is a quote from *Syndicat Northcrest v. Amselem*, Cases 29252 and 29253, *supra* n. 123, para. 40.

243 *Alberta v. Hutterian Brethren of Wilson Colony*, Case 32186, *supra* n. 231, para. 88.

244 *Ibid.*, para. 94.

245 *Ibid.*, paras 93-95.

246 *Ibid.*, para. 93.

247 *Ibid.*, paras 97-98.

248 *Ibid.*, paras 97-98.

compromise the goal of minimizing the risk. Finally, the measure was proportionate in terms of effects: “[...] the impact on the claimants, while not trivial, does not deprive them of the ability to follow their religious convictions.”<sup>249</sup>

The three dissenting justices agreed with the majority that the measure limited the freedom of religion, that there was a pressing and substantial objective, and that there was a rational connection. However, they did not agree that the impairment was minimal and/or that the salutary effects outweighed the deleterious effects for the Hutterites.<sup>250</sup>

According to Justice Abella “[t]he harm to the constitutional rights of the Hutterites, in the absence of an exemption, is dramatic. Their inability to drive affects them not only individually, but also severely compromises the autonomous character of their religious community.”<sup>251</sup> Hence, the detrimental effects for the community were much greater than the benefits for the Province from not exempting them.<sup>252</sup> The alternatives proposed by the province did not address the religious objection to photos.

Citing the *Big M* judgment, Abella reminded us that “[A]n emphasis on individual conscience and individual judgment [...] lies at the heart of our democratic political tradition.”<sup>253</sup> In light of this, she also referred to the liberal concept of the freedom of religion and the Strasbourg *Kokkinakis* judgment<sup>254</sup> (see section I3.3.1), because the very requirement of the photo “offends the religious beliefs of the Wilson Colony members”. It is “difficult to conclude that it minimally impairs the Hutterites’ religious rights”.<sup>255</sup> With regard to the salutary effects, she noted that the system with the non-photo licenses had worked without incident in the past, and as there were so many other Albertans who (did not have driver’s licenses and thus) were not in the database, the effect of not including the Hutterites would be minimal.<sup>256</sup>

LeBel agreed with Abella’s reasoning. He felt the majority had understated the nature and importance of the communal aspect of the freedom of religion and belief. LeBel then gave much attention to the ratio, philosophy and tradition behind the *Oakes* test. Drawing, among other things, on *St Thomas Aquinas* he reminded the reader that it was necessary to limit the power of government to ensure that the lawgiver’s laws are just.<sup>257</sup>

Justice Fish gave no reasoning of his own, but stated agreement with the reasoning and methodology of Abella and LeBel.<sup>258</sup>

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249 *Ibid.*, paras 104.

250 *Ibid.*, paras 176, 202, and 203.

251 *Ibid.*, para. 111.

252 *Ibid.*, para. 116.

253 *Ibid.*, para. 127.

254 ECtHR (C), *Kokkinakis v. Greece*, app. no. 14307/88, 25 May 1993.

255 *Alberta v. Hutterian Brethren of Wilson Colony*, Case 32186, *supra* n. 231, paras 147-148.

256 *Ibid.*, paras 157-158.

257 *Ibid.*, paras 183-187.

258 *Ibid.*, para. 203.

## 4.14 R. v. N.S. [2012]

|               |                                                                                                                                                                                                                                                                                                                     |
|---------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Essence:      | Wish of a Muslim witness in a sexual assault case to testify with a <i>niqab</i> based on sincere religious belief regarding the covering of the face. Balancing with the requirements of trial fairness.                                                                                                           |
| Dimension:    | Freedom of religion and belief and personal freedom. Freedom of religion and belief and secularism.                                                                                                                                                                                                                 |
| Lower courts: | Trial Judge ordered N.S. the victim in the assault case to remove the <i>niqab</i> . Superior Court overruled the order. Court of Appeal referred back to the trial judge after deciding freedom of religion and belief and trial fairness could be reconciled in this case and priority depended on circumstances. |
| Majority:     | 6:1. Found against the appellant. Majority opinion by McLachlin, also on behalf of Deschamps, Fish and Cromwell. Separate concurring opinion of LeBel also on behalf of Rothstein.                                                                                                                                  |
| Dissenting:   | Abella.                                                                                                                                                                                                                                                                                                             |

N.S., who was the appellant in this case accused her uncle and cousin of sexually assaulting her several times when she was a child. The two now face trial for this. N.S. is a Muslim who believes she has to wear a face-covering in public. She wanted to testify wearing her *niqab*, a garment, which covers most of the face and leaves only the eyes uncovered. At the trial, she admitted that she had removed the *niqab* before when a lady photographer took her photos for the driver's license, and she would remove it at a border crossing. The inquiry judge ruled that N.S.'s religious belief was "not that strong"<sup>259</sup> and ordered her to remove her *niqab*. N.S. appealed to the Superior Court which ruled in her favor. The Court of Appeal held that the witness may be ordered to remove the *niqab* if her freedom of religion and the accused's fair trial interests could not be reconciled, depending on the context. The Court of Appeal returned the matter to the preliminary inquiry judge.<sup>260</sup> N.S. appealed to the SCC.

A majority of 6 found against N.S. The majority opinion by McLachlin, also on behalf of Deschamps, Fish and Cromwell affirmed the Court of Appeal's ruling that it depends on the circumstances whether the freedom of religion rights of a *niqab* wearing witness or the fair trial rights of the accused are reconcilable and which must prevail. Concurring justice LeBel and Rothstein found that witnesses could always be ordered to remove their *niqab*. Abella, who dissented, found that the negative result that she would likely not testify without the *niqab* was a significantly more harmful consequence than the accused not being able to see a witness's whole face.

The majority rejected an "extreme" approach that would always require the witness to remove her *niqab* while testifying, or one that would never do so. Hence, the majority rejected a "secular response that requires witnesses to park their religion at the courtroom door". This "is inconsistent with [...] the Canadian tradition, and

<sup>259</sup> R. v. N.S., Case 33989, *supra* n. 27, para. 4

<sup>260</sup> *Ibid.*, paras 4-6.

limits freedom of religion where no limit can be justified". On the other hand, always allowing witnesses to testify with their face covered "may render a trial unfair and lead to wrongful conviction". "What is required is an approach that balances the vital rights protecting freedom of religion and trial fairness when they conflict. The long-standing practice in Canadian courts is to respect and accommodate the religious convictions of witnesses, unless they pose a significant or serious risk to a fair trial."<sup>261</sup>

According to McLachlin, four questions needed to be answered in this case:<sup>262</sup> (1) Would requiring the witness to remove the *niqab* while testifying interfere with her religious freedom? (2) Would permitting the witness to wear the *niqab* while testifying create a serious risk to trial fairness? (3) Is there a way to accommodate both rights and avoid the conflict between them? (4) Do the salutary effects of requiring the witness to remove the *niqab* outweigh the deleterious effects of doing so?

Concerning the first question, the majority found that N.S.'s objection to remove the *niqab* was based on a sincere religious belief. Sincerity was the correct criterion. "Strength" of belief which the inquiry judge took into consideration, was not the correct criterion, though it may be relevant in the rest of the analysis. "Inconsistent adherence to a religious practice may suggest lack of sincere belief, but it does not necessarily do so." N.S. seems to have made earlier compromises in order to participate in some facet of society.<sup>263</sup> Nevertheless, the majority was convinced that her belief in wearing a *niqab* was sincere.

Concerning the second question, the majority argued that there was "a strong connection between the ability to see the face of a witness and a fair trial". Yet seeing a face was not the only or the most important factor. But because seeing the face was "deeply rooted in our criminal justice system" it should not be set aside unless there was "compelling evidence".<sup>264</sup> The witness had to provide such evidence. "If wearing the *niqab* poses no serious risk to trial fairness, a witness who wishes to wear it for sincere religious reasons may do so."<sup>265</sup>

Concerning the third question, the judge had to assess how to reconcile the rights. This included determining whether there were reasonably available alternative measures that would conform to the witness's religious convictions while still preventing a serious risk to trial fairness.<sup>266</sup> If no accommodation was possible, then the fourth question had to be answered: Do the salutary effects of requiring the witness to remove the *niqab* outweigh the deleterious effects of doing so?<sup>267</sup>

Amongst the negative effects, was the harm done by limiting the witness's sincerely held religious practice. Chief Justice McLachlin gave suggestions in making the difficult assessment of the effects based on earlier case law. "How important is the practice to the claimant? What is the degree of state interference with the religious

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261 *Ibid.*, paras 1-2.

262 *Ibid.*, paras 8-9.

263 *Ibid.*, para. 13.

264 *Ibid.*, para. 27.

265 *Ibid.*, para. 29.

266 *Ibid.*, paras 30-33.

267 *Ibid.*, para. 29.

practice? How does the actual situation in the courtroom [...] affect the harm to the claimant of limiting her religious practice?"<sup>268</sup> "The judge should also consider broader societal harms, such as discouraging *niqab*-wearing women from reporting offences and participating in the justice system."<sup>269</sup>

These negative effects had to be weighed against the positive effects of requiring the witness to remove the *niqab*. Salutory effects included preventing harm to the fair trial interest of the accused and safeguarding the repute of the administration of justice.<sup>270</sup> The nature of the proceedings may also be taken into consideration<sup>271</sup> as well as the nature of the evidence given by the witness.<sup>272</sup> Where "the liberty of the accused is at stake, the witness's evidence central and her credibility vital, the possibility of a wrongful conviction must weigh heavily in the balance favoring removal of the *niqab*."<sup>273</sup>

A clear rule that would always or never allow for ordering the removal of the *niqab* when testifying was not compatible with the engaged rights, according to the majority opinion.<sup>274</sup> Always permitting a witness to wear the *niqab* would "offer no protection for the accused's fair trial interest and the state's correlative interest in avoiding wrongful convictions".<sup>275</sup> On the other hand, never allowing the *niqab* was inconsistent with "Canadian jurisprudence, courtroom practice, and our tradition of requiring state institutions and actors to accommodate sincerely held religious beliefs insofar as possible".<sup>276</sup> For over half a century, this tradition of accommodation had served Canada well, argued McLachlin. To depart from it would set the law down a new road, with unknown twists and turns.<sup>277</sup>

LeBel and Rothstein drew attention to "the tension and changes caused by the rapid evolution of contemporary Canadian society and by the growing presence in Canada of new cultures, religions, traditions and social practices".<sup>278</sup> The Charter protected the freedom of religion and belief and the rights of the accused in a criminal justice case.<sup>279</sup> While they accepted the sincerity of N.S.'s beliefs and acknowledged the discomfort caused by a sexual assault trial, especially one involving relatives,<sup>280</sup> they believed that balancing the rights and interests worked in favor of the accused. This was because he must be allowed full cross-examination for the purpose of his defense. This required the removal of the veil "while giving evidence at the preliminary inquiry and at trial".<sup>281</sup>

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268 *Ibid.*, para. 36.

269 *Ibid.*, para. 37.

270 *Ibid.*, para. 38.

271 *Ibid.*, para. 39.

272 *Ibid.*, para. 43.

273 *Ibid.*, para. 44.

274 *Ibid.*, paras 47-48.

275 *Ibid.*, para. 48.

276 *Ibid.*, para. 51.

277 *Ibid.*, para. 54.

278 *Ibid.*, para. 59.

279 *Ibid.*, paras 62-63.

280 *Ibid.*, para. 65.

281 *Ibid.*, para. 68.



LeBel and Rothstein did favor a clear rule instead of the case-by-case approach favored by the majority. Given the underlying values of the Canadian justice system, they proposed never allowing a witness to wear a *niqab*.<sup>282</sup> The Charter protected the multicultural heritage of Canada. The “‘living tree’ keeps growing, but always from its roots”.<sup>283</sup> Part of the roots was the independent and open justice system.<sup>284</sup> Because a trial is an “act of communication with the public at large”,<sup>285</sup> a “clear rule that niqabs may not be worn would be consistent with the principle of openness of the trial process”.<sup>286</sup>

Abella, in her dissenting opinion, drew attention to the controversy regarding the appellant’s *niqab*. For the appellant, it was part of her faith, while many of the same faith did not see it as required or even a religious practice as such. In broader Canadian society, some were fearful that it might marginalize women, while others defended it as a woman’s choice; some see it as enhancement of multiculturalism and others are opposed to it. But all this was not the issue at hand, reasoned Abella. The only question for the SCC was whether a “witness’ sincerely held religious belief that a *niqab* must be worn in a courtroom, yield to an accused’s ability to see her face”.<sup>287</sup>

Abella readily conceded that the *niqab* imparted seeing the facial expression.<sup>288</sup> However, she did not regard this impairment to be so compelling on assessing the credibility of a witness, that the witness would have to choose “between her religious rights and her ability to bear witness against an alleged aggressor”.<sup>289</sup> Only in cases where the face was directly related to issues at trial, would she order the face to be shown.<sup>290</sup>

The appellant’s sincerity of belief was not contested and therefore there was no risk that she was wearing it for a strategic advantage in de trial.<sup>291</sup> Unlike the majority, she believed that “strength” of the belief could never be an issue in such a case.<sup>292</sup> Ordering the witness to remove the *niqab* while testifying was a far greater harm than the harm done to the accused, if she were able to wear it while testifying.<sup>293</sup> Especially since in the interest of justice there had already been an evolution of practices in testimony. Children could testify behind screens, there were witnesses with visual, oral, or aural impediments and witnesses who required an interpreter. In all these exceptions, the credibility of the witness could still be assessed. The same would go for a *niqab*.<sup>294</sup> A witness wearing a *niqab* could still be cross-examined

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282 *Ibid.*, para. 69.

283 *Ibid.*, para. 72.

284 *Ibid.*

285 *Ibid.*, para. 76.

286 *Ibid.*, para. 78.

287 *Ibid.*, para. 80.

288 *Ibid.*, paras 81-82.

289 *Ibid.*, para. 82.

290 *Ibid.*, para. 83.

291 *Ibid.*, para. 88.

292 *Ibid.*, para. 89.

293 *Ibid.*, para. 86.

294 *Ibid.*, paras 91- 92.

in the courtroom, where gestures, tone of voice and so forth were visible and audible.<sup>295</sup>

Abella let the rights of the appellant weigh so heavily because of the serious consequences not allowing accommodation for *niqab* wearing women would have. It would send them a message that they were not welcome. Consequently, they might not turn to the criminal justice system if they had been victimized.<sup>296</sup> Especially after sexual assault, forcing victims to choose between justice and their sincere beliefs was “no meaningful choice at all”.<sup>297</sup> It “undermines the public perception of fairness not only of the trial, but of the justice system itself”.<sup>298</sup>

4.15      *Mouvement laïque québécois v. Saguenay (City)* [2015]

|               |                                                                                                                                                                                                                                                                         |
|---------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Essence:      | A municipal council practice of opening its meetings with a prayer accompanied by religious rituals in light of state neutrality which follows from freedom of religion and belief and the rights of the claimant not to be discriminated against as a sincere atheist. |
| Dimension:    | Freedom of religion and belief and secularism.                                                                                                                                                                                                                          |
| Lower courts: | Human Rights Tribunal found in favor of Mr. Simoneau and the MLQ. The Court of Appeal found in favor of the City.                                                                                                                                                       |
| Majority:     | 9:0. Found in favor Mr. Simoneau and the MLQ Majority opinion by Gascon. Separate concurring opinion by Abella.                                                                                                                                                         |
| Dissenting:   | None                                                                                                                                                                                                                                                                    |

Mr. Simoneau regularly attended the public meetings of the municipal council of Saguenay. He describes himself as an atheist and felt discriminated because<sup>299</sup> that at the beginning of each meeting, the mayor would recite a prayer after making the sign of the cross while saying “in the name of the Father, the Son and the Holy Spirit”. The prayer also ended with the sign of the cross and the same words. Other councilors and City officials would cross themselves at the beginning and end of the prayer as well. Also, in some of the council chambers there were artifacts like statues and paintings with a religious meaning.<sup>300</sup>

Under the Quebec Charter, Mr. Simoneau initiated proceedings with the Quebec Human Rights Commission. The Commission limited its investigation to the question whether the prayer was discriminatory. It considered the evidence to be sufficient to submit the dispute to the Human Rights Tribunal, but it did not do so itself. Mr.

295 *Ibid.*, para. 105.

296 *Ibid.*, para. 94.

297 *Ibid.*, para. 96.

298 *Ibid.*, para. 95.

299 SCC, *Mouvement laïque québécois v. Saguenay (City)*, Case 35496, [2015] 2 SCR 3, 15 April 2015, para. 2.

300 *Ibid.*, paras. 3-8.

Simoneau, with the support of the *Mouvement laïque québécois* (MLQ), applied to the Tribunal.<sup>301</sup>

In the meantime, the City adopted a by-law regulating the prayer, which changed the wording of the prayer and provided for a two-minute delay between the end of the prayer and the official opening of council meetings. The mayor and the councilors continued to act in the same way as described above.<sup>302</sup> The applicants amended their motion to ask the Tribunal to declare the by-law to be inoperative and of no force or effect. The City and mayor argued that their freedom of religion and belief entitled them to the practice.<sup>303</sup>

The Tribunal found in favor of the claimants, finding that the prayer and the way it was conducted amounted to showing a preference for one religion to the detriment of others which constituted a breach of the state's duty of neutrality.<sup>304</sup> The Court of Appeal found that the issue of religious neutrality of the state was a matter of importance to the legal system. Hence, this mandated review under the standard of "correctness". It held that there had been no discrimination and that any possible interference was trivial or insubstantial. In its opinion, the prayer at issue expressed universal values and could not be identified with any particular religion.<sup>305</sup>

The Court unanimously found in favor of Mr. Simoneau and the MLQ. Justice Gascon authored the majority opinion also on behalf of McLachlin, LeBel, Rothstein, Cromwell, Moldaver, Karakatsanis, and Wagner. Abella did not agree with the majority concerning the standards of review, but also found in favor of the appellants.

Gascon argued different standards of review apply to the different elements in the case. Hence the Court of Appeal was in the wrong in applying "correctness". Tribunal functions vary comparable to a court, but this was still an administrative tribunal. The correctness standard applied to the state's duty of religious neutrality that flows from freedom of conscience and religion. The reasonableness standard applied in answering whether the prayer was religious in nature, the extent to which the prayer interfered with the complainant's freedom and the extent of its discriminatory nature.<sup>306</sup> With regard to the religious symbols, the majority agreed with the Court of Appeal that the Tribunal could not consider them, because the Commission had not conducted an investigation into this question.<sup>307</sup>

Gascon derived the state's duty of religious neutrality from an evolving interpretation of freedom of conscience and religion. The Canadian concept of neutrality "requires that the state neither favor nor hinder any particular belief, and the same holds true for non-belief". It requires the state to "abstain from taking any position".<sup>308</sup> "Sponsorship of one religious tradition by the State in breach of its duty of neutrality amounts to discrimination against all other such traditions." This is because "it imports a disparate impact that is destructive of the religious freedom

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301 *Ibid.*, paras 8-13.

302 *Ibid.*, paras 12-13.

303 *Ibid.*, para. 2.

304 *Ibid.*, para. 15.

305 *Ibid.*, paras 18-22.

306 *Ibid.*, paras 49-50.

307 *Ibid.*, paras 53-60.

308 *Ibid.*, para. 72.

of the collectivity".<sup>309</sup> "Religion is an integral part of each person's identity. When the state adheres to a belief, it [...] is creating a hierarchy of beliefs [...]. It is also ranking the individuals who hold such beliefs [...]."<sup>310</sup>

The protection of the Quebec Charter, under which the case was filed, and the Canadian Charter extended to the freedom not to believe, manifest one's non-belief and to refuse to participate in religious observance. Hence "belief" and "religion" for the purposes of the Charter protection "encompass non-belief, atheism and agnosticism".<sup>311</sup>

The pursuit of the ideal of a free and democratic society required the state to encourage everyone to participate freely in public life, regardless of their beliefs. A neutral public space free from coercion, pressure and judgment on the part of public authorities in matters of spirituality was intended to protect every person's freedom and dignity, and it helped preserve and promote the multicultural nature of Canadian society.<sup>312</sup>

The majority found the Tribunal's reasoning "reasonable" that there had been discriminatory interference with Simoneau's freedom of conscience and religion. The recitation of the prayer at the council's meetings was, above all else, a use by the council of public powers to manifest and profess one religion to the exclusion of all others. This was true regardless of whether the practice had a traditional character.<sup>313</sup> Evidence showed that the mayor and others had explicitly referred to the legal conflict in terms of quest for their religion. The prayer recited, resulted in a distinction, exclusion and preference based on religion, in this case of the claimants sincere atheism. The circumstances in which the prayer was recited, turned the meetings into a preferential space for people with theistic beliefs.<sup>314</sup> Although non-believers could refrain from participating, the price for doing so was isolation, exclusion and stigmatization. This impaired Mr. Simoneau's right to exercise his freedom of conscience and religion.<sup>315</sup>

On the other hand, barring the municipal council from reciting the prayer would not amount to giving atheism and agnosticism prevalence over religious beliefs. Gascon was aware that "secularism" was not more neutral than other positions regarding belief and religion. "True neutrality" presupposed abstention, but it did not amount to a stand favoring one view over another.<sup>316</sup> "A practice according to which a municipality's officials, rather than reciting a prayer, solemnly declared that the council's deliberations were based on a denial of God would be just as unacceptable."<sup>317</sup> True neutrality was not a favoritism of unbelief. But the concept of "benevolent neutrality" adhered to by the Court of Appeal was not compatible with "true neutrality". According to this concept, the state could use religious ex-

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309 *Ibid.*, para. 64.

310 *Ibid.*, para. 73.

311 *Ibid.*, para. 70.

312 *Ibid.*, paras 74-75.

313 *Ibid.*, para. 87.

314 *Ibid.*, paras 116-120.

315 *Ibid.*, paras 120-126.

316 *Ibid.*, paras 130-133.

317 *Ibid.*, para. 133.

pression in light of cultural or historical reality or heritage. That was not compatible with freedom of religion and belief.<sup>318</sup>

Unlike what the City and the mayor alleged, the prayer in this case was not non-denominational, and thus not aimed at inclusion. Evidence supported a very different analysis.<sup>319</sup> There was no evidence before the SCC concerning the payer in the House of Commons and the practice also falls within certain parliamentary privileges.<sup>320</sup> The Constitutional preamble, which asserts the “supremacy of God”, expressed the political theory under which the Constitution was drafted and could not lead to an interpretation of freedom of conscience and religion that authorized the state to consciously profess a theistic faith. Hence it could not be used to justify the prayer in question.<sup>321</sup>

Abella agreed with much of the content of the majority’s opinion. However, she disagreed with using the multiple standards for different aspects of the Tribunal’s decision. She believed that the majority’s reasoning undermined a “holistic approach”.<sup>322</sup> The majority distinguished between “the question of the state’s duty of religious neutrality that flows from freedom of conscience and religion and other aspects of the Tribunal’s decision”. But, argued Abella, they themselves acknowledged that one flows from the other, and deciding whether discrimination based on freedom of religion had taken place was the Tribunal’s “daily fare”. None of the elements of this right deserved more heightened scrutiny than the right itself.<sup>323</sup>

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318 *Ibid.*, para. 134.

319 *Ibid.*, paras 135-140.

320 *Ibid.*, paras 141-143.

321 *Ibid.*, paras 144-149.

322 *Ibid.*, para. 172.

323 *Ibid.*, para. 166.



## Appendix I2

### The CCSA and case studies of the selected cases

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## 1 Introduction to this chapter and reading aid

This chapter introduces the South African legal system, the Constitutional Court of South Africa (CCSA), and the Bill of Rights, as well as the selected cases. Section 2 briefly introduces the South African constitutional and legal history. It also gives an impression of the current constitutional and legal system. In section 3, the selected cases are introduced and an overview is given. Section 4 contains the case studies of the selected cases and discusses them in chronological order.

## 2 Introducing the South African legal system, the CCSA, and the Bill of Rights

This section gives an impression of the constitutional and legal order of South Africa and the Constitutional Court's position therein. It provides an overview of South Africa's modern constitutional and political history in a nutshell, outlines South Africa's contemporary constitutional and legal system and introduces the Bill of Rights and other Human Rights legislation.

South Africa is a highly pluralist country, consisting of many ethnic, cultural, religious, and linguistic communities. Before 1994, a "minority population had aggressively held a monopoly of political power for three centuries".<sup>1</sup> With the Interim Constitution and later the 1996 Constitution, South Africa re-invented itself as the "Rainbow Nation". The right to self-determination of the South African people does "not preclude recognition of the right of self-determination of any community sharing a common cultural and language heritage, within a territorial entity in the Republic or in any other way determined by national legislation".<sup>2</sup>

The Constitution protects the right of everyone to use the language and to participate in the cultural life of their choice, and protects the rights of cultural, religious, and linguistic communities. It explicitly provides for the recognition of customary and religious family and personal law. It also provides for individual and collective freedom of religion and belief, including the accommodation of religious observances.<sup>3</sup> The Constitution also recognizes six official languages of the republic,<sup>4</sup> while also containing provisions regarding the promotion, protection and use of minority languages of aboriginal minorities, other linguistic minorities (of European and South Asian origin), and languages for religious use such as Hebrew, Arabic and Sanskrit.

The recognition of such collective rights and the group identities is seen as a precondition for the exercise of individual rights, yet also a consequence of the exercise of the individual freedom of association.<sup>5</sup>

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11 I. Currie and J. de Waal (in association with Lawyers for Human Rights and the Law Society of South Africa), *The Bill of Rights Handbook*, Juta & Co, Cape Town (South Africa), 2006, p. 623.

2 Constitution of the Republic of South Africa, 10 December 1996, s. 235.

3 *Ibid.*, ss 30, 31 and 15.

4 *Ibid.*, s. 6.

5 See Currie & de Waal, *supra* n. 1, at 624.

## 2.1 The constitutional and legal history of South Africa in a nutshell

For any constitutional order, it is no easy task to determine where to begin a sketch of the (constitutional) history. Depending on preference and context of the overview, in the case of South Africa one could, for example, start with the history of the peoples who inhabited the territory of what is currently the Republic of South Africa prior to colonization by European powers, or with the Boer Republics, or with the British colonization of South Africa.

Because the “Rainbow Nation” was constituted in contrast to the apartheid regime which had preceded it, it is necessary to briefly discuss the history of apartheid in order to understand the current political order. Apartheid was formally introduced in South Africa after the National Party had won the 1948 elections in the British dominion, then called Union of South Africa. Apartheid’s constitutional aim was to establish sovereign black ethnic nation states, leaving the rest of the territory “white”, “colored” and Asian (mainly originating from former British India), while the government would be dominated by “whites”.<sup>6</sup>

In the 19<sup>th</sup> century, South Africa had been systematically absorbed by the British Crown, following various conflicts between British forces and Afrikaner settlers. The Afrikaners of mainly Dutch, but also German, Huguenot and other non-British European heritage, entered into conflicts with African tribes as they established “Boer Republics”. British acquisition of territory had begun with the occupation of the Cape of Good Hope in 1795, annexed in 1809 as a Crown Colony.<sup>7</sup> In 1899, when the Anglo-Boer War broke out, Natal and the Cape were British colonies, while Transvaal and the Orange Free State were Boer republics. These four territories were merged by the South Africa Act of 1909 into the Union of South Africa,<sup>8</sup> which became a dominion<sup>9</sup> in 1931 in accordance with the Statute of Westminster.<sup>10</sup>

Racism and racial segregation began in colonial times in South Africa, first under Dutch and then under British rule.<sup>11</sup> However, under the Union constitution, in the Cape and Natal there was a non-racial, yet qualified franchise (which factually led to a large part of the African and colored population not being eligible to vote). The

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6 See F. Venter, ‘The Emergence of South African Constitutionalism: From Colonial Constraints to a Constitutional State’, in G. van der Schyff (ed.) *Constitutionalism in the Netherlands and South Africa, A Comparative Study*, Wolf Legal Publishers, Nijmegen (Netherlands), 2008, p. 27.

7 *Ibid.*, p. 26.

8 See I. Currie, ‘Electoral Democracy in South Africa: A brief History’, in G. van der Schyff (ed.) *Constitutionalism in the Netherlands and South Africa, A Comparative Study*, Wolf Legal Publishers, Nijmegen (Netherlands), 2008, p. 67.

9 In 1926 Lord Balfour, chairman of the inter-imperial relations committee declared famously about dominions: “They are autonomous Communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs, though united by a common allegiance to the Crown, and freely associated as members of the British Commonwealth of Nations.”; F. Venter, *Constitutional Comparison: Japan, Germany, Canada and South Africa as Constitutional States*, Juta & Co, Ltd, Cape Town (South Africa), 2000, p. 72.

10 See D. Van Wyk, J. Dugard, V.B. de Villiers, D. Davis (eds.), *Rights and Constitutionalism, The New South African Legal Order*, Clarendon Press, Oxford (UK), 1996, p. 131. See also Venter, *supra* n. 6, at 26-27.

11 See Van Wyk et al., *supra* n. 10, at 131; Venter, *supra* n. 6, at 26.

former Boer republics, however, confined the franchise to white men (and in 1930 to white adults).<sup>12</sup> After the Union was formed, Afrikaner nationalists moved to gradually segregate politics and society.<sup>13</sup>

In the run-up to the 1948 elections, the main Afrikaner nationalist party, the *Herenigde Nasionale Party* (Reunited National Party, HNP) under the leadership of Protestant Minister Daniel Francois Malan, campaigned based on its proposed policy of “apartheid”. The HNP narrowly defeated (former prime minister) Smuts’ United Party and formed a coalition government with another Afrikaner nationalist party, the Afrikaner Party. The two parties later merged to form the National Party (NP). Malan became the prime minister.

The first grand apartheid law was the Population Registration Act of 1950, which formalized racial classification (“native”, “white”, “colored”, and “Asian”). This caused difficulty, especially for colored people, separating their families as members were allocated different races.<sup>14</sup> Another important law was the Group Areas Act of 1950, which segregated residential areas. The Prohibition of Mixed Marriages Act of 1949 prohibited marriage between persons of different race.

Under the Reservation of Separate Amenities Act of 1953, municipal grounds could be reserved for a particular race, creating, among other things, separate beaches, buses, hospitals, schools and universities. The Promotion of Black Self-Government Act of 1959 entrenched the National Party’s policy of nominally independent “homelands” for black people. The Black Homeland Citizenship Act of 1970 changed the status of black people living in South Africa so that they were no longer citizens of South Africa, but became citizens of one of the ten autonomous territories.<sup>15</sup>

Apartheid sparked significant internal resistance. Hence, further laws had the aim of suppressing any resistance to apartheid. The government responded to popular uprisings with the use of violent police action and secret service operations. One of those protests was held in the township of Sharpeville, where 69 people were killed by police in the infamous Sharpeville massacre. In the wake of the Sharpeville incident, the African National Congress (ANC) and its offshoots were banned. The resistance went underground, with some leaders in exile abroad.<sup>16</sup> In the infamous Rivonia trial of 1964, leaders of the resistance – Nelson Mandela, Walter Sisulu and Ahmed Kathrada – were sentenced to death (turned into life imprisonment). The Soweto uprising in 1976 and the “mysterious” death of imprisoned Black Consciousness activist Steve Biko in 1977 are also landmarks in the struggle.

Criticism against apartheid also came from the United Kingdom and the Commonwealth of Nations. As Afrikaner nationalism had always had an anti-British and republican outlook,<sup>17</sup> the apartheid government organized a referendum. More than 90% of eligible voters (in accordance with Apartheid law) participated in the referendum, and 52.3% of those who did, voted in favor of a republic. Hence, South Africa

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12 Currie, *supra* n. 8, at 67.

13 See *ibid.*, p. 68.

14 See Venter, *supra* n. 6, at 27.

15 See *ibid.*

16 See Van Wyk et al., *supra* n. 10, at 134.

17 See Venter, *supra* n. 9, at 75.

left de Commonwealth and changed its name from Union of South Africa to Republic of South Africa in 1961.<sup>18</sup>

In the 1980s, national and international opposition to apartheid increased. Early in 1989, President Botha suffered a stroke and resigned from office. He was succeeded by F.W. de Klerk. Despite his reputation as a conservative, De Klerk moved towards negotiations to end the political stalemate.<sup>19</sup> He lifted the 30-year ban on leading anti-apartheid groups such as the ANC and the United Democratic Front.<sup>20</sup> In 1990, Nelson Mandela was released and negotiations concerning a process of political reforms were started. In September 1991, the government and representatives of 27 political organizations and national and homeland governments signed the National Peace Accord. In a referendum held on 17 March 1992, a white electorate voted 68% in favor of dismantling apartheid through negotiations.<sup>21</sup>

Eventually the Multi-party Negotiating Process finally led to the text of the Interim Constitution and a set of constitutional principles for a final constitution.<sup>22</sup> On 22 December 1993, the tri-cameral Parliament adopted the Interim Constitution.<sup>23</sup> In 1993, De Klerk and Mandela were jointly awarded the Nobel Peace Prize for their work for the peaceful termination of the apartheid regime. From 26 to 29 April 1994, the South African population voted in the first universal suffrage general elections. Nelson Mandela was elected President on 9 May 1994 and formed – according to the Interim Constitution of 1993 – a government of national unity, consisting of the ANC, the NP and the Inkatha, with Thabo Mbeki and F.W. de Klerk as his vice-presidents.

## 2.2 South Africa's contemporary constitutional and legal system

The current Constitution is the one of 1996. It was preceded by the Interim Constitution of 1993. The Interim Constitution provided for a Constitutional Assembly, which would adopt a constitution in accordance with the Constitutional Principles. These principles had emerged from the pre-1993 negotiation process. The final constitution had to be certified by the Constitutional Court, which was established by the Interim Constitution. The Constitutional Assembly adopted a text in May 1996. Following the first review by the Constitutional Court, amendments had to be made because certain provisions did not conform to the Constitutional Principles. The improved adopted text was then certified by the Constitutional Court (CC) on 4 December 1996 and took effect on 4 February 1997.<sup>24</sup>

The Constitution of 1996 is the longest in the world.<sup>25</sup> Its essence is the creation of a post-apartheid democratic constitutional state, based on equality, fundamental

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18 See Venter, *supra* n. 6, at 27.

19 See Venter, *supra* n. 9, at 77.

20 See Van Wyk et al., *supra* n. 10, at 131.

21 See *ibid.*, pp. 134-143.

22 Currie, *supra* n. 8, at 71.

23 See *ibid.*, p. 70.

24 See Venter, *supra* n. 6, at 30-31.

25 See Van Wyk et al., *supra* n. 10, at 158.

rights, national unity, and restructuring of the state.<sup>26</sup> Under it, South Africa is a parliamentary republic, with both centralist and federalist elements. The national legislative branch consists of the National Assembly and the National Council of Provinces. The National Assembly is elected every five years using a party list proportional representation system where half of the members are elected proportionally from nine provincial lists and the remaining half from national lists so as to restore proportionality.<sup>27</sup>

The National Council of Provinces (NCOP) is elected indirectly. Citizens vote for provincial legislatures, and each legislature then nominates a delegation of ten members to the NCOP. Each provincial delegation consists of six permanent delegates, who are nominated for a term that lasts until a new provincial legislature is elected, and four special delegates.

The national executive branch is formed by the President, Deputy President and the Ministers and Deputy Ministers. The leader of the political party or coalition of parties that wins a majority of the seats in the National Assembly is named President. The President is both Head of State and Head of Government. The President appoints the Deputy President and the Ministers. The President and the Ministers are responsible to the Parliament, of which they must be elected members.<sup>28</sup>

2.3 South Africa's contemporary judicial structure

The judicial branch is not subdivided into a federal and provincial level and consists of the Constitutional Court, the Supreme Court of Appeal, and the High Courts and the Magistrates' Courts. Next to these, Section 166(e) of the Constitution also provides that by Act of Parliament other courts may be established or recognized, "including any court of a status similar to either the High Courts or the Magistrates' Courts".

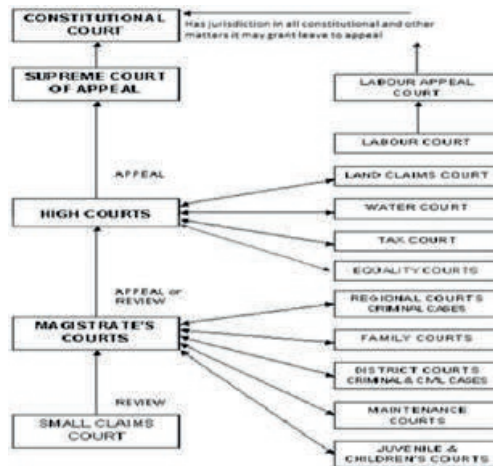


Figure 3: South African Court system

26 *Ibid.*, p. 159.

27 *Ibid.*, p. 160.

28 *Ibid.*, pp. 162-164.

The Constitutional Court is the highest court of appeal in all constitutional cases. It consists of the Chief Justice of South Africa, the Deputy Chief Justice and nine Constitutional Court judges. A case must be heard by at least eight judges.<sup>29</sup> The CCSA has exclusive jurisdiction in<sup>30</sup>

- disputes between organs of state in the national or provincial sphere concerning the constitutional status, powers or functions of any of those organs of state,
- constitutional review during the national or provincial legislative process,
- deciding the constitutionality of any amendment to the Constitution,
- determining whether President or Parliament failed to fulfil a constitutional obligation, and
- certifying a provincial constitution.

The Supreme Court of Appeal is the highest court in respect of all other matters other than constitutional matters. Since a court reform in 2013, there is a single South African High Court which hears cases. A high court has jurisdiction in its own area over all persons residing or present in provincial divisions of the Court. The Magistrates' Courts are the lower courts which deal with the less serious criminal and civil cases. They are divided into regional courts and district courts. In Criminal Courts, the state prosecutes people for breaking the law. There are also specialist courts, the Land Claims Court, the Tax Court and the Equality Courts.

## 2.4 The provincial level

South Africa is not a federation. However, the provinces do have features "reminiscent of federal principles".<sup>31</sup> Provinces have a "distinctive, interdependent and inter-related" relation with the central government. This is what is called "cooperative government" in South African constitutional law.<sup>32</sup>

The legislative organ of each province is the provincial legislature.<sup>33</sup> The executive power is vested in the premier of each province<sup>34</sup> who exercises this power together with the members of the Executive Council.<sup>35</sup> Provincial constitutions need to be certified by the Constitutional Court.<sup>36</sup>

## 2.5 Legal system

Historically, South African public law has been dominated by the English common law tradition. South African legal scholars and practitioners closely followed and applied the English legal traditions and concepts. The apartheid regime attached great

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<sup>29</sup> See Constitution of the Republic of South Africa, *supra* n. 2, s. 167, subss (1) and (2).

<sup>30</sup> See *ibid.*, s. 167, subss (3) and (4).

<sup>31</sup> Venter, *supra* n. 9, at 244.

<sup>32</sup> See Venter, *supra* n. 6, at 33.

<sup>33</sup> See Constitution of the Republic of South Africa, *supra* n. 2, s. 104.

<sup>34</sup> *Ibid.*, s. 125.

<sup>35</sup> *Ibid.*, s. 125(2).

<sup>36</sup> *Ibid.*, ss 142 and 144.

value to the “supremacy of parliament”.<sup>37</sup> It provided a doctrinal legitimacy for apartheid rule under the National Party. Yet, already in the apartheid era, ideas of “*rechtsstaat*” (rule of law) and human rights were discussed in legal academic literature and presented as alternatives which would enable a non-apartheid society.<sup>38</sup> The Constitution of 1996 was indeed intended to be an instrument of change in South African society.<sup>39</sup> “[U]nlike ordinary legislation, a Bill of Rights talks to society and informs it, not only what kind of society it is, but also of the one it ought to be. It contains not only constraints but also aspirations.”<sup>40</sup>

Typical of the constitutional state or *rechtsstaat*, Section 2 of the Constitution declares the Constitution to be the supreme law of the land, while any “law or conduct inconsistent with it is invalid”.<sup>41</sup> This provision is far more explicit than equivalent provisions in most other constitutions, especially because not only laws, but also conduct contrary to the Constitution is declared invalid.<sup>42</sup>

One of the effects of the Constitution is that legal norms originating from common law and Roman Dutch law, or for that matter traditional or religious law, which may be recognized are subject to modification by constitutional norms, including the Bill of Rights.<sup>43</sup>

## 2.6 Recognition of customary and religious marriage and personal law

Section 31 of the Constitution provides for the collective rights of cultural, religious or linguistic communities. While Section 31 is not explicit about customary law, other sections of the Constitution explicitly refer to customary, indigenous and religious law. However, Section 39(2) obliges courts to promote the spirit, purport and objects of the Bill of Rights, when *inter alia* developing customary law. This section also makes clear that the Bill of Rights cannot be read to deny any rights recognized or conferred by *inter alia*, customary law, to the extent that they are not inconsistent with the Bill of Rights.

Religious law and tradition have a somewhat less prominent status under the Constitution. Section 15(3) does not recognize them as such, but it stipulates that the right to freedom of religion does not prevent the legislative recognition of marriages concluded under any tradition, or a system of religious, personal or family law and systems of personal and family law under any tradition, or adhered to by persons professing a particular religion. Therefore, the possibility of recognizing religious law by legislative means is not ruled out but enabled.

As far as marriage is concerned, a legally recognized marriage can be solemnized by a religious minister, registered as a marriage officer or by officials registered on

37 Venter, *supra* n. 9, at 75.

38 See Venter, *supra* n. 6, at 28-29.

39 *Ibid.*, p. 34.

40 Van Wyk et al., *supra* n. 10, at 2-3.

41 See Venter, *supra* n. 6, at 33.

42 Venter, *supra* n. 9, at 33 and 118.

43 See Venter, *supra* n. 6, at 33, referring to CCSA, *Government of the Republic of South Africa and Others v. Grootboom and Others*, Case CCT11/00, 4 October 2000 and CCSA, *Minister of Health and Others v. Treatment Action Campaign and Others (No 2)*, Case CCT8/02, 5 July 2002.



the part of the state. The Recognition of Customary Marriages Act 120 of 1998 grants official status to customary marriages. The Civil Union Act 17 of 2006 provides official legal status, either as a civil union or marriage, for same-sex couples<sup>44</sup> (see also *Fourie*<sup>45</sup> case discussed below). In 1998, Parliament adopted the Recognition of Customary Marriages Act. However, while being debated endlessly, there is still no Muslim marriage Act<sup>46</sup> (see also cases *Amod*,<sup>47</sup> *Daniels*,<sup>48</sup> *Hassam*<sup>49</sup> below and the *Moosa*<sup>50</sup> case decided more recently).

### 3 Introducing the selected CCSA cases

#### 3.1 Introduction: How the freedom of religion and belief contributed to the new ethos

As explained in section 2 both the interim and the final Constitutions included the freedom of religion and belief, both as individual and as community rights. South Africa's struggle against the injustices of apartheid may primarily been seen as a struggle against racial and ethnic discrimination, but any closer look immediately reveals the cultural and religious dimension in both apartheid and the struggle against it.

Apartheid, as conceptualized by the National Party, had always been justified as a means to secure the cultural and religious beliefs and identity of the Afrikaner people and as an expression of a theological order of things. Several of the Afrikaner Calvinist churches provided the policy with theological underpinnings.<sup>51</sup>

While Afrikaner nationalism was the cradle of apartheid theory, it could easily tap into British colonialist conceptions of non-European cultures, religions and beliefs. While this affected the native people of South Africa, infamous historical judgments dealing with Muslim marriages, such as *Seedat's Executors*, show how South Africans of mixed-race and South Asian origin were affected. The case stereotyped Muslim marriage "as repugnant to the policy and the legal institution both of Holland and England" and "reprobated by the majority of the civilized peoples, on grounds of

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44 J. D. van der Vyver, 'Multi-Tiered Marriages in South Africa', in J. A. Nichols (ed.), *Marriage and Divorce in a Multicultural Context Multi-Tiered Marriage and the Boundaries of Civil Law and Religion*, Cambridge University Press, Cambridge (UK), 2012, pp. 201 and 204.

45 CCSA, *Minister of Home Affairs and Another v. Fourie; Lesbian and Gay Equality Project and Eighteen Others v. Minister of Home Affairs*, Cases CCT60/04 and CCT10/05, 1 December 2005.

46 Currie & J. de Waal, *supra* n.1, at 356.

47 CCSA, *Amod v. Multilateral Motor Vehicle Accidents Fund*, Case CCT4/98, 27 August 1998.

48 CCSA, *Daniels v. Campbell NO and Others*, Case CCT40/03, 11 March 2004.

49 CCSA, *Hassam v. Jacobs NO and Others*, Case CCT83/08, 15 July 2009.

50 CCSA, *Moosa and Others v. Minister of Justice and Correctional Services and Others*, Case CCT25/17, 29 June 2018.

51 See A. Toit, 'Puritans in Africa? Afrikaner "Calvinism" and Kuyperian Neo-Calvinism in Late Nineteenth-Century South Africa', in *Comparative Studies in Society and History*, vol. 27, no. 2, pp. 209-240 (1985).

morality and religion".<sup>52</sup> Apartheid Courts drew on these precedents, for example in *Ismael v. Ismael* in 1983.<sup>53</sup>

While some religious beliefs were instrumental to the apartheid regime, the religious beliefs of others were important in the struggle against apartheid. The early Indian civil rights movement in South Africa was amongst other things directed against the legal non-recognition of Muslim and Hindu marriages. Within the anti-apartheid resistance movement, faith-based principles played an important role as shown by the ANC anthem, "Nkosi Sikelel' iAfrika", which is now part of the South African national anthem. While Bishop Tutu was possibly the most well-known religious dignitary to become active in the struggle, the movement was religiously pluralist and included people of different faiths and denominations, including staunch (philosophical) non-believers.

The selection of cases displays how the freedom of religion and belief found its way not only in rejecting past bigotry and intolerance, but in formulating a new ethos which would contribute to recreating South Africa as the "Rainbow Nation". Importantly, time has not stood still since 2015 – the final year for the selection of cases in this study. In the *Moosa*<sup>54</sup> case, the CCSA built further on the case law of the Muslim marriage cases *Amod*, *Daniels* and *Hassam*, discussed below. In this case, the two surviving spouses of a deceased Muslim husband filed the complaint together. The unanimous Court ruled that excluding them from the meaning of spouse for purposes of the Wills Act was unconstitutional.

### 3.2 Overview of selected cases

In the period from 1996 until 2015, 17 cases which feature the freedom of religion and belief in a substantial way were decided by the CCSA (see section 1.7). From these cases, the following selection of 15 cases was made:

|    |                                                                                                                                                                                                                             |
|----|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 1. | Ex parte Chairperson of the Constitutional Assembly: In re Certification of the amended text of the Constitution of the Republic of South Africa (Certification of the Constitution of the Republic of South Africa), 1996, |
| 2. | Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995 Case Number: CCT39/95, 4 April 1996                                                                                                    |
| 3. | Certification of the Constitution of the Western Cape, 1997, Case CCT6/97, 2 September 1997                                                                                                                                 |
| 4. | S v Lawrence; S v Negal; S v Solberg, Cases CCT38/96; CCT39/96; CCT40/96, 6 October 1997                                                                                                                                    |
| 5. | Amod v Multilateral Motor Vehicle Accidents Fund, Case CCT 4/98, 27 August 1998                                                                                                                                             |

52 Supreme Court of South Africa (Appellate Division), *Seedat's Executors v. The Master (Natal)*, 1917 AD 302, at 307-308.

53 Eastern Cape High Court (South Africa), *Ismail v. Ismail*, 1983 (1) SA 1006 (A).

54 *Moosa and Others v. Minister of Justice and Correctional Services and Others*, Case CCT25/17, *supra* n. 50.

|     |                                                                                                                                                                                                             |
|-----|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 6.  | Christian Education South Africa v Minister of Education, Case CCT4/00, 18 August 2000                                                                                                                      |
| 7.  | Prince v President of the Cape Law Society and Others, Case CCT36/00A, 12 December 2000 & Prince v President of the Cape Law Society and Others, Case CCT36/00B, 25 January 2002                            |
| 8.  | Daniels v Campbell NO and Others, Case CCT 40/03, 11 March 2004                                                                                                                                             |
| 9.  | Volks NO v Robinson and Others (CCT12/04) [2005] ZACC 2; 2005, 21 February 2005.                                                                                                                            |
| 10. | Minister of Home Affairs and Another v Fourie and Another; Lesbian and Gay Equality Project and Others v Minister of Justice and Constitutional Development, Cases CCT 60/04 and CCT 10/05, 1 December 2005 |
| 11. | MEC for Education: Kwazulu-Natal and Other v Pillay, Case CCT 51/06, 5 October 2007                                                                                                                         |
| 12. | Hassam v Jacobs NO and Others, Case CCT 83/08 [2009] ZACC 19, Case CCT 51/06, 15 July 2009                                                                                                                  |
| 13. | Women's Legal Centre Trust v President of the Republic of South Africa and Others, Case CCT 13/09 [2009] ZACC 20, 22 July 2009                                                                              |
| 14. | DE v RH (CCT 182/14) [2015] ZACC 18; 2015 19, June 2015                                                                                                                                                     |
| 15. | De Lange v Presiding Bishop of the Methodist Church of Southern Africa for the time being and Another (CCT223/14) [2015] ZACC 35; 2016. 24 November 2015                                                    |

The selection only includes cases in which the freedom of religion and belief features as the central right. It was considered to be the central right if the interpretation of the freedom of religion and belief was decisive in determining the outcome of the case. This includes cases in which the freedom of religion is raised as a major argument, although the central right is equal treatment of gender or sexual orientation or in which the freedom of religion is raised in combination with equal treatment, freedom of opinion or another right.

## 4 Case studies of the selected cases

## 4.1 Certification of the amended text of the Constitution - Final Certification [1996]

|               |                                                                                                                                                                                                                               |
|---------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Essence:      | Certification of the Constitution. Previous text was not entirely in conformity with constitutional principles. Conformity of derogable status of right to freedom of religion and belief with the Constitutional Principles. |
| Dimension:    | Freedom of religion and belief and secularism.                                                                                                                                                                                |
| Lower courts: | Not applicable. Only the CCSA has jurisdiction for certification.                                                                                                                                                             |
| Majority:     | 11:0. Constitution certified, list of derogable rights is in accordance with Constitutional Principles. No author of the majority opinion mentioned.                                                                          |
| Dissenting:   | None.                                                                                                                                                                                                                         |

Under South Africa's Interim Constitution of 1993, the CCSA had the task to certify the text for the permanent Constitution<sup>55</sup> in order to assure compliance with the Constitutional Principles stipulated by the Interim Constitution.<sup>56</sup> Prior to the certification in the present case, the CCSA had already assessed a prior draft text of the Constitution<sup>57</sup> in which it had raised objections against the text, based on the Constitutional Principles.<sup>58</sup>

In the Final Certification, the Court reached the unanimous conclusion that the text conformed to the Constitutional Principles and had addressed the earlier objections adequately. The judgment did not deal with the freedom of religion as such, but freedom of religion played a role in an intervention made by the province of KwaZulu Natal (KZN)<sup>59</sup>

Constitutional Principle II stipulated that "[e]veryone shall enjoy all universally accepted fundamental rights, freedoms and civil liberties, which shall be provided for and protected by entrenched and justiciable provisions in the Constitution". In Section 37 of the Bill of Rights, discrimination on the grounds of race, color, ethnic or social origin, sex, religion or language was made non-derogable, but not discrimination on the grounds of gender, pregnancy, marital status, sexual orientation, age, disability, conscience, belief and culture. This while all these grounds for discrimination are prohibited by Section 9(3). Also, Section 15 contains one right which encompasses the freedom of thought, opinion, religion, belief and conscience. Hence, freedom of religion which is made non-derogable is paired with the freedom of belief and conscience, which are made derogable. The province of KZN contended that there were no rational grounds for the exclusion of all the aforementioned rights from

55 See Interim Constitution of the Republic of South Africa [Act No. 200 of 1993], 27 April 1994, s. 71(2).

56 See *ibid.*, s. 71(1) referring to Schedule 4, containing the Constitutional Principles.

57 See CCSA, *Certification of the Constitution of the Republic of South Africa*, Case CCT23/96, 4 September 1996 paras. 1-16.

58 *Ibid.*, paras. 29-30.

59 *Ibid.*, para. 31.

non-derogation.<sup>60</sup> The CCSA concluded that the distinction between non-derogable rights and derogable rights in case of emergency as drafted was not in violation of Constitutional principle II.<sup>61</sup>

KZN argued that there might be aspects of the right to freedom of conscience, religion, thought, belief and opinion, which could be legitimately curtailed during emergency situations, but argued that the core of these rights should be inviolable. This core, the province argued, consisted of the right to hold particular religious, moral and other beliefs and opinions, and it was this core which should be included in the table of non-derogable rights.

The Court conceded that the criticism raised against the compiling of the table of non-derogable rights was “not without substance”.<sup>62</sup> However, the Court discussing the rights in abstract was difficult and their concrete meaning was to be determined by courts in future (constitutional) cases. Defining the core of rights in abstract terms was difficult and the Constitutional Assembly had to draft the provisions before any judicial determination could take place. “It chose to protect [...] as non-derogable certain core rights such as the rights to life and dignity and freedom from torture and cruel punishment.”<sup>63</sup>

While the Court understood that those who were protected by Section 9(3) but had not been included in the non-derogable clause expressed concern in this regard, it drew attention to the fact that the Constitutional Assembly did not have an obligation under Constitutional Principle II to include particular rights in a non-derogation clause. What the Principle did require was that “universally accepted protection be accorded to particular rights”.<sup>64</sup>

The Court continued its analysis by noting that any derogation required a stringent test since according to the Constitution any derogation must be strictly required by emergency. Accordingly, all rights were provided with extensive protection. In the case of emergency, courts would be able to review the derogation of those derogable rights. Furthermore, the fact that a distinction between rights was made in the case of emergency, did not imply a hierarchical distinction, let alone in situations outside of emergency.<sup>65</sup>

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60 *Ibid* para. 33.

61 *Ibid.*, para. 40.

62 *Ibid.*, para. 36.

63 *Ibid.*, para. 36.

64 *Ibid.*, para. 37.

65 *Ibid.*

#### 4.2 Constitutionality of Certain Provisions of the Gauteng School Education Bill of [1996]

|               |                                                                                                                                                                                 |
|---------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Essence:      | Referral case regarding the constitutionality of Gauteng School Education Bill concerning language and religion.                                                                |
| Dimension:    | Freedom of religion and belief and secularism. Freedom of religion and education.                                                                                               |
| Lower courts: | Not applicable. Only the CCSA has jurisdiction for certification.                                                                                                               |
| Majority:     | 11:0. Provisions are constitutional. Majority opinion by Mahomed also on behalf of eight others. Separate concurring opinion by Kriegler. Separate concurring opinion by Sachs. |
| Dissenting:   | None.                                                                                                                                                                           |

The case was referred to the CCSA by the speaker of the legislature of Gauteng. One third of the legislature questioned the constitutionality of the new Gauteng School Bill.<sup>66</sup> This bill prohibited language competence testing in public schools and provided that they should encourage use of several official languages. It also provided the religious policy of a school to be reviewed by administrative bodies. All students would have the right to be exempted from religious instruction. The petitioners in the legislature were aided by the South African Foundation for Education and Training, admitted as *amicus curiae*. The foundation is dedicated to Christian religion and Afrikaans language education.<sup>67</sup>

During apartheid, whites-only Afrikaans language public schools, based on a Reformed Christian outlook, existed in Gauteng as elsewhere in South Africa. Post-apartheid, these schools were still the most affluent ones. The aim of the Bill was to ensure that admission requirements for public schools did not unfairly discriminate on grounds of race, ethnic or social origin, color, gender, sex, disability, sexual orientation, religion, conscience, belief, culture or language.<sup>68</sup> Some members of the Afrikaner community were afraid that the Bill would diminish the Afrikaans language in Christian public schools. This, in turn, could threaten the existence of their community based on a common culture, language or religion.

The Constitution provided at the time that everyone had the right to “establish, where practicable, educational institutions based on a common culture, language or religion, provided that there shall be no discrimination on the ground of race”.<sup>69</sup> Currently, the provision is replaced by one which provides that everyone “has the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable”.<sup>70</sup>

The CCSA unanimously found no fault with the bill. It found no positive obligation on the part of the province to provide for public schools based on common

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66 CCSA, *In Re: Dispute Concerning the Constitutionality of Certain Provisions of The School Education Bill of 1995*, Case CCT39/95, 4 April 1996, para. 1.

67 *Ibid.*, paras 3-4.

68 *Ibid.*

69 *Ibid.*, para. 6.

70 See Constitution of the Republic of South Africa, *supra* n. 2, s. 29 (2).

culture, language or religion.<sup>71</sup> Deputy Chief Justice Mahomed authored the majority opinion, also on behalf of eight others. Justices Kriegler and Sachs each authored a concurring opinion. Justice Kriegler's separate concurring opinion is in Afrikaans. Of the selected cases, this is the only opinion written in Afrikaans.

The majority opinion explained that the article of the Constitution providing for the right to education, consists of three elements: everyone's right to education; the rights to have instruction in the language of choice where reasonable and practicable; and the right to establish where practicable educational institutions based on common culture, language or religion as cited above.<sup>72</sup> The first element is a positive obligation on the part of the state. The second element also creates a positive right, which is subject to the condition of practicability.<sup>73</sup> The third element by contrast is a negative obligation, a freedom right "to establish educational institutions based on a common culture, language or religion". Hence, the Constitution does not demand that the state establish or maintain such schools based on common culture, language or religion.<sup>74</sup>

The Constitution also protects the right to participate in the cultural, linguistic and religious communities of one's choice.<sup>75</sup> Furthermore, it protects the freedom of religion and belief, which does not prevent religious observances at state-run or state-aided educational institutions. However, all this does not infer a positive obligation on the part of the state to provide for educational institutions based on a single common culture, language or religion.<sup>76</sup>

Given the fact that the South African Constitution explicitly provides for judicial borrowing from other jurisdictions, the petitioners relied on Canadian legislation and case law mandating the government to provide for English as well as French language schools.<sup>77</sup> The CCSA noted that the Canadian example did not show an international law obligation to provide for educational institutions based on a single common culture, language or religion.<sup>78</sup> The petitioners also argued that "public schools must be allowed to insist that a learner be compelled to attend religious classes and religious practices at the school". According to the majority, this position could not be deducted from the right to education and such practice might also be a direct violation of the freedom of religion and belief as guaranteed by the Constitution.<sup>79</sup>

In his separate opinion, in Afrikaans, Kriegler re-emphasized that if racial prejudice was an element in a community's understanding of its own culture, language and religion for the purpose of operating an educational institution, there was no constitutional protection whatsoever. There was, however, constitutional protection

71 *In Re: Dispute Concerning the Constitutionality of Certain Provisions of The School Education Bill of 1995*, Case CCT 39/95, *supra* n. 66, para. 7.

72 *Ibid.*, para. 6.

73 *Ibid.*, para. 11.

74 *Ibid.*, para. 9.

75 See Constitution of the Republic of South Africa, *supra* n. 2, s. 31.

76 *In Re: Dispute Concerning the Constitutionality of Certain Provisions of The School Education Bill of 1995*, Case CCT 39/95, *supra* n. 66, para. 12.

77 *Ibid.*, para. 13.

78 *Ibid.*, para. 15.

79 *Ibid.*, para. 21.



for linguistic communities. If their number was substantial and it was practicable, they could demand that the government provide them with education in their language of choice. Kriegler noted the fluidity of the term “practicability” in this regard. Finally, there was the right for communities to operate their own private educational institutions, bearing their own costs. Such institutions may be founded on common culture, language and religion, but may not otherwise discriminate.<sup>80</sup>

In his separate opinion, Sachs stipulated, that international legal standards for minority protection must inform the interpretation of the constitutional rights in question. He explored historical and current marginalization fears of the Afrikaner community, which had made so many contributions to the broader South African culture. Yet, many other communities had made contributions and felt the threat of marginalization, past and present. The claims of all groups must be considered in combination and “multi-culturalism has to be looked at in a multi-cultural way”.<sup>81</sup>

Sachs noted that the evidence attempted to “eliminate members of the Afrikaans speaking community or to wipe out their culture”. The group which successfully launched such a claim was the San/Khoisan community, which through history had been marginalized and pushed from its ancestral lands. Afrikaans speakers were protected by the Constitution as much as members of any other community. However, neither could successfully claim a privilege based on the Constitution.<sup>82</sup>

Because there was still enormous inequality in access to education, the principle of equality must be operated to end this. Yet in a pluralist society based on democratic values, equality and diversity should not compete but cultural diversity should be “accomplished on the secure basis of justice and equity”. Also, in education the rights of children were central.<sup>83</sup> There was no obligation on the part of the state to “promote the separate development of minorities (as opposed to the duty of preventing discrimination against them)”. However, there was a tendency to recognize the “right to be different”,<sup>84</sup> and a sound legal obligation to “ensure the survival and continued development of the cultural, religious and social identity of minorities”.<sup>85</sup>

Given the existence of Afrikaans medium schools, one must assume that the practicability of instruction in Afrikaans was given. Therefore, the continuation of Afrikaans education in these public schools could be constitutionally enforced. However, this did not mean an exclusively Afrikaans educational environment. Multilingualism, as envisioned by the Constitution, benefited from multi-language schools. Cultural interaction between different groups may very well be to their mutual benefit.<sup>86</sup> An obligation on the part of the state to provide communities with distinct schools should be rejected because in South Africa’s history, racial exclusion and dominance had always been justified on grounds of cultural incompatibility. The Constitution was designed to overcome this past. Furthermore, there was no

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80 *Ibid.*, paras 38-43.

81 *Ibid.*, paras 44-51.

82 *Ibid.*, paras 70-72.

83 *Ibid.*, paras 52-53.

84 *Ibid.*, para. 65.

85 *Ibid.*, para. 67.

86 *Ibid.*, para. 74.

clear majority population in South Africa against which minorities needed to be protected. Everyone was part of one or more minorities.<sup>87</sup>

International law aimed at minority protection “would favor those groups seeking admission to Afrikaans medium schools” rather than any “claim of Afrikaans community groups to have the State subsidize what, objectively speaking, are privileges in terms of exclusive access to affluent schools”.<sup>88</sup> Citing the ECtHR’s *Belgian Linguistics* case,<sup>89</sup> Sachs stipulated that the right to education, within the South African context did not imply a right to be educated in the language of the parents with aid of or provided for by the state.<sup>90</sup>

In his conclusion, Sachs reiterated that the challenge for South Africa was to balance between “overcoming systemic inequality inherited from the past” and “preventing [...] assimilation of groups wishing to preserve and develop a distinctive identity”. In his opinion, however, this was “a matter for democratic resolution in the legislatures” more than “adjudication by the courts”.<sup>91</sup>

#### 4.3 Certification of the Constitution of the Western Cape [1997]

|               |                                                                                                                                                       |
|---------------|-------------------------------------------------------------------------------------------------------------------------------------------------------|
| Essence:      | Certification of the Provincial Constitution of the Western Cape. Consistency of a preamble referring to God with the freedom of religion and belief. |
| Dimension:    | Freedom of religion and belief and secularism.                                                                                                        |
| Lower courts: | Not applicable. Only the CCSA has jurisdiction for certification.                                                                                     |
| Majority:     | 11:0. Constitution certified; preamble is constitutional. No author of the majority opinion mentioned.                                                |
| Dissenting:   | None.                                                                                                                                                 |

The case concerns the certification of a provincial constitution. The Constitution confers on the provinces of the Republic the power to make their own constitutions. However, these constitutions must be certified by the Constitutional Court in order to become law.<sup>92</sup> In the Certification procedure, the text was supported by the Speaker of the Western Cape legislature, while the national government opposed the text. In this regard, it should be noted that the Western Cape at the time was one of only two provinces which was not governed by an ANC executive (the other being KwaZulu-Natal), while the national government was also headed by the ANC.

<sup>87</sup> *Ibid.*, paras 80-81.

<sup>88</sup> *Ibid.*, para. 83.

<sup>89</sup> ECtHR, *Case “Relating to Certain Aspects of The Laws on the Use of Languages in Education in Belgium” v. Belgium*, app. nos. 1474/62, 1677/62, 1691/62, 1769/63, 1994/63, 2126/64, 23 July 1968.

<sup>90</sup> *In Re: Dispute Concerning the Constitutionality of Certain Provisions of The School Education Bill of 1995*, Case CCT39/95, *supra* n. 66, para. 78.

<sup>91</sup> *Ibid.*, para. 92.

<sup>92</sup> See Constitution of the Republic of South Africa, *supra* n. 2, ss 104(1)(a) and 144(2).

The certification case dealt with a number of issues falling outside the scope of this study. However, one of the questions raised in argument<sup>93</sup> was whether the preamble of the Western Cape constitution was consistent with Section 15 of the Constitution. The preamble of the Western Cape constitution commences with “In humble submission to Almighty God”. The phrase echoes the prefatory words to the preamble of the Constitution “May God protect our people. Nkosi Sikelel’ iAfrika. Morena boloka setjhaba sa heso. God seën Suid-Afrika. God bless South Africa. Mudzimu fhatutshedza Afurika. Hosi katekisa Afrika.” A unanimous court found the preamble to be constitutional.

According to the Court, “ceremonial deism” as contained in the preamble had no particular (legal) constitutional significance. It showed “time-honored means of adding solemnity used in many cultures and in a variety of contexts”.<sup>94</sup> The words in the Western Cape constitution had “no operative constitutional effect”. Therefore, they were not incompatible with the spirit and objects of the Constitution. The phrase could also not be used to interpret the provisions regarding freedom of religion and belief restrictively. Hence, the preamble had no effect on the rights of believers and non-believers. Consequently, there was no inconsistency between the Western Cape constitution and the Constitution in this regard.<sup>95</sup>

#### 4.4 S v Lawrence; S v Negal; S v Solberg [1997]

|               |                                                                                                                                                                                      |
|---------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Essence:      | The question whether the prohibition of selling liquor on Sundays for holders of grocer’s wine license is contrary to the freedom of religion and belief.                            |
| Dimension:    | Freedom of religion and belief and secularism.                                                                                                                                       |
| Lower courts: | The Magistrates Court and Provincial Division of the Supreme Court convicted the accused and refused the direct leave to the Constitutional Court.                                   |
| Majority:     | 6:3 (Solberg). The challenged Act was upheld. Majority opinion by Chief Justice Chaskalson. Langa, Ackermann and Kriegler concurring. Separate opinion by Sachs. Mokgoro concurring. |
| Dissenting:   | O’Reagan, only with regard to the Solberg case. Goldstone and Madala concurring.                                                                                                     |

The judgment dealt with three combined criminal cases. All three appellants were charged with violations of the Liquor Act 27 of 1989. They each held a grocer’s license for the sale of wine. They each sold wine in deference of the days and times specified in the license. All three argued that the provisions which they had allegedly infringed were contrary to the Interim Constitution, which was still in place at the time they were charged. The freedom of religion and belief was only raised in the case of

93 CCSA, Certification of the Constitution of the Western Cape, Case CCT6/97, 2 September 1997, para. 28.

94 *Ibid.*

95 *Ibid.*

Solberg, as that defendant was charged with violating the restrictions on selling liquor on Sundays.<sup>96</sup>

The three defendants had each admitted to the material allegations in the lower courts, but challenged the constitutionality of the Act. As the Magistrates' Court has no jurisdiction in constitutional matters, they requested leave to the Constitutional Court and a postponement of the criminal trial. All three requests were denied and they were convicted. The Provincial Division of the Supreme Court upheld the judgment and dismissed the appeals.<sup>97</sup>

At the Constitutional Court, the justices unanimously dismissed the Lawrence and Negal case. In the Solberg case, a majority of four found no interference with the freedom of religion and belief. The majority opinion was authored by Chief Justice Chaskalson. Deputy President Langa and Justices Ackermann and Kriegler concurred. In his separate opinion, Justice Sachs explained that he found an interference which was justified. Mokgoro concurred. Justice O'Reagan, on behalf of herself and Justices Goldstone and Madala authored a dissenting opinion. She found an unjustified interference with the freedom of religion and belief.

In the majority opinion, Chaskalson extensively explored foreign constitutional law and case law, concerning "rational basis" for regulating and controlling the trade in liquor in an "open and democratic society" and thus the limitation of any freedom guaranteed by constitutional rights in this matter.<sup>98</sup> Mrs. Solberg relied on the Canadian *Big M*<sup>99</sup> case (discussed in section 4.3.1) to support her view that the restrictions on the sale of wine on Sundays were motivated by sectarian views regarding the Christian Sabbath. The applicant contended that all prohibited days (Sundays and certain public holidays) had a religious significance for (a part of) the Christian population of South Africa.<sup>100</sup> Hence, the restrictions in her view constituted unjustified interference with the freedom of religion and belief.

Chaskalson, expressing agreement with the *Big M* judgment, saw a significant difference between *Big M* and the case at hand. In his opinion, the South African Act did not prohibit the sale of liquor in grocery shops on Sundays merely for religious purposes. The Canadian Lord's Day Act did have the purely religious purpose of compelling people to observe the Christian Sabbath as a closed day. South African law did not compel supermarkets to be closed on closed days, it merely compelled them not to sell liquor. The Act permitted the selling of liquor under some licenses on closed days (e.g. restaurants and hotels), but prohibited the selling of liquor under other licenses on these days (e.g. supermarkets, sports facilities). Sundays as a closed day, in his opinion, also no longer had an exclusive religious significance, having instead become (secular) days of rest from work for all.<sup>101</sup>

As the purpose was also not directed at constraining the practice of other religions, he did not see why the purpose would be unlawful simply because Sunday

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96 CCSA, *S v. Lawrence*; *S v. Negal*; *S v. Solberg*, Cases CCT38/96, CCT39/96 and CCT40/96, 6 October 1997, paras 1-2.

97 *Ibid.*, paras 3-4.

98 *Ibid.*, paras 36 and 41-56.

99 SCC, *R. v. Big M Drug Mart Ltd.*, Case 18125, [1985] 1 SCR 295, 24 April 1985.

100 *S v. Solberg et al.*, Cases CCT40/96 et al., *supra* n. 96, para. 87.

101 *Ibid.*, paras 90-97.

is the Christian Sabbath.<sup>102</sup> There might be an original connection between the Christian religion and the public rest days and holidays in South Africa. The sale of liquor by supermarkets was prohibited on these closed days. Nevertheless, Chaskalson found the connection too tenuous to speak of compelling people to observe Christian religion. Liquor could be consumed elsewhere on Sundays and shops in general were not forced to close.<sup>103</sup>

Even if the challenged Act interfered with the freedom of religion and belief, the majority opinion argued, it would pass the limitations test. In this regard, Chaskalson deemed it relevant that unlike the United States, South African constitutional law did not contain an anti-establishment clause, but instead approached the relationship between religion and state from the equality angle.<sup>104</sup>

O'Reagan disagreed with the majority judgment as well as with the minority opinion by Sachs.<sup>105</sup> Extensively citing US jurisprudence, she supported a reading of the South African right to freedom of religion and belief which centers on both freedom and equality of treatment. While this interpretation did not prevent the state from taking measures to protect the adherents of any particular religions nor for religious observance at national level, such observances should not favor one religion to the exclusion of others.<sup>106</sup> In her opinion, the challenged Act did just that.

O'Reagan drew attention to legislation endorsing or even enforcing Christianity in South Africa's history, but this was no longer constitutional.<sup>107</sup> Given this history, O'Reagan was certain that the selection of closed days for the purpose of prohibiting wine sale in supermarkets had been inspired by their significance for Christians. Inevitably, she believed this resulted in Christianity's endorsement by legislative measures, to the exclusion of other beliefs and religions. This contravened the equal treatment requirement in the Constitution.<sup>108</sup>

Having established that the purpose of the closed day definition was not a secular one, she suggested reviewing on a case-by-case basis the overall purpose in the challenged Act. O'Reagan found the meaning given to the right to freedom of religion and belief by the majority too narrow. It not only encompassed a negative obligation on the part of the state, to abstain from coercion, but also a positive one, to treat all religions evenhandedly. As the closed day legislation favored one religion to the exclusion of all others, there was a breach of this obligation. Consequently, there was a breach of the freedom of religion and belief which must be justified in order to be constitutional.<sup>109</sup>

An analysis of justifiability must include an analysis of the necessity and proportionality and thus of the precise purpose of the challenged provision. O'Reagan noted that the government had not provided evidence regarding the purpose of prohibiting certain types of sale of liquor on closed days. However, one of its pur-

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102 *Ibid.*, para. 89.

103 *Ibid.*, paras 99-105.

104 *Ibid.*, paras 98-101.

105 *Ibid.*, para. 109.

106 *Ibid.*, paras 116-122.

107 *Ibid.*, para. 123.

108 *Ibid.*, paras 125-126.

109 *Ibid.*, paras 127-130.

poses must surely have been to restrict liquor consumption on the closed days as compared to other days. Given the relationship between the closed days and Christianity, this purpose further displayed an endorsement of Christianity and hence constituted an unjustifiable, though not a severe or egregious, infringement.<sup>110</sup>

Justice Sachs concurred with the majority that there was no unconstitutional interference. He concurred with O'Reagan that there was an interference, but deemed it justified. He noted that on the face of it, the challenged provision did not infringe the freedom of religion, because there was no belief, religious or secular, that actually required the sale or consumption of liquor on a closed day. However, going deeper, there are two ways in which the provision might indeed violate the freedom of religion. First, because it affected the choice of non-Christian liquor sellers, who because of their religion kept a different Sabbath and thus had a competitive disadvantage. Secondly, by symbolically endorsing the Christian religion to the exclusion of all others.<sup>111</sup>

Sachs explicitly rejected recourse to foreign case law as a solution in this case, but instead advocated an indigenous South African approach.<sup>112</sup> His rejection of judicial borrowing in this case was noteworthy because in other cases, as we shall see, he was more than ready to base part of his arguments on foreign case law.<sup>113</sup>

Sachs highlighted the multi-faith accommodation outlook which the South African Constitution had, as opposed to the exclusively Christian outlook of the past and the separationist outlook some foreign constitutional orders took.<sup>114</sup> While the preference for Christian holidays originated in the past, continuance did not necessarily serve the same purpose as before. The days continued to have religious significance for Christians. They had also acquired a secular significance as days of pause for example in labor law.

Hence, the Christian origins did not automatically bring the recognition of these days into conflict with the freedom of religion and belief.<sup>115</sup> This would only be the case if non-Christians were to suffer substantial (commercial) disadvantages as a result, or the result would be "state-imposed observance of the Christian Sabbath in any significant way". He believed it did not do either. The main problem, according to Sachs, was a different one. The challenged provision's objective was to restrict the consumption of liquor on the closed days which coincided with Christian holidays. Hence, even though the message might not be very powerful, it was inescapable: the provision displayed the requirement of temperance and thus special observance.<sup>116</sup>

Returning to the South African perspective, Sachs argued that the correct perspective was that of the "reasonable South African" rather than "for example, of the

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110 *Ibid.*, paras 130-132.

111 *Ibid.*, paras 136-138.

112 *Ibid.*, para. 141.

113 See, e.g., the reference to the *R. v. Big M Drug Mart Ltd.*, Case 18125, *supra* n. 99, in CCSA, *Christian Education South Africa v. Minister of Education*, Case CCT4/00, 18 August 2000, paras 18-19.

114 *S v. Solberg et al.*, Cases CCT40/96 et al., *supra* n. 96, paras 148-152.

115 *Ibid.*, para. 156.

116 *Ibid.*, paras 158-159.

reasonable Jew, Muslim, or Hindu, [or] the reasonable atheist". The reasonable South African was of any faith or none, and "neither hyper-sensitive nor overly insensitive to the belief in question, but highly attuned to the requirements of the Constitution". From this perspective, the public holidays (as such) no longer represented state endorsement of religion. But the prohibition of the sale of liquor on these public holidays did represent state endorsement of religion, which put the challenged provision in conflict with the freedom of religion and belief.<sup>117</sup> Hence, the limitations clause must be applied.

In accordance with the limitations clause, the limitation must be not only reasonable and justifiable but also necessary, in a way which is not "unduly burdensome, overbroad or excessive, considering all the reasonable alternatives".<sup>118</sup> The limitations clause required proportionality between breach and justification; the graver the breach, the more compelling the justification must be.<sup>119</sup>

Applying the aforementioned to the facts, Sachs concluded that while there was a clear favoritism towards Christianity, it was reduced by the marginal economic effects. The favoritism was further restricted by the fact that liquor is available elsewhere on the closed days and that many shops and places of leisure did thriving business on these days. Finally, the prohibition of the sale of liquor as such had little sectarian significance.<sup>120</sup> On the other hand, the dangers of excessive drinking on days in which the general public was off work was relatively high, which made the restriction both reasonable and necessary.

#### 4.5 Amod v Multilateral Motor Vehicle Accidents Fund [1998]

|               |                                                                                                                                                                                                                                                         |
|---------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Essence:      | Insurance rights of a widow in an Islamic marriage not registered as civil marriage.                                                                                                                                                                    |
| Dimension:    | Freedom of religion and belief and family law and family relations. Freedom of religion and belief and secularism.                                                                                                                                      |
| Lower courts: | The High Court applied the law under the 1996 Constitution but found in disfavor of Mrs. Amod. Direct leave to the CCSA was denied. She appealed nevertheless. Subsequent to the CCSA judgment the Supreme Court of Appeal ruled in favor of Mrs. Amod. |
| Majority:     | 11:0. Direct appeal not allowed. Majority opinion delivered by Chaskalson.                                                                                                                                                                              |
| Dissenting:   | None.                                                                                                                                                                                                                                                   |

The Amod case was the first of several cases regarding Islamic marriages not registered as civil marriages. During apartheid, Islamic marriages as such were deemed contrary to public order (because of their potentially polygamous nature) and therefore missing any legal significance.

<sup>117</sup> *Ibid.*, para. 163.

<sup>118</sup> *Ibid.*, para. 166.

<sup>119</sup> *Ibid.*, para. 168.

<sup>120</sup> *Ibid.*, paras 169-173.



Mrs. Amod had married her husband in accordance with Islamic law in 1987. They had not registered the marriage as a civil marriage in terms of the Civil Marriages Act. The couple had lived a married life since, the husband providing for the income. He died in 1993 following a traffic accident faulted by the other party.<sup>121</sup> As a spouse, Mrs. Amod would have been entitled to compensation under the Motor Vehicle Accidents Fund Act. The question was whether she had to be considered a spouse for legal purposes.<sup>122</sup>

The events in the case spanned three constitutional orders. The accident itself had occurred before even the interim Constitution was adopted. The action was instituted in the High Court during the interim Constitution, but was heard and decided after the 1996 Constitution had come into effect. In accordance with the 1996 Constitution, legal matters concerning facts which took place before its enactment had to be disposed of under the valid law of the time, unless it was in the interest of justice that the matter was dealt with in accordance with the 1996 Constitution.

Apartheid era precedents<sup>123</sup> determined that Islamic marriages were contrary to public order because of their potentially polygamous nature. Mrs. Amod claimed before the High Court that the line of reasoning was no longer valid. According to her, the case law had to be modified to comply with the Constitution which demands a development of law in accordance with its purpose, spirit and values and in particular the Bill of rights.<sup>124</sup>

The judge at the High Court reached the conclusion that in this case justice mandated the application of the 1996 Constitution.<sup>125</sup> Nevertheless, he ruled in disfavor of Mrs. Amod, finding that it was not up to judges, but merely the Parliament to change existing laws of parliament.<sup>126</sup> The appellant appealed for leave directly to the Constitutional Court<sup>127</sup> which was not granted.<sup>128</sup> The appellant appealed to the CCSA nevertheless. Hence, the CCSA had to decide whether it had jurisdiction and if there was simultaneous jurisdiction with the Supreme Court of Appeal whether the latter could definitely decide the case.<sup>129</sup>

President Chaskalson delivered the unanimous judgment. The High Court explicitly applied the current Constitution of 1996 in the interest of justice. Having decided the case as it did, Chaskalson questioned whether this interest of justice was actually served.<sup>130</sup> He also stated that the importance of the issue necessitated a decision

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121 *Amod v. Multilateral Motor Vehicle Accidents Fund*, Case CCT4/98, *supra* n. 47, para. 1

122 *Ibid.*, paras 2-3.

123 Supreme Court of Appeal of South Africa, *Suid-Afrikaanse Nasionale Trust en Assuransie Maatskappy Bpk (Santam) v Fondo 1960 (2) SA 467 (A Assuransie Maatskappy Bpk v. Fondo, 1960 (2) SA 467 (A). Ismail v. Ismail, 1983 (1) SA 1006 (A) supra* note 53.

124 *Amod v. Multilateral Motor Vehicle Accidents Fund*, Case CCT4/98, *supra* n. 47, para. 7.

125 *Ibid.*, para. 8.

126 *Ibid.*, para. 9.

127 *Ibid.*, para. 1.

128 *Ibid.*, para. 10.

129 *Ibid.*, para. 11.

130 *Ibid.*, para. 9.

by a higher court.<sup>131</sup> But the Supreme Court of Appeal should have first heard the case, therefore the direct leave to the CC was refused.<sup>132</sup>

While not disclosing any precise thoughts on the merits, Chaskalson did make very clear that the development of common law under the new democratic constitutional order may mandate deviations from earlier doctrines.<sup>133</sup> The Supreme Court of Appeal consequently decided that a *de facto* monogamous Muslim marriage had to be considered a marriage for the purposes of the Act and that there was no reason to deny Mrs. Amod her legal entitlements.<sup>134</sup>

4.6 Christian Education South Africa v Minister of Education [2000]

|               |                                                                                                                                                                                                 |
|---------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Essence:      | School Act disallows corporal punishment in all schools. For appellants, corporal punishment is essential for Christian education and they deem their freedom of religion and belief infringed. |
| Dimension:    | Freedom of religion and belief and education. Freedom of religion and belief and group autonomy. Balancing freedom of religion and belief with other rights.                                    |
| Lower courts: | Direct application to the CCSA denied. High Court found against the appellants. Direct appeal to the CCSA granted.                                                                              |
| Majority:     | 10:0. Upheld the Act. Majority opinion by Sachs.                                                                                                                                                |
| Dissenting:   | None.                                                                                                                                                                                           |

The appellant was an association of 196 independent schools. The parent body was established in the USA and had operated in South Africa since 1983. The member schools were dedicated to a Christian ethos and learning environment. The case was triggered by the new South African Schools Act, prohibiting corporal punishment in both public and private schools. For Christian Education, corporal punishment was an integral part of their Christian ethos. They considered the blanket prohibition a violation of their individual, parental and community rights to freely practice their religion and beliefs.<sup>135</sup>

After the Schools Act was adopted, the appellant sought direct access to the CCSA.<sup>136</sup> This was refused. They then applied to the High Court. The High Court judge, while not doubting the sincerity of the appellant's beliefs concerning corporal punishment, was not convinced that delegation to teachers was essential to the belief and that the ban interfered with the beliefs in a substantial way. The ban was con-

131 *Ibid.*, para. 14.

132 *Ibid.*

133 *Ibid.*, para. 31.

134 Supreme Court of Appeal of South Africa, *Amod v. Multilateral Motor Vehicle Accidents Fund*, (Commission for Gender Equality Intervening), 1999 (4) SA 1319 (SCA), 29 December 1999.

135 See *Christian Education South Africa v. Minister of Education*, Case CCT4/00, *supra* n. 113, para. 2.

136 CCSA, *Christian Education South Africa v. Minister of Education*, Case CT13398, 14 October 1998.

sidered justified to protect the dignity and security of children. The appellant applied for direct leave to the Constitutional Court which was granted.<sup>137</sup>

The central question before the Court was whether Parliament, by prohibiting corporal punishment, violated the rights of parents of children in independent schools who, in line with their religious convictions, had consented to the use of corporal punishment in school.<sup>138</sup> The Court unanimously answered this question in the negative, in a unanimous opinion delivered by Justice Sachs.

The appellant contended that corporal punishment was a vital aspect of the Christian religion. They drew on Bible verses referring to parental authority or corporal punishment independently or combined.<sup>139</sup> The respondent was the Minister of Education. While not doubting the sincerity of the belief of the appellant, he contended that granting an exception from the prohibition of corporal punishment, thereby enabling corporal punishment in private schools, would constitute a violation of constitutional rights of children. Hence, because the prohibition was necessary to protect constitutional rights, it could not at the same time be in violation of constitutional rights.<sup>140</sup>

According to Sachs, the constitutional values and interests involved in the case were partly overlapping, partly competing. The parents wished to live their lives and raise their children within a community according to their religious beliefs. The children were central to the conflicting rights. They were probably believers and part of the same community as their parents. Yet, they were also individuals and thus “entitled to the protections of [constitutional rights]”.<sup>141</sup>

Part of the dispute between the appellant and the respondent was about which section of the Constitution was applicable. Christian Education asserted that both Section 15 – which protects the individual freedom of religion and belief – as well as Section 31(1) – which guarantees *inter alia* collective rights – apply. The Constitution specifies that collective rights must be exercised in a manner consistent with the Bill of Rights. As the parents gave consent to corporal punishment of their children, this was the case, Christian Education asserted. Hence, any exemption had to be justified by a compelling state interest.<sup>142</sup>

According to respondent minister, the individual freedom was not applicable in this case. The collective rights, according to the government, were not infringed. Corporal punishment violated the constitutionally protected rights to equality and dignity. Therefore, corporal punishment could not be administered consistent with the Bill of Rights, even if consent had been given. If however, the minister asserted, there should indeed be an interference with the collective rights, this was reasonable and justified in an open and democratic society with the aim of protecting the rights of the children.<sup>143</sup>

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137 *Christian Education South Africa v. Minister of Education*, Case CCT4/00, *supra* n. 113, paras 6-7.

138 *See ibid.*, para. 8.

139 *Ibid.*, paras 4-5.

140 *See ibid.*, paras 8-14.

141 *Ibid.*, para. 15.

142 *Ibid.*, para. 16.

143 *Ibid.*, para. 17.

Referring to the quotation of the Canadian *BigM* case in *Lawrence* (see section 4.4) Sachs reiterated that the freedom of religion consists of the right to have a belief and the right to act in accordance with that belief. In many instances, these two cannot be separated, just as the individual and collective dimension can often not be separated.<sup>144</sup> He then thoroughly explored the relationship between individual and collective rights in South African constitutional law and international human rights law,<sup>145</sup> coming to the conclusion that the two are co-dependent. After all, individual rights – religious, cultural and linguistic – were annihilated if the community “dies whether through destruction or assimilation”. On the other hand, the community depended on individuals and thus on individual rights.<sup>146</sup>

“There are a number of other provisions designed to protect the rights of members of communities. [...] Taken together, they affirm the right of people to be who they are without being forced to subordinate themselves to the cultural and religious norms of others. Individuals and communities both enjoy the ‘right to be different’. In each case, space has been found for members of communities to depart from a general norm”. Larger communities could more easily rely on the legislative process than small communities. This was especially so if “they express their beliefs in a way that the majority regard as unusual, bizarre or even threatening”.<sup>147</sup>

For the purpose of the case at hand, Sachs, assumed two things, while explicitly mentioning that this was done without deciding. He assumed that both individual and collective rights were engaged, and that corporal punishment as practiced by the appellants was not *prima facie* contrary to the Bill of Rights (given that collective rights must be exercised consistent with the Bill of Rights).

Hence, this left the question to be considered whether the prohibition of corporal punishment was a reasonable and justifiable limitation of the protected rights.<sup>148</sup> The appellant’s position that the state needed to show a compelling interest relied on American “strict scrutiny” jurisprudence. The Court, however, rejected this. The strict scrutiny test had been rejected by the US Supreme Court itself in matters of religion.<sup>149</sup> But more importantly, under South African constitutional law a “nuanced and context-sensitive form of balancing is required”. As a general rule, the more serious the impact of the measure on the enjoyment of the right, the more persuasive or compelling the justification must be.<sup>150</sup>

Hence, the state must show whether the failure to accommodate Christian Education could be accepted as reasonable and justifiable in a democratic society, based on human dignity, freedom and equality.<sup>151</sup> In this regard, it must be taken into consideration that religion “is not just a question of belief or doctrine. It is part of

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144 *Ibid.*, paras 18-19.

145 *Ibid.*, paras 20-26.

146 *Ibid.*, para. 23.

147 *Ibid.*, paras 24-25.

148 *Ibid.*, para. 27.

149 See *ibid.*, para. 29, referring to US Supreme Court, *Employment Division, Department of Human Resources of Oregon et al. v. Smith et al.*, 494 US 872 (1990), 17 April 1990.

150 *Christian Education South Africa v. Minister of Education*, Case CCT4/00, *supra* n. 113, paras 29-31.

151 *Ibid.*, para. 32.

a way of life, of a people's temper and culture".<sup>152</sup> The balancing must combine two basic considerations: (1) believers have no automatic right to exemption, (2) where possible, it must be avoided to put believers in extremely painful and burdensome choices between respecting the law and the articles of their faith.<sup>153</sup>

The interference with the rights of the parents was far from trivial.<sup>154</sup> After all, they regarded corporal punishment as essential to their way of life and parenting. When they set up independent private schools in order to be able to educate their children in accordance with their beliefs and the state banned an integral element, this had a far-reaching impact. However, the ban did not preclude the parents from administering corporal punishment at home.<sup>155</sup>

The state relied, among other things, on its international law obligations (Convention on the Rights of the Child) and its general obligation to restrain violence and to prohibit corporal punishment. Only a general ban, without any exemptions could achieve such a goal.<sup>156</sup> Sachs noted that courts the world over had generally shown a certain solicitude for protecting children from potentially harmful religious practices. He cited the Canadian *P (D)* case<sup>157</sup> (see section I1.4.3) in this regard.<sup>158</sup>

While the state referred to the principle of equality in defense of the general ban, the Court noted that equality does not always mean treating everyone the same way, but treating everyone with equal concern and respect.<sup>159</sup> The Court found the argument that the international trend was to abolish corporal punishment in the educational system out of dignity concerns, much more convincing than the equality concern.

Not only with regard to schools but for state organs in general, there was a growing international consent amongst legislators and courts that corporal punishment of (juveniles) was degrading and contrary to universally recognized human rights. The states' concern regarding corporal punishment in schools was therefore mandated, also given the pre-constitutional history of state ordained violence in South Africa.<sup>160</sup> The purpose of a new legislative scheme for all schools was to "establish uniform educational standards" because "educational systems of a racist and grossly unequal character" had to be "integrated into one broad educational dispensation". The uniform prohibition of corporal punishment in all schools served this purpose: it was "deliberately designed to transform national civic consciousness in a major way".<sup>161</sup> Allowing for an exemption would seriously undermine this purpose.

Furthermore, providing for an exemption would put children in a vulnerable position, because it was difficult to monitor when corporal punishment exceeded a level deemed acceptable by parents and because parents would only be able to

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152 *Ibid.*, para. 33.

153 *Ibid.*, paras 34-35.

154 *Ibid.*, para. 37.

155 *Ibid.*, para. 38.

156 *Ibid.*, paras 39-40.

157 SCC, *P. (D.) v. S (C.)*, Case 22296, [1993] 4 SCR 141, 21 October 1993.

158 *Christian Education South Africa v. Minister of Education*, Case CCT4/00, *supra* n. 113, para. 41.

159 *Ibid.*, para. 42.

160 *Ibid.*, paras 43-47.

161 *Ibid.*, para. 50.

complain at the risk of angering the school and the community.<sup>162</sup> Sachs reiterated that he did not question the special meaning of corporal correction in school for the self-definition and ethos of a religious community. Yet, he believed that it was not unduly burdensome for the schools to accommodate themselves to the secular law. The parents were free to incorporate corporal correction at home. They were prevented from delegating this to teachers. Therefore, not providing for an exemption was not disproportional and the Act was constitutional.<sup>163</sup>

#### 4.7 Prince v President of the Cape Law Society and Others [2000 & 2002]

|               |                                                                                                                                                                            |
|---------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Essence:      | Conviction of an aspiring lawyer for the possession of marijuana. He is a practicing Rastafarian and the use of <i>ganja</i> is part of the practice of his religion.      |
| Dimension:    | Freedom of religion and belief and personal freedom. Freedom of religion and belief and group autonomy.                                                                    |
| Lower courts: | High Court and Supreme Court of Appeal found against Mr. Prince. In 2000 the CCSA unanimously ordered parties to submit additional evidence. Case was resubmitted in 2002. |
| Majority:     | 5:4. Found against Mr. Prince. Majority opinion by Chaskalson, Ackerman and Kriegler. Goldstone and Yacoob concurring.                                                     |
| Dissenting:   | Ngcobo. Mokgoro, Sachs and Madlanga concurring. Separate dissenting opinion by Sachs. Mokgoro concurring.                                                                  |

Mr. Prince was a Rastafari. Rastafarianism is an Afro-centric religion originating from Jamaica, which has followers all over the world including in South Africa. The use of cannabis, called *ganja* (or *dagga* in South Africa) is sacramental in Rastafarianism. Mr. Prince was a law school graduate, qualified to become an attorney. Only his prior convictions for cannabis possession stood in his way.<sup>164</sup> He challenged the refusal of the Law Society to register him in the High Court and then Supreme Court of Appeal. His constitutional challenge was directed against the absence of an exemption for religious purposes in the Drug Act.<sup>165</sup>

The case was brought before the CCSA twice. In the first proceedings at the CCSA in 2000, the Court unanimously ordered Mr. Prince to submit more information on cannabis use and its significance for his religion. The respondents in turn were ordered to submit evidence regarding the practical difficulties of granting an exemption for religious use and how the administration of such an exemption would differ from the existing exemption for medical and scientific purposes.<sup>166</sup> A good year later, the CCSA decided the merits based on the evidence submitted. A majority

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<sup>162</sup> *Ibid.*

<sup>163</sup> *Ibid.*, paras 50-51.

<sup>164</sup> See CCSA, *Prince v. President of the Cape Law Society and Others*, Case CCT36/00A, 12 December 2000, paras 1-5 and *Prince v. President of the Cape Law Society and Others*, Case CCT36/00B, 25 January 2002, paras 1-6.

<sup>165</sup> *Prince v. President of the Cape Law Society*, Case CCT36/00A, *supra* n. 164, para. 8.

<sup>166</sup> *Ibid.*, paras 10-18.

of five judges found against Mr. Prince. The majority opinion was authored by Chaskalson. Ackermann, Kriegler, Goldstone and Yacoob concurred. The minority opinion opening the judgment was authored by Ngcobo. Mokgoro, Sachs and Madlanga concurred with the minority opinion. Nevertheless, Sachs authored a separate dissenting opinion, with which Mokgoro concurred. Having lost his case at the CCSA, Mr. Prince pursued a human rights claim at the African Human Rights Commission and the UN Human Rights Committee, albeit without success.<sup>167</sup>

Ngcobo's minority opinion began by stating that Rastafarianism was undisputedly protected by the freedom of religion and belief. Rastafarians in South Africa were not centrally organized, but formed several independent communities. Additionally, they could be members of a House of Rastafari (i.e. denomination). Recently, the Rastafari National Council had been formed to advocate common interests. The lack of formal and hierarchical structures was inherent in the religious doctrine of the Rastafari.<sup>168</sup>

The Rastafari follow the Nazarene Code, according to which cannabis is central to collective rituals and ceremonies as well as to individual mediation. Cannabis itself has a sacramental status, being the "holy herb" provided to man by God for spiritual and physical healing and to come closer to God. Being purists, the Rastafari were prohibited from using all other intoxicants such as liquor, tobacco or (street) drugs. Mr. Prince was a practicing Rastafari. He wore dreadlocks, performed all rituals, observed religious ceremonies, and he consumed cannabis as part of rituals and ceremonies and at home.<sup>169</sup>

Mr. Prince did not challenge the prohibition of cannabis as such, but the absence of an exemption for religious use. This, he claimed, violated the Constitution. The government accepted that the general prohibition limited the freedom of religion and belief of those who used cannabis for *bona fide* religious purposes. Yet, they argued, the limitation was justified. In addition, they contended that any exemption would be impossible to administer. Ngcobo, however, noted that the evidence submitted in this regard related to the smoking of cannabis and not all the other uses common for Rastafari.<sup>170</sup>

Hence, the Court had to consider whether the prohibition was too broad as Mr. Prince suggested, or proportionate as the government asserted.<sup>171</sup> This required determining whether goals of the prohibition could have been achieved by less limiting means.<sup>172</sup> The freedom of religion and belief could be impaired when the law forced people to act contrary to their religious beliefs.<sup>173</sup> As the prohibition forced Rastafari believers to choose between following their religion or the law, it manifestly limited their right to practice their religion. Such a limitation had to be

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167 African Commission on Human and People's Rights, *Prince v. South Africa*, Communication no. 255/2002, 7 December 2004 and UN Human Rights Committee, *Prince v. South Africa*, Communication no. 1474/2006, 14 November 2007.

168 CCSA, *Prince v. President of the Cape Law Society*, Case CCT36/00B, *supra* n. 164, paras 15-16.

169 *Ibid.*, paras 17-21.

170 *Ibid.*, paras 27-28.

171 *Ibid.*, para. 29.

172 *Ibid.*, para. 36.

173 *Ibid.*, para. 38.



justified.<sup>174</sup> In Ngcobo's view, the central question was whether an exemption would undermine the overall purpose of the general prohibition.<sup>175</sup>

Ngcobo dismissed the government's questioning of the centrality of cannabis to Rastafari beliefs and the sincerity of Mr. Prince. The evidence supported that Mr. Prince was a *bona fide* Rastafari and the use of cannabis was central to Rastafarianism.<sup>176</sup> Sacred beliefs central to a faith may seem "bizarre, illogical or irrational to others or are incapable of scientific proof". Nevertheless, they were beliefs protected by constitutional rights. "Believers should not be put to the proof of their beliefs or faith". It was "undesirable for courts to enter into the debate whether a particular practice is central to a religion unless there is a genuine dispute as to the centrality of the practice".<sup>177</sup>

The limitation was required to be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. This required balancing the state interests and the rights of the individual. In this case, the government interests were: (1) the importance of the limitation; (2) the relationship between limitation and underlying purpose; (3) the impact of a possible exemption for the overall purpose. The applicant's interest consisted of (1) the nature and importance of his rights in an open and democratic society; 2) the importance of cannabis to Rastafari practice; (3) the impact of the limitation on the right and on the practice.<sup>178</sup>

Freedom of religion was closely related to the recognition and protection of diversity and was "one of the most important human rights". Protection of diversity was required by human dignity which was a central constitutional value of South Africa. The dignity of the Rastafari was at stake because the law did not distinguish between religious use and drug abusers. The effect was that "in the eyes of the legal system all Rastafari are criminals. The stigma thus attached is manifest." For Mr. Prince, the consequences were even worse: "He is now prevented from practicing the profession of his choice." This was "a palpable invasion of their dignity", saying that "their religion is not worthy of protection. The impact of the limitation is profound indeed."<sup>179</sup> In the minority's opinion, the blanket ban which made no distinction between sacramental and recreational use of cannabis was unconstitutional.<sup>180</sup>

Ngcobo accepted that given the effects of drug abuse and related crimes, the prohibition served a pressing social need. But an exemption was reconcilable with this.<sup>181</sup> Allowing for limited and controlled religious use in small quantities, would reconcile the rights of the Rastafari and the overall purpose of the Drug Act. For example, priests could be licensed to grow it and administer its use.<sup>182</sup> A neatly tailored exemption should be worked out by Parliament. It would not automatically

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174 *Ibid.*, para. 44.

175 *Ibid.*, para. 47.

176 *Ibid.*, para. 42.

177 *Ibid.*, para. 42.

178 *Ibid.*, paras 45-46.

179 *Ibid.*, paras 48-51.

180 *Ibid.*, paras 77-82.

181 *Ibid.*, paras 52-53.

182 *Ibid.*, paras 55-70.

violate the international obligations of South Africa, as the majority stated.<sup>183</sup> Relying on *Christian Education* (see section II.4.6), Ngcobo reminded us that religious communities must also accommodate general society as much as society must accommodate them. Nevertheless, the opinion suspended the invalidity for 12 months for the government to work out a closely knit exemption.<sup>184</sup>

Chaskalson's majority opinion expressed agreement with Ngcobo's analysis of the facts – the finding that Rastafari was a religion whose practices were entrenched by the Drug Act.<sup>185</sup> However, he disagreed that the Constitution obliged an exemption for Rastafari.<sup>186</sup> They also disagreed that an exemption was reconcilable with the purposes of the Act.<sup>187</sup> The difference between harmful and non-harmful use was not the sacramental or recreational nature of the use, but the quantity and intensity of use.<sup>188</sup>

Citing the (in)famous US Supreme Court *Smith* case,<sup>189</sup> the majority argued that the freedom of religion and belief did not entitle a believer to automatic exemption to comply with an otherwise valid neutral law.<sup>190</sup> However, they did admit that the minority's approach in *Smith* was more consistent with South African constitutional law. This approach sought to reconcile the general prohibition of drugs and the use of *peyote* (a natural and traditional hallucinogen) by the Native American Church. But according to Chaskalson, the major difference between *peyote* in *Smith* and cannabis, was that the latter was also used as a recreational drug by the mainstream. This, in turn, made it impossible for the authorities to distinguish between recreational and religious use and acquisition.<sup>191</sup>

An exemption was unworkable, according to the majority, also because international obligations prevented it. A system parallel to that for medical use would not work because of the loose organizational structures of the Rastafari community. Also, such a system would require the authorities to establish when *bona fide* Rastafari use was at stake and when it was not. This was inconsistent with the freedom of religion and belief.<sup>192</sup> Even if the exemption only included non-smoking use of cannabis, the very possession by Rastafarians would still undermine the purpose of the general prohibition. Because of the impossibility of any realistic exemption which could serve the needs of the Rastafari religion, the majority found that the limitation was reasonable and justified.<sup>193</sup>

Sachs in his separate opinion, concurring with Ngcobo, began by noting that intolerance comes in many forms, not just those intended to stigmatize and exclude. The criminalization of cannabis was not directed against the Rastafari, but the effect was the same as if they were singled out: they were forced to make an intolerable

183 *Ibid.*, paras 70-72.

184 *Ibid.*, paras 83-90.

185 *Ibid.*, para. 97.

186 *Ibid.*, para. 111.

187 *Ibid.*, para. 114.

188 *Ibid.*, para. 118.

189 *Department of Human Resources of Oregon v. Smith*, 494 US 872 (1990), *supra* n. 149.

190 *Prince v. President of the Cape Law Society*, Case CCT36/00B, *supra* n. 164, para. 121.

191 *Ibid.*, paras 128-130.

192 *Ibid.*, paras 131-138.

193 *Ibid.*, paras 139-142.

choice between their faith and the law. Also, the effect for Mr. Prince and possibly others was that they might not be able to exercise the profession of their choice, because they had come into conflict with the law.<sup>194</sup> By ruling out an exemption, however neatly tailored, the majority subjected the Rastafari to a continual choice between their faith and the law. Exemptions may be inconvenient, yet required by the “basic notion of tolerance and respect for diversity that our Constitution demands”. A modest exemption as proposed by Ngcobo, would still be a “meaningful measure of dignity and recognition”. “The fact that they cannot be given all that they ask for is not a reason for giving them nothing at all.”<sup>195</sup>

Fully agreeing with Ngcobo, Sachs added some observations. He highlighted the origins of Rastafarianism as a spiritual movement of the African *Diaspora* informed by the history of cultural alienation and suppression. Cannabis was used for mystical communion with the universe, which revived use in (ancient) African cultures. This was crushed by the general prohibition of cannabis.<sup>196</sup>

The South African sensitivity to careful balancing and proportionality must lead to a rejection of the *Smith* precedent (see above). The Constitution required “maximum harmonization” of competing interests on a “principled yet nuanced and flexible case-by case basis”. This required a central role for courts with a heavy responsibility. “Undue judicial adventurism can be as damaging as excessive judicial timidity. [...] Both extremes need to be avoided.”<sup>197</sup> The constitutional organs must lead the way in putting oneself in the other’s shoes.<sup>198</sup>

Sachs noted that mainstream society and the Rastafarians were mutually distrustful of one another. The Rastafari cultivated withdrawal from mainstream society was seen as the corrupt “Babylon system”. The mainstream, including the state, saw the Rastafari as defiant outsiders, distinct in looks, dress and rituals. The *Prince* case could create change towards mutual recognition and respect.<sup>199</sup> Religious tolerance was important “because religion and belief matter, and because living in an open society matters”.<sup>200</sup> Reminding the others of the unanimous ruling in *Christian Education*, Sachs closed by stating that tolerance was not accepting the easily acceptable, but respecting what was “unusual, bizarre or even threatening”.<sup>201</sup>

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194 *Ibid.*, para. 145.

195 *Ibid.*, paras 147-148.

196 *Ibid.*, paras 151-154.

197 *Ibid.*, paras 155-156.

198 *Ibid.*, para. 157.

199 *Ibid.*, paras 161-162.

200 *Ibid.*, paras 164-170.

201 *Ibid.*, para. 172.

## 4.8 Daniels v Campbell NO and Others [2004]

|               |                                                                                                                                                                                                                                    |
|---------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Essence:      | Inheritance rights of a widow in an Islamic marriage not registered as civil marriage.                                                                                                                                             |
| Dimension:    | Freedom of religion and belief and family law and family relations. Freedom of religion and belief and secularism.                                                                                                                 |
| Lower courts: | High Court found in favor Mrs. Daniels, although finding her marriage not legally valid. Direct leave to CCSA granted.                                                                                                             |
| Majority:     | 10:0. Challenged Act unconstitutional. 8:2. Remedy was interpreting Act to include partners in Muslim marriage. Separate majority opinions by Sachs and Ngcobo, concurring with one another. Six others also concurring with both. |
| Dissenting:   | Partly dissenting opinion by Moseneke. Mandla concurring. Rejecting remedy proposed.                                                                                                                                               |

Mrs. Daniels married her husband by Muslim rites in 1977. Their (monogamous) marriage was never registered under the Marriage Act. The husband passed away in 1994. The main asset in the estate was a house in which the appellant had resided since 1969 even prior to her marriage. When being told that she could not inherit from her husband, because she was not a “surviving spouse” due to the fact that their marriage had not been a civil law marriage, Mrs. Daniels asked the High Court to declare that she was a “surviving spouse”. Alternatively, she asked it to declare that the Intestate Succession Act and the Surviving Spouse Act be declared unconstitutional for discriminating against Muslim marriage.<sup>202</sup>

The High Court found Muslim marriages to have no legal consequence since they were potentially polygamous and thus contrary to public policy. To be valid as marriages, they had to be registered in terms of the Marriage Act.<sup>203</sup> However, the High Court judge also found that this situation denied the appellant a proper remedy in accordance with constitutional rights. Thus, as a remedy, the High Court read into the challenged Acts that “surviving spouse” would include spouses of *de facto* monogamous Muslim marriages, as long as the South African legislature had not taken measures to assure the equal treatment of Muslim spouses.<sup>204</sup> The appellant nevertheless requested direct leave to the CCSA which was granted.

At the CCSA, Mrs. Daniels argued that any interpretation of the word “spouse” which excluded parties to a Muslim marriage resulted in unfair discrimination on the grounds of marital status, religious practices and culture, and violated the right to dignity. The Minister supported the High Court order. The executors contended that “spouse” did not include parties to a Muslim marriage and that this was no unfair discrimination, as imams could be registered as marriage officers under the Marriage Act.<sup>205</sup>

202 *Daniels v. Campbell NO and Others*, Case CCT40/03, *supra* n. 48, paras 2-8.

203 *Ibid.*, para. 9.

204 *Ibid.*, paras 11-12.

205 *Ibid.*, paras 16-17.

A unanimous Court of judges found in favor of the appellant. Sachs authored a majority opinion with which Chaskalson, Langa, Ackermann, Mokgoro, Ngcobo, O'Regan, and Yacoob, concurred. However, Ngcobo also authored a separate opinion with which Sachs and the other six concurred. A partly dissenting opinion was delivered by Mosenke, with Mandla concurring. They disagreed with the remedy proposed by the majority.

Sachs noted that from a linguistic point of view, including the spouses in a Muslim marriage made more sense than exclusion. The exclusion of Muslim couples from the meaning was the result of a culturally and racially hegemonic appropriation of the term. In the apartheid era, Muslim marriages were intentionally discriminated against, sanctioned by courts. The present constitutional order, however, represented a break with this past. The Constitution had initiated a "spirit of transition and transformation". It was this spirit which pointed to a "broad and inclusive" meaning of the word spouse under the challenged Acts, which coincided with the ordinary linguistic meaning.<sup>206</sup>

Including the spouses of Muslim marriages under the Acts was further reinforced by a contextual analysis of the challenged Acts themselves. Their purpose was to provide relief to widows, left vulnerable after their husbands' passing. Although the Acts were gender-neutral, their substantive provisions were mostly favorable to women, which was consistent with the constitutional goal of substantive gender equality. Mrs. Daniels was illiterate and poor. She and her husband had lived simple lives, in which discussing legal matters or being advised therein, like drafting wills or inheritance, had no role. The Acts were designed to leave widows with the continued means to a livelihood. In light of this, there was no good reason to exclude a widow just because the marriage had not been solemnized under the Marriage Act.<sup>207</sup>

This was also the line of reasoning in *Arnod*<sup>208</sup> (see section 5.4.5), Sachs noted. Extending legal protection to marriages conducted under one faith or philosophy while excluding others, was unconstitutional. In *Arnod*, the Court also held that the possibility of registration for Muslim marriages, was irrelevant for the purpose of awarding legal protection. What mattered was whether the deceased was under a legal obligation to support the surviving spouse.<sup>209</sup> On the other hand, extending the application of the Act to spouses in a Muslim marriage, did not imply validity of Muslim marriages for all legal purposes. Hence, the constitutional values could be upheld without interfering with parliamentary jurisdiction regarding recognition of religious family law and/or marriages. Sachs also noted that many contemporary statutes explicitly included parties to Muslim unions, while the challenged Acts, however, were lastly amended before the constitutional era.<sup>210</sup>

In the High Court, the judge had also interpreted CCSA case law concerning (unmarried) same-sex partners. According to Sachs, however, the analogy was faulted because (pre-*Fourie*, see section I2.4.10) same-sex couples could not marry. But the

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206 *Ibid.*, paras 19-21.

207 *Ibid.*, paras 22-23.

208 *Amod v. Multilateral Motor Vehicle Accidents Fund*, Case CCT 4/98, *supra* n. 47.

209 See *Daniels v. Campbell NO and Others*, Case CCT40/03, *supra* n. 48, paras 24-25.

210 *Ibid.*, paras 26-27.

partners in a Muslim marriage fell under the ordinary meaning of “spouse”.<sup>211</sup> Having established that, it was not necessary to look into the fact that the imam performing Muslim weddings could register as a marriage officer. As Mrs. Daniel’s marriage had been *de facto* monogamous, the Court did not have to look into polygamous Muslim marriages. Summarizing, the Acts must be interpreted to include a party to a monogamous Muslim marriage under the term “spouse”.<sup>212</sup>

Ngcobo’s separate concurring opinion dealt with two further aspects of Sachs’ opinion – the constitutional context and the case law regarding same-sex couples. This was possibly triggered by the partial dissent (see below). In regard to the constitutional context, he re-emphasized that the constitutional values required the interpretative injunction to break with the racist past.<sup>213</sup> During apartheid, courts had abided by or even openly supported the racially, culturally and religiously hegemonic philosophy.<sup>214</sup> This had led to discrimination against Blacks and other “non-European” South Africans as people, but also against their laws, customs, traditions, religions and culture at large.<sup>215</sup>

The infamous judgments dealing with Muslim marriages, such as *Seedat’s Executors and Ismael*,<sup>216</sup> were informed by this. They considered Muslim marriage as repugnant to the dominant cultures of the time in the Netherlands and England.<sup>217</sup> The new constitutional order rejected demands for equal worth and equality of all South Africans. In accordance with this foundation, a spouse must be given a meaning “consistent with the foundational values of human dignity, equality and freedom”. Hence, Ngcobo agreed with Sachs that “spouse” in the challenged Acts must be read to include the partners to a Muslim union.<sup>218</sup> He also agreed with Sachs that the difference with the same-sex precedents was the fact that in those cases, the partners were not married at all. Hence, the cases did not preclude the construction of spouse to include parties married by Muslim rites.<sup>219</sup>

Moseneke and Madala agreed with the majority that an exclusivist reading of “spouse” violated the equality and equal dignity of spouses in a Muslim marriage.<sup>220</sup> Moseneke noted that the non-recognition in common law of Islamic marriages<sup>221</sup> was a constitutional anachronism. It was informed by racism, bigotry and prejudice. Yet, the restrictive common law interpretation was not the issue. The break with the past did not mandate reading an inclusive meaning into the challenged Acts.<sup>222</sup>

211 *Ibid.*, para. 30.

212 *Ibid.*, paras 35-39.

213 *Ibid.*, paras 42-48.

214 See *Daniels v. Campbell NO and Others*, Case CCT40/03, *supra* n. 48, para. 50, quoting Appellate Division Cape Town, *Moller v. Keimoes School Committee and Another*, 1911 AD 635.

215 *Daniels v. Campbell NO and Others*, Case CCT40/03, *supra* n. 48, para. 51.

216 *Seedat’s Executors v. The Master (Natal)*, 1917 AD 302; and *Ismail v. Ismail*, 1983 (1) SA 1006 (A), *supra* notes 52 and 53.

217 *Daniels v. Campbell NO and Others*, Case CCT40/03, *supra* n. 48, para. 51.

218 *Ibid.*, paras 54-56.

219 *Ibid.*, paras 60-63.

220 *Ibid.*, para 67.

221 *Ibid.*, para 69.

222 *Ibid.*, paras 74-79.

Moseneke and Madala argued that the Court must find invalidity as opposed to interpreting anew in compliance with the Bill of Rights.<sup>223</sup> They thus disagreed with the remedy of the majority.

“Spouse”, in Moseneke’s opinion, had no “ordinary” meaning as the majority suggested. It had purely a legal meaning as far as it was used in law.<sup>224</sup> In South African law, it referred to people married in accordance with the Marriage Act. This had been affirmed by the CCSA in the aforementioned same-sex partnership cases.<sup>225</sup> A Court could not therefore read partner in a Muslim union into “spouse” without violating *stare decisis*. Furthermore, the reasoning of the majority undid the equality jurisprudence in relation to same-sex couples.<sup>226</sup>

The challenged Acts withheld from Muslim widows the economic protection enjoyed by widows of other faiths and secular civil marriages, and recently customary unions. This was unfair discrimination which had to be taken away by a proper recognition of Muslim marriages through law. As this legislation had yet to be enacted, the relief proposed by Moseneke in the meantime was a precisely defined, tailored “reading in”, limited in time until proper legislation was enacted.<sup>227</sup>

#### 4.9 Volks NO v Robinson and Others [2005]

|               |                                                                                                                                                      |
|---------------|------------------------------------------------------------------------------------------------------------------------------------------------------|
| Essence:      | Inheritance rights of a remaining life partner after the primary provider deceased.                                                                  |
| Dimension:    | Freedom of religion and belief and family law and family relations.                                                                                  |
| Lower courts: | High Court ruled in favor of surviving partner. Distinction between married and unmarried survivors is unconstitutional.                             |
| Majority:     | 7:3. Act is constitutional. Majority opinion by Skweyiya, six others concurring. Separate concurring opinion by Ngcobo, rest of majority concurring. |
| Dissenting:   | Joint dissenting opinion by Mokgoro and O'Regan. Separate dissenting opinion by Sachs.                                                               |

Mrs. Robinson was the surviving partner following the death of Mr. Shandling, her partner of 16 years. They had lived together, him providing the main income as a lawyer, she working as a freelance journalist and artist, while also running the household. She cared for him in times when due to his bipolar disorder he needed care. Shandling was a divorcee with two children from his prior marriage. He had been strong minded about not marrying again. His will provided that Mrs. Robinson and others inherit.<sup>228</sup>

223 *Ibid.*, para 83.

224 *Ibid.*, paras 85-89.

225 *Ibid.*, paras 91-92.

226 *Ibid.*, paras 102-103.

227 *Ibid.*, paras 106-108.

228 CCSA, *Volks v. Robinson*, Case CCT12/04, 25 February 2005, paras 1-19.



Subsequent to Mr. Shandling's death, Mrs. Robinson sought advice from the Women's Legal Center about her rights as a surviving life partner. The High Court decided the challenged Act was unconstitutional for excluding life partners. The executor, a partner in Shandling's firm, first appealed and then withdrew the appeal. Yet, as the CCSA had not been informed in time it decided nevertheless.<sup>229</sup> A majority of seven judges decided that the Act was constitutional. Skweyiya wrote the majority judgment with which Chaskalson, Langa, Moseneke, Ngcobo, Van der Westhuizen and Yacoob, concurred. Ngcobo also wrote a separate opinion with which the other judges of the majority concurred. Two dissenting judges, Mokgoro and O'Regan, authored a joint opinion. There was a separate dissenting opinion by Sachs.

The case was not about the enjoyment of freedom of religion and belief as such, but about the question whether or not an inheritance Act may legally exclude survivors of life partnerships. The religious significance of marriage played an important role,<sup>230</sup> as did the belief to adhere to the institution of marriage while being in a committed relationship.<sup>231</sup> The majority was convinced that the challenged Act intended to define marriage as a union recognized by religion and/or law. Interpreting the Act to include life partnerships would unduly strain it.<sup>232</sup> The exclusion, admitted the majority, may amount to discrimination, but the discrimination was justified given the religious and social importance of marriage. Also, for married couples, the law fixed rights and responsibilities, while for unmarried couples all rights and responsibilities were open to agreement.<sup>233</sup>

The majority took issue with Sachs' comparison of marriage with long-lasting committed life partnerships. Even in such cases, the difference was much more than just a "piece of paper". But like Sachs, they had sympathy for surviving life partners who would end up economically vulnerable because the deceased partner had refused to marry them in spite of the sacrifice made and the support given by the survivor.<sup>234</sup> Nevertheless, the distinction between married and non-married couples was neither unfair nor violative of dignity. The plight of vulnerable women in life partnerships, argued the majority, could be served in other ways rather than declaring the challenged Act unconstitutional.<sup>235</sup>

Ngcobo separately concurred with the majority. He argued that the distinction the Act made followed from the recognition of marriage as a special institution in the Constitution and international law. The Constitution explicitly mandated the recognition of traditional and religious marriage. By giving a special status to marriage, one had to set it apart from other relationships. Hence, the discrimination was not unfair. The purpose of the Act was not unfair discrimination against survivors of permanent life partnerships. It merely did not regulate them.<sup>236</sup> Marriage, said Ngcobo, was a conscious choice, among other things, to accept all the legal conse-

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229 *Ibid.*, paras 20-26.

230 *Ibid.*, para. 20.

231 *Ibid.*, para. 15.

232 *Ibid.*, paras 41 and 45.

233 *Ibid.*, paras 50-54.

234 *Ibid.*, paras 55-56.

235 *Ibid.*, paras 60-68.

236 *Ibid.*, paras 76-88.

quences. It was therefore more than a piece of paper. Posthumously imposing the marriage regime onto someone, who, one must assume, had made a conscious choice not to marry, may be violative of their dignity. It would undermine the right to freely marry and amount to the imposition of the will of one on another.<sup>237</sup>

In their dissenting opinion, O'Reagan and Mokgoro expressed their agreement with Sachs.<sup>238</sup> They pointed to the evolution of South African marriage law, which once discriminated against marriages solemnized under African traditional, Islamic and Hindu law, which had been changed by the Constitution. They also pointed to the fact that common law marriage, like many traditional and religious marriage institutions, discriminated on the basis of gender and sex.<sup>239</sup> The common law privileged civil marriage and religious marriage performed in accordance with the Marriage Act. The law regulated the duties of marriage, the property, the home, and the children born in a marriage. Only in some cases did the law regulate these issues for other relationships.<sup>240</sup> Hence, if this privilege was not unfair discrimination against life partnerships, then "marriage will inevitably remain privileged"; this while many life partnerships played a very similar role in society to marriages.<sup>241</sup>

The two judges established the unfairness of the discrimination through three factors. First, the position of the complainants. Surviving partners of life partnerships were more vulnerable than other surviving partners, exactly because of the lack of legal regulation. Second, the nature of the provision. It was aimed at regulating only the cases of those surviving partners who were married. Third, the effect of the discrimination. Through the lack of legal regulation, they may end up empty-handed after their partner had passed notwithstanding their commitment to support and sacrifice.<sup>242</sup> They also established that the unfair discrimination was not reasonable and was without justification. The distinction rested solely on "the religious attributes of marriage". "While marriage plays an important role in our society, and most religions cherish it, the Constitution does not permit rights to be limited solely to advance a particular religious perspective."<sup>243</sup>

Emphasizing that their findings were limited to those life partnerships which stood the test of certain criteria making them similar to marriage, O'Reagan and Mokgoro concluded that the Act was unconstitutional. They suspended their order to read the narrow category of life partnerships into the Act, so Parliament could take action first. They noted in this regard that such regulation need not be exactly like the regulation of marriages. As for Mrs. Robinson's case, they concluded that the will had provided her with enough to inherit, so that she was no longer vulnerable.<sup>244</sup>

Dissenting Justice Sachs drew attention to the "matrix made up of varied historical, social, moral and cultural ingredients". In cases like this one, these factors

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237 *Ibid.*, paras 90-96.

238 *Ibid.*, para. 98.

239 *Ibid.*, paras 107-109.

240 *Ibid.*, paras 112-116.

241 *Ibid.*, paras 118 and 122.

242 *Ibid.*, paras 126-132.

243 *Ibid.*, para. 136.

244 *Ibid.*, paras 140, 139 and 141-142.

influenced the legal considerations on an invisible level and led to legal positions based on “unarticulated philosophical positions”. He believed that the common law status of the relationship during the lifetime of the deceased should not determine the rights of the survivor. Rather, the survivor’s rights should be looked at in a situational way, which was more in line with the development of family law in the new constitutional era.<sup>245</sup>

Drawing on Canadian jurisprudence, Sachs advocated a “balanced, flexible and nuanced approach” which would respect the choices people make on alternative lifestyles.<sup>246</sup> In the decontextualized approach a “survivor of an empty shell marriage” was protected, while the “survivor of a caring and committed life partnership” was not. This was unfair, Sachs argued. While racism wore “subtle masks”, sexism and patriarchy were more “culturally and socially normal” thus more “legally invisible” and hence more difficult to be exposed.<sup>247</sup> In order not to fall for these invisible traps, he argued for a functional approach to family rather than a reinterpretation of the legal definition of marriage. Where marriage was regulated by general laws, the response to cohabitation needed to be circumstantial, taking into account factors such as time period, seriousness of the commitment, and the presence of children. Yet in the case of marriage, a dichotomy remained: a couple was either married or they were not; circumstances were irrelevant.<sup>248</sup>

Sachs related the functional approach to the new legal landscape mandated by the Constitution, which emphasized tolerance towards difference and concern for human dignity. Recalling *Daniels* (section I2.4.8), he pointed to the value of non-sexism which required a hard look at law and legally backed practices.<sup>249</sup> The past’s “Calvinistic and conservative atmosphere” in which cohabitation was condemned or judged, should no longer inform the law of the constitutional era. The current institutions must not be bound by the original intent of pre-constitutional legislators.<sup>250</sup> Sachs noted that when the Constitution was adopted, most inequalities connected to being married had been eliminated. Hence, the main purpose of the discrimination on marital status was to protect people who were “vulnerable not because they were married, but because they were not married”. “The obvious classes of people requiring protection against unfair discrimination in this category would be single parents, divorcees, widows, gay and lesbian couples and cohabitants.”<sup>251</sup>

Sachs stressed that the value given to marriage by cultural and religious communities as a sacred institution was not the issue in this case. Based on their freedom of religion and belief, these groups also retained a right to “condemn those who are guilty of what they may regard as fornication and adultery”. But their beliefs could not be considered a source of the law. South African history also taught why marriage deserved special protection. Like the other dissenters, he noted the history of discrim-

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245 *Ibid.*, paras 147-149 and 151.

246 *Ibid.*, paras 156-157.

247 *Ibid.*, paras 162-163.

248 *Ibid.*, paras 169-174 and 179.

249 *Ibid.*, paras 181 and 186.

250 *Ibid.*, para. 189.

251 *Ibid.*, para. 200.

ination against African traditional, Muslim and Hindu marriage. But protection of marriages did not require the protection to be exclusive to marriages.<sup>252</sup>

Returning to the case at hand, Sachs argued that the Act should apply to cohabitation if the couple freely and seriously had committed themselves to a life of co-dependence financially, materially, and emotionally.<sup>253</sup> He also believed it should apply if this followed from the “nature of the particular life partnership”. “The critical factor” being whether the (materially) weaker party depended to a great degree on the (materially) more potent party.<sup>254</sup> Whether or not Mrs. Robinson actually sought marriage and Mr. Shandling refused it, there was a direct link between their relationship and her current need. Excluding her from inheritance just because their relationship was not a marriage was “socially harsh and legally unfair”.<sup>255</sup>

If the survivor’s continued economic well-being was threatened by the passing of the partner, this affected her equal dignity. Constitutional law must convert misfortune to be endured into injustice to be remedied. By failing to do so, the Act discriminated against the “powerless and economically dependent party”.<sup>256</sup> On the other hand, if people could rely on the law to provide basic justice, this could help to overcome fatalism and helplessness. According to Sachs, the message that people must take responsibility for their lives was important, as was the acknowledgment that “the law cannot ignore the fact that lack of resources has left many women with harsh options only”.<sup>257</sup>

The blanket exclusion of life partnerships from the challenged Act was unfair and thus unconstitutional. It sent a message that such relationships were somehow unworthy of protection. Considering that there was no justification, the Act was unconstitutional.<sup>258</sup> Sachs proposed suspending the invalidity for two years so that Parliament could complete the process of regulating unrecognized relationships. He also concluded that Mrs. Robinson required no more remedies, because the will had sufficiently provided for her continued economic security.<sup>259</sup>

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252 *Ibid.*, paras 204 and 206-208.

253 *Ibid.*, para 214.

254 *Ibid.*, para 218.

255 *Ibid.*, paras 219-220.

256 *Ibid.*, paras 221-222.

257 *Ibid.*, paras 224-225.

258 *Ibid.*, paras 226-236.

259 *Ibid.*, paras 237-242.

4.10 Minister of Home Affairs and Another v Fourie and Another; Lesbian and Gay Equality Project and Others v Minister of Justice and Constitutional Development, [2005]

|               |                                                                                                                                           |
|---------------|-------------------------------------------------------------------------------------------------------------------------------------------|
| Essence:      | Right of same-sex couples to get married.                                                                                                 |
| Dimension:    | Freedom of religion and belief and family law and family relations. Freedom of religion and belief and secularism.                        |
| Lower courts: | High Court ruled against the couple. Supreme Court of Appeal ruled in favor. Impossibility of marriage is unconstitutional.               |
| Majority:     | 9:0: Act is unconstitutional. 8:1 Majority suspension of declaration of unconstitutionality allow legislation. Majority opinion by Sachs. |
| Dissenting:   | O'Reagan, regarding the remedy.                                                                                                           |

Mrs. Fourie and Mrs. Bonthuys had been a couple for more than a decade and wanted to get married. In 2002, they asked the Pretoria High Court to declare that they had a constitutional right to marry.<sup>260</sup> Two years later, while the Fourie case was being heard in the Supreme Court of Appeal (SCA), the Lesbian and Gay Equality Project (hereafter Equality Project) launched an application in the Johannesburg High Court challenging the Marriage Act for excluding same-sex couples.<sup>261</sup> The judgment combined two cases.

In the *Fourie* case (first challenge), the High Court judge ruled against the couple and did not grant a direct leave to the Constitutional Court, but did grant leave to the SCA. When the couple approached the CCSA anyway, the Court affirmed that the case first had to be heard by the SCA.<sup>262</sup> The SCA ruled in favor of the couple, although the majority and the minority differed on the immediate remedy.<sup>263</sup> The CCSA combined the hearing of the *Fourie* case with that of the Equality Project (second challenge).<sup>264</sup>

A unanimous CCSA decided in favor of the couple and the Equality Project. However, Justice O'Reagan disagreed with the remedy. She would not have suspended the ruling. Justice Sachs authored the majority opinion with seven other justices – Langa, Moseneke, Mokgoro, Ngcobo, Skweyiya, Van der Westhuizen and Yacoob – concurring.

The Minister, being the opposing party in the case, argued that the Constitution did not protect the right to marry, but the right to establish family life.<sup>265</sup> The majority agreed with the Minister that the text of the Constitution did not include an explicit reference to the right to marry. However, this did not mean that the Constitution did not protect the right to marry and with the “concomitant right to

260 *Minister of Home Affairs and Another v. Fourie (et al.)*, Cases CCT60/04 and CCT10/05, *supra* n. 45, para. 1.

261 *Ibid.*, para. 34.

262 *Ibid.*, paras 7-9.

263 *Ibid.*, paras 12-32.

264 *Ibid.*, paras 34-44.

265 *Ibid.*, para. 46.

be treated equally and with dignity in the exercise of that right". The exclusion of same-sex couples from marriage, according to the CCSA, must be evaluated in light of the meaning given to privacy, equality and dignity by the Court in earlier cases concerning same-sex couples.<sup>266</sup> Sachs drew attention to the considerations in these cases of the heavy impact for LGBTQ+ people and same-sex partnerships of discrimination and social exclusion.<sup>267</sup>

Sachs approached the question of sexual orientation, freedom, and equality, from the angle of the right to be different. The right entailed in this context: (1) that no one family form may be entrenched as the only legally and socially acceptable one; (2) the acknowledgment of the history of persecution and exclusion of LGBTQ+ people, nationally and internationally; (3) the realization that although legal protection of sexual orientation equality has improved, there is no comprehensive legal regulation of the family law rights of same-sex couples; and (4) the appreciation of the fact that the Constitution represents a radical break with the history of intolerance and exclusion and a movement towards a society "based on equality and respect for all": "Equality means equal concern and respect across difference. [...] Respect for human rights requires the affirmation of self, not the denial of self." The "right to be different" embedded in the constitutional rights and values, required removing obstacles that prevent people from living their difference and protecting departure from the majoritarian norm.<sup>268</sup>

Yet, this promise had not been fulfilled in regard to same-sex couples. Same-sex couples were denied what opposite-sex couples were offered: a legal recognition of their partnership. While marriage, in essence, was an intense private and voluntary commitment, its legal recognition brought this commitment into "the most public, law governed and state-regulated domain".<sup>269</sup> Consequently, the impact of the denial of this institution to same-sex couples was great. It represented a "harsh if oblique statement by the law that same-sex couples were outsiders, and that their need for affirmation and protection of their intimate relations as human beings was somehow less than that of heterosexual couples."<sup>270</sup> This could only be taken away if same-sex unions enjoyed the equal legal recognition as opposite-sex marriages and if that recognition had equal legal consequences.<sup>271</sup>

In discussing the remedy, the majority opinion turned to religious views on marriage and same-sex partnerships. The state contended that alteration of the institution of marriage was not the proper remedy to facilitate the equality of same-sex unions. Rather, alternative forms of recognition should be provided for.<sup>272</sup> Amongst the arguments brought forward in this regard was the respect for religion next to the procreation rationale, the recognition of heterosexual marriage in international law and the recourse to diverse systems of family law as provided for by the Constitution. The procreation rationale, however, was considered by Sachs as possibly persuas-

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266 *Ibid.*, paras. 47-48.

267 *Ibid.*, paras 49-58.

268 *Ibid.*, paras 59-61.

269 *Ibid.*, paras 62-65.

270 *Ibid.*, para. 71.

271 *Ibid.*, para. 81.

272 *Ibid.*, para. 83.

ive in the context of a particular religious world view, but not definitive for conjugal relationships from a legal and constitutional perspective, because to “hold otherwise would be deeply demeaning to couples (whether married or not) who, for whatever reason, are incapable of procreating”.<sup>273</sup>

The religious argument brought forward by *amici* and not by the state, was that the recognition of same-sex marriage would violate religious freedom because it would “disrupt and radically alter an institution of centuries-old significance for many religions”. The argument was dealt with by Sachs in light of the Court’s case law on the freedom of religion. Freedom of religion as protected by the South African Constitution, as Sachs pointed out, went beyond the protection of 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. [...] Religious belief has the capacity to awaken concepts of self-worth and human dignity which form the cornerstone of human rights. [...] For believers, then, what is at stake is not merely a question of convenience or comfort, but an intensely held sense about what constitutes the good and proper life and their place in creation.”<sup>274</sup>

Sachs acknowledged that it would be wrong to dismiss opposition to homosexuality on religious grounds “simply as an expression of bigotry”.<sup>275</sup> After all, religious people while having nuanced views on homosexuality as such, may hold sincere beliefs which make it impossible for them to accept same-sex marriage. Yet, while these sincere beliefs were protected by the Constitution, they were not a source of interpreting the Constitution. Courts had the role of neutral arbiters in a free and open society capable of accommodating diversity: “In the open and democratic society contemplated by the Constitution there must be mutually respectful co-existence between the secular and the sacred. The function of the Court is to recognize the sphere which each inhabits, not to force the one into the sphere of the other.”<sup>276</sup>

The Marriage Act in fact recognized the diversity of belief that the Constitution envisioned, by permitting religious leaders to be designated as marriage officers, and religious buildings to be used for the solemnizations of marriages which could be performed in accordance with religious rites. It also recognized the right of marriage officers who are ministers of a religion or holders of any official position within a religious denomination to refuse to perform any marriage which would be contrary to the tenets of the denomination or religious organization in question. Hence, no minister of religion could ever be compelled to solemnize a same-sex marriage, if this was contrary to his or her beliefs and/or the beliefs of the religious community concerned.<sup>277</sup> While the freedom thus protects believers from any involvement in or assistance to the realization of same-sex marriage, it did not provide a valid argument to prevent legal recognition of same-sex marriage.<sup>278</sup>

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273 *Ibid.*, para. 84.

274 *Ibid.*, paras 88-89.

275 *Ibid.*, para. 91.

276 *Ibid.*, paras 93-94.

277 *Ibid.*, paras 96-97.

278 *Ibid.*, para. 98.



Section 15(3) of the Constitution provided a basis for legal recognition of traditional or religious marriages. The section had been relied on in court cases seeking recognition of for example African traditional and Muslim marriages and (proposed) legislation regulating these marriage systems and personal law. The section showed that the Constitution was appreciative of diversity in family law, yet it was not the only constitutional basis for the recognition of same-sex unions, nor could it be used to bar them.<sup>279</sup>

The international law argument was only dealt with briefly in the majority opinion. While recognizing that international law explicitly protected heterosexual marriage, the majority saw no reason to conclude that it opposed same-sex marriage.<sup>280</sup>

Having established that as a matter of principle, rights of dignity and equality mandated recognition of the rights of same-sex couples to have their unions legally recognized, and that the freedom of religion, traditional concepts of marriage and international law did not bar this recognition, the Court turned to the question of whether the absence of recognition could be justified under Section 36. Two inter-related arguments brought forward by amici for justification, were that recognition would undermine the institution of marriage and offend strong religious feelings of certain sections of the public.<sup>281</sup>

The Court dismissed these arguments for justification as invalid. Granting same-sex couples access to the institution of marriage did not undermine the capacity of heterosexual couples to get married in any form they wished and in accordance with the tenets of their religion. Accordingly, Sachs reached the conclusion that the failure of common law and the Marriage Act to provide for marriage of same-sex couples constituted an unjustifiable violation of their rights to equal protection under the law and not to be discriminated against unfairly.<sup>282</sup>

Sachs then proceeded to formulate the remedy. While there was a legislative trend to recognize same-sex partnerships, there was still no comprehensive legislation regularizing relationships of same-sex couples leaving them with "piecemeal relief".<sup>283</sup> Yet in working out a remedy, the Court had to be conscious of a variety of important developments and factors. This included, among other things, the SALRC report and the democratic process which needed to be involved in the solution to be found.<sup>284</sup>

Consequently, the Court ruled that "or spouse" as a gender-neutral typology should be read into the relevant sections of the Marriage Act to enable same-sex marriage. In order to ensure freedom of religion, civil marriage officers with sincere religious objections to performing same-sex marriage should not be obliged to perform same-sex marriages if this were to violate their conscience. However, the order was suspended for 12 months to give Parliament the chance to first adopt legislation to

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279 *Ibid.*, paras 106-109.

280 *Ibid.*, paras 99-105.

281 *See ibid.*, para. 110.

282 *Ibid.*, paras 111-114.

283 *Ibid.*, paras 115-117.

284 *See ibid.*, paras 111-157.

address the issue. If after 12 months there was no such legislation, the order would automatically enter into force.<sup>285</sup>

O'Reagan did not dissent with her colleagues on the merits, only on the remedy. She would have given immediate effect to the order, rather than suspend it for a year.<sup>286</sup> Before the year elapsed, the Parliament had adopted the Civil Union Act which provided for same-sex marriage and therefore made the coming into force of the order obsolete.

4.11 MEC for Education: KwaZulu-Natal and Other v Pillay [2007]

|               |                                                                                                                         |
|---------------|-------------------------------------------------------------------------------------------------------------------------|
| Essence:      | Right to manifest a cultural practice of wearing a nose stud.                                                           |
| Dimension:    | Freedom of religion and belief and personal freedom. Freedom of religion and belief and education.                      |
| Lower courts: | Equality Court ruled that discrimination was not unfair. High Court ruled in favor of claimant.                         |
| Majority:     | 11:0. Impermissible indirect discrimination. 10:1 majority on order. Majority opinion by Langa. Nine others concurring. |
| Dissenting:   | O'Reagan agreed on impermissible discrimination, disagreed on the order.                                                |

Sunali Pillay is of South Indian, Tamil and Hindu origin and in her final year in high school she started wearing a traditional nose stud. The Durban Girls High School's Code prohibited all jewelry except for ear studs and wristwatches, and she was ordered to remove the nose stud in school. She did not comply, claiming that the order violated her right to practice her cultural and religious traditions.<sup>287</sup>

Ms. Pillay went to the Equality Court which found that the school regulations were in fact discriminatory, though not unfair. The High Court found in favor of Pillay and qualified the prohibition as impermissible indirect discrimination.<sup>288</sup> The Constitutional Court affirmed this. The majority opinion (10 out of 11) was authored by Chief Justice Langa. Justice O'Reagan dissented, agreeing with the finding of unfair discrimination but not the order.

Ms. Pillay's claim was directed against the failure of the school to grant her an exemption from the Code's prohibition. As Langa saw it, however, it was the combination of the Code and the refusal to grant an exemption that resulted in the alleged discrimination. The Code provided no process or standard for exemptions. Hence, Sunali's request for exemption was denied.<sup>289</sup>

Discrimination on the grounds of culture and religion are both prohibited by the Constitution. The prohibition to discriminate is directed at state and private parties

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285 *Ibid.*, paras 159-161.

286 *Ibid.*, paras 168 and 173.

287 CCSA, *MEC for Education: Kwazulu-Natal and Other v. Pillay*, Case CCT51/06, 5 October 2007, paras 3-10.

288 *Ibid.*, paras 14-18.

289 *Ibid.*, paras 36-38.

alike. The Equality Act guarantees the horizontal prohibition. The case was first argued under this Act.<sup>290</sup>

The school had argued that there was no discrimination as the Code applied to everyone.<sup>291</sup> Langa did not agree: “The ground of discrimination is still religion or culture as the Code has a disparate impact on certain religions and cultures. The norm embodied by the code is not neutral, but enforces mainstream and historically privileged forms of adornment [...]” Hence, if the Code’s effect was that it imposed a burden on Sunali, it was discriminatory.<sup>292</sup>

While there is a difference between culture (traditions and beliefs of a community) and religion (personal faith and belief), the majorities found that the two concepts often overlap and that it was “equally possible for a practice to be both religious and cultural’”.<sup>293</sup> The next step the Courts took in the analysis was to establish whether Sunali was part of an identifiable cultural and/or religious group. Sunali was considered by the Court to be part of an identifiable group of South Indian, Tamil and Hindu origin.<sup>294</sup>

The last step was then to establish the cultural and religious significance of the nose stud. Langa noted that the applicable test was “sincerity” in South Africa, as well as many foreign jurisdictions. Langa found that Sunali’s persistence in refusing to obey the schools order and standing up for her belief in court and in the media, provided enough proof of the sincerity of her belief.<sup>295</sup> The school never contested the cultural relevance of the nose stud, but denied it had religious significance.<sup>296</sup> While Sunali admitted that the nose stud was not a mandatory tenet of her religion or culture, it was a voluntary expression of her South Indian, Tamil, and Hindu culture that was strongly intertwined with the Hindu religion. Whether the practice was more cultural or more religious was irrelevant: “culture and religion sing with the same voice”.<sup>297</sup>

The voluntary nature made it no less worthy of protection. Religious and cultural practices were protected as they were “central to human identity which in turn is central to human equality”. Voluntary practices were no less part of a human’s identity just because they were not (perceived as) mandatory.<sup>298</sup> “Differentiating between mandatory and voluntary practices does not celebrate or affirm diversity, it simply permits it.” But South Africa’s constitutional project “not only affirms diversity, but promotes and celebrates it”.<sup>299</sup>

Langa also explicitly referred to Canadian jurisprudence in order to highlight the importance of protecting voluntary religious practice.<sup>300</sup> The protection of voluntary practice applied equally to cultural and religious practices. Protection of

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290 *Ibid.*, para. 40.

291 *Ibid.*, para. 42.

292 *Ibid.*, paras 44-45.

293 *Ibid.*, para. 47.

294 *Ibid.*, para. 50.

295 *Ibid.*, para. 55.

296 *Ibid.*, para. 58.

297 *Ibid.*, para. 60.

298 *Ibid.*, para. 62.

299 *Ibid.*, paras 64-65.

300 *Ibid.*, para. 65.

voluntary cultural practices may even be more necessary, because in cultures unlike religions, practices were often perceived as voluntary. Not protecting voluntary practices might then result in not protecting culture at all.<sup>301</sup>

Having established discrimination, the Court investigated whether the discrimination was unfair. Comparing the US and Canadian interpretations of “reasonable accommodation”, Langa concluded that the Canadian interpretation was more in line with South African constitutional law. He also interpreted the duty of reasonable accommodation as “an exercise in proportionality that will depend on the facts”. In this case, the proportionality depended on the importance of the practice for Sunali, on the one hand, and the hardship of an exemption for the school, on the other hand.<sup>302</sup> Refuting the school’s reliance on the margin of appreciation doctrine in *de Şahin* case (section I3.4.7), the majority called the doctrine unfitting.<sup>303</sup>

Determining the importance of the practice for Sunali, Langa considered that the “symbolic effect of denying her the right to wear it for even a short period; it sends a message that Sunali, her religion and her culture are not welcome”.<sup>304</sup> Also, courts should not substitute their assessment of importance for that of the individual in question. “If Sunali states that the nose stud is central to her as a South Indian Tamil Hindu, it is not for the Court to tell her that she is wrong because others do not relate to that religion or culture in the same way.”<sup>305</sup> Langa found the purposes underlying the Code of discipline and education legitimate. But reasonable accommodation required the exemption, which would not have had any detrimental effect on the stated purposes.<sup>306</sup> Feelings of unfairness amongst other students should have been dealt with by explaining the values of the Constitution.<sup>307</sup> Hence, the majority set aside the school’s order and the school was ordered to provide for exemptions in the Code for religious and cultural practices.

Justice O’Reagan concurred with the majority in the essence of its opinion, but disagreed with part of the majority’s reasoning and with the order made. Unlike the majority, she believed that the Constitution recognized that culture was different from religion and should not be treated as if it was religion.<sup>308</sup> Hence, “sincere belief” was to be used when a cultural practice was concerned.<sup>309</sup> She stated three objections to the majority’s approach which according to her:<sup>310</sup>

1. did not fully appreciate that culture is associative rather than individual;
2. led to a society of atomized communities rather than a unified diverse society;
3. underestimated that human dignity requires more than just toleration of sincerely held beliefs.

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301 *Ibid.*, paras 67-68.

302 *Ibid.*, paras 76-77.

303 *Ibid.*, para. 80.

304 *Ibid.*, para. 85.

305 *Ibid.*, para. 87.

306 *Ibid.*, paras 99-102.

307 *Ibid.*, paras 103-104.

308 *Ibid.*, para. 143.

309 *Ibid.*, para. 147.

310 *Ibid.*, paras 154-156.

However, O'Reagan was convinced that the "neutral code" together with the refusal of an exemption did indeed discriminate against Sunali based on her culture.<sup>311</sup> Because there was no procedure in place which Sunali could use to request an exemption and no criteria on how such a request would be dealt with, the discrimination was unfair.<sup>312</sup> Yet because Sunali had already graduated, the declaratory order of the majority was superfluous in O'Reagan's opinion.<sup>313</sup> She did agree, however, that the Court needed to order the school to amend the Code to provide for exemption for religious and cultural reasons.<sup>314</sup>

#### 4.12 Hassam v Jacobs NO and Others [2009]

|               |                                                                                                                                    |
|---------------|------------------------------------------------------------------------------------------------------------------------------------|
| Essence:      | Inheritance rights of a widow in a de facto polygamous Islamic marriage not registered as civil marriage.                          |
| Dimension:    | Freedom of religion and belief and family law and family relations. Freedom of religion and belief and secularism.                 |
| Lower courts: | The High Court found in claimants favor and asked the CCSA to confirm the constitutional invalidity of the Acts for excluding her. |
| Majority:     | 11:0. Constitutional invalidity. Majority opinion by Nkabinde.                                                                     |
| Dissenting:   | None.                                                                                                                              |

Mrs. Hassam had married her husband in accordance with Muslim rites. Later, he married a second wife also in accordance with Muslim rites, without her knowledge or consent. When he passed away, Mrs. Hassam sought recognition as her husband's surviving spouse under the Intestate Succession Act, and the Maintenance of Surviving Spouses Act. The executor, however, contested that her marriage was still valid at the time of the death, citing among other things that she was part of a polygamous relationship.<sup>315</sup>

The High Court, considering the Constitutional Court's ruling in *Daniels*, held that the provisions of the Acts were in violation of the Constitution. It then asked the Constitutional Court to confirm its findings on constitutional invalidity. A unanimous Court found in favor of Mrs. Hassam. Justice Nkabinde authored an opinion which the other judges concurred with.

According to Nkabinde, the case was not about the constitutional validity of polygamous Muslim marriages as such, nor was it about incorporating Sharia law into South African law.<sup>316</sup> It was about the question of whether the exclusion of spouses in polygamous marriages from the Act constituted discrimination.<sup>317</sup> Nka-

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311 *Ibid.*, para. 166.

312 *Ibid.*, para. 182.

313 *Ibid.*, para. 183.

314 *Ibid.*, para. 183.

315 *Hassam v. Jacobs NO and Others*, Case CCT83/08, *supra* n. 49, paras 2-5.

316 *Ibid.*, para. 17.

317 *Ibid.*, para. 20.

binde reiterated the importance of equality for the democratic constitutional order of South Africa, especially in light of its past.<sup>318</sup>

The past prejudice against the Muslim community was evident in judgments from the apartheid era, declaring Muslim marriages “void on the ground of it being contrary to accepted customs and usages”.<sup>319</sup> Wrongly, courts in the past had simply ignored the hardship this would cause to the Muslim community. This “ignorance and total disregard of the lived realities prevailing in Muslim communities” was no longer acceptable under the new constitutional order and contrary to its values which prevented the imposition of one group’s views on others in a pluralistic society.<sup>320</sup> The respect for diversity was reflected in the Preamble to the Promotion of Equality and Prevention of Unfair Discrimination Act, the goal of which was to facilitate the transition into “a democratic society, united in its diversity”. The Court had repeatedly incorporated this in its interpretative approach in order to achieve the progressive realization of “transformative constitutionalism”.<sup>321</sup>

Nkabinde examined why the polygamous Muslim marriages from the intestate succession regime violated the equality rights of the Constitution. Women in polygamous marriages such as Mrs. Hassam’s suffered a comparative disadvantage: the Act worked to their detriment and not to that of men in such marriages.<sup>322</sup> The differentiation amounted to discrimination because it related to three of the listed grounds – namely religion, culture and gender. This was not, however, to imply that Muslim personal law if enacted would constitute discrimination, nor did it answer whether the Constitution mandated the recognition of polygynous Muslim marriages as such. It meant that the Constitution mandated affording women who are spouses in such marriages equal protection.<sup>323</sup>

While the Court’s decision in *Daniels* had provided relief to spouses in monogamous Muslim marriages, the distinction between spouses in monogamous and spouses in polygynous Muslim marriages unfairly discriminated against the latter.<sup>324</sup> Excluding this group from the protection of the Act was contrary to the goal of equality set out by the Constitution, because women often had no power to prevent their husband from marrying a second or third wife. Discrimination was presumed to be unfair unless there was a justification.<sup>325</sup> As the Minister did not provide any justification for the exclusion, the assumption stood, and the discrimination against women who were spouses in polygynous Muslim marriages was unfair.<sup>326</sup>

The next step was to identify whether the possible remedy against the unfair discrimination was to read “spouse” in the Act to include a widow to a de facto polygamous Muslim marriage. This could not be answered on the basis of past precedents from the apartheid era, which denied Muslim marriages recognition

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318 *Ibid.*, para. 24.

319 *Ibid.*, para. 25.

320 *Ibid.*, para. 25.

321 *Ibid.*, paras 27-29.

322 *Ibid.*, paras 30-31.

323 *Ibid.*, paras 33-35.

324 *Ibid.*, para. 36.

325 *Ibid.*, paras 38-39.

326 *Ibid.*, paras 41-42.

because they were deemed potentially polygynous and therefore contrary to the ordered dominant public morality. Instead, the question had to be answered through the “prism of the Constitution”.<sup>327</sup> In this regard, the Court considered that the significance “attached to polygynous unions solemnized in accordance with the Muslim religious faith is by no means less than the significance attached to a civil marriage under the Marriage Act or an African customary marriage. Similarly, the dignity of the parties to polygynous Muslim marriages is no less worthy of respect than the dignity of parties to civil marriages or African customary marriages.”<sup>328</sup>

In accordance with this spirit of equality, Nkabinde noted a trend in judicial decisions such as *Daniels* (section I2.4.8), *Bhe*<sup>329</sup> and *Khan*<sup>330</sup> of interpreting marriage and family law consistent with the Constitution. In *Bhe*, the CCSA held that the Marriage Act applied to marriages formally governed by the Black Succession Act. In *Khan*, the Supreme Court of Appeal held that “partners in a Muslim marriage, married in accordance with Islamic rites (whether monogamous or not) are entitled to maintenance”. The fact that Muslim marriages had not expressly been included in the relevant acts could not be interpreted to imply an indented exclusion “contrary to the spirit, purport and objects” of the Constitution. After all, such an exclusion would result in a violation of the widows’ “rights to equality in relation to marital status, religion and culture and would therefore violate their right to dignity”.<sup>331</sup>

The appropriate remedy then was “reading in” to the Act, after the word “spouse” “or spouses” as to include widows like Mrs. Hassam who are/were parties to a polygynous (Muslim) marriage.<sup>332</sup> The declaration of invalidity was to be applied retroactively to 1994 so as to provide remedies for those who had suffered injustice since.<sup>333</sup> Noteworthy was also that the Minister had to pay the appellants costs, because the state had still failed to provide for the necessary legislation to address the grievances of the Muslim community in the area of family and marriage law and had therefore forced Mrs. Hassam to assert her constitutional rights through court proceedings.<sup>334</sup>

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327 *Ibid.*, paras 42-43.

328 *Ibid.*, para. 46.

329 CCSA, *Bhe and Others v. Magistrate, Khayelitsha and Others* (Commission for Gender Equality as Amicus Curiae); *Shibi v. Sithole and Others*; South African Human Rights Commission and Another v. President of RSA and Another, Cases CCT49/03, CCT69/03 and CCT50/03, 15 October 2004.

330 Supreme Court of Appeal of South Africa, *Khan v. Khan* 2005 (2) SA 272.

331 *Hassam v. Jacobs NO and Others*, Case CCT83/08, *supra* n. 49, paras 47-48.

332 *Ibid.*, para. 53.

333 *Ibid.*, para. 55.

334 *Ibid.*, para. 56.



#### 4.13 Women's Legal Centre Trust v President of the Republic of South Africa and Others [2009]

|               |                                                                                                                    |
|---------------|--------------------------------------------------------------------------------------------------------------------|
| Essence:      | Parliaments failure to adopt a Muslim marriages Act in light of its constitutional obligations.                    |
| Dimension:    | Freedom of religion and belief and family law and family relations. Freedom of religion and belief and secularism. |
| Lower courts: | Not applicable. Direct application to the CCSA.                                                                    |
| Majority:     | 10:0. CCSA had no first instance jurisdiction. Majority opinion by Cameron.                                        |
| Dissenting:   | None.                                                                                                              |

The Women's Legal Centre Trust launched a direct application to the Constitutional Court in 2009, to seek a declaration that the President and Parliament had failed to fulfill their obligation under the Constitution to *inter alia* prepare, enact and implement legislation providing for the recognition of all Muslim marriages under South African law.<sup>335</sup>

As is apparent from cases like *Amod*, *Daniels* and *Hassam* (sections I2.4.5, I2.4.8 and I2.4.12), South African law before apartheid was discriminatory against Muslim marriages. In the constitutional era, Muslim marriages performed by a religious minister who was licensed in accordance with the *Civil Marriage Act*, had the benefit of being considered legal marriages under relevant legislation such as inheritance and compensation for surviving spouses. Muslim marriages not performed as civil marriages, remained unrecognized under the law.

In 2003, the South African Law Reform Commission submitted a report on the matter, which included a draft bill.<sup>336</sup> However, the draft bill was not adopted due to controversies within and outside of the Muslim community of South Africa. Amongst the many opposing positions taken were those that deemed the bill intrusive of the internal affairs of the Muslim community, a deviation from Islamic law, uncalled for special treatment of a religious group, and potentially opposed to public policy. Others like the applicant in this case supported the bill for being beneficial for the rights of Muslims in general and Muslim women in particular.

The unanimous Court judgment, written by Justice Cameron, focused on two questions: whether indeed Parliament had breached an obligation, and whether the CCSA had first and only jurisdiction to decide on the matter. It answered both questions in the negative. As the questions before the Court were of a jurisdictional nature, the judgment did not deal with the substantive relief claimed.<sup>337</sup>

335 CCSA, *Women's Legal Centre Trust v. President of the Republic*, Case CCT13/09, July 2009, para. 1.

336 *Ibid.*, para. 8.

337 *Ibid.*, para. 3.

The relevant provisions of the Constitution<sup>338</sup> in Section 167 read:

- “(4) Only the constitutional Court may- [...]
- (e) decide that Parliament or the President has failed to fulfill a constitutional obligation; or [...]
- (6) National legislation or the rules of the Constitutional Court must allow a person, when it is in the interests of justice and with leave of the Constitutional Court
- (a) to bring a matter directly to the Constitutional Court; or [...]”

The applicant claimed that since 2003 until 2009, no meaningful steps had been taken to further enact consequent implementation of legislation recognizing Muslim marriages, and this while the Constitution expressly permitted the legal recognition of a system of personal and family law, adhered to by the people of a particular religion.<sup>339</sup> The obligation on the part of the government organs that the applicant asserted, followed in her opinion from the fact that the absence of such legislation breached, among other things, the rights to dignity and equality and the freedom of religion, irrespective of the fact that imams may be recognized as marriage officers in terms of the Marriage Act.<sup>340</sup>

The Court argued that review of the CCSA in obligations of Parliament must be narrow. A broad meaning would render constitutional review by other courts of the conduct of the President and of the Acts of Parliament superfluous.<sup>341</sup> Hence, while the section in question should be given a narrow meaning, the provisions dealing with constitutional review by other courts must be interpreted widely.<sup>342</sup> The Constitutional Court’s jurisdiction must furthermore be exercised, keeping in mind its function as guardian of the Constitution and its place within the separation and balance of power(s).<sup>343</sup>

Cameron further noted that the review section is actor-specific; it referred to Parliament and the President. Yet the obligation allegedly not fulfilled rested on the state as a whole according to the Constitution, not Parliament (or the President) specifically.<sup>344</sup> Hence, the jurisdiction of the CCSA was also not exclusive, and consequently the direct access could not be granted on the basis of exclusive jurisdiction of the Constitutional Court. Finally, the Court drew attention to the fact that because of the many interests and choices involved in adopting legislation recognizing Muslim marriages, it would not be appropriate to decide it in a Court of first and final instance.<sup>345</sup>

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338 Constitution of the Republic of South Africa, *supra* n. 2, s. 167.

339 See *ibid.*, s. 15(3).

340 *Women’s Legal Centre Trust v. President of the Republic*, Case CCT13/09, *supra* n. 335, para. 9.

341 *Ibid.*, para. 11.

342 *Ibid.*, para. 12.

343 *Ibid.*, para. 15.

344 *Ibid.*, paras 16-17.

345 *Ibid.*, para. 23.

## 4.14 DE v RH [2015]

|               |                                                                                                                                                                                  |
|---------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Essence:      | The continued legal enforceability of a legal action which a spouse can take against the adulterous spouse and involved third party.                                             |
| Dimension:    | Freedom of religion and belief and family law and family relations.                                                                                                              |
| Lower courts: | High Court found in favor of husband taking legal action. Court of Appeal found on its own accord that the legal system should be rid of this claim.                             |
| Majority:     | 10: 0. The legal action against adultery was no longer valid. Majority opinion by Madlanga, eight others concurring. Separate concurring opinion by Mogoeng; Cameron concurring. |
| Dissenting:   | None.                                                                                                                                                                            |

The applicant in this case had sued his former wife and her partner for adultery. His wife had left him and shortly afterwards had initiated divorce proceedings. She claimed she had found her new partner only after the separation and that the relationship had only become physical after the divorce. The applicant claimed that the adultery had caused the break-up. His ex-wife claimed that the relationship had begun to deteriorate two years prior to the split.<sup>346</sup>

South African common law still included legal actions which a spouse could take against the adulterous spouse and the third party involved in the adultery. The applicant based his claims against his wife's new partner on this. While the High Court found in his favor, the Supreme Court of Appeal (SCA) out of its own accord raised the question whether the claims were still valid, drawing the conclusion that they were not. The applicant appealed to the CCSA.<sup>347</sup> A unanimous CCSA agreed with the SCA. The majority opinion was authored by Madlanga. Chief Justice Mogoeng issued a separate concurring opinion with which Cameron concurred.

In his appeal to the CCSA, the applicant argued that the "question whether the delictual claim based on adultery should continue to exist is an arguable point of law of general public importance". The Court agreed and allowed the appeal. Setting aside an existing claim indeed raised important legal questions the CCSA must answer.<sup>348</sup> The SCA had based itself on the reasoning that public policy is infused with the values of the Constitution. According to these, the legal action against adultery was violative of the privacy rights and dignity of those against whom the claim was brought. The applicant contended that the SCA did not take the Constitution into account properly: common law needed to be developed in line with the Constitution, his dignity was also involved and the Constitution safeguarded and protected the institution of marriage.<sup>349</sup> The central legal question was whether adultery as such was still to be considered "wrongful" enough for it to create a

346 CCSA, *DE v. RH*, Case CCT182/14, 19 June 2015, paras 6-7.

347 *Ibid.*, paras 1-5.

348 *Ibid.*, paras 8 and 10.

349 *Ibid.*, para. 9.

liability against the spouse affected by the adultery.<sup>350</sup> The Constitutional Court, like the SCA, did not think so.

The roots of the claims directed against adultery, argued Madlanga, were in patriarchy. They were once open only to men, but were opened to women through case law, drawing on the gender neutral principles of Christian fidelity.<sup>351</sup> Courts developed the common law then, as they could now, as development by courts was part of its inherent nature.<sup>352</sup> In developing the common law now, recourse had to be taken to the values underlying the Constitution, which formed an important and integral part of the *mores* of society.<sup>353</sup> Pointing to a case from 1944, in which the judge had already viewed the adultery claims unmodern, Madlanga pointed to the long-standing continued softening attitude towards adultery.<sup>354</sup> He also pointed to the growing relaxation of divorce requirements over time.<sup>355</sup> Taking a journey through comparative law, Madlanga noted that in many legal systems, the legal actions for spouses against the infidelity of their partner had been abolished or softened, while others had retained them.<sup>356</sup> He cited a Namibian case in which the judge explained that growing respect for autonomy and individual agency of human beings has led society to accept that even a married person may meet and fall in love with someone else.<sup>357</sup>

Nevertheless, the case law regarding those who challenged existing marriage laws because they wanted to get married but could not, and those who wanted their marriage to be legally accepted, showed that marriage as an institution was still valued highly.<sup>358</sup> Several cases before the CCSA had concerned the legal obstacles couples experience who were or wanted to get married. The applicant had cited these cases to show that the legal action he wished to take should still have a place in the law. Yet, removing obstacles was different from taking legal measures to prevent the disintegration of a marriage. The Constitutional Court, however, felt that not legal rules but love, trust and fidelity, were the foundations of marriage. If they diminished, so did the marriage.<sup>359</sup>

Turning to international obligations towards family and marriage, Madlanga noted that the legal obligations in international treaties did mandate a protection of marriage as they did for family which is a concept which included "lesbian and gay couples, whether married or not, and with or without children".<sup>360</sup> International instruments did require the protection of marriage, and it could not be denied that adultery was detrimental to a marriage. Nevertheless, the international requirements, much like

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350 *Ibid.*, para. 11.

351 *Ibid.*, para. 14.

352 *Ibid.*, para. 16.

353 *Ibid.*, paras 17-21.

354 *Ibid.*, paras 23-25.

355 *Ibid.*, para. 26.

356 *Ibid.*, paras 28-38.

357 *Ibid.*, para. 36.

358 *Ibid.*, para. 26.

359 *Ibid.*, paras 42-44.

360 *Ibid.*, para. 45.

the constitutional requirements, did not oblige the state “to strengthen a weakening marriage or breathe life into one that is disintegrating on its own”.<sup>361</sup>

Deciding the case, the rights of all parties in this case – applicant, former wife and her partner – and the constitutional norms had to be weighed. The constitutional norms also informed present-day attitudes towards adultery, which in turn informed the *boni mores* of the new ethos.<sup>362</sup> The former wife and the partner could rely on their rights to freedom and security of the person, privacy and freedom of association. In the case at hand, the procedure before the High Court showed how invasive the court case was. Details from the couple’s intimate and sexual lives were presented, discussed and analyzed in public.<sup>363</sup>

The rights of the adulterous spouse and the partner had to be weighed in the context with the behavior of the non-adulterous spouse. Certain behavior may have triggered adultery on behalf of the spouse, and this affected the appreciation of the facts surrounding the adultery and thus the weight given to the rights of the adulterous spouse and partner. “Even where the adulterous spouse has not been wronged by the other, it is life’s reality that sometimes marriages just do not work out. In those instances, the rights of the two that have committed adultery do not become irrelevant”. And even where the fault clearly lay with the adulterous party and the partner, their rights still mattered.<sup>364</sup>

In any event, upholding liability towards the non-adulterous spouse would restrict the rights of consenting individuals to engage in sexual relations with another party of their choosing.<sup>365</sup> On the other hand, the non-adulterous party’s right engaged is the right to dignity. The act of adultery intruded into the non-adulterous spouse’s most intimate relationship, without their consent. The changing social attitudes did not change this.<sup>366</sup> Yet, weighing the rights of the adulterous spouse and the partner against those of the non-adulterous spouse, in light of the changing attitudes in society, must lead to the conclusion that liability for adultery could not be upheld. “At this day and age, it just seems mistaken to assess marital fidelity in terms of money”.<sup>367</sup>

Chief Justice Mogoeng in his separate concurring opinion, with which Cameron concurred, stressed that marriage is a human institution, which the parties to the marriage needed to make work. The law regulated it, enforced obligations which flow from it and must take away obstacles which interfere with it. All the rest was the obligation of the spouses. Their loss of commitment would lead to the failure of the marriage. The law could not rescue an otherwise ailing marriage.<sup>368</sup>

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361 *Ibid.*, para. 49.

362 *Ibid.*, paras 51-52.

363 *Ibid.*, para. 54

364 *Ibid.*, paras 55-57.

365 *Ibid.*, paras 58-59.

366 *Ibid.*, paras 60-61.

367 *Ibid.*, para. 64.

368 *Ibid.*, paras 67-71.

4.15 De Lange v Presiding Bishop of the Methodist Church of Southern Africa for the time being and Another [2015]

|               |                                                                                                                                                                                    |
|---------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Essence:      | The constitutionality of the dismissal and subsequent internal procedure of a church minister for being in a same-sex relationship.                                                |
| Dimension:    | Freedom of religion and belief and family law and family relations. Freedom of religion and belief and group autonomy. Balancing freedom of religion and belief with other rights. |
| Lower courts: | High Court and Supreme Court of Appeal upheld the challenged arbitration agreement.                                                                                                |
| Majority:     | 10: 0. Majority opinion by Moseneke. Separate concurring opinion by van der Westhuizen.                                                                                            |
| Dissenting:   | None.                                                                                                                                                                              |

Mrs. De Lange was an ordained minister of the Methodist Church. Since being ordained as a minister, she had been living together with her same-sex partner for five years, with the knowledge of the Church. When she publicly announced her intention to get married under the Civil Unions Act, she was suspended. The suspension led to a labor conflict, which the Church intended to solve via an arbitration procedure. Over time, the arbitration procedure itself became a source of and part of the labor conflict.<sup>369</sup> The agreement had never been signed by Mrs. De Lange herself, but by the convener. This was made possible by the procedural rules. The previous draft, which had been signed by her, had not been signed by the Church and amended by the Church later.<sup>370</sup> The arbitration itself never took place.

Mrs. De Lange first asked the High Court to set aside the arbitration agreement because the entire conduct and agreement showed bias against her. After the High Court ruled in favor of the Church, she took the case to the Supreme Court of Appeal (SCA) which confirmed the judgment. At the SCA, she first raised the claim of unfair discrimination. Before the CCSA, she claimed that at the heart of the decision to suspend her was unfair discrimination for her sexual orientation, which was unconstitutional.<sup>371</sup> A unanimous Court ruled not to grant Mrs. De Lange leave to appeal. Moseneke authored the majority opinion on behalf of himself and the other nine, while Van der Westhuizen issued a separate concurring opinion.

Moseneke set out the main reasons for not granting the leave. First, during the procedures at the High Court and the SCA, Mrs. De Lange had been inconsistent with regard to basing her claim on unfair discrimination. She dropped the unfair discrimination argument when the opponent argued before the High Court that she would have to take the claim to the Equality Court first. Now she was raising the claim again. Were the CCSA to decide the matter anyway, it would do so as a court of first and last instance, which was inconsistent with procedure and undesirable

369 CCSA, *De Lange v. Presiding Bishop of the Methodist Church of Southern Africa for the Time Being and Another*, Case CCT223/14, 24 November 2015, paras 1-9.

370 *Ibid.*, paras 10-16.

371 *Ibid.*, paras 17-25.

given the social importance of the matter. Secondly, with regard to the arbitration agreement, the CCSA saw no reason to depart from the SCA's findings. However, the CCSA reiterated the nation's commitment to diversity, equality and the freedom of religion and belief, before further iteration on the subject matter.<sup>372</sup>

According to Mrs. De Lange, the arbitration agreement, which she conceded was valid, must be set aside because the procedure leading to it was biased against her. In terms of the law, "good cause" to set aside the agreement must be shown.<sup>373</sup> Initially, Mrs. De Lange had denied the existence of a church rule prohibiting same-sex marriage for ministers. Now she conceded having transgressed a rule, albeit a vague one, which was applied unfairly, which is why arbitration had no practical effect. She also believed that the arbitration procedure would not deal with the constitutional issues. Moseneke disagreed. The arbitration would be useful and of practical effect. The arbitrator could look into how the rule was applied as much as whether there was a rule as such.<sup>374</sup>

Mrs. De Lange also criticized the Church's stand as hypocritical. The Church had not taken issue with her living together unmarried with a woman, but had suspended her for getting married to one. The Church, on the other hand, argued that this stance signified its balance between dogma and tolerance. According to the dogma, marriage was exclusively an opposite-sex institution. Moseneke, reasoned that the Court, on the other hand, cannot adjudge Church dogma. Hence, Mrs. De Lange's criticism of the line drawn between two situations did not deliver the "good cause" needed to set aside the arbitration agreement. Arbitration, on the other hand, can focus on the merit of this complaint. It was in itself very much the reasonable accommodation, which Mrs. De Lange asked the Court to compel the Church to.<sup>375</sup> Finally, the Court did not agree with Mrs. De Lange that the fact that the arbiter and convener were members of the Church made the procedure biased. In conclusion, the CCSA agreed with the High Court and SCA that the agreement must not be set aside.<sup>376</sup>

Mrs. De Lange had first raised unfair discrimination in the High Court. She declared that she felt discriminated against for her sexual orientation. When the Church argued that she would have to put this claim before the Equality Court, she dropped the claim. Debate was possible whether, by following the relevant legal steps, a High Court judge could have heard the combined claims in one case as High and Equality Court. The CCSA avoided taking a decision on this, merely stating that it was not possible to revive the claim only before the CCSA as first and last instance.<sup>377</sup>

Mrs. De Lange had also failed to file for the procedure which would have allowed interest groups on both sides to enter the proceedings as *amici curiae*. The Church claimed that this alone should be reason to reject the appeal. After all, the Court had never heard a case of this kind, which required balancing competing equality and

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372 *Ibid.*, paras 30-31.

373 *Ibid.*, paras 32-37.

374 *Ibid.*, paras 38-40.

375 *Ibid.*, paras 41-43.

376 *Ibid.*, paras 44-45.

377 *Ibid.*, paras 46-59.



religious autonomy claims. The CCSA saw the great disadvantage of not following the procedure, but noted that it had also remedied the disadvantage. The fact that the procedure was not followed in itself, was insufficient to deny the appeal.<sup>378</sup> Turning to the unfair discrimination claim itself, Moseneke openly admitted that the issue was complex due to the competing constitutional claims and public repercussions. "If and when the unfair discrimination claim has been properly ripened, it will require all the judicial, if not Solomonic, wisdom we Judges can muster right through our court system." The appeal was refused for all the reasons given.<sup>379</sup>

In his separate concurring opinion, Van der Westhuizen addressed the underlying complex and challenging competing constitutional claims of equality and freedom of religion and belief. His opinion featured the role of courts in democratic constitutional orders, sometimes having to decide difficult constitutional issues. It also featured the question whether there was a constitution free zone for communities of believers and private interaction. His careful reasoning showed that rather than a constitution free zone, the Constitution itself created a free space for communities and individuals.<sup>380</sup>

The Constitution, which he cited as being called the "window to a nation's soul", "is the credo which binds our nation together". So, it did in fact also reach the religious and social spheres. But in doing so, it always "carries with it all the rights and values it recognizes". This included non-discrimination and equality as much as freedom of association and autonomy of choice, all going together with the recognition of human dignity.<sup>381</sup> As rights can compete, they needed to be balanced. But "courts are not necessarily the best instruments to balance competing rights and values in intimate spheres where emotions and convictions determine choices and association".

In the case at hand, the SCA, relying on the "doctrine of entanglement", held that the essence of the dispute was one which a secular court should try to avoid solving if possible. Van der Westhuizen iterated that the closer the tension between competing rights gets to "our inner sanctum the less suitable courts are to pronounce on the balancing of these rights". This was because judgments pronounce a winner and a loser.<sup>382</sup> He pronounced his hope that arbitration set within the community and founded on the free space guaranteed by the Constitution, would do justice to the complexity of the issue at hand. If thereafter several instances of courts had to decide, this would greatly benefit the CCSA if it to decide such a complex issue in last instance.<sup>383</sup>

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378 *Ibid.*, paras 60-64.

379 *Ibid.*, paras 65-66.

380 *Ibid.*, paras 69-74.

381 *Ibid.*, paras 75-76.

382 *Ibid.*, paras 77-82.

383 *Ibid.*, para. 85.

## Appendix I3

### The European Court of Human Rights and the selected cases

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#### 1 Introduction to this chapter and reading aid

This chapter introduces the Council of Europe (CoE) legal system, the European Court of Human Rights (ECtHR) and the European Convention on Human Rights as well as the selected cases. Section 10.2 briefly introduces the Convention system and legal history. It also gives an impression of the current constitutional and legal system. Section 10.3 introduces the selected cases and provides an overview. Section 10.4 discusses the case studies of the selected cases in chronological order.

## 2 Introducing the Council of Europe, the European Court of Human Rights and the European Convention on Human Rights

Consisting of 47 member states, the CoE covers most of the states on the European continent. The European Convention on Human Rights, officially European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR, Convention) is an integral and important part of it. The Strasbourg instruments are supranational. They exist in concert with the national constitutional systems of the member states, other international organizations they might be members of, and for many the supranational constitutional order of the European Union. However, the Strasbourg system has had a major influence on its member states because the focus on human rights (long before the EU adopted them as part of its framework) and of course the direct access to the Court and the binding nature of the judgments. In the Treaty on the Functioning of the European Union, the ECHR is affirmed as part of the common constitutional tradition of the member states and speaks of accession of the EU to the Convention.<sup>1</sup>

The nations which first signed the Convention were motivated by the recent experiences with dictatorship, genocide and war and a fast-developing division of Europe through ideology. The Convention was supposed to inspire values based on human rights. A second wave of nations joined after dictatorships in southern Europe collapsed, and finally a third wave after the end of the Cold War when Eastern and Southeastern European nations joined. The Convention and the Strasbourg institutions greatly contributed to the advancement of democracy and constitutionalism in Europe. In terms of European integration, the CoE contributed to the existence of the current European Union as the supranational structure that would eventually encompass the former adversaries of World War II and of the Cold War.<sup>2</sup>

The Convention itself, unlike for example the *International Covenant on Civil and Political Rights*, or the South African and Canadian constitutions, contains no provisions regarding the protection of cultural, linguistic or ethnic identity. Article 14 does, however, prohibit “discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status” in the “enjoyment of the rights and freedoms set forth in this Convention”.

### 2.1 Legal history of the CoE, the ECHR and Convention bodies

The ECHR was adopted in 1950, within the framework of the CoE which was formed after World War II to support ideas of freedom and democracy and to combat totalitarian ideologies of fascism and communism.<sup>3</sup> The CoE was founded on 5 May

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1 Consolidated version of the Treaty on the Functioning of the European Union, OJ L 326/47-326/390, 26 October 2012, A. Declaration 1, and art. 218, para. 6(a)(ii).

2 See M. Heinrich, ‘The Process that Led to the Creation of the COE’, in T.E.J. Kleinsorge (ed.), *Council of Europe*, Wolters Kluwer, Alphen a.d. Rijn (Netherlands), 2010, p. 68.

3 See D. Harris, M. O’Boyle and C. Warbrick (eds.), *Law of the European Convention on Human Rights*, 2d. ed., Oxford University Press, Oxford (UK) et al., 2009, p. 1.

1949 by the *Treaty of London*, also called the *Statute of the Council of Europe*.<sup>4</sup> It was first signed by Belgium, Denmark, France, Ireland, Italy, Luxembourg, the Netherlands, Norway, Sweden and the United Kingdom.

The CoE developed out of a process aimed at European integration in order to prevent future conflict and war. While reconciliation between the adversaries of World War II was an important goal, another was to oppose a future ideological divide. While the first goal was realized with the creation of the CoE, the second was not, as the Communist nations did not join the CoE. Rather, given its focus on liberal constitutionalism, both sides may have viewed it as symbolizing the ideological division between Western and Eastern Europe at the time. Nevertheless, the CoE maintained a commitment to a pan-European community of values based on democracy, the rule of law, and human rights.<sup>5</sup> This explains the quick ascension of Eastern and South European member states after the end of the Cold War (and the conflicts in Southeastern Europe). With the end of the Cold War, the number of member states increased rapidly and significantly, leading to the current number of 47 members.

The CoE focused exclusively on political values of democracy, rule of law, and human rights, rather than on economic interdependence as in the case of the later European Communities. The ECHR was an expression of this. In order to ensure effective protection of the rights guaranteed in the Convention, the member states also agreed to establish institutions which could hear complaints, not only by states, as was (and still greatly is) customary in international law, but also by individuals.<sup>6</sup>

The Court was established on 21 January 1959 on the basis of Article 19 of the Convention. Currently, the jurisdiction of the Court has been recognized by all 47 member states of the CoE. In the beginning, the European Commission of Human Rights decided on the admissibility of cases. It was abolished by Protocol No. 11, after which the Chambers would decide admissibility and merits. The Grand Chamber (GC) was introduced to hear appeals or direct referrals from the Chamber. Protocol No. 11 was adopted as an answer to the increase in cases after the accession of member states following the end of the Cold War.

Protocol No. 15, adopted in 2013, codifies the principle of subsidiarity and the doctrine of the margin of appreciation into the Convention's preamble. In 2013, Protocol No. 16 was also adopted which allows the highest domestic courts and tribunals to request the Court to give advisory opinions on questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or the protocols thereto. Protocol No. 16 is optional.

Article 17 of Protocol No.14 allows the European Union to become party to the Convention. The Lisbon Treaty, which entered into force in December 2009, in turn provided for the accession of the EU.

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4 See R.A. Lawson and H.G. Schermers, *Leading cases of the European Court of Human Rights*, Ars Aequi Libri, Leiden (Netherlands), 1999, preface xvi.

5 For an elaborate discussion see Heinrich, *supra* n. 2, part I.

6 See Lawson and Schermers, *supra* n. 3, preface xvii.

## 2.1 The CoE's contemporary legal system

The institutional structure of the CoE was the “result of a compromise” between those who favored a model of international organization dominated by democratic representation of the people and the conventional model of intergovernmental cooperation. Hence, the organization would consist of two primary decision-making organs, the Parliamentary Assembly composed of representatives of the national parliaments and the Committee of Ministers, consisting of the representatives of the national governments. Besides these two organs, the CoE consists of:<sup>7</sup>

- the Secretary General and Deputy Secretary General;
- the European Court of Human Rights;
- the Congress of Local and Regional Authorities;
- the Commissioner for Human Rights; and
- the Conference of INGOs.

There are 47 member states of the CoE which have all adopted the ECHR. In addition, there are five observers. The member states are:

|                           |                         |                        |
|---------------------------|-------------------------|------------------------|
| 1. Albania                | 16. Georgia             | 32. Netherlands        |
| 2. Andorra                | 17. Germany             | 33. Norway             |
| 3. Armenia                | 18. Greece              | 34. Poland             |
| 4. Austria                | 19. Hungary             | 35. Portugal           |
| 5. Azerbaijan             | 20. Iceland             | 36. Romania            |
| 6. Belgium                | 21. Ireland             | 37. Russian Federation |
| 7. Bosnia and Herzegovina | 22. Italy               | 38. San Marino         |
| 8. Bulgaria               | 23. Latvia              | 39. Serbia             |
| 9. Croatia                | 24. Liechtenstein       | 40. Slovak Republic    |
| 10. Cyprus                | 25. Lithuania           | 41. Slovenia           |
| 11. Czech Republic        | 26. Luxembourg          | 42. Spain              |
| 12. Denmark               | 27. Malta               | 43. Sweden             |
| 13. Estonia               | 28. Republic of Moldova | 44. Switzerland        |
| 14. Finland               | 29. North-Macedonia     | 45. Turkey             |
| 15. France                | 30. Monaco              | 46. Ukraine            |
|                           | 31. Montenegro          | 47. United Kingdom     |

The Parliamentary Assembly has a total of 642 members (321 principal and 321 substitute) who are representatives of the parliaments of each member state. There are also 18 delegates from observers. The number of seats per member are determined by population size and budgetary contribution. Each delegation must be representative of the political make-up of the national parliament. Each state member selects its own method of designating its representatives to the Parliamentary Assembly. However, they must be chosen from among the members of the respective parliaments and must reflect the different political parties within the respective parliaments.<sup>8</sup>

<sup>7</sup> See T.E.J. Kleinsorge, ‘The Council of Europe’s Institutional Structure’, in T.E.J. Kleinsorge (ed.), *Council of Europe*, Wolters Kluwer, Alphen a.d. Rijn (Netherlands), 2010, pp. 69-70.

<sup>8</sup> *Ibid.*, pp. 69-74.

Important statutory functions of the Parliamentary Assembly are the election of the Secretary General of the Council of Europe, the judges of the ECtHR and the members of the European Committee for the Prevention of Torture. The Parliamentary Assembly has few decision-making powers, but has effectively used its power of making recommendations to the Committee of Ministers.<sup>9</sup>

The Committee of Ministers is the CoE's decision-making body. It comprises the Foreign Affairs Ministers of all the member states, or their permanent diplomatic representatives in Strasbourg. Unlike in the Parliamentary Assembly, each member has one vote. In collaboration with the Parliamentary Assembly, it is the guardian of the Council's fundamental values.<sup>10</sup>

The Committee has the legislative and executive functions of the CoE, including admitting new member states, monitoring respect of commitments by member states and adopting recommendations to member states. It also supervises the execution of judgments of the ECtHR judgments (see Article 46 of the Convention).<sup>11</sup>

The Secretary General is elected by the Parliamentary Assembly on the recommendation of the Committee of Ministers for a period of five years. Although the Secretary General's powers are not clearly defined, in practice the holder has overall responsibility for the strategic management of the CoE's work program and budget, and oversees the day-to-day running of the organization and secretariat.<sup>12</sup>

## 2.2 The ECtHR, the Convention and Protocols

The Chambers of the Court hear applications in first instance, deciding admissibility or inadmissibility. They consist of 7 judges. The GC which will hear cases referred by the Chamber after a decision has been taken, or if the Chamber has relinquished hearing the case, consists of 17 judges. There are also single judge rapporteurs who will do the first examinations on clearly inadmissible applications and three-judge committees deciding on admissibility. A single judge may not examine applications against the state which nominated him. The three-judge committee has jurisdiction to declare applications admissible and decide on the merits of the case if it was clearly well founded and based on well-established case law.<sup>13</sup> The jurisdiction of the court is generally divided into:

1. inter-state cases (Article 33);
2. applications by individuals against contracting states (Article 34); and
3. advisory opinions (Article 47).

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9 *Ibid.*, p. 71.

10 See M. Kuijer, *The Blindfold of Lady Justice: Judicial Independence and Impartiality in Light of the Requirements of Article 6 ECHR*, (Diss. Leiden), E.M. Meijers Instituut, Leiden (Netherlands), 2004, p. 16.

11 Kleinsorge, *supra* n. 7, at 70. M. W. Janis, R.S. Kay and A.W. Bradley, *European Human Rights Law - Texts and Materials*, Oxford University Press, Oxford (UK) et al., 2008, p. 71.

12 See Kleinsorge, *supra* n. 7, at 69; B. Rainey, P. McCormick and C. Ovey (eds.), *Jacobs, White & Ovey: The European Convention on Human Rights*, 8th ed., Oxford University Press, Oxford (UK), 2021, p. 10.

13 See Janis, Kay & Bradley, *supra* n. 11, at 70-74.

Applications by individuals constitute the majority of cases heard by the Court. Applications by individuals against contracting states can be made by any natural person, a non-governmental organization or any group of individuals. Although the official languages of the Court are English and French, applications may be submitted in any one of the official languages of the contracting states.<sup>14</sup>

The judgment of the GC is final. Judgments by the Chamber of the Court become final three months after they are issued, unless a reference to the GC for review or appeal has been made. If the panel of the GC rejects the request for referral, the judgment of the Chamber of the Court becomes final. Judgments by the Court are binding on the respondent states concerned (Article 46 of the Convention). On the other hand, advisory opinions, by definition, are non-binding. Chambers and the GC decide cases by a majority. Any judge who has heard the case can attach a separate opinion to the judgment.

2.3 Convention Rights Review by the ECtHR

The following rights and freedoms are protected by the Convention and Protocols<sup>15</sup>

| <i>Convention</i>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       | <i>Protocols</i>                                                                                                                                                                                                                                                                                                                                               |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Article 2 - life<br>Article 3 - torture<br><br>Article 4 - servitude<br>Article 5 - liberty and security<br>Article 6 - fair trial<br>Article 7 - retroactivity<br>Article 8 - privacy<br>Article 9 - conscience and religion<br>Article 10 - expression<br>Article 11 - association<br>Article 12 - marriage<br>Article 13 - effective remedy<br>Article 14 - discrimination<br>Article 15 - derogations<br>Article 16 - aliens<br>Article 17 - abuse of rights<br>Article 18 - permitted restrictions | <i>Protocol 1</i><br>Article 1 - property<br>Article 2 - education<br>Article 3 - elections<br><i>Protocol 4</i> - civil imprisonment, free movement, expulsion<br><i>Protocol 6</i> - restriction of death penalty<br><i>Protocol 7</i> - crime and family<br><i>Protocol 12</i> - discrimination<br><i>Protocol 13</i> - complete abolition of death penalty |

Article 57 allows the High Contracting Parties to make reservations. Such reservations have been made by a great number of states and have been successfully invoked in cases before the Court.<sup>16</sup>

14 *Ibid.*, pp. 74-75.  
15 See for a short introduction Lawson and Schermers, *supra* n. 3, preface xix-xxv.  
16 Harris, O'Boyle & Warbrick, *supra* n. 3, at 21.



Under Article 1 of the Convention, the member states must undertake to “secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention”. While this does not require states to incorporate the Convention into national law, by now all member states have done so in one way or another.<sup>17</sup>

The guarantee in Article 1 is to secure the rights to those “within the jurisdiction” of a Contracting Party. Hence, the jurisdiction must be established as a matter of threshold before the Court can examine a complaint.<sup>18</sup> The matter of extraterritorial application of the Convention was the subject matter of the *Banković* case<sup>19</sup> and has been discussed thoroughly in academic literature.<sup>20</sup> While the Court recognized in *Banković* that there were exceptions to the territorial principle of “effective control”, airborne military action in an armed conflict was not one of them.<sup>21</sup>

The Convention has no retroactive effect in accordance with international treaty law. However, under certain circumstances a violation which has its origins prior to the accession of the member state to the Convention can still be considered.<sup>22</sup> Denunciation under Article 58 has no immediate effect. When a state ratifies the Convention, there is an initial commitment for five years. Hereafter a six-month notice is required to denounce the Convention.<sup>23</sup>

### 3 The selected ECtHR cases

#### 3.1 Introduction: Kokkinakis and a right pluralism depends on

The *Kokkinakis* case of 1994<sup>24</sup> may rightly be called the first milestone case.<sup>25</sup> Not because it was the first Article 9 case, but because for the first time the Strasbourg institutions developed a theory of interpretation for Article 9, which has served as the foundation of the interpretation of the freedom of religion and belief under the Convention ever since.

Mr. Kokkinakis was a Jehovah’s Witness and had been convicted for proselytism. For Jehovah’s Witnesses, bearing witness is an integral part of their faith. This involves approaching strangers and/or going door to door to spread the word. One of the people Mr. Kokkinakis had approached was the wife of an Orthodox cleric. Proselytism, defined as trying to persuade Orthodox believers to join another faith,

17 *Ibid.* See also Rainey, McCormick & Ovey, *supra* n. 12, at 85.

18 Rainey, McCormick & Ovey, *supra* n. 12, at 89.

19 ECtHR (GC), *Bankovic and Others v. Belgium and 16 Other Contracting States* (admissibility decision), app. no. 52207/99, 12 December 2001.

20 See further, R.A. Lawson, *Het EVRM en de Europese Gemeenschappen: bouwstenen voor een aansprakelijkheidsregime voor het optreden van internationale organisaties*, (diss: Leiden), E.M. Kluwer, Deventer (Netherlands), 1999, pp. 248-263.

21 See Rainey, McCormick & Ovey, *supra* n. 12, at 91-92. See further R.A. Lawson, ‘Life after Banković: On extraterritorial Application of the European Convention on Human Rights’, in F. Coomans and M. Kamminga (eds.), *Extraterritorial Application of Human Rights Treaties*, Intersentia Antwerp (Belgium), 2004.

22 Rainey, McCormick & Ovey, *supra* n. 12, at 88-90.

23 *Ibid.*, p. 88.

24 ECtHR (C), *Kokkinakis v. Greece*, app. no. 14307/88, 25 May 1993, para. 31.

25 See Janis, Kay & Bradley, *supra* n. 11, at 323, calling it a “landmark judgment”.

was punishable by law in Greece.<sup>26</sup> Mr. Kokkinakis challenged the criminalization of proselytism.<sup>27</sup> In his opinion the prohibition violated Article 9, which explicitly acknowledges the freedom to change one's religion.

Interestingly, the Court tried to draw a line between improper proselytism and "true Evangelism". While the first is a corruption or deformation of the latter, the latter is protected by the freedom of religion. Because the Greek courts had failed to establish in what way the accused had conducted himself improperly when trying to persuade the priest's wife, the Court found that a pressing social need had not been proven. Therefore, Article 9 had been violated.<sup>28</sup>

The *Kokkinakis* judgment included reasoning which would later be revisited every time a freedom of religion and belief case had to be decided. The Court held the freedom of religion and belief to be a foundation of a free and democratic society. It stipulated that "freedom of thought, conscience and religion is one of the foundations of a 'democratic society' within the meaning of the Convention. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, skeptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it."<sup>29</sup>

### 3.2 Overview of the selected cases

In the period from 1998 to 2015, 21 cases which feature the freedom of religion and belief in a substantial way were decided by the ECtHR (see section 1.7). From these cases, the following selection of 15 cases was made:

|     |                                                                                                                                |
|-----|--------------------------------------------------------------------------------------------------------------------------------|
| 1.  | Buscarini And Others v. San Marino, app. no. 24645/94, 18 February 1999.                                                       |
| 2.  | Thlimmenos v. Greece, app. no. 34369/97, 6 April 2000.                                                                         |
| 3.  | Cha'are Shalom Ve Tsedek v. France, app. no. 27417/95, 27 June 2000.                                                           |
| 4.  | Hasan And Chaush v. Bulgaria, app. no. 30985/96, 26 October 2000.                                                              |
| 5.  | Refah Partisi (The Welfare Party) And Others v. Turkey, app. nos. 41340/98, 41342/98, 41343/98 and 41344/98, 13 February 2003. |
| 6.  | Maestri v. Italy, app. no. 39748/98, 17 February 2004.                                                                         |
| 7.  | Leyla Şahin v. Turkey, app. no. 44774/98, 10 November 2005.                                                                    |
| 8.  | Folgerø And Others v. Norway, app. no. 15472/02, 29 June 2007.                                                                 |
| 9.  | İçtihat v. Turkey, app. no. 3976/05, 2 November 2010.                                                                          |
| 10. | Lautsi And Others v. Italy, app. no. 30814/06, 18 March 2011.                                                                  |
| 11. | Bayatyan v. Armenia, app. no. 23459/03, 7 July 2011.                                                                           |
| 12. | Mouvement Raëlien Suisse v. Switzerland, app. no. 16354/06, 13 July 2012.                                                      |

<sup>26</sup> Rainey, McCormick & Ovey, *supra* n. 12, at 467.

<sup>27</sup> *Kokkinakis v. Greece*, app. no. 14307/88, *supra* n. 24, para. 29.

<sup>28</sup> *Ibid.*, paras 48-50.

<sup>29</sup> *Ibid.*, para. 31.

|     |                                                                                  |
|-----|----------------------------------------------------------------------------------|
| 13. | <i>Sindicatul “Păstorul Cel Bun” v. Romania</i> , app. no. 2330/09, 9 July 2013. |
| 14. | <i>Fernández Martínez v. Spain</i> , app. no. 56030/07, 12 June 2014.            |
| 15. | <i>S.A.S. vs. France</i> , app. no. 43835/11, 1 July 2014.                       |

The selection only includes cases in which the freedom of religion and belief featured as the central right. It was considered to be the central right if the interpretation of the freedom of religion and belief was decisive in determining the outcome of the case. This includes cases in which the freedom of religion was raised as a major argument, although the central right was equal treatment of gender or sexual orientation, or in which the freedom of religion was raised in combination with equal treatment, freedom of opinion, or another right.

#### 4 Case studies of the selected cases

##### 4.1 *Buscarini And Others v. San Marino* [1999]

|               |                                                                                                                                                                                  |
|---------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Essence:      | Requirement for legislators to swear allegiance to the Constitution on the Holy Gospels.                                                                                         |
| Dimension:    | Freedom of religion and belief and secularism. Freedom of religion and belief and personal freedom.                                                                              |
| Lower courts: | Direct application to the European Commission of Human Rights, no national remedies to be exhausted. Commission found application admissible and found a violation of Article 9. |
| Majority:     | 17:0. Oath was unjustifiable interference.                                                                                                                                       |
| Dissenting:   | None.                                                                                                                                                                            |

The applicants in this case had been elected Members of Parliament of San Marino. The Elections Act required them to swear allegiance to the Constitution on the Holy Gospels. Three parliamentarians requested to the Captains-Regent, who acts as the head of state of San Marino, that they be exempted from swearing on a religious text.<sup>30</sup> Subsequently they took the oath in writing, as required by law, but omitted the reference to the Gospels. However, the General Grand Council adopted a resolution a short while afterwards ordering the applicants to take the oath once more, but then on the Gospels. They would otherwise have to forfeit their parliamentary seats. The applicants complied, but with the complaint that their freedom of religion and conscience had been infringed. They launched an application to the European Commission of Human Rights shortly afterwards. Before they had launched the application, the law requiring the oath was changed to include a choice between taking the oath on the Gospels or the words “on my honor”.<sup>31</sup>

30 ECtHR (GC), *Buscarini and Others v. San Marino*, app. no. 24645/94, 18 February 1999, paras 7-8.

31 *Ibid.*, paras 10-14.

The Commission found the application to be admissible and found a violation of Article 9.<sup>32</sup> The case was referred directly to the GC.<sup>33</sup> The GC unanimously found a violation of Article 9 of the Convention.

Before turning to the content of the claim, the Court first had to deal with preliminary objections by the Government of San Marino. The Government raised the following objections:

1. The application was an abuse of process, because the claim was of a political nature;
2. The application was lodged out of time; and
3. Domestic remedies had not been exhausted.

The GC dismissed all these preliminary objections. First, the fact that the applicants had announced their intention to bring the question to Strasbourg after taking the oath the second time, could not be regarded as an abuse of process. Second, It also explained why the applications had been submitted within the time period required by the Convention. Third, it argued that the applicants had no access to domestic remedies, as courts in San Marino had no power of constitutional review and therefore the *de jure* jurisdiction in such a case was irrelevant. Hence, there were no remedies to be exhausted, and in conformity with standing case law, the applicants could apply directly to the Court.<sup>34</sup>

The essence of the applicants' claim was that Article 9 had been infringed, as the exercise of the political right of holding parliamentary office was subject to "publicly professing a particular faith".<sup>35</sup> The Government claimed that the oath was not religious but traditional in nature, and that San Marino was a secular state with freedom of religion enshrined in law. Much like religious holidays had lost their exclusively religious character, so had the oath.<sup>36</sup>

According to the Court, the freedom of religion was triggered in this case. The applicants had to take an oath which required them to profess to a particular faith, on pain of losing their parliamentary seats. This was an interference which in order to be lawful had to be prescribed by law, serve a legitimate aim, and be necessary in a democratic society.<sup>37</sup>

The oath was required by the Elections Act, and therefore required by law. As far as the legitimate aim was concerned, the Government argued that the oath affirmed republican values and that because the history and traditions of San Marino were linked to Christianity, the oath had a religious connotation. However, in modern history its significance was strictly republican and secular. It was within a government's margin of appreciation to formulate such a republican oath.<sup>38</sup>

The CG considered it unnecessary to look into the legitimacy of the aim, as clearly the requirement of the oath was incompatible with Article 9. The oath, the

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32 *Ibid.*, para. 15.

33 *Ibid.*, paras 3-4.

34 *Ibid.*, paras 19-28.

35 *Ibid.*, para. 30.

36 *Ibid.*, para. 32.

37 *Ibid.*, para. 34.

38 *Ibid.*, para. 36.

GC held, was tantamount to requiring elected representatives of the people to swear allegiance to a particular religion. In light of the values of pluralism and non-discrimination, this was unacceptable. In a parliament, all different views present in society should have a chance to be represented. Hence, a requirement vis-à-vis elected representatives was not necessary in a democratic society.<sup>39</sup>

#### 4.2 Thlimmenos v. Greece [2000]

|               |                                                                                                                                                   |
|---------------|---------------------------------------------------------------------------------------------------------------------------------------------------|
| Essence:      | Criminal conviction for conscientious objection to military service. Criminal conviction prevents eligibility for becoming accountant.            |
| Dimension:    | Freedom of religion and belief and personal freedom.                                                                                              |
| Lower courts: | Domestic Courts found against the applicant. European Commission of Human Rights found application admissible and found a violation of Article 9. |
| Majority:     | 17:0. Unjustifiable interference of freedom of religion and belief in conjunction with prohibition of discrimination.                             |
| Dissenting:   | None.                                                                                                                                             |

Mr. Thlimmenos, a Jehovah's Witness, was convicted in Greece for refusing compulsory (unarmed) military service. He served his prison sentence. A few years later, he passed a test to become an accountant, a liberal profession in Greece, but was refused appointment by the responsible Board because he had previously been convicted for criminal charges. Domestic courts found that the Board had acted in accordance with the law.<sup>40</sup>

The Commission declared the application partly admissible and found that there had been a violation of Article 9 in conjunction with Article 14, because Greek law failed to differentiate between someone who had been convicted for conscientious objection to military service for religious reasons and "ordinary convictions".<sup>41</sup>

The GC unanimously found a violation of Article 9 in conjunction with Article 14. Before turning to the content of the claim, the Court first had to deal with a preliminary objection by the Government of Greece. The Government raised as objection that in the meantime a law had been adopted that allowed for conscientious objection to military service and also allowed for past convicts to apply for the status of conscientious objectors. The Government claimed that the applicant could have applied for this status and/or could have requested a pardon under the Constitution.<sup>42</sup>

The GC dismissed the objection, arguing that even had he received the recognition and subsequent removal of the criminal record, this would not have resulted

39 *Ibid.*, paras 38-40.

40 ECtHR (GC), *Thlimmenos v. Greece*, app. no. 34369/97, 6 April 2000, paras 7-13.

41 *Ibid.*, paras 3 and 38.

42 *Ibid.*, para. 29.

in reparation for past prejudice suffered, and there was no certainty that his request for a pardon would have been honored.<sup>43</sup>

Before the Court, the applicant argued that his non-appointment as accountant was directly linked to his manifestation of his religion as a Jehovah's Witness. Due to the pacifist tenets of his religion, he was unable to perform military duty, which was the reason for his conviction and, in turn, for his non-appointment. In his opinion, the law should have distinguished between his conviction relating to his manifestation of his religion, and that of ordinary offenders convicted for ordinary crimes.<sup>44</sup>

The Government disputed that Article 14 was applicable because the claim did not fall within the ambit of Article 9. After all, he had not been convicted for his religious beliefs, but for refusing to comply with a general and neutral law which made no distinction between religions. The sanction applied was not disproportionate to the offence committed as military service was linked to the safety and independence of the country and refusing it was considered a serious breach of civic duties. Even if Article 14 did apply, there would be no violation as the follower of any other religion would face the very consequences in the same position.<sup>45</sup>

According to the Court, there was no doubt that the applicant had refused to comply with military service for religious reasons, and religious reasons only. It was known that Jehovah's Witnesses adhered to doctrinal pacifism, and that such pacifism must lead to refusal to wear a military uniform. This was the reason he was convicted, and his conviction in turn prevented him from becoming an accountant. His claim was that based on Article 14 in conjunction with Article 9, the law should have differentiated between ordinary offenders and people like him who were convicted solely for adherence to their religious beliefs. The Court accepted that the "set of facts" fell within the ambit of Article 9.<sup>46</sup>

While previous case law on Article 14 stressed that in analogous situations people must not be treated differently without objective and reasonable justification, the reverse was also true: "The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different."<sup>47</sup>

In accordance with this principle, the Court found that there was no objective and reasonable justification to treat the applicant as any common offender, while his refusal to serve in the military was exclusively based on his religious and philosophical convictions. As he had already served a prison sentence, imposing a further sanction by excluding him from his desired profession was disproportionate and did not serve a legitimate aim. Consequently, Article 14 had been breached.<sup>48</sup>

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44 *Ibid.*, para. 34.

45 *Ibid.*, paras 35- 37.

46 *Ibid.*, para. 42.

47 *Ibid.*, para. 44.

48 *Ibid.*, para. 47.

## 4.3 Cha'are Shalom Ve Tsedek v. France [2000]

|               |                                                                                                                                                       |
|---------------|-------------------------------------------------------------------------------------------------------------------------------------------------------|
| Essence:      | Refusal by Government to grant license for slaughter in <i>glatt kosher</i> tradition.                                                                |
| Dimension:    | Freedom of religion and belief and personal freedom. Freedom of religion and belief and group autonomy.                                               |
| Lower courts: | Domestic Courts found against the applicant. European Commission of Human Rights found application admissible and found a violation of Article 9.     |
| Majority:     | 12:5. No violation of Article 9 of the Convention taken alone. 10:7 no violation of Article 9 of the Convention taken in conjunction with Article 14. |
| Dissenting:   | Joint Dissenting Opinion of Bratza, Fischbach, Thomassen, Tsatsa-Nikolovska, Panfîru, Levits and Traja.                                               |

The applicant in this case was a French liturgical association of ultra-orthodox Jews, who operate a few synagogues and a few community institutions, including butcher shops, restaurants and catering businesses. They adhered to the rules of *glatt kosher* slaughter. *Glatt kosher* slaughter requires more and stricter rules to be applied when slaughtering than ordinary orthodox kosher slaughter.<sup>49</sup>

In France, the slaughter of animals is regulated and religious organizations can acquire exemptions. For the Jewish community, the exemption was given to the ACIP (*Association consistoriale israélite de Paris*) which is linked to the organization representing all Jewish communities in France with the exception of liberals and ultra-orthodox persons.<sup>50</sup>

The applicant had previously sold meat imported from Belgium or slaughtered and certified in accordance with its own religious prescriptions in France, therefore without the relevant authorization from ACIP. When the applicant applied to receive a separate exemption, the request was denied which subsequently led to the Strasbourg case.<sup>51</sup> The Commission declared the application partly admissible and found that there had been a violation of Article 9 in conjunction with Article 14.<sup>52</sup>

The GC found by twelve votes to five that there had been no violation of Article 9 taken alone and by ten votes to seven that there had been no violation of Article 9 in conjunction with Article 14. A joint dissenting opinion was authored by Judges Bratza, Fischbach, Thomassen, Tsatsa-Nikolovska, Panfîru, Levits and Traja.

Before turning to the merits of the case, the GC had to address a preliminary question relating to the application itself. This concerned an attempt to withdraw the case by the former president of the applicant organization, an attempt contested by the lawyer representing the applicant. The Government left it up to the Court

49 ECtHR (GC), *Cha'are Shalom Ve Tsedek v. France*, app. no. 27417/95, 27 June 2000, paras 28-32.

50 *Ibid.*, paras 20-24.

51 *Ibid.*, paras 35-44.

52 *Ibid.*, para. 3.



to determine the validity of the claim. The Court ruled that it seemed that it had been proven that the applicant wanted to pursue the claim.<sup>53</sup>

The applicant claimed that preventing them from slaughtering in accordance with their religious rules infringed the Article 9 rights of their community, as they could not consume meat which fulfilled the requirements of the dietary rules they followed. The Government responded that ACIP shops also sold *glatt* meat, that the applicant could import *glatt* meat from Belgium, and that the applicant was free to reach an agreement with ACIP to slaughter under their supervision. The Government did not dispute that according to the applicant, the meat at ACIP shops did not qualify as *glatt*, but claimed that this was an internal religious dispute within the Jewish community which state authorities in accordance with the principle of secularism should not get involved in. The Government denied interference with the freedom of religion and belief as the only impact the decision had, was economic: the impossibility for Cha'are to sell meat themselves.<sup>54</sup>

Even if the freedom of religion had been infringed, the Government maintained that this was justified under the limitations clause. Regulating slaughter was mandated by public health and animal protection. Ritual slaughter derogated from the general rules, which justified limiting such derogation. Also the decision was covered by the margin of appreciation and the association's activity "was essentially commercial and only religious in an accessory way". The Government also made mention of the limited number of members of the applicant association.<sup>55</sup>

The Government lastly disputed that there had been discrimination. It claimed that if the applicant had been able to prove that it was essentially a religious body, and had wider support within the Jewish community, it might have been granted approval. ACIP had been given the exemption because it had been the recognized administrator of Jewish worship in France for 200 years. However, it did not have an intentional *a priori* monopoly.<sup>56</sup>

According to the Court, the applicant as a religious association could exercise the Article 9 rights on behalf of its followers and that the consumption of meat slaughtered in accordance with religious dietary rules fell within the ambit of Article 9. After all, ritual slaughter constituted a *rite* (French) which was synonymous with the English word "observance". Hence, the applicant could rely on Article 9. The Court then made the following observations:<sup>57</sup>

- The exemption for ritual slaughter represents a deviation from otherwise applicable rules, which serve the interests of public health and animal welfare.
- Given this fact it is understandable that the state aims to regulate ritual slaughter in a way that requires approval of bodies and authorization of slaughter by these bodies.
- The approval granted to ACIP is thus not an infringement of the freedom of religion and belief.

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53 *Ibid.*, paras 54-57.

54 *Ibid.*, paras 65-67.

55 *Ibid.*, para. 69.

56 *Ibid.*, paras 70-71.

57 *Ibid.*, paras 72-79.

- Examination of applications by other organizations must include freedom of religion and belief as consideration.
- The ACIP's meat is accepted as *kosher* by the great majority of Jews living in France, except for the followers of the applicant. However, the difference in method is small.

According to the Court, there would only be interference with the freedom of religion and belief if it was impossible for ultra-orthodox Jews to eat meat which qualified as *glatt*. But as they could obtain meat from Belgium, this was not so. Also, the ACIP provided for *glatt* meat in its own shops. Article 9 did not entail the right to take part "in person" in the process of ritual slaughter. Given that there were other ways to obtain the meat which conformed to one's dietary rules, there had been no interference with the applicant's rights under the freedom of religion and belief. Yet, even if there had been an interference, this would be justified as it was prescribed by law, served the legitimate aim, namely public health, and fell within the margin of appreciation. It was not excessive or disproportionate, and therefore compatible with Article 9.<sup>58</sup>

The Court further observed that even when there was no breach of freedom of religion and belief, but cases fell within its ambit, a discrimination claim must be separately assessed. Yet, in this case, there was no interference with non-discrimination rights. As there was no interference with the freedom of religion and belief, any difference of treatment was limited in scope and, even if there was interference, could be justified by reference to the limitation clause.<sup>59</sup>

The dissenting judges disagreed with both the reasoning and the conclusion reached by the majority. They agreed that the approval granted to ACIP in itself did not violate the freedom of religion and belief. However, granting approval to one organization did not relieve the state from the obligation to also give one to other organizations of the same religion. Citing the prior *Serif* case,<sup>60</sup> they reiterated that divisions which exist in a religious community are "unavoidable consequences of the need to respect pluralism". "In such a situation the role of the public authorities is not to remove any cause of tension by eliminating pluralism, but to take all necessary measures to ensure that the competing groups tolerate each other." Hence, it was also inappropriate to mention that the applicant could have reached an agreement with the ACIP, because that would "discharge the State, the only entity empowered to grant approval, from the obligation to respect the freedom of religion". The fact that *glatt* meat could be obtained elsewhere – in Belgium or the ACIP shops – did not justify the conclusion that there had been no interference. Any denial of an application constituted an interference which must be justified by Article 9(2).<sup>61</sup>

With regard to the justification, the minority saw the main problem in the discrimination against which the applicant complained. It was not for the Court to hold that the interference was limited in scope and effect if the applicant held other-

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58 *Ibid.*, paras 80-85.

59 *Ibid.*, paras 86-87.

60 ECtHR (C), *Serif v. Greece*, app. no. 38178/97, 14 December 1999, para. 53.

61 *Cha'are Shalom Ve Tsedek v. France*, app. no. 27417/95, *supra* n. 49, *Joint dissenting opinion of Judges Bratza, Fischbach, Thomassen, Tsatsa-Nikolovska, Panfîru, Levits and Traja*, para. 1.

wise, because the Convention protected “individuals’ most private convictions”. The minority found that there was a violation of Article 9, in conjunction with Article 14. Cha’are was a religious body, much like the ACIP, irrespective of its smaller size. It was in an analogous situation to that of the ACIP as its method of slaughter also required deviation from the general rule. There was no reason to regard Cha’are as more commercial than the ACIP, unlike what the Government stated, or to assume it would apply animal health and hygienic standards differently. Also, the argument of representativity must fail.<sup>62</sup>

Authorities had an interest in dealing with the most representative organization of a community in many instances. But in the current case “the applicant association has by no means challenged the role and function of the ACIP”. It was “solely a matter of obtaining approval to practice ritual slaughter”. Granting the request could not have undermined public order. Especially since other communities seemed to be granted such approvals quite liberally. The margin of appreciation which states have in this area, was limited by the need to “secure true religious pluralism, which is an inherent feature of the notion of a democratic society”.<sup>63</sup> Hence, there was no objective and reasonable justification and the denial of approval to the applicant was disproportionate.<sup>64</sup>

4.4 Hasan And Chaush v. Bulgaria [2000]

|               |                                                                                                                                                          |
|---------------|----------------------------------------------------------------------------------------------------------------------------------------------------------|
| Essence:      | Dispute within the Muslim community regarding office of Mufti, Government intervenes.                                                                    |
| Dimension:    | Freedom of religion and belief and group autonomy. Freedom of religion and belief and secularism.                                                        |
| Lower courts: | Domestic Supreme Court found in favor of applicant. European Commission of Human Rights found application admissible and found a violation of Article 9. |
| Majority:     | 17:0. Government interference was infringement of Article 9. 11: 6 regarding the satisfaction.                                                           |
| Dissenting:   | Partly opinion by Tulkens and Casadevall joined by Bonello, Stráznická, Greve and Maruste, concerning the satisfaction.                                  |

The first applicant was the former Chief Mufti of the Bulgarian Muslims, the second applicant was his secretary who held other positions within the community as well. After the end of Communist rule, in 1989, the sitting Grand Mufti was removed when the Government declared his election null and void. While the communist era Mufti challenged the removal, the first applicant was elected by the National Conference of Muslims as new Grand Mufti. The events that gave rise to the application started in 1994.<sup>65</sup>

62 *Ibid.*, para. 2.

63 *Ibid.*

64 *Ibid.*

65 ECtHR (GC), *Hasan and Chaush v. Bulgaria*, app. no. 30985/96, 26 October 2000, paras 9-13.

The applicants' opponent organized an alternative conference in which he was elected. He then applied to the Directorate of Religious Affairs on behalf of himself and the council also elected to be registered as legitimate leadership of the Bulgarian Muslims. By then, the former communist party had formed the Government. In 1995, the first applicant was forcefully removed from his offices and his opponent was (re-)instated. The first applicant took administrative steps to repeal the removal. Despite a ruling of the Supreme Court in his favor, the Government refused to take necessary steps. In the meantime, a national conference had once again elected him as Grand Mufti.<sup>66</sup>

Subsequent to the formation of a new government by the parties that had formed the first democratic government, a unification conference for the Bulgarian Muslim community was organized. It elected, amongst others, members of the first applicant's former council and did not include his opponent. His opponent refused to accept the legitimacy of the outcome of these elections and challenged them and the subsequent registration of the new unified leadership in court. The Supreme Administrative Court found in his opponent's disfavor.<sup>67</sup>

The Commission declared the application admissible and expressed unanimously that there had been violations under Articles 9 and 13. The GC found unanimously that the applicants' rights under Article 9 and Article 13 had been violated. A majority of 11 judges found that the dictum itself represented a just satisfaction for the second applicant (while the first applicant was unanimously awarded pecuniary damages). A minority of seven judges disagreed.

In the applicant's opinion the freedom of religion and belief covered the right of religious communities to organize themselves in accordance with their own rules and opinions. The organizational structure was then "not simply a form of their existence but [has] a substantive meaning".<sup>68</sup>

The Government held that not every act motivated by religion fell under Article 9. As Islam was registered as an official religion, the denomination had several schools and a newspaper, and believers could freely attend mosques and worship and practice in freedom. Therefore, there was no interference with the freedom of religion and belief proper. The applicants had failed to claim a violation of Article 9 read in conjunction with Article 11 (freedom of association), which they should have done in accordance with standing case law. Hence, their claim had to be dismissed.<sup>69</sup>

The GC began its consideration by reasserting the *Kokkiankis* finding on the importance of religious freedom for pluralism (see section 10.3.1). It stressed that the freedom of religion and belief had a personal and a communal dimension. This did not mean that every act motivated by religion was protected.<sup>70</sup> However, "religious communities traditionally and universally exist in the form of organized structures. Religious ceremonies have their meaning and sacred value for the believers if they have been conducted by ministers empowered for that purpose in compliance with these rules. The personality of the religious ministers is undoubtedly of import-

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66 *Ibid.*, para. 14-38.

67 *Ibid.*, paras 39-45.

68 *Ibid.*, para. 56.

69 *Ibid.*, para. 57.

70 *Ibid.*, para. 60.

ance to every member of the community. Participation in the life of the community is thus a manifestation of one's religion." This required Article 9 in the present case to be interpreted in light of Article 11.<sup>71</sup>

However, the organizational aspect was not only relevant for the community as such, but also essential for the individual believers.<sup>72</sup> As the first applicant was the elected leader of the Muslim community at the time that the events which gave rise to the application took place, and the second applicant was a practicing Muslim and active member of the community in its organizational structures, it was clear that Article 9 was applicable and must in this case be interpreted in light of Article 11.<sup>73</sup>

The applicants asserted that the state had arbitrarily interfered with the internal organization of the Muslim community and had done so in the absence of clear legal rules justifying the official's actions and positions. In the applicants' opinion, the absence of a legal framework and the failure to enact one itself gave rise to a violation of Article 9 obligations on the part of the state. The applicants further asserted that the decrees which recognized the alternative leadership and the removal of the first applicant from the premises of the Grand Mufti's office, constituted a breach of relevant law. Also, the Government's *modus operandi* in the circumstances attested no legitimate aim.<sup>74</sup>

The Government's position was that no organizational freedom whatsoever had been impaired. The first applicant's organization had been free to organize and meet, as was shown from the fact that they had organized a national conference. His replacement was the direct result of the free will of the Muslim community and hence, his opponent and not the applicant had qualified for registration in accordance with relevant law. In the Government's opinion, the nature of the conflict was political, not religious, and Bulgaria was well under way in furthering religious freedom by adopting a new law on religious denominations.<sup>75</sup>

The Court left the question undecided whether registration of religious denomination and their leadership in abstract constituted an interference. The facts of this case, however, showed that the state did not remain neutral vis-à-vis a conflict of leadership. The whole goal of trying to establish a religious community under a single unified leadership, whether by stimulation or pressure, ran contrary to this neutrality. The failure to implement court rulings was also deemed a relevant fault on the part of the Government by the Court. The Government taking sides in the internal conflict and failure of registration of the applicants' organization had serious implications for the applicants, at least as far as managing and representing their part of the Muslim community was concerned.<sup>76</sup>

Turning to the possible justification, the Court noted the absence of substantive criteria for the registration of religious denomination and procedural safeguards against arbitrary exercise of government power. Hence, there was no adequately

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71 *Ibid.*, para. 62.

72 *Ibid.*, para. 62.

73 *Ibid.*, paras 64-65.

74 *Ibid.*, para. 67-69.

75 *Ibid.*, paras 70-73.

76 *Ibid.*, paras 77-82.

accessible and foreseeable domestic legal basis. The fact that every time that the registration changed, this was preceded by a change in government, was seen by the court as proof of arbitrary exercise of discretion. Consequently, the interference was not prescribed by a law as understood by the Convention.<sup>77</sup>

The Court further noted that the refusal on the part of the Government to comply with court judgments was clearly unlawful. In light of this, it was unnecessary to continue the analysis regarding the legitimate aim and necessity in a democratic society. After all, the standard for application of Article 9(2) could no longer be met.<sup>78</sup>

Given the findings under Article 9, in the Court's opinion no separate issue arose under Article 11.<sup>79</sup> The applicants also claimed that they had not had an effective remedy against interference with their human rights.<sup>80</sup> Given that the first applicant and his council could not launch an effective challenge against the state interference with the internal matters of their community, there was indeed a violation.<sup>81</sup> The Court found no separate violation of the right to fair trial.<sup>82</sup>

Judges Tulkens and Casadevall joined by Judges Bonello, Strážnická, Greve and Maruste, authored a separate opinion, arguing that because the second applicant had also suffered distress, he too should have received pecuniary satisfaction.<sup>83</sup>

#### 4.5 Refah Partisi (The Welfare Party) And Others v. Turkey, [2003]

|               |                                                                                                                                                                       |
|---------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Essence:      | Ruling government party declared unconstitutional for violation of secularism.                                                                                        |
| Dimension:    | Freedom of religion and belief and group autonomy. Freedom of religion and belief and secularism. Freedom of religion and belief and family law and family relations. |
| Lower courts: | Domestic Constitutional Court found unconstitutional. Chamber found justifiable interference.                                                                         |
| Majority:     | 17:0. Prohibition was justified interference. Separate concurring opinion by Ress and Rozakis. Separate concurring opinion by Kovler.                                 |
| Dissenting:   | None                                                                                                                                                                  |

The applicants were the Refah Party and Mr. Necmettin Erbakan, former prime minister and leader of the party. Refah was founded following the subsequent prohibition of the National Order Party and the Salvation Party, its two predecessors.

<sup>77</sup> *Ibid.*, paras 84- 86.

<sup>78</sup> *Ibid.*, paras 87-88.

<sup>79</sup> *Ibid.*, para. 90.

<sup>80</sup> *Ibid.*, para. 93.

<sup>81</sup> *Ibid.*, para. 100-104.

<sup>82</sup> *Ibid.*, para. 108.

<sup>83</sup> *Hasan and Chaush v. Bulgaria*, app. no. 30985/96, *supra* n. 65, *Joint partly dissenting opinion of Judges Tulkens and Casadevall joined by Judges Bonello, Strážnická, Greve and Maruste*, paras 1-4.

From 1991 until 1995, the party was represented in Parliament. After it came out largest in national elections in 1995, it formed the government together with the center-right True Path Party, under the leadership of Mr. Eberkan. In 1998 it was prohibited by the Constitutional Court, in response to the case brought by the Public Prosecutor's Office, which claimed that the party had become a center of unconstitutional activity.<sup>84</sup> Some of the facts raised by the prosecutors were:<sup>85</sup>

- Eberkan had challenged the constitutionally enshrined concept of secularism in favor of a different concept of secularism;
- He had said that religious believers should place the rules of their religions on a higher value than state law;
- He had received leaders of religious and political movements for a fast-breaking dinner (*iftar*) during Ramadan;
- He advocated the wearing of religious attire (headscarves) at state institutions like schools and universities (which is prohibited in Turkey);
- He called upon Muslims to make their religious donations (*zakat*) to Refah;
- He called for the introduction of legal pluralism in personal and family law, to allow Muslims, and other believers to have their family affairs governed by traditional religious law;
- He amended working hours during Ramadan to make allowances for fasting;
- He and other party members uses language which was interpreted to imply overturning the constitutional order and/or condoning violence.

Having been outlawed by the Constitutional Court, the Refah party, Mr. Eberkan and its members turned to the ECtHR. The Chamber declared the applications of the applicants partly admissible and held by four votes to three that there had been no violation. The GC unanimously found that there was no violation of Article 11. There had been an interference which was prescribed by law, served legitimate aims and was necessary in a democratic society.<sup>86</sup> Judges Ress and Rozakis issued a joint separate opinion. Judge Kovler also authored a separate concurring opinion.

The featured right in the *Refah* case was the freedom of association. However, the essence of the case was the prohibition of a political party, which was deemed by the highest national tribunal to be directed against the particular form of secularism, enshrined in the Turkish Constitution. Hence, much of the reasoning was relevant to the self-organization of a religious community in a political party, which had politico-religious goals, including the very explicit agenda to introduce legal pluralism.

The Turkish Constitutional Court, when declaring Refah unconstitutional, observed that the Turkish version of secularism as enshrined in the Constitution was to be regarded as “one of the indispensable conditions of democracy”. It had been developed “on account of the country’s historical experience and the specific features of Islam. The rules of *shari’a* were incompatible with the democratic regime.” “Inter-

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84 ECtHR (GC), *Refah Partisi (The Welfare Party) and Others v. Turkey*, app. nos. 41340/98, 41342/98, 41343/98 and 41344/98, 13 February 2003, paras 10-21.

85 *Ibid.*, paras 12, 16 and 26-44.

86 *Ibid.*, paras 4, 50, 64, 67 and 135.



vention by the State to preserve the secular nature of the political regime had to be considered necessary in a democratic society.”<sup>87</sup>

The Court found that the prohibition was provided for by relevant national law. It was undisputed that anti-secular activities were prohibited in Turkey and could result in the disbandment of a political party. It also found the application of the relevant laws to the facts sufficiently clear and foreseeable.<sup>88</sup>

The Court also accepted that a legitimate aim was served by the prohibition: “Taking into account the importance of the principle of secularism for the democratic system in Turkey, it considers that Refah’s dissolution pursued several of the legitimate aims listed in Article 11, namely protection of national security and public safety, prevention of disorder or crime and protection of the rights and freedoms of others.”<sup>89</sup>

Refah’s main argument was that it was not an anti-secular party, but a party that sought to redefine the principle of secularism in order to allow a broader concept of freedom of religion for Turkey’s practicing religious citizens – not just Muslims, but people of all denominations. Refah was thus of the opinion that its actions and policies were not contrary to the Constitution. It regarded the national discussion of competing concepts of secularism as not only acceptable, but even necessary for the very survival of democracy.

Refah argued that the coalition government had been in power for a year, yet no initiative had been taken to introduce “a regime based on Islamic law”. In Refah’s opinion, the “rigorous European supervision” by the ECtHR itself was enough guarantee to safeguard that a government would comply with democratic principles. Hence, prohibition was not necessary. The proposed policy on legal pluralism in civil matters would have left public law intact. The Constitutional Court’s judgment that the very notion of such a policy must be disqualified, in light of secularism amounted to discrimination against Muslims who wished to conduct their private lives in accordance with the precepts of their religion. Refah also argued that the Constitutional Court was inconsistent when it accused Refah of simultaneously wanting to replace the current legal system with *Shari’a* and wanting to introduce legal pluralism. Refah could not support proposals simultaneously.<sup>90</sup>

The Constitutional Court and the Chamber had both given significance to the term “just order” used by Refah on a structural basis. They interpreted the term to imply a religious law-based order to replace the existing constitutional order, if necessary, by violent means.<sup>91</sup> Refah pointed to the fact that many faith-inspired politicians used such terms. Making a distinction between Muslim and Christian use of terms, amounted to discrimination against Muslim democrats and the Muslim population of Europe by suggesting that their religious values were by definition anti-democratic.<sup>92</sup>

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87 *Ibid.*, para. 25.

88 *Ibid.*, paras 59-63.

89 *Ibid.*, para. 67.

90 *Ibid.*, paras 70-73.

91 *Ibid.*, paras 80-84.

92 *Ibid.*, paras 74-75.

The Court assessed the situation in light of the jurisprudence regarding political parties and pluralism in a democratic society in general. It also reiterated the importance of freedom of religion, and that in a democratic open society, freedom of religion must sometimes be restricted to ensure equal treatment and respect for everyone. The Court then stressed the cases in which it had held that restrictions of the freedom of religion were necessary in a democratic society<sup>93</sup> such as:

- Obliging someone to wear a helmet for traffic security although his religious observance to wear a turban was stifled by this rule;
- Disallowing someone to take breaks from work in order to pray;
- Disallowing a teacher to wear a religiously motivated head covering.

According to the Court, the Turkish principle of secularism was respectful of the freedom of religion and belief, “being one of the fundamental principles of the State which are in harmony with the rule of law and respect for human rights and democracy. An attitude which fails to respect that principle will [...] not enjoy the protection of Article 9.” “In order to perform its role as the neutral and impartial organizer of the exercise of religious beliefs, the State may decide to impose [...] the duty to refrain from taking part in the Islamic fundamentalist movement, whose goal and plan of action is to bring about the pre-eminence of religious rules.” In light of this, reference was made to the fact that in Turkey the majority of the population was Muslim, and that fundamentalist groups may exercise pressure on those who did not follow the religion as they did or adhered to a different religion.<sup>94</sup>

Although the potential risk to democracy may not have materialized in the Court’s eyes, the prohibition of a political party may be justified as being necessary in a democratic society.<sup>95</sup> In this case, the Court made the following assessments: it considered the proposed legal pluralism to be incompatible with the Convention and *Shari’a* to be incompatible with democracy; it considered that religious fundamentalist movements had previously seized power in some nations and the Turkish republic overcame the theocracy of Ottoman administration. The Ottoman Empire applied both *Shari’a* as legal pluralism, therefore it was not inconsistent to accuse Refah of pursuing both.<sup>96</sup>

The Court also believed that the freedom of religion and belief did not include a right to choose for a religious marriage and family law. “[F]reedom of religion, is primarily a matter of individual conscience” which is “quite different from the field of private law”. “It has not been disputed before the Court that in Turkey everyone can observe in his private life the requirements of his religion. On the other hand, Turkey, like any other Contracting Party, may legitimately prevent the application within its jurisdiction of private-law rules of religious inspiration”. The freedom to enter into contracts cannot “encroach upon the State’s role as the neutral and impartial organizer of the exercise of religions, faiths and beliefs.”<sup>97</sup>

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93 *Ibid.*, paras 86-92.

94 *Ibid.*, paras 93-95.

95 *Ibid.*, paras 104-105.

96 *Ibid.*, paras 119-126.

97 *Ibid.*, para. 128.

The Court also followed the domestic authorities' reading that the use of the term *jihad* (struggle) had a "primary meaning [of] holy war and the struggle to be waged until the total domination of Islam in society is achieved".<sup>98</sup> Because the Court was convinced that Refah had political aims incompatible with a democratic society, there was a pressing social need to prohibit the party. Also, the measure was proportionate under the circumstances. Hence, there was no violation of Article 11. Because of the reasoning given, the complaints made under Articles 9, 10, 14, 17 and 18 of the Convention need not be addressed.<sup>99</sup>

The concurring opinion of Judges Ress and Rozakis explained the philosophy underlying what was called "vigilant democracy". Parties seeking to undermine democracy and rule of law, could not rightfully claim that their exclusion from the political process and legal sanctioning violated the principles they sought to undermine.<sup>100</sup>

While not disputing the assessment that Refah's goals were in contradiction to Turkish secularism, which is a pillar underlying its democracy, Judge Kovler was bothered by some elements of the judgment. He found the language of the judgment too political/ideological in nature. He believed that the majority was wrong to dismiss legal pluralism as opposed to convention freedoms. After all legal pluralism is used in many democratic nations of the world. In addition, he felt that the Court was out of order in treating *Shari'a*, a legal tradition of a world religion, which had existed for centuries, simply as a caricature that was antithetical to human rights. Lastly, he was unhappy with the use of opinion polls to support legal reasoning, as they are fit only for a political analysis.<sup>101</sup>

4.6      Maestri v. Italy [2004]

|               |                                                                                                                                           |
|---------------|-------------------------------------------------------------------------------------------------------------------------------------------|
| Essence:      | Judge dismissed for being a member of Freemasons.                                                                                         |
| Dimension:    | Freedom of religion and belief and personal freedom. Freedom of religion and belief and secularism.                                       |
| Lower courts: | Domestic courts found against applicant. Chamber relinquished jurisdiction in favor of the Grand Chamber.                                 |
| Majority:     | 11:6. Unjustified interference for lack of foreseeability of law.                                                                         |
| Dissenting:   | Joint Dissenting Opinion of Bonello, Strážnická, Bîrsan, Jungwiert and Del Tufo. Dissenting Opinion of Loucaides, joined by Judge Bîrsan. |

Mr. Maestri was an Italian judge. He was also a member of a Masonic Lodge. Following an investigation in 1993, disciplinary measures were taken against him because he had been a Freemason since 1981. This led to his dismissal. His membership of

98    *Ibid.*, para. 130.

99    *Ibid.*, paras 132-137.

100   *Refah Partisi (The Welfare Party) and Others v. Turkey*, app. nos. 41340/98 et al., *supra* n. 84, *Concurring opinion of Judge Ress joined by Judge Rozakis*.

101   *Refah Partisi (The Welfare Party) and Others v. Turkey*, app. nos. 41340/98 et al., *supra* n. 84, *Concurring opinion of Judge Kovler*.

the Lodge was deemed to be in violation of a regulation which stipulated that judges who failed to fulfill their obligations and act contrary to what may be expected of them, thereby undermining the prestige of the judiciary, could incur disciplinary sanctions. In Italy, Masonic lodges had previously been assumed to be collaborating with the mafia and organized crime. The judiciary organization issued internal directives in the early 1990s ordained that judges should not be members of Masonic lodges. The reasons for dismissing Mr. Maestri were the “incompatibility between the Masonic and judicial oaths, the hierarchical relationship between Freemasons, the ‘rejection’ of State justice in favor of Masonic ‘justice’ and, lastly, the indissoluble nature of the bond between Freemasons, even in the case of a member who wished to leave the organization”.<sup>102</sup>

Mr. Maestri appealed against the disciplinary measures, but lost the national case at the national court of cassation. While he was still active as a judge, he argued that the procedures had impacted his career.<sup>103</sup> Hence, he turned to Strasbourg. Due to the fact that the application was transmitted to the Court when Protocol No. 11 came into force, changing the procedure, the application was allocated to the Chamber. The Chamber declared the application admissible, yet the Chamber relinquished jurisdiction in favor of the GC.<sup>104</sup>

The GC found in favor of the applicant by 11 votes to 6. Five of the dissenting judges authored a joint dissenting opinion. Judge Loucaides authored a separate dissenting opinion, in which one of the other five judges, Judge B?rsan, joined in.

The applicant alleged violations of his rights under Articles 9, 10 and 11 of the Convention. According to the GC, the complaint fell mainly within the ambit of Article 11, and it therefore considered the complaints of this article. As the Government did not dispute that there had been interference with the applicant’s Convention rights, the Court assumed interference.<sup>105</sup>

The applicant submitted that there was no law prohibiting judges from being members of the Freemasons or, for that matter, any political party, trade union or church. The organizations prohibited by the Constitution were secret organizations that pursued political aims by military means. Yet the Freemasons was not a paramilitary organization but a private organization, which unlike other private organizations even made the lists of its members public. The Government held that there was a legal basis in Italian law, sufficiently accessible and foreseeable to meet the standard required by the Convention.<sup>106</sup>

The Court extensively analyzed the criteria “prescribed by law” and “in accordance with the law” as contained in the second paragraphs of Articles 8 to 11, revisiting the standing case law. The text of the regulation, on which the disciplinary measures had been based, was general in wording, interdicting in general terms behavior which could harm the judiciary function, without any reference to membership of organizations or, for that matter, Freemasonry. Hence, the Court concluded that the wording in the cited legislation was not “sufficiently clear to [inform] the applicant, [...] that

102 ECtHR (GC), *Maestri v. Italy*, app. no. 39748/98, 17 February 2004, paras 11-13.

103 *Ibid.*, paras 14-16.

104 *Ibid.*, paras 4-7.

105 *Ibid.*, paras 23-26.

106 *Ibid.*, paras 28-29.

his membership of a Masonic lodge could lead to sanctions being imposed on him".<sup>107</sup> Having found that the interference was not prescribed by law, it was unnecessary for the Court to assess the other requirements of Article 11.<sup>108</sup>

Four dissenting judges, in their combined dissenting opinion, disagreed with the majority regarding the legal basis. In their view, the principle of subsidiarity, the "fourth instance" doctrine and the "margin of appreciation" should have guided the Court towards a different outcome.<sup>109</sup> The dissenters pointed to the fact that in Italy, Freemasonry had been implicated in plots to overthrow Italian democracy, and had allegedly aligned itself with organized crime, terrorism and the Mafia.<sup>110</sup>

Given the relevant legislation cited by the Government, Constitutional Court judgments regarding the restriction of the right to association for judges, and a directive of the National Council of the Judiciary explicitly mentioning the Freemasons, the dissenters were of the opinion that the applicant could have foreseen disciplinary measures before he joined the Freemasons in 1982.<sup>111</sup> The said directive had been explained by reference to "[...] the scandals rocking Italy at and prior to that time as a result of the infiltration of degenerate Freemasonry into all spheres of power, an infiltration which had resulted in a stranglehold of all democratic institutions, including the judiciary, and had compromised every sector of Italian public life and Italian Freemasonry as a whole".<sup>112</sup>

Furthermore, the dissenters found Freemasonry as such incompatible with the duties of the office of a judge, since judges are beholden only to the law whereas a Freemason is bound solemnly to "swear to obey without hesitation or dissent such orders as are given to me by the Sovereign Tribunal of the 31st Degree and by the Council of the 33rd Degree of the Ancient and Accepted Scottish Rite". Also, Freemasons are bound towards one another by oaths of loyalty, which according to the dissenting judges compromise judicial impartiality. The parliamentary report which had preceded the decree, in the dissenting judges opinion, should have convinced Mr. Maestri that Freemasonry and the office of a judge were incompatible, especially since the report had also registered popular opinion about the "noxious infestation of degenerate Freemasonry throughout the vital organs of the State".<sup>113</sup>

Judge Loucaides, with whom Judge Bîrsan agreed, did not disagree with the other dissenting judges, yet preferred to base his judgment on a specific line of reasoning focusing mainly on the foreseeability.<sup>114</sup> He was of the opinion that it was foreseeable before 1982 (when Maestri joined the Freemasonry, after having been a judge for more than 10 years) and certainly after the directive of 1990 that being a Freemason was incompatible with being a judge.

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107 *Ibid.*, para. 41.

108 *Ibid.*, para. 43.

109 *Maestri v. Italy*, app. no. 39748/98, *supra* n. 102, *Joint dissenting opinion of Judges Bonello, Strážnická, Bîrsan, Jungwiert and del Tufo*, paras 8-9.

110 *Ibid.*, para. 10.

111 *Ibid.*, paras 11-13.

112 *Ibid.*, para. 14.

113 *Ibid.*, paras 15-16.

114 *Maestri v. Italy*, app. no. 39748/98, *supra* n. 102, *Dissenting opinion of Judge Loucaides joined by Judge Bîrsan*.

## 4.7 Leyla Şahin v. Turkey [2005]

|               |                                                                                                                                                                |
|---------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Essence:      | Student expelled for wearing headscarf at Turkish university.                                                                                                  |
| Dimension:    | Freedom of religion and belief and personal freedom. Freedom of religion and belief and the educational system. Freedom of religion and belief and secularism. |
| Lower courts: | Domestic courts found against applicant. Chamber found application admissible, but no violation of Article 9.                                                  |
| Majority:     | 16:1. No violation Article 9. Separate joint concurring opinion by Judges Rozakis and Vajić. 17:0 No violation of Articles 8 and 10.                           |
| Dissenting:   | Dissenting opinion by Tulkens concerning violation of Article 9.                                                                                               |

Leyla Şahin was a medical student at the University of Istanbul. She wore a headscarf as part of her adherence to the religious precepts of Islam. While at first, she could pursue her studies while wearing the headscarf, later on she was refused enrolment in certain classes. Subsequently, she left Turkey to pursue her medical studies in Vienna, where she could wear a headscarf at the university. Her claim was directed against a circular by the University of Istanbul, which ordered that students covering their heads or wearing beards must not be admitted to class. Her complaint was dismissed by the Administrative Court and the Supreme Administrative Court. Both courts also found against her in the procedures regarding the disciplinary measures taken against her.<sup>115</sup> The Chamber found the application to be admissible, but found no violation of Article 9, as the conditions of paragraph 2 had been met.<sup>116</sup>

A majority of 16 at the GC found that freedom of religion and belief and the right to education had not been violated. Unanimously, the Court found that there had been no violation of Articles 8 and 10. Judge Tulkens, the dissenting judge, wrote an elaborate dissenting opinion. Judges Rozakis and Vajić authored a joint concurring opinion.

The majority first analyzed the history and recent past of religious dress and secularism in Turkey. It recalled that modern European dress was mandated by law and that since the 1980s, religious attire had been prohibited in educational institutions.<sup>117</sup> The majority also observed that the headscarf had triggered many debates in many member states. While the Muslim majority countries of the member states had all regulated religious attire, the non-Muslim majority nations were not uniform in their approach. The United Kingdom was the most liberal nation when it came to the acceptance of religious attire and symbols in schools.<sup>118</sup>

The applicant did not contest that prohibition of religious attire would always constitute infringement of freedom of religion and belief, but that it did in her case. The Government endorsed the Chamber's findings that the interference was justified by the limitations clause.<sup>119</sup> The CG easily assumed interference with the freedom

115 ECtHR (GC), *Leyla Şahin v. Turkey*, app. no. 44774/98, 10 November 2005, paras 14-27.

116 *Ibid.*, paras 6, 8 and 71.

117 *Ibid.*, paras 30-35.

118 *Ibid.*, paras 55-65.

119 *Ibid.*, paras 72-74.

of religion and belief. The applicant claimed to be obeying a religious precept, thereby manifesting her desire to comply strictly with her religion's rules.<sup>120</sup>

The applicant claimed that there had been no legal prohibition. The circular had only come into force six months after she entered university.<sup>121</sup> Based on case law, the Court called the rule foreseeable. Ms. Şahin, according to the Court, could have anticipated that she would be forbidden to enter classes wearing the headscarf.<sup>122</sup> The majority also assumed that the interference was aimed at the protection of the rights and freedoms of others, noting that this was not in dispute between parties.<sup>123</sup>

The applicant challenged the version of secularism adhered to by the Government. She argued that democracies must be based on pluralism and broadmindedness. She pointed to the fact that the member states which had the longest tradition of parliamentary democracy did not prohibit the wearing of a headscarf in university. She also denied that there were any tensions in Turkey, which required such a measure. The argument that by wearing the headscarf she had somehow shown a lack of respect for the rights and freedoms of others was unfounded.<sup>124</sup>

The Court began its analysis by reiterating the relevant principles. First, it stressed the importance of the freedom of religion and belief for pluralism by reference to *Kokkinakis* (see section 10.3.1). It recalled the internal, external and collective dimensions of the right.<sup>125</sup> It furthermore recalled the role of the state as the impartial organizer of pluralism, stating that the state must ensure mutual tolerance between opposing groups and that this could not be done by eliminating pluralism. This required a balance "which ensures the fair and proper treatment of people from minorities and avoids any abuse of a dominant position". With regard to the relationship between religion and state, the majority noted, there was a broad margin of appreciation. This was due to the fact that there was no uniform approach among the member states. However, the margin of appreciation nevertheless went hand in hand with European supervision.<sup>126</sup>

The majority then turned to the Islamic headscarf, noting that restricting its wearing was compatible with the Convention. Recalling the *Dahlab*<sup>127</sup> Chamber case, it called the headscarf a "powerful external symbol" which "might have some kind of proselytizing effect" and seemed to be "imposed on women by a religious precept that [is] hard to reconcile with the principle of gender equality". Therefore, it concluded that it could not "easily be reconciled with the message of tolerance, respect for others and, above all, equality and non-discrimination".<sup>128</sup>

In its assessment of the Turkish principle of secularism, the majority noted that it guided the state in its role of "impartial arbiter". Secularism necessarily entailed freedom of religion and conscience and protected the individual against "arbitrary

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120 *Ibid.*, para. 78.

121 *Ibid.*, paras 79-80.

122 *Ibid.*, para. 92.

123 *Ibid.*, para. 99.

124 *Ibid.*, paras 100-101.

125 *Ibid.*, paras 104-105.

126 *Ibid.*, paras 107-110.

127 ECtHR (C), *Dahlab v. Switzerland*, app. no. 42393/98, 15 February 2001.

128 *Leyla Şahin v. Turkey*, app. no. 44774/98, *supra* n. 115, para. 111.



interference by the State” as well as “external pressure from extremist movements”. Hence, the freedom of religion could be restricted to defend this principle.<sup>129</sup>

Overall, the majority deemed the interference justified, given above considerations on the headscarf, gender equality and secularism. It also noted the existence of religio-political movements in Turkey that aspired to a society in which everything was founded on religious precepts. In light of all this, the Court was understanding of the fact that Turkish authorities considered it “contrary to such values [i.e. pluralism, equality] to allow religious attire to be worn”.<sup>130</sup>

Given the consistent policy of the university reminding students not to wear religious attire in the university’s premises, the Court rejected the argument put forward by the applicant that the absence of penalties for a breach of this rule effectively meant that no rules existed. Altogether, application of the principles to the case at hand led the majority to conclude that Article 9 was not violated.<sup>131</sup>

Ms. Şahin had also argued that the ban, which forced her to choose between following her religion and the university’s rules, effectively denied her the right to education.<sup>132</sup> The Court, however, found that in principle disciplinary measures were no interference with the right to education. Given its findings concerning Article 9, the majority found the prohibition of religious dress in the university was proportional to the means pursued. As Mrs. Şahin could foresee these measures, there was also no impairment of the right to education.<sup>133</sup> As the applicant basically formulated the same complaints under Articles 8, 10 and 14 as she did under Article 9, the Court did not find any violation there either.<sup>134</sup>

Judges Rozakis and Vajić, who concurred with the majority, agreed with both the analysis and outcome under Article 9 as well as the analysis under Article 2 of Protocol No. 1. However, they would have refrained from addressing the freedom of education separately from the freedom of religion and belief, as the main issue was the wearing of the headscarf.<sup>135</sup>

Dissenting Judge Tulkens agreed with the majority regarding the importance of the freedom of religion for pluralism in a democratic society. She also agreed that in the interest of pluralism, individual freedom can sometimes be restricted. However, in her opinion the majority’s approach granted too much room for the margin of appreciation in this case. As the margin of appreciation went hand in hand with the European supervision by Strasbourg, and the issue raised questions in many member states, she argued for more supervision in this case.<sup>136</sup>

Judge Tulkens also critiqued the way in which the majority seemed to have measured secularism and equality against liberty. In her opinion, these principles were mutually supportive and should have been applied in a reconciliatory fashion.

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129 *Ibid.*, para. 113.

130 *Ibid.*, paras 115-116.

131 *Ibid.*, paras 121 and 123.

132 *Ibid.*, para. 147.

133 *Ibid.*, para. 161.

134 *Ibid.*, paras 163-166.

135 *Leyla Şahin v. Turkey*, app. no. 44774/98, *supra* n. 115, *Concurring opinion of Judges Rozakis and Vajić*.

136 *Leyla Şahin v. Turkey*, app. no. 44774/98, *supra* n. 115, *Dissenting opinion of Judge Tulkens*, paras 1-3.

She also believed there was no “pressing social need” which mandated restricting liberty to uphold secularism. Seemingly criticizing the inconsistency of Article 9 jurisprudence, she highlighted that there was no clear case law on the wearing of religious symbols, “whose symbolic importance may vary greatly according to the faith concerned”.<sup>137</sup>

Judge Tulkens argued that Ms. Şahin did not challenge the principle of secularism as such, nor was there any evidence that she did not support it. She also believed that the majority failed to take into consideration the difference between teachers and students when it came to applying secularism in public education. The freedom of religion and belief protected a broad liberty, to be restricted only when the rights and freedoms of others or public order were endangered. Hence, the Government had to show that somehow the headscarf worn by Ms. Şahin would provoke a reaction or was employed by her to exert pressure, proselytize or actually undermined the convictions of others. The Government had produced no evidence in this regard.<sup>138</sup>

Tulkens also referred to the *Gündüz* judgment,<sup>139</sup> in which the ECtHR found the conviction of a religious leader for insulting in strong language the secular part of the population, to be a violation of the freedom of expression. In Tulkens’ eyes this implied that “manifesting one’s religion by peacefully wearing a headscarf may be prohibited whereas, in the same context, remarks which could be construed as incitement to religious hatred are covered by freedom of expression”.<sup>140</sup>

Tulkens argued that the majority assumed, easily and wrongly, that in view of combatting religious extremism, a personal interest in wearing a headscarf may be limited by rules, because it could be associated with extremism. Furthermore, unlike the majority’s assessment, the headscarf had no single meaning but meant something different to women who wore it or did not wear it. It was these women’s opinions that should have been central in the debate. For courts to make appraisals was uncalled for in her view. After all “equality and non-discrimination are subjective rights which must remain under the control of those who are entitled to benefit from them”. “Paternalism of this sort” is counter to the personal autonomy jurisprudence developed under Article 8.<sup>141</sup>

Regarding Article 9, Judge Tulkens concluded that in the absence of relevant and sufficient reasons to prohibit Ms. Şahin from wearing the headscarf at the university, the interference was not necessary in a democratic society. Consequently, there was a violation of Article 9. Leyla Şahin was *de facto* deprived of her right when she was refused access to lectures and examinations under the precondition of removing her headscarf. Hence, the essence of the right to education was also infringed. Effectively, this deprivation may be considered discrimination on the basis of religion.<sup>142</sup>

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137 *Ibid.*, paras 4-6.

138 *Ibid.*, paras 7-8.

139 ECtHR (C), *Gündüz v. Turkey*, app. no. 35071/97, 14 June 2004.

140 *Leyla Şahin v. Turkey*, app. no. 44774/98, *supra* n. 115, *Dissenting opinion of Judge Tulkens*, para. 10.

141 *Ibid.*, paras 10-12.

142 *Ibid.*, paras 17-18.

Lastly, the dissenting judge raised the issue of tolerance. If Ms. Şahin and other women who wore a headscarf were admitted to university, this would create a pluralist environment in which women with and without headscarves would encounter one another and would have to solve whatever conflict would arise between them by dialogue. Imposing an obligation to wear no headscarf could never create tolerance: “Bans and exclusions echo that very fundamentalism these measures are intended to combat. “When rejected by the law of the land, young women are forced to take refuge in their own law. As we are all aware, intolerance breeds intolerance.”<sup>143</sup>

4.8 Folgerø And Others v. Norway [2007]

|               |                                                                                                                                                                                                                        |
|---------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Essence:      | Denial of request for exemption from religious/philosophical instruction class.                                                                                                                                        |
| Dimension:    | Freedom of religion and belief and personal freedom. Freedom of religion and belief and the educational system. Freedom of religion and belief and secularism.                                                         |
| Lower courts: | National courts found against applicants. Chamber found the complaint admissible and relinquished jurisdiction in favor of the Grand Chamber.                                                                          |
| Majority:     | 9:8. Failure to grant exemption was infringement of Article 9. 15:2 case was admissible. Separate opinion authored by Judges Zupančič and Borrego Borrego. 17:0 no separate issues under Article 14 of the Convention. |
| Dissenting:   | Dissenting opinion by Wildhaber, Lorenzen, Birsan, Kovler, Steiner, Borrego Borrego, Hajiyeu and Jebens.                                                                                                               |

The applicants in this case sought an exemption for their children from the Norwegian school subject called KRL (Christianity, religion and philosophy). They were members of the Norwegian Humanist Association. The Association had also been an applicant originally, but it later withdrew. Up to the 1990s, legislation had provided that teachers had to teach pupils the tenets of Norwegian Lutheran faith. In 1990, a reform was introduced of which KRL was an integral part. While the subject was a compulsory course, children could be exempted from parts of the course, provided reasons were given. Norway has Lutheran Protestantism as the state religion and a state church, while the overwhelming majority of the Norwegian population (86%) is also a member of that church.<sup>144</sup>

Norwegian courts rejected the request for full exemption.<sup>145</sup> The applicants held that their rights under Article 9 and under Article 2 of Protocol No. 1 had been violated. The Chamber declared the application (partly) admissible (the Humanist

143 *Ibid.*, para. 19.

144 ECtHR (GC), *Folgerø and Others v. Norway*, app. no. 15472/02, 29 June 2007, paras 7-28.

145 *Ibid.*, paras 30-42.

Association's application being inadmissible) and relinquished jurisdiction in favor of the GC.<sup>146</sup>

The GC, by a slim majority of nine against eight, found that there had been a violation of Article 2 of Protocol No. 1, while unanimously holding that it was unnecessary to evaluate separately the complaints under Articles 14, 8 and 9 in conjunction with the right to education. In a separate opinion, Judges Zupančič (who voted with the majority on the merits) and Borrego Borrego (who voted with the minority on the merits) explained their view that the case was inadmissible. There was a separate concurring opinion authored by Judges Wildhaber, Lorenzen, Birsan, Kovler, Steiner, Borrego Borrego, Hajiyeve and Jebens.

The applicants maintained that KRL was neither objective, critical, nor pluralistic for the purposes of the right to education. Given the Lutheran predominance in Norway, the special status of the Lutheran state church, the presence of its officials in the educational system and the fact that no full exemption was given for KRL, amounted to violations of freedom of religion, freedom of privacy and prohibition of discrimination. Prior to KRL, there had been a right to full exemption from the Christian Knowledge subject. Since KRL, no such exemption existed. The Government maintained that only a few elements of the subject could be perceived as being of a religious nature. Exemption could be given from those. The applicants held that the entire subject was based on the intention to provide children with a "religious foundation".<sup>147</sup>

The partial exemption applied only to children whose parents adhered to "another religion" or another "philosophical conviction" if the reasons for exemption were stated. This implied that parents had to disclose personal convictions, while the information would be "examined by school teachers and administrators". According to the applicants, this was an assault on their dignity. In practice, the applicants held, the exemption procedure was too burdensome and difficult for many non-Christian parents, especially if they had an immigrant background and/or were not well-informed or well-versed. As a consequence, the children would also feel pressure.<sup>148</sup>

For the applicants, the better alternative would have been to retain the situation which had existed before KRL. Then, there was one subject for the Christian pupils set on teaching them their religion and information about other religions. There was also another subject for non-Christian children, teaching them in a neutral way about the history of religions and philosophies.<sup>149</sup>

According to the Government, the KRL subject struck a fair balance between transmitting knowledge about Christianity and its tenets such as cultural heritage, the Lutheran faith and other world religions and philosophies as well as ethical issues. If fundamental rights could be cited to receive full exemption, then this would also apply to other compulsory tuition and would even run counter to the Government's positive obligations under fundamental rights to transmit the underlying values.<sup>150</sup>

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146 *Ibid.*, para. 4.

147 *Ibid.*, paras 55-60.

148 *Ibid.*, paras 63-66.

149 *Ibid.*, para. 69.

150 *Ibid.*, para. 73.

While the Convention could be raised to protect against indoctrination, it could not be raised against acquiring knowledge.<sup>151</sup> Also, in Norway there was an opportunity to set up private schools, in which an alternative curriculum could be taught.<sup>152</sup>

The Court began its assessment by setting out the principles underlying Article 2 of Protocol No. 1 which contained the right to education. The said right must be interpreted in light of the rights to private and family life, freedom of religion and belief and freedom of expression. Parents had a right to respect for their religious and philosophical convictions, while there was no distinction between private and state education. Respect in this regard was more than acknowledgement. It was a positive obligation on the part of the state. A balance must be struck between majority opinions and interests, and those of minorities in society. Expediency also had to be taken into consideration; the rights of parents could not seriously hinder the administration of compulsory general education. Knowledge, however, must be transmitted in an objective, critical and pluralistic manner. The state was prohibited from indoctrination. Parents' "religious and philosophical convictions must not be disregarded by carelessness, lack of judgment or misplaced proselytism".<sup>153</sup>

Before applying these principles to the present case, the Court noted that even the Norwegian Constitution conferred on adherents of the Lutheran faith the obligation to educate their children in this tradition.<sup>154</sup> The Court acknowledged that the intention of the school reform was to create "a meeting place for different religious and philosophical convictions where pupils could gain knowledge about their respective thoughts and traditions" instead of "an arena for preaching or missionary activities".<sup>155</sup> Yet, it was also the stated ambition of the subject to "transmit *thorough* knowledge of Christianity [...] and the Lutheran Faith" and there was a clear preponderance of Christianity in the composition of the subject.<sup>156</sup> Consequently, the Court found that the curriculum insufficiently showed "a uniform pedagogical approach in respect of the different religions and philosophies".<sup>157</sup>

The Court also noted that the procedure for partial exemption was crafted in such a way that parents might prefer avoiding it because it would potentially cause conflict.<sup>158</sup> In addition, the Court noted it was "capable of subjecting the parents concerned to a heavy burden with a risk of undue exposure of their private life". "It must be remembered that the Convention is designed to guarantee not rights that are theoretical or illusory but rights that are practical and effective." The possibility of private schools, did not exempt the state from the obligation to safeguard pluralism in state-run schools.<sup>159</sup>

Accordingly, the refusal to grant full exemption was a violation of Article 2 of Protocol No. 1.<sup>160</sup> Given the examination and conclusion, the Court found it un-

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151 *Ibid.*, para. 77.

152 *Ibid.*, para. 83.

153 *Ibid.*, para. 84.

154 *Ibid.*, para. 86.

155 *Ibid.*, para. 88.

156 *Ibid.*, paras 91-92.

157 *Ibid.*, para. 95.

158 *Ibid.*, para. 98.

159 *Ibid.*, para. 100.

160 *Ibid.*, para. 102.

necessary to review separately the claims made under Articles 8, 9, and 14 taken in conjunction with Article 2 of Protocol No. 1.<sup>161</sup>

The separate opinion of Judges Zupančič and Borrego Borrego dealt only with the admissibility of the case. The two judges reached the conclusion that the Court could have and should have declared the application inadmissible, because another group of the same parents had already petitioned the (UN) Human Rights Committee.<sup>162</sup>

For the dissenting judges, “the notion of pluralism embodied in these provisions should not prevent a democratically elected political majority from giving official recognition to a particular religious denomination and subjecting it to public funding, regulation and control.” “Conferring a particular public status on one denomination does not in itself prejudice the State’s respect for parents’ religious and philosophical convictions in the education of their children, nor does it affect their exercise of freedom of thought, conscience and religion.”<sup>163</sup>

The dissenters were not convinced that there were qualitative differences regarding the teaching of Christianity as compared to other traditions, while the overemphasis was justified by the role played by Christianity in Norwegian history. Also, their appreciation of the procedure for partial exemption was different. They did not consider it *a priori* burdensome, transgressing the margin of appreciation. Hence, for them, the failure to provide a full exemption was no violation of the right to education.<sup>164</sup>

4.9 Şerife Yiğit v. Turkey [2010]

|               |                                                                                                                    |
|---------------|--------------------------------------------------------------------------------------------------------------------|
| Essence:      | Widow in a purely religious marriage claimed social benefits and inheritance.                                      |
| Dimension:    | Freedom of religion and belief and family law and family relations. Freedom of religion and belief and secularism. |
| Lower courts: | National courts found against applicant. Chamber found the complaint admissible but no violation.                  |
| Majority:     | 17:0. No violation. Rozakis and Kovler each issued separate concurring opinions.                                   |
| Dissenting:   | None.                                                                                                              |

Mrs. Yiğit was a widow who had been married to her husband only by religious rites. After he passed away, she sought formal recognition of herself as widow and of her daughter to be entered into the registers as the deceased’s daughter. She also requested to be treated as a widow and for her daughter to be treated as a partial

161 *Ibid.*, para. 105.

162 *Folgerø and Others v. Norway*, app. no. 15472/02, *supra* n. 144, *Separate opinion of Judges Zupančič and Borrego Borrego*.

163 *Folgerø and Others v. Norway*, app. no. 15472/02, *supra* n. 144, *Joint dissenting opinion of Judges Wildhaber, Lorenzen, Birsan, Kovler, Steiner, Borrego Borrego, Hajiyeve and Jebens*, p. 49.

164 *Ibid.*, pp. 50-52.

orphan by the pension fund and the health insurance.<sup>165</sup> The national courts had found against her in reference to national case law that refused recognition as a marriage to relationships based solely on religious marriage. National law only recognized compensation, pecuniary and non-pecuniary damage, and compensation for loss of financial support to the surviving female spouse in a purely religious marriage. Such marriages were a social reality.<sup>166</sup>

Turkish law required a civil marriage in order for couples to be recognized as married and for their children to be automatically registered as children of both parents. Conducting a religious marriage without a prior civil marriage was prohibited for religious leaders.<sup>167</sup> Although Article 9 was not raised in the case, the merits concerned equal treatment of a widow in a religious marriage.

The Chamber held the application to be admissible, but found no violation.<sup>168</sup> The GC unanimously found no violation. Judges Rozakis and Kovler each issued separate concurring opinions.

The GC analyzed the legislative situation in the member states before going into the merits of the case, finding that the majority of nations did not recognize purely religious marriages, nor cohabitation. Most only provide social security benefits of a deceased to the surviving (legally married) spouse, if at all.<sup>169</sup> While the applicant had based her initial application solely on Article 8, both parties were invited by the Court to also reflect on the prohibition of discrimination in relation to the right to property – Article 14 in conjunction with Article 1 of Protocol No. 1. The Court found said provisions to be applicable.<sup>170</sup>

According to the Government, the regulation of marriage fell within the margin of appreciation. In Turkey, only the persons who had contracted a civil marriage could enjoy the rights that resulted from marriage. Because of the principle of secularism, enshrined in the Constitution, the Government could not attach any legal consequences to religious marriages. To the contrary, it had been the legislature's intent to prevent purely religious marriages, but also to "protect the most important building block of society, the family". Yet, while the right to marry was unrestricted, and legal consequences were only attached to a civil marriage, cohabitants could not be obliged to marry.<sup>171</sup>

The Government further explained that the non-recognition of religious marriage would protect women against polygamy. After all, traditional Islamic law would allow one husband to have four wives. If the applicant had chosen to get married in accordance with civil law, then she would have been entitled to the social security she now sought.<sup>172</sup>

The applicant explained that she herself had been born out of a purely religious marriage, which was why her name had not been entered in the civil status register

165 ECtHR (GC), *Terife Yiğit v. Turkey*, app. no. 3976/05, 2 November 2010, paras 9-17.

166 *Ibid.*, paras 28-33.

167 *Ibid.*, para. 40.

168 *Ibid.*, para. 4.

169 *Ibid.*, paras 41-44.

170 *Ibid.*, paras 51-53 and 59.

171 *Ibid.*, paras 60-61.

172 *Ibid.*, para. 62.



until 2002. This was one of the reasons she and her husband could not obtain a civil marriage. She denied that her application would tend towards the legal recognition of polygamy. She also argued that purely religious marriage was a social reality in Turkey and that her situation could be regularized by amnesty laws which were frequently applied to children born outside civil marriage for entry into the civil status register.<sup>173</sup>

The Court explained that discrimination was different treatment, without an objective and reasonable justification. Article 14 did not prohibit distinction in treatment, founded on an objective assessment of essentially different circumstances, which was based on public interest and struck a balance between the interest of the community and respect for individual freedom. In this, states enjoyed the margin of appreciation. With regard to (civil) marriage, the Court referred to earlier case law, saying that giving a special status and recognition to marriage, including conferring special rights on those who entered into it, was not contrary to the Convention.<sup>174</sup>

The Court then applied the principles to the facts, noting that the applicant and her husband had had a monogamous relationship for 26 years and had six children together. Her situation was comparable to that of a widow in a marriage. The legal consequences when it came to the desired social benefits, were fundamentally different. The question was whether this amounted to discrimination. As the nature of a marriage was not amongst the grounds for discrimination explicitly named in the list of Article 14, the Court examined whether it might come under “other status”. In the Court’s opinion, this was the case and it noted that other than the nature of the marriage, the Government gave no reason for the difference in treatment. Hence, the difference in treatment amounted to unlawful discrimination, unless covered by an objective and reasonable justification.<sup>175</sup>

The Court accepted that obligatory civil marriage was introduced to protect women against gender discrimination, which had been incorporated in traditional religious marriage. Hence, the Court accepted the legitimate aims of protection of public order and the rights and freedoms of others. The Court also found the interference proportional to the aim. Mrs. Yiğit was aware of the legal situation. Turkish law clearly prohibited solemnization of a marriage by religious rites, unless preceded by a civil marriage. In an earlier Chamber case, Spain had awarded a couple married in a traditional Roma way some of the legal consequences of a marriage, failing to grant it to others.<sup>176</sup> Turkey had done no such thing, and had consistently treated all purely religious marriages as not fulfilling the legally required prerequisites. The amnesty laws raised by the applicant had been aimed solely at improving the situation of children born out of a relationship which was not legally recognized.<sup>177</sup> From this, the Court concluded that the measure was proportional, and thus that Article 14 had not been violated.<sup>178</sup>

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173 *Ibid.*, paras 64-65.

174 *Ibid.*, paras 67-72.

175 *Ibid.*, paras 73-80.

176 ECtHR (C), *Muñoz Díaz v. Spain*, app. no. 49151/07, 8 December 2009.

177 *İrfiye Yiğit v. Turkey*, app. no. 3976/05, *supra* n. 165, paras 81-84.

178 *Ibid.*, paras 87-88.

As Article 8 applied to all families “legitimate” or “illegitimate”, the family situation of the applicant was covered by Article 8. “Family life” covered issues of a social, moral, cultural as well as material nature.<sup>179</sup> While Article 8 entailed positive obligations on the part of the state, there was also a margin of appreciation. This margin of appreciation was wider as regards the state’s planned economic, fiscal or social policy in which opinions within a democratic society may reasonably differ widely.<sup>180</sup>

The Court noted that the state did not effectively interfere with the applicant’s family life with the deceased and their children. There were no negative civil law or penal consequences. As far as the consequences raised were concerned, the Court argued that Article 8 did not oblige states to establish a special regime for religious marriages or any relationship of unmarried couples. Consequently, there had been no breach of Article 8.<sup>181</sup>

Concurring Judge Rozakis believed that the Court overemphasized the nature of the applicant’s relationship as a religious marriage. In his opinion, the comparison should have been between long-standing cohabitation and marriage. According to standing case law, it was within the state’s margin of appreciation to treat long-standing cohabitation legally different to marriage. But Rozakis wondered whether the social reality of stable relationships outside of marriage in many member states should lead to a reconsideration of its stance where social security and related benefits were concerned.<sup>182</sup>

Judge Kovler thought that the freedom of choice aspect of Article 8 had been infringed by Turkey, by withholding from the applicant the social security benefits. But this had not been raised by the applicant, hence the Court could not consider it. What Kovler disagreed with, were the Court’s pronouncements concerning Islamic religious marriage. In his opinion, no comments on Islamic marriage should have been made rather than portraying it in “a reductive and highly subjective manner”. He then went on to remind the Court that he had called it to order before concerning prejudice against Islamic values. He warned his colleagues not to become entrenched in eurocentrism.<sup>183</sup>

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179 *Ibid.*, paras 94-98.

180 *Ibid.*, para. 100.

181 *Ibid.*, paras 102-103.

182 *İrife Yiğit v. Turkey*, app. no. 3976/05, *supra* n. 165, *Concurring opinion of Judge Rozakis*.

183 *İrife Yiğit v. Turkey*, app. no. 3976/05, *supra* n. 165, *Concurring opinion of Judge Kovler*.

## 4.10 Lautsi And Others v. Italy [2011]

|               |                                                                                                                                                                                 |
|---------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Essence:      | National legislation mandating crucifixes to be hung in every classroom in public schools.                                                                                      |
| Dimension:    | Freedom of religion and belief and personal freedom. Freedom of religion and belief and the educational system. Freedom of religion and belief and secularism.                  |
| Lower courts: | National courts found against applicant. Chamber found claim admissible and a violation.                                                                                        |
| Majority:     | 15:2. No violation. Joint concurring opinion by Separate concurring opinion by Rozakis and Vajić. Separate concurring opinion by Bonello. Separate concurring opinion by Power. |
| Dissenting:   | Dissenting opinion by Malinvern, joined by Kalaydjieva.                                                                                                                         |

Due to an Italian national regulation, a crucifix had to be hung in every classroom, in every public school. Mrs. Lautsi brought the case to Strasbourg on behalf of herself and her two sons. She complained that the crucifixes fixed to every school classroom in the public school the boys attended violated her and her sons' freedom of religion as agnostics. The national courts did not find any violation of the freedom of religion.<sup>184</sup> The Chamber unanimously held that the case was applicable and that there had been a violation of Article 9.<sup>185</sup> Much controversy was caused by the Chamber judgment. Several member states made official complaints and the judgments and their implications for European nations were discussed extensively in popular media as well as in academic publications.

The GC by 15 votes to 2 found no violation. No other judgment has ever raised so many questions about the judicial impartiality of the Strasbourg Court. Three separate concurring opinions were issued. The dissenting opinion was authored by Judge Malinverni and joined by Judge Kalaydjieva.

In the vast majority of member states, religious symbols in schools were not regulated by law. Only Macedonia, France (except two administrative regions) and Georgia explicitly prohibited religious symbols in state schools. A few member states, namely Italy, some German *Länder*, some Swiss *communes*, Austria and Poland actually prescribed it. In Spain, Greece, Ireland, Malta, San Marino and Romania it was not prescribed, but religious symbols could be found in state schools. Also, in some member states the issue of religious symbols in classrooms had been brought before (the highest) courts. The results had been mixed.<sup>186</sup>

- Federal Court of Switzerland: unconstitutional;
- German Constitutional Court: unconstitutional when there is no procedure for objection; general prescription without any procedure for objection parents or students who disagreed;

184 ECtHR (GC), *Lautsi and Others v. Italy*, app. no. 30814/06, 18 March 2011, paras 10-16.

185 *Ibid.*, paras 4 and 30-32.

186 *Ibid.*, paras 27-28.

- Romanian Supreme Court: may only be displayed in classrooms for religious instruction;
- Polish Constitutional Court: constitutional if not compulsory;
- Spanish regional court: must be removed upon request.

The Government brought forward the following arguments against the Chamber judgment. While states must refrain from proselytizing, they must also not promote secularism or atheism. The crucifix was a passive symbol, it did not influence the lessons. It was an expression of Italian cultural history, which could be acknowledged and protected, given the Strasbourg case law regarding prevailing cultural and religious feelings of the population (*Otto Preminger*<sup>187</sup>). The Convention did not prohibit member states from showing a preference for a certain religion. The Italian legislation in question was the outcome of the democratic process. The crucifixes in the classroom made children understand the national community, while the curriculum helped them to develop the critical minds to form their own opinion regarding religion. Minority religions were accommodated<sup>188</sup> in schools. Finally, the Government asserted, crucifixes in the classrooms did not prevent the applicant from educating her children in accordance with her own convictions.<sup>189</sup>

The applicants agreed with the Chamber judgment. Religious symbols in classrooms expressed a preference for a certain religion in a place where conscience was formed. The crucifix was a religious symbol, and not a passive symbol as the Government argued. But it gave “material form to a cognitive, intuitive and emotional reality”. Neutrality obliged the state to establish a neutral space in classrooms where everyone could live according to their own beliefs.<sup>190</sup> While not disputing that removing the crucifix from classrooms would impact Italian cultural identity, it was mandated by “the principles of the liberal state, and a pluralist, open democracy, respect for the individual rights and freedoms enshrined in the Italian Constitution and the Convention”.<sup>191</sup>

Some member states had intervened as third parties. They argued that neutrality as mandated by the Convention was not to be confused with “secularism”. Most nations in Europe were not secular and the Chamber judgment would introduce an “Americanization” of Europe. Other third parties argued that either the crucifix should remain in classrooms because it had first and foremost a cultural and historical meaning, or it should be removed because it interfered with state neutrality.<sup>192</sup>

The Court began by defining the scope of the legal question. This consisted only of the question whether Article 9 and Article 2 of Protocol No. 1 required the crucifix to be taken out of classrooms in state schools. Other places were not the issue here, and neither was the compatibility with the Italian Constitution. Without any doubt, agnostics and supporters of secularism could claim protection under Article 9. Also,

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187 ECtHR, *Otto-Preminger-Institut v. Austria*, app. no. 13470/87, 20 September 1994.

188 The term ‘accommodation’ is not used, yet the measures resemble Canadian ‘reasonable accommodation’.

189 *Lautsi and Others v. Italy*, app. no. 30814/06, *supra* n. 184, paras 35-40.

190 *Ibid.*, paras 41-43.

191 *Ibid.*, para. 47.

192 *Ibid.*, paras 47-56.

their views fell under “philosophical convictions”, and they were worthy of “respect in a democratic society” as intended by Article 2 of Protocol No. 1.<sup>193</sup>

When setting out the general principles, the Court reemphasized that states have a duty of neutrality and impartiality vis-à-vis the various convictions existing in society and while this was primarily a negative duty, there was also a positive obligation on the part of the state.<sup>194</sup> On the other hand, parents and students were not protected against the transmission of knowledge, directly or indirectly of a religious or philosophical kind. What was prohibited, however, was the aim of indoctrination.<sup>195</sup>

Applying the principles to the case at hand, the Court noted that without any doubt the crucifix was primarily a religious symbol. Whether it had any other meaning beyond that was irrelevant. While no evidence was submitted showing that the state aimed to indoctrinate children at state schools, it was understandable that the first applicant saw in the crucifix’s presence in the classroom a lack of respect for her philosophical convictions. The varying situations in the member states could be explained by reference to culture and history. Hence, the margin of appreciation was broad, while states could not cite tradition to be relieved of their positive obligations.<sup>196</sup>

Consequently, the question was whether the margin of appreciation, which does go hand in hand with European supervision, covered legislation regarding religious symbols in schools. The crucifix was undoubtedly connected to Catholicism, being the dominant religion in Italy. That, however, was not enough to establish indoctrination. Referring to earlier case law, the Court acknowledged that state preference for a certain religion was not in conflict with Convention obligations. The Court also regarded a symbol on a wall as essentially passive, as opposed to class religious activities.<sup>197</sup>

The Chamber had used the *Dalhab*<sup>198</sup> approach, calling it a “powerful external symbol”. The majority of the GC disagreed. In *Dalhab*, the state itself had legislated against the wearing of religious symbols, while here the state had legislated in favor of the religious symbol on the wall. The Italian Government had shown it had weighed all interests concerned. The children taught by Mrs. Dalhab were young (kindergarten age), whereas the children in this case were teenagers.<sup>199</sup>

The majority considered that in Italy the crucifix in the classroom was not associated with compulsory education in Catholic religion and that other religions were accommodated in schools by “celebrating” their holy days and by giving them the opportunity to introduce optional religious education. Lastly, the first applicant was not restricted in her rights to teach her children her own philosophical convictions.<sup>200</sup> Hence, the Court concluded that Article 2 of Protocol No. 2 had not

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193 *Ibid.*, paras 57-58.

194 *Ibid.*, paras 60-61.

195 *Ibid.*, paras 60- 62.

196 *Ibid.*, paras 66-68.

197 *Ibid.*, paras 70-72.

198 *Dalhab v. Switzerland*, app. no. 42393/98, *supra* n. 127.

199 *Lautsi and Others v. Italy*, app. no. 30814/06, *supra* n. 184, para. 73.

200 *Ibid.*, paras 74-75.

been violated and that no separate issue arose under Article 9. In view of these findings, there was also no violation of Article 14.<sup>201</sup>

Judges Rozakis and Vajić in their concurring opinion argued that the neutrality of the state was better served by a liberal and tolerant approach, than by rigid secularism. Such an approach allowed for all religions and convictions to manifest themselves in the public sphere. In their view, Italy lived up to this liberal approach by allowing all religions their “accommodation” in the public school system.<sup>202</sup>

Judge Bonello began with a sweeping opening statement, in which he warned of “historical Alzheimer’s” if the “cultural continuum of a nation’s flow through time” should be forgotten. A human rights court should protect human rights but “not ignore customs which evolve over time, harden over history into cultural cement. They become defining, all-important badges of identity for nations, tribes, religions, individuals.”<sup>203</sup> Continuing, he noted that education was first organized by the Church and only later by the state, that fascists were not the first to ordain the crucifix in schools,<sup>204</sup> and that there was a difference between freedom of religion and belief on the one hand and secularism on the other. He believed that only national authorities should enforce secularism. He was convinced that the crucifix in the classroom had never hindered anyone from making own autonomous choices about their world view. Also in terms of numbers, Mrs. Lautsi would be indoctrinating if the crucifix was removed for the benefit of her two sons, while all other children who were “crucifix receptive” would have to suffer the consequences.<sup>205</sup>

Judge Power in his separate concurring opinion also referred to the pluralist as opposed to the secularist approach, when it comes to state neutrality. Secularism connoted the preference for one world view. Pluralism respected them all in the same way. He did think that symbols carry meaning, implicitly rejecting the “passive symbol” findings of the Court, but was convinced that Italy adhered to pluralism because it opened up the school system to a variety of world views.<sup>206</sup>

Dissenting Judges Malinverni and Kalaydjieva pointed to the fact that the majority mainly based itself on the margin of appreciation, due to the lack of European consensus. However, in Italy the crucifix in schools had a weak basis in law. Whenever Italian courts were asked to rule on crucifixes in classrooms, they emphasized state neutrality. Even the Italian Constitutional Court itself had previously recognized the principle of state neutrality and impartiality towards religious beliefs.<sup>207</sup>

The dissenters did not argue for rigid secularism as the only way for state neutrality, but argued that the educational system must reflect the “freedom and the spirit of understanding, peace, tolerance, equality of sexes, and friendship among

201 *Ibid.*, paras 77-81.

202 *Lautsi and Others v. Italy*, app. no. 30814/06, *supra* n. 184, *Joint concurring opinion of Judges Rozakis and Vajić*.

203 *Lautsi and Others v. Italy*, app. no. 30814/06, *supra* n. 184, *Concurring opinion of Judge Bonello*, para. 1.1.

204 *Ibid.*, paras 1.4-1.6.

205 *Ibid.*, para. 3.6.

206 *Lautsi and Others v. Italy*, app. no. 30814/06, *supra* n. 184, *Concurring opinion of Judge Power*.

207 *Lautsi and Others v. Italy*, app. no. 30814/06, *supra* n. 184, *Dissenting opinion of Judges Malinverni and Kalaydjieva*, paras 1-2.

all peoples, ethnic, national and religious groups”.<sup>208</sup> They also cited the Canadian Supreme Court in this respect.<sup>209</sup> Religious symbols hanging in classrooms were part of the educational environment. Paraphrasing the Swiss Federal Court, the dissenting judges argued: “[A]s guarantor of the denominational neutrality” the state should not “manifest its own attachment to a particular religion, be it a majority or a minority one, because certain people may feel that their religious beliefs are impinged upon by the constant presence at school of the symbol of a religion to which they do not belong”.<sup>210</sup>

The crucifix was first and foremost a religious symbol and could be considered a “powerful external symbol” in the school environment. The Italian Court of Cassation itself rejected the argument that the crucifix had values independent of religious belief. Such a symbol was capable of infringing the religious freedom of schoolchildren, and even more so than a garment worn by another pupil.<sup>211</sup>

In conclusion, the dissenting judges pointed out that freedom of education in conjunction with freedom of religion and belief covered both the curriculum and the school environment. Children were not able to extract themselves from a symbol present in every classroom. Therefore, the practice violated Article 2 of Protocol No. 1 in conjunction with Article 9.<sup>212</sup>

#### 4.11 Bayatyan v. Armenia [2011]

|               |                                                                                           |
|---------------|-------------------------------------------------------------------------------------------|
| Essence:      | Criminal punishment for faith-based conscientious objection to military service.          |
| Dimension:    | Freedom of religion and belief and personal freedom.                                      |
| Lower courts: | National courts found against applicant. Chamber found claim admissible but no violation. |
| Majority:     | 16:1. Violation of Article 9.                                                             |
| Dissenting:   | Dissenting opinion by Gyulumyan.                                                          |

Mr. Bayatyan was an Armenian Jehovah’s Witness. As pacifism was an essential part of his faith, he, like Mr. Thlimmenos (see section 10.4.2), refused mandatory military service. He did offer to perform alternative civilian service.<sup>213</sup> He was arrested, tried and convicted. All national courts found against him.<sup>214</sup> The Chamber found the

208 *Ibid.*, para. 3, citing UN Committee on the Rights of the Child, *General comment No. 1 (2001)*, Article 29 (1), *The aims of education*, CRC/GC/2001/1, 17 April 2001, para. 19.

209 *Ibid.*, para. 3, referring to SCC, *Ross v. New Brunswick School District No. 15*, Case 24002, [1996] 1 SCR 825, 3 April 1996.

210 *Ibid.*, para. 4, referring to Swiss Federal Court, *Comune di Cadro*, ATF 116 Ia 252, 26 September 1990, para. 7.

211 *Ibid.*, para. 6.

212 *Ibid.*, para. 8.

213 ECtHR (GC), *Bayatyan v. Armenia*, app. no. 23459/03, 7 July 2011, paras 10-15.

214 *Ibid.*, paras 19-40.



application to be admissible, but held by nine votes to one that there had been no violation of Article 9.<sup>215</sup>

By a vote of 16 to 1, the GC held that the absence of a right to conscientious objection from military service violated Article 9. Judge Gyulumyan argued his dissent in a separate dissenting opinion.

The majority looked at the situation concerning conscientious objection and mandatory military service in all member states. All CoE member states, apart from Armenia and Turkey, had either abolished military service (in peacetime) altogether, introduced alternative civilian service, and/or recognized a right to conscientious objection (in peacetime).<sup>216</sup> A quite extensive overview of relevant international documents and practice was given to show that the right to conscientious objection was recognized in international (human rights) law.<sup>217</sup>

The Chamber observed that Article 9 had to be read in conjunction with Article 4 §3(b) of the Convention which leaves the right to introduce military service up to the High Contracting Parties. The applicant submitted that in his opinion the “living instrument” doctrine now implied that a right to conscientious objection was included in Article 9 and that Article 4 (3)(b) could not be used to limit Article 9. After all, the sole purpose of the provision was to delimit the prohibition of forced labor.<sup>218</sup>

The applicant further argued that the interference was not prescribed by law. When it joined the CoE, Armenia had taken on the obligation to pardon all conscientious objectors and, under international law, it was obliged to respect conscientious objection. Moreover, the punishment he had received was not necessary in a democratic society due to the disproportionality. He had been detained under harsh conditions, verbally abused, and treated like a criminal though he had no criminal record. Besides, Armenia had already pardoned others in his situation.<sup>219</sup>

While the Government did not dispute that the Convention was a living instrument, it referred to the earlier judgments on the matter in which the Court had time and time again refrained from formulation that Article 9 mandated an exemption from military service. It was convinced that Article 9 had still to be read in conjunction with Article 4 §3(b). Hence, there was no Convention obligation to grant exemption from military service. The Government also raised the practical argument that allowing for conscientious objection would increase the number of objectors, which could seriously harm the capacity of the armed forces. It also raised the danger of a “spill over” onto other civic duties like paying taxes. Finally, the Government argued that even if there had been interference, it was justified by Article 9(2).<sup>220</sup>

The third-party interveners, all religious groups and/or conscientious objection support groups, argued that conscientious objection should be recognized in Armenia due to international human rights standards and that Jehovah’s Witnesses suffered

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215 *Ibid.*, paras 4 and 72.

216 *Ibid.*, paras 46-49.

217 *Ibid.*, paras 50-70.

218 *Ibid.*, paras 72-74.

219 *Ibid.*, paras 75-77.

220 *Ibid.*, paras 79-84.

discrimination and maltreatment in Armenia due to their stand on armed service and violence.<sup>221</sup>

The Court revisited the former case law by Commission and Court. According to the case law of the Commission, the Convention could not be read to imply a right to conscientious objection from mandatory military service or a right to choose between military service and alternative civilian service. The case law even showed that the Convention did not prevent states from punishing those who refused military service. In *Thlimmenos*, the issue of Article 9 vis-à-vis conscientious objection was not raised and instead the Court had to answer questions related to Articles 14 and 3. Hence, unlike the Commission, the Court had not decided on conscientious objection as such under the Convention.<sup>222</sup>

The majority went on to argue that it was not convinced the Commission's connection between Article 9 and Article 4 §3(b) was correct, historically or legally. At the same time, the Commission's interpretation reflected prevailing opinion at the time in the member states. However, since then the overwhelming majority of member states had indeed recognized a right to conscientious objection and/or alternative civic service. Given all this, the Court concluded that the law had changed and changed in a foreseeable way for Armenia. After all, Armenia itself was a party to the ICCPR, which recognized the right and had pledged when joining the CoE to introduce legislation to recognize conscientious objection.<sup>223</sup>

The "living instrument" doctrine thus made it impossible to uphold the Commission's case law and mandates for Article 9 could no longer be read in conjunction with Article 4 §3(b) in this regard. This did not mean that Article 9 as such held a right to conscientious objection, but when opposition to military service was motivated by strong and genuinely held religious or philosophical convictions of "sufficient cogency, seriousness, cohesion and importance", it did attract the protection of Article 9.<sup>224</sup> Applying this to the applicant, a Jehovah's Witness, known for their theological opposition to military service, even if unarmed, the merits of the case fell under Article 9, and there was an interference with his freedom of religion.<sup>225</sup> Having established this, the Court turned to the possible justification under Article 9(2).

While the criminal law under which the applicant was convicted at the time was still valid law, Armenia was also a party to the ICCPR and had vowed to adopt legislation to recognize conscientious objection when joining the CoE. Hence, the Court left the question of whether or not the interference was prescribed by law unanswered.<sup>226</sup> Given the existing pledge to introduce legislation recognizing conscientious objection at the time, it was questionable whether it could still rely on public order and other related legitimate aims in this case. The Court did not consider it necessary whether or not there was a legitimate aim at the time.<sup>227</sup>

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221 *Ibid.*, paras 89-91.

222 *Ibid.*, paras 93-97.

223 *Ibid.*, paras 100-108.

224 *Ibid.*, para. 110.

225 *Ibid.*, paras 109-112.

226 *Ibid.*, paras 113-115.

227 *Ibid.*, para. 117.

Necessity in a democratic society had to be viewed in light of the standing case law regarding the freedom of religion.<sup>228</sup> In this regard, the Court observed that the state's role "as the neutral and impartial organizer of the exercise of various religions, faiths and beliefs" was "conducive to public order, religious harmony and tolerance in a democratic society". "The State's duty of neutrality and impartiality is incompatible with any power on the State's part to assess the legitimacy of religious beliefs or the ways in which those beliefs are expressed."<sup>229</sup>

The margin of appreciation was limited in this case, because almost all member states which had compulsory military service had also introduced alternatives to accommodate conscientious objection. Hence, a state which had not done so had a limited margin of appreciation and must give "convincing and compelling reasons" to justify the interference, and must demonstrate that a "pressing social need" was present.<sup>230</sup>

The applicant refused military service on genuine religious grounds. He had offered to perform alternative service, but the legal system did not provide for any such alternative. That reasonable alternatives existed was demonstrated by the overwhelming majority of member states. Instead, he had to serve a prison sentence. Therefore the interference was not necessary in a democratic society.<sup>231</sup>

The Court rejected that providing for alternatives was far from privileging certain groups: "[P]luralism, tolerance and broadmindedness are hallmarks of a 'democratic society'. Although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of a majority must always prevail." This required "fair and proper treatment of people from minorities and avoids any abuse of a dominant position". "Thus, respect on the part of the State towards the beliefs of a minority religious group like the applicant's by providing them with the opportunity to serve society as dictated by their conscience might, [...] ensure cohesive and stable pluralism and promote religious harmony and tolerance in society."<sup>232</sup>

Dissenting Judge Gyulumyan was not convinced that Article 9 was applicable. Citing the earlier case law, he argued that not every act motivated by religion was covered by Article 9. Article 9 was never amended to include conscientious objection and the living instrument doctrine did not require a different reading of Article 9 than it did before. In his opinion, the majority used the judgment to ensure that Armenia would implement its obligations under international law, while this was uncalled for and unnecessary. As in his opinion Article 9 was not applicable, it could not have been breached and hence there was no violation.<sup>233</sup>

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228 *Ibid.*, paras 118-119.

229 *Ibid.*, para. 120.

230 *Ibid.*, para. 123.

231 *Ibid.*, paras 124-125.

232 *Ibid.*, para. 126.

233 *Bayatyan v. Armenia*, app. no. 23459/03, *supra* n. 213, *Dissenting opinion of Judge Gyulumyan*, paras 1- 6.

## 4.12 Mouvement Raëlien Suisse v. Switzerland [2012]

|               |                                                                                                                                                                                                                                             |
|---------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Essence:      | Refusal to allow posters of religious/spiritual movement.                                                                                                                                                                                   |
| Dimension:    | Freedom of religion and belief and other rights. Freedom of religion and belief and group autonomy.                                                                                                                                         |
| Lower courts: | National courts found against applicant. Chamber found claim admissible but no violation.                                                                                                                                                   |
| Majority:     | 9:8. No violation of Article 10. Separate concurring opinion of Judge Bratza. 17:0: No separate evaluation under Article 9 needed.                                                                                                          |
| Dissenting:   | Joint dissenting opinion of Judges Tulkens, Sajó, Lazarova Trajkovska, Bianku, Power-Forde, Vučinić and Yudkivska. Joint dissenting opinion of Judges Sajó, Lazarova Trajkovska and Vučinić. Dissenting opinion Judge Pinto de Albuquerque. |

The applicant in this case was the national Swiss branch of the Raëlien Movement. This new religion/spiritual movement, founded by a French national in 1970, believed in extraterrestrials who in their opinion had created life on earth including the world religions. They advocated “geniocracy”, rule by the people who have the highest intellect, free sexuality and human cloning.<sup>234</sup>

The legal proceedings were started when the applicant was denied a request to put up a poster near a road in Swiss Canton Neuchâtel. The refusal was based on the consideration that the posters contained a link to the movement’s website, which in turn contained a link to a company owned by the applicant which offered human cloning services. The Swiss authorities and courts all ruled in favor of the municipality because, among other reasons, the movement theoretically advocated pedophilia and human cloning, both criminal law offences, and because the doctrine of geniocracy was antithetical to the democratic order of society.<sup>235</sup> The Chamber by a vote of five to two found no violation of Article 10 and no necessity to evaluate separately the claims under Article 9.<sup>236</sup>

By a vote of nine to eight, the GC held that Article 10 had not been violated, while finding unanimously that it was unnecessary to evaluate separately the claims under Article 9. Judge Bratza authored a separate concurring opinion. Seven dissenting judges authored a joint dissenting opinion. Judges Sajó, Lazarova Trajkovska and Vučinić who had participated in the joint dissenting opinion also issued a separate dissenting opinion. Judge Pinto de Albuquerque issued a separate dissenting opinion.

The applicant claimed that its rights under Article 10 had been violated. The Government raised a preliminary objection, arguing that the Court could have put aside a complaint if it had been examined in substance by the competent national bodies and if the proceedings had met all conditions of fairness and non-arbitrary

234 ECtHR (GC), *Mouvement Raëlien Suisse v. Switzerland*, app. no. 16354/06, 13 July 2012, paras 10-12.

235 *Ibid.*, paras 13-21.

236 *Ibid.*, paras 4 and 33.

handling. The Chamber had taken the view that the application was not manifestly ill-founded and the GC saw no reason to depart from this conclusion.<sup>237</sup>

The Chamber had considered that the poster could have multiplied visits to the website. The Swiss courts had carefully reasoned their decisions and the ban did not extend to the Association itself, nor the website. Therefore, the interference had not overstepped the wide margin of appreciation.<sup>238</sup>

The applicant argued that there should not be a wide margin of appreciation in such a case. After all, this would allow local or national governments to restrict the expression of minority groups. They pointed to the fact that the posters referred to a legal website of a legal organization. The interference was even graver as neither the poster nor the website referred to the concept of genocracy and human cloning, which had so prominently been raised by the national authorities and courts. Also, the Association rejected the accusations of promoting pedophilia, claiming that any member ever convicted of related offenses had been evicted from the movement.<sup>239</sup>

The Government, while agreeing that freedom of expression was an important human right, mentioned that it was justified to limit advertising in public spaces and that authorities had a wide margin of appreciation, because the messages of the Raëlien Movement were capable of offending the religious and moral feelings of the public. The Government once again raised human cloning, genocracy and “sensual awakening” as messages in direct confrontation with law, democratic principles and public “mores”. Also, the ban had been limited in scope as it extended only to the poster and not to the website, nor any other activity or information.<sup>240</sup> A third party intervener, a freedom of speech NGO, argued that it was always disproportionate to prohibit a message referring to a website if the website was legal.<sup>241</sup>

According to the Court, the ban did without any doubt constitute interference. As the restriction was based on the local regulations and since the applicant had never disputed that the municipality had sought to prevent crime, protect morals and the rights of others, the Court concluded that the interference had been prescribed by law and served legitimate aims.<sup>242</sup>

As far as necessity was concerned, the majority noted that poster space was generally regulated and not open to everyone.<sup>243</sup> The margin of appreciation was broad, because the posters of the applicant were not political but closer to commercial speech. In such cases, the national judges were better equipped to rule on “necessity”.<sup>244</sup> Hence, only very serious reasons could lead to overturning them.<sup>245</sup>

The Court, hence, turned to proportionality and whether the reasons given by the national authorities were “relevant and sufficient”.<sup>246</sup> Taken together, all the facts convinced the Court that there was a pressing social need to ban the poster,

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237 *Ibid.*, paras 28-31.

238 *Ibid.*, para. 33.

239 *Ibid.*, paras 34-37.

240 *Ibid.*, paras 39-45.

241 *Ibid.*, para. 47.

242 *Ibid.*, paras 49-55.

243 *Ibid.*, para. 58.

244 *Ibid.*, paras 62-63.

245 *Ibid.*, para. 66.

246 *Ibid.*, para. 69.

and the measure was proportionate because it did not involve the website or the Association itself. It saw no reason to substitute its own assessment for that of the Federal Court.<sup>247</sup> Also, the GC saw no reason to depart from the Chamber's finding that a separate analysis under Article 9 was not necessary.<sup>248</sup>

Judge Bratza agreed with the majority opinion. He found it important to stress that here there was no general prohibition, but a limited interference. It was the limited nature of the interference that led to the conclusion that there was no violation. Restricting a poster which referred to a website was much less of an interference than prohibiting a website, which required stronger reasons.<sup>249</sup>

The group of 7 dissenters led by Tulkens noted that the speech in question was neither commercial nor political, but did concern issues of public interest. They then approached each of the "controversial" messages one by one. The scientific atheism in the dissenters' view fell under the ambit of Article 9. The human cloning was one of those opinions which "offend, shock and challenge the establish order" and thus attracted the protection of the freedom of expression. Geniocracy ran counter to the Convention concept of a democratic society. But it was a utopia, not a concrete political project. Therefore, case law concerning political parties did not apply. With regard to the "sensual awakening", the dissenters found no evidence of clear and imminent danger regarding pedophilia. If there was, the Association could/would have been banned earlier; it had existed since 1977. The dissenting judges also noted that posters of the movement had not been banned in other places in Switzerland. While it has been accepted case law that a situation may vary within a member state, the prevention of abuse of children was certainly not greater in Neuchatel than elsewhere.<sup>250</sup>

Tulkens et al. found the reasoning concerning the limited scope of the interference paradoxical. If the reason for banning the poster was the reference to the unbanned website, this was not a limited interference.<sup>251</sup> There was also a certain view regarding the use of public space represented in the majority opinion, which the dissenting judges rejected. In public spaces, the neutrality of the state should be even greater than elsewhere. The majority judgment seemed to suggest that authorities were free to restrict expression in public space of messages they disagreed with.<sup>252</sup>

Sajó, Lazarova Trajkovska and Vučinić agreed with the first group of dissenters, but were most concerned by the "new standard" set by the majority in this case: the category of speech which was non-political, but "quasi-commercial" and less protected. In their view, it meant the diminishment of freedom of expression "in respect of the world view of a minority". That the speech was restricted to protect "prevailing

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247 *Ibid.*, paras 72-76.

248 *Ibid.*, paras 78-80.

249 *Mouvement Raëlien Suisse v. Switzerland*, app. no. 16354/06, *supra* n. 234, *Concurring opinion of Judge Bratza*, paras 4-5.

250 *Mouvement Raëlien Suisse v. Switzerland*, app. no. 16354/06, *supra* n. 234, *Dissenting opinion of Judges Tulkens, Sajó, Lazarova Trajkovska, Bianku, Power-Forde, Vučinić and Yudkivska*, paras 2-7.

251 *Ibid.*, para. 9.

252 *Ibid.*, para. 11.

opinions of the local authorities and, perhaps, the majority of citizens of Neuchâtel" was incompatible with the goals of the Convention.<sup>253</sup>

The arguments given by Sajó et al. may be summarized as follows. The speech on the poster portrayed a world view. Hence, the standard of protection for non-commercial speech should apply. Public spaces required an even greater neutrality on the part of the state as impartial organizer of pluralism. In reference to allegations: "[r]eligious organizations are not banned in a democracy because some of their members commit crimes". Even if the website had a link to Clonaid which praised illegal cloning research, "[a] advocacy of criminalized behavior in the form of requesting legalization is not an inducement to crime". Furthermore, the link referred to a website which contained much more information that could be found with any search engine. The majority relied on a mosaic of facts when referring to "all the circumstances of the case", which introduced another new standard.<sup>254</sup>

In conclusion, the four dissenters argued that the Court had breached its obligation regarding European supervision: "The undeniably better knowledge of local circumstances and sensitivities" which point toward local authorities "must not become a fig-leaf for acquiescence in bigotry".<sup>255</sup>

Dissenting Judge Pinto de Albuquerque also used strong language. In his view, public space should be used as a public forum for all ideas including those that run counter to the majority opinion. The case should be reviewed under the negative obligation of the state not to interfere. Because the censorship in question was content based, the margin of appreciation should have been narrow. The margin was also narrow where content of websites on the internet is concerned. The speech was not commercial. It related to science, religion, politics and social issues and was therefore a "*Weltanschauung*".<sup>256</sup>

Regarding the proportionality test, he argued that the national authorities had ignored the applicable standard of clear and present danger. The Association had never been involved in any unlawful activity. Hence, the standard of proportionality was not met. Like the other dissenters, he criticized seeing "necessity" where no reference was made to a legal website. Also, the fact that in other cities in Switzerland the posters were allowed pointed to the absence of necessity. The limited scope of the interference was an excuse to interfere without a sufficient reason. Furthermore, banning the poster by reference to the website put the Association in uncertainty regarding a possible future ban on the website. In sum, he believed the "facts show an inadmissible pattern of content-based discriminatory conduct of public authorities towards a minority". "Content-based expression control ends up as pure speaker-based discrimination." Such "State conduct inevitably produces a chilling effect [...]" in regard to any person wishing to communicate ideas not shared by the majority.<sup>257</sup>

253 *Mouvement Raëlien Suisse v. Switzerland*, app. no. 16354/06, *supra* n. 234, *Dissenting opinion of Judges Sajó, Lazarova Trajkovska and Vučinić*, para. 1.

254 *Ibid.*, paras II- IV.

255 *Ibid.*, para. IV.

256 *Mouvement Raëlien Suisse v. Switzerland*, app. no. 16354/06, *supra* n. 234, *Dissenting opinion of Judge Pinto de Albuquerque*, pp. 47-58.

257 *Ibid.*, pp. 64-67.



## 4.13 Sindicatul “Păstorul Cel Bun” v. Romania [2013]

|               |                                                                                                                                         |
|---------------|-----------------------------------------------------------------------------------------------------------------------------------------|
| Essence:      | Refusal of registration of labor union for employees of Orthodox Church.                                                                |
| Dimension:    | Freedom of religion and belief and group autonomy. Freedom of religion and belief and secularism.                                       |
| Lower courts: | Court of first instance registered the applicant. County Court found against applicant. Chamber found claim admissible and a violation. |
| Majority:     | 17:0 Interference with freedom of association 11:6. Interference was justified. Separate concurring opinion of Judge Wojtyczek.         |
| Dissenting:   | Joint dissenting opinion of Judges Spielmann, Villiger, López Guerra, Bianku, Møse and Jäderblom.                                       |

The applicant in this case was a trade union, albeit potential trade union formed by priests and laymen of the Romanian Orthodox Church, called Păstorul cel Bun (“The Good Shepherd”) In accordance with Romanian law, the trade union had applied for registration with the Court of First Instance. The court registered the applicant. However, the Archdiocese of Craiova, which had intervened in the proceedings, filed an appeal. It requested annulment of the registration because the union had not received permission from the archbishop as required by Church rules. These internal rules were binding, given the legal status of the Church statute.<sup>258</sup> The County Court consequently allowed the appeal and found in favor of the Church. It ruled that allowing a trade union undermined the Church autonomy granted by the Constitution and national law.<sup>259</sup>

The applicant thus lodged their application with the ECtHR. The Chamber found the application admissible. It also found an interference with Article 11, the freedom of association, for which there was no justification as there had been no pressing social need in a democratic society.<sup>260</sup>

The GC unanimously found that Article 11 applied, and by a vote of 11 to 6 found no violation. Judge Wojtyczek issued a concurring opinion. The dissenting judges on the question issued a joint opinion.

In its assessment of relevant law and practice, the GC noted, among other things, that there were already two trade unions within the Romanian Orthodox Church. It also noted that standing Romanian case law provided that civil law including labor law was restricted, though not fully restricted in its application to the Romanian Orthodox Church in accordance with legally guaranteed autonomy in internal matters.<sup>261</sup>

In a great number of states, there were already trade unions for employees of religious organizations, including the clergy. In the practice of the member states

258 ECtHR (GC), *Sindicatul “Păstorul Cel Bun” v. Romania*, app. no. 2330/09, 9 July 2013, paras 10-17.

259 *Ibid.*, paras 21-22.

260 *Ibid.*, paras 4 and 82-84.

261 *Ibid.*, paras 45-55.

with regard to labor relations in faith-based organizations, there were three different groups:<sup>262</sup>

1. Majority of member states: The law does not define the labor relationship between a faith-based community and clergy. They are free to enter employment contracts but do not need to, and in most cases do not. This is the majority of member states.
2. Minority of member states: labor law is applicable, but members of the clergy are required to observe a heightened duty of loyalty towards the religious community that employs them.
3. Belgium, the UK and the Netherlands: Courts decide on a case-by-case basis whether there is a contractual relationship according to labor law.

The applicants contended that after the Chamber judgment, their members had been put under severe pressure against which the Government had not protected them. Consequently, they argued that the Government had breached Article 34 (right to individual complaint, prohibition of hinderance/reprisals). The Government denied this. It also complained about the anonymity of several members of the applicant, in light of admissibility.<sup>263</sup> The GC found neither of these preliminary issues justified.<sup>264</sup>

The applicants argued that they were employees of the Church. If they were denied the right to form a union, this would compromise their rights under the freedom of association (Article 11). While accepting that church autonomy could be a legitimate aim, they argued that a difference should be made between the religious, civil and commercial activities of the Church. A trade union for Church employees would not interfere with the religious activities.<sup>265</sup> There were also two other trade unions within the Church and in other nations, trade unions of church personnel operated freely.<sup>266</sup>

The Government conceded that there had been interference, yet claimed this was justified under the limitations clause.<sup>267</sup> By virtue of the statute of the Romanian Orthodox Church and the Religious Freedom Act, the relationship between clergy and the church fell outside labor law.<sup>268</sup> The fact that the Trade Union Act did not explicitly exclude priests, could not amount to the recognition of a right. Furthermore, the applicants could set up a union, but only after prior consent from the bishop. Upholding this rule was legitimate and necessary given the church autonomy. The Government also argued that by becoming priests, individuals had accepted a different status to that of other employees and that the lack of European consensus favored a wide margin of appreciation.<sup>269</sup> A number of third parties intervened supporting

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262 *Ibid.*, para. 61.

263 *Ibid.*, paras 62-67.

264 *Ibid.*, paras 73 and 80.

265 *Ibid.*, paras 87-91.

266 *Ibid.*, para. 93.

267 *Ibid.*, paras 95 and 100.

268 *Ibid.*, paras 95-96.

269 *Ibid.*, paras 101-109.

the Government's side. These were mostly churches and states, with similar church autonomy rules to Romania.<sup>270</sup>

The majority reiterated that Article 11 "affords members of a trade unions the right [...] to be heard [...], but does not guarantee them any particular treatment by the State. What the Convention requires is that under national law trade unions should be enabled [...] to strive for the protection of their members' interests."<sup>271</sup> On the other hand, Article 9 "encompasses the expectation that the community will be allowed to function peacefully, free from arbitrary State intervention. The autonomous existence of religious communities is indispensable for pluralism in a democratic society [...]." It also repeated the *Hasan and Chaush* line that if the organizational life of a religious community was not protected by Article 9, the individual rights under the freedom of religion and belief would become meaningless.<sup>272</sup> Finally, the GC repeated the *Şahin* finding that in matters of the relationship between religion and state, there should be a considerable margin of appreciation.<sup>273</sup>

The majority found that the applicant fell under the protection of Article 11(1). The nature of the relationship between clergy and laymen within the Church showed enough analogy with ordinary employment. The special nature of the relationship did not justify excluding it entirely from Article 11. Furthermore, even under Romanian law, employees of the Church could set up trade unions within the limits of internal Church rules. The refusal to register the applicant was therefore an interference which must be justified under the limitations clause.<sup>274</sup> The GC agreed with both parties that the refusal pursued a legitimate aim, namely protecting church autonomy.<sup>275</sup>

With regard to necessity in a democratic society, the Court observed that "a mere allegation by a religious community" of "actual or potential threat to its autonomy is not sufficient" to justify any interference with trade union rights. The limitation must not be used for more than what is necessary to guarantee "the exercise of the religious community's autonomy". "The national courts must ensure that these conditions are satisfied, by conducting an in-depth examination" and "a thorough balancing exercise between the competing interests at stake".<sup>276</sup>

The majority also noted that the state must show "[r]espect for the autonomy of religious communities". This implied acceptance of the "right of communities to react, in accordance with their own rules and interests, to any dissident movements emerging within them". It was therefore not the task of the national authorities to act as the "arbiter between religious communities and the various dissident factions that exist or may emerge within them."<sup>277</sup>

The majority found that the limitation was justified for the following reasons. The acceptance of a trade union would seriously "imperil the freedom of religious

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270 See *ibid.*, paras 110-123.

271 *Ibid.*, para. 134.

272 *Ibid.*, para. 136.

273 *Ibid.*, para. 138.

274 *Ibid.*, paras 141-150.

275 *Ibid.*, para. 158.

276 *Ibid.*, para. 159.

277 *Ibid.*, para. 165.

denominations to organize themselves in accordance with their own traditions" and would "undermine the Church's traditional hierarchical structure". In Romania all religions were allowed to make their own internal rules and there was no special status for the Romanian Orthodox Church. Given the stated ambitions of the union, the refusal was reasonable in "view of the State's role in preserving such autonomy". State neutrality required the state not to become involved in the internal organization of the Church. Finally, the internal rules required the consent of the archbishop and the applicant had not put forward any reasons to justify its failure to request permission formally from the archbishop. There was nothing that prevented the setting up a trade union in accordance with the internal rules or joining one of the existing trade unions.<sup>278</sup> Finally, the Court reiterated the broad margin of appreciation in such cases.<sup>279</sup>

Judge Wojtyczek essentially argued that with regard to members of the clergy, there was no employment relationship with the Church. Therefore, it was "difficult to conclude" that part of Article 11 applied to them.<sup>280</sup>

The dissenting judges agreed with the majority that there had been interference. They argued that justifications must be narrowly construed. They did find the refusal to be proportionate or necessary in order to protect religious autonomy. After all, the applicant had explicitly stated willingness to "observe and apply ecclesial rules". The applicant only aimed at protecting its members' professional, economic, social and cultural rights and interests. It did not aspire to any authority or decision-making capacity within the Church.<sup>281</sup>

The dissenters then turned to the relationship with the Government. Registration alone could not have led to any disruption internally. Whether or not this would have been the case, would have to be determined in the future on the basis of actual facts instead of speculation on the intentions of the applicant. Refusing registration would only be justified if the program or goals of the applicant had been unlawful or in violation of democratic principles. Even after registration, the individual members would still have been subject to the internal rules of the Church, which would have secured the autonomy of the Church. Also, in concrete cases the rights of such a union under Article 11 could have been limited in light of the autonomy of the Church.<sup>282</sup>

Finally, the dissenters observed that the existence of the other two trade unions within the Church had not jeopardized the autonomy of the Church, nor was there evidence that this was the case with other churches elsewhere where such unions were required by law for the personnel of churches.<sup>283</sup>

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278 *Ibid.*, paras 161-170

279 *Ibid.*, para. 171.

280 *Sindicatul "Păstorul Cel Bun"*, app. no. 2330/09, *supra* n. 258, *Concurring opinion of Judge Wojtyczek*, para. 7.

281 *Sindicatul "Păstorul Cel Bun"*, app. no. 2330/09, *supra* n. 258, *Partly dissenting opinion of Judges Spielmann, Villiger, López Guerra, Bianku, Møse and Jäderblom*, paras 2-7.

282 *Ibid.*, para. 8.

283 *Ibid.*, paras 9-10.

## 4.14 Fernández Martínez v. Spain [2014]

|               |                                                                                                                                                                                                                               |
|---------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Essence:      | Married former priest dismissed as public school teacher upon proposal by Catholic Church.                                                                                                                                    |
| Dimension:    | Freedom of religion and belief and group autonomy. Freedom of religion and belief and secularism. Freedom of religion and belief and the educational system.                                                                  |
| Lower courts: | National courts found against applicant. Chamber found no violation.                                                                                                                                                          |
| Majority:     | 9:8. No violation, interference justified.                                                                                                                                                                                    |
| Dissenting:   | Joint dissenting opinion of Spielmann, Sajó, Karakaş, Lemmens, Jäderblom, Vehabović, Dedov and Saiz Arnaiz. Joint Dissenting Opinion of Spielmann, Sajó and Lemmens. Dissenting opinion by Sajó. Dissenting opinion by Dedov. |

Mr. Fernández Martínez was ordained as a priest in the Catholic Church. While canon law requires celibacy for priests, he applied to the Vatican in 1984 for dispensation from celibacy. Dispensation was granted in 1997, after the events which led to the case. However, in 1985 he got married in a civil law marriage and since then had become the father of five children. From 1991 onwards, he worked as a public school teacher in Catholic religion and ethics. In accordance with a treaty between the Holy See and Spain, such appointments by state authorities required a proposal from the Church. The relevant treaty provisions had been incorporated into Spanish law.<sup>284</sup>

In 1996, a newspaper article was published about the “Movement for Optional Celibacy” for priests (MOCEOP). The applicant was an active member and the article, which featured him and others, was illustrated by a picture of him with his family. It also explained the movement’s position on matters including celibacy, divorce, sex, contraception and abortion. When Mr. Fernández Martínez’ contract came up for renewal in 1997, the Bishop informed the Ministry of Education that the Church would not propose renewal. Reference was made to the newspaper article and the fact that the relevant legal provisions referred to “scandal”. The ministry subsequently did not prolong the contract.<sup>285</sup>

Mr. Fernández Martínez fought the decision from 1997, even though he retired from his new job in a museum in 2003. The national courts all found against him.<sup>286</sup> The Chamber found no violation of Article 8 (private /family life).<sup>287</sup> The majority of the GC found no violation affirming the Chamber’s judgment. The eight dissenting judges issued one joint dissenting opinion. Judges Spielmann, Sajó and Lemmens also issued a separate joint dissenting opinion. Judges Sajó and Dedov each also issued separate dissenting opinions.

284 ECtHR (GC), *Fernández Martínez v. Spain*, app. no. 56030/07, 12 June 2014, paras 11-13 and 48-57.

285 *Ibid.*, paras 14-20.

286 *Ibid.*, paras 58-61.

287 *Ibid.*, paras 4 and 68-71.

The applicant argued that the Chamber had created a new absolute right of the Catholic Church to which his private and family life had been sacrificed. The Church had dismissed him on trivial grounds, while he had never challenged any of the Church's doctrine in class. In accordance with standing case law (*Hasan and Chaush*, see section 6.4.4) not every act motivated by religion or belief is protected. The non-renewal decision following the publicity given to the applicant's situation had clearly been disproportionate. The Government agreed with the approach and findings of the Chamber. It also pointed to the mandatory nature of the proposal made by the Church according to the legislation, which the ministry could not have ignored. Whilst his public position regarding Church policy fell within the applicant's right to freedom of expression, it was also true that it was at odds with the Church's doctrine and thus with the suitability of its teachers. All third-party interveners supported the Government's position and the Chamber judgment.<sup>288</sup>

The applicant had complained that both the Constitutional Court and the Chamber had relied on facts other than those established by the Employment Tribunal. The GC saw no reason to assume that this was so. Articles 8 to 11 were all relevant according to the GC. Article 8 covered the applicant's private, family and professional life. Article 9 protected his freedom of religion and belief. Articles 10 and 11 protected his right to express his viewpoints and his membership of the MOCEOP. But as the essence of his complaint was that he could not remain a teacher, given the family situation and his membership of MOCEOP, his case was examined under Article 8.<sup>289</sup>

Unlike the Chamber, the GC took the view that the relevant question was not whether the state's positive obligations prevailed over the autonomy rights of the Church. The central question was whether the Ministry of Education's enforcement of the decision of the Church was an interference and, if so, whether it could be justified. The majority and the dissenting judges agreed that there had been an interference with the applicant's private and family life. This interference was provided for in the relevant legislation according to the relevant standard and pursued a legitimate aim, namely that of protecting the rights and freedoms of others, i.e. the Catholic Church.<sup>290</sup> Hence, the central question was whether the interference was necessary in a democratic society.

According to the majority, the interference was necessary. The majority considered standing case law regarding the autonomy of religious communities which highlighted the vice-versa importance of the collective and individual dimension of the freedom of religion and belief. Article 9 did not contain a right to dissent, whilst the "State's role as the neutral and impartial organizer of the exercise of various religions, faiths and beliefs" mandated "public order, religious harmony and tolerance in a democratic society, particularly between opposing groups" (reference is made to *Hasan and Chaush*, *Şahin*, see sections 10.4.4 and 10.4.7). The "principle of religious autonomy prevents the State from obliging a religious community to admit or exclude an individual or to entrust someone with a particular religious duty". Finally, the relationship between church and state can and does differ greatly in democratic

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288 *Ibid.*, paras 71-100.

289 *Ibid.*, paras 106 and 107-112.

290 *Ibid.*, paras 114-121.

societies, given the differences between member states (here reference is made to *Sindicatul "Păstorul Cel Bun"*, see section 10.4.13).<sup>291</sup>

The majority acknowledged that based on their autonomy, faith-based organizations may demand "a certain degree of loyalty from those working for them or representing them". There may be a heightened duty of loyalty in relation to a specific mission of the person concerned. However, a "mere allegation by a religious community that there is an actual or potential threat to its autonomy is not sufficient to render any interference with its members' rights" compatible with the Convention. The interference with individual rights to protect a community from a risk which was "probable and substantial" "should not go beyond what is necessary to eliminate that risk". Also, the substance of the individual right should not be affected. Revisiting *Sindicatul "Păstorul cel Bun"*, the majority pointed to the national courts to balance this properly, based on the "circumstances of the case and a thorough balancing exercise between the competing interests at stake".<sup>292</sup>

Applying this to the case, the majority considered the following. The status of the applicant was unclear when the dismissal took place. He was married, still ordained as a priest and had not received dispensation. Yet, when he had first signed his employment contract, he had willingly and knowingly accepted a heightened duty of loyalty to the Catholic Church. While Mr. Fernández Martínez had not given publicity to his situation as a married priest, he had willingly cooperated with the media. This was also the case with regard to the publicity given to his membership of MOCEOP. Through this publicity, attention was drawn to the discrepancies between Church dogma and his personal opinions. While he was legally an employee of the state, this did not discharge him from the heightened loyalty. In the majority of CoE members, churches have co-decision or exclusive decision in the appointment of religious education teachers. While the sanction of the non-prolongment was severe, Fernández Martínez had knowingly placed himself in the situation which had triggered the decision. In addition, he was entitled to unemployment benefits.<sup>293</sup>

Finally, the majority found that the domestic courts had taken all these factors into proper consideration. Given the margin of appreciation in such cases, the conclusion was that the interference was justified and not disproportionate.<sup>294</sup>

The dissenting judges disagreed with this last assessment, while not disputing that the Catholic Church had autonomy rights under Article 9. The difference of opinion concerned the role of the state (Ministry of Education) as distinct from the Church institutions and their appreciation of Mr. Fernández Martínez from a perspective of canon law. The issue before the ECtHR, according to the dissenters, was not the bishop's decision, but that of the Ministry of Education. While the bishop's decision had led to the decision not to renew the contract, the decision itself was taken by the Ministry. According to the dissenting judges, the state could not absolve itself of its obligations by delegating decisions to non-state bodies (in this case the

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291 *Ibid.*, paras 126-129.

292 *Ibid.*, paras 130-131.

293 *Ibid.*, paras 133-145.

294 *Ibid.*, paras 146-152.



Catholic Church). Notwithstanding the obligation to comply with the bishop's decision, the state was bound by the Convention.<sup>295</sup>

The dissenting judges disagreed with the majority about what triggers the rights under Article 8 in this case. While the majority saw the consequences of the decision as the trigger, for the dissenters it was the reasons for the decision. His private life situation was the direct cause of the dismissal. A "person's manifestation of his or her private and family life is covered by the right to respect for private and family life". The dissenters agreed that interference was the failure not to reappoint. But in their view, the ministry should have evaluated whether giving effect to the proposal by the Church would violate the applicant's rights.<sup>296</sup>

Unlike the majority, the dissenters were not convinced that the interference was provided for by law. However, as they found the decision to be faulted elsewhere, they did not take a firm stand. They agreed with the legitimate aim of the interference. The center of their criticism was the "necessity" of the interference.<sup>297</sup> "The autonomy of religious communities is not absolute." Courts should not examine the religious reasons of a decision taken by a religious body; they must "verify that such a decision does not produce effects that constitute a disproportionate interference with the fundamental rights". The duty of scrutiny was higher, given the effects of dismissal from employment and the fact that the actual decision was taken by a state organ.<sup>298</sup>

While the Ministry had rightly left the decision whether Mr. Fernández Martínez was still suitable to teach Catholic religion and ethics to the exclusive jurisdiction of the Church, it took no other action but not to renew the applicant's contract. According to the dissenting judges, it was the Ministry's action and inaction which deserved scrutiny by the courts, in light of the applicant's right to respect for his private life. "Whatever the applicant's situation might have been under canon law, from an outside perspective he was in any event to be regarded as mandated by the Catholic Church to teach Catholic religion. As far as his secular position was concerned, he was a teacher appointed by the Ministry and had entered into a contract with it."<sup>299</sup>

The dissenting judges also took the following into consideration. They believed that neither the Church nor the Ministry had followed a due decision-making process, denying the applicant the right to be heard and taking such a decision without prior warning. They also believed that the essence of dismissal was his private life situation as a married priest and member of MOCEOP. This touched on the essence of Article 8. Yet these circumstances had all been known to the Church long before the decision was taken. The dispensation from celibacy requested by the applicant had been granted (and thus answered) only 13 years after he had applied for it. Furthermore, there was no evidence which suggested that Mr. Fernández Martínez had ever disputed any Church dogma in his teachings. Finally, while perhaps he was no longer

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295 *Fernández Martínez v. Spain*, app. no. 56030/07, *supra* n. 284, *Joined dissenting opinion of Judges Spielmann, Sajó, Karakaş, Lemmens, Jäderblom, Vehabović, Dedov and Saiz Arnaiz*, paras 5-8.

296 *Ibid.*, paras 10-13.

297 *Ibid.*, paras 14-17.

298 *Ibid.*, paras 21-22.

299 *Ibid.*, paras 24-27.

eligible as a Catholic religious education teacher, it was never considered whether he could have held another position in the educational system. In sum, the Ministry's reaction to the proposal was not proportional and thus Article 8 rights had been violated.<sup>300</sup>

Three of the dissenting judges, Spielmann, Sajò and Lemmens, also expressed the view that the case should also have been examined under Article 14 of the Convention, taken together with Article 8, or under Articles 9 and 10 of the Convention, taken separately or together with Article 14. This would have been justified if the Court had also found a violation of Article 8.<sup>301</sup> Judge Sajò in his separate dissenting opinion reaffirmed and reiterated some of the arguments in the joint dissenting opinion. He highlighted that the Court should have made explicit the limits of autonomy of religious communities. He also highlighted that the failure of solid argumentation by the Church made the state's ("as proxy of the Church") legal process inadequate.<sup>302</sup>

Judge Dedov took the most far-reaching approach in his separate dissenting opinion. He did not believe that there was an autonomy for religious communities, to be derived from Article 9, which allowed for interference with other human rights. "If the Convention system is intended to combat totalitarianism, then there is no reason to tolerate the sort of totalitarianism that can be seen in the present case." He also explicitly criticized the rule of celibacy as interference with fundamental rights such as the right to have a family.<sup>303</sup>

4.15 S.A.S. vs. France [2014]

|               |                                                                                                     |
|---------------|-----------------------------------------------------------------------------------------------------|
| Essence:      | Ban on face-concealing clothing.                                                                    |
| Dimension:    | Freedom of religion and belief and personal freedom. Freedom of religion and belief and secularism. |
| Lower courts: | Direct application. Chamber relinquished jurisdiction on behalf of the Grand Chamber.               |
| Majority:     | 15:2 No violation of Articles 8 and 9.                                                              |
| Dissenting:   | Joint dissenting opinion of Judges Nussberger and Jäderblom.                                        |

The case was triggered by the French general ban on full-face veils. The applicant was a Muslim who wore face-concealing clothing in accordance with her beliefs. The applicant emphasized the personal spiritual choice she made to wear *burqas* and/or *niqabs* (face coverings of different cultural origins) on certain occasions of religious importance. The applicant did not argue for a right to leave the covering on for security or identity checks, but felt restricted by the general ban.<sup>304</sup>

300 *Ibid.*, paras 21-38.

301 *Ibid.*

302 *Fernández Martínez v. Spain*, app. no. 56030/07, *supra* n. 284, *Dissenting opinion of Judge Sajó*, (especially) paras 4-5.

303 *Fernández Martínez v. Spain*, app. no. 56030/07, *supra* n. 284, *Dissenting opinion of Judge Dedov*.

304 ECtHR (GC), *S.A.S. v. France*, app. no 43835/11, 1 July 2014, paras 10-14.

The French ban followed a report by a parliamentary commission and was passed unanimously. The report found the practice to coincide with radical and/or fundamentalist outlooks and to be at odds with French values. The French Human Rights Commission advised against a general ban. The advisory opinion of the *Conseil d'État* drew the conclusion that a ban could be justified. The *Conseil constitutionnel* also found the ban permissible, except for places of religious worship. Shortly after entry into force, the Court of Cassation found against a protestor who had worn face coverings to protest the ban.<sup>305</sup>

The applicant applied directly to Strasbourg without any prior national proceedings. The Chamber relinquished jurisdiction on behalf of the GC. The Court unanimously found the application admissible. A majority of 15 judges found no violation of Articles 8 and 9. Judges Nussberger and Jäderblom did find a violation and issued a joint dissenting opinion.

The Government argued that the applicant was not a victim for Convention purposes. They argued that there was no evidence that she was a Muslim and that she wore face coverings for religious reasons. They also viewed the absence of national proceedings as decisive. The applicant argued in response that the requirement to prove religious affiliation and beliefs in itself was a violation of human rights, and that given her beliefs and practices she was a potential victim. Also, the legislative process and the case decided under the act made it clear that French judicial institutions would not find against the ban as such. The Court found that indeed the state's "duty of neutrality and impartiality is incompatible with any power on the State's part to assess the legitimacy of religious beliefs or the ways in which those beliefs are expressed".<sup>306</sup>

The Court also found that given the context, it was not necessary for the applicant to be herself charged with violating the ban, to be regarded a victim. The Court also dismissed the Government's assertion that the case was an abuse of the right of individual application, launched by activists. Concerning the claims of the applicant under the freedom of religion and belief, private and personal life and under the freedom of opinion, the Court found them to be admissible.<sup>307</sup>

While the underlying documents of the legislative process showed a desire to uplift women, the applicant argued that the ban had been motivated by "stereotyping and chauvinistic logic, that women who wore veils were 'effaced'". "True gender equality, argued the applicant, required to respect the own choices women make about the way they want to dress". Paraphrasing Canadian jurisprudence, without actual reference, she argues that a "truly free society was one which could accommodate a wide variety of beliefs, tastes, pursuits, customs and codes of conduct, and that it was not for the State to determine the validity of religious beliefs". Doubting that the aims pursued were legitimate instead of discrimination hiding under other considerations, she argued that, even if legitimate, they could have been pursued by other, less infringing means.<sup>308</sup>

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305 *Ibid.*, paras 16-30 and 34.

306 *Ibid.*, paras 53-61.

307 *Ibid.*, paras 62-75.

308 *Ibid.*, paras 76-78.

Also, according to the applicant, the ban amounted to indirect effect discrimination as it distinguished in effect between Muslim women who believed that their religion required face covering and other Muslim women who did not share those beliefs and also Muslim men. The Government acknowledged that the ban was a limitation, but argued that it pursued legitimate aims and that it was necessary in a democratic society. The Government raised public safety, gender equality and the notion of “living together”.<sup>309</sup> While the Belgian Government intervened on behalf of the French Government, all non-governmental interveners, academic institutions, and human rights organizations, supported the claimant’s cause.<sup>310</sup>

The Court viewed choices regarding an individual’s appearance in public or in private, including the choice of clothes, to be protected by the right to private life. The ban, being a measure which restricted the freedom, would therefore constitute an interference. As the ban mostly affected individuals who wore a face covering for reasons of religion and belief, the ban mainly raised issues under that right.<sup>311</sup> Given the scope and character of the ban, the applicant found herself in a situation of “continued interference”, a notion which has been recognized in Strasbourg case law. Such interference must be justified under the limitations clause. As the ban was issued by law, the interference being “prescribed by law” was no dispute.<sup>312</sup>

While “public safety” which was raised as an aim expressly recognized in Article 9(2), the “respect for the minimum set of values of an open and democratic society” also invoked was not. Yet the Government in the pleadings relied on “protection of the rights and freedoms of others” which was an aim recognized in both Article 9(2) and Article 8(2). However, the purpose of gender equality was not accepted by the Court. A “State Party cannot invoke gender equality in order to ban a practice that is defended by women – such as the applicant – in the context of the exercise of the rights enshrined in those provisions, unless it were to be understood that individuals could be protected on that basis from the exercise of their own fundamental rights and freedoms.”<sup>313</sup>

Furthermore, respect for human dignity cannot be raised to justify a blanket ban for face coverings in public places. While face coverings may be perceived as strange by some, they were “the expression of a cultural identity which contributes to the pluralism that is inherent in democracy”. Views regarding covering and uncovering of the human body can vary greatly. Also there was no evidence before the Court that “women who wear the full-face veil seek to express a form of contempt against” others or society. However, the notion of “living together” could be linked to the legitimate aim of protecting the rights and freedoms of others. But because the notion could easily be abused when restricting rights, the Court must conduct a full examination.<sup>314</sup>

Reiterating the standing case law about the importance of the freedom of religion and belief for pluralism, the role of the state as impartial organizer of pluralism and

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309 *Ibid.*, paras 79-85.

310 *Ibid.*, paras 86-105.

311 *Ibid.*, paras 106-108.

312 *Ibid.*, paras 110-112.

313 *Ibid.*, paras 115-119.

314 *Ibid.*, paras 120-122.

the individual and collective dimension, the Court pointed to the fact that limiting freedom of religion and belief may be necessary to assure peaceful coexistence in pluralist societies. But the views of the majority could not prevail at all times. After all “pluralism, tolerance and broadmindedness are hallmarks of a ‘democratic society’”. As far as striking the balance was concerned, the Court reaffirmed the standing case law regarding the margin of appreciation in state-religion relationships. This margin is wide, but goes hand in hand with European supervision by the Strasbourg institutions.<sup>315</sup>

Revisiting earlier cases on religious clothing, including *Şahin* (see section 10.4.7), the Court pointed to the fact that the face-covering veils were different from all the other religious clothing in the case law, given the fact they conceal the entire face, with the possible exception of the eyes.<sup>316</sup> The Court also found that unlike what the applicant was claiming, the prime motive of the ban seemed not to be to restrict a practice (wrongly) assumed to be forced upon women, but to enhance public safety and the rights and freedoms of others (i.e. the notion of living together). Because the ban was general and unlimited, it failed to be proportionate to the public safety aim, as specific requirements to remove religious clothing in certain situations would have been.<sup>317</sup>

But the majority of the Court found that the ban was justified by the aim of protecting the rights of freedom of others (i.e. living together). It was possible for the state to give a certain weight to social requirements in this regard, like being able to see someone’s face for living together in the French context. Given the wide margin of appreciation in which the outcome of a national democratic process must be respected, and the fact that within Europe there was no common ground regarding the full-face veil, the majority found the overall blanket ban proportional for the purpose of the limitation test. However, it also acknowledged the fact that the ban had a disproportional effect on Muslim women and that the Islamophobic remarks which featured in the national debate were unreconcilable with the Convention.<sup>318</sup> Given the entire analysis, the Court also found that there was no violation of Article 14 either in conjunction with Articles 8 and 9 or alone.<sup>319</sup>

The dissenting judges, Nussberger and Jäderblom, acknowledged the careful balancing of the majority opinion. Nevertheless, they could not agree because in their view it “sacrifices concrete individual rights guaranteed by the Convention to abstract principles”. They agreed with the majority that neither reference to equality, human dignity, nor public safety, could justify a legitimate aim. The notion of living together was too “far-fetched and vague” to be linked to the rights and freedoms of others for Convention purposes.<sup>320</sup>

The dissenters viewed the ban in light of a pre-supposed symbolic meaning of the full-face veil given to it in the legislative process. It was assumed to be an ex-

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315 *Ibid.*, paras 123-131.

316 *Ibid.*, paras 132-136.

317 *Ibid.*, paras 137-142.

318 *Ibid.*, paras 143-158.

319 *Ibid.*, paras 160-163.

320 *S.A.S. v. France*, app. no 43835/11, *supra* n. 304, *Joined partly dissenting opinion of Judges Nussberger and Jäderblom*, paras 1-4.

pression of subversive and exclusivist sentiments. But the claimant argued that she wore it for personal spiritual reasons. The dissenters reminded the majority that no one had a right not to be “shocked or provoked”. “Pluralism, tolerance and broad-mindedness”, as case law on freedom of expression shows, includes everyone’s right to “shock, offend and disturb”. No one may be forced into social contact against their will by a notion of “living together”, especially since such notions were very dependent on subjective cultural interpretations. Altogether, no concrete rights and freedoms were protected by the ban.<sup>321</sup>

What was problematic in their view, was the majority’s assessment that in the end “pluralism, tolerance and broadmindedness as hallmarks of a democratic society” would allow for subjecting the practices of a religious minority to mainstream views. The very attempt of the ban was to restrict pluralism to remove social tension instead of ensuring that competing groups tolerated each other. In any case, the ban was disproportionate because it was so broad and general. In the dissenters’ view, the majority also wrongly concluded an absence of consensus in its “margin of appreciation” analysis, as the majority of states in Europe had chosen not to legislate, and international law and expert opinions were directed against blanket bans and thus towards a far more narrow margin. Because of the possible reoccurring nature, the effect on the women in question was substantial and the Government had failed to show why less restrictive means could not attain the goal.<sup>322</sup>

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321 *Ibid.*, paras 6-10.

322 *Ibid.*, paras 13-24.





## Appendix II

### The freedom of religion in the three instruments

#### 1 Canadian Charter of Rights and Freedoms

##### 1.1 Preamble

Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law:

##### 1.2 Section 1

The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society

##### 1.3 Section 2

Everyone has the following fundamental freedoms:

- a) freedom of conscience and religion;
- b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
- c) freedom of peaceful assembly; and
- d) freedom of association.

##### 1.4 Section 15(1)

Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

##### 1.5 Section 25

The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including

- a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and

- b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.

## 1.6 Section 26

The guarantee in this Charter of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exist in Canada.

## 1.7 Section 27

This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.

# 2 South African Bill of Rights

## 2.1 Preamble

We, the people of South Africa,  
Recognise the injustices of our past;  
Honour those who suffered for justice and freedom in our land;  
Respect those who have worked to build and develop our country; and  
Believe that South Africa belongs to all who live in it, united in our diversity.  
We therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to -  
Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights;  
Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law;  
Improve the quality of life of all citizens and free the potential of each person; and  
Build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations.  
May God protect our people.  
Nkosi Sikelel' iAfrika. Morena boloka setjhaba sa heso.  
God seën Suid-Afrika. God bless South Africa.  
Mudzimu fhatutshedza Afurika. Hosi katekisa Afrika.

## 2.2 Section 6

- 1) The official languages of the Republic are Sepedi, Sesotho, Setswana, siSwati, Tshivenda, Xitsonga, Afrikaans, English, isiNdebele, isiXhosa and isiZulu.

- 2) Recognising the historically diminished use and status of the indigenous languages of our people, the state must take practical and positive measures to elevate the status and advance the use of these languages.
- 3) a) The national government and provincial governments may use any particular official languages for the purposes of government, taking into account usage, practicality, expense, regional circumstances and the balance of the needs and preferences of the population as a whole or in the province concerned; but the national government and each provincial government must use at least two official languages.  
b) Municipalities must take into account the language usage and preferences of their residents.
- 4) The national government and provincial governments, by legislative and other measures, must regulate and monitor their use of official languages. Without detracting from the provisions of subsection (2), all official languages must enjoy parity of esteem and must be treated equitably.
- 5) A Pan South African Language Board established by national legislation must –
  - a) promote, and create conditions for, the development and use of –
    - i) all official languages;
    - ii) the Khoi, Nama and San languages; and
    - iii) sign language; and
  - b) promote and ensure respect for –
    - i) all languages commonly used by communities in South Africa, including German, Greek, Gujarati, Hindi, Portuguese, Tamil, Telegu and Urdu; and
    - ii) Arabic, Hebrew, Sanskrit and other languages used for religious purposes in South Africa.

## 2.3 Section 7

1. This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.
2. The state must respect, protect, promote and fulfil the rights in the Bill of Rights.
3. The rights in the Bill of Rights are subject to the limitations contained or referred to in section 36, or elsewhere in the Bill.

## 2.4 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.

## 2.5 Section 15

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

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.
- a) This section does not prevent legislation recognizing-
- 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 provisions of the Constitution.

## 2.6 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, practice their religion and use their language; and
  - b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.
2. The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights.

## 2.7 Section 36

1. The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-
  - a) the nature of the right;
  - b) the importance of the purpose of the limitation;
  - c) the nature and extent of the limitation;
  - d) the relation between the limitation and its purpose; and
  - e) less restrictive means to achieve the purpose.

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

### 3 European Convention on Human Rights and fundamental freedoms

#### 3.1 Article 9

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

#### 3.2 Article 14

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

#### 3.3 Article 2, 1st Protocol

No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.



## Curriculum vitae

Florian H. Karim Theissen was born in Cairo, Egypt, to German diplomat parents. When he was 11 months old, the family moved to Germany. Florian spent his early childhood years in the federal state of Hesse, Germany. He spent his later childhood and early teens in New Delhi, India and Jakarta, Indonesia, before moving to The Hague, Netherlands, at age 16. He graduated from the German International School of The Hague with the German Abitur, before starting university in Leiden.

At Leiden University Florian completed his Bachelor in Dutch Law, and in 2003 completed two Masters degrees. One in European and International Law; one in Legal Theory and Philosophy. He also followed courses in Political Science. Subsequently he worked at Leiden University's Faculty of Law until 2006 as a junior researcher and lecturer.

In 2007 he started his career in public sector consultancy at consultancy firm Berenschot in Utrecht. From 2007 until 2015 he worked at Berenschot, PriceWaterhouseCoopers and KokxDeVoogd in various consultancy positions. In 2015 Florian and two colleagues started 'PROOF Adviseurs', a consultancy firm based in Rotterdam, which specializes in collaborative governance for collaborations on public impact goals. Their philosophy is to combine institutional, procedural and cultural/relation-oriented governance. The majority of their projects focus on collaboration at the local and regional level.

Florian has strong affinity with projects which focus on health and wellbeing, youth care, participation in the labor market and environmental sustainability. He enjoys projects which focus on process-management and/or advice concerning governance in complex multi-stakeholder environments. Currently he leads the firm as managing partner.

Florian has published articles and book-chapters related to the topic of his dissertation and his everyday work. He lives in The Hague with his wife and daughter.





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“There are as many paths to God, as there are souls in this world”. So goes an old Sufi wisdom. Those who believe – including those who believe divergently and those who disbelieve – can clash in daily life with others who believe or disbelieve differently. They can come into conflict with laws and regulations that are contrary to their beliefs, or with state institutions that disturb, interfere with or obstruct their lives based on those beliefs. When these conflicts reach the courts, they are adjudicated under the freedom of religion and belief. Sometimes, similar cases lead to different outcomes in different jurisdictions.

The notion that judicial interpretation matters for human rights is almost uncontested. This study is interested in the standard interpretations of the freedom of religion and belief by the Supreme Court of Canada (SCC), the Constitutional Court of South Africa (CCSA), and the European Court of Human Rights (ECtHR). From each of these Courts, 15 cases were selected and systematically analyzed to reconstruct the standard interpretations. They have been compared to find similarities and differences, in terms of optimal protection of believers. The study also analyses and compares the standard interpretations from the perspective of Cass R. Sunstein’s judicial minimalism. The ultimate goal is to find best practices for optimal protection of believers in the judicial interpretation of the freedom of religion and belief and to enable possible judicial borrowing.

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