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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2 Theoretical framework

Concepts of freedom of religion and belief and of judicial minimalism

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.[1] 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.[2] It has been affirmed by faith-based and/or interfaith initiatives like the Cairo Declaration of Human Rights in Islam,[3]

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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

the Vatican's Declaration on Religious Freedom – Dignitatis Humanae[4] and by the Parliament of the World's Religions.[5] 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)[6] 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

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 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.[7] 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.[8]

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

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.[9] 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.[10]

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.[11]

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:[12]

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.

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.[13] European understandings of freedom of religion and belief were globalized in the late modern era of colonialism and imperialism, and after that in de 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.[14] 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.[15] 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.[16]

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.[17] De Tocqueville in his famous

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".[18] 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 20th 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".[19] Soroush explains the Quranic induction that there "shall

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"[20] 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.[21] "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".[22]

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.[23] Similar arguments can be invoked from various (historical and contemporary) strands of Judaism, Christianity Buddhism, Hinduism[24] 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.[25] 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[26] 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".[27] 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.[28]

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.[29] 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".[30] 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.[31] 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.[32]

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

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"[33] is espoused by the Parliament of the World's Religions initiated by Hans Küng,[34] but also by (inter)faith movements such as the Universal Sufis of the Inayati Order founded by Indian mystic Hazrat Inayat Khan.[35]

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.[36]

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.[37]

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.[38] 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,

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.[39] 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 serval narratives on religion and belief, along with several narratives regarding the freedom of religion and belief and, more broadly, human rights.[40] 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."[41] 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.[42] 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."[43]

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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".[44]

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*[45] 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[46] 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[47] 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*,[48] 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*[49] 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)*,[50] 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" .[51] 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?

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.[52] 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.[53] 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.[54] 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.[55]

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".[56]

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".[57] 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".[58] Others echo that "[t]he Constitutional Court has endorsed the principle of self-restraint on a number of occasions"[59] and that "[t]he Court has, in the past, been willing to defer to legislative bodies to come up with solutions to constitutional problems […]."[60]

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".[61]

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".[62] 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.[63] Yet the Court tends to emphasize incremental rather than sudden change.[64]

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-

57 *Ibid.*

58 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.

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

60 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.

61 Roux, *supra* n. 56, at 398.

62 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.

63 *See* Harris, O'Boyle & Warbrick, *supra* n. 62, at 7 and 33.

64 *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.[65] It coincides with a general sentiment against European integration.[66] 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.[67]

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[68] 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."[69] 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.[70] "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."[71]

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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" .[72] 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 its 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

72 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.[73] This distinction should replace the one often used in the United States between "liberals" and "conservatives" because it is "hopelessly inadequate".[74]

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

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".[75] 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.[76]

A distinction can be made between democratic perfectionists and rights perfectionists.[77] Democratic perfectionists believe that constitutional courts should interpret the constitution so as to enhance rather than compromise democracy. "Unblocking stoppages in the democratic process",[78] 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".[79] Dworkin here counters widespread criticism that liberals favor judicial activism. According to Sunstein, the terms "activism" and "restrain" 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.[80]

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

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".[81] 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:[82]

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[83] as well as reference to a "living constitution".[84] 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."[85]

Whereas orginalists 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[86] 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"[87] 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.[88] 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."[89] 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.[90] 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.[91] 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.[92]

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".[93]

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".[94] 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.[95]

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:[96]

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

94 *Ibid.*, p. 44.
95 Habermas, *supra* n. 78, at 292-293.
96 *Ibid.*, pp. 294-296, 299 and 310-311.

degree law-creation. Therefore, the legislator must interpret values, while the constitutional court must interpret norms.[97]

2.4.4 Minimalism

Minimalism is the theory which Sunstein himself advocates. However, minimalism is a widely accepted theory amongst judges.[98] "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.[99] Central to minimalism as a theory of interpretation, is the notion of "incompletely theorized agreements" and constitutional principles without a constitutional theory.[100]

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",[101] 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".[102]

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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.[103]

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.[104]

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.[105]

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103 *See ibid.*, p. 51.

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

105 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."[106] Sunstein's book *Designing Democracy* illustrates the designing of constitutional orders making frequent use of South Africa's transition from apartheid to liberal democracy.[107] 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.[108]

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.[109]

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.[110]

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.[111]

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:[112]

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".[113]

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".[114] 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."[115]

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 misguiding. 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 17th 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.[116]

However, it is certainly possible to apply incomplete theorization and to willingly break with tradition. For example, the South African constitution deliberately and thoroughly brakes 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.[117]

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

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.[118]

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.[119] 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.[120] 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".[121] 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.[122] In our example, this means that the ruling should be focused on the student in question, his or her re-

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:[123]

	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.[124] 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.[125]

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.[126] 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.[127]

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.[128] 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.[129]

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.[130]

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.[131]

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*[132] 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

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.[133] 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),[134] the Supreme Court decided that "separate is inherently unequal". *Brown* was not only a wide decision, but also a deep one.[135]

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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133 Sunstein, *supra* n. 104, at 836-837.
134 US Supreme Court, *Brown v. Board of Education*, 347 US 483 (1954), 17 May 1954.
135 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 (section2.6.2). 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.[136]

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.[137]

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.[138] 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

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.[139] 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".[140] But he argues it is neither possible nor desirable to separate religious views and politics. Rawls may heave based his theory to 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.[141]

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.[142]

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.[143]

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.[144] 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

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.[145] 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 accomodationist 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.[146]

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.[147] 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

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.[148]

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.[149] 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.[150] 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.[151]

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.[152]

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

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 two. 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.[154] 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 todays diverse societies.[155]

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.[156]

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.[157] 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

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).[158]

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".[159]

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".[160] 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.[161]

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.[162]

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.[163] 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.[164]

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.[165]

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".[166] 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,

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"[167] 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.[168] 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.[169] 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".[170] 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.[171]

The Charter clearly envisions a "non-assimilationist model of citizenship, one aimed at promoting equality and multiculturalism".[172] "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."[173] Weinrib responds to claims that a rights-based approach

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.[174]

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.[175]

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 I1.4.4), 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.[176]

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.[177] As Weinrib notes, pre-Charter politics were characterized by a cultural bias towards Christian religion as one of the foundations of society

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 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 I1.3), 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.[178] But Berger attributes this to a "general transforming ideology" with "individualism as a hallmark".[179] The Charter clearly envisions a "non-assimilationist model of citizenship, one aimed at promoting equality and multiculturalism".[180] "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."[181]

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.[182]

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.[183]

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."[184]

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".[185] But he concedes that "religionists have not always lost",[186] 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."[187]

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

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".[188]

Does the inside law concept also address the grievances of aboriginal communities? Borrows 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.[189] 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.[190] 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",[191] 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.[192]

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".[193] 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-

188 *Ibid.*, pp. 124-132.
189 Borrows, *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".[194]

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.[195] 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."[196] Currie and De Waal note that the Canadian Charter of Rights and Freedoms was the principal model for the South African Bill of Rights.[197] 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).

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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*, 6th 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".[198] 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".[199] 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".[200] 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".[201] This does not mean that there is less legal constraint than in liberal legalism, but legal constraint is always "culturally construed".[202]

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".[203] 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".[204]

Nevertheless, according to Lenta, the South African judiciary, including the CCSA, is more naturally inclined to restraint than to activism.[205] 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

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."[206] 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".[207]. 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".[208]

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 […]."[209] 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".[210]

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.[211] 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."[212]

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

206Goodsell *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".[213] 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).[214] 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 inacceptable choice and does not ask the state to walk an extra mile (as dissenting Justice Ngcobo put it).[215] Mark Kende draws attention to the race and culture factor on the Court itself, at least when it comes to *Prince*.[216] 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."[217]

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.[218] "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.[219]

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".[220] 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".[221]

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."[222] 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."[223]

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."[224] Erin Goodsell, another advocate for an African perspective, agrees: this connection between religion or traditional African culture and the Constitution is essential and possible.[225] 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.[226] "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."[227] 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."[228]

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."[229] Also religious freedom, "at least for minority groups like Muslims

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".[230] 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".[231]

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.[232] "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."[233] 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".[234] 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.[235]

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.[236] 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.[237]

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

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".[238] He sees evidence for this in the preamble which highlights the history of suffering and injustice, "thereby connoting the political necessity of positive tolerance".[239] 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."[240] 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."[241]

"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".[242] 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."[243]

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.[244]

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

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".[245]

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.[246]

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 illusionary.[247] 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

245 de Vos, *supra* n. 58, at 851.

246 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.

247 *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".[248]

Evans attributes to the Convention institutions "a generally liberal approach", when it comes to defining religion and belief.[249] Rainey, McCormick and Ovey also note the broadness of the Court's definition of religion,[250] 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.[251] 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".[252]

Indeed, one could argue that "fresh imagination and boldness"[253] 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.[254] The legal concept of a minority is hardly developed in Europe and only one Western European nation has an officially recognized religious minority.[255] 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.[256] 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

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.[257] 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".[258]

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.[259]

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

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 préporatoires.

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.[260]

Europe's demographics in terms of religion and belief have consistently changed since the beginning of the 20th 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.[261]

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.[262]

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".[263] 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".[264]

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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.[265] 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".[266]

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".[267] 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.[268] Maris notes that liberal neutrality requires the rejection of religious arguments from public reason as well as secular metaphysics,[269] 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.[270]

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.[271] As Boyle observes, the cases supporting a rigid secularism, suggesting that religion belongs solely in the private sphere,

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, 'Laicité 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.[272] 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.[273]

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.[274] 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[275] (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.[276] 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.[277] 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."[278]

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

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.[279] 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.[280]

This approach would also shift away from the Christian bias supposedly characterizing the current jurisprudence.[281] 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.[282] 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.[283]

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.[284] 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".[285] 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.

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.[286] 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.[287] Commenting on *Konrad*,[288] 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.[289] 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.[290]

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[291] 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.[292]

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

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 19th and 20th 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,[293] 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,[294] 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.

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.