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

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#### 4.1 INTRODUCTION TO THIS CHAPTER

In this chapter, all selected cases (Appendix I) of the three Courts will be comparatively analyzed in order to find the standard interpretations and the similarities and differences between them within the six dimensions of the freedom of religion and belief mentioned in paragraph 1.5.3. These six dimensions are: the individual dimension (section 4.2); the family and family law dimension (section 4.3); the collective and group autonomy dimension (section 4.4); the dimension of the educational system (section 4.5); the dimension of balancing with other rights (section 4.6); and, finally, the dimension of secularism (section 4.7). Many of the cases feature in several sections. While the relevant facts of the cases are incidentally repeated, knowledge of the case studies provided in Appendix I is presupposed in this chapter.

#### 4.2 FREEDOM OF RELIGION AND BELIEF AND PERSONAL FREEDOM

The first dimension to consider is personal freedom of individual believers and the individual manifestations of their beliefs. While the term manifestation can suggest a conscious decision to make the religious beliefs known to the greater public, most of the believers in the selected cases go about their ordinary lives as students, employees, tenants and so forth, without any concrete desire to make their beliefs known to others. What they wish is to manifest their beliefs while leading their everyday lives: eat/consume, dress, worship, celebrate and work according to their beliefs. This is what brings them into collision with authorities or fellow citizens.

##### 4.2.1 Neutral laws of general applicability

Neutral laws of general applicability can nevertheless impair believers in their beliefs. Gurbaj Multani Singh was unduly affected by the general rule against dangerous objects in school (section I1.4.10). As an orthodox Sikh, he believed he had to wear a metal *kirpan* at all times. Other Sikhs in Canada perhaps did not adhere to this requirement and/or wore a wooden *kirpan* instead. But the

practices of others were irrelevant to Gurbaj – his school was interfering with his personal freedom.

Mr. Amselem observed the holiday of *Sukkot* by erecting a *succah* on his balcony (section I1.4.7). The other inhabitants of the apartment complex relied on neutral rules against decorating the balconies and for keeping the fire exits safe. Other Canadian Jews with similar living conditions might dwell in *succahs* erected in communal gardens or elsewhere. To Mr. Amselem and his co-claimants, this was irrelevant. The homeowners' syndicate was trying to interfere with their personal freedom to erect personal dwellings on their own balconies.

The claimant in *R. v. N.S.* wore a face-covering veil in accordance with her Islamic beliefs (section I1.4.14). She wore it at all times and would certainly like to wear it in the courtroom where the person who had abused her as a child was the defendant. Ordering her to remove the veil was not only an interference with her personal freedom as a believer, but it also intersected with her freedom of personal space as a victim.

In the first two Canadian cases referred to above, the SCC found in the interest of the believer. In the latter case, it found against the believer. The SCC's definition of religion and belief is broad, and the protection generated by the freedom right is bold. Impairment must be justifiable in accordance with the limitations clause. Necessity for limitation is not easily assumed and if less restrictive alternatives are conceivable, they must be applied. There is an administrative law obligation to create reasonable accommodation for believers. Gurbaj and Amselem profited from the jurisprudence. N.S. found her sincerely held beliefs interfered with in accordance with the limitations clause. The rights of the accused provided for the legitimate interference.

The *Multani* case is perhaps the second Canadian milestone freedom of religion and belief case after *Big M*. The judgment guaranteed Gurbaj the personal autonomy to work out for himself what the *kirpan* rule meant for him. The judgment, however, was controversial in Canada and especially Québec. There was even hateful protest at the school doors.<sup>1</sup> These events, among other things, led to the Bouchard/Taylor Commission reviewing interculturalism in Quebec.<sup>2</sup>

Clashes between Chasidic Jews and the secular francophone inhabitants in Outremont had occurred before *Amselem*. However, the *Amselem* case was the first to reach the SCC. The earlier instances concerned the building of a

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1 See B. Ryder, 'The Canadian Conception of Equal Religious Citizenship', in R. Moon (ed.), *Law and Religious Pluralism in Canada*, UBC Press, Vancouver/Toronto (Canada), 2008, p. 104.

2 See G. Bouchard & C. Taylor, *Building the future, A time for reconciliation*, Government of Quebec, 2008, p. 242.

synagogue, the erection of strings in public streets (*eruv*<sup>3</sup>) and the location of bus stops for a private transport service to Brooklyn.<sup>4</sup> The SCC established that under the Charter's freedom of religion and belief, the individualized beliefs of Amselem cs. to dwell in one's own *succah* instead of a communal one – men as well as women – were all protected. Limitations must be in conformity with the limitations clause. The SCC concluded that an absolute prohibition of succahs on balconies was unnecessary and unjustified in order to safeguard the legitimate interests and rights of other tenants.

According to a majority on the SCC, N.S.'s freedom to wear a *niqab* when testifying in court, was legitimately interfered with in the criminal case against her uncle. While her sincere beliefs were protected in principle, his rights as a defendant would be impaired too much if she could testify wearing the *niqab*. The majority tailored a specific justification. A clear rule that would either "always" or "never" allow for ordering the removal of the *niqab* when testifying, was not compatible with the engaged rights. Assessing possible accommodation was considered the starting point.<sup>5</sup>

Mr. Prince, much like our Canadian claimants, adhered to a practice which was controversial (section I2.4.7). Prince was a candidate attorney in South Africa and as a practicing Rastafarian he consumed marihuana. To Mr. Prince, *dagga* was a "holy herb", but he was exposed to the "manifest and hidden prejudices of [the] majority" population which condemned the use of *dagga* which, in turn, had led to its criminalization.<sup>6</sup> While the Court was sympathetic to Mr. Prince, the majority considered an exemption for the Rastafarians too great a risk for the state interest of preventing illicit drug use. Although his sincere beliefs were protected by freedom of religion and belief, the interference was justified by the legitimate aim pursued.

Sunali Pillay was a South African of Tamil-Hindu background (section I2.4.11). Like many women of her creed, she wore a nose stud. Her school's dress code prohibited this. The CCSA, however, recognized that indisputably the norm embodied in the code "is not neutral, but enforces mainstream and historically privileged forms of adornment [...] at the expense of minority and historically excluded forms". The history of exclusion and discrimination against minorities was invoked to show that an exemption for minorities from a neutral rule could be required by equality. The CCSA found in Pillay's favor,

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3 The erection of such strings marks the public space as private/domestic (*eruvim*) to allow for goods to be carried there on religious holidays, when such carrying would be prohibited in external/public spaces.

4 See Quebec Superior Court, *Forget v. Outremont (Ville)*, 2000 CanLII 19415 (QC CS), 23 February 2000 and Quebec Superior Court, *Rosenberg v. Outremont (Ville)*, 2001 CanLII 25087 (QC CS), 21 June 2001.

5 SCC, *R. v. N.S.*, Case 33989, [2012] 3 SCR 726, 20 December 2012, paras 47-48 and 54.

6 L. Du Plessis, 'Current Problems Concerning Church and State Relationships and Religious Freedom in South Africa', in H. Warnik (ed.), *Legal Position of Churches and Church Autonomy*, Uitgeverij Peeters, Leuven (Belgium), 2001, p. 28.

even though the nose stud had no religious significance as such but was inspired by culture and/or religion which together “sing with the same voice”.<sup>7</sup>

Nine of the selected cases of the ECtHR involved personal freedom: *Buscarini*, *Maestri*, *Şahin*, *S.A.S.*, *Thlimmenos*, *Batayan*, *Cha’are Shalom*, *Folgerø* and *Lautsi*. In five cases the Court found against, in four it found in favor of the believer. *Cha’are Shalom* is better discussed under freedom of religion and belief and autonomy, and *Folgerø* and *Lautsi* are better discussed under the dimension with regard to the educational system. The other six cases will be discussed in this section. The Court itself, however, does not regard cases dealing with neutral and generally applicable laws as a conceptually distinct category, as Evans notes.<sup>8</sup>

In *Buscarini* (section I3.4.1) the rule was neutral, yet only at first sight. All parliamentarians were required to swear on the Christian Gospels. This caused problems of conscientious nature for people who believed in other holy books, no holy books, or for whom swearing on this, or any holy book went against their conscience. For these people, the choice was between not becoming parliamentarians, or violating their conscience. In a democratic society, parliament should potentially represent all walks of life. The Court found the interference unjustifiable.

The *Maestri* case (section I3.4.6) concerned the intended explicit and legally mandated exclusion of Freemasons from the office of judge. But the legal basis was weak – a general provision regarding rules on proper conduct for judges. To interpret this to imply that Mr. Maestri had to choose between his profession and his beliefs was unforeseeable in terms of “provided by law”.

The rule in *Şahin* (section I3.4.7) was also only neutral at first sight. All visible religious attire was prohibited in Turkish state-run universities for everyone. Leila claimed that at her university it was only enforced against Muslim women like her who wore headscarves. The mere fact that religious attire was prohibited already affected some students more than others, she argued. Non-religious students, or students whose beliefs did not include the wearing of such attire, were not affected. Amongst believers, carrying external signs of their religion, it would depend on how “neutral” they looked. Leila’s headscarf would always appear as a religious symbol, a fellow student’s beard or dreadlocks may not. Yet the ECtHR granted a broad margin of appreciation to Turkey and accepted that the interference was justified to achieve harmony between competing groups. The pluralism that the state claimed to protect was thus eliminated, with reference to the rights and freedoms of others.

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7 CCSA, *MEC for Education: Kwazulu-Natal and Other v. Pillay*, Case CCT51/06, 5 October 2007, paras 44 and 60.

8 C. Evans, *Freedom of Religion under the European Convention of Human Rights*, Oxford University Press, Oxford (UK) et al., 2001, p. 168.

In *S.A.S.* (section I3.4.15), the Court found that interference with the face-veil wearing believers was justified. Because the ban was general and unlimited, it failed to be proportionate to the public safety aim.<sup>9</sup> But the majority found that the ban was justified by the aim of protecting the rights of freedoms of others. Given the wide margin of appreciation, Parliament could give great weight to “living together”. The ban did, however, have a disproportional effect on Muslim women.<sup>10</sup>

*Thlimmenos* and the other conscientious objection case *Bayatyan* (sections I3.4.2 and I3.4.11) may be considered the more activist judgments of the Strasbourg Court when it comes to freedom of religion and conscience. *Bayatyan* is also the only Article 9 case in which the “living instrument” doctrine was applied.<sup>11</sup> Yet, the ten-year period between them also highlights the caution the ECtHR will apply when handling controversial issues. In *Thlimmenos*, the Court was confronted with the “*stare decicis*” of the Commission in combination with the still widely practiced and accepted military duty of many member states. After that, most member states introduced alternative service and/or abandoned military duty.

#### 4.2.2 The obligation to accommodate

While believers may be adversely affected by neutral rules, one way of preventing this is to exempt them. The notion of reasonable accommodation calls for measures which reconcile general rules with the practices of believers affected. In Canada “reasonable accommodation” exists under that name purely within administrative law. However, “minimal impairment”, used in constitutional law, shows similarities. In South Africa and the European Convention jurisdiction there is no equivalent to “reasonable accommodation” as a formulated rule.

The notion of reasonable accommodation as such can, however, be discussed more broadly. Reasonable accommodation as discussed here shall refer to a general positive obligation to accommodate believers, whenever such accommodation is to be considered reasonable. The interaction between government body and believers is subsequently subject to legal scrutiny. It also implies that the positive obligation resting on government bodies or public institutions *vis-à-vis* private individuals or organizations is different from positive obligations which might exist in civil law interaction. This is something the South African and Convention legal orders can relate to. If religious manifestation and customs are not accommodated in the public sphere,

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9 ECtHR (GC), *S.A.S. v. France*, app. no. 43835/11, 1 July 2014, paras 137-142.

10 *Ibid.*, para. 151.

11 ECtHR (GC), *Bayatyan v. Armenia*, app. no. 23459/03, 7 July 2011, para. 109.

“neutral” rules effectively render some religious citizens second class citizens, because they place a heavier burden on them than on all others.<sup>12</sup>

Nevertheless, the administrative law context in Canadian law is relevant to a more general discussion. Administrative organizations may be regarded to be better equipped to preview and/or review the effects of rules on specific groups. The legislature will usually decide on legislation more abstractly and generally. In private law, however, reasonable accommodation would require citizens to accommodate each other. In *Amsalem*, the discussion between majority and dissenters focused on whether the obligation to accommodate, or something similar, may exist in the private law – in this case, relationships between the Jewish tenants of the building and the organization of all tenants.

The duty to accommodate will usually benefit minorities albeit the “historically unprivileged” groups. As we saw in the *Pillay* case, the CCSA refers explicitly to “minority and historically excluded forms” of adornment which are prohibited, unlike “mainstream and historically privileged” forms.<sup>13</sup> While popular conception often equates equality with identical rules for all, the history of exclusion and discrimination is invoked to show that an exemption from a neutral rule can be required by equality: “What is relevant is the symbolic effect of denying her the right to wear it for even a short period; it sends a message that Sunali, her religion and her culture are not welcome.”<sup>14</sup> Ergo, Sunali must be accommodated by being exempted from the rule, even if the rule remained intact for other students who might want to wear nose studs for esthetic reasons only.

Naturally, some people belonging to the mainstream will feel disadvantaged when (minority) people are accommodated. They will feel that minorities have privileges that they do not have. This was the case with some of the students in Multani’s school. However, as the SCC explained, this line of thinking is ill-informed.<sup>15</sup> Through accommodating, the unfair disadvantage the rule has for the believer who belongs to a minority is taken away. It is not a privilege for the believer, *vis-à-vis* others. The accommodation is necessary to recreate equal conditions for everyone.

Both Mr. Thlimmenos and Mr. Bayatyan were Jehovah’s Witnesses, and thus belonged to small minorities in Greece and Armenia. They believed that serving in the army violated the pacifist precepts of their religion. Both were punishable with prison for acting in accordance with the dictates of their conscience. Mr. Thlimmenos’ claim was directed against the fact that his criminal record now prevented him from acquiring accreditation as an accountant in his native Greece. The Court carefully maneuvered the legal grounds

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12 Evans, *supra* n. 8, at 170.

13 *MEC for Education: Kwazulu-Natal and Other v. Pillay*, Case CCT51/06, *supra* n. 7, para. 44.

14 *Ibid.*, para. 85.

15 See SCC, *Multani v. Commission scolaire Marguerite-Bourgeoys*, Case 30322, [2006] 1 SCR 256, 2 March 2006, paras 74 and 76.

in a period when many member states still had a mandated military service, while the Convention explicitly excluded this from the prohibition of forced labor.

In Mr. Batyan's case, 11 years later, all member states, except Armenia, had abandoned mandated military service and/or had introduced an alternative service for conscientious objectors and/or exempted conscientious objectors from military service. Armenia itself had changed the law, but it had not come into effect yet. The Court formulated a bold protection for conscientious objectors from military service. Not providing an alternative other than serving a prison sentence was in violation of the freedom of religion and belief according to the Court at that point in time.

The European Commission of Human Rights had ruled before *Thlimmenos* that as the Convention explicitly excluded obligatory military service from forced labor, Article 9 should not be read to prohibit such obligatory military service – even if no alternative “civil” duty was made possible. In *Thlimmenos*, the Court formulated a different accommodation. Leaving the most fundamental issue aside, it focused narrowly on the issue of the criminal record preventing the conscientious objector from entering the profession of his choice. Equality mandated that he be treated differently from other criminals. After all, in a democratic society there was no reason to prevent pacifists from becoming accountants.<sup>16</sup>

In *Bayatyan*, a decade later, the Court saw reason to revise the Commission jurisprudence regarding military duty and conscientious objection. Given that most member states had abolished obligatory military service and/or had introduced alternative civilian service and given that Armenia itself had vowed to abolish the obligatory military duty, the conviction and subsequent prison sentence of Mr. Bayatyan constituted an unjustifiable breach of Article 9.<sup>17</sup> Now the accommodation was to make an alternative possible and/or relieve a conscientious objector from mandatory military duty.

While the CCSA was sympathetic to Mr. Prince's plight in its argument and analysis, the majority considered an exemption from the general prohibition of the possession and use of cannabis for Rastafarians too great a risk for the overall state interest of preventing drug use. Comparison was made to legal medical use of cannabis. But unlike the medical system, the Rastafarian community was very loosely organized. Also, such a system would require authorities to establish when *bona fide* Rastafari use was at stake and when it was not. This was inconsistent with the freedom of religion.<sup>18</sup>

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16 ECtHR (GC), *Thlimmenos v. Greece*, app.no. 34369/97, 6 April 2000, paras 35-47. See Evans, *supra* n. 8, at 179.

17 *Bayatyan v. Armenia*, app. no. 23459/03, *supra* n. 11, paras 101-125.

18 CCSA, *Prince v. President of the Cape Law Society*, Case CCT36/00B, 25 January 2002, paras 131-138.

The accommodation, which was never discussed in the *Prince* case, is whether Mr. Prince's ambition to become a lawyer should also suffer from the criminalization of his religious practice. Why not do away with just that consequence? Now Mr. Prince was "prevented from practicing the profession of his choice. The impact of the limitation is profound indeed."<sup>19</sup> The careful approach of the ECtHR in *Thlimmenos* could have also helped Mr. Prince. It is one thing if there can be no exemption from the ban on the consumption of *dagga* for Rastafarian's. But in a democratic society, there is no reason why *dagga*-smoking Rastafarians should not be attorneys at law.

Mr. Prince's spiritually motivated fighting spirit did not stop there. In 2018, he was one of the parties of a CCSA case in which the Court declared legislation criminalizing the use, possession, purchase, and cultivation of cannabis unconstitutional, given the unjustified interference with the right to privacy.<sup>20</sup>

#### 4.2.3 Personal beliefs and other views

In *Amselem*, as in *Multani*, the SCC dismissed testimonies of religious "officials" of the religion in question and co-religionists. The Charter rights could not be construed as to protect only or specifically mainstream religious dogma. The very essence of the freedom of religion and belief was that it entitles individuals to create their own personal religious lifestyle out of existing doctrines – adhering to some, altering some, abandoning others.

The *Amselem* case was a sequel in a row of cases involving clashes between Chasidic Jews and the secular francophone inhabitants in Outremont.<sup>21</sup> *Amselem* was the first of these cases to "reach" the SCC. Did the inhabitants of an apartment building have a right to erect personal *succahs* on their balconies when celebrating the religious holiday of *Succoth*? The Court defined the freedom of religion and belief broadly. It reasoned that for the applicants, alternatives for the personal *succahs* would have resulted in distress which would "constitute a non-trivial interference" with their rights, whereas the impact on the other owners' rights, in allowing the *succahs* was at best minimal.<sup>22</sup> Hence, the ban was not justified.

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19 *Ibid.*, para. 51.

20 CCSA, *Minister of Justice and Constitutional Development and Others v. Prince (Clarke, Stobbs and Thorpe Intervening) (Doctors of Life International Inc as Amicus Curiae); National Director of Public Prosecutions and Others v Rubin; National Director of Public Prosecutions and Others v. Acton and Others*, Case CCT108/17, 18 September 2018.

21 See S. Van Praagh, 'View from the Succah', in R. Moon (ed.), *Law and Religious Pluralism in Canada*, UBC Press, Vancouver/Toronto (Canada), 2008, pp. 30-35. See *Forget v. Ville d'Outremont*, t 2000 CanLII 19415 (QC CS and *Rosenverg v. Ville d'Outremont*, 2001 CanLII 25087 (QC CS) *supra* note 4.

22 SCC, *Syndicat Northcrest v. Amselem*, Case 29252, 29253, [2004] 2 SCR 551, 30 June 2004, para. 64.

The difference between majority and minority in this case was not only the difference regarding “reasonable accommodation” in a private law context (see section 4.2.2), but the sincerity of belief in question. The dissenting judges suspected that Mr. Amselem was looking for the protection of his personal preferences rather than his sincere religious beliefs. The argument that claimants may dishonestly allege sincere belief, where the matter was actually one of preference, had been raised before.<sup>23</sup> On the other hand, it was not a secular Court’s place to dig too deeply in the individual conscience of a believer or to accept only the testimony of religious officials. In both cases, the Court would be violating the freedom of religion and belief. The SCC’s concept of freedom of religion and belief enabled Mr. Amselem to have his personal beliefs, regarding the protection of a widely known Jewish religious tradition. Hence, the practice was obviously connected to the faith he adhered to. The vehemence and commitment shown in pursuing the legal protection demonstrated sincerity.<sup>24</sup>

While sympathetic to the situation of the Rastafarians, in *Prince* the Court found that an exemption was impossible to execute without compromising the state’s legitimate interest of preventing drug abuse and/or infringing the freedom of religion of Rastafarians. After all, an exemption modeled along the lines of the medical exemption would require the authorities to establish when *bona fide* Rastafari use was at stake and when it was not. Here, much like with the question of when a court should draw in doubt the sincerity of a believer, the dimension of personal freedom touched on the dimension of secularism and freedom of religion and belief (see section 4.7)

Leila Şahin was also forced to make a painful choice: continuing her education or removing the headscarf which was important to her in conducting her life in accordance with her faith. The same goes for the claimant in *S.A.S.* She ran the risk of being repeatedly fined, as the dissenting judges pointed out, or refraining from her religious practice. It was these “extremely painful and intensely burdensome choices of either being true to their faith or else respectful of the law” which according to the CCSA the “state should, wherever reasonably possible, seek to avoid”<sup>25</sup> placing before believers.

Prior to Şahin, the Strasbourg institutions had already decided cases involving the Islamic headscarf. At first, the Court was reluctant to even acknowledge that prohibition of the Islamic headscarf interfered with Article 9; first denying it, then assuming it,<sup>26</sup> and only in *Dogru*<sup>27</sup> finally accepting it.<sup>28</sup> Part of the

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23 See Bouchard & Taylor, *supra* n. 2, at 176.

24 *Syndicat Northcrest v. Amselem*, Case 29252, 29253, *supra* n. 22, paras 45-56.

25 CCSA, *Christian Education South Africa v. Minister of Education*, Case CCT4/00, 18 August 2000, para. 35.

26 C. Evans, ‘The Islamic Scarf in the European Court of Human Rights’, in *Melbourne Journal of International Law*, vol. 72, no. 7, pp. 52-73 (2006), p. 55, referring to *Dalhab* and *Şahin*.

27 ECtHR (C), *Dogru v. France*, app. no. 27058/05, 4 December 2008.

reluctance to protect the wearing of the headscarf by Muslim women, seemed to arise from a particular view regarding the Islamic headscarf. In so many words the majority in *Dalhab* and later in *Şahin* argued that the headscarf was at odds with gender equality, being “imposed on women by a religious precept”.<sup>29</sup>

This viewpoint was received with criticism. Dissenting judge Tulkens argued that the views of the majority regarding gender equality and the headscarf were at odds with the concept of human autonomy and showed intrusive paternalism.<sup>30</sup> Evans alleged that the judgment symbolized the Court’s general “reluctance to acknowledge the value and religious importance of many key religious practices outside of Christianity”.<sup>31</sup> Whether it was the criticism or just the passing of time, the ECtHR’s view has evolved. While finding against S.A.S., the Court took a different approach that was much more similar to the SCC: “What matters is how a believer, or a group of believers understand the conduct or symbol themselves.”<sup>32</sup>

While Leila Şahin’s headscarf was to be considered quite a mainstream practice among many Muslim women, S.A.S.’s *niqabs* and *burqas* were worn only by small groups of women in France and elsewhere in the world. Yet, the Court made it very explicit that respect for human dignity cannot be raised to justify a blanket ban for face coverings in public places. While face coverings may be perceived as strange by some, they were “the expression of a cultural identity which contributes to the pluralism that is inherent in democracy”.<sup>33</sup> While France was given a broad margin of appreciation by the majority to determine that rights and freedoms of others to mandate limitation of the practice to ensure “living together”, the dissenting judges Nussberger and Jäderblom saw it differently. They agreed with the careful balancing of the majority opinion. Nevertheless, they felt it “sacrifices concrete individual rights guaranteed by the Convention to abstract principles”.<sup>34</sup> The very attempt of the ban was to restrict pluralism based on “selective tolerance”.<sup>35</sup>

In *N.S.*, the question was not a general ban of the face veil in public, but an order to remove it when testifying in a criminal case. The majority in *N.S.*

28 C. Evans, ‘Individual and Group Religious Freedom in the European Court of Human Rights: Cracks in the Intellectual Architecture’, in *Journal of Law and Religion*, vol. 26, no. 1, pp. 321-343 (2010), p. 330.

29 ECtHR (GC), *Leyla Şahin v. Turkey*, app. no. 44774/98, 10 November 2005, para. 111.

30 See ECtHR (GC), *Leyla Şahin v. Turkey*, app. no. 44774/98, 10 November 2005, *Dissenting opinion of Judge Tulkens*, para. 12.

31 Evans, *supra* n. 26, at 56.

32 Compare this to the discussion between the majority and dissenting Judge Tulkens: *Leyla Şahin v. Turkey*, app. no. 44774/98, *supra* n. 29, para. 111 and *Dissenting opinion of Judge Tulkens*, para. 12.

33 *S.A.S. v. France*, app. no. 43835/11, *supra* n. 9, para. 120.

34 *S.A.S. v. France*, app. no. 43835/11, *supra* n. 9, *Joint partly dissenting opinion of Judges Nussberger and Jäderblom*, para. 2.

35 *Ibid.*, para. 14.

rejected a “secular response that requires witnesses to park their religion at the courtroom door”. This “is inconsistent with [...] the Canadian tradition, and limits freedom of religion where no limit can be justified”.<sup>36</sup> Neither was there always a right to wear a religious garment when testifying. Concurring Judges LeBel and Rothstein, on the other hand, did favor a clear rule: they proposed to never allow a witness to wear a *niqab*.<sup>37</sup> Dissenting Justice Abella regarded forced removal of the *niqab* while testifying far greater harm, than the harm done to the accused if she were able to wear it while testifying.<sup>38</sup> She wanted to prevent a message that they were not welcome. If that was the message they heard, they might not turn to the criminal justice system if they had been victimized.<sup>39</sup> Forcing victims to choose between justice and their sincere beliefs was “no meaningful choice at all”.<sup>40</sup>

Abella’s view was identical to that of the CCSA in *Pillay*: what must be prevented is the message that “your religion and your culture (i.e. the way you practice it) are not welcome”.<sup>41</sup> In *Şahin*, a Muslim practice was banned in a Muslim majority country. While the claimant did not belong to a historically excluded religious minority, the message was identical to that in *Pillay*: you and your practice do not belong in this educational institution. That message is always hurtful, never mind the historical, political or sociological context.

#### 4.2.4 The obligation to promote tolerance

Over decades, conscientious objectors to military service have won increasing sympathy from human rights scholars and practitioners, as the evolving ECtHR case law in *Thlimmenos* and *Bayatyan* has shown. Yet conscientious objection to military service is but an “ideal type” of conscientious objection to “neutral rules of general applicability”. As seen above, many conscientious individuals clash with seemingly neutral laws of general applicability because they mandate action or prohibit action which is of contentious significance to them. Gurbaj Singh with his metal kirpan and Moïse Amselem with his personal succah on the balcony, are such people – just like Sunali Pillay, Leyla Şahin, S.A.S., Garreth Anver Prince and N.S.

When general rules are made, especially in very pluralistic societies, the adverse effects on specific (religious) individuals are often difficult to assess. These adverse effects often materialize at a later point in individual cases. But in concrete administrative cases, where the legal framework merely provides

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36 *R. v. N.S.*, Case 33989, *supra* n. 5, para. 2

37 *Ibid.*, para. 69.

38 *Ibid.*, para. 86.

39 *Ibid.*, para. 94.

40 *Ibid.*, paras 86, 94 and 96.

41 See *MEC for Education: Kwazulu-Natal and Other v Pillay*, Case CCT51/06, *supra* n. 7, para. 85.

a basis for a certain decision, but does not strictly demand it, the consequences for the individual are known. Thus, reasonable accommodation can be applied in such cases.

Both the *Multani* and the *Amsalem* cases caused controversy. Bouchard and Taylor note that there was strong opposition to the *Multani* judgment in Quebec, including amongst 79% of the non-French speaking community in Montreal.<sup>42</sup> Gurbaj had to be escorted to school by the police because of hateful protest at the school gates, and articles were published in newspapers which described the judgment as “multiculturalism gone mad”.<sup>43</sup> Bouchard and Taylor were asked to advise the Quebec Government on interculturalism. What seems to matter is that Gurbaj was an orthodox believer from a minority religion which was relatively new in Canada, while mainstream society was largely secularized and culturally less familiar with his religion. The misunderstanding of a religious or cultural practice is also more likely if the said practice is (intentionally) misrepresented by others (belonging to the majority).<sup>44</sup>

Bouchard and Taylor propose the dissemination of “civic virtues” based on mutual understanding and respect as a solution.<sup>45</sup> The Court in *Multani* basically referred to these civic virtues when it iterated that indeed educators needed to install the values of tolerance and pluralism in students to counter the feelings of unfairness. One could argue that the installment and dissemination of civil virtues of mutual understanding and respect should be part of the basic toolkit of the “impartial organizer of pluralism”, a concept repeatedly applied by the ECtHR.

The inability to identify with “the other” led to large parts of the society viewing Gurbaj’s kirpan first and foremost as a weapon. The Court addressed this, rejecting the presentation of the kirpan as a symbol of violence as “disrespectful” and contrary to “Canadian values based on multiculturalism”.<sup>46</sup> What mattered is how a believer or a group of believers understand the conduct or symbol themselves.<sup>47</sup> An absolute prohibition of the kirpan would make orthodox Sikhs like Gurbaj unwelcome, forcing them to make a painful choice between their religion and the benefits of receiving an education in a public school.

The CCSA’s *Prince* and *Pillay* cases are also illustrative of what one could call the minority dimension of the freedom of religion. To Mr. Prince, *dagga* is a “holy herb”. However, he was exposed to the “manifest and hidden

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42 Bouchard & Taylor, *supra* n. 2, at 66.

43 See Ryder, *supra* n. 1, at 104.

44 See *ibid.*, p. 89.

45 See Bouchard & Taylor, *supra* n. 2, at 242.

46 *Multani v. Commission scolaire Marguerite-Bourgeoys*, Case 30322, *supra* n. 15, para. 71.

47 Compare this to the discussion between the majority and dissenting Judge Tulkens: *Leyla Şahin v. Turkey*, app. no. 44774/98, *supra* n. 29, para. 111 and *Dissenting opinion of Judge Tulkens*, para. 12.

prejudices of [the] majority” which condemned the use of dagga and which, in turn, had led to its criminalization.<sup>48</sup> “There can be no doubt” says Justice Ngcobo, “that the existence of the law which effectively punishes the practice of the Rastafari religion degrades and devalues the followers of the Rastafari religion [...]. It is a palpable invasion of their dignity. [...] It says that their religion is not worthy of protection. The impact of the limitation is profound indeed.”<sup>49</sup>

The *Multani* judgment argued that in an open society, we sometimes need to accept a certain degree of risks in order to enable people with different beliefs and customs to live together and afford everyone the same protection of his or her (religious) identity. When the only risk is the confrontation with others who do not share the same beliefs or might interpret some symbols differently, one court argued, there is no reason at all to limit the freedom to act upon beliefs. Rather, the state institutions should spread the message of tolerance and respect for diversity.

Part of that message was for teachers to explain to other children that the accommodation of Gurbaj’s religious beliefs was not “unfair” but mandated by tolerance for his beliefs, culture, and way of life. As the Canadian Supreme Court noted: “Tolerance is always age-appropriate.”<sup>50</sup> Properly worded, a message of tolerance would surely have been age-appropriate for Ms. Şahin’s fellow students and educators at the university. As the majority in *S.A.S.* noted, when a state legislates specifically to address practices motivated by belief it “takes the risk of contributing to the consolidation of the stereotypes which affect certain categories of the population and of encouraging the expression of intolerance, when it has a duty, on the contrary, to promote tolerance”.<sup>51</sup>

In *Şahin* and earlier cases, the ECtHR noted a “proselytizing effect” of the Islamic headscarf on other Muslim women. Religious symbols and practices will always have this effect to a certain degree. But in *Kokkinakis*, the ECtHR also said that the state must be totally indifferent to proselytism.<sup>52</sup> After all, as the SCC noted in *Big M*: “A truly free society is one which can accommodate a wide variety of beliefs, diversity of tastes and pursuits, customs and codes of conduct. What may appear good and true to a majoritarian religious group, or to the state acting at their behest, may not, for religious reasons, be imposed upon citizens who take a contrary view.”<sup>53</sup> The minority in *S.A.S.* echoes this,

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48 Du Plessis, *supra* n. 6, at 28.

49 *Prince v. President of the Cape Law Society*, Case CCT36/00B, *supra* n. 18, para. 51.

50 See majority opinion in SCC, *Chamberlain v. Surrey School District No. 36*, Case 28654, [2002] 4 SCR 710, 20 December 2002, para. 69.

51 *S.A.S. v. France*, app. no 43835/11, *supra* n. 9, para. 149.

52 ECtHR (C), *Kokkinakis v. Greece*, app. no. 14307/88, 25 May 1993, *Partly dissenting opinion of Judge Martens*.

53 SCC, *R. v. Big M Drug Mart Ltd.*, Case 18125, [1985] 1 SCR 295, 24 April 1985, pp. 336-337.

when reminding us that “[p]luralism, tolerance and broadmindedness” even includes everyone’s right to “shock, offend and disturb”.<sup>54</sup>

### 4.3 FREEDOM OF RELIGION AND BELIEF AND FAMILY LAW/FAMILY RELATIONS

Freedom of religion and belief in the family and family law context relates to the intimate relationships believers have and the role their beliefs have therein. The cases studied deal more than once with the issue of a religious marriage, the right to get married for same-sex partners, and the distinction between marriage and other relationships. They also deal with the authority of parents with regard to their children and with personal law and individual autonomy. Here again, like with the individual dimension, the prime concern of the believers in question is not making their beliefs known, but to be able to live their personal, private, and family lives in accordance with their beliefs.

#### 4.3.1 Parents and children, medical autonomy and marriage

Five of the Canadian cases can be discussed under this dimension. *P.(D)*, (section I1.4.3) concerned a mother who was the custodian and still feared religious indoctrination of her child by the Jehovah’s Witness father who had access rights. In *Children’s Aid Society of Metropolitan Toronto* (section I1.4.4), the Jehovah’s Witness parents refused a blood transfusion for their new-born on religious grounds. Jehovah’s Witness’ beliefs regarding blood transfusion also feature in *A.C. v. Manitoba* (section I1.4.12). But *A.C.* is a mature 14-year-old, not an infant. The fourth case was initiated by a Jewish divorcé against her former husband (*Bruker* see section I1.4.11) for not fulfilling his contractual obligation to divorce her in accordance with Jewish religious law (*get*). Pursuant to the Supreme Court Act, the SCC can be asked to give advisory opinions concerning the constitutionality of proposed legislation. In 2003, the Governor referred the questions regarding proposed legislation to legalize same-sex marriage to the Court (*Same-Sex Marriage*, section I1.4.9).

Seven of the South African cases in this dimension challenge the existing exclusiveness of civil law marriage. Three of the cases deal with the recognition of women married only in accordance with Muslim rites as “spouse” for the purpose of insurance (*Amod*, section I2.4.5) and inheritance (*Daniels, Hassam*, sections I2.4.8 and I2.4.12). The *Fourie* case (section I2.4.10) was initiated by same-sex couples to challenge the exclusion of same sex from the institute of civil law marriage. *De Lange* (section I2.4.15) also deals with a same-sex union. Only this time, one of the partners was a minister for the South African

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54 *S.A.S. v. France*, app. no 43835/11, *supra* n. 9, *Joint partly dissenting opinion of Judges Nussberger and Jäderblom*, paras 6-10.

Methodist Church who had been dismissed because of this. The case is better discussed under freedom of religion and belief and group autonomy. *Robinson* (section I2.4.9.) concerned a life partnership and whether the surviving life partner should not have the same rights as a spouse. The sixth South African case, *Women's Legal Centre Trust*, (section I2.4.13) was about the question whether the failure to regulate Muslim marriages in a Muslim marriage Act amounted to a breach of constitutional obligations by parliament and executive. Finally, the eighth case in this dimension, *DE* (section I2.4.14), concerned existing provisions making it possible for a partner to take legal action against their adulterous spouse.

Just two of the Strasbourg cases are best discussed under the theme religion in the family and family law context. In *Yiğit* (section I3.4.9), similarly to the South African Islamic marriage cases, the widow of a purely religious marriage aspired to inherit from her deceased husband and to benefit from social security. *Refah* (section I3.4.5) was not about religious aspects of family law in practice, but about hypothetical legal pluralism, allowing for religious family law. The *Refah* party was prohibited because, among other things, it advocated such legal pluralism. This case is better discussed under the topic of freedom of religion and belief and secularism.

#### 4.3.2 The best interest of the child and freedom of religion and belief

The Canadian cases in this dimension show that the best interest of the child can limit the parent's and/or the minor child's freedom of religion. Where custody has been awarded to one parent, following a divorce, the other parent's freedom of religion and belief can be an issue. The "best interest of the child" can mandate a restriction of the right to disseminate the religion to the children. However, we also see debate on the bench on whether the proper standard for limiting parental rights should not be "harm" instead of best interest. There is also discussion as to whether the Charter applies with regard to family relations.

In *P. (D.) v. S. (C.)* the relationship between the little girl's separated parents had deteriorated. The Jehovah's Witness father challenged the existing access arrangement with the custodian mother, who was a Catholic. The mother was concerned about the intensity of the father's proselytism towards the child and the fact that the child actually accepted and repeated what she had heard. The majority dismissed the father's appeal and found that the Charter did not apply in the family context. Yet the majority was also of the view that there would be no infringement of the freedom of religion and belief, even if it did apply in the case. As the freedom of religion and belief was not absolute, it may be restricted in the child's best interest which was at stake.

In *Children's Aid Society of Metropolitan Toronto*, Jehovah's Witness parents had a seriously ill prematurely new-born child. While the parents' belief

prohibited blood transfusions, the child had no chance of survival without one. The SCC unanimously upheld the judgment which found that ordered transfusion did not violate the freedom of religion and belief of the child and parents.

In *A.C. v. Manitoba* it was the young teenager, a devout Jehovah's Witness like her parents, who initiated the case. The appellant was admitted to hospital when she was 14, almost 15 years old, suffering from Crohn's disease. Although the doctor believed that without a blood transfusion, she would run serious risks to her health and her life, she refused on the basis of her beliefs. A.C. wanted to show that she was mature like a 16-year-old, because that was the legal age at which her decision would have to be taken into consideration. Because she was not given this chance, she argued that her freedom of religion and belief had been violated. The majority found no violation, while two judges sympathized with the teenager in their separate opinion. One judge disagreed with the majority and found a violation.

*Children's Aid Society* showed the hard limit of the freedom of religion and belief in the Canadian approach. There was a medical emergency regarding an infant who could not speak for itself. Authorities may limit the rights of the parents in matters of life and death. The parents could not claim that the child's beliefs were also violated when her life was at stake as well.<sup>55</sup> Two judges argued that the freedom rights of the parents were also not interfered with. They did not extend to taking decisions which could harm the child. This line of reasoning may appeal to some, but arguably the reasoning of the majority was more consistent with the overall jurisprudence of the SCC. The freedom of religion and belief has a broad scope but can be limited, when (serious) harm is present: in this case the infant's life. After all, the decision of the parents would be irreversible in the most absolute sense. This prevents a *carte blanche* for state paternalism, even in matters of medical emergency.

The fundamental difference between the *Children's Aid Society* and *A.C.* is the age of the child. *A.C.* was old enough to have developed a consciousness and beliefs of her own. Nevertheless, the majority found against her. The law was clear and the official institutions had acted in accordance with it. *A.C.* was not yet 16. All judges acknowledged that in such situations, the maturity of minors should be taken into account more substantially than was the case here. Two judges even found a violation of the freedom of religion and belief, but also found a justification.

Binnie, the dissenting judge, went further. The Act as it stands violated the Charter rights of young people like *A.C.* The Act should provide for a procedural guarantee that allows for rebuttal of assumed immaturity. "[S]trong as is society's belief in the sanctity of life, it is equally fundamental that every competent individual is entitled to autonomy to choose or not to choose

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55 SCC, *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, Case 23298, [1995] 1 SCR 315, 27 January 1995, para. 103.

medical treatment [...].” The freedom of religion and belief “is given to everyone, including individuals under 16 years old”.<sup>56</sup> Binnie was honest about the fact it “is entirely understandable that judges, as in this case, would instinctively give priority to the sanctity of life. Religious convictions may change. Death is irreversible.”<sup>57</sup> But nevertheless, his views regarding the Charter demanded a bold stand, even where the outcome did not coincide with his own moral preferences.

*P. (D.) v. S(C.)* involved a non-custodian Jehovah’s Witness father who wished to teach his daughter about his religion. The mother feared “indoctrination”. Bearing witness to their religion is a fundamental element of the belief system of Jehovah’s Witnesses. They are known to “spread the word” by approaching strangers. Even more so, teaching their children about their faith will be important to them, as it would be for any believer of any religion, denomination, and confession.

Evidence of detrimental effects was the issue in *P. (D.)* Was the child’s father indoctrinating her and if so, did this create any kind of adverse effects on C? The difficulty here was when does the teaching of a devoutly religious parent become “indoctrination”, and when was such “indoctrination” harmful or not in the best interest? A majority of the Court here found against the father. Possibly the evidence had convinced them that he was a little too “fanatic” and that the mother was justified in being worried. But taking a look from behind the “veil of ignorance” does not support that view.

The child seemed to repeat quite frequently the creationist doctrine that her father had taught her: the world and all that lives in it was made by Jehovah. This view is representative for a great many religions and beliefs the world over, including the mother’s own Catholic faith. In itself, this shows no sign of fanaticism. One must be careful to assume “indoctrination” or “fanaticism” just because the behavior in question is connected to a religious belief.

Obviously there is a natural conflict here. The mother wanted to celebrate Christmas with her child and her father taught her that it was not good to do so. It is even more complicated when they are separated and especially if the difference of belief had led to conflict before the separation. But judges should not become arbiters in parental wars of religion. There is bound to be some confusion for the child. And, as the dissenting Justices McLachlin and Sopinka noted, “confusion” is not the same as “harm”.<sup>58</sup> Confusion is not enough to justify interference with the freedom of religion and belief.

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56 SCC, *A.C. v. Manitoba (Director of Child and Family Services)*, Case 31955, [2009] 2 SCR 181, 26 June 2009, para. 192.

57 *Ibid.*

58 SCC, *P. (D.) v. S (C.)*, Case 22296, [1993] 4 SCR 141, 21 October 1993, p. 65.

### 4.3.3 Religious marriage

Five cases deal with religious marriage. In *Bruker*, a Jewish divorcee took legal action to acquire the *get*, the divorce agreement which her husband had promised her. The three South African cases *Daniels*, *Hassam* and *Amod* were all initiated by widows of purely religious Muslim marriage, who challenged the disadvantageous legal consequences of not being considered “spouses”. The Convention case, *Yiğit*, was similarly initiated by the widow of a purely religious Muslim marriage in order to challenge disadvantageous inheritance and social security consequences from not being considered a spouse.

Jewish religious law requires the husband to initiate a religious law divorce, the *get*. In the present day, contractual agreements are used to provide women with the possibility of obtaining the divorce, i.e. obliging the husband to cooperate and to provide the *get*. Mr. Markovitz raised the freedom of religion and belief in his defense. A secular court could not oblige him to perform any act of religious law. As far as the state was concerned, Mrs. Bruker was divorced in civil law and free to marry anew. The majority of the Courts found with the ex-wife.

The majority considered that Mr. Marcovitz did not argue the existence of any sincere beliefs which prevented him from providing the *get*. As he himself claimed to be a practicing Jew, going to a rabbinical court to realize the *get* could not be considered interference. Had accepting the authority of a rabbinical court been counter to his beliefs, the situation might have been different.<sup>59</sup> Mrs. Bruker, however, was impaired by not obtaining a divorce in ability to live her life as a Jewish woman in Canada.<sup>60</sup> She would continue to be married in accordance with religious law, which would make it impossible to remarry and any new romantic relationship would automatically be adultery according to the religious law.

Two of nine judges dissented from the majority, because they believed that secular courts should not enforce an agreement stipulating any religious activity – this would violate the principle of secularity. The dissenting judges acknowledged that not enforcing the agreement would impair Mrs. Bruker. Yet they believed that the cost was too high. In their view, the freedom of religion was “negative”. Comparing it to the freedom of expression, the two argued that the state may not interfere, but does not “have to provide preachers with megaphones [...]”.<sup>61</sup> In 2008, Bouchard and Taylor seem to have advised the province of Quebec against such a purely negative reading of freedom of religion and belief. They favored an inclusive notion of “open

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59 D. Schneiderman, ‘Associational Rights, Religion and the Charter’, in R. Moon (ed.), *Law and Religious Pluralism in Canada*, UBC Press, Vancouver/Toronto (Canada), 2008, p. 77.

60 See SCC, *Bruker v. Marcovitz*, Case 31212, [2007] 3 SCR 607, 14 December 2007, para. 93.

61 *Ibid.*, para. 121.

secularism<sup>62</sup> instead of exclusivist and rigid *laïcité*. The majority opinion seemed more embedded in the notion of “open secularism”. This did not preclude the enforcement concepts of religious law by secular law, as long as they were translated into legal obligations. As for any legal obligation, the limits were set by human rights and public order amongst others.

The three South African religious marriage cases were all initiated by widows in Muslim marriages that had never been solemnized or registered as civil marriages. However, South African law made it possible to have a religious official be licensed as a civil marriage officer. Nevertheless, there was a strong practice of engaging in solely religious and/or traditional marriage.

Marriage as legal concept in South Africa must be understood in light of the political turnaround from an apartheid state to the Rainbow Nation. The apartheid era law equated European Christian understanding with civilization, degrading all other concepts to being uncivilized or at odds with good morals or *boni mores*. While apartheid era law made it possible to convert a religious marriage into a civil one, many African, “Colored” and Asian South Africans opted for traditional, Muslim or Hindu marriages, instead of civil ones. This left their unions to be regarded as not legally married and their offspring to be regarded as “illegitimate” by the state.<sup>63</sup> Subsequently, the new Rainbow Nation was committed to “the rights of ethnic, religious, and linguistic communities to promote their indigenous culture, to practice their religion, and to speak their language without undue state interference”.<sup>64</sup>

Polygamy, however, recognized in Islamic and traditional African customary law remained a controversial issue. Van der Vyver notes that “affording full recognition to multi-tiered marriages was problematic from the outset due mainly to the persistence of a typically Western perception of marriage and the dictates of predominantly Christian principles relating to matrimonial affairs”.<sup>65</sup> Legal and political discussion thus focused on the (alleged) conflict between religious law and equality.<sup>66</sup> Advocates of the new constitutional order differed in their appreciation of polygamous marriage. For some, it represented patriarchal norms which were at odds with gender equality. Others argued that if correctly understood in its own cultural context, it was not at odds with gender equality; on the contrary, it may even further equality. The pragmatic middle ground would be to acknowledge the social reality of

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62 Bouchard & Taylor, *supra* n. 2, at 20.

63 I. Currie & J. de Waal (in association with Lawyers for Human Rights and the Law Society of South Africa), *The Bill of Rights Handbook*, Juta & Co, 6<sup>th</sup> ed. Cape Town (South Africa), 2013, p. 333.

64 J. D. van der Vyver, ‘Multi-Tiered Marriages in South Africa’, in J. A. Nichols (ed.), *Marriage and Divorce in a Multicultural Context Multi-Tiered Marriage and the Boundaries of Civil Law and Religion*, Cambridge University Press, Cambridge (UK), 2012, p. 200.

65 *Ibid.*

66 Currie & de Waal, *supra* n. 63, at 333-334.

polygamous marriage.<sup>67</sup> It was the latter approach which the Court gradually adopted.

In *Amod* and *Daniels*, the CCSA highlighted the monogamous religious marriage. The only difference between the couples in question and common law couples was the certificate. If this led to detriment of the widows, they would be effectively discriminated against as women on the basis of religion and belief. In the *Amod* Supreme Court case, Chief Justice Mahomed refuted the apartheid era precedent which called Islamic marriage contrary to *boni mores* because of its (potentially) polygamous nature. He referred to the “new ethos” of “tolerance, pluralism and religious freedom”. This passage was repeated in *Daniels*. It symbolized the equation of cultural biases with apartheid era discrimination and the desire to break with that legacy. However, the Court reemphasized in *Daniels* that its ruling did not “foreshadow any answer on the question as to whether polygynous marriages are themselves consistent with the Constitution”.<sup>68</sup>

Finally, *Hassam* made it necessary to decide whether the equality argument also applied for a polygamous Islamic marriage. As her husband had married a second wife (without her knowledge or consent), the dilemma was either to acknowledge her rights as spouse in a polygamous marriage or to leave her empty-handed after his passing. The CCSA ruled in her favor. Mrs. Hassam was a spouse for the purpose of inheritance and in this case the Court made sure to mention it did not want to interfere in the discussion about the adoption of a Muslim Marriage Act. The Recognition of Customary Marriages Act 120 of 1998 sought to offer official status to customary marriages while retaining protection of equality.<sup>69</sup> However, recognition of Muslim marriages and personal and family law by legislation provoked so much debate inside and outside the Muslim community that it had prevented the passing of legislation thus far.

The 2004 *Bhe* case, not amongst the selected cases, concerning traditional African law and marriage, also made clear that the Constitutional Court had a double equality commitment, much like in the religious liberty cases. The first commitment was then towards equal treatment of cultural and religious identities. The second was to equal treatment of individuals, including equal treatment of men and women, in equal circumstances. The Court was cautious of “slippery slopes” and promoted “living customary law”, which was an acknowledgement of the rules that are adapted to fit in “with changed circumstances”.<sup>70</sup> There are human rights scholars and advocates, outside of the

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67 J. Sinclair, ‘Family Rights’, in D. Van Wyk, J. Dugard, V.B. de Villiers, D. Davis (eds.), *Rights and Constitutionalism, The New South African Legal Order*, Clarendon Press, Oxford (UK), 1996, pp. 561-565.

68 CCSA, *Hassam v. Jacobs NO and Others*, Case CCT83/08, 15 July 2009, paras 24, 30 and 35.

69 See van der Vyver, *supra* n. 64, at 201.

70 CCSA, *Bhe and Others v. Khayelitsha Magistrate and Others*, Case CCT49/03, 15 October 2004, para. 87.

religious minorities in question, who believe in a synthesis of the two equality promises. Eventually “freedom of religious exercise” in South Africa may “empower a pious Muslim man to take four wives into his loving permanent care”.<sup>71</sup>

In 2009, the Women’s Legal Centre Trust sought direct access to the Constitutional Court to declare that the failure of Parliament to enact a Muslim Marriage thus far, which would have remedied uncertainties, constituted a breach of constitutional obligations. In accordance with the Constitution, the Constitutional Court can make such a declaration. However, the CCSA in the *Women’s Legal Centre Trust* case specified that the provision was to be interpreted narrowly while constitutional review (of proposed or existing legislation) must be interpreted broadly to guarantee protection of constitutional rights. Finally, the Court considered that given the many interests and choices involved in adopting legislation recognizing Muslim marriages, it would not be appropriate to decide as a Court of first and final instance. Quite recently the Women’s Legal Centre Trust brought a case to the CCSA to invalidate the Marriage Act and Divorce Act, for amongst others not recognizing marriages conducted under *Shari’a*. The CCSA declared in 2022 that the challenged Acts were indeed with the Constitution in that they fail to recognize such marriages, marriages which have not been registered as civil marriages, as valid marriages for all purposes in South Africa, and to regulate the consequences of such recognition.<sup>72</sup>

Just like the South African widows, Mrs. Yiğit was only married in accordance with Islamic law in Turkey. National law recognized only civil law marriage. Hence, after her husband’s passing Mrs. Yiğit had no pension, social security, or inheritance rights. Mrs. Yiğit never raised the freedom of religion and belief in her plight. After all, the declared state doctrine of *laïcité* was the reason for the insistence on civil law marriage. She raised her rights under private and family life. At the ECtHR, the majority found against Mrs. Yiğit. Inheritance and social security law differentiated between married and unmarried couples. Mrs. Yiğit was not married, while there was no legal obstacle to getting married. So, she was no widow in the eyes of the law. But was the differentiation as such justified? The concurring Judge Rozakis drew attention to the social fact of lasting unions and families outside marriage in many member states. The “living instrument” doctrine did not yet mandate

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71 J. Witte Jr. and J.A. Nichols, ‘The Frontiers of Marital Pluralism- An Afterword’, in J. A. Nichols (ed.), *Marriage and Divorce in a Multicultural Context Multi-Tiered Marriage and the Boundaries of Civil Law and Religion*, Cambridge University Press, Cambridge (UK), 2012, p. 366.

72 CCSA, *Women’s Legal Centre Trust v. President of the Republic*, Case CCT13/09, July 2009, paras 11-12 and 23. See CCSA, *Women’s Legal Centre Trust v President of the Republic of South Africa and Others*, Case CCT 24/21, 28 June 2022.

that all lasting unions and families were treated equally in all cases.<sup>73</sup> What was implied, was that in the future it might.

The Turkish Government took the position that differentiation between legal marriage and other unions had the purpose to “protect the most important building block of society, the family”.<sup>74</sup> Mrs. Yiğit and her husband might not have disagreed. For their own purposes, most probably they were married, and the civil marriage most likely represented nothing more than a formality. Arguably, inspiration from the CCSA cases on Islamic marriages would have led to a different outcome. One which have done more to protect the equality of Mrs. Yiğit *vis-à-vis* other widows in Turkey.

#### 4.3.4 Same-sex marriage

The issue of same-sex marriage often raises controversy. Some of the arguments on either side are inspired by religion and belief. This was and is no different in Canada, before and after the amendment to the Marriage Act<sup>75</sup> or in South Africa before and after *Fourie*.

The four questions put to the Supreme Court of Canada in *Same-Sex Marriage* regarded the jurisdiction of the national Parliament to change the law in this regard, whether the proposed legalization was consistent with the Charter, whether officials who did not want to participate in such marriages for religious reasons would be protected, and whether legislation in the provinces at the time, restricting marriage to be eligible for different-sex couples only, was consistent with the Charter.<sup>76</sup>

The Court concluded that the national parliament could change the law so as to extend the right to marry to same-sex couples. It found that the act, rather than being in opposition to the Charter, furthered the Charter values. The SCC proposed that officials who did not want to be involved in the execution of such marriages for religious reasons, could claim conscientious objection on basis of the freedom of religion and belief. Finally, the Court deemed the fourth question, regarding the situation before the amendment, irrelevant, since the Act proposed to alter the legal situation.

The CCSA in *Fourie* ordered the legislator to accommodate same-sex couples wishing to enter into a legally recognized union. Consequently, the Civil Union

73 ECtHR (GC), *Terife Yiğit v. Turkey*, app.no. 3976/05, 2 November 2010, *Concurring opinion of Judge Rozakis*.

74 ECtHR (GC), *Terife Yiğit v. Turkey*, app.no. 3976/05, 2 November 2010, para. 61.

75 For a discussion of the internal debate within the United Church of Canada see J. Nedelsky and R. Hutchinson, ‘Clashes of Principle and the Possibility of Dialogue: A Case Study of Same-Sex marriage in the United Church of Canada’, in R. Moon (ed.), *Law and Religious Pluralism in Canada*, UBC Press, Vancouver/Toronto (Canada), 2008.

76 See SCC, *Reference re Same-Sex Marriage*, Case 29866, [2004] 3 SCR 698, 9 December 2004, para. 2.

Act 17 of 2006 provided official legal status, either as a civil union or marriage, for same-sex couples.<sup>77</sup> Mrs. Fourie and Mrs. Bonthuys had been a couple for more than a decade and wanted to get married. In 2002, they asked the Pretoria High Court to declare their right to get married.<sup>78</sup> While the *Fourie* case was being heard in the Supreme Court of Appeal, the Lesbian and Gay Equality Project launched an application with the same ambition.<sup>79</sup> The judgment without any doubt was part of the formulation of the new ethos<sup>80</sup> which characterized South Africa as post-apartheid Rainbow Nation, as relied on by Justice Mohamed in *Daniels*.

In the *boni mores* of the new ethos, marriage as an institution was seen as one of great social, cultural, and emotional relevance. In 2005, a majority of the Court still held that the distinction between married and unmarried couples in the Maintenance of Surviving Spouses Act was justified, mainly because the law attributed many kinds of special privileges to married couples as opposed to unmarried couples.<sup>81</sup> Same-sex couples however were excluded, literally “by definition”. They could never claim to be married. “The position of partners married according to Muslim rites in this respect is different. They fall under the ordinary meaning of ‘spouse’”.<sup>82</sup> It was the categorical exclusion of same-sex couples which violated the new ethos.

Both the SCC and the CCSA showed that a free and open society required mutual respect and a balance to be struck between the rights of different people and groups. Their reasoning implicitly and explicitly touched on fundamental issues to do with the freedom of religion and belief.

The exclusion of same-sex couples from the institution of marriage in Canada and South Africa, as elsewhere in the world, was rooted in the past. The marriage which the state recognized was the “civil marriage”, which may or may not coincide or be identical to a religious or cultural marriage. Civil marriage as a state institution afforded couples some kind of state or societal recognition of their bond, often with legal consequences.<sup>83</sup> If the state limited the civil marriage because of the beliefs of one part of society, it put their beliefs above those who believe differently.

The South African Constitutional Court said in another of the selected cases (*Solberg c.s.*, section I2.4.4) that parliament “[b]y endorsing a particular faith as a direct and sectarian source of values for legislation binding on the whole

77 See van der Vyver, *supra* n. 64, at 201.

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

79 *Ibid.*, para. 34.

80 See CCSA, *Daniels v. Campbell NO and Others*, Case CCT40/03, 11 March 2004, para. 30.

81 See CCSA, *Volks v. Robinson*, Case CCT12/04, 25 February 2005. See also van der Vyver, *supra* n. 64, at 213.

82 *Daniels v. Campbell NO and Others*, Case CCT40/03, *supra* n. 80, para. 30.

83 See Schneiderman, *supra* n. 59, at 74.

nation, it exceeds the competence granted to it by the Constitution". This was because it divided the nation into "insiders who belong, and outsiders who are tolerated". "This is impermissible in the multi-faith, heterodox society contemplated by our Constitution."<sup>84</sup> The SCC in *Same-Sex Marriage* referred to a past when "marriage and religion were thought to be inseparable". "This is no longer the case. Canada is a pluralistic society. Marriage, from the perspective of the state, is a civil institution."<sup>85</sup>

In Canada and South Africa, as elsewhere in the world where the issue of same-sex marriage is raised in courts, there are always constitutional issues regarding the power of courts and/or legislatures in defining the concept, foundation, or institution of marriage. The arguments and counterarguments are very relative to the respective constitutional orders. Yet from the perspective of the freedom of religion and belief, a state recognizing just one concept, foundation and definition of marriage will always be infringing the freedom of those who hold another concept, foundation, or institution of marriage to be true. Such infringement must be justified under a limitations clause. And the relevant question is if this is possible as a matter of principle. The distinction between the "sacred and the secular" must be maintained in a constitutional state in a truly free society, the CCSA said in *Fourie*. Forcing one into the other was contrary to it.<sup>86</sup>

For those who on the basis of sincere beliefs refuse to actively participate in the performance of a same-sex marriage, both the SCC and the CCSA acknowledged "conscientious objection" on the basis of freedom of religion and belief.<sup>87</sup> According to Ryder's "conception of equal religious citizenship", freedom of religion requires the accommodation of religious objectors as long as equal access to same-sex marriage is guaranteed.<sup>88</sup> After the introduction of same-sex marriage in Canada, civil servants who had religious objections to performing such marriages relied on the freedom of religion and belief. This issue has been resolved in different fashions by the provincial governments:<sup>89</sup>

- three provinces issued statements to marriage commissioners saying they must resign if unwilling to perform same-sex marriage and be given other posts;
- four provinces allowed conscientious refusal for civil servants, as they took the position that this would not compromise equal access to same-sex marriage;

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84 CCSA, *S v. Lawrence; S v. Negal; S v. Solberg*, Cases CCT38/96; CCT39/96; CCT40/96, 6 October 1997, para. 179.

85 *Reference re Same-Sex Marriage*, Case 29866, *supra* n. 76, para. 22.

86 *Minister of Home Affairs and Another v. Fourie et al.*, Cases CCT60/04 and CCT10/05, *supra* n. 78, para. 94.

87 *Reference re Same-Sex Marriage*, Case 29866, *supra* n. 76, paras 58-59.

88 See Ryder, *supra* n. 1, at 101-102.

89 See *ibid.*, pp. 100-101.

- in Nova Scotia, Ontario and Quebec, the issue has not arisen, because legal marriage can be performed by judges and justices of the peace or even any individual chosen by parties (Quebec).

After all, the freedom of religion does not include the right to violate the equality rights of others. This places on the provincial governments the burden to demonstrate “undue hardship” when allowing conscientious objection. Furthermore, now that same-sex marriage is legal, it is not discriminatory for governments to require new civil servants to accept performing same-sex marriage. The freedom of religion issue is relevant mainly for those civil servants who applied for their jobs at a time when it was not foreseeable that this would ever be the case.

From a more fundamental point of view, the question is whether the freedom of religion and belief should not always oblige the state to accommodate civil servants, who are conscientious objectors, by allowing them from refraining from being engaged in the performance of marriages at odds with their beliefs. The obvious limit is of course that the accommodation may not negatively affect the possibility of the state to conduct those marriages, because that would violate the equality rights of the candidate spouses.

The CCSA, while ruling that the absence of a possibility for same-sex couples to get married constituted a violation of the constitutional rights, did not fill the “constitutional vacuum” itself. It “cast the ball” towards the legislator. The Civil Union Act 17 of 2006 provided official legal status, either as a civil union or marriage, for same-sex couples.<sup>90</sup>

#### 4.3.5 The importance of the issue of marriage

But did the *boni mores* of the new ethos also include co-habitants next to religious and traditional marriages, as well as same-sex marriages? All marriage cases show that people themselves are the authors of the “mores” according to which they shape their intimate and family relations. In *Robinson*, a majority of judges on the CCSA found the differentiation between married and unmarried opposite-sex partners in inheritance to be constitutional. There is a choice to get married and to not get married. Both must be respected.<sup>91</sup> The dissenting judges disagreed. The privilege given to marriage was unfair discrimination. Why should marriage “inevitably remain privileged”? All lasting partnerships play a very similar role in society to marriages.<sup>92</sup>

For many ECHR member states, for many years the position of the Turkish Government in *Yiğit* was natural and logical. It also justified unequal treatment

90 See van der Vyver, *supra* n. 64, at 201.

91 *Volks v. Robinson*, Case CCT12/04, *supra* n. 81, paras 90-96.

92 *Ibid.*, paras 118 and 122.

against children born out of wedlock,<sup>93</sup> unequal treatment of same-sex couples in the possibility of obtaining a legal marriage, and unequal treatment of unmarried couples. Some of these differences over time failed to stand the test of necessity in a democratic society. Are not all families and lasting relationships “building blocks”?

In his separate dissenting opinion in *Robinson*, Sachs argued for a situational assessment of all relationships and families.<sup>94</sup> He stressed the value given to marriage by cultural and religious groups. Based on their freedom of religion and belief, these groups also retained a right to “condemn those who are guilty of what they may regard as fornication and adultery”. But their beliefs could not be considered a source of the law. Protection of marriages did not require the protection to be exclusive to marriages.<sup>95</sup> Indeed his argument heralded the unanimous decision in, which did away with still existing legal action against adultery. The roots of the claims directed against adultery, so Madlanga argued, lay in patriarchy.<sup>96</sup> Chief Justice Mogoeng, in his separate concurring opinion, stressed that marriage is a human institution. The law regulated it, enforced obligations which flow from it and must take away obstacles which interfere with it. All the rest was the obligation of the spouses. The law cannot rescue an otherwise ailing marriage.<sup>97</sup>

The current legal concept of (civil) marriage, as applied in many parts of the world, is a consequence of the modern state born out of Enlightenment and the French Revolution. Prior to this, the state had no role in forging marriages.<sup>98</sup> While for mainly Catholic France, state marriage was an instrument of separating church and state, for many Protestant nations the civil marriage was a beneficial way of containing the minority Catholic communities. These concepts informed the member states of the Council of Europe (CoE), Canada and South Africa. Interestingly nowadays, the issue of religious personal and marriage law is not just important for religious and cultural minorities in Western liberal democracies, but “increasingly relevant for more traditional Christian communities”.<sup>99</sup> Not only in Canada, South Africa and Europe, but elsewhere in the world amongst “various Christians, Jews, Muslims, Hindus, and others [there] is a call to withdraw from the state family law system and to operate their own internal religious legal systems”.<sup>100</sup>

In *Fourie*, the CCSA said that a truly free society distinction between the “sacred and the secular” must be maintained. “Forcing one into the other”

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93 ECtHR, *Marckx v. Belgium*, app. no.6833/74, 13 June 1979 and *Dudgeon v. the United Kingdom*, app. no.7525/76, 22 October 1981.

94 *Volks v. Robinson*, Case CCT12/04, *supra* n. 81, paras 147-149 and 151.

95 *Ibid.*, paras 204 and 206-208.

96 CCSA, *DE v. RH*, Case CCT182/14, 19 June 2015, para. 14.

97 *Ibid.*, paras 67-71.

98 See Witte and Nichols, *supra* n. 71, at 362.

99 *Ibid.*, p. 358.

100 *Ibid.*, p. 365.

was contrary to the principles of a free society and a constitutional state.<sup>101</sup> The argument can work both ways. Sunstein and Thaler challenge us to imagine a society without civil marriage. Faith-based and secular institutions would be free to define marriage as they see fit, thereby accommodating all various views on marriage. Couples choose themselves. The state regulates only inheritance, taxation, pensions, insurance and bans incestuous relationships, (sexual) violence and marriage of minors.<sup>102</sup> The idea might seem radical from a current perspective, but before the modern state so did civil marriage.

Witte and Nichols note that liberalism's contractarian logic supports a pluralist personal and marriage law system, in which couples and faith-based communities can govern their own domestic lives instead of the state. While some may want to opt out of state law, others could choose to opt in. Obviously, the system of manifold accommodation would require all to tolerate all the diverging choices. It also requires the acceptance that at some level, the state has the power to intervene and regulate. A legal pluralism based on liberalism's values can never become a claim to absolute legal autonomy and a wholly independent parallel legal order.<sup>103</sup>

#### 4.4 THE FREEDOM OF RELIGION BELIEF AND GROUP AUTONOMY

Communities of believers create infrastructures which consist, for example, of places of worship, religious schools and religious organizations. This enables their members to take part in rituals, sacrosanct activities and other relevant practices.<sup>104</sup> Dinstein explains that "freedom of religion, as an individual right, may be nullified unless complemented by a collective human right of the religious group to construct the infrastructure" for the individual enjoyment of the right.<sup>105</sup> This is echoed in many of the selected cases by all three tribunals. The Canadian Charter, the South African Bill of Rights and the European Convention each explicitly or implicitly recognize a collective dimension of freedom of religion and belief.

Individuals and groups rely on the collective dimension when the state or others interfere with the group autonomy created by the freedom right. Sometimes, individuals claim that the group autonomy's scope is too broad

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101 *Minister of Home Affairs and Another v. Fourie et al.*, Cases CCT60/04 and CCT10/05, *supra* n. 78, para. 94.

102 C. R. Sunstein and R. H. Thaler, 'Privatizing Marriage', in *The Monist*, vol. 91, nos. 3 and 4, pp. 377-87 (2008), pp. 377-387.

103 Witte and Nichols, *supra* n. 71, at 364-371.

104 See Evans, *supra* n. 8, at 103.

105 Y. Dinstein, 'Freedom of Religion and Religious Minorities', in Y. Dinstein (ed.) *The Protection of Minorities and Human Rights*, M. Nijhoff, Dordrecht (Netherlands), 1992, p. 152, cited by Evans, *supra* n. 8, at 103.

and infringes on individual rights. Sometimes, difficult questions have to be answered about the coexistence between state law and “own law” of communities.

#### 4.4.1 Different aspects of group autonomy for faith-based groups

The collective dimension of freedom of religion and belief features in a total of 13 of the case studies. Six of these cases were decided by the ECtHR, five were decided by the SCC, two were decided by the CCSA. However, in one other South African case, the collective dimension plays a major “support role”.

The Canadian *Sioui* case (section I1.4.1) was not decided under the Charter but concerned treaty-rights for members of a First Nation to roam freely in their ancestral hunting grounds, now a national park. *Hofer* (section I1.4.2) was about a contractual conflict between a Hutterian community and one of its members. In *Trinity Western University (TWU)* (section I1.4.5), the issue was whether a Christian university which had banned homosexual relations could nevertheless pre-educate teachers for the public educational system. The Jehovah’s Witnesses congregation in *Lafontaine* (section I1.4.8) wanted to establish a place of worship, but remained unsuccessful because of municipal zoning. The *Alberta v. Hutterian Brethren* case (section I1.4.13) was about the withdrawal of an exemption for the Anabaptist brethren, regarding the obligatory photograph on drivers licenses.

In the South African case *Christian Education* (section I2.4.6), an educational association resisted the national ban on corporal punishment in schools. Corporal punishment was considered part of its faith-based educational approach. *De Lange* (section I2.4.15) was about a Methodist minister who was dismissed when she married her same-sex partner in a civil procedure. In *Prince* (section I2.4.7), already discussed in sections above, the collective dimension played a major “support role”, as the CCSA assessed the workability of an exemption from illicit drug law for the Rastafarian community.

*Cha’are Shalom* (section I3.4.3) decided by the ECtHR was about the permit the group wanted to acquire so it could slaughter in accordance with Jewish ultra-orthodox precepts. *Hasan v. Chaush* (section I3.4.4) dealt with a conflict between two leaders and factions within the Muslim community of Bulgaria. The question was whether the government’s official recognition of one of the two was interference with the collective dimension. *Refah* (section I3.4.5) was about a faith-based political party, declared unconstitutional by the Turkish Constitutional Court while in government.

The *Mouvement Raëlien* case (section I3.4.12) concerned a new religious community which advertised with posters. In one Swiss canton, the posters were banned. *Sindicatul Păstorul Cel Bun* (section I3.4.13) was about the question whether the clerical and lay employees of the Orthodox Church in Romania may organize themselves in a new trade union. The sixth Strasbourg case,

*Fernández Martínez* (section I3.4.14), like *De Lange* concerned a dismissal. The claimant was a “married priest” who taught Catholic religion in the public school system. When the Church no longer regarded him fit to do so, he was not prolonged as a teacher.

In *Sioui, Alberta v. Hutterian Brethren, Lafontaine, Cha'are Shalom, Mouvement Raëlien* and with regard to the community aspect in *Prince*, the collective dimension relates primarily to collective practice and manifestation. In *Hofer, Trinity Western University, Christian Education, De Lange, Hasan v. Chaush, Sindicatul Păstorul Cel Bun* and *Fernández Martínez*, the collective dimension translates to organizational autonomy. *Refah* features a different aspect, namely political freedom for faith-based communities to influence the political process within the nations they live in. One of the central ideas advocated by the *Refah* party is legal pluralism. This relates to cases of religious and/or traditional family law, discussed elaborately in section 4.3. It also relates to freedom of religion and belief and secularism discussed in section 4.7. In this section, it will be discussed from the angle of the “own law” of faith-based communities.

#### 4.4.2 Collective practice and manifestation

Collective worship may very well be at the center of communal practice and manifestation. The Jehovah's Witness community of Lafontaine, Quebec, was looking for a lot to build a place of worship. Unfortunately, wherever there were lots for sale, the zoning plan did not allow for places of worship. On three occasions, the congregation applied after it had found buildings/land in areas where there were also other places of worship. Three times, the applications were denied.<sup>106</sup>

The majority and the minority on the SCC agreed that the municipality did not live up to required transparency and procedural fairness. What they disagreed on, was whether this amounted to a breach of a positive obligation. The majority found a positive obligation of cooperation which followed from the freedom of religion and belief. Denial without reason amounted to a breach of procedural fairness.<sup>107</sup> The minority found that state neutrality prevented a municipality from actively assisting a congregation in finding a lot to build a house of worship.<sup>108</sup> The dissenting judges did not answer how prejudice hiding under neutrality could be prevented.

In *Sioui*, the invoked rights did not follow from the Charter, but from a treaty concluded long before the existence of contemporary Canada between a British officer and the Huron nation. The treaty guaranteed freedom to “carry

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106 SCC, *Congrégation des témoins de Jéhova de St-Jérôme-Lafontaine v. Lafontaine (Village)*, Case 29507, [2004] 2 SCR 650, 30 June 2004, paras 18-27.

107 *Ibid.*, paras 1-9.

108 *Ibid.*, para. 71.

on their customs and their religion” in the area. The rights were invoked by members of a present-day Huron band. To adhere to ancestral customs, they had camped in a national park and cut down trees to make a fire. According to existing laws, the Hurons were punishable. The treaty, however, covered the area in the park.<sup>109</sup>

The SCC first established that the treaty still had legal force under Canadian law. But this did not automatically mean that practice of ancestral customs in the park was protected. After all, the treaty did not specify any area. Yet “for a freedom to have real value and meaning, it must be possible to exercise it somewhere.” A “liberal and generous approach [...] must be adopted towards Indians’ rights”.<sup>110</sup> Hence, the claimant’s rights must lead to an exemption from the generally applicable Act (see section 4.2). The SCC found the interests of the Park Act to be reconcilable with the treaty rights. The Huron practiced to not compromise the overall purpose of preservation of nature. “Exclusive use is not an essential aspect of public ownership.”<sup>111</sup>

While the generous and liberal approach in *Sioui* led to an exemption from generally applicable laws, in *Alberta v. Hutterian Brethren*, the SCC found in favor of the province which revoked an exemption. The province used to allow the Hutterians to hold drivers licenses without photographs. For the Hutterians, photographs were contrary to their belief that no images of humans must be made. Yet the transport of people and goods was essential to their life as a community, isolated from others in the countryside. For the majority, however, the Hutterians still had a meaningful choice. Not driving themselves, but hiring drivers with a photograph license, would make the rural lifestyle more costly but not impossible, while they could adhere to their rejection of photographs.<sup>112</sup>

The minority disagreed. Because the very requirement of the photo “offends the religious beliefs of the Wilson Colony members”, Justice Abella explained, it was “difficult to conclude that it minimally impairs the Hutterites’ religious rights”.<sup>113</sup> With regard to the salutary effects, she noted that the system with the non-photo licenses had worked without incident in the past. Not including them now would only have minimal effects for the province.<sup>114</sup>

In *Prince*, the CCSA was also looking to reconcile the purpose of a general prohibition with minority rights. It concluded that a general exemption for the Rastafarian community was unworkable because of the loose organizational structure. Exemption would also imply that state institutions would have to decide when *bona fide* Rastafari use was at stake and when it was not. This

109 SCC, *R. v. Sioui*, Case 20628, [1990] 1 SCR 1025, 24 May 1990, pp. 8-13.

110 *Ibid.*, pp. 45-47.

111 *Ibid.*, p. 53.

112 SCC, *Alberta v. Hutterian Brethren of Wilson Colony*, Case 32186, [2009] 2 SCR 567, 24 July 2009, paras 93 and 97-98.

113 *Ibid.*, paras 147-148.

114 *Ibid.*, paras 157-158.

was inconsistent with the freedom of religion<sup>115</sup> (see further section 4.2.2). The South African Constitution explicitly acknowledges collective rights. In this regard the term “communities” is used. Community is neutral as far as numerical relations are concerned and still signifies “non-dominance”.<sup>116</sup> South African history teaches that communities outnumbered by others can be the dominant and excluding party.

Community also connotes voluntarism: individuals who feel connected by beliefs, practices, customs and rites which they share. However, O’Reagan, the dissenting judge in the South African *Pillay* case, pointed to a danger of a society of the atomized communities rather than a unified diverse society.<sup>117</sup> This echoes a commonly heard criticism of group rights. The question is whether a truly open society is conceivable without some communities which wish to withdraw from general society? (see further section 4.4.5).

The ECtHR has explicitly and vividly acknowledged the “indispensable” nature of “autonomous existence of religious communities” for “pluralism in a democratic society”.<sup>118</sup> While giving bold protection to organizational autonomy (see section 4.4.3), in two cases in the selection in which collective practice and manifestation features, the Court found against the communities. The ultra-orthodox Jews of France could not rely on the majority of the Court for a permit to slaughter *glatt kosher*. Nor could the Raëlien Movement of Switzerland rely on the majority to protect them to spread their message by poster. Some have criticized that the Strasbourg institutions have neglected this element of the collective dimension, unlike the organizational autonomy since the days of the Commission. For example, in one Commission case a Muslim teacher requested time off to pray at the local mosque. The Commission found that since he had a prayer room in school, there was no interference. Yet taking part in the communal nature of Friday Prayers is of special significance to many Muslims.<sup>119</sup> “Whether a belief is practiced ‘alone or in community with others’ and in ‘public or in private’ is a matter of choice for the believer”<sup>120</sup> Evans explains.

Cha’are Shalom Ve Tsedek is an organization representing ultra-orthodox Jews in France. The community’s standard of *kosher* meat differs from main-

115 CCSA, *Prince v. President of the Cape Law Society*, Case CCT36/00B, 25 January 2002, paras 131-138.

116 Currie & de Waal, *supra* n. 63, at 628-629.

117 *MEC for Education: KwaZulu-Natal and Other v. Pillay*, Case CCT51/06, *supra* n. 7, paras 154-156.

118 See Z. R. Calo, ‘Pluralism, Secularism and the European Court of Human Rights’, in *Journal of Law and Religion*, vol. 26, no. 1, pp. 261-280 (2010), p. 262. See B. Rainey, P. McCormick and C. Ovey (eds.), *Jacobs, White & Ovey: The European Convention on Human Rights*, 8th ed., Oxford University Press, Oxford (UK), 2021, p. 461. See, e.g., ECtHR (C), *Metropolitan Church of Bessarabia and Others v. Moldova*, app. no. 25781/94, 13 December 2001.

119 EComHR, *X v. the United Kingdom*, app. no. 8160/78, 12 March 1981.

120 Evans, *supra* n. 8, at 103.

stream orthodoxy and is called *glatt kosher*. The Government had refused a permit for the community, as the mainstream orthodox community already possessed permits. Also, the ultra-orthodox community already imported *glatt kosher* meat from Belgium. This is why the ECtHR found against the community.<sup>121</sup> The judgment fails to explain conceptually how one member state can rely on the policies of another to discharge itself of obligations under the Convention.

The majority accepted that slaughter in accordance with religious law was covered by Article 9. However, it found that selling such meat was not protected by Article 9.<sup>122</sup> Critics like Learner and Rabello have asserted that the Court failed to take into consideration that slaughter in accordance with Jewish law “is not simply a way to provide permitted food but a manifestation of a religious belief and a way of life”.<sup>123</sup> The majority instead insisted that selling *glatt kosher* meat was essentially commercial and only religious “in an accessory way”. The Government had raised the same argument.<sup>124</sup> But does the reasoning not sound more logical the other way around? Whoever sells food to a minority (within a minority) faith-based group, cannot have departed from commercial considerations first. It is the commercial nature, which is an accessory, while the religious nature is dominant.

Both the majority and minority opinions in *Cha'are* cited earlier jurisprudence about the state as impartial organizer of pluralism. Lerner and Rabello suggest that the Government's purpose was to eliminate pluralism within the Jewish community.<sup>125</sup> Indeed the minority stressed that the state may not eliminate pluralism to eliminate communal tension. In their opinion, the denial of the application constitutes an interference which cannot be justified under the limitations clause. They find a violation of the freedom of religion and belief in conjunction with the right to non-discrimination.<sup>126</sup>

The Movement Raëlien established in the 1970s was a new religion. The Swiss canton of Neuchâtel prohibited posters of the movement which referred to the website. On the website, which was legal, the core beliefs were explained. They included human cloning “geniocracy” and “sensual awakening”. “Geniocracy” is based on the idea that only the most competent and intelligent (geniuses) should rule. “Sensual awakening” infers that sexual liberty is to be enjoyed by everyone, including minors. The website also

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121 ECtHR (GC), *Cha'are Shalom Ve Tsedek v. France*, app.no. 27417/95, 27 June 2000, paras 80-82.

122 *Ibid.*, paras 74 and 82-83

123 P. Lerner and A. M. Rabello, ‘The Prohibition of Ritual Slaughtering (Kosher Shechita and Halal) and Freedom of Religion of Minorities’, in *Journal of Law and Religion*, vol. 22, no. 1, pp. 1-62 (2006), p. 20.

124 *Cha'are Shalom Ve Tsedek v. France*, *supra* n. 121, paras 68-69.

125 *Cha'are Shalom Ve Tsedek v. France*, *supra* n. 121, *Joint dissenting opinion of Judges Sir Nicolas Bratza, Fischbach, Thomassen, Tsatsa-Nikolovska, Panfîru, Levits and Traja*, para. 1, referring to ECtHR (Second Section), *Serif v. Greece*, app. no. 38178/97, 14 December 1999, para. 53,

126 *Ibid.*

contained links to other related websites, for example a company offering human cloning services. The local authorities argued that the poster offended the “religious and moral feelings of the public”. They also pointed to pedophilia cases against members of the movement.<sup>127</sup>

The ECtHR allowed for the prohibition relying on a large margin of appreciation. In the majority’s view, the message was essentially commercial. The dissenting judges believed that the margin should have been narrow because the speech was only commercial in an accessory way. Just like in *Cha’are*, the difference of opinion at the Court revolved around commercial aspects of the manifestation. The minority found that the essence of the posters and website was to disseminate beliefs. In their view, the “state as impartial organizer” should not have assessed the content of the poster and website ideologically. While one may have personal opinions about the concepts of the Raëlians, it was not for the state to exercise “content-based expression control” which “ends up as pure speaker-based discrimination”.<sup>128</sup>

This minority view resembled the assessment of the majority in *TWU*: “For better or for worse, tolerance of divergent beliefs is a hallmark of a democratic society.”<sup>129</sup> If tolerance only stretched to the beliefs we find agreeable, acceptable or logical, this would render tolerance empty. As Justice Sachs, discussing the South African *Prince* case in his Free Diary, explained, “[t]he true test of tolerance comes when the practice exist on the margins of society and appear bizarre, even threatening to the mainstream”.<sup>130</sup> His colleague Ngcobo, who was willing to find in Mr. Prince’s favor, said “beliefs that believers hold sacred and thus central to their religious faith may strike non-believers as bizarre, illogical or irrational”. “Yet, [this] does not detract [from] the protection guaranteed by the right to freedom of religion.”<sup>131</sup>

#### 4.4.3 Organizational autonomy

Organizational freedom, being another aspect of the freedom of religion and belief as group autonomy, is the freedom of faith-based communities to operate their organizational structures as freely as possible, without interference by

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127 ECtHR (GC), *Mouvement Raëlien Suisse v. Switzerland*, app. no. 16354/06, 13 July 2012, paras 34-41.

128 *Mouvement Raëlien Suisse v. Switzerland*, app. no. 16354/06, *supra* n. 127, *Dissenting opinion of Judges Sajó, Lazarova Trajkovska and Vučinić*, para. II.1; *Dissenting opinion of Judges Tulkens, Sajó, Lazarova Trajkovska, Bianku, Power-Forde, Vučinić and Yudkivska*, para. 11; *Dissenting opinion of Judge Pinto de Albuquerque*, p. 67.

129 SCC, *Trinity Western University v. College of Teachers*, Case 27168, [2001] 1 SCR 772, 17 May 2001, para. 36.

130 A. Sachs, *The Free Diary of Albie Sachs*, Random House, Johannesburg (South Africa), 2004, p. 67.

131 *Prince v. President of the Cape Law Society*, Case CCT36/00B, *supra* n. 18, para. 42.

the state or by others. Justice Sachs explained to us in *Christian Education*, discussed below, that “religious bodies play a large part in public life, through schools, hospitals and poverty relief. They command ethical behavior from their members. [T]hey promote music, art and theatre [...]. They are part of the fabric of public life, and constitute active elements of the diverse and pluralistic nation contemplated by the Constitution. Religion is not just a question of belief or doctrine. It is part of a way of life, of a people’s temper and culture.”<sup>132</sup>

Indeed, depending on their own size, tenets and context, faith-based communities operate schools and universities, social organizations, care or cure organizations. Some would also argue that enterprises with an explicit faith-based identity fall under the organizational freedom.<sup>133</sup> The ECtHR in *Hasan and Chaush* explained that an organizational structure is “not simply a form of their existence but [has] a substantive meaning”. “[R]eligious communities traditionally and universally exist in the form of organized structures.”<sup>134</sup>

In *TWU*, a Christian university obliged its students and staff to sign an agreement to refrain from same-sex relationships. According to the British Columbia College of Teachers (BCCT), this implied that the graduates of TWU would hold views on same-sex relationships which disqualified them from becoming good teachers in the public school system. LGBTQ+ students must be able to count on teachers to be supportive of their situation as a minority. The SCC, however, decided that simply assuming that graduates of TWU would behave in a discriminatory fashion towards these students was not called for. The freedom of religion and belief guaranteed TWU autonomy to engage in agreements with faculty and students which reflected their ethical beliefs. It was not for the BCCT to enforce a view of homosexuality on a religious minority.<sup>135</sup> As long as there was no evidence that the students were unfit to be teachers, there was no reason to exclude them from becoming teachers. If discrimination was found in the case of individual teachers, disciplinary measures were called for.<sup>136</sup> The SCC, thus, reconciled the rights to equal treatment and the collective freedom of religion and belief.

In 2018, the SCC had to decide a new case which involved the TWU’s covenant. This time it was the Law Society of British Columbia (LSBC) which had denied accreditation of the TWU’s law school. The decision followed a

132 *Christian Education South Africa v. Minister of Education*, Case CCT4/00, *supra* n. 25, para. 33.

133 Compare US Supreme Court, *Burwell v. Hobby Lobby Stores*, 573 US 682 (2014), 14 June 2014. See the discussion in J. L. Cohen, ‘Freedom of Religion, Inc.: Whose Sovereignty?’, *Netherlands Journal of Legal Philosophy*, vol. 43, no. 3, pp. 169-210 (2015).

134 ECtHR (GC), *Hasan and Chaush v. Bulgaria*, app.no. 30985/96, 26 October 2000, paras 56 and 62.

135 *Trinity Western University v. College of Teachers*, Case 27168, *supra* n. 129, paras 25 and 28.

136 *Ibid.*, paras 13 and 35- 37.

referendum amongst the members of LSBC which the responsible body had decided would be binding. A majority of 5:2 found that the decision struck the appropriate balance between the freedom of religion and belief and the equality rights the LSBC was pursuing.<sup>137</sup>

In *Hofer*, Daniel Hofer, a member of the Lakeside Colony, had been expelled by the leadership of his community due to a conflict. Mr. Hofer had not abided by the decision of the community leadership. According to the majority, the community's internal procedures did not stand the test of procedural fairness mandated by civil law. Dissenting Chief Justice McLachlin tried to understand the procedures as the community itself understood them. She concluded that they were "open and eminently fair". She concluded that the problem was not with procedural fairness, but the fundamental conflict of views. Mr. Hofer did not accept the decision taken by the community leadership. Yet as a member of the community, he had vowed to do so.<sup>138</sup>

In South African law, churches are viewed as voluntary associations. They are thus judged in terms of contractual law and can assert rights and have legal obligations to other legal subjects.<sup>139</sup> There is at least some debate as to whether juristic persons fall under the meaning of "everyone" in Section 15 of the Bill of Rights.<sup>140</sup> The Constitution protects both individual freedom of religion and belief and group rights of religious communities (see section 3.2). They are seen as two sides of the same coin, as the Constitutional Court recognized in *Christian Education*. Individuals often participate in collective activities as a manifestation of their individual faith. Communities depend on individuals to survive, and vice versa. According to the Constitutional Court, diversity can only be protected "through the double mechanism of positively enabling individuals to join with other individuals of their community, and negatively enjoining the state not to deny them the rights collectively to profess and practice their own religion (as well as enjoy their culture and use their language)".<sup>141</sup>

The case in *Christian Education* was launched by an organization which operates Christian schools. Parliament had only recently outlawed corporal punishment in education, including privately-run schools. Christian Education maintained that corporal punishment was an integral part of the Christian ethos adhered to by the schools and the parents who sent their children to

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<sup>137</sup> SCC, *Law Society of British Columbia v. Trinity Western University*, Case 37318, [2018] 2 SCR 293, 15 June 2018.

<sup>138</sup> SCC, *Lakeside Colony of Hutterian Brethren v. Hofer*, Case 22382, [1992] 3 SCR 165, 29 October 1992, pp. 73-83.

<sup>139</sup> P. Coertzen, 'The Position of Churches in South Africa under a New Constitution', in H. Warnik (ed.), *Legal Position of Churches and Church Autonomy*, Uitgeverij Peeters, Leuven (Belgium) 2001, pp. 45 and 50.

<sup>140</sup> Du Plessis, *supra* n. 6, at 18.

<sup>141</sup> *Christian Education South Africa v. Minister of Education*, Case CCT4/00, *supra* n. 25, paras 19 and 23.

school there.<sup>142</sup> The Constitutional Court unanimously found in favor of the Minister of Education in this case. The majority was sympathetic to the claimant's reasoning, but the rights to physical integrity of schoolchildren outweighed the rights engaged under the freedom of religion and belief.

The child, the CCSA argued, was "probably a believer, and a member of a family and a participant in a religious community". Yet, at the same time, the child was also an individual who could rely on constitutional protection.<sup>143</sup> The freedom of religion and belief included the "right to be different" which encompassed "space for members of communities to depart from a general norm". But the democratic process had weighed the interests and had concluded that children should not endure corporal punishment in their education, no matter if the school was state-run or privately-owned.<sup>144</sup>

The logic of the right to be different was that "members of large groups can more easily rely on the legislative process than can those belonging to smaller ones". These small communities must be protected even if the majority regards their beliefs as "unusual, bizarre or even threatening". Nevertheless, Sachs explained in the majority opinion, "the interest protected by section 31 is not a statistical one dependent on a counter-balancing of numbers, but a qualitative one based on respect for diversity". The right to be different does not require "treating everyone in the same way, but in treating everyone with equal concern and respect".<sup>145</sup> This signifies the South African emphasis on "community" explained above. The ECtHR in *Thlimmenos* also explored how equal concern and respect sometimes requires different instead of identical treatment (see section 4.2.2).

The "right to be different" entitled believers, where possible, to not have to be put to extremely painful and burdensome choices between respecting the law and the articles of their faith. But they could not claim an automatic right to be exempted from the laws of the land. The blanket ban of corporal punishment in all schools could be justified under the limitations clause. Anything else but a blanket ban would undermine the goal of preventing that all juveniles undergo the painful and degrading experience of corporal punishment in school. Parents were still free to incorporate corporal correction into education at home. They were only prevented from delegating it to teachers. Hence, not providing for an exception was proportional.<sup>146</sup> Sachs' careful maneuvering in *Christian Education*, explained here, has earned him the compliment that he is "alive to the communal dimension". More generally Du

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142 See *ibid.*, para. 2.

143 *Ibid.*, para. 15.

144 *Ibid.*, paras 24-25.

145 *Ibid.*, paras 24-25 and 42.

146 *Ibid.*, paras. 35 and 43-51.

Plessis finds that the Court signaled a “profound awareness of the group orientation inherent in the exercise of religious freedom”.<sup>147</sup>

While *TWU* and *Christian Education* exemplify conflicts between state institutions and faith-based communities, involving organizational freedom, *Hofer* showed us the complications involved in conflicts within the organizational structures of a community. The South African *De Lange* case, much like the ECtHR’s *Fernández Martínez* and *Sindicatul Păstorul Cel Bun*, also involved such internal conflicts. What makes *De Lange* and *Fernández Martínez* even more complicated is that on the one hand they involve privacy/family life rights of church officials, while on the other hand they also involve (deviation from) church doctrine.

It seems that it is exactly the solving of this puzzle on which majority and dissenting judges disagreed in the ECtHR’s *Fernández Martínez* case. The majority found an interference which was justified. The “principle of religious autonomy prevents the State from obliging a religious community to admit or exclude an individual or to entrust someone with a particular religious duty”. Faith-based organizations could also demand “a certain degree of loyalty from those working for them or representing them”.<sup>148</sup> The dissenting judges did not disagree. But they believed that the state had its own obligations, and that the state could not absolve itself of its obligations by delegating decisions to non-state bodies (in this case the Catholic Church).<sup>149</sup>

Mr. Fernández Martínez was no longer considered eligible to be a religion teacher by the Catholic Church. While the state was the employer, an agreement between Holy See and the Spanish Government mandated that the Church had the last word on teachers of religion. But for the dissenters, the assessment by the Church was not the essence. It was the ministry’s decision which finally impacted the claimant.<sup>150</sup> While the Church may claim autonomy rights, courts must not review the content of a decision by a faith-based organization. They must, however, “verify that such a decision does not produce effects that constitute a disproportionate interference with the fundamental rights of those affected by the decision”.<sup>151</sup>

*Fernández Martínez* shows us the complicated nature of church-state relationships, when the state desires to be neutral and accommodationist simultaneously. The CCSA in *De Lange* predicted Solomonic wisdom to be necessary. Is there Solomonic wisdom in the approach of the majority or minority in *Fernández Martínez*? Arguably, the dissenting opinion leaves an opening for reconciling organizational autonomy and individual human rights. Had the state not

147 Du Plessis, *supra* n. 6, at 26 and 32.

148 ECtHR (GC), *Fernández Martínez v. Spain*, app. no. 56030/07, 12 June 2014, paras 126-131.

149 *Fernández Martínez v. Spain*, app. no. 56030/07, *supra* n. 148, *Joined dissenting opinion of Judges Spielmann, Sajó, Karakaş, Lemmens, Jäderblom, Vehabović, Dedov and Saiz Arnaiz*, paras 5-7.

150 *Ibid.*, paras 5-7.

151 *Ibid.*, paras 21-22.

dismissed Mr. Fernández Martínez, but given him a different job, or enabled him to find different work the minority is likely to have voted differently. Like the SCC in *TWU*, the minority opinion suggests that sometimes it requires pragmatism to honor all principles.<sup>152</sup>

While many authors focus on minority religions when it comes to accommodation and establishment issues, Evans and Thomas note that in nations with an established church/religion, there is always a specific autonomy issue for the established church. After all, the establishment almost automatically implies more state control of the internal affairs of such a church.<sup>153</sup> Any attempt to control minority religions will be met with close scrutiny by the ECtHR. One could even argue that this is the Article 9 area where the Court is most consistently and ardently protective of believers. The case of *Hasan and Chaush* exemplifies this.

While the applicant, Mr. Hasan, was elected as Grand Mufti by the National Conference of Muslims, the Government supported his predecessor and ultimately recognized him as Grand Mufti for all Muslims in Bulgaria.<sup>154</sup> The Grand Chamber found unjustified interference with Articles 9 and 13. Revisiting considerations from the earlier case *Serif v. Greece*,<sup>155</sup> the Court set a standard in which interference of the government to remove tension between rival factions within a religious community, by choosing sides was deemed violative of freedom of religion and belief. Instead the state's role is to ensure that rival factions tolerate each other.<sup>156</sup> What makes the situation more troublesome was that the meddling concerned not just any organizational issue, but the leadership of the Muslim community of Bulgaria. "The personality of the religious ministers is undoubtedly of importance to every member of the community."<sup>157</sup> The Government had attempted to unify the entire community under its candidate of choice.

Repeated many times over, the concept of the state as impartial organizer of religious freedom<sup>158</sup> was given a robust fundament in the *Hasan and Chaush* case. Hands-off impartiality was the bare minimum of organizational autonomy. Pluralism was a direct result of (the) freedom (of religion and belief)<sup>159</sup> and therefore the attempt to eliminate the pluralism by trying to bring a

152 *Trinity Western University v. College of Teachers*, Case 27168, *supra* n. 129.

153 C. Evans and C.A. Thomas, 'Church-State Relations in the European Court of Human Rights', in *Brigham Young University Law Review*, vol. 2006, no. 3, pp. 699-725 (2006), p. 717.

154 *Hasan and Chaush v. Bulgaria*, app.no. 30985/96, *supra* n. 134, paras 10-38.

155 *Serif v. Greece*, app. no. 38178/97, *supra* n. 125.

156 See Rainey, McCormick & Ovey, *supra* n. 118, at 485. See also Evans, *supra* n. 8, at 86.

157 *Hasan and Chaush v. Bulgaria*, app.no. 30985/96, *supra* n. 134, para. 62.

158 See, e.g., *Leyla Şahin v. Turkey*, app. no. 44774/98, *supra* n. 29, para. 107. *Bayatyan v. Armenia*, app. no. 23459/03, *supra* n.11, para. 120; *Mouvement Raëlien Suisse v. Switzerland*, app. no. 16354/06, *supra* n. 127, *Joint dissenting opinion of Judges Sajó et al.*, para. II.2.1.

159 See *Hasan and Chaush v. Bulgaria*, app.no. 30985/96, *supra* n. 134, para. 60. Compare *Leyla Şahin v. Turkey*, app. no. 44774/98, *supra* n. 29, para. 104 and *Cha'are Shalom Ve Tsedek v. France*, *supra* n. 121, *Joint dissenting opinion of Judges Sir Nicolas Bratza et al.*, para. 1.

religious community into one organizational structure was antithetical to freedom. If the state tried this, it acted contrary to both negative and positive obligations under Article 9.

While the state may officially recognize a certain religious leader or group, it may not prevent the exercise of unofficial religious leadership or ensure or enforce unity within a religious denomination.<sup>160</sup> The Court was ready to accept that some legal requirements for registration were permissible and must be complied with by religious groups, “but the State must discharge a significant burden in order to justify interference with associational rights or to deny registration”.<sup>161</sup>

We learn from *Hasan and Chaush* that organizational autonomy encompasses a “hands off” approach in organizational conflicts. We learn from *Fernández Martínez* that a broad margin of appreciation allows the state to go along with the recognized church’s assessment of suitability for state employees engaged in religious matters. What can we learn from *Sindicatul “Păstorul Cel Bun”*?

The Romanian Government’s refusal to register a trade union of clergy and laymen employed by the Romanian Orthodox Church, was aimed at protecting the autonomy rights of the Church. Both the majority and minority on the Grand Chamber agreed that the right of association had been infringed. The majority found a legitimate aim, which could be justified. But the dissenters were not convinced that the refusal was necessary or proportionate.<sup>162</sup> Labor relationships which involve faith-based organizations have led to interesting case law and discussions in many places in the world.<sup>163</sup> Obviously, if secular equal treatment law were to be applied, the faith-based character of many such organizations would be undermined. But does this require that secular labor law be shut out entirely as opposed to those provisions which would undermine a faith-based principle, doctrine or view? I think not, a pragmatic approach, which combines autonomy with collective rights of the employees is feasible.

For every view one can take regarding *De Lange* or *Fernández Martínez*, the employees in these two cases represent obvious deviation from declared theological views of their respective communities/churches. But the members of “*Păstorul Cel Bun*” just wanted a union. What was unclear was why they had not obtained permission from the bishop as required by internal procedure. But can the autonomy of the church only be protected if registration is

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160 *Hasan and Chaush v. Bulgaria*, app.no. 30985/96, *supra* n. 134, para. 78. See also Evans & Thomas, *supra* n. 153, at 720. See also Evans, *supra* n. 28, at 321-329.

161 Evans, *supra* n. 28, at 327-329, citing amongst others ECtHR (C), *Moscow Branch of the Salvation Army v. Russia*, app. no. 72881/01, 5 October 2006, para. 61.

162 ECtHR (GC), *Sindicatul “Păstorul Cel Bun” v. Romania*, app. no. 2330/09, 9 July 2013, *Partly dissenting opinion of Judges Spielmann, Villiger, López Guerra, Bianku, Møse and Jäderblom*.

163 Compare US Supreme Court, *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission*, 565 US 171 (2012), 11 January 2012 and *Burwell v. Hobby Lobby Stores*, 573 US 682 (2014), *supra* n. 133.

refused? The majority extended “hands-off” to the labor relations of the church. Echoing Justice Sachs in *Fourie* the secular and the sacred must coexist peacefully. Courts must “recognize the sphere which each inhabits, not to force the one into the sphere of the other.”<sup>164</sup> Justice Van der Westhuizen in the South African *De Lange* case warned of creating a “Constitution free zone”.<sup>165</sup> Organizational freedom for faith-based organizations is based on human rights instruments. There must be mutual respect, but it must certainly not lead to “free zones” which exist entirely outside these instruments’ spectra.

#### 4.4.4 Political freedom

Faith-based political parties exist in many countries with very different institutional arrangements. Even more than other aspects related to group autonomy, they involve the consequences of the autonomy for non-members of the community. Faith-based decisions in national politics may impact many who do not identify with the underlying rationale. Obviously, this also works vice versa as we saw in section 4.2. Indeed, we may identify the very purpose of human rights is to ensure “minority rights” counterbalance “majority rules”.

In all the selected cases of all three courts, *Refah* is the only one concerning a faith-based political party. *Refah*, to a certain degree, represents a deviation from the Court’s firm line on organizational freedom of religion and belief, while some call it consistent with the case law on political parties.<sup>166</sup> The Court was sympathetic to the notion of the “vigilant democracy” which must “combat” political parties that seek to undermine the democratic society envisioned by the Convention. The *Refah* party was seen as seeking to drastically reshape the constitutional order into a religious system of some kind.<sup>167</sup> The Court went along with the Turkish Constitutional Court in using the party’s program for legal pluralism as evidence. Yet, as we will see below (section 4.4.5) different views are reasonably possible, regarding compatibility of legal pluralism and human rights.<sup>168</sup>

The dual test for “vigilant democracy” is if the party is committed to peaceful means and the change itself “is compatible with fundamental democratic principles”. The *Refah* party set out to reinterpret “secularism” in the Turkish constitutional system. Evidence was submitted in the case which

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164 CCSA, *Minister of Home Affairs and Another v. Fourie (e.a)*, Cases CCT 60/04 & 10/05, 1 December 2005, paras 93-94.

165 CCSA, *De Lange v Presiding Bishop of the Methodist Church e.a.* Case CCT 223/14 [2015] ZACC 35, paras. 69-74.

166 See Rainey, McCormick & Ovey, *supra* n. 118, at 543-544.

167 See *ibid.*

168 See H.M.Th.D. ten Napel, ‘The ECHR and Political Rights: The Need For More Guidance’, in *European Constitutional Law Review*, vol. 5, no. 3, pp. 464-480 (2009), p. 477.

seemed to suggest ambiguity with regard to violence or illegal action.<sup>169</sup> But as Boyle notes, the “evidence brought before the Constitutional Court did not include the statute of the Party, its election manifesto or the program for government agreed with its coalition partner.” Nothing supported any concern that the “party intended to undermine democracy or violate the constitutional principle of secularism, such as through the advocacy of a theocratic state”. “Nor was evidence adduced” that “members of the party had espoused or encouraged violence while in government”. Also, the evidence showed no intention to replace the existing legal and political order with any other, while being outspoken about creating possibilities for faith-based “subcultures”.<sup>170</sup>

The Chamber later relied on *Refah* in the Dutch *SGP* case, not included in the selected cases. The orthodox Dutch Reformed party did not allow female membership and was outspoken at the time about the undesirability of women in state affairs from a theological viewpoint.<sup>171</sup> The state had denied the party all funds for political organizations following a national judgment. The Chamber found the application manifestly ill founded, as the viewpoints of the party were deemed opposed to Convention values. Ten Napel notes that the Court has until now only found against political parties in Article 11 cases, when the party concerned was a faith-based party.<sup>172</sup> Interestingly, shortly before *Refah* the Court had dismissed the prohibition of the Turkish Communist Party earlier, exactly because of the absence of any evidence in the program or statutes of the party regarding their anti-democratic ambitions.<sup>173</sup>

We will never know what turn Turkish politics would have taken if *Refah* had not been prohibited. Some of its members regrouped and founded the current government party AKP. We will never know if misconceptions about political Islam and Turkey played a major role in the reasoning as some suggested. While “the importance of political parties in a democracy requires that a narrow margin of appreciation” be applied, “the Grand Chamber gave a rather wide margin of appreciation to the Turkish authorities, including the legitimacy of pre-emption”.<sup>174</sup> While the risk of waiting too long may be that nothing further can be done, a logic of pre-emption with regard to political parties is certainly troublesome for organizing pluralism.

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169 ECtHR (GC), *Refah Partisi (The Welfare Party) and Others v. Turkey*, app. nos. 41340/98, 41342/98, 41343/98 and 41344/98, 13 February 2003, paras 98 and 31.

170 K. Boyle, ‘Human Rights, Religion and Democracy: The Refah Party Case’, in *Essex Human Rights Review*, vol. 1, no. 1, pp. 1-16 (2004), p. 5.

171 ECtHR (Third Section), *Staatkundig Gereformeerde v. the Netherlands*, app. no. 58369/10, 10 July 2012, paras 58-65 and 9.

172 See ten Napel, *supra* n. 166, at 475.

173 See Boyle, *supra* n. 170, at 10.

174 *Ibid.*, p. 10.

#### 4.4.5 Living by their own law: Subculture and legal pluralism

In section 4.4.3, the ECtHR was cited as saying that “[R]eligious communities traditionally and universally exist in the form of organized structures.” The Court added to this that “[T]hey abide by rules which are often seen by followers as being of a divine origin.”<sup>175</sup> Indeed, faith-based communities will usually uphold certain customs, rites, rituals, and rules. Sometimes these are revered as (sacred and/or religious) law.

One of the hot issues in the *Refah* case was the proposed legal pluralism in personal and family law. The Turkish Government contended that such legal pluralism would lead to discrimination. The Court agreed. *Refah* contended that the voluntarism inherent in its proposal prevented discrimination.<sup>176</sup> The assumptions made by both the national courts and Strasbourg did not take this into consideration.<sup>177</sup> However, concurring Judge Kovler did not agree with the negative view of legal pluralism. The concept was “well-established in ancient and modern legal theory and practice. [M]odern constitutional law accepts that under certain conditions members of minorities of all kinds may have more than one type of personal status [...]”<sup>178</sup>

The “own law” of faith-based communities also appears in other cases in this Chapter. In *Sioui*, there is no legal pluralism exactly, but the Treaty once concluded between the British colonizers and the First Nations serves as a source of law for the rights of indigenous Canadians even today. In *TWU*, we see the autonomy of a faith-based educational institution to engage in agreements with students and staff, which outside the “own law” would be discriminatory. Alberta no longer facilitates the “own law” of their Hutterite community in *Alberta v. Hutterian Brethren* by disallowing photograph-less drivers licenses. In *Hofer*, a majority on the SCC believes that “own law” procedures, do not stand the test of national law standards for fairness.

*Christian Education*, like *Hofer*, showed how national law can overrule “own law” even within the community; in this case when national law explicitly enforces human rights standards even in faith-based educational institutions. In *De Lange*, the CCSA saw no reason why the internal arbitration procedure should be mistrusted. In *Cha’are Shalom*, difference in interpretation of “own law” within a religion was no reason to grant a small minority its own exemption from secular law. However, in *Hasan v. Chaush* we learn that the state may not prevent “dissenters” within a religious group from setting up their own group. In accordance with *Sindicatul Păstorul Cel Bun*, such dissenters

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175 *Hasan and Chaush v. Bulgaria*, app. no. 30985/96, *supra* n. 134, paras 56 and 62.

176 *Refah Partisi (The Welfare Party) and Others v. Turkey*, app. nos. 41340/98, 41342/98, 41343/98 and 41344/98, *supra* n. 167, paras 28 and 80.

177 *Evans & Thomas*, *supra* n. 153, at 710.

178 *Refah Partisi (The Welfare Party) and Others v. Turkey*, app. nos. 41340/98, 41342/98, 41343/98 and 41344/98, *supra* n. 167, para. 119.

cannot rely on state-recognition when setting up organizations within the “own law”. Finally, *Fernández Martínez* showed the complexity involved when “own law” and state law were applicable simultaneously.

Bader enlightens us that a liberal-democratic constitutional view on religion, state and freedom is not fundamentally at odds with legal pluralism as long as it is characterized by:<sup>179</sup>

1. Freedom of entry and exit and choice of law;
2. The scope being limited for example to private or personal law; and
3. The state being guarantor of individual rights and freedoms.

The *Refah* judgment provided evidence that Refah respected these three principles in its proposal.<sup>180</sup> The South African marriage cases discussed in section 4.3.3 provided illustration of how the acceptance of a certain degree of legal pluralism may even be mandated by non-discrimination, rather than causing discrimination. A thick notion of democracy based on pluralism<sup>181</sup> may require accommodation of those who are adversely affected by the so-called neutral rules of the state (see section 4.2.2).

In 2004, a debate concerning the recognition of religious law based arbitration emerged in the Canadian province Ontario. The Jewish orthodox and conservative and reform communities had for a long time made use of the Arbitration Act to operate the *Beis Din* of Ontario. It was mainly used for divorces under *Halakhah* (Jewish religious law) and the related property issues. The outcome of the arbitration was binding under the Arbitration Act, but could be challenged, as any agreement or contract, in a court of law.<sup>182</sup> Inspired by this, Syed Mumtaz Ali, a lawyer from Ontario, tried to establish the “Islamic Institute of Civil Justice” (IICJ) as an Islamic equivalent. The initiative led to heated debate, both inside and outside Canada. Given the uproar, the Ontario Government asked Marion Boyd, a former attorney general and former provincial minister of women’s issues, to report on the matter. She heard experts and laypeople, advocates and opponents of religious arbitration. She concluded that Ontario should allow for religious arbitration but also provide human rights checks. Not coincidentally, her report features the words “choice” and “inclusion”.<sup>183</sup>

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179 V. Bader ‘Constitutionalizing secularism, alternative secularism or liberal democratic constitutionalism? A critical reading of some Turkish, ECtHR, and Indian Supreme Court cases on secularism’, in *Utrecht Law Review*, vol. 6, no. 3, pp. 8-35 (2010), p. 26.

180 Evans & Thomas, *supra* n. 153, at 710.

181 See ten Napel, *supra* n. 166, at 477.

182 See M. Boyd, *Dispute Resolution in Family Law: Protecting Choice, Promoting Inclusion*, Government of Ontario, 2004, pp. 11-12 and pp. 40-41. Rabbinical courts are referred to as *Beis Din*, *Beit Din*, *Beth Din* or *Bet Din*. Boyd uses the first term.

183 *Ibid.*, pp. 3-4; p. 42 ff and s. 8. Compare H.M. Vroom, ‘Church – State relations in the Public Square: French Laicism and Canadian Multiculturalism’, in W.B.H.J.v.d. Donk et al. (eds), *Geloven in het publieke domein*, Amsterdam University Press, Amsterdam (Netherlands), 2006, pp. 300-301.

Boyd eloquently explains how the supposedly neutral secular laws encompass cultural and religious norms which may in certain cases negatively affect cultural and religious minorities. Regulated arbitration ensures that religious arbitration functions within the scope set by Charter values and norms. Boyd acknowledges the vulnerability of women, who may be put under pressure to agree to religious arbitration. This, however, must not be used to prevent voluntary arbitration. The state must safeguard voluntarism, not prevent it out of paternalism.<sup>184</sup> Until 2005, the Government seemed to follow the Boyd report. But then the Premier of Ontario decided to abolish the possibility of religious family law arbitration, not only for Muslims, but for all religious groups. However, the possibility to choose religious principles for binding agreements remains. Hence, the decision is a matter of “legal form rather than of normative substance”.<sup>185</sup>

An-Na'im, arguing that within the Islamic context, the notion of the “Islamic state” should be abandoned, because no state can ever rightly claim to be religious, nevertheless points out that the relationship between law and religion is never one in abstract. It is always “a specific view of particular legal and religious traditions, as viewed through the inherently limited experience of human beings. Since this cannot be exhaustive or conclusive of all religious and legal traditions, we should accept the possibility of alternative views of the relationship between law and religion in different contexts.” Hence we should be open different conceptions of the relationship between law and religion, acknowledge that both are dynamic and be aware of the human agency in both. On the other hand he argues for the possibility of a coexistence between state law and religious law, in separate spheres, and to explore and further develop the possibilities of legal pluralism.<sup>186</sup>

Lerner and Rabello note that the “rule-and-exception system is part of what might be called the multicultural concept of social life”. Whenever “society’s fundamental principles and critical concerns, such as public order, are not seriously affected” the law should provide “an exception which permits the minority to deviate from the ideal practice in order to recognize the minority’s interests, beliefs or cultural background”.<sup>187</sup> While “rule and exception” serves well to impartially organize pluralism from a “liberty” and/or “dignity” standpoint, the issue of minorities inside minorities always deserves special attention. As can be learned from *Cha'are*, sometimes a minority within a minority should be treated as a separate minority.

Individuals wanting to leave religious communities or structures are another issue which requires special attention. Hence, the state must safeguard

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184 Boyd, *supra* n. 180, at 45, 52-53 and s. 3, p. 66 ff.

185 Ryder, *supra* n.1, at 105.

186 A. A. An-Na'im, 'Complementary, Not Competing, Claims of Law and Religion: An Islamic Perspective', *Pepperdine Law Review* vol 39, no. 5 (2013), pp. 1248, 1232; and 1250-1252.

187 Lerner & Rabello, *supra* n. 123, at 27.

that no one is subjected to faith-based rules against their will.<sup>188</sup> Boyd speaks of the “basic tension inherent in multiculturalism”.<sup>189</sup> However, in her opinion this tension must not be solved by applying (secular) absolutism, nor by non-interventionism, but within the tradition of liberal democratic multiculturalism which reconciles democratic public policy, with communal self-determination and individual rights.<sup>190</sup> In Evan’s commentary on *Refah*, another interesting viewpoint is added. Revitalizing religious law within a modern constitutional context also provides the chance that the norms develop further within that framework: “the Court ignored the notion of *ijithad* (Islamic legal reasoning) that many more progressive Muslims see as a way of injecting a dynamic element into *sharia*.”<sup>191</sup>

Whether the legal pluralism proposed by the *Refah* party resembled the *millet* system<sup>192</sup> as the Turkish Constitutional Court and the ECtHR assumed, or whether was inspired by notions like those put forward by Boyd, Bader and/or Lerner and Rabello, cannot be known, because the party was preemptively prohibited.

#### 4.5 THE FREEDOM OF RELIGION AND BELIEF AND EDUCATION

Religion in the educational system often raises discussions. While some parents and educators hold that knowledge of religion(s) and belief(s) is part of a well-rounded education, others fear that religion in class and indoctrination are never far apart, and that religious education may create sectarian sentiments. While for many years religious education was on the retreat, it is currently gaining support in Europe. This is because religion is of increasing importance to society; the number of students, parents and educators with a religious background is increasing. Many believe that socially-fit citizens need the knowledge to be able to tolerantly interact with others.<sup>193</sup>

South Africa and Canada both have a public school educational system and privately-run educational institutions, some of which are faith-based. In South Africa, complaints regarding the relationship between education and religion are more likely to come from believers than from unbelievers. Many believers desire that their children are educated in the value system of their

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188 See Evans, *supra* n. 8, at 128-129. See also Evans & Thomas, *supra* n. 153, at 708.

189 Boyd, *supra* n. 182, at 89.

190 *Ibid.*, pp. 89-94.

191 Evans & Thomas, *supra* n. 153, at 712. Compare *inter alia* A.A. An-Na’im, ‘Islamic Politics and the Neutral State, A Friendly Amendment to Rawls?’, in T. Bailey, and V. Gentile (eds.), *Rawls and Religion*, Columbia University Press, New York (USA), 2014, p. 250.

192 See *Refah Partisi (The Welfare Party) and Others v. Turkey*, app. nos. 41340/98, 41342/98, 41343/98 and 41344/98, *supra* n. 167, para. 126.

193 C. Evans, ‘Religious Education in Public Schools: An International Human Rights Perspective’, in *Human Rights Law Review*, vol. 8, no. 3, pp. 449-473 (2008), pp. 450 and 458-459.

religious group. But the Government is reluctant to establish fully state-subsidized denominational schools (like in the Netherlands), partly because racial and religious lines very often overlap.<sup>194</sup> In Canada, state-financing of faith-based schools is not required by the Constitution.<sup>195</sup> In the CoE member states, the organization of the educational system differs greatly, and so does the relationship between education and the freedom of religion and belief. The so-called Toledo Guidelines, adopted by the Organization for Security and Cooperation in Europe (OSCE), illustrate the various systems of religious instruction found amongst the member states.<sup>196</sup>

#### 4.5.1 Issues of religion, belief and the educational system

In a total of nine of the reviewed cases, there are elements of religion and belief in regard to the educational system. The European Court of Human Rights, the Supreme Court of Canada and the Constitutional Court of South Africa each decided three such cases. All these cases are also discussed elsewhere in this chapter from different angles.

In the SCC *Multani* case (section I1.4.10), discussed several times above, the central question was whether a schoolboy should be accommodated in wearing his metal *kirpan* to school. In *Chamberlain* (section I1.4.5), a decision of the governing board of a public school was assessed. Can religious and/or belief-based objections of parents towards depicting same-sex families justify disapproval of such material for educational use? In *TWU* (section I1.4.6), the policy of a private faith-based university was central. The board of education of the province held that the existence of a code of conduct interdicting same-sex romantic relationships, was a reason not to accredit the teacher program of the university. This case is also discussed under group autonomy in section 4.4.

The South African *Christian Education* case (section I2.4.6) also discussed under group autonomy in section 4.4, featured the requested exemption of certain Christian schools from the national ban on corporal punishment in schools. *Pillay* (section I2.4.11), much like *Multani*, was about an individual student. The case also features in section 4.2. Sunali Pillay was disproportionately affected by the school regulation relating to jewelry. As a South African Hindu of South Indian Tamil background, she wore a nose stud, as many women of her religion and culture do. In *Gauteng School Education Bill* (section I2.4.2), some members of the provincial parliament of Gauteng challenged the

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194 Currie & de Waal, *supra* n. 63, at 332.

195 SSC, *Adler v. Ontario*, Case 24347, [1996] 3 SCR 609, 21 November 1996.

196 ODIHR Advisory Council of Experts on Freedom of Religion or Belief, *Toledo Guiding Principles on Teaching about Religions and Beliefs in Public Schools*, Organization for Security and Cooperation in Europe, 2007.

constitutionality of a Bill which required public schools to accept speakers of several languages and prohibited compulsory religious instruction.

Leyla Şahin's case (section I3.4.7) also features in section 4.2. Her personal practice of wearing a headscarf collided with the general prohibition of all religious attire at the university where she was a student. The Strasbourg *Folgerø* and *Lautsi* cases (sections I3.4.8 and I3.4.10) were analyzed in the same section. In *Folgerø*, some parents believed that the exemption procedure for the subject of Christian religion and ethics was too burdensome and infringing. In *Lautsi*, one family confronted a law obliging all (public) schools to hang crucifixes in the classroom. *Fernández Martínez* (section I3.4.14) discussed above in section 4.2 featured a teacher of religious instruction, whom the Catholic church no longer regarded as representative of its institution. But it is not about the educational system as such and therefore the case is not discussed in this section.

#### 4.5.2 The public school system

*Chamberlain* dealt with a decision by an elected school board. Obviously, members of a school board may have religious views on what is appropriate in the curriculum. In this case, a majority of the members believed that books depicting same-sex families were inappropriate for Kindergarten-Grade One (K1). Some of the religious views prevailing in some of the families regarded marriage and family to be reserved for opposite-sex couples. Therefore, the board feared cognitive dissonance. A majority of the SCC found the decision to be at odds with the applicable standard of "reasonableness". While the school board was correct to consider the possible religious objections of parents, it did not consider the interests of LGBTQ+ parents equally. Nor did it consider that children needed to know about the diversity in Canadian society.<sup>197</sup> As Woehrling notes, in Canadian and American literature, a distinction is made between exposure to ideas deemed reprehensible from a religious standpoint and having to act contrary to a religious conviction or confirm a religious conviction.<sup>198</sup> According to this distinction, there can only be infringement of the freedom of religion and belief in the second and third case, not when there is only exposure to opposing ideas.

However, one might have to make a distinction between children and adults here. If ideas are presented to children in school, they are inclined to

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197 SCC, *Chamberlain v. Surrey School District No. 36*, Case 28654, [2002] 4 SCR 710, 20 December 2002, paras 47 and 1-3.

198 J. Woehrling, 'Appendix G: Examination and analysis of jurisprudence pertaining to reasonable accommodation in the schools', in Advisory Committee on Integration and Reasonable Accommodation in the Schools, *Inclusive Quebec Schools: Dialogue, Values and Common Reference Points*, Quebec Ministry of Education, Leisure and Sport, 2007, p. 116.

think that the school approves them and experience a conflict between values taught in school and values taught at home. Woehrling, while noting that it is the task of public schools to bring different groups within society together and to install in them some sense of common and shared values, does not reject the possibility of granting exemption to children from parts of the curriculum that their parents find problematic in accordance with sincere beliefs. Yet, he also draws attention to the possibility of private denominational schools and homeschooling for those families who cannot identify with the curricula of public schools.<sup>199</sup>

Yet *Chamberlain* is not about exemption, but about the disapproval which affected all children in the school. Such a rejection could only be reasonable if all interests involved were balanced properly (see section 4.6). The book in question depicted on a factual level the diversity of family structures present in Canadian society. “The only additional message of the materials appears to be the message of tolerance. Tolerance is always age-appropriate.” The books might cause some cognitive dissonance, but “cognitive dissonance is arguably necessary if children are to be taught what tolerance itself involves.”<sup>200</sup> The dissenting judges in the case believed that the case was less clear. Any decision by the school board would have been constitutional under the Charter,<sup>201</sup> because the collision of two Charter rights was involved: the freedom of religion and belief and the right to equality.

The South African cases need to be understood in light of the constitutional change between the apartheid era and the constitutional era. During apartheid, South Africa understood itself to be a Christian nation and provided for single tradition Christian education. With the transition to democracy, South Africa came to understand itself as a neutral state.<sup>202</sup> Section 15(2) of the Bill of Rights clearly states that “religious observances” may be conducted in “state-aided institutions” if they are “voluntary and conducted on an equitable basis”. Currie and De Waal note that as South Africa knows no “wall of separation”, Section 15(2) is not to be regarded as an exception to the protection of the freedom of religion and belief in the Bill of Rights.<sup>203</sup> Maestry notes that the Ministry of Education interprets the provision in as skepticism “towards ‘single faith’ religious observances”.<sup>204</sup>

While the text of the Bill of Rights refers to “state-aided institutions”, it was clearly intended for government schools. There are, however, also private

199 *Ibid.*, pp.116 and 118.

200 *Chamberlain v. Surrey School District No. 36*, Case 28654, *supra* n. 197, paras 69 and 66.

201 *Chamberlain v. Surrey School District No. 36*, Case 28654, *supra* n. 197, *Dissenting opinion of Judges Gonthier and Bastarache*, para. 122.

202 R. Maestry, ‘The Constitutional Right to Freedom of Religion in South African Primary Schools’, in *Australia and New Zealand Journal of Law and Education*, vol. 12, no. 2, pp. 57-68 (2007), p. 57.

203 Currie & de Waal, *supra* n. 63, at 331.

204 Maestry, *supra* n. 202, at 58.

schools which receive substantial aid from the state. Yet, Currie and De Waal conclude on the basis of High Court Case *Wittmann*<sup>205</sup> that private schools fall outside the spectrum of “state-aided institutions”. However, private schools are also prevented from compelling students into religious observance, because of the horizontal application of the right. While subsequent to *Wittmann* “religious observance” must be understood as a rite of obedience and worship, religious instruction, whether of a confessional or informative nature, is not covered by “religious observance”. State schools, however, may compel students to attend multi-faith informative instruction and parents may compel their children to attend single faith instruction, without infringing the freedom of religion and belief.<sup>206</sup>

In *Gauteng School Education Bill*, besides the language aspect, religious instruction was the major issue. During the apartheid era, many whites-only Afrikaans language schools which featured Calvinist religious instruction had become affluent. The Education Bill was designed to make these public schools more inclusive, for example by making instruction in several languages obligatory, prohibiting language testing and mandatory religious instruction, without opt-out possibility. Some members of the Afrikaner community feared that the Bill would endanger the preservation of their “common culture, language or religion”. But the Court found that there was no positive obligation to provide for Afrikaans language Christian public schools. While there was a negative obligation to not interfere with the establishment or maintenance of such private schools, this must not be read to resist the Bill. Compelling students to attend religious instruction classes would be a violation of the negative obligations under these rights.<sup>207</sup>

In his separate opinion, in Afrikaans, Justice Kriegler was quick to point out that racial prejudice could never claim protection, even if presented as an element of a community’s understanding of its own culture, language and religion.<sup>208</sup> Sachs, in his separate opinion, pointed to the underlying purpose of the Bill: to end existing inequality in access to education. While continuation of Afrikaans education in these public schools could be constitutionally enforced, it could not remain an exclusively Afrikaans educational environment.<sup>209</sup> The state had no obligation to facilitate and/or finance the existence of religious schools, but it may also not interfere with the establishment of independent schools.<sup>210</sup>

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205 High Court of South Africa, *Transvaal Provincial Division, Wittmann v. Deutscher Schulverein, Pretoria and Others*, Case 95/10017, 4 May 1998.

206 Currie & de Waal, *supra* n. 63, at 331-333.

207 CCSA, *In Re: Dispute Concerning The Constitutionality of Certain Provisions of The School Education Bill of 1995*, Case CCT39/95, 4 April 1996, paras 1-7 and 21.

208 *Ibid.*, paras 38-43.

209 *Ibid.*, paras 52-53 and 80-81.

210 See Du Plessis, *supra* n. 6, at 22, referring to *In Re: Dispute Concerning The Constitutionality of Certain Provisions of The School Education Bill of 1995*, Case CCT 39/95, *supra* n. 204.

Doubtlessly, Article 9 of the ECHR applies, among other areas, to the educational environment. Yet, Article 2 of Protocol 1 applies specifically. The ECtHR has made clear that the instruction meant in said article is not merely religious instruction. The respect for parents' religious and philosophical convictions thus relates to the entire curriculum.<sup>211</sup> Evans and Thomas conclude from the existing case law that states enjoy a wide margin of appreciation when it comes to which religion or religions, is/are taught in schools. "This has the potential to shore up to the dominant religion."<sup>212</sup>

The Court's findings in *Folgerø* deviated somewhat from earlier Commission case law in which it found in favor of Poland in a case where the parents of a young schoolgirl alleged that psychological pressure had led her to join Catholic religious instruction classes at her public school, while being the only non-Catholic in the class.<sup>213</sup> Yet in *Folgerø*, the reason to find a violation was exactly the pressure put on parents in having to justify the need for exemption from KRL (Norwegian abbreviation for Christianity, religion and philosophy), which can stimulate argument and even conflict. The fact that the subject is taught in public schools was significant. While the Norwegian Government raised the argument that non-Lutheran parents could send their children to private schools, the Court did not see why the toleration and thus existence of private schools would somehow relieve the state of its obligation to ensure pluralism in the public school system. Interestingly, if all this could be derived from Article 2 of Protocol 1, a separate or conjunct application of Article 9 was not necessary.<sup>214</sup>

While there are many good reasons to support religious education, even in public schools, caution is essential because, Evans warns, these are necessarily places of coercion. Not only will students be required to pay attention in class or do their homework, but education also necessarily involves exerting some kind of pressure to accept what is being taught. Yet with regard to religion, this coercion must be restrained in order to safeguard students not feeling compelled to have or not have to change their religion. "The fact that a school can force the reluctant math student to study algebra does not mean that it can require the committed atheist to take religious instruction." Yet the caution must apply in different ways. Not only can secular or atheist proselytism in the school system be as intrusive as religious instruction, many subjects, like biology, sports, literature and sex education, may trigger conflicts about

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211 ECtHR (C), *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, app. nos. 5095/71; 5920/72; 5926/72, 7 December 1976, para. 121.

212 Evans & Thomas, *supra* n. 153, at 715.

213 EComHR, *C.J., J.J. and E.J. v. Poland*, app. no. 23380/94, 16 January 1996.

214 ECtHR (GC), *Folgerø and Others v. Norway*, app.no. 15472/02, 29 June 2007, paras 98, 102-105.

the beliefs of parents and children. Respect for the beliefs of parents and children should apply “throughout the entire State education program”.<sup>215</sup>

Obviously, education in itself is a right guaranteed by the Convention. For children with religious backgrounds, a school environment perceived as hostile or disrespectful will impact not only their freedom of religion, but also their right to education. For children without a religious background, a place for religion in the curriculum may seem hostile and dangerous. Finally, for children from minority religions, a strong emphasis on the dominant religion may make them feel like outsiders. While parents ought to have substantial influence in what is taught to their children, it is impossible to give parents the right to decide or veto what their children are taught. The state must strike a proper balance between legitimate majority and minority concerns, without subjecting one to the other. This balance includes that children have a right to learn about other groups and beliefs with which they co-exist in society. This creates a “religious literacy”, which will counteract bigotry, intolerance, and discrimination.<sup>216</sup>

The case, when seen in its entirety, portrays a conceptual view of the relationship between freedom of religion and belief and the educational system under the Convention.<sup>217</sup> While states are free to have a state religion as well as a state church and to promote, protect and enhance both by means of legislation, the Convention obliges them to create an educational environment free of proselytism. This does not mean that the state’s promotional, protective, and enhancing activities regarding the state-sponsored religion and religious organization have to end in the public school system. But parents and students who do not wish to participate, must be able to opt out without hinderance that is unreasonably burdensome. In *Folgerø*, the majority and the dissenting judges essentially disagreed on two things: whether the classes qualified as pluralist or unitary education, and whether or not the procedure for exemption was too burdensome.

The dissenting judges in *Folgerø* did not perceive the existence of the procedure to justify the opting out as *a priori* burdensome. While the majority seemed to suggest that state proselytism in public schools must go hand in hand with a general exemption for those wishing to opt out, the minority regarded an individual procedure in which the opting out has to be justified as feasible under Article 2, of Protocol 1.<sup>218</sup>

A general exemption cannot be derived directly from Article 2 of Protocol 1. Yet *Folgerø* seems to suggest that religion can never be taught in such an

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215 Evans, *supra* n. 190, at 453, 463, 469 and 456, referring to Article 2 of Protocol 1 and relevant case law.

216 *Ibid.*, pp. 454-459.

217 See *Folgerø and Others v. Norway*, app.no. 15472/02, *supra* n. 214, para. 56.

218 *Folgerø and Others v. Norway*, app.no. 15472/02, *supra* n. 214, *Joint dissenting opinion of Judges Wildhaber, Lorenzen, Birsan, Kovler, Steiner, Borrego Borrego, Hajiyev and Jebens*, p. 52.

objective and neutral way to justify the absence of an “opt out” possibility. This is supported by Chamber case *Zengin v. Turkey*.<sup>219</sup> Furthermore, if exemptions require parents and students to disclose personally held beliefs and or discuss them with officials, freedom of religion is infringed. Yet these cases also “signal a possible shift from the rather formalistic approach that had previously been taken to exemptions with greater consideration of the practical and emotional burden that they can place on students and parents”. On the other hand, exemptions can also lead to a “ghetto approach”.<sup>220</sup>

The Toledo Guidelines deal with the relationship between the freedom of religion and belief and public education. However, the place of religion and belief in the public school system is also always related to the alternatives when it comes to education. In some states, private schools (some of them faith-based) account for a large part of the education. In the Netherlands, so-called special schools (some of them faith-based) receive public funding. In Germany, denominational schools exist as part of the public school system. Another issue in this regard is homeschooling. Commenting on *Konrad*,<sup>221</sup> a Chamber case about homeschooling, Ten Napel points to the fact that many nations accept homeschooling by religious communities and have granted a constitutional opting-out right for homeschooling parents. Yet clearly, both issues are covered by the margin of appreciation in standing case law.<sup>222</sup>

Opting out is not possible if the parents and students take issue with the way in which the public school presents itself with regard to preference for a certain religion. This is what *Lautsi* was about. The Lautsi children could not opt out. The crucifix was hung in every classroom. To majority in the classroom, it symbolized faith and belonging. To the Lautsis as agnostics it symbolized that they did not belong. The judgment noted that schools in Italy, without being specific on the school in question, pay much attention and respect to the practices and holidays of minority religions. But for the Lautsi family, this was insignificant. It did not contribute to their feeling of acceptance as agnostics. Yet the crucifix was mandated by law, to be hung in every public school classroom in Italy. No exemption or exception procedure was provided.

The Chamber first unanimously found in favor of the Lautsi family, then the Grand Chamber by 15:2 found no violation at all. The Chamber judgment sent “a shockwave through Europe”.<sup>223</sup> The Grand Chamber judgment ended a case which had “dragged on for almost 10 years”.<sup>224</sup> A high amount of

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219 ECtHR (C), *Hasan and Eylem Zengin v. Turkey*, app. no. 1448/04, 9 October 2007.

220 Evans, *supra* n. 190, at 465 and 466-470.

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

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

223 N. Bratza, ‘The “Precious Asset”: Freedom of Religion Under the European Convention on Human Rights’, in *Ecclesiastical Law Review*, vol. 14, no. 2, pp. 256-271 (2012), p. 269.

224 F. Cortese, ‘The Lautsi Case: A Comment from Italy’, in *Religion and Human Rights*, vol. 6, no. 3, pp. 221-230 (2011), p. 221.

pressure was put on the Grand Chamber to overturn the Chamber judgment.<sup>225</sup> This came not only from Italy, but also a “number of Eastern-European countries – with their own historical reasons”.<sup>226</sup> The campaign was also supported by known critics of the Strasbourg Court elsewhere in Europe, many aligned with right-wing, nationalist or populist agendas and/or parties.<sup>227</sup>

In the past, the Court had been skeptical with regard to arguments centered on the historical links between the state and a particular religion.<sup>228</sup> While the Chamber still followed this line, the Grand Chamber deviated from it. It accepted that such links can even lead to a situation in which the religious symbols lose their exclusive religious meaning. While this earned the Grand Chamber praise from critics in the Government of Italy and the Vatican,<sup>229</sup> it was also criticized. The Chamber judgment had developed a controversial, yet “fairly straightforward argument against the display of a crucifix in public schools on the grounds that the state should not favor any particular religion”. From this perspective, the Grand Chamber judgment might be called convoluted.<sup>230</sup>

The Grand Chamber accepted that the crucifix had somehow attained a post-religious meaning. By doing so, it took into account criticism of the Chamber judgment which pointed out that given the contribution of Christianity to democratic Europe’s development, the crucifix as such could never be at odds with a democratic society based on human rights. Rather, the symbol was made to be not only a symbol of a particular religion, but rather a meta-religious symbol for European values and civilization.<sup>231</sup>

Yet from a more traditional Christian viewpoint, this is offending. As Zucca explains: “Jesus Christ would be deeply disappointed to learn that the last chapter of his life does not move people”. As to the impact of the symbol on the educational environment, nobody would argue that the presence of the crucifix is neutral. Indeed, putting *Lautsi* and *Dalhab* together would suggest that minority religion’s symbols are powerful and hence compromise neutrality, while the symbols of the mainstream religion are passive and therefore do

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225 See case note on the Chamber judgment by H.M.Th. D ten Napel, ‘Noot bij EHRM 3 November 2009, no. 30814/06’, in *European Human Rights Cases*, 08/2010, Sdu Uitgevers, p. 1.

226 W. de Been, ‘Lautsi: A Case of “Metaphysical Madness”’, in *Religion and Human Rights*, vol. 6, no.3, pp. 231–235 (2011), p. 233.

227 See, e.g., T. Baudet ‘Het Europees Hof voor de Rechten van de Mens vormt een ernstige inbreuk op de democratie’, in NRC, 13 November 2011.

228 Evans, *supra* n. 8, at 147, referring to ECtHR (C), *Manoussakis and Others v. Greece*, app.no. 18748/91, 26 September 1996.

229 L. Zucca, ‘Lautsi: A Commentary on a decision by the ECtHR Grand Chamber’, in *International Journal of Constitutional Law*, vol. 11, no. 1, pp. 218–229 (2013), p. 218.

230 See de Been, *supra* n. 226, at 231.

231 *Ibid.*, p. 232.

not impact neutrality.<sup>232</sup> Obviously, that is an indefensible position. Yet it is important to note that the Grand Chamber does not accept that the crucifix has somehow become a symbol of Italian republicanism and religious pluralism.<sup>233</sup>

Like Zucca, Weiler also believes that such an assessment of the crucifix as a-religious is actually disrespectful to believing Christians. Like the Chamber, he would have rejected the neutrality argument.<sup>234</sup> Yet according to him, it was indeed the Chamber who did not do justice to the complexity and importance of the question before it, but resolved the case impatiently and apodictically. The Court, in Weiler's opinion, should be watchful to ensure that school environments are not religiously coercive (pro- or contra religion) and not take sides in the cleavage between believers and non-believers. He reiterates the many state-religion constitutional arrangements found in the Convention area. Since the ECtHR is not a constitutional court, it should not assess the legitimacy of constitutional arrangements.<sup>235</sup>

In *Lautsi*, the Italian Government, most probably still offended by the Chamber judgment, argued that the state "should refrain from promoting not only a particular religion but also atheism, 'secularism' on the State's part being no less problematic than proselytizing by the State".<sup>236</sup> Without any doubt, the statement is true. The Italian Government put forward this argument presumably because *Refah*, *Şahin*, *Folgerø*, the *Lautsi* Chamber judgment and other cases, may be interpreted to show a preference for state-sponsored secularism. However, the ordained display of a religious symbol in every classroom is not the only way in which not to sponsor secularism. Zucca is of the opinion that two different notions of secularism were mixed up in the judgment. Mrs. Lautsi's secularism is a philosophical belief. State secularism must be neither preferential nor opposed to such philosophical secularism, nor any religious or other philosophical belief. It requires the state to be the "impartial organizer of religious pluralism"<sup>237</sup> (see further section 4.7).

While Evans notes that the Grand Chamber employed the margin of appreciation to solve the conflict, like in many freedom of religion and belief cases,<sup>238</sup> in Zucca's opinion the use of the margin in the judgment is circular. "If a wide margin of appreciation is based on lack of consensus, it should not come as a surprise that there is no consensus on the prohibition of religious

232 See Zucca, *supra* n. 229, at 220-221.

233 Cortese, *supra* n. 224, at 226.

234 J.H.H. Weiler, 'Lautsi: Crucifix in the Classroom Redux', in *The European Journal of International Law*, vol. 21, no. 1, pp. 1-6 (2010), p. 5.

235 *Ibid.*, pp. 1 and 5. See also J.H.H. Weiler, 'Lautsi: A reply', in *International Journal of Constitutional Law*, vol. 11, no. 1, pp. 230-233 (2013), pp. 231-232.

236 ECtHR (GC), *Lautsi and Others v. Italy*, app.no. 30814/06, 18 March 2011, para. 35.

237 Zucca, *supra* n. 229, at 222.

238 M. D. Evans, 'Lautsi v. Italy: An Initial Appraisal', in *Religion and Human Rights*, vol. 6, no. 3, pp. 237-244 (2011), p. 237.

symbols." "It all sounds like a tautology."<sup>239</sup> Yet, as Ten Napel rightly notes, what is surprising in the Chamber judgment is that the margin of appreciation is hardly mentioned, while in *Şahin* and elsewhere,<sup>240</sup> states with secularist state philosophy were given a wide margin to implement it in the public education system.<sup>241</sup>

Evans suggests that the Grand Chamber's appraisal of the entire educational environment rather than the isolated symbol fits within Strasbourg jurisprudence. Also, as in earlier judgments, the Court stresses that respect for the convictions of the parents does not imply their right to have a determinative say. This, in his opinion, mandates revisiting some earlier case law which seemed to suggest that the public schoolroom needs to be religiously neutral.<sup>242</sup>

The opportunity missed in *Lautsi* may have been to approach the issue from the other angle. How could Catholics have been accommodated, other than the obligatory display of the crucifix in every public school classroom? Such a judgment might have found the legislation to be antithetical to Article 9, without having to find that the presence of the symbol as such is. The solution might have been the approach taken by the German Constitutional Court in the Bavarian crucifix case. As Luca points out, the German Constitutional Court stipulated a case-by-case approach. Only when students express that the symbol sends a message of inequality to them, is there a need to remove it. Rather than a blanket ban or a finding of systematic violation, such an approach does justice in concrete cases.<sup>243</sup>

#### 4.5.3 Faith-based educational institutions

Canada has a public school and university system as well as private educational institutions, some of which are denominational. Unlike in the United States, the constitutional question in relation to the financing of denominational schools is not whether state financing is permitted, but whether it is required. The Supreme Court answered this question in the negative.<sup>244</sup> In *TWU*, the Court dealt with a religious institution. While in the public school system religious beliefs which may exist in the population could be taken into consideration, the religious educational institutions were founded as denominational structures. While public institutions need to be pluralist, the denomina-

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239 Zucca, *supra* n. 229, at 226.

240 *Dogru v. France*, app. no. 27058/05, *supra* n. 27; ECtHR (C), *Kervanci v. France* 31645/04 app. no. 42393/98, 4 December 2008.

241 See ten Napel, *supra* n. 225, at 5.

242 Evans, *supra* n. 238, at 241-243.

243 See Zucca, *supra* n. 229, at 228-229.

244 *Adler v. Ontario*, Case 24347, *supra* n. 192.

tional institutions by definition are not. TWU was not for everyone; it was a school for people who shared its religious views.<sup>245</sup>

TWU's policy on same-sex relationships was doubtlessly contrary to the Charter's equality promise to LGBTQ+ citizens. The SCC, however, concluded that the BCCT was wrong in denying the application of TWU solely on that basis. Once the graduates were teachers in the public educational system, they were required to conduct themselves in a non-discriminatory manner. But this did not mean that TWU was unfit to educate teachers. Denominational schools and universities had a freedom to create a learning environment which suited them in a pluralist society. This did not mean they have absolute freedom to create a homogenous environment, in which they could reject the principles and values of that same pluralist society. For example in 2005, the *Commission des droits de la personne et des droits de la jeunesse* of Quebec ruled that private denominational establishments were bound to accommodate students of other faiths, for example by allowing the wearing of a headscarf, unless they could show that the confessional status of these establishments demanded certain exclusions or preferences.<sup>246</sup>

The Constitutional Court of South Africa may have leaned on Canadian and American approaches in deciding *Christian Education*. According to Smith, *Christian Education* "was not a good case to develop a theory of the scope of religious freedom", "because the freedom to act in terms of one's religious convictions had clearly been infringed". Sachs applied the harm principle developed in, amongst others, American and Canadian jurisprudence. Consequently, freedom of religion and belief was held not to allow for overriding the best interests of the child. As corporal punishment is harmful "the state must be allowed to impose some limits". But harm, in Smith's opinion, does not set a proper limit for the freedom of religion. What is harm and what is not, is often determined by our (religious and/or secular) value system. Therefore only "neutral harm" should serve as a limit.<sup>247</sup>

Another reading of *Christian Education* is also possible. Not harm as a negative limit, but the human dignity purpose of the Constitution mandates a limitation. After all, the Constitution mandates that all rights are interpreted in conformity with "human dignity".<sup>248</sup> But human dignity is arguably also determined by a value system, underlying the South African Constitution. Either way, given that no right is absolute and corporal punishment by definition causes "neutral harm", I cannot see how the CCSA could have decided any other way in *Christian Education*.

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245 See *Trinity Western University v. College of Teachers*, Case 27168, *supra* n. 129, para. 25.

246 See Bouchard & Taylor, *supra* n. 2, at 51.

247 N. Smith, 'Freedom of Religion in The Constitutional Court', in *The South African Law Journal*, vol. 118, pp. 1-9 (2001), pp. 5 and 7-8. See *Christian Education South Africa v. Minister of Education*, Case CCT4/00, *supra* n. 25, para. 51.

248 See Currie & de Waal, *supra* n. 63, at 322, referring to s. 39(1)(a) of the Bill of Rights.

#### 4.5.4 Students with sincere beliefs

Gurbaj Singh Multani was an orthodox Sikh schoolboy who always wore a metal *kirpan* that was sheathed and worn underneath his clothes. Leyla Şahin was an orthodox Muslim female university student who wore a headscarf at all times. Sunali Pillay was a schoolgirl of South Indian Tamil Hindu background who wore a nose stud, like many women of her religion and culture. All three were impaired by rules prohibiting them from wearing these attributes and/or attire in their educational institutions. As a consequence, Gurbaj switched to a private school and Leyla left her country to study abroad. Sunali finished her high school in the same institution. The judgment was rendered after she had graduated.

Gurbaj was a student in the public educational system. Being a state institution, the Charter applied to dealing with accommodation issues of religious students. The school had unjustifiably infringed the student's right to freedom of religion, because the three criteria formulated by Bouchard and Taylor for accommodation requests did not apply.<sup>249</sup> Gurbaj's request did not:

1. violate the student's other rights or the rights of other students;
2. run counter to the Education Act, program organization or other statutes;
3. impose undue hardships on the school with regard to its operations and budget.

The SCC argued that an "absolute prohibition would stifle the promotion of values such as multiculturalism, diversity, and the development of an educational culture respectful of the rights of others". Such a prohibition would send "students the message that some religious practices do not merit the same protection as others". Accommodating Gurbaj, on the other hand, "demonstrates the importance that our society attaches to protecting freedom of religion and to showing respect for its minorities. The deleterious effects of a total prohibition thus outweigh its salutary effects."<sup>250</sup>

The *Multani* decision thus sends a powerful signal regarding the educational system. It is the duty of the educational system to not only create an environment which is welcoming and supportive of diversity, but also to communicate this message to those who might not understand at first hand, and who might initially feel treated unfairly, because the member of a minority is accommodated.<sup>251</sup> The CCSA's Pillay judgment echoes this powerful signal.

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249 Bouchard & Taylor, *supra* n. 2, at 163, referring to M. McAndrew, 'L'Accommodement raisonnable dans une perspective d'intégration: fondements, mise en contexte et questionnements', Université de Montréal, 2006, p. 16.

250 *Multani v. Commission scolaire Marguerite-Bourgeoys*, Case 30322, *supra* n. 15, paras 78-79.

251 Compare Bouchard & Taylor, *supra* n. 2, at 179. See also Advisory Committee on Integration and Reasonable Accommodation in the Schools, *supra* n. 195.

The school code of the Durban Girls High School prohibited all jewelry except for ear studs and wristwatches and Sunali Pillay was ordered not to wear the nose stud in school. She did not comply with the order and claimed that not allowing her to wear the nose stud violated her constitutional right to practice her cultural and religious traditions.<sup>252</sup>

Ms. Pillay first took her case to the Equality Court which found that the school regulations were in fact discriminatory, yet that the discrimination was not unfair. The High Court, however, found in favor of Pillay.<sup>253</sup> The Constitutional Court affirmed this. Chief Justice Langa's majority opinion illustrated the importance of religious freedom in the South African constitutional order. It also illustrated the departure from exclusion of otherness towards the "new ethos". The judgment shows the correlation between culture and religion. Both are strongly linked to a person's identity. Whereas cultural identity is related to identification with a community, religious identity is often related to the metaphysical. Yet neither are monolithic and interpretation differs between individuals.

Sunali admitted that the nose stud was not a "mandatory tenet of her religion or culture, it is a voluntary expression of her South Indian Tamil Hindu culture that is strongly intertwined with the Hindu religion". The school never contested the cultural relevance of the nose stud, but denied it had religious significance. Langa, however, found that Sunali's persistence in continuing her practice in spite of the school's orders and in standing up for her belief in court and the media provided enough proof of the sincerity her belief. In this case he reasoned "culture and religion sing with the same voice".<sup>254</sup> As the norm embodied by the code was not neutral, but "enforces mainstream and historically privileged forms of adornment at the expense of minority and historically excluded forms", it discriminated in an unjustifiable manner.<sup>255</sup>

In the *Şahin* case, the Turkish Government took a completely different view of the state's role to guarantee pluralism. They considered it "contrary to such values [i.e. pluralism, equality] to allow religious attire to be worn".<sup>256</sup> This view was then supported by the ECtHR in its judgment. The line of reasoning in *Şahin* seems to be: "(1) There are extremist political movements in Turkey. One of their demands is the freedom of women to wear Islamic *hijab* in public places. (2) Any measure preventing students from wearing headscarves is therefore in line with the Convention."<sup>257</sup> Yet the Court also never found

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252 *MEC for Education: Kwazulu-Natal and Other v. Pillay*, Case CCT51/06, *supra* n. 7, paras 3-10.

<sup>253</sup> *Ibid.*, paras 14-18.

254 *Ibid.*, paras 53-55, 58 and 60.

<sup>255</sup> *Ibid.*, para. 44.

256 *Leyla Şahin v. Turkey*, app. no. 44774/98, *supra* n. 29, para 116.

257 K. Altıparmak and O. Karahanoğulları, 'After Şahin: The debate on headscarves is not over, Leyla Şahin v. Turkey', Case note in *European Constitutional Law Review*, vol. 2, no. 2, pp. 268-292 (2006), p. 280.

that Ms. Şahin was an extremist who sought to impose the headscarf on all women. “The only evidence before the Court was that she had actively sought to resist the ban against voluntary wearing of the head-scarf.”<sup>258</sup> What would have happened in *Şahin*, if the line of reasoning in *Multani* and *Pillay* had been adopted? The Canadian and South African judges seem to suggest that diversity must be embraced by allowing its display and instilling understanding of diversity in students.

#### 4.5.5 Guidelines for education and religion and belief

Evans points to the six different possibilities in regard to religious education, given by the Toledo Guidelines adopted by the OSCE in relation to freedom of religion and belief in education:<sup>259</sup>

1. Strict secularism: there is no discussion of religion at all in the classroom.
2. Incidental religious education: religion is taught only to the extent necessary for other subjects.
3. Plural religious education: students learn about a variety of religions and non-religious world views without any claims as to the (un)truth of these.
4. Sectarian religious instruction: students receive it in their religion or alternatively non-religious world view in (sectarian) groups.
5. Unitary religious education: instruction in the dominant religion of the State. Teachers do not claim truth, but the classes deal either exclusively or predominantly with a single religion.
6. Religious or ideological instruction: instruction only in the dominant religion. The religion is taught as true. Instruction prepares for participation in religious rituals. Exemptions may be granted.

These possibilities actually represent the diversity of approaches towards religion and education in the Convention area. Evans discusses all six possibilities from the viewpoint of the criteria of “objectivity”, “neutrality”, “critical” and “pluralistic” given by the ECtHR in *Folgerø* and other cases such as *Zengin v. Turkey*.<sup>260</sup> In the *Zengin* case, the Court found that the failure to provide exemption for a minority Muslim Alevi sect from religious instruction classes, based on Sunni Islam, while Christians and Jews were given automatic exemption, violated the respect for the parent’s religious views as protected by the Convention (see also below in section 4.7).

While the first option may easily create a hostile environment for religious students, thus not being pluralistic, the second option does also not produce students with adequate religious literacy. The fourth option may also be seen

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<sup>258</sup> *Ibid.*, p. 282.

<sup>259</sup> Evans, *supra* n. 190, at 461.

<sup>260</sup> *Hasan and Eylem Zengin v. Turkey*, app. no. 1448/04, *supra* n. 219.

not to enhance pluralism, while also not qualifying as objective and critical, yet is to be seen as preferable to the first and second options. The last option is only acceptable from the pluralist viewpoint if an exemption is given, and even then, it cannot be seen as enhancing pluralism. This leaves unitary and pluralistic education (options 3 and 5) as the two feasible options for education to the whole class.<sup>261</sup>

Obviously, any method chosen must also take into account a teacher's freedom of religion and belief. If the teaching material creates problems of consciousness for her or him, there should be no compulsion. Yet this may not be seen as a right by teachers to actively share or discuss their beliefs with the students. Finally, teaching methods must also be critically reviewed: "Jewish parents may object to their children taking part in a nativity play; Christian parents to their children visiting a mosque; and atheist parents to their children singing religious songs." "The Toledo Guidelines also underline the importance of education that is 'inclusive, fair and respectful' to both religious and non-religious views and suggest that 'care should be taken to avoid inaccurate or prejudicial material, particularly when this reinforces negative stereotypes' (principle 7)."<sup>262</sup>

The Canadian Supreme Court noted in *Chamberlain* that "tolerance is always age-appropriate".<sup>263</sup> In a pluralist society, in which many individuals and groups profess a religion or other beliefs, tolerance arguably requires the "religious literacy" Evans talks about. It is the task of the education system to provide children with this literacy while counteracting "bigotry, intolerance and discrimination".<sup>264</sup> It is the task of courts to balance when conflicts arise between the pluralist cleavages.

#### 4.6 FREEDOM OF RELIGION AND BELIEF AND BALANCING WITH OTHER RIGHTS

Harris, O'Boyle and Warbrick note "[o]n occasion there are conflicts between Article 9 and other rights."<sup>265</sup> This of course is not particular to Article 9. Human rights are bound to collide. After all, they protect the freedom of individuals and groups, whose choices are bound to differ, even more so when they are truly free to choose. Quoting the landmark case *Big M*, the Canadian Supreme Court has reiterated many times that "[a] truly free society is one which can accommodate a wide variety of beliefs, diversity of tastes and

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261 Evans, *supra* n. 193, at 463.

262 *Ibid.*, pp. 464, 466 and 471.

263 See majority opinion in *Chamberlain v. Surrey School District No. 36*, Case 28654, *supra* n. 197, para. 69.

264 Evans, *supra* n. 193, at 454-459.

265 D. Harris, M. O'Boyle and C. Warbrick (eds.), *Law of the European Convention on Human Rights*, 2nd ed., Oxford University Press, Oxford (UK) et al., 2009, p. 439.

pursuits, customs and codes of conduct. A free society is one which aims at equality with respect to the enjoyment of fundamental freedoms.”<sup>266</sup>

Legal theorists have provided us with theorems to ensure the equal freedom while freedom rights collide. Legal theorist Ronald Dworkin sees no competition between freedom and equality, but co-dependency instead.<sup>267</sup> This notion is very similar to Rawls’ “justice as fairness”.<sup>268</sup> So when diverse beliefs, opinions, preferences, traditions, and rituals collide, courts must balance the conflicting rights in order to ensure the equilibrium of pluralism. This section discusses the balancing in the selected cases.

#### 4.6.1 Issues of balancing the freedom of religion and belief with other rights

Almost all the selected cases involve, to a certain degree, judicial balancing between the freedom of religion and belief and some other right or compelling interest. Hence, in the previous sections we have already encountered various aspects of judicial balancing when it comes to the freedom of religion and belief. In this section, the focus is on the equilibrium of equal concern and respect: how do the three tribunals maintain this equilibrium in solving the freedom of religion and belief cases?

In at least a total of 18 of the reviewed cases, the equilibrium of equal concern and respect for all rights and interests involved is central to the judicial reasoning. Eight of these were decided by the SCC. The CCSA decided six of these cases. Four were decided by the ECtHR. All these cases have already been analyzed in previous sections, but from another angle. The issues of balancing, discussed here, are best subdivided in the following topics:

- The balance of pluralism: (religious) beliefs and LGBTQ+ equality rights (section 4.6.2);
- Preventing elimination of pluralism: individual rights and communitarian interests (section 4.6.3);
- The balance between individuals and communities of faith (section 4.6.4);
- Balancing parental authority and the rights of children (section 4.6.5);
- What is balancing? (section 4.6.6).

In a total of five cases, LGBTQ+ equality rights collided with the freedom of religion and belief. Both, in the Canadian *Reference Same-Sex Marriage* case

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266 *Chamberlain v. Surrey School District No. 36*, Case 28654, *supra* n. 197, para. 135 and *Trinity Western University v. College of Teachers*, Case 27168, *supra* n. 129, para. 28, quoting *R. v. Big M Drug Mart Ltd.*, Case 18125, *supra* n. 53, at 336-337.

267 R.M. Dworkin, *Taking Rights Seriously*, Duckworth, London (UK), 1991 Ch. 10

268 J. Rawls, *A Theory of Justice*, Revised Edition, Oxford University Press, Oxford (UK) et al., 1999. See for the comparison A. J. Kwak, ‘Equal concern and respect, Ronald Dworkin’s gelijkheidsbeginsel’, in J. Doomen & A. Ellian, *De strijd van gelijkheid en vrijheid*, Boom Juridische Uitgevers, Den Haag (Netherlands), 2015, pp. 69-86.

(section I1.4.9) and in the South African *Fourie* case (section I2.4.10), the highest tribunal had to decide whether same-sex couples had a right to get married before the law. Both cases were also analyzed in section 4.3.

Two other Canadian cases involved the collision between LGBTQ+ equality rights and the freedom of religion and belief. In *Chamberlain* (section I1.4.6), the SCC had to find the balance between the rights of LGBTQ+ families to be shown in study material in the *Kindergarten* class, and the rights of other families who believed that marriage and family are exclusively opposite-sex. In *TWU* (section I1.4.5), the balance must be struck between the rights of a Christian university to educate future teachers and the interest put forward by the British Columbia College of Teachers, to create an educational environment supportive of LGBTQ+ students. Both cases were also examined in section 4.2.4. The fifth case involving LGBTQ+ equality rights and the freedom of religion and belief is the South African *De Lange* case (section I2.4.15). The case was brought by a minister dismissed by her church when she entered into a civil marriage with another woman. This case was also featured in section 4.4.

Some cases required the balancing of individual freedom and communitarian interests in a democratic society. In the cases *Şahin* (section I3.4.7) and *S.A.S.* (section I3.4.15), the ECtHR had to find a balance between religious attire worn by individuals and the interests of general society as viewed by institutions. In *R. v. N.S.*, the Canadian case, it was the victim of sexual assault who wore a *niqab*. All three cases were also discussed in section 4.2.

The Canadian *Multani* (section I1.4.10) and South African *Prince* (section I2.4.7) cases have been examined several times in the previous sections. They also require the balancing between individual practices and communitarian interests. In *Multani*, the interest was the safety of the other school children. In *Prince*, it was public health and safety underlying the national policy of combating illicit drugs. In *Gauteng School Education Bill* (section I2.4.2), the CCSA had to decide on the constitutionality of a Bill which required schools to accept speakers of several languages and prohibited compulsory religious instruction. This case was also discussed in section 4.5.

The balancing between community rights and rights of individuals belonging to the community was a central issue in two ECtHR cases also examined in section 4.4. In *Fernández Martínez* (section I3.4.14), the claimant's rights as a state employee had to be balanced with the rights of the Catholic Church to endorse those seen fit for (prolongation of) employment as teachers of religion. In *Sindicatul "Păstorul Cel Bun* (section I3.4.13), the collective rights of the Church collided with the rights of its employees to set up a union. In the Canadian *Hofer* case (section I1.4.2), the SCC had to decide whether the internal procedure of dismissal of an individual from a Hutterite community fulfilled procedural fairness.

The freedom of religion and belief can also collide with the rights of children. All of the cases have been analyzed in previous sections. In the South African case *Christian Education* (section I2.4.6) we saw the Government's attempt to protect children against pain and humiliation by corporal punishment in school. This collided with parents and an educational institution, who identified corporal punishment as an article of faith. In the Canadian *Children's Aid Society* (section I1.4.4), the infant's right to life collided with the parents' freedom of religion and belief right to refuse blood transfusions. In the other Canadian blood transfusion case, *AC vs. Manitoba* (section I1.4.12) it was the young believer herself who experienced the collision between the protection of her right to life and her own religious liberty. Finally in *P.(D)*, (section I1.4.3), also before the SCC, the balancing was between the freedom of religion and belief of the father with access rights and the child's best interest.

The legal frameworks which protect the right to freedom of religion and belief in Canada, South Africa and the Convention, allow for the limitation of said right in view of the rights and freedoms of others.<sup>269</sup> The concrete balancing stays true to the notion that rights are engaged in non-hierarchical relations towards one another and that each right is in itself an incompletely theorized agreement. The principles of balancing shall be discussed in section 4.6.6, by way of summary of section 4.6.

#### 4.6.2 The balance of pluralism: (Religious) Beliefs and LGBTQ+ equality rights

Many systems of religion and belief touch on (assumed proper) gender roles and sexual morality. In accordance with (a certain interpretation of) a creed, certain roles and conduct are deemed in accordance with religious law or rules and others are not. For some believers, inclusive views on gender equality and LGBTQ+ equality collide with their faith-based views. Hence, equality claims will trigger responses based on the freedom of religion and belief. Similarly, claims based on the freedom of religion and belief to create personal or group freedom are sometimes met by equality responses, arguing that a human right must not be used as a license to discriminate.

Baroness Hale of Richmond, Deputy President of the UK Supreme Court, explained in her annual human rights law lecture in 2014: "the integrity of religious motivation in moral assessment of gender roles or sexual conduct should not be drawn into doubt if the balance to be struck should be perceived as fair by all."<sup>270</sup> This does not mean that religion or belief is a *carte blanche* for gender and/or sexual orientation discrimination. It does, however, mean

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<sup>269</sup> Compare The Right Hon the Baroness Hale of Richmond, Deputy President of the UK Supreme Court, 'Freedom of Religion and Belief', *Annual Human Rights Lecture*, Law Society of Ireland, 13 June 2014, pp. 5-7.

<sup>270</sup> See *ibid.*, p. 8.

that the balance must always be found in concrete cases rather than a general equilibrium.

In *Chamberlain*, the school board declined to approve a book for a Kindergarten-Grade One (K-1) class requested by a teacher. The book depicted the variety of family types which occur in Canadian society, including same-sex parent families. Some parents had voiced religious objections. The superintendent expressed in court that he thought the books were not necessary for learning objectives and that they were controversial.<sup>271</sup> The majority of the SCC decided the board's refusal to approve the books violated "reasonableness". While the school board was correct to consider the possible religious objections of parents, it did not consider the possible interest of LGBTQ+ parents and the fact that children need to know about the diversity in Canadian society.<sup>272</sup> The ruling reflected the pluralist balance struck between the conflicting views and rights.

The dissenting judges considered the equal constitutional value of freedom of religion and belief and equality. Because the two rights collided, any decision by the board would have been constitutional.<sup>273</sup> The dissenters' viewpoint was both pragmatic and principled. They implied that sometimes, in cases of resolving collision, more than just one decision was defensible. After all, pluralism by its very definition implies difference. Yet, the majority in *Chamberlain* considered that equilibrium of pluralism starts with procedural fairness. The board should have considered the religious concerns of some families equally to those of same-sex families.<sup>274</sup>

Factual information about the many choices people make in a pluralist society could very well co-exist with differing normative preference based on religious considerations, the SCC reasoned. The message of tolerance also sent by the books, "does not require that we agree with the other". Tolerance required us to "treat others with equal respect", "regardless of whether they are right". Children could not learn this unless they are exposed to views that differ from those they are taught at home. This may involve some cognitive dissonance for the children. But this was necessary in order to teach them tolerance. "Tolerance is always age-appropriate." Parental views could not override the imperative placed on the public school system "to mirror the diversity of the community and teach tolerance and understanding of difference".<sup>275</sup>

TWU, on the other hand, was a religious educational institution. The prevailing theological view at the university was that only opposite-sex relationships

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271 *Chamberlain v. Surrey School District No. 36*, Case 28654, *supra* n. 197, Introduction, para. 47.

272 *Ibid.*, paras 1-3.

273 See *Chamberlain v. Surrey School District No. 36*, Case 28654, *supra* n. 197, *Dissenting opinion of Judges Gonthier and Bastarache*, para. 122.

274 See *Chamberlain v. Surrey School District No. 36*, Case 28654, *supra* n. 197, para. 61.

275 *Ibid.*, paras 66-69 and 33.

were in accordance with Christian doctrine. Hence, faculty and students were obliged to enter into agreements with the school, declaring amongst others abstinence from same-sex relationships. However, simply assuming that TWU graduates would discriminate against LGBTQ+ students, as the British Columbia College of Teachers had done, was uncalled for. Such an assumption was intolerant in itself. It failed to treat different viewpoints regarding sexual orientation with equal concern and respect. "It would undermine the Charter's stipulation of pluralism in the public school classroom to curtail the accreditation and employment possibilities of persons of faith any more than strictly necessary."<sup>276</sup> Moreover, any such assumption failed to take the individual and his or her own opinions and conduct into consideration. A TWU graduate may or may not hold the same views as his *alma mater*. And whether the individual graduate held these views or not, he or she may very well be more tolerant than graduates from other universities.

A good 10 years after the case, the SCC struck a different balance in another TWU case. This time it was the Law Society of British Columbia (LSBC) that denied accreditation of the TWU's law school. The decision followed a referendum amongst the members of LSBC which the responsible body had decided would be binding. A majority of 5:2 found that the decision struck the appropriate balance between the freedom of religion and belief and the quality rights the LSBC was pursuing. The fact that the referendum had taken place was deemed relevant to the outcome.<sup>277</sup>

Dissenting Justice L'Heureux-Dubé would have decided differently in 2007. She warned that to wait until discrimination actually materializes is taking a risk. She noted that especially for LGBTQ+ students, an educational environment based on support was essential. After all, these students may also experience distress from "coming out" to their parents, family and friends. The denial of the accreditation would imply that TWU graduates would have to obtain a degree from a different institution before being allowed to become teachers. This ensured a year of reflection. The majority also saw the risk, but considered it in a different light. "The BCCT, rightfully, does not require public universities with teacher education programs to screen out applicants who hold sexist, racist or homophobic beliefs. For better or for worse, tolerance of divergent beliefs is a hallmark of a democratic society."<sup>278</sup>

L'Heureux-Dubé compared the case to the case of Bob Jones University before the US Supreme Court.<sup>279</sup> This American university had discouraged interracial dating on religious grounds. The US Supreme Court ruled that because this policy violated the Constitution, the federal Government could

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276 L.E. Weinrib, "This New Democracy ..." Justice Iacobucci and Canada's Rights Revolution', *University of Toronto Law Journal*, vol. 57, no. 2, pp. 399-413 (2007), p. 407.

277 *Law Society of British Columbia v. Trinity Western University*, Case 37318, *supra* n. 137.

278 *Trinity Western University v. College of Teachers*, Case 27168, *supra* n. 129, paras 36.

279 See US Supreme Court, *Bob Jones University v. United States*, 461 US 574 (1983), 24 May 1983.

not financially aid institutions which acted contrary to the constitution. Similar considerations were used in the Dutch *SGP* case discussed briefly in section 4.4.4. The Dutch Government withdrew the funding for political parties because the party excluded women from becoming members on religious grounds. But *TWU* is not about financial aid by the Government. The key balancing issue was whether or not the graduates must be considered unfit as teachers.

The Charter creates equal liberty for groups with (seemingly) opposing interests. The “truly free society” envisaged by the Charter accommodates the freedom of LGBTQ+ Canadians to be who they are and want to be, as much as for Canadians who believe that marriage and parenthood should be reserved for opposite-sex couples. One could even argue that in this vision of a truly free society, there are no longer opposing interests because of the “great variety of beliefs, diversity of tastes and pursuits, customs and codes of conduct”<sup>280</sup> which can be accommodated. “The Charter safeguards religious minorities from the threat of ‘the tyranny of the majority’”, so says the SCC explicitly.<sup>281</sup> Naturally it also safeguards the LGBTQ+ communities.

The balancing applied by the SCC in *TWU* is echoed in *Same-Sex Marriage*. This referral case was initiated when the Canadian federal Parliament proposed legislation to amend the federal Marriage Act. Following earlier provincial Acts, Parliament wanted to introduce same-sex marriage. As elsewhere in the world, amending the legal marriage caused heated debates between opponents and advocates of the proposal. However, not all opponents were driven by beliefs motivated by religion, while there were also religious advocates of same-sex marriage.<sup>282</sup>

Faith-based feelings, regarding marriage and family, had been considered in drafting the Act. Besides introducing a gender-neutral definition of marriage for civil purposes, the Act also specified that nothing shall affect “the freedom of officials of religious groups to refuse to perform marriages that are not in accordance with their religious beliefs”. This is relevant, because under Canadian law religious institutions can perform legal marriages and there is thus no separation between civil and religious marriage as in many European countries. Significantly, the SCC already noted that it could not foresee at this point that any such compulsion could be justified under the limitations clause.<sup>283</sup>

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280 *Chamberlain v. Surrey School District No. 36*, Case 28654, *supra* n. 197, para. 135; and *Trinity Western University v. College of Teachers*, Case 27168, *supra* n. 129, para. 28, quoting *R. v. Big M Drug Mart Ltd.*, Case 18125, *supra* n. 53, at 336-37.

281 *Trinity Western University v. College of Teachers*, Case 27168, *supra* n. 129, para. 28, citing *R. v. Big M Drug Mart Ltd.*, Case 18125, *supra* n. 53, at 336-37.

282 For a discussion of the internal debate within the United Church of Canada, see *Nedelsky & Hutchinson*, *supra* n. 75.

283 *Reference re Same-Sex Marriage*, Case 29866, *supra* n. 76, para. 58.

The SCC considered the proposed Act to be very much in line with the Charter's vision of a pluralist inclusive society.<sup>284</sup> The same vision also affords protection to those who hold views on marriage which exclude same-sex couples from the concept. What the Act does is recognize all different conceptions, preferring none to the other. Alvin Esau, himself an Anabaptist, calls this being "liberals in the public sphere and illiberals in the church sphere".<sup>285</sup> Hence, such recognition cannot be said to violate their freedom of religion.

The introduction of same-sex marriage also raised the issue of civil servants who had religious objections to performing such marriages. Could they rely on the freedom of religion and belief to be exempted from performing these marriages? The provinces resolved the issue differently<sup>286</sup> (see further section 4.3.4).

According to Ryder's concept of "equal religious citizenship", the freedom of religion and belief requires the accommodation of conscientious objectors as long as equal access to same-sex marriage is guaranteed. In his opinion, provinces that do not allow for conscientious objection for marriage commissioners, must demonstrate that this is necessary to ensure the rights of those wishing to be married. Furthermore, after the introduction of same-sex marriage, it is not discriminatory to require that new civil servants accept performing same-sex marriage. Conscientious objection is relevant for those civil servants who applied for their jobs when same-sex marriage was not foreseeable.<sup>287</sup>

The reconciliatory approach of equal liberty was also employed by the South African Constitutional Court in *Fourie*, one year after *Same-Sex Marriage*. Here, there was no proposed or existing legislation, provincial or national. In the case, which actually merged two different claims by same-sex couples, a unanimous Constitutional Court ruled that the exclusion of same-sex marriage from the common law definition of marriage and the Marriage Act was a breach of constitutional equality rights. The CCSA's reasoning echoed many of the considerations in *Same-Sex Marriage*. The Constitution protects those with beliefs opposing same-sex marriage equally as those same-sex couples who wish to have their unions legally recognized. The freedom of religion and belief does not make religious beliefs a source of interpreting the Constitution; neither can such beliefs be reason to withhold rights of others.<sup>288</sup>

Sachs' majority judgment approached the question of freedom and equality from the angle of the "right to be different". The right entails in this context: (1) that no one family form may be entrenched as the only legally and socially

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284 See *ibid.*, paras 1-7.

285 Schneiderman, *supra* n. 59, at 74.; A. Esau, 'Living by Different Law. Legal Pluralism, Freedom of Religion and Illiberal Religious Groups', in *idem*, p. 133.

286 See Ryder, *supra* n.1, at 100-101.

287 See *ibid.*, pp. 101-102.

288 *Minister of Home Affairs and Another v. Fourie et al.*, Cases CCT60/04 and CCT10/05, *supra* n. 78, paras 91-92.

acceptable one; (2) the acknowledgment of the history of persecution and exclusion on the basis of sexual orientation, nationally and internationally; (3) the realization that although legal protection of sexual orientation equality has improved, there is no comprehensive legal regulation of the family law rights of same-sex couples; and (4) the appreciation of the radical break with the history of intolerance and exclusion which the Constitution represents, moving towards a society “based on equality and respect for all”.<sup>289</sup>

Sachs’ careful reasoning explains how “equal concern and respect” creates a “right to be different”. Equal concern and respect mandated “an acknowledgement and acceptance of difference”. In the “democratic, universalistic, caring and aspirationally egalitarian society” thus created, all are accepted and embraced “for who they are”.<sup>290</sup> Sachs’ reasoning reads almost as Solomonic wisdom. His colleague Moseneke, many years later, predicted in *De Lange* that Courts will “require all the judicial, if not Solomonic, wisdom we Judges can muster”,<sup>291</sup> to decide the merits of such a case. *De Lange* itself offers the escape of a procedural decision.

Mrs. De Lange was dismissed as a minister by her church after she had made use of the right recognized in *Fourie*. She had married another woman. But because Mrs. De Lange had not raised the equality claim consistently and had failed to take the case to the Equality Court first, the CCSA dismissed her case on procedural grounds. Justice Van der Westhuizen in his separate concurring opinion warned that the free spaces created by the Constitution for faith-based communities, must never become Constitution free zones.<sup>292</sup>

#### 4.6.3 Preventing elimination of pluralism: Individual rights and communitarian interests

Finding the pluralist balance with freedom of religion and belief and other rights is of course not confined to LGBTQ+ equality. *Şahin, R. v. N.S. and S.A.S.* illustrate how personal attire worn for religious reasons can become the central issue of balancing, because it is viewed as problematic by others. In Leyla Şahin’s case, the university was wary of the message sent by Leyla’s headscarf to other Muslim students who chose not to wear a headscarf and to students of other or no religious affiliation. For N.S., her face covering was a matter of personal piety and identity. To remove it while testifying against the culprit who had violated her, was a great interference. But the defendant felt that

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289 *Ibid.*, para. 59.

290 *Ibid.*, para. 60.

291 CCSA, *De Lange v. Presiding Bishop of the Methodist Church of Southern Africa for the Time Being and Another*, Case CCT223/14, 24 November 2015, paras 65-66.

292 *Ibid.*, paras 69-74.

his fair trial rights would be violated if he and his attorney could not see the facial expression of the accuser when testifying.

The applicant in *S.A.S.* also wore her face covering as a matter of personal piety and identity. She took legal action against the new legislation in France outlawing face coverings in public places. The majority of the French legislature was convinced that face coverings were at odds with the French concept of “living together”.

The ECtHR time and time again reiterated that “pluralism, tolerance and broadmindedness are hallmarks of a ‘democratic society’”.<sup>293</sup> This connects to the messages of equal concern and respect identified in the jurisprudence of the SCC and the CCSA. There is also a recurring communitarian theme in the ECtHR’s jurisprudence on pluralism. In its interpretation of “democratic society” which must necessitate restrictions of individual or group freedom, the state is often called the “neutral and impartial organizer of pluralism”.<sup>294</sup> Furthermore, the interpretation also suggests that on occasion particularistic (individual or group) interests must be subordinated to those of society at large. Yet the Court does not adhere to a majoritarian version of democracy: “a balance must be achieved which ensures the fair and proper treatment of people from minorities and avoids any abuse of a dominant position.”<sup>295</sup>

The relationship between democracy and human rights is as often stained as it is mutually enhancing. Taking into account the “will of the people” is important in the reasoning in both *Şahin* and *S.A.S.* Obviously, the ECtHR is not the only one of the three courts to take the democracy element of constitutionalism into consideration. In *Christian Education*, the fact that the democratic process led to outlawing corporal punishment was essential in the reasoning. In the new *TWU* case against the British Columbia Law Society mentioned in section 4.5.1, the fact that the Law Society held a referendum was deemed relevant. It is clear that the balancing with regard to “democracy” is closely related to the fact that in all three systems, interferences must be justified by reference to a “democratic society”.

Some critics have lamented that where Article 9 collides or overlaps with other rights, the Court tends to benefit the other rights or to focus entirely on those, at the expense of Article 9. This is voiced alongside the related criticism that it has interpreted Article 9 too restrictively.<sup>296</sup> However, there is one (in)famous case, which illustrates the opposite. In *Otto Preminger*,<sup>297</sup> the Court memorably allowed for a restriction of the freedom of speech in

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293 *Bayatyan v. Armenia*, app. no. 23459/03, *supra* n.11, para. 126 and *Leyla Şahin v. Turkey*, app. no. 44774/98, *supra* n. 29, para. 108.

294 See, e.g., *Leyla Şahin v. Turkey*, app. no. 44774/98, *supra* n. 29; *Bayatyan v. Armenia*, app. no. 23459/03, *supra* n.11; *Mouvement Raëlien Suisse v. Switzerland*, app. no. 16354/06, *supra* n. 127.

295 *Leyla Şahin v. Turkey*, app. no. 44774/98, *supra* n. 29, para. 108.

296 Harris, O’Boyle & Warbrick, *supra* n. 265, at 440-441.

297 ECtHR (C), *Otto-Preminger-Institut v. Austria*, app no. 13470/87, 20 September 1994.

order to protect the prevailing religious sentiments in one of the Austrian states. It upheld a ban against the showing of a satirical film which was deemed blasphemous by many Catholic organizations.

*Otto Preminger* showed in accordance with communitarian views that social tension can be a reason to limit freedom rights. The Turkish Government in *Şahin* pointed to social tension and argued that especially because the majority of Turkey was Sunni Muslim like Leyla, restrictions must be administered to prevent abuse of the dominant position. The Court did not inquire whether there were specific tensions at the actual campus, or if there were concrete tensions at universities elsewhere in Turkey. There was no iteration as to whether other reasonable and less infringing measures to ease these tensions and pressure had been tried without success. The line of reasoning in *Şahin* seems to be that because the demand that women be allowed to wear Islamic *hijab* in public places was voiced by movements with an allegedly extremist agenda, upholding the prohibition was necessary. But there was no evidence that Ms. Şahin sided with extremist movements and sought to impose the headscarf on all women. The only evidence before the Court was that she had “actively sought to resist the ban against voluntary wearing of the headscarf”.<sup>298</sup>

Turkey’s official state ideology (at least during the selected cases) was one of rigid as opposed to “open” secularism (see further section 4.7). The Convention, of course, is not preferent to any religion/state relationship, state ideology or lack thereof. Yet the role of impartial organizer of pluralism can mean nothing different than that the state refrains from imposing any world view on the public. Its role is to organize to ensure protecting the rights of everyone. The Turkish authorities considered it contrary to the values of pluralism equality “to allow religious attire to be worn”. But while the Court warned that social tension must never be a justification to eliminate pluralism,<sup>299</sup> it seems that this is exactly what the university was doing. This is what Judge Tulkens noted in her opinion.<sup>300</sup> The ban may also prevent religious women from studying, which would effectively be detrimental to pluralism, let alone the “serious ramifications for the advancement of Muslim women”.<sup>301</sup>

Ms. Şahin argued that states must be measured against the demands of liberal democracy.<sup>302</sup> Her implicit argument was that rigid secularism as maintained by the Turkish state was contrary to these demands. Her position was that the Convention was intended to alter policies of the High Contracting Parties through European judicial intervention. The Court did not find in her

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298 Altiparmak & Karahanoğullari, *supra* n. 257, at 280 and 282.

299 *Leyla Şahin v. Turkey*, app. no. 44774/98, *supra* n. 29, paras 107 and 116.

300 *Leyla Şahin v. Turkey*, app. no. 44774/98, *supra* n. 29, *Dissenting opinion of Judge Tulkens*, para. 6.

301 D.C. Decker and M. Lloyd, ‘Case Comment Leyla Sahin v Turkey’, in *European Human Rights Law Review*, vol. 6, pp. 672-678 (2004), p. 677.

302 See *Leyla Şahin v. Turkey*, app. no. 44774/98, *supra* n. 29, para. 100.

favor and there is yet to be a Strasbourg case which proclaims secularist policies too intrusive on individual liberty. However, in *S.A.S.* it came close. The majority did afford France a broad margin of appreciation and found the ban to be justified. It also acknowledged that face coverings were “the expression of a cultural identity” and were therefore a natural feature of “the pluralism that is inherent in democracy”.<sup>303</sup> In addition, it showed much more sensitivity towards the position of the individual believer and her self-understanding than in *Şahin*. Similarly in *N.S.*, the SCC majority rejected a “secular response that requires witnesses to park their religion at the courtroom door”. Such secularism “limits freedom of religion where no limit can be justified”.<sup>304</sup>

The dissenting judges in *S.A.S.* lamented the fact that the majority did find a justification for the ban. The notion of “living together”, apart from being too abstract, was no “right” or “freedom” or any other and therefore could not carry the ban as a “legitimate aim”. As it was the ban’s purpose to restrict pluralism, its aim was not reconcilable with the Convention.<sup>305</sup> Two of the dissenting judges in *N.S.* did argue that a *niqab* should never be allowed in a courtroom. The other dissenting judge would allow the *niqab*, at least in this case. She wanted to prevent a message that women like *N.S.* were not welcome, especially after they had already been victimized by sex offenders.<sup>306</sup>

Unlike in *Şahin*, *S.A.S.* and *N.S.*, in *Multani* the object of personal religious observance was concealed. Yet because the *kirpan* could be dangerous (if unsheathed), the school banned it from the school grounds. *Prince* showed a majority which assessed that granting an exemption for *dagga* use for the Rastafari community would endanger the overall policy of preventing illicit drug use. The *Gauteng School Education Bill* illustrated how the CCSA had to balance the ambition of legislatures to further the rights of others and pluralism, with the resistance of faith-based communities against such plans.

Gurbaj Singh Multani insisted that his sincere belief as a Sikh required him to wear a metal *kirpan* (traditional dagger) at all times, including to school. While initially accommodating Gurbaj, the school then banned the *kirpan*. It is this blanket ban, which the SCC finds disproportionate.<sup>307</sup> Between the extremes of total security and total lack thereof lies “a concern to ensure a reasonable level of safety”.<sup>308</sup> This was the balance that had to be struck. A blanket ban sent a message that Gurbaj and his religion were not welcome. That was at odds with Canadian multiculturalism. As “[r]eligious tolerance

303 *S.A.S. v. France*, app. no 43835/11, *supra* n. 9, para. 120.

304 *R. v. N.S.*, Case 33989, *supra* n. 5, para. 2

305 *S.A.S. v. France*, app. no 43835/11, *supra* n. 9, *Joint partly dissenting opinion of Judges Nussberger and Jäderblom*, paras 2 and 14.

306 *R. v. N.S.*, Case 33989, *supra* n. 5, para. 94.

307 *Multani v. Commission scolaire Marguerite-Bourgeoys*, Case 30322, *supra* n. 15, paras 52-54.

308 *Ibid.*, para. 45.

is a very important value of Canadian society” educators must instill this value in their students to explain why the accommodation is not unfair.<sup>309</sup>

Indeed, the message of tolerance which says that we treat others with equal respect, is that message, which according to the SCC in *Chamberlain* is always age-appropriate.<sup>310</sup> It necessitated agreement with the other’s position but did require to acknowledge the equal freedom in the public sphere. In *Prince*, the majority was eager to show positive tolerance towards Mr. Prince and his right to be different and the Rastafarians, even though there would be no exemption for them. The majority suggested that if only the exemption could have been administered without undermining the purpose of combating illicit drug use and without compromising the freedom of religion and belief of everyone claiming to be Rastafari, it would have been granted. For dissenting Justice Ngcobo, positive tolerance mandated an exemption from the general prohibition for the Rastafari community.

The *Gauteng School Education Bill* is a reference case. A substantial number of legislators in the Gauteng provincial parliament questioned the constitutionality of the new Gauteng School Bill. The bill was designed to even out apartheid era consequences. Whites-only Afrikaans language schools which featured Calvinist religious instruction were once the prime beneficiaries of Ministry of Education funding. Post-apartheid, these schools were still affluent. The Bill prohibited language competence testing in public schools and provided that they should encourage use of several official languages. It also provided that the religious policy of a school was to be reviewed by administrative bodies and that exemptions from religious instruction classes must be granted. Some members of the Afrikaner community feared that the Bill would endanger the continued existence of Afrikaans language Christian public schools. They pointed to the right to have schools based on “common culture, language or religion, provided that there shall be no discrimination on the ground of race”.<sup>311</sup>

The CCSA found no positive constitutional obligation on the part of the province to provide for Afrikaans language Christian public schools. The obligation was for the state not to interfere with establishing or maintaining such schools, but not to establish or maintain them itself. However, compelling students to attend religious instruction classes would be a violation of the negative obligations under this same right.<sup>312</sup>

In his separate opinion, in Afrikaans, Justice Kriegler reemphasized that racial prejudice as an element of a community’s understanding of its own culture, language and religion could not claim any constitutional protection

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309 *Ibid.*, paras 74 and 76.

310 *Chamberlain v. Surrey School District No. 36*, Case 28654, *supra* n. 197, para. 69.

311 See *In Re: Dispute Concerning The Constitutionality of Certain Provisions of The School Education Bill of 1995*, Case CCT39/95, *supra* n. 207, paras 1-6.

312 *Ibid.*, paras 7 and 21.

whatsoever.<sup>313</sup> Sachs noted that the principle of equality must be operated to end existing inequality in access to education. Yet in a pluralist society based on democratic values, equality and diversity should not compete. Instead, cultural diversity should be “accomplished on the secure basis of justice and equity”. Given the existence of Afrikaans medium schools, the continuation of Afrikaans education in these public schools could be constitutionally enforced. This did not apply to an exclusively Afrikaans educational environment.<sup>314</sup>

#### 4.6.4 The balance between individuals and their faith-based group

The Canadian case *Hofer*, and the ECtHR cases *Fernández Martínez* and *Sindicatul “Păstorul Cel Bun”* all require the balancing of a collective right of a community and/or church structure against that of individual believers who are part of the same community or structure.

Mr. Hofer felt that the authorities of his Hutterite community had unduly compromised his intellectual property rights. While he had invented a technique, his community now paid another Hutterite community patent rights. Because of this, Mr. Hofer felt he could no longer obey the authorities of his community, as he had vowed to do. The SCC had to decide whether it could apply secular law of procedural fairness to a community’s internal procedure to dismiss Mr. Hofer. The majority of the court found in his favor. His right of procedural fairness in the light of the state’s secular law had been breached. This outweighed autonomy considerations. According to dissenting Chief Justice McLachlin, the balance swung to the side of the community. She concluded that Hofer was not willing to accept the decision taken by the community leadership. This touched on the very essence of their autonomy.<sup>315</sup>

In *Sindicatul “Păstorul Cel Bun”*, the autonomy rights of the Church had to be balanced against those of church employees to start a trade union like any other employees. The Romanian authorities refused the registration of a trade union. The Grand Chamber considered the decision to be accurate in accordance with the ECHR. They considered, among other things, that the church employees had not requested or received the permission by the archbishop to set up a union as required by the internal rules.<sup>316</sup> But the dissenters were not convinced that the refusal was necessary or proportionate. Careful balancing required careful assessment and finding middle ground

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313 *Ibid.*, paras 38-43.

314 *Ibid.*, paras 52-53 and 80-81.

315 *Lakeside Colony of Hutterian Brethren v. Hofer*, Case 22382, *supra* n. 138, p. 83.

316 *Sindicatul “Păstorul Cel Bun” v. Romania*, app. no. 2330/09, *supra* n. 162, paras 168-169.

between the autonomy rights of the Church and the “ordinary” rights of the church employees.<sup>317</sup>

In *Fernández Martínez*, the balance required also involved the state and the Church. This time, the claimant was just one employee who had been working as a religious instruction teacher for many years without complaints. However, there was then media coverage about his life and opinions. He had once been ordained as a priest and had then requested dispensation from celibacy. But before this was granted, he had got married in accordance with state law. He and his wife had been blessed with children. He was also an active member of a movement which challenged some of the official doctrines of the Church.<sup>318</sup>

In accordance with its autonomy rights, the Church had the right to determine who was suitable to teach Catholic religion in the public school system.<sup>319</sup> When Mr. Fernández Martínez’s contract was up for renewal, the Church considered him no longer suitable. The state then did not prolong the contract. This was an accurate balance according to the majority on the ECtHR. Through the publicity, attention had been drawn to the discrepancies between Church dogma and his personal opinions. While he was legally an employee of the state, this did not discharge him from the heightened loyalty towards the Church. While the sanction of the non-prolongment was severe, Fernández Martínez had knowingly placed himself in the situation which triggered the decision. Finally, the majority found that the domestic courts had taken all these factors into proper consideration. Given the margin of appreciation in such cases, the conclusion was that the interference was justified and not disproportionate.<sup>320</sup>

But the minority felt that the interests of the claimant had not been taken into proper consideration. While the state might be obliged to let the Church decide who teaches Catholic religion in a public school, it must not let the Church decide who is suited or not to be on the payroll of the education system. Was there a possibility to honor Mr. Fernández Martínez’s rights as state employee while also honoring the rights of the Church? Could other (teaching) jobs have been found, could some kind of transitional arrangement have been made? The dissenting judges believed that careful balancing required the state to look into this. The state could not absolve itself of its obligations by delegating decisions to non-state bodies.<sup>321</sup>

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317 *Sindicatul “Păstorul Cel Bun” v. Romania*, app. no. 2330/09, *supra* n. 162, *Joint Partly Dissenting Opinion of Judges Spielmann et al.*, paras 5 and 8.

318 *Fernández Martínez v. Spain*, app. no. 56030/07, *supra* n. 148, paras 14-20.

319 *Ibid.*, paras 11-13 and 48-57.

320 *Ibid.*, paras 133-152.

321 *Fernández Martínez v. Spain*, app. no. 56030/07, *supra* n. 148, *Joined dissenting opinion of Judges Spielmann et al.*, paras 5-7, 10 and 21.

#### 4.6.5 Balancing parental authority and the rights of children

Parents are bound to raise their children in accordance with their beliefs. As we saw above in the discussion of *Chamberlain* (section 4.6.2), children may experience strain when confronted with the beliefs of others which do not match or contradict those they are raised with. There are also situations in which state institutions overrule parental authority to serve the interests of the children themselves. These are always situations that are painful for the parent and possibly also for the children.

In *P. (D.) v. S. (C.)*, a majority was convinced that the best interest of the child required limits to the father's access to the child. While C. lives with her mother, her Jehovah's Witness father took her to community events when visiting him. He also taught her about the tenets of his faith. The little girl repeated what she had learned when at home: "Jehovah [who] made [C.], [who] made [...] everything".<sup>322</sup> The facts, as stated in the judgment, show that the father was a devoted member of his congregation. While some, much like the mother, may feel that the frequency and intensity of the transmission of the articles of his faith to his child are high, is there really something that might harm the child? A majority on the SCC saw reasons to uphold a limitation of access rights.

The dissenting judges agreed with the majority that the best interest of the child was the right and constitutional standard. But they disagreed that the complexity caused by the situation was automatically harmful. The child, they reasoned, had a right to get to know her father, "including his religious values". While the mother wished for C. to enjoy Halloween and Christmas, this was "insufficient to support an order forbidding the father to impart his views on such holidays".<sup>323</sup> According to the dissenting judges, the balance was thus to let C. grow up to know both her parents as they are. The differences may cause some cognitive dissonance. But as we learn from *Chamberlain*, cognitive dissonance may be necessary to develop a tolerant outlook, in addition to one's personal beliefs.

In *Children's Aid Society of Metropolitan Toronto and A.C. v. Manitoba*, the physical health (i.e. life) of children was involved. In *A.C. v. Manitoba*, the balancing was intellectually and emotionally challenging. AC was 14 years old and a devout Jehovah's Witness just like her parents. She opposed blood transfusions, but the doctors believed she needed one to save her life from a potentially life-threatening disease. Had she been 18, her decision would have counted. Had she been 16, her decision would have been determinative in the medical decision to be taken. But AC was just 14.

The judgment shows us three different attempts to balance the best interests of the child against her rights as an autonomous human being to act in accord-

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<sup>322</sup> *P. (D.) v. S. (C.)*, Case 22296, *supra* n. 58, p. 58.

<sup>323</sup> *Ibid.*, pp. 64-68.

ance with her faith and conscience. Four judges reached the conclusion that constitutionally speaking, it was wrong not to give A.C. the chance to prove that she had the capacity to take a mature, well-informed decision. However, under the age of 16, these wishes would not have been determinative. As it was no longer possible to determine whether A.C. was indeed capable at the time of taking a decision as a 16 or 18-year-old (the emergency was long since over and A.C. had reached the age of 16), the majority found no interference. Because A.C. never got the chance for rebuttal of the psychiatric assessment, the majority awarded her all costs throughout the judicial proceedings.<sup>324</sup>

Two other judges concurred with the outcome, but took a different approach. They stressed that whether or not a minor was capable of taking a decision which was determinative or influential in matters of life and death should be determined by a “case by case analysis with a review to the relevant statutory criteria”. The distinction between age categories as such was justifiable, including limitations on the outcome of the decision. These two judges accepted that A.C. had a sincere belief against receiving blood transfusions and that this right had been interfered with. However, they believed that the interference was proportionate to the pressing and substantial objective of ensuring the health and safety of minors.<sup>325</sup>

Dissenting Justice Binnie did find a violation. The Act as it stood violated the Charter rights of teenagers under the age of 16. The Act prevented them from rebutting the presumption of immaturity. This interfered with their Charter rights, because these rights “are given to everyone, including individuals under 16 years old”. It was not known whether rebuttal would have led to a different outcome in the case at hand. Yet, Binnie still believed that judges, as well as other persons, do not have the right to substitute the choices of an individual with theirs. While most of us would “instinctively recoil from the choice made by A.C. because of our belief (religious or otherwise) in the sanctity of life. But it is obvious that anyone who refuses a potentially lifesaving blood transfusion on religious grounds does so out of a deeply personal and fundamental belief about how they wish to live, or cease to live, in obedience to what they interpret to be God’s commandment.”<sup>326</sup>

The balancing in *Children’s Aid Society of Metropolitan Toronto* is far more straightforward than in *A.C. v. Manitoba*. Again, Jehovah’s Witness beliefs regarding blood transfusions were the central belief. The child, however, was a newborn. The SCC unanimously upheld the lower court’s judgment which found that the surgeon who overruled the parental authority and ordered the transfusion had not violated the freedom of religion of the child and parents.<sup>327</sup> Two separately concurring judges even believed that the freedom

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324 *A.C. v. Manitoba (Director of Child and Family Services)*, Case 31955, *supra* n. 56, paras 120-122.

325 *Ibid.*, paras 128, 134-156.

326 *Ibid.*, paras 192, 213-214 and 219.

327 *B. (R.) v. Children’s Aid Society of Metropolitan Toronto*, Case 23298, *supra* n. 55, para. 103.

of religion and belief was not even engaged. Therefore, balancing was not called for. They believed that because the Act was instrumental to securing the life, liberty and security of the child, the parental decision to withhold treatment was outside the sphere of "liberty". With regard to the freedom of religion and belief, they argued that this freedom "should not encompass activity that so categorically negates the 'freedom of conscience' of another".<sup>328</sup>

In the South African *Christian Education* case, the Government overruled parental authority in general, in all cases of delegating the right to administer corporal punishment to schools. The new law adopted by Parliament outlawed this practice for public and private schools. Christian Education, an organization which ran faith-based schools, and some of the parents believed that this unjustifiably interfered with their parental authority. Justice Sachs, writing for the majority, balanced the involved rights. While honoring the sincere beliefs of Christian Education, he explained that an exemption could not be granted. That would automatically undermine the stated purpose of the Act: to ensure that all children in public and private schools are protected from the potentially harmful and humiliating experience of corporal punishment.<sup>329</sup>

Du Plessis applauded Sachs' careful maneuvering in *Christian Education*, especially with regard to outlining a jurisprudence of the communal dimension of the freedom of religion and belief.<sup>330</sup> The judgment included quotes, repeated in later judgments, such as the acknowledgement of the many social contributions of religious bodies to ethical, social and cultural life: "They are part of the fabric of public life, and constitute active elements of the diverse and pluralistic nation contemplated by the Constitution. Religion is not just a question of belief or doctrine. It is part of a way of life, of a people's temper and culture."<sup>331</sup>

#### 4.6.6 What is balancing?

Evans notes that "the problem with competing or conflicting rights is that in many instances it is not easy to determine which should take priority over the other under the circumstances and why".<sup>332</sup> The discussion and analysis of the balancing cases above shows us a few balancing principles that could apply to the balancing cases.

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328 *Ibid.*, paras 213-221 and 224-230.

329 Currie & de Waal, *supra* n. 63, at 322.

330 Du Plessis, *supra* n. 6, at 26 and 32.

331 *Christian Education South Africa v. Minister of Education*, Case CCT4/00, *supra* n. 25, para. 33.

332 Evans, *supra* n. 8, at 164.

In the cases in which balancing of religious beliefs and LGBTQ+ equality was required, we saw that where possible it is preferable not to prioritize one right over the other. The introduction of same-sex marriage to guarantee the rights of such couples, does not mean that those who hold (religious) beliefs against same-sex marriage must submit to it. They have a constitutional right not to be an accessory or facilitating in the legal realization and ceremonies of such unions. We also saw that the tolerance in a pluralist society does require acknowledging the existence of the other, even if we do not agree with them.

In balancing individual rights and communitarian interests, the cases showed that it is not always easy to uphold individual choice and liberty where the practice is deemed at odds with mainstream views, especially once these have been expressed through democratic procedure. But equally, the mainstream must not have the privilege to have its views enforced through law. After all, the principle is “majority rules, minority rights”. Sometimes we must even accept a certain risk of harm, to enable all of us to live in accordance with our sincere beliefs and truly respect difference. It is for public officials (such as teachers) to instill tolerance in others. Where the individual rights must submit to the overriding interest, the balance-full approach is to make an effort to explain at length why and how the individual right in question is engaged. This shows that the claim is taken seriously and that under slightly different circumstances, the outcome could be different.

We also saw that balancing requires not to generalize and assume. The case at hand should be solved. If there is no evidence of a certain danger, risk and/or collision of rights, then in the case in question there is no necessity to choose to limit a right.

The cases in which the balancing requires equilibrium between individuals and their communities seem complex with regard to equal concern and respect. The challenge is to leave the “inside law” as untouched as possible, without leaving individual rights unprotected. The state may not delegate its authority to non-state bodies. Finding an angle which does not make the decision zero-sum, as the dissenters in *Fernández Martínez* suggested, creates opportunities for such a balance.

The cases show that balancing between the rights of parents and their children is complex. *Christian Education* shows that similar to the individual/communitarian cases, giving detailed attention to the right of the parents, which is overridden, helps to achieve the balance. In many cases in which the interests of parents and children collide, the interest of children will prevail because they are less able to look out for their own interests. Nevertheless, interfering with parental authority is always serious state interference and must be justifiable by a high-stake interest.

Critics of the Strasbourg jurisprudence have argued that by balancing, the “Strasbourg organs have blurred the freedom of religion into a general mélange of mutual respect not only between the religions but between the freedom

of religion and other rights.”<sup>333</sup> Many of the cases discussed above show that balancing does not necessarily blur the meaning of the freedom of religion and belief at all. On the contrary, in many of the cases we see that the freedom of religion and belief is first given robust content before being balanced with the other rights and interests in question. This contributes to an outcome of equal concern and respect. Neither of the Courts has accepted internal limits as a principle of balancing. However, in their separate concurring opinion in *Children’s Aid Society*, Justices Iacobucci and Major concluded that they believe that the parental decision to withhold treatment is outside the sphere of liberty.<sup>334</sup> Yet the approach taken by the majority achieved more of a balance.

#### 4.7 THE FREEDOM OF RELIGION AND BELIEF AND SECULARISM

Secularism is commonly understood to be a constitutional principle which prescribes the separation of state authority and religious authority, i.e. institutional secularism (see further section 2.6.2). It comes in many different shapes and forms, much like the interdependence of religious and state authority. Obviously, secularism and the right to freedom of religion and belief have a relationship – sometimes mutually supportive, sometimes strained. Secularism plays a role in many of the selected cases. This section analyzes the relationship between secularism and the right to freedom of religion and belief.

States can choose from a variety of models when it comes to the relationship with religion and belief. In Hirschl’s view, the ways in which a state can relate to religion and belief can be divided into: (1) a separationist model; (2) an accommodationist model; and (3) a strong establishment or theocratic model. While France, the United States and Turkey are assembled under “separationist”, multicultural democracies such as Canada, South Africa or India are “accommodationist”, whereas countries from the traditional Kingdom of Saudi Arabia to the revolutionary Islamic Republic of Iran portray the “strong establishment”.<sup>335</sup> Within any of these categories, there is also a high degree of diversity. Two of the tribunals which feature in this study, the SCC and the CCSA, function within national contexts with their own models of the state-religion relationship. The ECtHR is a supranational court which has to deal with a variety of models between the member states.

The preamble of the Canadian Charter reads: “Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law”.

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333 Harris, O’Boyle & Warbrick, *supra* n. 265, at 440, paraphrasing M.D. Evans, *Religious Liberty and International Law in Europe*, Cambridge University Press, Cambridge (UK) 1997, p. 365.

334 *B. (R.) v. Children’s Aid Society of Metropolitan Toronto*, Case 23298, *supra* n. 55, paras 213-221.

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

While the principle of the rule of law can be adjudicated, there is doubt as to whether the same can be said for the supremacy of God.<sup>336</sup> Ryder suggests reading the clause as “secular humility towards religion and the recognition that the Charter as the nation’s new secular religion” recognizes that “there are other truths [...] that are profound sources in people’s lives that ought to be nurtured as counterbalance to state authority.”<sup>337</sup>

The South African Constitution has a preamble which refers to the South African struggle for freedom and the respect for the country’s diversity and the ambition to build a democratic South Africa. The preamble to the Constitution closes in four of the nation’s languages:

*May God protect our people.  
Nkosi Sikelel’ iAfrika. Morena boloka setjhaba sa heso.  
God seën Suid-Afrika. God bless South Africa.  
Mudzimu fhatutshedza Afurika. Hosi katekisa Afrika.*

Currie and de Waal argue that the drafters of the Constitution must have had the “cozy relationship that existed between the apartheid regime and the three Afrikaans churches in South Africa” as much on their mind as the problems that could be caused by insisting on a strict separation. The compromise reached in the Constitution, however, is not unique: the state is not prevented from recognizing or supporting religion, but equal treatment is required. Furthermore, all individuals but also communities are free to exercise their religion. When the subsections are read together, a strong equal treatment component besides a freedom component within the right becomes manifest.<sup>338</sup>

The European Convention of Human Rights does not deal directly with the relationship between church and state. Like all international human rights treaties, it is instead limited to freedom of religion and belief and non-discrimination thereof. From this reference point, there are permissible and non-permissible state actions with regard to faith-based organizations and communities, as we saw in the selected cases. If the state respects the freedom of religion and belief, the ECHR neither prohibits or prescribes any of the three, separation, accommodation or establishment in religion-state relations.<sup>339</sup> The contracting states vary greatly in their state-religion models. Some have one or more established religions. Some distinguish between recognized religions and non-recognized religions. Some are officially implicitly pluralist

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336 See L. Sossin, “The “Supremacy of God”, Human Dignity and the Charter of Rights and Freedoms”, in *University of New Brunswick Law Journal*, vol. 52, no. 227, pp. 227-241 (2003), p. 232.

337 Ryder, *supra* n.1, at 94.

338 See Currie & de Waal, *supra* n. 63, at 315.

339 Evans & Thomas, *supra* n. 153, at 699-700.

and/or secular.<sup>340</sup> Evans and Thomas position Turkey and France at one end with secularism as official doctrine and state policy. Germany also belongs on this end of the spectrum. But while its constitution prohibits establishment, the preamble refers to “responsibility before God” and the Catholic and Evangelical (i.e. Protestant) Churches are public law bodies. At the other end of Evans’ and Thomas’ spectrum are member states with strong establishment, such as Greece, Iceland, Italy, and the United Kingdom. Yet a “country such as the United Kingdom, it might be argued, has a great deal of religious freedom and religious tolerance – more than many secular countries – despite its established church”. A state not distinguishing between state and religious authority at all, would clearly violate the Convention. Short of this extreme, the Strasbourg case law shows that those states with established churches will at times intrude into the religious freedom of their citizens.<sup>341</sup> Yet also in secularist states, the principle of secularism will often outweigh the freedom of religion and belief.<sup>342</sup>

#### 4.7.1 Issues of freedom of religion and belief and secularism

Many of the selected cases involve to a certain degree issues of secularism and the freedom of religion and belief. In many of the selected cases, the theme is even central. Hence, the state’s relationship with religion and belief is elaborately discussed in many of the above sections. Here, therefore, we can draw on many of the previous observations. Indeed, Evans and Thomas stipulate that church-state relationships are not only defined by the freedom of religion and belief, but also by the freedoms of expression, privacy, assembly, and marriage. “In most religion cases, however, the Court treats the religion-specific provisions outlined above as the *lex specialis* – the law that is most appropriate to the particular legal problem – and tends to focus on those provisions.”<sup>343</sup>

In a total of at least 25 cases, the state’s relationship towards religion and belief is central. Five of these were decided by the SCC, 10 each were decided by the CCSA and ECtHR. A few topics are central to the discussion. One of these topics is the exclusiveness of state marriage. This topic correlates with the discussion of marriage in sections 4.4.3–4.4.5 and raises the following questions:

- Must state institutions recognize religious marriage under some circumstances (South African cases *Amod*, *Daniels*, *Hassam* (sections I2.4.5, I2.4.8 and I2.4.12) and the Strasbourg case *Yiğit* (section I3.4.9))?

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340 See Rainey, McCormick & Ovey, *supra* n. 118, at 478.

341 Evans & Thomas, *supra* n. 153, at 699, 705 and 707-708.

342 Lerner & Rabello, *supra* n. 123, at 18.

343 Evans & Thomas, *supra* n. 153, at 705.

- Can secular courts enforce a contractual obligation to provide for a religious divorce (Canadian case *Bruker*; section I1.4.11)?
- Is there an obligation for Parliament to regulate religious marriages of a minority religion (South African case *Women’s Legal Centre Trust*; section I2.4.13)?

Another topic is the relationship between state institutions and religion. This correlates with the discussion of political freedom of faith-based communities in 4.4.4 and raises the following questions:

- Can legislators be required to swear a religious oath and can legislative meetings be started with a collective prayer (Strasbourg case *Buscarini*; section I3.4.1 and Canadian case *Mouvement laïque québécois*; section I1.4.15)?
- Can faith-based political parties which oppose the current form of secularism be prohibited? (Strasbourg case *Refah*; section I3.4.5)?
- Can a state dismiss a judge for being a member of a faith-based community (Strasbourg case *Maestri*; section I3.4.6)?
- Can secular courts apply secular law to procedures in a faith-based community (Canadian case *Hofer*; section I1.4.2)?

Religious education is also a topic in this section. This topic correlates with the discussion of religious education in state schools in section 4.5.2 and raises the following question: may the state order the display of religious symbols in state schools and/or order the compulsory character of a religious instruction class (South African case *Gauteng School Education Bill*; section I2.4.2 and Strasbourg cases *Lautsi* and *Folgerø*; section I3.4.8 and 6.4.10)?

The final topic is religious and secular beliefs as a source of law and policy. This topic relates to many of the other themes discussed in the previous sections and raises the following questions:

- Can religious or secularist beliefs be sources of interpretation of legal concepts? Canadian case *Reference Same-Sex Marriage* (section I1.4.9) and South African *Fourie* case (section I2.4.10).
- Can religious or secular beliefs be a source of legislation to enforce certain behavior? South African cases *Solberg* and *DE v RH* (sections I2.4.4. and I2.4.14) and Strasbourg cases *Şahin* (section I3.4.7) and *S.A.S.* (section I3.4.15).
- What does state neutrality require? Canadian case *Lafontaine* (section I1.4.8), South African cases *Final Certification* and *Certification Western Cape* (sections I2.4.1 and I2.4.3), and Strasbourg cases *Hasan v. Chaush* and *Fernández Martínez* (sections I3.4.4 and I3.4.14).

#### 4.7.2 Exclusiveness of state marriage

The Muslim marriage cases *Amod*, *Daniels*, and *Hassam*, as we saw in sections 4.4.3-4.4.5, show that according to the CCSA a purely religious marriage must sometimes be seen as a legal marriage in spite of the lack of legal formalization. Not doing so would seriously disadvantage the widows of such marriages to a discriminatory degree. In all the cases, the claimants are widows. The cases do not indicate if such a marriage must also be recognized under certain circumstances, when both spouses are alive.

In *Yiğit*, it is clear that the Turkish authorities take a much more binary approach to marriage than the CCSA, even though the claimant was also a widow. The ECtHR affirmed this approach. Mrs. Yiğit and her husband did not acquire a formal status as a married couple which led to social security, pension and inheritance disadvantage after her husband had passed. The fact that many couples in Turkey (like in South Africa for that matter), like Mrs. Yiğit, do not have their marriages registered for financial reasons did not change the judicial evaluation. The CCSA, on the other hand, regarded such personal factors and consequences as dominant, rather than the risk of people no longer registering their marriages.

In the Canadian *Bruker* case, the ex-husband claimed that the secular courts could not enforce a clause in the divorce agreement which obliged him to give his wife a *get* (Jewish religious law divorce). The dissenting judges on the SCC agreed. State neutrality in matters of religion made it impossible to enforce it. The majority, however, found in her favor. Not honoring the agreement inhibited her freedom as a Jewish woman in Canada.<sup>344</sup>

The South African Muslim marriage cases were decided against the backdrop of an ongoing debate in South Africa over the regulation of Muslim marriages. The Constitution actually makes this possible. The Women's Legal Centre Trust relied on a provision in the Constitution according to which the CCSA can declare that a state organ has forsaken its constitutional duties. But in *Women's Legal Centre Trust*, the CCSA found that said provision did not apply in this case. There were many interests and choices involved in adopting legislation recognizing Muslim marriages. Hence, the absence of an Act could not be attributed to mere negligence of constitutional obligations. Furthermore, it would not be appropriate for the CCSA to decide as a Court of first and final instance.<sup>345</sup>

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<sup>344</sup> See *Bruker v. Marcovitz*, Case 31212, *supra* n. 60, paras 121 and 93.

<sup>345</sup> *Women's Legal Centre Trust v. President of the Republic*, Case CCT13/09, *supra* n. 72, paras 11-12 and 23.

### 4.7.3 State institutions and religion

The *Buscarini* case was brought to Strasbourg by legislators from San Marino. They objected to being required to swear on the Christian Gospels in order to formalize their status as Members of Parliament. The Court found an unjustifiable interference. There was no legitimate aim for such a rule. This is noteworthy, seeing whenever the government can point to any of the mentioned aims in the Convention, the Court will usually assume the legitimate aim and continue the analysis by looking into the necessity component. According to the Court, the oath effectively represented exclusion. Potential parliamentarians who because of their own beliefs were unable to swear an oath on the Christian Holy Book were kept from entering Parliament, whereas in a democratic society there should be no barrier to keeping people from taking elected office.<sup>346</sup>

Mr. Simoneau regularly attended the public meetings of the municipal council of Saguenay, in Quebec. He also felt excluded as an atheist because each meeting started with a prayer and related religious symbolism. After Mr. Simoneau had made his concerns known and had applied to the Human Rights Tribunal with the support of the *Mouvement laïque québécois* (MLQ), the City adopted a by-law regulating the prayer, which changed the wording of the prayer and provided for a two-minute delay between the end of the prayer and the official opening of council meetings. The mayor and the councilors did show religious affiliation during the prayer and the opening, pointing to their rights under the freedom of religion and belief.<sup>347</sup> With the help of the movement, Mr. Simoneau took his case up to the SCC.

The SCC was unanimous in finding in favor of the claimants. “Sponsorship of one religious tradition by the State in breach of its duty of neutrality amounts to discrimination against all other such traditions.”<sup>348</sup> The Canadian concept of neutrality “requires that the state neither favor nor hinder any particular belief” and this included non-belief atheism and agnosticism. A neutral public space, free from coercion, pressure and judgment on the part of public authorities in matters of spirituality protected every person’s freedom and dignity, and it helped preserve and promote the multicultural nature of Canadian society.<sup>349</sup>

The SCC found that the recitation of the prayer at the council’s meetings was more than anything else a use of public powers to manifest and profess one religion to the exclusion of all others. This was true regardless of the

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346 ECtHR (GC), *Buscarini and Others v. San Marino*, app. no. 24645/94, 18 February 1999, paras 38-40. See also Rainey, McCormick & Ovey, *supra* n. 118, at 477.

347 SCC, *Mouvement laïque québécois v. Saguenay (City)*, Case 35496, [2015] 2 SCR 3, 15 April 2015, para. 2.

348 *Ibid.*, para. 64.

349 *Ibid.*, paras 70-75.

traditional character. The evidence even showed that the mayor and council members had explicitly referred to the conflict as a quest for their religion. The prayers and religious symbolism were very much denominational, in spite of claims to the contrary. While non-believers could refrain from participating, the price for doing so would be exclusion. This is what state neutrality was meant to prevent.<sup>350</sup>

Not reciting a prayer or displaying religious affiliations, on the other hand, did not amount to giving atheism and agnosticism prevalence over religious beliefs. The SCC was aware that “secularism” was not more neutral than other positions regarding belief and religion. “True neutrality” presupposed abstention, but it did not amount to a stand favoring one view over another.<sup>351</sup> As the opponent had also cited the constitutional preamble, the SCC explained that it could not lead to an interpretation of freedom of conscience and religion that authorized the state to consciously profess a theistic faith. Hence, it could not be used to justify the prayer in question.<sup>352</sup>

Whereas the MLQ advocated more laicism and restraint of state-sponsored religion in Quebec, the Refah party’s quest was to restrain state-sponsored laicism and to create more liberty for believers to conduct their lives in accordance with their faith. They even proposed legal pluralism, so believers could have their religious traditions govern their family relations. But the Turkish authorities were convinced that Refah’s plans went much further. In their view, the party’s criticism of Kemalist laicism implied the goal to establish a theocracy.

The Refah Party had won 22% and thus by far the largest part of the popular vote in the 1995 elections in Turkey. It had formed a coalition government with another party (non-controversial by Turkish standards), headed by a Refah prime minister. Prior to Refah, a total of fourteen other political parties had been dissolved in Turkey, three of which had previously challenged the prohibition in Strasbourg. In the three earlier cases, the Court had found violations of the guarantees of the Convention on freedom of association and freedom of expression. All these parties adhered to secular ideologies and had little electoral success. Refah was faith-based and had won the elections. “However, the European Court decided not to second-guess the Turkish authorities in the Refah case and upheld the dissolution as compatible with the Convention”. As Boyle notes, this took the notion of “militant democracy” and the actions permissible under this concept to a whole new level.<sup>353</sup>

In *Refah*, the Government argued that theocracy by definition rules out democracy. It accused Refah of wanting to return to the theocratic past of

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350 *Ibid.*, para. 87.

351 *Ibid.*, paras 120-126 and 130-133.

352 *Ibid.*, paras 144-149.

353 Boyle, *supra* n. 170, at 2.

Ottoman rule.<sup>354</sup> The Court went along. But the argument misrepresented both the stated goals of Refah and Turkey's history. Democracy as understood in the Convention system does not rule out the various models described in the introduction to this section. Refah did try to introduce public law, which would accommodate the majority religion. But given the existence of Sabbatarian laws in many of the other member states, both secular and establishment, this can hardly be seen as "subversive of democracy or human rights". Was "it not perfectly legitimate for a political party such as Refah, which represented millions of Muslim voters, to introduce [...] varying working hours in the public service during Ramadan?"<sup>355</sup>

In light of this modern notion of democracy, the faults of the Ottoman Empire at the time it ceased to exist, lay not with the status given to religion but with the (material) lack of rule of law and human rights. It was not in any proper understanding a "theocracy", ruled by religious authorities, comparable to contemporary Iran or the Vatican state. Indeed, An-Na'im calls the very idea that a state enforce *Shari'a* a "historical fallacy, inconsistent with *Shari'a* itself".<sup>356</sup> The Kemalist single party republic was modelled on the Ottoman Empire, with Turkish nationalism replacing the Ottoman intercommunalism and the all-powerful president replacing the omnipotent sultan. Leyla Şahin, in her case discussed elaborately above, suggests many elements of Kemalist secularist state ideology might be at odds with modern notions of liberal democracy. This is a legitimate view within a pluralist understanding of democracy.

The *Refah* case did not only represent a slippery slope when it comes to understanding Turkish history. Justice Kovler warned in *Refah* and *Yiğit*, that interpreting the meaning of terms, concepts and practices originating from a certain religion is dangerous for a court, especially when the religion in question is wholly unfamiliar to most of the judges. It might get an international human rights court "entangled in Eurocentrism".<sup>357</sup> He also warned that the jurisprudence of the Court must not dismiss all political movements that seek to assert the tenets of Islam in a political fashion as *a priori* anti-democratic and not deserving of human rights protection.<sup>358</sup>

*Maestri* also illustrated that sometimes judges are not immune to uniformed stereotypes. While the majority ruled in favor of the Freemason judge who was dismissed in absence of a clear, undisputable and predictable rule,<sup>359</sup> the dissenting judges saw the dismissal as justified. They believed that the

354 *Refah Partisi (The Welfare Party) and Others v. Turkey*, app. nos. 41340/98, 41342/98, 41343/98 and 41344/98, *supra* n. 167, paras 82 and 125.

355 Boyle, *supra* n. 170, at 14.

356 An-Na'im, *supra* n.186, at. 1242.

357 See *Terife Yiğit v. Turkey*, app.no. 3976/05, *supra* n. 74, *Concurring opinion of Judge Kovler*.

358 *Refah Partisi (The Welfare Party) and Others v. Turkey*, app. nos. 41340/98, 41342/98, 41343/98 and 41344/98, *supra* n. 167, *Concurring opinion of Judge Kovler*.

359 ECtHR (GC), *Maestri v. Italy*, app. no. 39748/98, 17 February 2004, paras 41-43.

loyalty which Freemasons promise to their Lodge and brethren is incompatible with the office of a judge.<sup>360</sup> But do the Freemasons truly categorically differ in this from many organized faith-based groups the world over?

In *Hofer*, the central question was whether the standards of civil law applied to a procedure regulated by “own law” of a community. Mr. Hofer did not abide by the decision of the community leadership. According to the majority, the community’s internal procedures did not stand the test of procedural fairness mandated by civil law. Dissenting Chief Justice McLachlin concluded that the procedures were “open and eminently fair”. She concluded that the problem was not with procedural fairness, but the fact that Mr. Hofer did not accept the decision taken by the community leadership, although as a member of the community he had vowed to do so.<sup>361</sup>

The cases *Refah* and *Hofer* and especially the discussion between the judges touch on another important issue for the relationship between state and religion. This is the relationship between the secular judiciary and secular law, and concepts, rules and behavior originating from religion and/or belief. Section 4.7.5 deals with religion and beliefs as sources of law and policy. But how should judges approach the concepts which the believers hold dearly? In *Amselem* (section I1.4.7), also discussed in section 4.2, the SCC preferred approaching beliefs as personal sincerity. Judicial neutrality demands that judges do not interpret religious concepts. As justice Iacobucci explained for the majority, the state was not fit to be “the arbiter of religious dogma”. Accordingly, courts should avoid judicially interpreting the content of a subjective understanding of “religious requirement, obligation, precept, commandment, custom or ritual”. “Secular judicial determinations of theological or religious disputes”, “unjustifiably entangle the court in the affairs of religion.”<sup>362</sup>

In *Multani*, also discussed in section 4.2, the SCC dismissed the declarations made by Sikh officials that replica kirpans could be worn to honor the religious precept as irrelevant.<sup>363</sup> What mattered were the sincere personal religious beliefs of Gurbaj.<sup>364</sup> In *Bruker*, discussed above in section 4.7.2, the Court dismissed the ex-husband’s declaration that his wife did not live a particularly religious life as irrelevant. It was not for the Court to judge how Mrs. Bruker should practice her religion.<sup>365</sup> The CCSA reasoned along the same lines when in *Pillay*, discussed in section 4.2 as elsewhere in this chapter, it said that questioning the importance or centrality of a practice “would require them

360 *Maestri v. Italy*, app. no. 39748/98, *supra* n. 358, *Joint dissenting opinion of Judges Bonello et al.*, para. 15.

361 *Lakeside Colony of Hutterian Brethren v. Hofer*, Case 22382, *supra* n. 138, pp.73-83.

362 *Syndicat Northcrest v. Amselem*, Case 29252, 29253, *supra* n. 22, para. 50.

363 *Multani v. Commission scolaire Marguerite-Bourgeoys*, Case 30322, *supra* n. 15, para. 39.

364 *Ibid.*, paras 32-33, quoting *R. v. Big M Drug Mart Ltd.*, Case 18125, *supra* n. 53.

365 *Bruker v. Marcovitz*, Case 31212, *supra* n. 60, para. 113, quoting the Superior Court Judge.

to substitute their judgment of the meaning of a practice for that of the person before them and often to take sides in bitter internal disputes".<sup>366</sup>

ECtHR judge Kovler, as we saw, was bound to agree with McLachlin (*Hofer*) and the majority in *Amselem*, *Multani* and *Pillay*. Secular judges are not trained in religious doctrine and looking at another (sub-) culture from one's own always contains a risk of bias. This is why they tried to raise awareness among their colleagues in *Refah* and *Yiğit*. Literature has been critical of the ECtHR's tendency to evaluate religious doctrine.<sup>367</sup> Martínez-Torrón and Navarro-Valls, warn of the dangers involved if judges substitute their assessment of what is reasonable for an individual to believe, for the individual's own belief system.<sup>368</sup> Lerner and Rabello are also of the opinion that courts should avoid "interpretations of religious precepts which are really the province of the religious authorities and not the Government".<sup>369</sup> The Arrowsmith test, once developed by the European Commission of Human Rights, seems to have gone out of use in recent years.<sup>370</sup> The test was once used in order to determine "objectively" whether a certain practice or manifestation is actually linked to a religious or other belief and covered by Article 9.

In *Refah*, one of the doctrines evaluated by the ECtHR was a concept from Islamic jurisprudence, the term *jihad*. The Court, much like we often see in Western media, referred to the term as meaning "holy war" for "total domination of Islam in society".<sup>371</sup> But as Kevin Boyle notes, "the definition [the Court] gives to jihad as 'Holy War' represents a false interpretation to millions of Muslims." The proper meaning of the word is "struggle". "The concept has been expropriated by extreme believers to mean religiously-sanctioned killing. But the majority of Muslims see this as a grave distortion of what is in actuality the spiritual idea of personal struggle for piety." In *Refah's* case, the use of the term may have referred to a political struggle, but there was no evidence of any violent connotation. Boyle and Bader note that the approach

<sup>366</sup> *MEC for Education: Kwazulu-Natal and Other v. Pillay*, Case CCT 51/06, *supra* n. 7, para. 87.

<sup>367</sup> E. Brems, 'Above Children's Heads. The Headscarf Controversy in European Schools from the Perspective of Children's Rights', in *The International Journal of Children's Rights*, vol. 14, no. 2, pp. 119–136 (2006). Important also are Evans, *supra* n. 26; S. Langlaude, 'Indoctrination, Secularism, Religious Liberty, and the ECHR', in *International and Comparative Law Quarterly*, vol. 55, no. 4, pp. 929–944 (2006); Boyle, *supra* n. 170, at 14; J. Gunn 'Fearful Symbols: The Islamic Headscarf and the European Court of Human Rights in Sahin v. Turkey', in *Droit et Religion*, pp. 339–367 (2008).

<sup>368</sup> See J. Martínez-Torrón and R. Navarro-Valls, 'The Protection of Religious Freedom in the System of the Council of Europe', in T. Lindholm, W.C. Durham and B.G. Tahzib-Lie (eds.), *Facilitating Freedom of Religion or Belief: A Deskbook*, Martinus Nijhoff Publishers, Leiden (Netherlands), 2004, p. 234.

<sup>369</sup> Lerner & Rabello, *supra* n. 123, at 43.

<sup>370</sup> Harris, O'Boyle & Warbrick, *supra* n. 265, at 433.

<sup>371</sup> *Refah Partisi (The Welfare Party) and Others v. Turkey*, app. nos. 41340/98, 41342/98, 41343/98 and 41344/98, *supra* n. 167, para. 130.

taken in Strasbourg would not have passed the strict scrutiny test of US “clear and present danger” jurisprudence.<sup>372</sup>

#### 4.7.4 Religion and public education

The essence of the conflict in *Gauteng School Education Bill* was whether the state must provide for educational institutions based on a single common culture, language or religion. The South African constitution protects the right to participate in the cultural, linguistic and religious communities of one’s choice. It also allows for religious observances at state-run or state-aided educational institutions. However, all this does not infer a positive obligation on the part of the state to actually provide for state-run educational institutions specifically for every cultural, linguistic or religious group.<sup>373</sup> The CCSA also made it very clear that compelling students “to attend religious classes and religious practices at the school” is a direct violation of the freedom of religion and belief as guaranteed by the Constitution.<sup>374</sup>

In *Folgerø*, there was a compulsory subject which taught Christianity, religion and philosophy. While exemptions were possible, according to a majority on the Court, the procedure created such high burdens that parents and children effectively felt coerced into following the subject. The majority considered it relevant that this all applied in the state schools. Hence, the argument that non-Lutheran parents could send their children to private schools was deemed irrelevant. States have an obligation to ensure pluralism in the public school system, irrespective of the possibility to have a state religion as well as a state church and to promote, protect and enhance both by means of legislation.<sup>375</sup>

The majority also took into consideration that schools were necessarily places of coercion. Yet with regard to religion, this coercion must be restrained in order to safeguard, that students did not feel compelled to have or not have to change their religion. The necessary restraint applies equally to religious, secular and atheist proselytism in the school system. They can all be intrusive. In the state educational system, minorities must not be made to feel like outsiders. The state must balance legitimate majority and minority concerns, without subjecting one to the other. Ideally, the state provides for “religious literacy” which will also counteract bigotry, intolerance and discrimination.<sup>376</sup>

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372 Boyle, *supra* n. 170, at 13 and 11. See also Bader, *supra* n. 179, at 30- 31.

373 Constitution of the Republic of South Africa, 10 December 1996, art. 31.

374 *In Re: Dispute Concerning The Constitutionality of Certain Provisions of The School Education Bill of 1995*, Case CCT39/95, *supra* n. 204, para. 21.

375 *Folgerø and Others v. Norway*, app.no. 15472/02, *supra* n. 214, paras 98 and 102.

376 Evans, *supra* n. 193, at 453, 469, 455, 457-459.

The dissenting judges in *Folgerø* did not perceive the procedure as burdensome. As there was an opt-out option, the Norwegian state had struck the right balance. It was natural for the procedure to create some obstacles as to prevent abuse.<sup>377</sup> But what if there is no 'opt-out' option? The claimants in *Lautsi* objected to the obligatory nature of the crucifix in every classroom in Italy. The Lautsi family could not opt out from attending class, and neither could the class or the school accommodate the Lautsi family's agnosticism. The chamber followed the jurisprudence that historical ties between the state and a particular religion do not justify deviation from the principle of a pluralist educational environment.<sup>378</sup>

The Grand Chamber took complicated twists and turns to argue why the symbol which is at the heart of Catholic Christianity was still neutral enough not to display favoritism of the mainstream religion. Although the Lautsi family had attested that they felt unwelcome, the Grand Chamber still felt that the obligatory display of a religious symbol in every Italian classroom could go hand in hand with the state's role as impartial organizer of pluralism. The lack of coherence and logic in this reasoning invited speculations that politics, more than law had guided the reasoning.

#### 4.7.5 Religious and secularist beliefs as sources of law and policy

In both the Canadian *Same-Sex Marriage* case and the South African *Fourie* case, interveners raised arguments proclaiming that marriage had been fixed by culture and religion to bonds between opposite-sex couples. But both Courts warned not to confuse two types of marriage: the legal concept which the state administers and the cultural concept which faith-based communities may determine and alter in their own right.

In *Same-Sex Marriage*, the SCC explained that "even if in the past religion and marriage were seen as inseparable by courts", nowadays it could not be interpreted from the point of view of a particular religious tradition as it had become a civil institution.<sup>379</sup> In *Fourie*, the CCSA said that while religious beliefs and practices may be supported by the state in an even-handed manner, they were no source for legislation nor were they a source for interpreting the Constitution. After all, if judges "were called upon to construe religious texts and take sides" this would place them in an impossible and undesirable situation.<sup>380</sup> As discussed in section 4.7.3, such a situation is impossible and

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377 *Folgerø and Others v. Norway*, app.no. 15472/02, *supra* n. 214, *Joint dissenting opinion of Judges Wildhaber, Lorenzen, Birsan, Kovler, Steiner, Borrego Borrego, Hajiyev and Jebens*, p. 52.

378 *Evans*, *supra* n. 8, at 147, referring to *Manoussakis and Others v. Greece*, app.no. 18748/91, *supra* n. 228.

379 *Reference re Same-Sex Marriage*, Case 29866, *supra* n. 76, para. 22.

380 *Minister of Home Affairs and Another v. Fourie et al.*, Cases CCT 60/04 and CCT10/05, *supra* n. 78, paras 91-92.

undesirable because secular judges are not trained in religious doctrine, and should avoid “interpretations of religious precepts which are really the province of the religious authorities”.<sup>381</sup> Therefore, the distinction between secular law and religious “own law” protects the citizens who do not wish to be bound by certain religious rules as much as those who hold them sacred.

But even when faith-based precepts are not to be considered sources for interpreting legislation, a constitution or a human rights document, we can hardly deny that many secular legal rules are inspired by religion, belief or a secularist world view. What does this say about the legality of such rules, vis-à-vis those who believe differently? In *Solberg*, the claimant challenged the prohibition of liquor sales on Sundays because they enforced a religious norm. In *DE v RH*, the former wife of the claimant and her new partner believed they should not suffer legal consequences for adultery. The legal rule, which was inspired by moral considerations of the past, illegitimately interfered in private and family affairs. The claimants in *Şahin* and *S.A.S.* felt inhibited by the secularist mainstream rules which limited their freedom as women of faith to make personal choices in their attire.

In *Solberg*, the owner of a supermarket was charged for violating the Liquor Act. The Act prohibited the sale of liquor, including table wine, in supermarkets on Sundays and public holidays. Liquor could be bought in bars and restaurants on such days. Supermarkets could also be open in order to sell other goods. A majority of the CCSA found that the Liquor Act did not infringe constitutional rights. The majority argued that the Constitution (in this case the interim constitution which was still in place during the case) did not include an “anti-establishment clause”.<sup>382</sup> Hence, such a clause should not be read into the Constitution. The South African Constitution and thus the Court approached the relationship between religion and state from the equality angle.<sup>383</sup>

The Canadian milestone case *Big M* played an important role of reference in the case. Generally, the CCSA is very open to judicial borrowing. Also, this case was also decided very early on in the constitutional era and any judicial inspiration from a liberal constitutional order would have been foreign. According to the majority, South African law, unlike the Lord’s Day Act in *Big M*, did not compel supermarkets to be closed on closed days, neither did it make it impossible to consume liquor elsewhere on those days. Hence, Chief Justice Chaskalson, writing for the majority, could not see why the Liquor Act would compel people to act or refrain from acting in a manner contrary to their religious beliefs. But even if the Act was seen to interfere with the freedom of religion and belief, the majority argued, the interference would be reasonable

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381 Lerner & Rabello, *supra* n. 123, at 43.

382 *S v. Lawrence et al.*, Cases CCT38/96 et al., *supra* n. 84, paras 1-2.

383 *Ibid.*, paras 99-101. See also Currie & de Waal, *supra* n. 63, at 329.

and justifiable in an open and democratic society. After all, the closed days nowadays did not necessarily serve religious purposes.<sup>384</sup>

Justice Sachs in his separate opinion took another route. He did see an interference with the freedom of religion and belief, which must be read from an equality angle. The Act had an impact on the choice of non-Christian liquor sellers, who because of their religion kept a different Sabbath and thus had a competitive disadvantage. Secondly, it had an impact by symbolically endorsing the Christian religion to the exclusion of all others.<sup>385</sup> While the days have Christian origins, from the perspective of the “reasonable South African” – who could be of any religion or of none – the public holidays (as such) no longer represented state endorsement of religion. On the other hand, the prohibition of the sale of liquor on these public holidays did represent state endorsement of religion.<sup>386</sup> However, Sachs concluded that the economic disadvantages involved for non-Christians, or non-observers of Sabbath temperance, were very marginal. The message of favoritism towards Christianity was also reduced by the marginal economic effects and the possibility of consuming liquor elsewhere.<sup>387</sup> Hence, there was no violation.

The dissenting judges were inspired by the nation’s break with the past to take a more critical look. Given South Africa’s (until then recent) history of exclusive support for white Afrikaner Protestantism, it was unavoidable to conclude that the selection of closed days was “inspired by their significance for Christians”. Inevitably, the effect was that Christianity to the exclusion of other religions had been endorsed by legislative measures. Such favoritism was clearly contradicted with the Constitution’s duty of equal treatment of all religions and beliefs. Treating the obligation as a negative duty only failed to see the full spectrum. The positive obligation was breached by a regulation about closed days which favored one religion to the exclusion of all others. The purposes of the Liquor Act must surely be to restrict liquor consumption on the closed days as compared to other days. This displayed an endorsement of Christianity and hence constituted an unjustifiable, though not severe or egregious, infringement.<sup>388</sup>

By holding that the connection between the Christian Sabbath and the prohibition of liquor sale on a Sunday was too tenuous, Chaskalson tried to reconcile the prohibition with the equal treatment of all religions.<sup>389</sup> Yet as O’Reagan observed in the dissenting opinion, not only the “wall of separation” jurisprudence, but indeed also accommodationist jurisprudence would have required the striking down of this prohibition.<sup>390</sup> The real freedom of religion

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384 *S v. Lawrence et al.*, Cases CCT38/96 et al., *supra* n. 84, paras 90-97.

385 *Ibid.*, paras 136-138.

386 *Ibid.*, paras 156 and 163.

387 *Ibid.*, paras 169-173.

388 *Ibid.*, paras 116-122 and 125-132.

389 See Currie & de Waal, *supra* n. 63, at 327.

390 *S v. Lawrence et al.*, Cases CCT38/96 et al., *supra* n. 84, para. 122.

issue in *Solberg*, Du Plessis argued, should have approached the question from exactly the opposite angle: how to accommodate certain Christians' objection to the sale of liquor on their holy day.<sup>391</sup> In Smith's opinion, the freedom of religion and belief in the Bill of Rights required striking down old favoritism towards (Protestant) Christianity.<sup>392</sup>

In *DE v RH*, the claimant was the ex-husband who made use of existing law that allowed him to sue his ex-wife and her partner for adultery which took place while he was still married to her. According to the claimant, adultery had caused the break-up. His ex-wife claimed that the relationship had begun to deteriorate two years prior to the split.<sup>393</sup> A unanimous CCSA found the legal provisions the ex-husband based his claim on to be invalid for constitutional reasons.

The roots of the legal provision, Madlanga argued for the unanimous Court, lay in patriarchy. Case law then created the possibility for women to use them. Common law has always required the development of law by courts. Hence, now the law must be developed further based on the constitutional values which form an important and integral part of the *mores* of society. Long before the current constitutional order, societal views on adultery as well as divorce had changed. Many legal systems related to South Africa had abolished the legal claims against adultery.<sup>394</sup> The constitutional norms also informed present-day attitudes towards adultery, which in turn informed the *boni mores* of the new ethos. The former wife and the partner could rely on their rights to freedom and security of the person, privacy and freedom of association. Legal proceedings invaded the most intimate part of their private lives.<sup>395</sup>

Even if the fault for a failing marriage clearly lay with the adulterous party and the partner, their rights still mattered. Upholding liability towards the non-adulterous spouse would restrict the rights of consenting adults to make their own choices in sexual relations. On the other hand, the non-adulterous party's right to dignity was also engaged. The changing social attitudes did not change this. Yet weighing all the rights involved, in light of social change, must lead to the conclusion that legal liability for adultery could not be upheld. While marriage was still an important cornerstone of society, the law could not rescue a marriage.<sup>396</sup>

The ECtHR cases *Şahin* and *S.A.S.* both deal with secularist beliefs which were the source of official government policy and legislation. *Laïcité* is a constitutional principle developed during the French Revolution, usually

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391 L. du Plessis, 'Freedom of or Freedom from Religion? An Overview of Issues Pertinent to the Constitutional Protection of Religious Rights and Freedom in "the New South Africa"', in *Brigham Young University*, vol. 2001, no. 2, pp. 439-466 (2001), p. 453.

392 Smith, *supra* n. 247, at 5.

393 *DE v. RH*, Case CCT182/14, *supra* n. 96, paras 6-7.

394 *Ibid.*, paras 14-38.

395 *Ibid.*, paras 51-52 and 54.

396 *Ibid.*, paras 55-61, 64, 67-71.

interpreted as a strict separation between the domain of religion and state. Both the French and the Turkish constitutions include provisions on the laic nature of the state. The *Şahin* case was set in the 1990s in Turkey. Leyla was a medical student who wore the Islamic headscarf. University regulations prescribed, that students not show any signs of religious affiliation in their attire. But for Leyla, who sincerely believed she had to wear the headscarf at all times, this connoted a painful choice between continuing her studies and following her religious beliefs.

*S.A.S.*, set a good 20 years later in France, was launched right after the French Parliament adopted a new law prohibiting face coverings in public. While formulated in a religiously neutral way, the debates concerning the law in the French Parliament made it very clear that the law targeted the (revitalized) traditional face coverings worn by a small group of French Muslim women. The law drew on the notion of “living together” as reason to prohibit the face coverings. Both governments, Turkey in *Şahin* and France in *S.A.S* cited the rights and freedoms of others to curtail the freedom of religion and belief of the women who were affected. In both cases, the Court had to assess whether the attempt by a government to eliminate concrete pluralism, was somehow for the better of pluralism in general.

In *Şahin*, the majority opinion did not indicate a dilemma. While the measure surely limited the freedom rights of Ms. Şahin and other women like her, the Government argued that its purpose was to create an educational environment in which religious minorities and Muslims who do not believe that women are required to wear the *hijab* would not be confronted with the “powerful external symbol” which “might have some kind of proselytizing effect” and seems to be “imposed on women by a religious precept that [is] hard to reconcile with the principle of gender equality”. Therefore it concluded that it could not “easily be reconciled with the message of tolerance, respect for others and, above all, equality and non-discrimination”.<sup>397</sup> Judge Tulkens noted in her separate opinion, that the Court should not have repeated the unfortunate passages from *Dalhab* regarding the “powerful external symbol”. She failed to see “how the principle of sexual equality can justify prohibiting a woman from following a practice which, in the absence of proof to the contrary, she must be taken to have freely adopted”.<sup>398</sup>

Twenty years later, the majority was much more cautious in making statements about individual choices in following religious rules and customs. The majority found that the ban was justified by the aim of protecting the rights of freedoms of others, because Parliament could give great weight to “living together”, given the wide margin of appreciation. The ban did, however, have a disproportional effect on Muslim women and Islamophobic

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397 *Leyla Şahin v. Turkey*, app. no. 44774/98, *supra* n. 29, para. 111.

398 *Leyla Şahin v. Turkey*, app. no. 44774/98, *supra* n. 29, *Dissenting opinion of Judge Tulkens*, paras 11-13.

remarks which featured in the national debate were unreconcilable with the Convention.<sup>399</sup> The dissenting judges in *S.A.S.*, Nussberger and Jäderblom, lamented the fact that the majority did find a justification for the ban. The notion of “living together” apart from being too abstract was no “right” of “freedom” of any other and therefore could not carry the ban as a “legitimate aim”. As it was the ban’s purpose to restrict pluralism, based on “selective tolerance”, its aim was not reconcilable with the Convention.<sup>400</sup>

From a Canadian perspective Ryder notes, “the result of the *Şahin* case is destructive of religious harmony and tolerance, for it forces her (*Şahin*) to choose between observing the tenets of her faith and fully participating in higher education.”<sup>401</sup> Indeed, Judge Tulkens lamented how the majority in *Şahin* easily accepted that the role of impartial organizer required the state to ban the headscarf at university.<sup>402</sup> She noted: “freedom and equality for women cannot mean depriving them of the chance to decide on their future. Bans and exclusions echo that very fundamentalism these measures are intended to combat. When rejected by the law of the land, young women are forced to take refuge in their own law. As we are all aware, intolerance breeds intolerance.”<sup>403</sup>

Tulkens argued, unlike the majority’s assessment, that the headscarf had no single meaning but meant something else to women who wore it, or did not wear it. It was these women’s opinions that should have been central in the debate. For courts to make appraisals was uncalled for. After all, “equality and non-discrimination are subjective rights which must remain under the control of those who are entitled to benefit from them”. Paternalism is contrary to the personal autonomy jurisprudence developed under Article 8.<sup>404</sup> Not coincidentally, the claimant in *S.A.S.* accused the French Government of paternalist and culturally biased notions. Still, Judge Tulkens may have planted a seed which paid off in the cautious analysis of the majority in *S.A.S.*

While *Şahin* and *S.A.S.* show that for the Strasbourg bench secularist state policies deserve a certain benefit of doubt when it comes to their pluralist credentials, the Court has been known to be quite strict when it comes to the state’s mingling in the internal affairs of a faith-based community. In *Hasan v. Chaush*, hands-off impartiality was the Court’s bare minimum of organizational autonomy. Pluralism was a direct result of (the) freedom (of religion and belief). Therefore, the attempt to eliminate pluralism by trying to bring a religious community into one organizational structure was antithetical to

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399 *S.A.S. v. France*, app. no 43835/11, *supra* n. 9, para 151.

400 *S.A.S. v. France*, app. no 43835/11, *supra* n. 9, *Joint partly dissenting opinion of Judges Nussberger and Jäderblom*, paras 2 and 14.

401 Ryder, *supra* n.1, at 99.

402 *Leyla Şahin v. Turkey*, app. no. 44774/98, *supra* n. 29, *Dissenting opinion of Judge Tulkens*, para. 6.

403 *Ibid.*, para. 19.

404 *Ibid.*, paras 10-12.

freedom. While the state may officially recognize a certain religious leader or group, it may not prevent the exercise of unofficial religious leadership or ensure or enforce unity within a religious denomination.<sup>405</sup>

Obviously, the ECtHR's interpretation of secularism depends on the various meanings given to the concept by the member states and so the Court grants establishment systems the same benefit of doubt it grants the secularist systems. In *Fernández Martínez*, the majority was accepting of the dismissal of a public servant who was no longer suitable as a religious instruction teacher, because his non-conformism *vis-à-vis* Catholic Church doctrine had become public knowledge.<sup>406</sup> He had, however, never been accused of any negligence regarding his teaching position. This is why the minority on the Court believed that while the state had to honor its agreement with the Church, the dismissal of Mr. Fernández Martínez showed that the state had wrongly delegated its obligations to the Church.<sup>407</sup>

Whether state neutrality requires a passively neutral hands-off approach, or an actively neutral helpful approach was the essence of the difference of opinion on the bench in the SCC case *Lafontaine*. The congregation of Jehovah's Witnesses in the Quebecois village felt that the municipality had applied the zoning regulations to their detriment. They had found several lots for their church in areas with other houses of worship, but the municipality maintained that the zoning regulations did not allow for the church to be built there. The majority and the minority of the SCC agreed that the municipality had not acted to the best of its abilities in providing for the required transparency and the appearance of procedural fairness. What they disagreed on was whether this amounted to a breach of fairness and good faith and whether the municipality was under a positive obligation to assist the congregation. The majority thought it did. The minority found no breach of the freedom of religion.

According to one of the two dissenting judges, LeBel, state neutrality even prevented the municipality from actively assisting the congregation. He asserted that this neutrality was embedded in the freedom of religion and belief.<sup>408</sup> The interpretation of state neutrality, which LeBel derived from the freedom of religion and belief echoes the interpretation of the minority opinion of Deschamps and Charron in *Brucker*. They believed that state neutrality prevented secular courts from enforcing an agreement to grant a religious divorce.

According to the majority, the municipality's second and third decision regarding proposed lots was arbitrary because no reasons were given and no

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405 See *Hasan and Chaush v. Bulgaria*, app.no. 30985/96, *supra* n. 134, paras 60 and 78.

406 *Fernández Martínez v. Spain*, app. no. 56030/07, *supra* n. 148, paras 126-131.

407 *Fernández Martínez v. Spain*, app. no. 56030/07, *supra* n. 148, *Joined dissenting opinion of Judges Spielmann et al.*, paras 5-7.

408 *Congrégation des témoins de Jéhova de St-Jérôme-Lafontaine v. Lafontaine (Village)*, Case 29507, *supra* n. 106, paras 18-21.

alternatives were communicated. This “breached the duty of procedural fairness”. The duty existed, among other reasons, because of “the importance of the decision to the Congregation, impacting as it did on the right of the Congregation to practice the religion of its choice”.<sup>409</sup> LeBel disputed this but conceded that “more detailed reasons would have given the appellants a better understanding of the municipality’s decision”.<sup>410</sup> Justice Major agreed with LeBel in result, but only agreeing with the reasons concerning the finding of facts, and absence of any infringement to freedom of religion and belief. He distanced himself from the reasoning that the state’s neutrality prevented a more constructive attitude by the Municipality.<sup>411</sup>

In their report on interculturalism in Quebec, Bouchard and Taylor distinguish between liberal open secularism and republican rigid secularism. According to liberal open secularism, “[a] democratic, liberal State cannot be indifferent to certain core values, especially basic human rights, the equality of all citizens before the law, and popular sovereignty. [...] A democratic, liberal State cannot remain neutral toward them and has no choice but to assert and defend them”. This seems in line with the majority opinion in *Lafontaine*. The municipality had the positive obligation to make sure the congregation could build its house of worship somewhere in the town. Republicanism, on the other hand, required a system “by a secularist, indeed antireligious, moral philosophy”. “Such a moral and political philosophy becomes a civil religion.” Such a “system that replaces religion as the foundation of its action by a comprehensive moral and political philosophy makes those who embrace any sort of religion second-class citizens since their fundamental reasons are not enshrined in the officially recognized philosophy.”<sup>412</sup> Forced compliance with such secularism, like *laïcité* in France, will lead to “the marginalization of religious minorities from French public life”.<sup>413</sup>

Even in the *Chamberlain* case discussed before (section 4.6.2), where the state neutrality stood in the way of religious moral considerations preventing a book on same-sex families for a kindergarten class, the interpretation of state neutrality was the open secularism. The majority considered that “secular” did not mean “non-religious” because “nothing in the Charter, political or democratic theory, or a proper understanding of pluralism demands that atheistically based moral positions trump religiously based moral positions on matters of public policy”.<sup>414</sup> However, “decisions based solely on religious reasons will not survive the s.1 justification test”.<sup>415</sup> Bouchard and Taylor conclude that rigid secularism is rejected by the Supreme Court because: a) it

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409 *Ibid.*, para. 30.

410 *Ibid.*, para. 92.

411 *Ibid.*, para. 36

412 Bouchard & Taylor, *supra* n. 2, at 135.

413 Ryder, *supra* n.1, at 94.

414 *Chamberlain v. Surrey School District No. 36*, Case 28654, *supra* n. 197, para. 137.

415 See Schneiderman, *supra* n. 59, at 79.

does not truly link institutional structures to the outcomes of secularism; b) an emancipatory mission directed against religion is not compatible with the principle of state neutrality in respect of religion and non-religion; c) the integration process in a diversified society is achieved through exchanges between citizens, who thus learn to get to know each other and not by relegating identities to the background.<sup>416</sup>

The relationship of state and faith in the new Rainbow Nation was an issue in two very early cases of the CCSA. In *Final Certification*, one of the questions put forward was why the freedom of religion and belief were derogable in cases of public emergency, while other rights were non-derogable. In *Certification Western Cape*, there was an objection to the preamble of the province's Constitution, which included a religious reference.

In the certification of the national Constitution, the province of KwaZulu Natal had raised questions as to the possibility to derogate from some rights, including the freedom of religion and belief, while others were non-derogable. The province raised the question of whether this was not contrary to Constitutional Principle II which stipulated that everyone shall enjoy all universally accepted rights, freedoms and civil liberties.<sup>417</sup> The Constitutional Principles had been agreed upon earlier in the process, to provide guidelines for the drafting of the Constitution. The CCSA concluded that the distinction between non-derogable rights and derogable rights in case of emergency as drafted was not in violation of Constitutional Principle II, as the Bill of Rights may be said to include the standards of all modern human rights catalogues.<sup>418</sup>

Not only the national Constitution had to be certified, but also the provincial ones. The legislature of the province of the Western Cape adopted a provincial constitutional text with a preamble which commenced "In humble submission to Almighty God". The case *Certification of the Western Cape* had to answer, among other questions, whether the preamble of the Western Cape constitution was consistent with the constitutional freedom of religion and belief. The Court highlighted the similarities with the "ceremonial deism" in the national Constitution. As "ceremonial deism", an "honored means of adding solemnity used in many cultures and in a variety of contexts", had no particular (legal) constitutional significance, there could be no violation of the freedom of religion and belief.<sup>419</sup>

However, some believe the Court should not have ignored the fact that the reference to God in the preamble of the Western Cape constitution was

416 Bouchard & Taylor, *supra* n. 2, at 30.

417 F. Venter, *Constitutional Comparison; Japan, Germany, Canada and South Africa as Constitutional States*, Juta & Co Ltd, Cape Town (South Africa), 2000, p. 140.

418 CCSA, Ex parte Chairperson of the Constitutional Assembly: *In re Certification of the amended text of the Constitution of the Republic of South Africa*, Case CCT37/96, 4 December 1996, para. 40. See also *ibid.*, p. 140.

419 CCSA, *Certification of the Constitution of the Western Cape*, Case CCT6/97, 2 September 1997, para. 28

worded exactly like the reference in the pre-1994 South African constitution of the apartheid era. Hence, the wording “verbalized Afrikaner-Calvinist monotheism”<sup>420</sup> and was fit to provoke associations with the apartheid government, especially since the (new) National Party formed the government in the Western Cape. In this regard, it should be noted that the pre-1994 Cape Province was split into three provinces: Western Cape, Northern Cape and Eastern Cape. The Western Cape set itself apart by being one of the two provinces to have rejected an ANC mandate (the other being KwaZulu-Natal) by electing former South African Law and Order minister Hernus Kriel (NP) as the first premier of the Western Cape.

In Du Plessis’ opinion, the preamble, while it can be seen to favor monotheistic beliefs, is not necessarily a “gesture of intolerance towards polytheists and atheists”. However, he sees it as “inconsiderate nonetheless”. Du Plessis argues that the Court should not have disposed of the matter by reference to ceremonial deism, but by acknowledging that “the contested phrase expresses religious sentiments” and that these are consistent with guarantees of religious freedom in the national Constitution. “Such a finding would still have been open to criticism, but at least it would not have been ridiculous.”<sup>421</sup> Sunstein, on the other hand, discussing ceremonial deism in the American context believes there should be a heavy burden on striking down ceremonial deism in light of this diversity. After all, it usually refers to God and religious symbolism in a non-denominational and thus inclusive way, and does not harm anyone.<sup>422</sup>

Justice Sachs may have summarized the CCSA’s approach to secular/religious relations in *Fourie* “[T]here must be mutually respectful co-existence between the secular and the sacred. The function of the Court is to recognize the sphere which each inhabits, not to force the one into the sphere of the other.”<sup>423</sup> According to An-Na’im secular institutions in general should not claim any religious authority, as religious truth cannot be determined by means of the modern state.<sup>424</sup>

#### 4.7.6 The many faces of secularism

In his discussion of *Lautsi*, Zucca points out that two different notions of secularism were mixed up in the judgment. Mrs. Lautsi’s secularism is a philosophical belief, which opposes religious beliefs. The secularism that the

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420 du Plessis, *supra* n. 388, at 454.

421 *Ibid.*, pp. 444-445 and 454.

422 C.R. Sunstein, ‘Celebrating God, Constitutionally’, in *University of Detroit Mercy Law Review*, vol. 83, pp. 567-578 (2005), pp. 567-568.

423 CCSA, *Minister of Home Affairs and Another v. Fourie (e.a)*, Cases CCT 60/04 &10/05, 1 December 2005, paras 93-94.

424 An-Na’im, *supra* n. 186, pp. 1234-1235.

state should apply must be neither preferential nor opposed to such philosophical secularism, nor any religious or other philosophical belief. It requires the state to be the “impartial organizer of religious pluralism”.<sup>425</sup> Justice Abella in the first paragraph of the *Braker* case noted the “evolutionary tolerance for diversity and pluralism” and the “growing appreciation for multiculturalism, including the recognition that ethnic, religious or cultural differences will be acknowledged and respected”.<sup>426</sup> Secularism understood in this sense means that the state should neither favor nor disfavor any particular religion, denomination or belief.<sup>427</sup>

This Canadian view seems to coincide with the South African view. The South African Constitution, as explained by Chaskalson in *Solberg*, does not regard a wall of separation necessary to protect religious freedom. To the contrary, the Bill of Rights seems to express a view that religious freedom requires an “open secularism” that embraces all religions and non-religious world views equally, instead of limiting freedom in order to block everything religious from the public sphere. Hence, the South African state can be “‘accommodationist’ in its approach to religious groups: it may support such groups, as long as its support is fair and even”.<sup>428</sup>

The European Commission of Human Rights which once assessed all cases prior to submission to the Court, explicitly stated that establishment itself is no violation of the ECHR.<sup>429</sup> Harris et al. distinguish five areas in which the state must be wary in church-state relationships according to the Court’s case law:<sup>430</sup>

1. The state must not interfere with the autonomy of religious communities when it comes to choosing their leaders (*Hasan and Chaush*).
2. When a state accords official recognition to certain faiths under national law, due regard must be paid to the Convention.<sup>431</sup>
3. The state must comply with the Convention when it comes to the regulation of places of worship.<sup>432</sup>
4. The education of children and young people as far as provided in the public school system must be conducted with due regard to existing pluralism and without indoctrination (*Folgerø*).
5. The state must not ignore the communal nature of Article 9.<sup>433</sup>

425 *Zucca*, *supra* n. 229, at 222.

426 *Braker v. Marcovitz*, Case 31212, *supra* n. 60, para. 1.

427 Compare *Chamberlain v. Surrey School District No. 36*, Case 28654, *supra* n. 197, para. 21.

428 E.E. Goodsell, ‘Constitution, Custom, and Creed: Balancing Human Rights Concerns with Cultural and Religious Freedom in Today’s South Africa’, in *Brigham Young University Law Review*, vol. 21, no. 1, pp. 111-154 (2007), pp. 126-127.

429 See *Evans & Thomas*, *supra* n. 153, at 706, referring to EComHR, *Darby v. Sweden*, Darby v. Sweden, app. no. 11581/85, 23 October 1990.

430 Harris, O’Boyle & Warbrick, *supra* n. 265, at 430-432.

431 *Metropolitan Church of Bessarabia and others v. Moldova*, app. no. 45701/99, *supra* n. 118.

432 *Manoussakis and Others v. Greece*, app. no. 18748/91, *supra* n. 228.

433 ECtHR (CG), *Cyprus v. Turkey*, app. no. 25781/94, 10 May 2001.

Clearly, secularism comes in different shapes and forms. Rosenfeld, as explained in paragraph 2.6.2 distinguishes between institutional secularism and ideological secularism. Institutional secularism mandates “the public sphere should warrant neutrality among religions and among the latter and non-religious ideologies in order to provide an optimal setting for the realization of freedom of religion as well as of freedom from religion.” Ideological secularism is a “conception of the good”. It relates to notions of human happiness, freedom and therefore public policy and the “common good”. Therefore, ideological secularism is in direct competition with religious theological and ethical views and or religious ideologies.<sup>434</sup>

Rosenfeld acknowledges that modern constitutionalism’s adherence to institutional secularism has put ideological secularism in a privileged position. It is this privilege that has come under attack, as we can see from the discussions mentioned above. “Proponents of religious views have thus accused secularism of bias in favor of atheism or of the ‘religion’ of ‘secular humanism’. On the other hand, postmodernism has built upon the ‘disenchantment of reason’ to question secularism’s coupling with reason and distancing from faith, which were meant to lend the principal support to secularism’s claim to neutrality.”<sup>435</sup> Bader, for example, calls the Kemalist *laïcité* a threat to both freedom of religion and democracy.<sup>436</sup> Adams and Overbeeke suggest that rather than Turkey’s Islamic character and culture, the authoritarian political culture introduced by Atatürk is what divides Turkey from Europe.<sup>437</sup> Altıparmak and Karahanoğullari suggest that the Government during *Şahin* was actually hoping for Strasbourg to crush the Constitutional Court’s judgment. It would have made it easier for the Government to convince the unelected elites of the military and civil service of the need for reforming the Turkish rigid secularism in light of human rights demands.<sup>438</sup>

Yet the ECtHR quite easily accepted Kemalist secularism not only as legitimate to create an atmosphere of inter-religious tolerance in a Muslim majority nation, it also seems to suggest that (Kemalist) secularism is the only valid interpretation of secularism compatible with the Convention: “An attitude which fails to respect [secularism] will not necessarily be accepted as being covered by the freedom to manifest one’s religion and will not enjoy the

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

435 *Ibid.*, p. 2.

436 Bader, *supra* n. 179, at 15.

437 M. Adams and A.J. Overbeeke, ‘The Constitutional Relationship between Law and Religion in the History of Ideas: A Contemporary European Perspective’, in *Global Jurist*, vol. 8, no. 3, pp. 1-24 (article 4) (2008), pp. 1-2 and 20.

438 Altıparmak & Karahanoğullari, *supra* n. 257, at 269. *Leyla Şahin v. Turkey*, app. no. 44774/98, *supra* n. 29.

protection of Article 9 [...]”.<sup>439</sup> Yet the same Court also asserts that the “autonomous existence of religious communities is indispensable for pluralism”.<sup>440</sup>

Ideological secularism, however, tends to want to control religious communities. In his case note on the Chamber case of *Zengin v. Turkey*,<sup>441</sup> ten Napel draws attention to this feature. The state had made it mandatory for Muslim pupils to follow religious instruction classes in public schools. Non-Muslims were not required to take the class, which was based on a Sunni interpretation of Islam. But *Alevis*, a minority sect in Turkey, showing similarities to the Shia tradition and adhering to heterodox practices from a Sunni perspective, were not exempted. Ten Napel applauds the finding of a violation, as clearly the mandatory nature violated the religious freedom of both the Alevi children and their parents.<sup>442</sup>

Yet in two French cases,<sup>443</sup> the Chamber reiterated the support for rigid secularism, reasoning once again that “[A]n attitude which fails to respect that principle [secularism] will not necessarily be accepted as being covered by the freedom to manifest one’s religion and will not enjoy the protection of Article 9 of the Convention [...]”. However, it also conceded “having regard to the margin of appreciation which must be left to the member states with regard to the establishment of the delicate relations between the Churches and the State”. The Chamber found accepted that the penalty imposed on a Muslim schoolgirl for wearing her headscarf during physical education classes “is merely the consequence of the applicant’s refusal to comply with the rules applicable on the school premises” – “not of her religious convictions, as she alleged”.<sup>444</sup> This is even more surprising since here the rule is not “indirect effect” but as the Court itself acknowledges, the French policy is directed against religious attire in schools, fully conscious that this policy effects some religions more than others, and within a certain religion one of the sexes disproportionately (e.g. Muslims, Jews and Sikhs more than Christians, Muslim girls and Sikh boys more than Muslim boys and Sikh girls).

Without any doubt, the principles established in the *Dalhab* and *Şahin* cases – “in particular the importance of secularism in state educational institutions – have continued to be applied to reject claims relating to the disciplining or expulsion of pupils from schools in Turkey and France for refusing to remove

439 *Refah Partisi (The Welfare Party) and Others v. Turkey*, app. nos. 41340/98, 41342/98, 41343/98 and 41344/98, *supra* n. 167, paras 93-95.

440 *Metropolitan Church of Bessarabia and others v. Moldova*, app. no. 45701/99, *supra* n. 118, para. 58.

441 *Hasan and Eylem Zengin v. Turkey*, app. no. 1448/04, *supra* n. 219.

442 H.M.Th.D. ten Napel, ‘Noot bij EHRM 9 oktober 2007, no. 1448/04’ in *European Human Rights Cases*, 08/2007, Sdu Uitgevers, p. 4.

443 *Dogru v. France*, app. no. 27058/05, *supra* n. 27; *Kervanci v. France*, app. no. 31645/04, *supra* n. 240.

444 *Dogru v. France*, app. no. 27058/05, *supra* n. 27, paras 72-73. See also *Kervanci v. France*, app. no. 31645/04, *supra* n. 240.

headscarves".<sup>445</sup> Yet, rigid secularism also has boundaries in the Strasbourg case law. In a case in Turkey in which the members of a religious group had assembled in the streets of Ankara dressed in their religious attire, their prosecution and conviction was found by the Court to have violated their rights under Article 9.<sup>446</sup> The Court distinguished this case from the earlier ones on the grounds that the applicants were ordinary citizens and had no public functions, that they posed no threat to public order and that their presence alone could not be said to put pressure on passers-by or to amount to improper proselytism.<sup>447</sup>

Nevertheless, any acceptance or even defense of rigid secularism is dangerous for liberal-democratic constitutionalism and social cohesion, because it instrumentalizes the judiciary in ideological and political conflicts and thus threatens the impartiality of the judiciary and the legal system as such.<sup>448</sup> Altıparmak and Karahanoğullari question whether the principle of secularism should be referred to by the ECtHR. After all, "secularism has not been enumerated as a legitimate aim to restrict a right in the Convention".<sup>449</sup> Evans believes that the Court should indeed question the elevated status of secularism and probe for an anti-Muslim agenda.<sup>450</sup>

Rosenfeld explores the option of post-secular polity in secularism surrendering its privileged position and becoming one of the conceptions of the good, competing with religious world views in the completion of ideas, while the rules of competition are set by a polity inspired by pluralist as opposed to liberal constitutionalism. While liberal constitutionalism has a bias for ideological secularism, pluralism accepts all notions of the good as *prima facie* equal in worth and protection.<sup>451</sup> Liberalism may in the end have more than just the two identified faces,<sup>452</sup> but Benson argues that it is important to choose those that "respect and encourage diversity and as far as possible independence". This will enable a holistic pluralism.<sup>453</sup>

"Secularism", Rosenfeld argues, "is an essentially contested concept both in the context of philosophy or ideology and in that of constitutional law." Secularism, however, like religion is neither total nor monolithic. It is compatible with many different philosophical approaches, "such as monism, pluralism and relativism" and with political theories "such as liberalism, republicanism,

445 Bratza, *supra* n. 220, at 267.

446 ECtHR (C), *Ahmet Arslan and Others v. Turkey*, app. no 41135/98, 23 February 2010.

447 Bratza, *supra* n. 223, at 267.

448 Bader, *supra* n. 177, at 34.

449 Altıparmak & Karahanoğullari, *supra* n. 254, at 278.

450 Evans, *supra* n. 28, at 336.

451 Rosenfeld, *supra* n. 433, at 2 and 4.

452 J. Gray, *Two Faces of Liberalism*, Polity Press, Cambridge (UK), 2004.

453 I. T. Benson, 'The Attack on Western Religions by Western Law: Re-framing Pluralism, Liberalism and Diversity', in *International Journal for Religious Freedom*, vol. 6, no. 1-2, pp. 111-125 (2013), p.118 ff.

and communitarianism". According to Rosenfeld, secularism needs guarantees in a constitutional democracy if it should let go of the privileged position.<sup>454</sup> What Rosenfeld basically argues for are the basic freedom of religion and belief rights for secularists.

Rosenfeld proposes what he calls "comprehensive pluralism" as the facilitator of peaceful coexistence between ideological secularism and its competitors. Comprehensive pluralism will entail shifting from situations of factual inequality to counterfactual equality. In Justice Sachs words "mutually respectful co-existence between the secular and the sacred. The function of the Court is to recognize the sphere which each inhabits, not to force the one into the sphere of the other."<sup>455</sup> Comprehensive pluralism engages pluralist norms as mediator between competing norms of the various conceptions of the good. Pluralist norms are essentially based on reversible reciprocity.<sup>456</sup> Esau concept of "reciprocal pluralism" entails that individuals and communities grant each other the freedom to make different choices.<sup>457</sup>

The pluralist approach taken by the SCC and the CCSA may very well fit into the description of a comprehensive and holistic pluralism. The cases may serve as inspiration for the ECtHR if it wishes to expand the jurisprudence started with *S.A.S.* However, the differences between the member states and the margin of appreciation also require a vision on the meta-pluralism between the various state-religion models of the member states.

#### 4.8 INTERMEDIARY CONCLUSION: BEST PRACTICES IN THE SIX DIMENSIONS OF THE FREEDOM OF RELIGION AND BELIEF

##### 4.8.1 Revisiting the six dimensions of the freedom of religion and belief

In section 4.2 we saw that seemingly neutral laws, can have grave impact on the personal freedom of believers because of adverse affect discrimination. This leads to a feeling of being unwelcome at least and in the worst case, a painful choice. In such situations, the believer has to decide between following the law, an education, a job, their home, preventing a fine or imprisonment etc. and their beliefs. In a free and open society, such choices should be prevented were possible. Acknowledging the impact of such neutral laws on believers, is a necessary step in protecting their freedom of religion and belief. If the assessment is, that somehow the freedom of religion and belief is not

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454 Rosenfeld, *supra* n. 433, at 5-6 and 10-11.

455 CCSA, *Minister of Home Affairs and Another v. Fourie (e.a)*, Cases CCT 60/04 &10/05, 1 December 2005, paras 93-94.

456 *Ibid.*, pp. 25-29.

457 A. Esau, 'Living by Different Law: Legal Pluralism, Freedom of Religion and illiberal Religious Groups', in R. Moon (ed.), *Law and Religious Pluralism in Canada*, UBC Press, Vancouver/Toronto (Canada), 2008, p.132.

engaged, or does not protect the practice, insult is added to injury. In adjudication this means, that the interference with the freedom of religion and belief has to be recognized, even if for whatever reason they cannot be accommodated.

Often enough accommodation of the practices of believers is possible, without undermining the general purpose of the law or regulation in question. Sometimes this can be easily done by exempting the believers from (certain aspects of) the law. Sometimes a more detailed arrangement is necessary, as we saw in *Multani*, to ensure that the purpose of the rule (safety for all students) and the practice (wearing the metal *kirpan*) can be reconciled. In other cases, where the interference cannot be prevented, unnecessarily heavy consequences can be taken away, like in *Thlimmenos*. If conscientious objection to military service cannot be allowed, and the objector goes to prison, there is no need to hold the criminal record against them in their choice of job.

Exemption or other means of accommodation will sometimes meet criticism from the mainstream. The selected cases highlight the need for public institutions to promote and instill tolerance and for courts to point to this. Especially when the initial reaction is to rather curtail the freedom of believers in order to seemingly protect the mainstream against the assumed deviance by believers.

Protection of the personal freedom of religion and belief, always requires taking the sincere individual beliefs of believers as starting points, rather than practices “objectified” by expert opinions or statistics.

In paragraph 4.3 we saw how parental authority and the best interests of the child can collide, especially where medical decisions are concerned, how religious marriage and state marriage can collide and how the rights of same-sex partners to get married have a specific relationship with the freedom of religion and belief. Parents are the natural authority of children. Whatever parents believe or not believe is bound to impact the children. If parents believe differently and separate, this can cause conflicts in the upbringing. When parental authority is limited by state institutions, judicial review is necessary to assess the impact on the freedom of religion and belief of the parents and the children.

The selected cases show clearly that one case at a time review is necessary because of the thorny issues involved. Where parental decisions impact health or continuation of life of minors, adjudication must find limits to the parental freedom of religion and belief under the limitation clause. Where the child is a mature minor, their own freedom of religion and belief is engaged. I am bound to agree with Justice Binnie in *AC*, this mandates that they be given a chance to prove, that they are capable of a mature informed decision.

In parental conflicts of religion, confusion is unavoidable. I side with the dissenters in *P. (D.)* that confusion and even cognitive dissonance are themselves not enough to conclude that it is in the best interest of the child not to know one of the parents as they are. Also, caution requires that we acknow-

ledge that many articles of faith we regard as normal in our own beliefs, may come across as indoctrination in other beliefs.

Religious marriage has existed longer than civil marriage/state marriage. It continues to exist alongside civil or state marriage and is for many people an alternative for state orchestrated marriage like other lasting relationships which form the foundations of families. Treating social reality as fact and preventing inequality in areas of inheritance, social security, insurance and so forth, can be mandated by the freedom of religion and belief, as we saw in the selected cases. In order for the judiciary to respect the domain of the legislative, this requires a case-by-case contextual approach. Courts should not be as the CCSA rightly observed in *Women's Legal Centre Trust*, be the first and last instance to regulate the institution of marriage for a faith-based community.

Upholding an exclusive and privileged position for state marriage on the other hand, seems difficult to reconcile with the freedom of religion and belief, while at times religious marriage and private law are bound to interact in a pluralist society governed by liberal democratic constitutionalism. Upholding a strict separation approach whereby private law agreements cannot be enforced, just because they relate to religious family law and/or relations, is antithetical to the freedom of religion and belief.

Both the South African and Canadian same-sex marriage cases show, how equality rights make it difficult to uphold an exclusive opposite-sex requirement, when it comes to civil/state marriage. In fact, while this did not play any role in the evaluation, same-sex couples could rely on the freedom of religion and belief to claim the right to marry. After all, the opposite sex requirement gives privilege to the belief that marriage is for opposite sex partners only, over all other beliefs. Both judgements do mention however, that the faith-based views on marriage cannot be a source of interpreting state-law or the constitution.

The other side of the coin concerns the rights of those who believe that marriage should only be an opposite-sex requirements. They can rely on the freedom of religion and belief to demand exemption from facilitating or aiding in same-sex unions. As long as the state is capable of ensuring the right to marriage for all same sex couples, I cannot see, why faith-based exemptions should not be granted to civil servants.

Marriage is so essential to the freedom of religion and belief and other human rights, and the analysis of the selected cases leads me to support a dynamic non-hierarchical co-existence of state marriage with faith- or culture-based marriage and other practiced forms of lasting relationships.

In section 4.4 we saw the relationships between the individual and communal dimension of the freedom of religion and belief. "Whether a belief is practiced 'alone *or* in community with others' and in 'public *or* in private' is

a matter of choice for the believer".<sup>458</sup> The SCC found the interests of the Park Act to be reconcilable with the treaty rights in *Sioui*. The Huron practices did not compromise the overall purpose of preservation of the park. Like *TWU* the case suggests that sometimes it requires pragmatism to honor all principles.<sup>459</sup> An if tolerance only stretched to the beliefs we find agreeable, acceptable or logical, this would render tolerance empty. I agree with Justice Sachs, "[t]he true test of tolerance comes when the practice exist on the margins of society and appear bizarre, even threatening to the mainstream".<sup>460</sup>

The state should not try to eliminate pluralism, either within society or within a religious community, but even-handedly protect all. A thick notion of democracy based on pluralism (ten Napel) requires enabling and balancing voluntarism of communities and abstaining from paternalism. "Own law" or legal pluralism which is compatible with liberal multicultural democracy may very well be an important answer to the demand for pluralism. The choice is to be made by communities and the national legislator, not by judges, but they should be open and embracing to towards it, instead of dismissing it. Yet on the other hand autonomy is not absolute. There can be no constitution/human rights free zones, in which the own law is absolute. The dynamic engagement between state law and own law works both ways.

In section 4.5 we saw that freedom of religion and belief in the educational system relates to the believers in the public education system, religious instruction in the public education system and faith-based education.

The public educational system should ensure the exposure to all of society, diversity on display, including idea's different from the own family. This might cause some cognitive dissonance, but that is no reason to limit this. To the contrary, some cognitive dissonance is necessary for tolerance, something children should learn in the educational system in an open society based on human rights. The state's responsibility to ensure pluralism cannot be organized away by pointing to non-state schools. Part of the task of ensuring pluralism is to ensure religious literacy. When there is instruction, which collides with beliefs, the possibility to opt out, is one way to ensure pluralism. Opting out should not be too burdensome or include having to discuss one's beliefs with state officials.

It can easily be assumed that religious symbols displayed in schools or classrooms do not have a neutral meaning. A situational opting out possibility, where those who believe differently or not at all, can initiate that symbols are removed (Bavarian approach), reconciles majority and minority interests. Also here opting out, requires one case at a time. There a several possibilities for organizing religious instruction in the public education system in a way which

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458 Evans, *supra* n. 8, at 103.

459 *Trinity Western University v. College of Teachers*, Case 27168, *supra* n. 129.

460 A. Sachs, *The Free Diary of Albie Sachs*, Random House, Johannesburg (South Africa), 2004, p. 67.

reconciles majority and minority interests. Adjudication should take into consideration the effect of peer pressure and subtle forms of pressure on children (and their parents). Religious institutions on the other hand are not for everyone and follow a less pluralistic logic, but should be inclusive, if this does not conflict with their beliefs.

In section 4.6, balancing, which plays an important role in all the other dimensions, was revisited as a separate issue. Balancing is first and foremost achieving equal concern and respect through a procedural fairness, that gives all sides equal recognition in their rights and concerns. This implies that it is better to decide a case under the limitations clause than to argue that a certain position or desire is not protected by the freedom of religion and belief at all, or must be put aside *a priori*. The recognition of a right to be different (CCSA), helps to make the point, that no one is just subjugated to a mainstream preference, as believers and/or because of their sexual orientation or gender identity. Equal religious citizenship (Ryder) also underscores this point. Believers are citizens as believing individuals. They should not be required to park their beliefs “inside” before they enter the public domain. Finally, a thick notion of democracy (ten Napel), which underscores the minority rights in balance with majority rules, also supports this point.

Balance requires the acceptance that mainstream society will have to sometimes give equal concern and respect to beliefs and practices that strike them as bizarre, illogical or irrational, or even shocking and offensive. Complexity is no reason not to accommodate. Cognitive dissonance is no reason to restrict a right. Tolerance in an open society even requires some cognitive dissonance.

Balance can sometimes be achieved by leaving the hot topic undecided, by finding purely procedural grounds to decide the case. This is not an invitation to not decide cases. But a decision on procedural grounds may sometimes have to potential to be viewed as acceptable by opposing sides. Yet judges, nor other state organs, while they should not force secular law logic on faith-based institutions, should also not discharge themselves, by delegation of the responsibility to protect human rights to others, be they faith-based or non-faith-based actors. On the other hand, judges nor other institutions should make assumptions or generalizations about beliefs and practices and certainly not substitute the choices of the believer(s) with their own.

Balance can most easily be achieved in a case-by-case fashion. Deciding all future cases immediately, will always cause someone to lose for all future.

The final dimension discussed in section 4.7 was that of secularism. This again makes it necessary to distinguish between institutional and ideological secularism. While institutional secularism can be an aide of the freedom of religion and belief to ensure evenhandedness towards different religions and beliefs, ideological secularism if adopted by the state forms a risk for the freedom of religion and belief. Like (strong) establishment it can lead to preferential treatment of one group, secularists, above others. Open secularism

on the other hand, accepts that ideological secularism is not at all more neutral than (religious) beliefs and tries to emphasize non-preferential treatment of all religions, beliefs and worldviews through a combination of institutional secularism and pluralist accommodation.

The exclusiveness of state marriage, while not uncommon in many liberal-democratic constitutional orders, has a relationship with ideological secularism. Upholding it, will often interfere with the rights of believers. On the other hand, it leads to believers mistaking state marriage to be identical to their religious institution, and thus opposing its evolution, when it collides with their ideas about marriage. A more pluralistic and accommodating approach, which allows for the co-existence of several religious and cultural forms of marriage next to state marriage, enables a reconciliatory protective approach towards faith based and LGBTQ+ communities.

When state institutions adopt a preference towards a certain faith, ideological secularism or any secular ideology, discrimination against all others is often the automatic result. It begins with these others receiving a message of being unwelcome, second class or merely tolerated strangers. It can lead to painful choices for them between following their conscience and other important benefits in life or even partaking in the public institutions themselves. Opting out of the practice or ritual in question, is not always a solution as it can underscore the feeling of not belonging, like for example in the situation of a prayer of all parliamentarians, which gives those who do not wish to participate the option to leave the room and return.

In public education, as also mentioned above, several models are conceivable, which respect the freedom of religion and belief of all students (and teachers). They must respect individual choices and accommodate the pluralism present in the student body. They should allow for flexibility in the necessary steps to accommodate, amongst which the option to adapt symbolism which sends a message of favoritism and opting out, where lesson's conflict with the conscience of students.

Freedom of religion and belief naturally leads to situations where beliefs, practices and religious precepts are part of the legal conflict. Consistent with institutional secularism, secular judges should not interpret the religious or belief-based practice, let alone substitute the understanding of the believer in question. Doing so, is a grave violation of the freedom of religion and belief. Obviously the same goes for other state-institutions. Moreover state paternalism is always violative of freedom of religion and belief and/or freedom of choice generally.

In line with the above, neither religion, any other belief, nor ideological secularism can serve as sources of interpreting human rights or constitutional law (in the accommodationist or separationist model). A rigid form of state-secularism, based on ideological secularism, with its often missionary agenda is not compatible with state-neutrality and freedom of religion and belief and

effectively relegates identities to the background instead of inviting them into an inclusive process of dynamic citizenship (Compare Taylor and Bouchard<sup>461</sup>).

#### 4.8.2 Best practices in adjudicating the freedom of religion and belief

In light of the intermediary conclusions drawn in the previous section, conclusions regarding the adjudication of the freedom of religion and belief can be formulated. The following best practices were present in the selected cases:

1. Recognition of all sincere religious, cultural, or other beliefs as triggering protection without prior exclusion, limiting them where necessary under the limitations clause. No objectivation by dogma, officials, or statistics.
2. Preventing painful choices and allowing for or ordering accommodation and/or exemption, where reconciliation between freedom of religion and belief and other rights or important aims of public policy is needed. Where this is impossible, taking of the sharp edges of enforcing a law against conscientious objectors.
3. Absence of value judgement from any other perspective than the believers' own perspective. No substitution of the own understanding believers have of a belief or practice with that of judges or other state officials. Being weary of all forms of paternalism, directed at believers.
4. Inclusive protection: preventing division into insiders who belong, and outsiders who are tolerated. Recognition that all official state policies inspired by state religion and/or state secularism are potentially intrusive to all outside the mainstream. Concepts like the "right to be different", equal "religious citizenship" or a pluralist understanding of democracy aid in this.
5. Promoting tolerance and providing that other state institutions do so; tolerance requires some cognitive dissonance and always extends to the beliefs others find bizarre and even threatening.
6. Protecting human rights and pluralism, never delegating, or letting other state institutions delegate the responsibility to private institutions, faith-based or otherwise.
7. Being reflective of social reality and allowing for a flexible co-existence between state law and "own" law. Allowing for communities to govern themselves, while autonomy is never absolute.
8. Equal concern and respect for all sides, taking the losing party's point of view seriously: showing real understanding for their point of view.
9. Balancing under the limitations clause: rather than finding no interference at all or *a priori* justifications of limits. If necessary, using judicial assumption.

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461 Bouchard & Taylor, *supra* n. 2, at 30.

10. Deciding one case at a time, especially with thorny issues, embracing contextualism, deciding only what needs to be decided to solve the case, making use of procedural considerations, where possible.
11. Being conscious of the inter-institutional dialogue with the executive and legislative powers, but resolute protection of human rights: no state or state institution or legislative body has a natural inclination to protect human rights; it is the judiciary's role to check and balance.

