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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1 Introduction

"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,[1] 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,

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*[2] 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*[3] (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*[4] (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*[5] (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*[6] case (section I2.4.10), the Grand Chamber of the ECtHR had to decide whether to overrule

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*[7]*)* (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.

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[8]) 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.[9] 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

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*",[10] 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".

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.

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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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In *Trinity Western Union (TWU*[16]*)* (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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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.

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[17]) 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.[18] 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 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.

1.4.2 Standard interpretation

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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

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",[19] 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.[20]

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

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.[21] In Britain, reversal of the implementation of the ECHR and even withdrawal from the ECtHR has been raised in public debate.[22] 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.[23] 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.[24] 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.[25]

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,[26] others criticize the Courts communitarian tolerance for

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 African 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.[27] 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.[28] 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.[29]

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

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.[30] 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.[31] 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

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.[32] 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

32 *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,*[33] (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*[34] (section I3.4.9) and three before the CCSA (*Amod,*[35] *Daniels,*[36] *Hassam,*[37] 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*[38] 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*[39] 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*[40] (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), Ţerife 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*[41] 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*[42] (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*[43] (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*[44] case and the Canadian Reference case *Same Sex Marriage*[45] *(*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*,[46] a Canadian school board disallowed a first-grade school book displaying same-sex families. Members of the school board were concerned about the conflicting

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*[47] and *Refah*[48] (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*

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 11th 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*[49] 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.

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.[50] In the period from 1996 until 2015, 17 cases regarding the freedom of religion and belief were decided by the South African Constitutional Court.[51] The Grand Chamber of the European Court of Human Rights decided 21 cases regarding the freedom of religion and belief from 1998 until 2015.[52] 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 (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 (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"]} (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.