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

3.1 Introduction to this chapter

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

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

3.2 Codification of the freedom of religion and belief

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

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

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

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

3.2.1 Freedoms and freedom rights in the different instruments

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

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

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

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

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

since the expression of "thought and conscience" is protected explicitly by Article 10.[1]

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

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

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

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

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

3.2.2 Equality and collective dimension

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

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

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

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

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

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

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

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

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

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

3.2.3 Limitation

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

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

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

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

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

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

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

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

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

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

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

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

3.2.4 Individual rights and group rights

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

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

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

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

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

3.3 Intermediate conclusion regarding the parallels and differences in codification

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

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

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

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

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

3.4 Solving human rights cases in Canada

3.4.1 Introduction to solving human rights cases in Canada

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

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

3.4.2 Judicial and constitutional review

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

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

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

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

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

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

6 SCC, *Robertson and Rosetanni v. The Queen*, [1963] SCR 651, 18 October 1963.

issue was whether the Sunday-closing provisions of the federal Lord's Day Act conflicted with the freedom of religion as provided for by the Bill of Rights. The Court ruled that it did not. Referring to the clause recognizing the rights as those that "have existed and shall continue to exist", the Court ruled that the protection of Sunday had never conflicted with the freedom of religion before the Bill and therefore did not conflict with it at the time of the case. Interestingly, the landmark case of the Supreme Court under the Charter concerning the freedom of religion, *Big M Drug Mart*, also concerned the protection of Sunday. Now, 20 years later and under the Charter, the SCC did find that a law protecting Sunday interfered with the freedom of religion and belief.

The Constitution Act of 1982 was the first Canadian Constitution to be adopted by the Canadian legislature, as opposed to the British Parliament. It explicitly included a provision on judicial enforcement of constitutional rights (section 24(1) of the Charter).[7] Because the Charter is included in the supreme, laws of both the federal and the provincial legislatures are subjected to rights scrutiny.[8]

The Charter is Part I of the Constitution Act 1982. It consists of 34 sections. The Charter contains the following rights and freedoms:[9]

- Fundamental freedoms: freedom of conscience and religion; freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication; freedom of peaceful assembly; and freedom of association (section 2);
- Democratic rights (sections 3–5);
- Mobility rights (section 6);
- Legal rights (section 7–14);
- Equality rights (section 15);
- Provisions on the official languages and minority language rights, (sections 16–23);
- Aboriginal rights and recognition of the multicultural heritage of Canadians (sections 25 and 27).

In accordance with section 1, these rights may be subject to reasonable limits, prescribed by law and demonstrably justifiable in a free and democratic society.

The Charter is applicable on the national level as well as in provinces and the territories (section 32). It applies vertically to the relationships between government institutions and bearers of rights (section 24). Yet because the federal government and the provinces and territories have their own human rights acts which also address private discrimination and the necessity of

7 Manfredi, *supra* n. 5, at 11-12.
8 *See* Venter, *supra* n. 4, at 74.
9 *See ibid.*, p. 139.

accommodation, individuals have the chance to also claim their rights in individual legal relationships.[10]

While the Charter cannot be raised in private litigation, the Court can out of its own motion test the actions of government bodies and institutions. Also, with regard to administrative action, as Venter notes, the Court is not deterred from testing the constitutionality of any government action, whatever the political nature of this action. The Constitution, including the Charter, represents the absolute standard for the government. The introduction of the Charter thus represents a major shift in Canadian constitutional law from common law judicial review to full-fledged constitutional review on the basis of human rights as is common in the United States, Germany and South Africa.[11]

Laws enacted outside the authority granted by the Constitution, including the Charter, are ultra vires and hence void.[12] However, section 33 provides that federal Parliament and/or the provincial or territorial legislatures may temporarily override certain sections of the Charter, including the fundamental freedoms and some of the rights (excluding democratic rights). The "override clause" was included in the Charter to accommodate the opponents of the Charter who feared judicial activism and departure from the British doctrine of "sovereignty of parliament". They included both conservative groups who feared the erosion of social mores and progressive groups who feared the impossibility of social engineering. The override clause has never been used.[13]

Non-Canadian law can have persuasive value in Canadian legal proceedings.[14] It is not uncommon for the Supreme Court to refer to important cases from other nations or even the European Court of Human Rights.

– *Canadian Human Rights Act*

In 1977, five years before the adoption of the Charter, federal Parliament passed the Canadian Human Rights Act. The Canadian Human Rights Act protects people that are lawfully present in Canada or legally entitled to return to Canada against discrimination by federal departments, agencies and Crown corporations and several federally regulated employers or service providers. The Act also instituted the Canadian Human Rights Commission.

10 *Ibid*.
11 *Ibid*., pp. 117, 95 and 138.
12 *See ibid.,* p. 96, citing P.W. Hogg, *Constitutional Law of Canada*, Carswell, Toronto (Canada), 1998, at 8-14 – 8-15. See also P. W. Hogg, *Constitutional Law of Canada*, 2012 student ed., Carswell, Ontario (Canada), 2012, para. 35.3
13 *See* L.E. Weinrib, 'The Canadian Charter's Transformative Aspirations', in *Supreme Court Law Review (2nd)*, vol. 19, pp. 17-37 (2003), pp. 23-29.
14 Venter, *supra* n. 4, at 117.

– *Provincial human rights legislation*

Each province and territory has its own human rights law, usually called a Code or an Act (or in Quebec, a Charter), and a provincial or territorial human rights commission. Notably, the Quebec Charter of Human Rights and Freedoms was passed in 1975 by the National Assembly and the Saskatchewan Human Rights Code entered into force in 1979. The Quebec Charter has been amended several times since 1975. In light of section 26 of the Charter of Rights and Freedoms, the (1975 version of the) Quebec Charter will therefore prevail if applicable alongside the Charter in the event of any conflict. In many of the selected cases, like the *Multani* case mentioned in section 3.2.1 the provincial human rights codes are the primary source of the rights in question.

3.4.3 The *Oakes* test

In the *Oakes*[15] case, the Supreme Court for the first time established the general methodology of assessing constitutionally sanctioned limitations of human rights under section 1 of the Charter. This is referred to as the *Oakes* test.[16] The *Oakes* test consists of the following elements, which are applied in a subsequent manner. If the answer to one of the questions is negative, there is no need to continue the test; but the interference is a violation of the right.[17]

The first step (1) is establishing whether the interference is prescribed by law. A law in this regard can be a statute or regulation. The interference does not have to follow from the statute or regulation[18] directly, but it has to have some basis in a statute or regulation, but "[w]hether the impugned measure was passed into law by statute or regulation is usually of no consequence for the s. 1 analysis."[19]

The second test is the proportionality analysis (2), which consists of the following elements: the interference must have a purpose which is both pressing and substantial (2a); the limit on the constitutional right is rationally connected to the purpose (2b); the limit minimally impairs the right (2c); and the law is proportionate in its effect also (2d).

In order to establish a rational connection (2b), the government "must show a causal connection between the infringement and the benefit sought on the basis of reason or logic […]. The rational connection requirement is aimed at preventing limits being imposed on rights arbitrarily. The government must

15 SCC, *R. v. Oakes,* Case 17550, [1986] 1 SCR 103, 28 February 1986.

16 *See* Venter, *supra* n. 4, at 139.

17 *R. v. Oakes,* Case 17550, *supra* n. 15, paras 69-72.

18 As in other common law countries, Statutes or Acts are laws adopted by Parliament or a Provincial Legislature. and are also known as Acts. Regulations are usually based on an Act and contain administrative procedure.

19 SCC, *Alberta v. Hutterian Brethren of Wilson Colony*, Case 32186, [2009] 2 SCR 567, 24 July 2009, para. 40.

show that it is reasonable to suppose that the limit may further the goal, not that it will do so."[20]

The *Oakes* test is prominent in many of the selected cases like *Multani* and *Bruker* mentioned above in section 3.2.1 and the cases of *Alberta v. Hutterian Brethren of Wilson Colony* (section I1.4.12), *R. v. N.S.* (section I1.4.14) and *A.C. v. Manitoba* (section I1.4.12). In the first case, the SCC had to assess whether the withdrawal of the province of a previous exemption for the colony from the required photo on a driver's license was a proportional limitation of a right. In *R. v. N.S.* the critical question was whether the judge's order to a sexual assault victim to remove her face-veil in court, was a minimal impairment and proportional to the fair trial rights of the accused. In *A.C.* the Court had to answer whether not taking 14 year old AC's personal wishes into consideration when she refused a potentially life-saving blood transfusion was a limit on a constitutional right which minimally impaired a right and was proportionate in effect. On all questions there was no unanimity in the Court.

3.4.4 Is there a difference between administrative and constitutional review?

While the *Oakes* is the applicable standard in constitutional cases, administrative cases involving rights must be solved with a different standard, the so-called functional and pragmatic approach of administrative law,[21] which consists of three standards for judicial review:

- correctness;
- patent unreasonableness; and
- the intermediate standard of reasonableness.[22]

The standard of "correctness" involves minimal deference and implies that there is just one correct answer and that the administrative body's decision must reflect it. "Patent unreasonableness", involves a deferential standard, permits the "decision to stand unless it suffers from a defect that is immediately apparent or is so obvious that it demands intervention by the court upon review".[23] "The intermediate standard of "reasonableness" allows for somewhat more deference: the decision will not be set aside unless it is based on an error or is "not supported by any reasons that can stand up to a somewhat probing examination".[24]

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20 *Ibid.,* para. 48.
21 SCC, *Multani v. Commission scolaire Marguerite-Bourgeoys*, Case 30322, [2006] 1 SCR 256, 2 March 2006, para. 85-86.
22 *See* SCC, *Chamberlain v. Surrey School District No. 36*, Case 28654, [2002] 4 SCR 710, 20 December 2002, paras 5-6.
23 *Ibid.,* para. 6.
24 *Ibid.*

Yet the line is not always beyond dispute as many of the cases show. In *Multani* cited before, the majority of the judges applied the *Oakes* test. The justices Deschamps and Abella reached the same conclusion as the majority, but argued that the *Oakes* test is not suited for the review of the decisions of administrative bodies and applied the administrative standard instead.[25] Similarly, the minority in *Chamberlain*, mentioned in section 3.2.2, felt that the majority had wrongly applied the *Oakes* test, while the school board's decision to disapprove the books depicting same-sex families was not "patently unreasonable".

3.4.5 Reasonable accommodation and minimal impairment

The difference between "reasonable accommodation" and "minimal impairment" is the subject of a thorough examination conducted by former Chief Justice Beverly McLachlin in the case *Alberta v. the Hutterite Brethren* discussed above (section 3.4.3)."Reasonable accommodation is a concept drawn from human rights statutes and jurisprudence. It envisions a dynamic process whereby the parties […] adjust the terms of their relationship in conformity with the requirements of human rights legislation, up to the point at which accommodation would mean undue hardship for the accommodating party. […] This dialogue enables them to reconcile their positions and find common ground tailored to their own needs."[26]

"A very different kind of relationship exists between a legislature and the people subject to its laws. By their very nature, laws of general application are not tailored to the unique needs of individual claimants. […]. It cannot be expected to tailor a law to every possible future contingency, or every sincerely held religious belief. […]" Minimal impairment is used to determine "whether the goal of the measure could be accomplished in a less infringing manner. The balancing of effects takes place at the third and final stage of the proportionality test" under the *Oakes* analysis.[27]

In her reasoning in *Alberta v. the Hutterite Brethren*, McLachlin pointed to *Multani (*mentioned above), in explaining that the doctrine of reasonable accommodation must only be used when applying human rights, not when analyzing the constitutionality of a law.[28] Indeed, in *Multani* the majority opinion also looked at "minimal impairment" in correlation with the doctrine of "reasonable accommodation", while the concurring judges believed this to be wrong.

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25 *Multani v. Commission scolaire Marguerite-Bourgeoys*, Case 30322, *supra* n. 21, paras 121 and 125.

26 *Alberta v. Hutterian Brethren of Wilson Colony*, Case 32186, *supra* n. 19, para. 68.

27 *Ibid.,* paras 69-71.

28 *Ibid.,* para. 61.

In the *R. v. N.S.* case also mentioned above (section 3.4.3), McLachlin iterated how Canadian jurisprudence, courtroom practice, and the tradition of requiring state institutions and actors "to accommodate sincerely held religious beliefs insofar as possible, has served Canada well for over half a century".[29] In *Chamberlain*, also mentioned above, the notion of reasonable accommodation was linked to "the fact that Canada is a diverse and multicultural society, bound together by the values of accommodation, tolerance and respect for diversity".[30] In *Amselem* (section I1.4.7), the discussion between majority and dissenters focused on whether the obligation to accommodate, or something similar may exist in the private law: in this case, relationships between the Jewish tenants and the organization of tenants.

In their report on interculturalism in Quebec, Bouchard and Taylor make note of the fact that only very few requests for accommodation or adjustment (not only in religion-related cases) come before courts. Most are dealt with in the citizen's sphere. Some adjustments, which are made voluntarily, might not even be legally required.[31] The report was triggered by heated discussions in Quebec regarding the desirability, extent and impact of accommodation of minorities and interculturalism. The *Multani* case, mentioned above, in which the SCC found in favor of the Sikh student was one of the catalyzers of this heated debate.

The duty of accommodation presupposes discrimination (adverse effect or otherwise, see below). "The duty of accommodation is limited by the realism of the request, i.e. by the ability of the organization to accommodate. The notion of undue hardship is decisive in this instance."[32] The criteria used to ascertain undue hardship must take into account the particularity of the situations. Nevertheless, certain guidelines apply generally.[33]

3.4.6 Direct and indirect infringement of rights

Freedom of religion and belief cases, in Canada and elsewhere in the world, often involve the claim of unjustified (indirect) discrimination on the part of the believer. In subsection 18(2), the Human Rights Act explicitly prohibits adverse effect discrimination. If private arrangements result in adverse effect discrimination, and cannot be justified under the act, the provision in the arrangement is void.[34]

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29 SCC, *R. v. N.S.*, Case 33989, [2012] 3 SCR 726, 20 December 2012, para. 51.
30 *Chamberlain v. Surrey School District No. 36*, Case 28654, *supra* n. 22, para. 21.
31 G. Bouchard and C. Taylor, *Building the future, A time for reconciliation*, Government of Quebec, 2008, pp. 64-65.
32 *Ibid.*, p. 63.
33 *See ibid.*, pp. 64-63 and 163.
34 *See* SCC, *Central Okanagan School District No. 23 v. Renaud*, Case 21682, [1992] 2 SCR 970, 24 September 1992, p. 21.

The duty of accommodation, as discussed above, only exists if the detrimental effect of a general rule amounts to discrimination against the individual in question. Whether or not there is discrimination is determined in accordance with Charter standards. Discrimination which triggers the duty to accommodate can be circumstantial, such as pregnancy or marital status, or permanent traits such as sex, skin color or a disability, or sociocultural traits such as religion.[35]

In the case *Alberta v. Hutterian Brethren of Wilson Colony* mentioned above (section 3.4.3), the initial policy of the province to introduce an obligatory photograph on drivers licenses was not aimed at interfering with the rights of the community members. The interference was indirect. However, they were opposed to photographs of themselves for religious reasons. The province granted an exemption. When this exemption was revoked with the introduction of a new policy, the community members challenged this decision in court.

3.4.7 Internal limits and hierarchy of rights

As Bouchard and Taylor mention in their report on interculturalism: "[r]ights, even the most basic ones, are not absolute. Under certain circumstances, they can be limited". The SCC has time and time again reasserted that the freedom of religion is not an absolute right and can conflict with other rights.[36]

The Canadian Charter allows for limitations of its rights, on the condition that they are reasonable, prescribed by law and necessary in a democratic society.[37] "When rights conflict or when statutes with legitimate purposes impinge on individual rights, the courts seek to hand down decisions in which the level of infringement of the curtailed rights is minimal. The courts have thus developed legal techniques and tests that allow them to ascertain whether the infringement of a right is reasonable and acceptable."[38]

If rights are not absolute but do collide, the subsequent question is whether such collision should be legally resolved by construing internal limits to those rights. The SCC consistently rejects construing internal limits as the appropriate fashion of reconciling rights. For example, in the case of *AC v. Manitoba* mentioned above (section 3.4.3), the majority does not accept internal limits to the freedom of religion and belief in a medical decision of life-importance for

35 Bouchard & Taylor, *supra* n. 31, at 64-63.

36 *See Multani v. Commission scolaire Marguerite-Bourgeoys*, Case 30322, *supra* n. 21, para. 30; *Syndicat Northcrest v. Amselem*, Cases 29252 and 29253, [2004] 2 SCR 551, 30 June 2004, para. 1; *P. (D.) v. S (C.)*, Case 22296, [1993] 4 SCR 141, 21 October 1993, p. 5; *Congrégation des témoins de Jéhova de St-Jérôme-Lafontaine v. Lafontaine (Village)*, Case 29507, [2004] 2 SCR 650, 30 June 2004, para. 69

37 *See* Canadian Charter of Rights and Freedoms, s. 7, Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, s. 1.

38 Bouchard & Taylor, *supra* n. 31, at 106.

minors, arguing instead that the state must justify its interference under the limitation clause.[39]

However, in *Multani* the majority does consider that in cases of conflicting rights, a proper delineation of rights can be useful and hence no balancing between rights will be necessary.[40] But is this not a general delineation of rights but a concrete one, in the specific case before the Court? In Canadian legal doctrine, as in international law,[41] a hierarchy of rights has been rejected. After all "[t]he links in the chain of rights must all be equally strong, since the exercising of rights and freedoms is intended to protect the dimensions of existence that we value the most."[42]

Bouchard and Taylor argue that generally and abstractly speaking, even the right to life, in Canadian doctrine, is not superior to other rights. They refer to cases where the claimant argues a right to refuse medical treatment or chose to die. In these cases, the freedom of religion and of conscience as well as individual autonomy can outweigh the right to life, which the state may wish to protect.[43] They point to *Multani* and *A.C.* in this regard, which "reveal that the absence of a hierarchical ordering of rights does not leave the courts without resources in the arbitration of conflicting rights. Indeed, the courts can attempt to obtain the means favorable to the maximum reconciliation of the competing rights and reject requests that impose an overly heavy toll on certain of the parties involved."[44]

3.5 Solving human rights cases in South Africa

3.5.1 Introduction to solving human rights cases in South Africa

This section examines the methodology of solving human rights cases as applied by the Constitutional Court of South Africa. Section 3.5.2 looks at the concept and institution of constitutional review in South Africa. Section 3.5.3 looks into judicial review under the Bill of Rights. Section 3.5.4 then considers the limitations of human rights in general and constitutional standards. In section 3.5.5 some specific limitation clauses and suspension of rights are discussed. Then, in section 3.5.6 administrative action is discussed. Section 3.5.7 discusses direct and indirect application and horizontal application. The following section 3.5.8 discusses direct and indirect infringement of rights and

39 SCC, *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, Case 23298, [1995] 1 SCR 315, 27 January 1995, paras 109-110.

40 *See Multani v. Commission scolaire Marguerite-Bourgeoys*, Case 30322, *supra* n. 21, para. 28.

41 UN General Assembly, Vienna Declaration and Programme of Action, 12 July 1993, A/CONF.157/23, art. 5.

42 *See* Bouchard & Taylor, *supra* n. 31, at 107.

43 *See ibid.*, p. 107.

44 *See ibid.*, p. 174.

reasonable accommodation. Finally, section 3.5.9 addresses the issue of whether internal limits and a hierarchy of rights are to be considered part of South African human rights law.

3.5.2 Constitutional review

The selected cases feature several types of constitutional review belonging to South African constitutional law. In the *Final Certification of the Constitution of 1996* (section I2.4.1), the current national Constitution had to be certified and in *Certification of the Constitution of the Western Cape* (section I2.4.3), the constitution of a province had to be certified. In *Constitutionality of Certain Provisions of the Gauteng School Education Bill* (section I2.4.2), some provincial legislators requested constitutional review of an Act adopted by a provincial legislature. In *Christian Education*, mentioned before in this chapter (section 3.2.2), individuals and organizations challenged the constitutionality of an Act. This is also true for a great many other cases in the selection.

In accordance with section 167(4) of the South African Constitution, it is the Constitutional Court's exclusive task to review legislation before it is officially signed into law by the President. The same goes for provincial legislation before being signed into law by the Premier. Section 79 provides for constitutional review within the legislative process. If the president has reservations about the constitutionality of a Bill, he must refer it back to the National Assembly. If, after renewed consideration, the President still has reservations, he refers the bill to the Constitutional Court. If the Court then finds that the bill is indeed constitutional, the President has no option but to sign it into law.

In the *Final Certification of the Constitution of 1996*, the Constitutional Court held that also adherence to the constitutional rules for the conduct of parliament, including in regard to the legislative process, is fully judiciable. In instances where parliament and the provincial legislatures have discretion in the way they must give effect to a constitutional duty, the CCSA applies a reasonableness test.[45]

As noted, the Constitution presents a departure from the political past of apartheid rule and from elements of the pre-constitutional legal order. Whereas apartheid was founded on the doctrine of sovereignty of parliament, now the Constitution is supreme. Legislation and conduct of state organs must be in

45 *See* CCSA, Ex parte Chairperson of the Constitutional Assembly: In *Certification of the amended text of the Constitution of the Republic of South Africa*, Case CCT37/96 – Final Certification, 4 December 1996, para. 224. *See also* I.M. Rautenbach, 'Constitutional Review by the Judiciary in South Africa', in G. van der Schyff (ed.) *Constitutionalism in the Netherlands and South Africa, A Comparative Study*, Wolf Legal Publishers, Nijmegen (Netherlands), 2008, p. 145.

conformity with the human rights assembled in the Bill of Rights. Because of the past, the South African doctrine of human rights in the democratic era could not draw on a homegrown tradition. Instead, it tried to assemble elements from other liberal democracies and attune them to South African conditions.[46]

Venter notes that the value-oriented approach the Constitutional Court adopted for rights review, was inspired by the approach of the Supreme Court of Canada.[47] The value-based approach is also provided for in section 39, dealing with the interpretation of the Bill of Rights. It prescribes that such interpretation:

a. must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
b. must consider international law; and
c. may consider foreign law.

It also provides that when interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum "must promote the spirit, purport and objects of the Bill of Rights". The Bill of Rights does not deny the existence of any other rights or freedoms that are recognized or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill. There are four types of constitutional remedies:[48]

– Declarations of invalidity;
– Declarations of rights: differ from declarations of invalidity because they may be given even if no law or conduct is found to be inconsistent with the Bill of Rights;
– Prohibitory or mandatory interdicts; and
– Awards of constitutional damages.

Declarations of invalidity can have several elements:[49]

– Severing the bad from the good: invalidity must only effect the parts of the statute that actually violate the Constitution;
– Reading into the challenged legislation: this must be distinguished from "reading down" interpreting a statute in conformity with the Constitution;

46 *See* F. Venter, 'The Emergence of South African Constitutionalism: From Colonial Constraints to a Constitutional State', in G. van der Schyff (ed.) *Constitutionalism in the Netherlands and South Africa, A Comparative Study*, Wolf Legal Publishers, Nijmegen (Netherlands), 2008, p. 34.

47 Venter, *supra* n. 4, at 140.

48 *See* Constitution of the Republic of South Africa, 10 December 1996, s. 172. *See also* I. Currie & J. de Waal (in association with Lawyers for Human Rights and the Law Society of South Africa), *The Bill of Rights Handbook*, Juta & Co, Cape Town (South Africa), 2006, pp. 183-205.

49 Currie & de Waal, *supra* n. 48, at 183-195.

– Retrospective effect of orders of invalidity; and
– Suspension of orders of invalidity.

An interdictory relief may also be an interim relief, pending the adjudication of a dispute or pending new legislation.[50] Section 8(3) lays down guidelines for application of remedies when private violations of the rights are found. However, it does not prescribe any particular kind of relief.[51]

3.5.3 Judicial review under the Bill of Rights

Whereas most of the South African cases actually involve constitutional review of legislation, there are also cases which involve judicial review of other actions of governmental institutions, educational institutions, and private organizations, in light of the Bill of Rights and other human rights legislation. In the *Pillay* case (section I2.4.11), a claim was brought against the code of conduct of a school which had adverse effects on a schoolgirl who wore a nose stud for religious and cultural reasons. In *De Lange* (section I2.4.15), a former minister of the Episcopal Church challenged her dismissal subsequent to her private law marriage to a same-sex partner.

Chapter 2 of the Constitution contains the Bill of Rights. It is a comprehensive catalogue containing 32 sections (sections 7–39). The first provision of that chapter states that the Bill of Rights is a "cornerstone of democracy" which "affirms the democratic values of human dignity, equality and freedom" and that "the state must respect, protect, promote and fulfill" the rights in the Bill of Rights. Hence, there can be no doubt that there is a positive obligation on the state under section 7. The Bill of Rights was required by Constitutional Principle II, which stipulated that everyone shall enjoy all universally accepted rights, freedoms and civil liberties. The Bill of Rights can be said to include the standards of all modern human rights catalogues.[52]

Besides containing a number of classical individual rights, the South African Constitution also makes reference to socio-economic and collective rights, such as the right to have the environment protected, the right to access to housing, health care, food and social security and the right to basic and further education.[53] Indeed, some argue it may be one of the most progressive contemporary texts in the field of the promotion of socio-economic rights, which in turn has given rise to remarkable Court judgments.[54]

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50 *Ibid.*, p. 216.
51 *Ibid.*, p. 226.
52 Venter, *supra* n. 4, at 140.
53 *See* Constitution of the Republic of South Africa, 10 December 1996, ss 24-29.
54 Venter, *supra* n. 46, at 38.

The Bill of Rights contains the following rights and freedoms

9. Equality	22. Freedom of Trade, Occupation and Profession
10. Human Dignity	23. Labor Relations
11. Life	24. Environment
12. Freedom and Security of the Person	25. Property
13. Slavery, Servitude and Forced Labor	26. Housing
14. Privacy	27. Health Care, Food Water and Social Security
15. Freedom of Religion, Belief and Opinion	28. Children (rights of)
16. Freedom of Expression	29. Education
17. Assembly, Demonstration, Picket and Petition	30. Language and Culture
18. Freedom of Association	31. Cultural, Religious and Linguistic Communities
19. Political Rights	32. Access to Information
20. Citizenship	33. Just Administrative Action
21. Freedom of Movement and Residence	34. Access to Courts
	35. Arrested, Detained and Accused Persons (rights of)

As mentioned above, the legal supremacy of the Constitution and thus judicial review, embedded in section 2, were issues that were readily agreed on in the negotiating process.[55] Individuals may challenge the constitutionality of legislation or conduct of state organs in any court. Orders made in this regard by a lower Court must be affirmed by the Constitutional Court before having any force. Yet, temporary relief may be granted. Any person or organ of state with a sufficient interest may appeal, or apply, directly to the Constitutional Court to confirm or vary an order of constitutional invalidity. Courts must declare any law or conduct that is inconsistent with the Constitution invalid to the extent of its inconsistency. There are also special procedures for the Constitutional Court to directly hear cases and for appeal directly to the Constitutional Court from any lower court.[56]

In light of section 2, the rights contained in the Bill of Rights can be applied to "any conduct", hence also to horizontal relationships between individuals, including indirect application to private law.[57] Not unsurprisingly then, section 8(2) states explicitly that a "provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right". Yet section 8(4) provides for the enjoyment of the rights in the Bill of Rights by juristic persons along the same line.

55 Rautenbach, *supra* n. 45, at 143.

56 Constitution of the Republic of South Africa, 10 December 1996, ss 167(5) and (6); 172(2b), (2d); and (1a).

57 *See* Venter, *supra* n. 4, at 121.

The Constitutional Court is the highest court in constitutional matters, and as such the final court of appeal in constitutional matters. As mentioned above, it also has exclusive jurisdiction in some matters. The lower courts may consider all constitutional matters not falling within the exclusive jurisdiction of the CCSA.[58]

The general positive obligation of the state to respect, protect, promote, and fulfill the rights in the Bill of Rights, is contained in section 7(2) of the Constitution. More specific obligations are contained in some of the specific rights, ordering the state to take such "reasonable legislative and other measures" to ensure the realization of a right.[59] The Constitution establishes the following human rights watchdogs:[60]

– the Public Protector;
– the Human Rights Commission;
– the Protection of the Rights of Cultural, Religious and Linguistic Communities Commission;
– the Commission Gender Equality;
– the Auditor General; and
– the Electoral Commission.

The main purpose of the Commission for the Protection of the Rights of Cultural, Religious and Linguistic Communities, in accordance with section 185, is to promote respect for all cultures languages and religions. To that end, it shall monitor, investigate, research, educate, lobby, advise and report on issues concerning the rights of cultural, religious, and linguistic communities. The commission can also refer cases to the Human Rights Commission.[61]

– *Other instruments*

Besides the Bill of Rights, the other two major national instruments for human rights protection and equal treatment are the Employment Equality Act (EEA)[62] and the Promotion of Equality and Prevention of Unfair Discrimination Act (Equality Act).[63] The EEA provides for protection against unfair discrimination at the workplace and for affirmative action based on race, gender and disability. The Equality Act protects against unfair discrimination in the public and private spheres, except for where the EEA is applicable. The *Pillay* case, mentioned above, was heard first by an Equality Court.

58 Rautenbach, *supra* n. 45, at 143.
59 *See* Constitution of the Republic of South Africa, 10 December 1996, ss 25-27.
60 *See* J. C. Mubangizi, *The Protection of Human Rights in South Africa – A legal and Practical Guide*, Juta & Co, Lansddowne (South Africa,) 2005, pp. 66-70.
61 *See ibid.*, p. 68. *See* Constitution of the Republic of South Africa, 10 December 1996, s. 185(3).
62 Employment Equity Act [No. 55 of 1998], 19 October 1998.
63 Promotion of Equality and Prevention of Unfair Discrimination Act [No. 4 of 2000], 1 September 2000.

The Equality Act provides for claims of unfair discrimination to be brought before Equality Courts. These are Courts within the Magistrates and High Courts, with the presiding officer being qualified in equal treatment law.[64] The CCSA ruled that litigants cannot circumvent the Equality Act by relying directly on a constitutional right, while the Equality Act may not be applied in any manner inconsistent with section 9 of the Constitution.[65]

The provinces can adopt provincial bills of rights. Such provincial human rights legislation must not be inconsistent with the Constitution. Provisions in a provincial bill of rights can only be inconsistent with the Constitution in two ways:[66]

- the provision falls outside the scope of provincial competence/jurisdiction according to the constitution;
- the provision is inconsistent with the Bill of Rights in the Constitution.

3.5.4 Limitations and constitutional standards

Justifiable limitations as opposed to unjustifiable limitations are at the center of some of the selected cases. In *Pillay* mentioned above (section 3.5.3), the Court had to assess whether it was acceptable to restrict a schoolgirl from wearing a nose stud consequent to her culture. In *Prince* (section 3.2.3), the question was whether the impact the general prohibition of illicit drugs had on the Rastafarian community was an acceptable limit. The claimant in the case, like other Rastafarians, used *ganja* for religious purposes.

Limitation of rights must be distinguished from interpretation of rights. Once the preliminary issue of the applicability of the right to a certain situation has been addressed, the CCSA follows a two-stage approach:[67]

1. Has the right been limited and/or was there failure to comply with the duties imposed by a right? If so;
2. Is there any justification for such limitation or non-compliance?

In the first stage, the person claiming that his constitutional right was limited/ not complied with has the burden of proof, having to show that this was factually the case. In the second stage, the one who has limited the right bears

64 *See* C. Albertyn, 'South African Equality Law', in *European Anti-discrimination Review*, no. 9, no. pp. 11-20 (2009), p. 15.

65 CCSA, *MEC for Education: Kwazulu-Natal and Others v. Pillay*, Case CCT 51/06, 5 October 2007, paras 40 and 43.

66 *See* CCSA, *Ex Parte Speaker of the KwaZulu-Natal Provincial Legislature: In Re Certification of the Constitution of the Province of KwaZulu-Natal*, Case CCT 15/96, 6 September 1996, paras 17-26.

67 Rautenbach, *supra* n. 45, at 151. *See also* Currie & de Waal, *supra* n. 48, at 152-155.

the burden of proof for any possible justification. The justification can only be given by reference to a limitation clause.[68]
The general limitation clause as stipulated by section 36 of the Constitution stipulates that the rights may only be limited:

- by a law of general application;
- to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom;
- taking into account all relevant factors, including
  - the nature of the right;
  - the importance of the purpose of the limitation;
  - the nature and extent of the limitation;
  - the relation between the limitation and its purpose; and
  - less restrictive means to achieve the purpose.

– *By law of general application*

Law in this context includes legislation, common law, customary law and international law as far as the law is applicable to a number of persons and not just an individual case or group of cases.[69] The law must be sufficiently clear, accessible and precise, that "those who are affected by it can ascertain the extent of their rights and obligations". In this the CCSA, from an early stage followed the approaches taken by the ECtHR and SCC.[70] In most of the selected cases, the constitutionality of an Act is challenged. The status as law of general application is not an issue in any of the selected cases.

– *Reasonable and justifiable*

While section 36(1) refers explicitly to the values of human dignity, equality, and freedom, the list is not limitative. Other values included in the Constitution (e.g. non-racialism, non-sexism, supremacy of the Constitution and the rule of law), as well as values and principles found in democratic societies, must also be considered.[71] As the Constitutional Court explains in the *Solberg* case (section I2.4.4), "[t]he requirement that limitations on section 14 rights must be not only reasonable and justifiable, but also necessary, clearly identifies section 14 as one of the core provisions of the Bill of Rights requiring special solicitude by this Court." According to the Court, a test of reasonableness on its own would allow the legislature more margin of appreciation. By adding "necessity" the Constitution places "special emphasis" on "options which are clearly not unduly burdensome, overbroad or excessive".[72]

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68 Rautenbach, *supra* n. 45, at 151.
69 Y. Burns, *Administrative Law under the 1996 Constitution* (Revised Reprint), Butterworths, Durban (South Africa), 1999, p. 30.
70 Currie & de Waal, *supra* n. 48, at 1.
71 Burns, *supra* n. 69, at 30.
72 CCSA, *S v. Lawrence; S v. Negal; S v. Solberg*, Cases CCT38/96; CCT39/96; CCT40/96, 6 October 1997, para. 166.

Burns, however, notes that the standard of necessity, while it applied under the interim constitution, no longer applies. According to her, limitations must be reasonable and justifiable alone.[73] In applying the clause, the CCSA has cited Canadian and US case law and literature regarding the "rational connection"/"rational basis" tests for the relation between the limitation and its purpose.[74] Venter notes that the Court's approach to the limitations test is in fact an incorporation of the Canadian Supreme Court's approach to proportionality in South African law.[75]

– *The nature of the rights*

The nature of the rights must be considered. For example, interference with socio-economic rights through positive action is unconstitutional unless it complies with the general limitation clause of section 36.[76]

The importance and purpose of the limitation

A limiting measure must serve a purpose that "all reasonable citizens would agree to be compellingly important. For this reason, the purpose of protecting the personal morality of a sector of society will not qualify as justification for the limitation of rights." This criterion requires the balancing of interests; on the one hand the right limited, on the other hand the interest served by the limitation. If the limitation's sole purpose is to limit a right, the limitation is unconstitutional. Some general interest which is connected to the constitutional values and/or other rights must be served.[77]

The following purposes have been identified in South African jurisprudence and academic literature as valid purposes for the limitation of rights:[78]

- Protecting the administration of justice at its broadest;
- The prevention, detection, investigation and prosecution of crime;
- Reduction of unemployment among South African citizens;
- Inspection and regulation of health undertakings;
- Protection of the rights of others;
- Compliance with constitutional obligations;
- Promoting healing of the divisions of the past and the building of a united society;
- Complying with South Africa's international obligations; and
- Preventing people from gaining entry to the country illegally.

In *Christian Education* mentioned above (section 3.5.2), the government argued that the blanket ban of corporal punishment even for private faith-based

73 Burns, *supra* n. 69, at 31.
74 *See S v. Lawrence et al.*, Cases CCT38/96 et al., *supra* n. 72, paras 42-44.
75 Venter, *supra* n. 4, at 145.
76 Rautenbach, *supra* n. 45, at 150.
77 Currie & de Waal, *supra* n. 48, at 166-167; Burns, *supra* n. 69, at 32.
78 Currie & de Waal, *supra* n. 48, at 167-168.

schools served the protection of the rights and freedoms of children. In *Prince*, the legitimate interest raised was the prevention and prosecution of crime.

– *The nature and extent of the limitation, the relation between the limitation and its purpose and less restrictive means*

This element includes the principle of proportionality. If the limitation is not proportional to the purpose, it is unconstitutional. If the limitation is not fit to fulfill the purpose, it will not meet the standards of reasonableness and justifiability. The question is not if there are other means to achieve the objective or purpose, but whether less restrictive means are fit to achieve the purpose of the limitation.[79] For example, legislation must be narrowly tailored and not "use a sledgehammer to crack a nut".[80]

In *DE v. RH* mentioned in this chapter (section 3.2.1), a central balancing exercise dealt with the constitutional obligation of the state to protect marriage, and whether this criminalizing adultery was proportional to this goal under current circumstances. In *Prince*, the majority of the Court, even after careful balancing, saw no less restrictive means vis-à-vis the Rastafarians than the total ban of *ganja* given that any exemption would undermine the purpose.

3.5.5 Specific limitation clauses and suspension of rights

Besides this general limitation clause, there may also be specific limitations which are included in the formulation/definition of the right itself. For example, through specifications on how, when and by whom the right may be limited.[81]

In applying the limitation clauses, the courts will regard the extent of a discretion to limit the right as a matter which related to the nature and extent of the limitation.[82]

In a state of emergency, fundamental rights may be suspended by an Act of Parliament if the life of the nation is threatened by *inter alia* war, natural disaster, or public emergency. A competent court may decide on the validity of a state of emergency, a prolongation of the state of emergency or any legislation or action in connection with it.[83]

Section 35 of the Constitution includes a table of non-derogable rights, containing the rights which may not be suspended even in cases of emergency. For example, the right to equality is non-derogable with respect to unfair discrimination solely on grounds of race, color, ethnic or social origin, sex, religion or language. The same goes for the right to life, human dignity,

79 Burns, *supra* n. 69, at 32.
80 Currie & de Waal, *supra* n. 48, at 168.
81 Rautenbach, *supra* n. 45, at 151-152.
82 *Ibid.,* pp. 152-153.
83 *See* Burns, *supra* n. 69, at 37.

prohibition on slavery. In *Final Certification of the Constitution of 1996* mentioned above (section 3.5.2), interveners had raised the question of whether the omission of the freedom of religion and belief from the list of non-derogable rights was not actually a constitutional error.

3.5.6 Administrative action

Section 33 of the Constitution contains the right to administrative action that is lawful, reasonable and procedurally fair. "At a minimum this right entrenches a common law entitlement to natural justice, without being confined to it".[84] Yet, section 33 "introduces different levels of scrutiny for laws which cause an infringement of rights. The requirement of reasonableness and justifiability […] clearly envisages a less stringent constitutional standard than does the requirement of necessity" which must be followed in legislation.[85]

This was also the issue in the *Solberg* case mentioned above (section 3.5.4), in which Sachs, referring to Canadian theorist Hogg in his separate opinion, also argued that a "trivial breach of a specially protected right might be easier to justify in terms of section 33 than a grievous infringement of an 'ordinary' right. The intensity or severity of the breach must accordingly be a highly relevant factor in any proportionality exercise; the more grievous the invasion of the right, the more compelling must be its justification."[86]

Hence, even in administrative law "[s]imple logic dictates that only conduct which is constitutionally irrelevant can be immune from the test of constitutionality". Hence, the judiciary cannot refuse to adjudicate even policy determinations, "acts of state" or political questions.[87] However, the Constitutional Court has found its own system of inter-institutional dialogue when dealing with such questions, creating room and possibilities for Parliament and/or other state organs to address the issue as well.

3.5.7 Direct and indirect application, horizontal application

While section 8(1) provides that the Bill of rights is applicable to "all law, and binds the legislature, the executive, the judiciary and all organs of state", section 8(2) provides for horizontal application. A provision of the Bill of rights binds natural and juristic persons "if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed

84 Currie & de Waal, *supra* n. 48, at 672.
85 CCSA, *S v. Makwanyane and Another*, Case No. CCT/3/94, 6 June 1995, para. 104.
86 *S v. Lawrence et al.*, Cases CCT38/96 et al., *supra* n. 72, para. 168. *See* P.W. Hogg, *Constitutional Law of Canada,* 2012 student ed., Carswell, Scarborough (Canada), 2012, para. 38.6.
87 Venter, *supra* n. 4, at 121.

by the right." The subsection speaks of a provision and not an entire right. Hence, it is possible that a certain provision of a right does apply horizontally while another provision of the same rights does not.[88]

In accordance with section 8(2), provisions have direct horizontal application under the considerations:[89]

- The context of the situation requires or makes possible the application of a provision;
- the purpose of the provision mandates the application in the concrete circumstances;
- the nature of the duty imposed by the provision is taken into account;
- indications can be found in the provision itself (for example "no person").

In respect of vertical application, the Bill of rights applies:[90]

- to common law and legislation of the central, provincial and local government legislatures as well as to the non-legislative conduct of these legislatures;
- to administrative action;
- to the conduct of organs of the state, as defined in section 239;
- to conduct of the central, provincial or local executive (as in party political appointees), while deference will be shown to political decisions, particularly when exercising the constitutional executive and head of state powers;
- to non-lawmaking conduct of the judiciary.

The Bill of Rights requires the state to respect, protect and promote the rights of all people under South African jurisdiction, including foreigners. The state is also required to respect, protect and promote the rights of foreigners when they lose the benefits of the Bill of Rights if they leave the country. However, the obligation of the state to respect, protect and promote the rights of South Africans when they are in foreign countries was rejected.[91]

The Bill of Rights also applies indirectly both vertically and horizontally. As of 1996, the South African law no longer separates the constitutional jurisdiction and the ordinary jurisdiction. Hence the Bill of Rights applies indirectly in what was previously the non-constitutional jurisdiction. Indirect application to legislating requires "reading down", that is interpreting legislation in conformity with the Bill of Rights.[92]

As far as judicial decisions in common law conflicts are concerned, post-constitutional decisions of higher courts are binding, whether they are on constitutional issues or not. Pre-1994 decisions of higher courts are binding

88 Currie & de Waal, *supra* n. 48, at 48-49.
89 See *Ibid.,* pp. 48-50.
90 *Ibid.,* pp. 42-45.
91 *Ibid.,* p. 63.
92 *Ibid.,* pp. 43, 51 and 64-65.

except in cases of direct conflict with the Constitution or in cases involving open standards such as *boni mores.* In common law horizontal conflicts, indirect application must be considered before direct application (principle of avoidance).[93] In the three Muslim marriage cases (see above section 3.2.2), the evolution of common law *boni mores* under the "new ethos" of the Constitution was a determining factor in departing from precedents regarding the character of Muslim marriages. They were regarded under apartheid common law to be repugnant to *boni mores* because of their potentially polygamous character. The new ethos was respectful of minority traditions.

3.5.8 Indirect infringement of rights and reasonable accommodation

In *Pillay*, mentioned above, the CCSA explained that fairness in some situations demands reasonable accommodation. In determining whether or not reasonable accommodation is required, the Court will take two factors into consideration:[94]

1. Reasonable accommodation is appropriate when a rule or practice that is neutral on the face of it and is designed to serve a valuable purpose, nevertheless, has a marginalizing effect on certain portions of society.
2. The principle is particularly appropriate in specific localized contexts, such as an individual workplace or school, where a reasonable balance between conflicting interests may more easily be struck.

However, even where fairness requires a reasonable accommodation, the other factors listed in section 14 of the Equality Act will remain relevant.[95] In *Solberg*, mentioned above, the Court referred to "mutual accommodation" as one of the underpinnings of the constitutional order together with tolerance.[96]

Affirmative action is explicitly made possible by the Constitution in said section to correct historical disadvantage. Thus, unlike some might be inclined to argue, affirmative action is not regarded as contrary to, but positively mandated by, the right to equality. Positive action is regarded as lawful if:[97]

1. the measure targets persons of categories of persons who have been disadvantaged by unfair discrimination;
2. the measure is designed to protect target persons of categories of persons who have been disadvantaged by unfair discrimination, and;
3. the measure promotes the achievement of equality.

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93 *Ibid.,* pp. 71 and 75.
94 *MEC for Education: Kwazulu-Natal and Others v. Pillay*, Case CCT51/06, *supra* n. 65, para. 78.
95 *Ibid.*
96 *S v. Lawrence et al.*, Cases CCT38/96 et al., *supra* n. 72, para. 147.
97 Albertyn, *supra* n. 64, at 12.

3.5.9 Internal limits and hierarchy of rights

In South African legal literature, there is a tendency to regard the specific limitations included in the articles stipulating the rights, as "internal modifiers". The general limitation clause is seen as an external limitation.[98] Other than the wording of the text of the right, internal limitations following from the logic or nature of the rights are not assumed.

The Court has clearly rejected a hierarchy of rights. In one case, *Mamabolo*, the CCSA compared South African jurisprudence to that of the US in this regard. The US Supreme Court has developed a jurisprudence ranking the freedom of speech amongst all others; the South African Constitution envisions interlinked rights to be carefully balanced and equally protected.[99] While in the *Certification of the Constitution* case mentioned above (section 3.5.2), the Court ruled that the fact that a distinction between rights was made in the case of an emergency does not imply a hierarchical distinction, let alone in situations outside of an emergency.[100]

In *Christian Education*, mentioned above (section 3.2.2), the Minister of Education argued that the freedom of religion and belief was not breached by the prohibition of corporal punishment in schools, because the practice could not be administered consistent with the rights of student.[101] Rather than accepting a complicated and controversial argument of internal limits, the Court assumed the breach of the freedom of religion by the prohibition of corporal punishment in schools and then explored the justifiability under the limitation clause.

However, commentators seem divided on whether the core foundational values – human dignity, equality and freedom – weigh equally in constitutional law. Venter suggests that the Court is leaning towards an interpretation in which human dignity is the strongest interpretational determinant. Underpinned by dignity, equality and freedom then serve as cornerstones for the constitutional rights. The mention of "inherent dignity" in section 10 may be interpreted to underpin this view. Also, equality and freedom may be said to be "pillars upholding human dignity and not *vice versa*".[102]

The socio-economic rights contained in the Constitution are just as judiciable according to South African jurisprudence, as are the classical rights.[103] Indeed, the Constitutional Court has held that "*all* the rights of the Bill of

98 Venter, *supra* n. 4, at 189.

99 *See* CCSA, *State v. Mamabalo*, Case CCT44/00, 11 April 2001, para. 41.

100 Ex parte Chairperson of the Constitutional Assembly: In *re Certification of the amended text of the Constitution of the Republic of South Africa*, Case CCT37/96 – Final Certification, *supra* n. 45, para. 37.

101 CCSA, *Christian Education South Africa v. Minister of Education*, Case CCT4/00, 18 August 2000, para. 17.

102 Venter, *supra* n. 4, at 35-36 and 142.

103 *See* Rautenbach, *supra* n. 45, at 143.

Rights are interrelated and mutually supporting" [emphasis added].[104] The South African Constitution does not contain an eternity clause. However, it does contain a table of non-derogable rights in section 35(5) as mentioned above (section 3.5.5).

South African constitutional law permits the waiver of constitutional rights under certain conditions. However, a waiver cannot turn something which is otherwise unconstitutional into a constitutional situation. For example, the prohibition of slavery cannot be waivered. One can, however, waiver protection of a right, to exercise the right negatively. While freedom rights such as free speech, free movement or freedom of association qualify for waiver, the rights to human dignity, life, not to be discriminated against, and fair trial, cannot be waived. For a waiver to have effect it must be a fully informed consent which clearly shows that the applicant was aware of the exact nature and extent of the waiver regarding the rights concerned. In a concrete case, the length of the period of the waiver and the danger of abuse and position of the beneficiary may be decisive.[105]

3.6 Solving human rights cases under the Convention system

3.6.1 Introduction to solving human rights cases under the Convention system

This section examines the methodology of solving human rights cases as applied by the ECtHR. Section 3.6.2 looks at some general aspects relevant to interpreting the ECHR. Section 3.6.3 examines state sovereignty, "living instrument doctrine" and the margin of appreciation. In section 3.6.4, the limitations of human rights under the Convention are considered. Section 3.6.5 discusses direct and indirect application and horizontal application. Finally, section 3.6.6 addresses the issue of whether internal limits and a hierarchy of rights are to be considered part of the Convention system.

3.6.2 Interpreting the ECHR

The Convention is a treaty between the High Contracting Parties. As a treaty, the Convention must be interpreted in accordance with the international rules of treaty interpretation, as laid down in the *Vienna Convention on the Laws of Treaties*. According to Article 31 of the Vienna Convention, treaties must be

104 CCSA, *Government of the Republic of South Africa v. Grootboom,* Case CCT11/00, 4 October 2000.

105 *See* Currie & de Waal, *supra* n. 48, at 39- 4, referring to CCSA, *Mohamed and Another v. President of South Africa and Others*, Case CCT17/01, 28 May 2001.

interpreted in "good faith in accordance with the ordinary meaning given to the terms of the treaty in their context and in the light of its object and purpose". The Court has applied this principle consciously and faithfully. Nevertheless, some critics have called the method of interpretation applied by the Court incoherent and unstructured.[106]

Rainey, McCormick and Ovey suggest that the following propositions should be used for interpretation:[107]

1. Terms used in the treaty should be given their ordinary meaning.
2. Regard can be given to the context in which they appear.
3. Regard can be given to the object and purpose of the treaty.
4. The *travaux préporatoires* can be used to resolve ambiguity.
5. The treaty is equally authentic in English and French and differences in meaning should be resolved by adopting the meaning that best solves the object and purpose.

As far as the equal authenticity in English and French is concerned, where the connotation of the two languages is different, the Convention institutions have frequently used the "ordinary" meaning of words or sentences in order to determine the meaning of Convention rights. For example, the Court has held, that the right to marry does not include the right to divorce.[108] In the case *Cha'are Shalom* (section I3.4.3), a Jewish community in France challenged the refusal of the government to provide them with a license so they could slaughter meat in accordance with their religious precepts. The Court took into consideration that ritual slaughter constitutes what is called a "*rite*" in French. This is synonymous with the English word "observance". Hence, ritual slaughter was covered by a textual interpretation of the freedom of religion and belief in Article 9.

Many terms, such as "degrading", have been understood in their "dictionary sense". However in the *Golder* case, which still serves as an important precedent, the majority of the Court explicitly rejected the "cautious and conservative approach" proposed by one of the judges, and instead chose "the interpretation that is the most appropriate in order to realize the aim and achieve the object of the treaty and not that which would restrict to the greatest possible degree the obligations undertaken by the parties."[109] Many Convention terms have been given autonomous meaning in light of the object and purpose of the Convention and the differences in national law.[110] Terms such

106 B. Rainey, P. McCormick, & C. Ovey (eds.) *Jacobs, White and Ovey?: the European Convention on Human Rights* 8th ed., Oxford University Press, Oxford (UK), 2021, p. 64.

107 *Ibid.,* pp. 65-71.

108 ECtHR (C), *Pretty v. United Kingdom*, app. no 2346/02, 29 July 2002; White & Ovey, *supra* n. 106, at 67.

109 *See* Harris, O'Boyle & Warbrick, *supra* n. 1, at 5; ECtHR, *Golder v. the United Kingdom*, app. no. 4451/70, 21 February 1975.

110 White & Ovey, *supra* n. 106, pp. 70-71.

as "criminal charge", "civil rights and obligations", and "tribunal" are examples. "Law" and "lawful" have a mixed Convention law and national law meaning for the same reason.[111]

According to Rainey, McCormick and Ovey, the "context" interpretation has frequently been used where a protocol governs a certain issue in detail and the respondent state has not ratified the protocol. In such cases, the state will often try to argue that the entire matter is governed by the protocol alone. The Court has found that the existence of specific rules does not bar the application of general principles to a case where the specific rules do not apply. However, if a right is not part of a specific provision, it cannot be part of the general provision.[112] In the case of *Folgerø,* mentioned above (section 3.2.2), the Court assessed the complaints of the parents against the procedure of exemption from the class under the Protocol covering freedom of education, which includes provisions regarding education in religious and philosophical beliefs. The Court found therefore that a separate analysis under the freedom of religion and belief was not necessary.

"In practice the Court, and formerly the Commission, has made only occasional use of the *travaux préporatoires*."[113] Rainey, McCormick and Ovey argue that as a matter of fact, the preparatory work is "notoriously unreliable". It should only be invoked as to provide explanations regarding party intent rather than to delimit strictly the scope of articles. Also, the dynamic interpretation of the Convention as a "living instrument" conflicts with a fixation in time by reference to preparatory work. Where the Court used the *travaux préporatoires*, it used them not as something decisive, but to construe a "working hypothesis". In recent years, they have been used more frequently in dissenting opinions than in the majority opinions of the Court.[114]

3.6.3 State sovereignty, "living instrument doctrine" and margin of appreciation

Harris *et al.* argue that the theory of interpretation which emphasizes state sovereignty which can only be limited in accordance with the explicit consent to such limitation given by the Member States, has "now totally given way to an approach that focuses instead upon the Convention's law making character and its role as a European human rights guarantee that must be interpreted as to permit its development with time".[115] The dynamic or evaluative

111 Harris, O'Boyle & Warbrick, *supra* n. 1, at 16.
112 White & Ovey, *supra* n. 106, pp. 68-69. *See* as example for the third point reference to ECtHR (GC), *Maaouia v. France*, app. no. 39652/98, 5 October 2000.
113 Harris, O'Boyle & Warbrick, *supra* n. 1, at 17.
114 White & Ovey, *supra* n. 106, pp. 65-66, referencing a.o. ECtHR, *Young, James and Webster v. the United Kingdom*, app. nos. 7601/76 and 7801/77, 13 August 1981.
115 Harris, O'Boyle & Warbrick, *supra* n. 1, at 6. *See also* White & Ovey, *supra* n. 106, p. 70.

interpretation referred to as the "living instrument doctrine" mandates that the Convention not be interpreted in accordance with the social standards adopted when the Convention was adopted, but reflective of the policy of the law in European states. Examples are the cases dealing with, amongst others, treatment of prisoners, children born out of wedlock, homosexuals, the death penalty and conscientious objectors to military service. Yet, if the issue at hand is a controversial one, the Court will also often revert respect to national institutions under the margin of appreciation.[116]

The evaluative and dynamic approach, called "living instrument", can be derived from what is called the principle of effectiveness. The Convention rights were designed to provide individuals with protection of their rights and freedoms. Hence, in accordance with the object and purpose, the Convention rights must be interpreted in light of present day circumstances in order to be effective.[117] The Court has consistently held that the Convention is intended to guarantee practical and effective rights and not rights that are theoretical and illusionary.[118]

There is no doctrine of binding precedent according to the Convention or the Court's jurisprudence. However, for reasons of legal certainty and an orderly development of international law, the Court usually follows and applies its own precedents, unless the living instrument doctrine commands a critical review of the precedents.[119] In the case of *Bayatyan* (section I3.4.11), an Armenian Jehovah's Witness challenged his imprisonment for refusing military service. Eleven years before, the case of *Thlimmenos* (section I3.4.2), a Jehovah's Witness from Greece, had challenged his ineligibility as an accountant due to his prison term which he had served for being a conscientious objector to military service. Then, due to the textual exclusion of military service from the definition of forced labor in the Convention, the Court had not deemed the prison term as such to be violative of the freedom of religion and belief. Eleven years later, however, the great majority of High Contracting Parties had abolished obligatory military service and/or introduced alternative military service. The Court concluded that the "living instrument" must now be read to proscribe criminal punishment for conscientious objectors.

The margin of appreciation doctrine plays a crucial role in the interpretation of the Convention.[120] While not explicit in the text, the doctrine was first explained by the Court in *Handyside.* Here, the Court reasoned that "Article 10 para. 2 leaves to the Contracting States a margin of appreciation. This margin is given both to the domestic legislator ('prescribed by law') and to the bodies, judicial amongst others". Nevertheless, this does not "give the

116 White & Ovey, *supra* n. 106, pp. 70-71.
117 *Ibid.,* pp. 75-76.
118 *See* Harris, O'Boyle & Warbrick, *supra* n. 1, at 15.
119 *Ibid.,* pp. 17-18.
120 *See ibid.,* p. 11.

Contracting States an unlimited power of appreciation. The Court, [….] is empowered to give the final ruling […]. The domestic margin of appreciation thus goes hand in hand with a European supervision."[121]

In *Şahin* (section I3.4.7), in which a Turkish university student challenged her exclusion from classes for wearing a headscarf, the Court considered that due to the margin of appreciation Member States must work out the relationship between religion and state themselves. There is no European consensus on the matter. This was reiterated in many of the other selected cases, amongst which *Lautsi* (see section 3.2.2), concerning the Italian law which ordained that crucifixes be present in every classroom. Whether or not there is a European consensus is analyzed in many other selected cases, amongst which *S.A.S.* (see section 3.2.3), concerning the French ban on all face covering attire. Cases like *Hasan and Chaush* also mentioned above (section 3.2.2), illustrate the European supervision with which the margin of appreciation goes hand in hand.

Both the Court and formerly the Commission made clear that the Convention bodies do not constitute a fourth instance in the sense of a further judicial tribunal. Claimants must argue a breach of their Convention rights and more than a mere error of law by the domestic tribunals. A claim that such an error is a breach of Article 6 will usually not succeed. The Court does not, however, consider itself bound by the determination of the facts on the national level if there is reason to doubt them. While the Court will not supervise the correct application of national law, if necessary, it will assess whether the application was arbitrary.[122]

3.6.4 Limitations

The Convention does not contain one single approach to limiting the scope of the rights it protects. Instead, there are several mechanisms:[123]

- Article 15 provides for derogation of some of the protected rights in times of war or public emergency, which threaten the life of the nation.
- Some of the articles define conduct outside of protection. For example, Article 2(2) defines deprivations of life which do not fall under the protection of the right to life. Article 4(3) specifies situations that do not fall under "forced labor".
- Articles 8-11 contain a detailed limitation clause, with parallel but also specific elements.

Rainey, McCormick and Ovey distinguish two principles concerning the restriction of the rights guaranteed. The first principle is that only the restric-

121 ECtHR, *Handyside v. the United Kingdom*, app. no. 5493/72, 7 December 1976, paras 48-49.
122 Harris, O'Boyle & Warbrick, *supra* n. 1, at 14-15.
123 White & Ovey, *supra* n. 106, pp. 347-348.

tions expressly authorized by the Convention are allowed. Although this principle is not stated as such in the Convention, it is presupposed by the entire system. Also, it is presupposed by the second principle which is expressly included in the Convention in Article 18 and stipulates that "restrictions permitted under this Convention […] shall not be applied for any purpose than those for which they have been prescribed."[124]

There are judgments which suggest that the limitation clause must be applied restrictively and narrowly. The legitimate aims for which the rights can be protected can be divided into public interests (order, security, public health, morals etc.) and private interests (maintaining the impartiality of the judiciary, rights and freedoms of others etc.).[125] In *Soering*, the Court said that "inherent in the whole of the Convention is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights."[126] This expresses the principle of proportionality which is a "reoccurring theme in the interpretation of the Convention". The principle stipulates that any restriction of a right and freedom guaranteed in the Convention must be legitimate to the aim pursued. Yet, proportionality also sets limits to implied restrictions read into the Convention guarantees.[127]

Whenever there is no evidence that the relevant authorities have balanced the competing individual and public interests when deciding in limiting a right, whether in terms of positive or negative application, proportionality is not met. Similarly, when the requirements to be met to benefit from application or to avoid restriction of a right are so high as to not permit meaningful balancing, the measure is disproportionate. While the margin of appreciation applies in the instances as mentioned, the margin of appreciation cannot do away with the disproportionality.[128] The Court adopted a three-part inquiry regarding limitations:[129]

1. First, the Court will inquire into the legal basis for the limitation ("prescribed by law");
2. Second, the Court will establish whether the limitation is justified by one of the specific "legitimate aims" mentioned in the article ('in the interest of'); and
3. Third, the Court will look into the question whether the limitation is "necessary in a democratic society". In the third step, the principle of proportionality is applied.

124 *Ibid.*, p. 348.
125 *Ibid.*, p. 349.
126 ECtHR, *Soering v. the United Kingdom*, app. no. 14038/88, 7 July 1989, para. 89.
127 *See* Harris, O'Boyle & Warbrick, *supra* n. 1, at 10.
128 *See ibid.*
129 White & Ovey, *supra* n. 106, p. 349.

However, the Court will not always follow this three-step approach in detail in its reasoning. In some cases it goes directly to the third step, indicating that if this is not the case, it is irrelevant whether or not the limitation was prescribed by law or in support of a legitimate aim.[130]

– *Prescribed by law*

Although the Convention uses two different formulations "in accordance with the law" and "prescribed by law", the difference between these two is irrelevant for the first step. Three elements are necessary to determine that the criterion was fulfilled. The latter two have been described as the "quality of law" test. The three criteria are:[131]

1. There must be "some basis in national law".
2. The law must be "accessible".
3. The law must be formulated in a way that people can "reasonably foresee" its application in the circumstances and the consequences that this entails.

There is no requirement that the law must be statutory or indeed written. In the famous *Sunday Times*[132] case, the unwritten common law of contempt was accepted as qualifying as "law" for the purpose of the limitation clause.[133] Yet precisely because of this, the elements of the quality of law test are significant. The element of "foreseeability" does not require absolute certainty, as to imply that no interpretation may be used to determine the scope of the law. However, a "certain level of clarity" or precision is required to allow those whose human rights can be limited, to reasonably anticipate that this may be the case. If there is discretion on the part of the executive, the law must indicate this discretion. Broad general terms can at times be too vague as to provide the required level of predictability.[134]

– *Legitimate aims*

The Convention contains the following legitimate aims in the following articles, for the purpose of limiting the rights as specified in the articles.

There is considerable overlap between some of the legitimate aims, while there are also differences in wording. According to Rainey, McCormick and Ovey, these differences are not significant. One of these insignificant differences in wording is the difference between "prevention of disorder and crime" common to Articles 8, 10 and 11 and "protection of public order" in Article 9.[135]

130 *Ibid.*
131 *Ibid*, pp. 350.
132 ECtHR, *Sunday Times v. the United Kingdom*, app. no. 6538/74, 26 April 1979.
133 White & Ovey, *supra* n. 106, p.350.
134 *Ibid.*, pp. 351-354.
135 *Ibid.*, pp. 354-355 and 359-60.

Interests of national security	Arts. 8,10, 11.
Interest of territorial integrity	Art. 10.
Interest of public safety	Arts. 8, 9, 10,11.
Economic wellbeing of the country	Art. 8.
Prevention of disorder or crime	Arts. 8, 10, 11.
Protection of public order	Art. 9.
Protection of health or morals	Arts. 8,9, 10, 11.
Protection of the reputation of others	Art. 10.
Protection of the rights and freedoms of others	Arts. 8,9,11.
Prevention of the disclosure of information received in confidence	Art. 10.
Maintenance of the authority and impartiality of the judiciary	Art. 10.

According to Rainey, McCormick and Ovey, once the Court is satisfied that any restriction has a legal basis it will be quite easy for the member state to bring its action within one of the stated exceptions. The Court has ""seldom […] spend much time analyzing the nature of the limitations tot satisfy itself that it falls within the scope of them".[136]

In the *Şahin* case mentioned above (section 3.6.3), the Turkish government raised the rights and freedoms of others as a legitimate aim to restrict the wearing of religious apparel in educational institutions. The restriction was necessary to create an environment in which different groups respected each other. In *S.A.S.*, also mentioned above (section 3.6.3), the French government justified the ban of face concealing clothes by amongst other things the notion of "living together". The majority Court accepted that this notion was tied to the rights and freedoms of others. In the Turkish *Yiğit* case, also in the selection (section I3.4.9), a widow in a purely religious marriage claimed that excluding her from inheritance and pension and social security just because her husband and her were not officially married, is contrary to her Convention rights. The Court followed the government's argument that such restrictions are necessary for maintaining public order and the rights and freedoms of others.

– *Necessary in a democratic society*

The classic formulation of the third requirement was given by the Court in the *Silver* case:[137]

– "necessary" is not synonymous with indispensable, but neither has the flexibility of "admissible", "ordinary", "reasonable" or "desirable";

136 *Ibid.*, p. 355.

137 *Ibid.*, p. 366. ECtHR, *Silver v. the United Kingdom*, app. nos. 5947/72; 6205/73; 7052/75; 7061/75; 7107/75; 7113/75; 7136/75, 25 March 1983.

- states enjoy a certain, though not unlimited, margin of appreciation;
- the interference must correspond to a "pressing social need" and must be proportionate to the legitimate aim pursued, albeit the interference must not be greater than required by the pressing social need; and
- exceptions to a right must be narrowly construed.

The scope of the margin of appreciation is sometimes broad and sometimes narrow, depending on the nature of the rights and facts at issue. Rainey, McCormick and Ovey note that it is difficult to provide a definition which would apply in every case, as the concept is "indeterminate and the application difficult to predict".[138] Leta distinguishes two meanings of the margin of appreciation:[139]

- the substantive concept addresses the relationship between individual freedom and communitarian interests; and
- the structural concept addresses the intensity of review by the Strasbourg Court.

The substantive margin of appreciation thus applies to a proportionality analysis in balancing the involved individual and public interests, the necessity to interfere and the intensity of the interference required by the aim pursued.[140] The discretion is arguably widest in cases of:[141]

- public emergency arising under Article 15;
- some national security cases;
- protection of morals;
- social and economic policies/ town and country planning; and
- the interest of children.

Rainey, McCormick and Ovey argue that while on first sight the margin is broader in positive obligations, this impression must be nuanced, as "it will oft be the case that the nature of the right in respect of which positive obligations are argued is finely balanced against the wider interests of the whole community".[142]

On the other hand, the margin is most limited when an individual's identity or existence is at stake. Yet this is not always the case. In the *Dudgeon* case, the margin was narrow although homosexual conduct was prohibited in reference to "health and morals", because the interference also concerned the "most intimate aspects of private life". The early transsexual cases, which

138 White & Ovey, *supra* n. 106, at 366.
139 G. Leta, *A Theory of Interpretation of the European Convention of Human Rights,* Oxford University Press, Oxford (UK), 2007, chapter 4.
140 *See* Harris, O'Boyle & Warbrick, *supra* n. 1, at 12.
141 *Ibid.,* p. 13. *See also* White & Ovey, *supra* n. 106, at 367-373.
142 White & Ovey, *supra* n. 106, at 369.

clearly concerned "identity" were nevertheless characterized by a broad margin in absence of a European standard. Possibly in these cases, the communitarian interests called for the wide margin.[143]

It can be derived from the case law that the "democratic society" in which the interference must be necessary is characterized by the Convention rights themselves. Hence "democratic society" encompasses pluralism, tolerance, broadmindedness, respect for human rights and the rule of la. equality.[144] As shall be seen in the case studies of the selected cases, in freedom of religion and belief cases the Court will often emphasize a role for the state to make sure that different groups in society tolerate each other. This is the case in *Şahin* and *S.A.S.* mentioned above, as well as *Hasan and Chaush* mentioned earlier (section 3.6.3). In Folgerø, also mentioned above (section 3.6.2), the Court considers the nature of a democratic society to determine whether the burdens to request exemption from religious instruction class are too severe for parents and students. In *Buscarini*, also included the selected cases (section I3.4.1), "democratic society" is also the measure to determine whether the state of San Marino may require all legislators to swear the "republican oath" on the Gospels.

3.6.5 Direct and indirect application, horizontal application

From early case law onwards, the Convention bodies have distinguished between negative and positive obligations. While the "classical" negative obligation (freedom from) on the part of the state can be derived from the Convention, the Convention also holds positive obligations for the Member States corresponding with a "freedom to" from individuals. The positive obligation requires the state to act, while the negative obligation requires the state to refrain from certain acts.[145]

While *Cha'are Shalom* (section 3.6.2) illustrates a claim concerning a positive obligation (i.e. providing a permit to slaughter in accordance with religious law and custom), *Hasan and Chaush,* mentioned several times before (section 3.6.4), illustrates a claim concerning primarily a negative obligation (i.e. refraining from interfering in and taking sides in leadership disputes in a faith-based community).

As Article 34 makes claims possible only where a Member State has breached its obligations, its jurisdiction does not extend to human rights violations between individuals proper. However, the obligation in Article 1, for Member States to ensure "within their jurisdiction" the application of the

143 White & Ovey, *supra* n. 106, at 368-369; ECtHR, *Dudgeon v. the United Kingdom*, app. no. 7525/76, 24 February 1983.

144 See White & Ovey, *supra* n. 106, pp. 79-89.

145 *See* Harris, O'Boyle & Warbrick, *supra* n. 1, at 19-21.

Convention, holds a positive obligation to ensure that individuals do not breach each other's human rights and/or to provide remedies if this has happened.[146]

The horizontal application of the Convention is a consequence of the positive obligation. If individuals are not hindered by law, state authority and court rulings to infringe each other's human rights, the state may have violated its positive obligation under the Convention.[147] This has been called the "indirect horizontal" application and is derived from Article 1 of the Convention. As only states can be respondents under the Convention, this interpretation is the only feasible way to construe horizontal application.

In several of the selected cases, the horizontal obligation is of relevance. In *Fernández Martínez* (section I3.4.14), the dissenting judges felt that the state had tried to discharge itself of its positive obligations by giving the Church too much liberty to decide on the continuation of the employment of a religious instruction teacher. In accordance with an agreement between the government and the church, the Catholic Church had to recommend employees for this function and its prolongation. Mr. Fernández Martínez was deemed no longer eligible, as more about his personal life as a married former priest and theological positions became publicly known.

3.6.6 Internal limits and hierarchy of rights

The Court has not rejected the theory of inherent limits outright. Wherever an internal limit was accepted, this was done on the basis of the wording in the Convention.[148] This is illustrated by the initial cautiousness of the Convention bodies regarding the rights of conscientious objectors to military service, as illustrated by the selected case *Thlimmenos,* mentioned above (section 3.6.3). In *Cha'are Shalom,* mentioned above (section 3.6.4), the government asserted that the freedom of religion and belief had not been interfered with because, amongst other things, the freedom right does not include the rights to operate community-owned slaughterhouses and the ultra-orthodox Jews of France could import *glatt kosher* meat from Belgium. While this is not referred to as an internal limit, the reasoning comes close to the idea that the slaughter in accordance with religious precepts could fall within the ambit of the right, without being covered by it.

At times, the Court will also go against the clear wording of the Convention in order to achieve a restrictive result, in reference to the intention of the drafting states (even where there was no clear sign in the *travaux prépora-*

146 *See* White & Ovey, *supra* n. 106, p. 88.
147 *See* Harris, O'Boyle & Warbrick, *supra* n. 1, at 19-21.
148 *See ibid.,* p. 15.

toires).[149] Yet in the *Golder* case, the Court rejected implied limitations in reference to the limitation clause in Article 8(2), saying that the clause left "no room for implied limitations".[150] The Court has thus far rejected a hierarchical order of rights as well as of the principles of interpretation it uses.[151]

3.7 Intermediate conclusion regarding the parallels and differences in solving human rights cases

The previous subsections showed that there are important parallels in the approach or method of solving human rights cases. These can partly be derived from the parallels in codification. All three courts follow a number of steps to determine whether there has been interference with a right which amounts to a violation. With regard to the limitation clause and the related approach, the system as such is very similar: there must be a legal basis for interference, a legitimate aim followed and a justifiability of the measure. The latter includes "democratic society" to determine whether an interference fits with the entirety of the human rights-based legal order and elements like "proportionality", "least restrictive" and "rational connection" to determine whether the interference is the proper restriction.

Being national rather than international legal orders, the distinction between administrative law and constitutional law, and between constitutional, judicial and administrative review, is relevant only for the SCC and the CCSA. Doctrines of direct and indirect application, including horizontal application, and positive and negative obligations are, however, very similar. The ECtHR seems most inclined to accept internal limits on rights, yet only if included in the codification. All tribunals reject a hierarchy of rights. In sections I1.2, I2.2 and I3.2, the three legal systems are further introduced, in terms of history and institutions for those readers less familiar with either of them. Sections I1.4, I2.4 and I3.4 provide the case studies of the selected cases.

The comparison allows for a preliminary conclusion. While there are differences in the methodology, the similarities are quite strong. This indicates that the approaches followed will be similar, to say the least. The important nuance in this regard is the relevance of procedural aspects resulting from the national law differences between constitutional, administrative, and private law in South Africa and Canada on the one hand, and the relevance of the margin of appreciation for the ECtHR on the other hand.

Indeed, as we shall see in Chapter 4, there are strong similarities in the standard interpretations, for example in the procedural methodology of applying the limitation clauses, though not necessarily in the substantive analyses.

149 *Ibid.*, p. 16, referring to ECtHR, *Pretto and Others v. Italy*, app. no. 7984/77, 8 December 1983.
150 *Golder v. United Kingdom*, app. no. 4451/70, *supra* n. 109, para. 44.
151 White & Ovey, *supra* n. 106, at 65.

We will also encounter differences of standard interpretations of the freedom of religion and belief by the three tribunals in Chapter 4. As will be seen, not all these differences can be derived from the differences in the methodology of solving human rights cases as discussed in this chapter. Some of the differences are a result of differences in substantive interpretation.

Hence, due to the similarities in codification, and the modest impact the differences have, there is no reason to assume that the differences in codification alone account for any differences between the standard interpretations.