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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5 Comparative analysis of the concepts of the freedom of religion and belief and the standard interpretations

5.1 Introduction to this chapter

Based on the comparative analysis of the selected cases in Chapter 4, this chapter systematically derives the standard interpretation of the freedom of religion and belief by the three courts. The case studies of the selected cases in Appendix I and the analysis in Chapter 4, show that each of the three courts has certain (guiding) principles for the interpretation of freedom of religion and belief case law. These are discussed in section 5.2. The concept of religion and belief used by each of the courts as featured in the selected cases is examined in section 5.3. Next, in section 5.4, the content of the right is considered: what does the right entail in the selected cases? Subsequently, in section 5.5, we explore how the freedom of religion and belief is triggered in the jurisprudence of the three courts as evident in the selected cases. Finally in section 5.6 there is a discussion of whether human rights adjudication necessarily leads to the furtherment of secularization as some commentators hold. The chapter closes with preliminary conclusions regarding the best practices when it comes to the standard interpretation of the freedom of religion and belief.

5.2 Guiding principles for interpretation

In his 1961 classic work *The Concept of Law*, H.L.A. Hart argued that laws "require interpretation if they are to be applied to concrete cases, and once the myths which obscure the nature of the judicial processes are dispelled by realistic study, it is patent […] that the open texture of law leaves a vast field for a creative activity which some call legislative". He further argued that the interpretation of laws as conducted in judicial activity ought to be guided by certain virtues which are "impartiality and neutrality", consideration of all affected interests and a concern to deploy some "acceptable general principle as a reasoned basis for decision".[1]

The studied case law by the three courts shows that when interpreting the freedom of religion and belief, each of the courts actually follows a certain general principle, or principles, as a reasoned base. The main principles shall

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

hereafter be called the guiding principles. They are founded in what may be called the theoretical foundations of the respective constitutional documents. The guiding principles are supported by what will be called supporting principles. They support the "creative activity" on the basis of the guiding principles, providing direction and substance. The main guiding principles and supporting principles form the prism through which the right is interpreted in every case, while the facts of every case also influence the (further development of the) guiding principles. Hence the main guiding and supporting principles are not static, but dynamic, being continuously amended and adjusted over time.

The main guiding principle applied by the SCC in the freedom of religion and belief cases is "individual liberty". The "harm principle", "religion à la carte" and "sincerity of belief" are informing principles. They inform what individual liberty implies for solving the selected cases. The judicial reasoning starts with the freedom of the individual to work out religious obligations for themselves. These obligations can differ from other individuals professing the same faith or beliefs. There is complete freedom for religion à la carte, the personal beliefs of the individual. They are protected, as long as they are sincere. If this is shown, the freedom to act or to refrain from action can only be limited in the interest of preventing harm. Harm must always be concrete in this regard. If the harm is not done to the rights and freedoms of others, but to some overriding public interest, this interest must be concrete and in the great majority of the selected cases, directly linkable to the rights of others; *Alberta v. Hutterian Brethren* (Appendix I1.4.13) being the only exception in this regard. In that case, the countervailing interest was an abstract concern of identification of individuals licensed to drive a motorized vehicle.

"Human dignity" is the main guiding principle applied by the CCSA in the freedom of religion and belief cases. Human dignity has three components: an individual freedom right component, a communitarian component and a constitutional principle component. These components inform what human dignity implies for solving the cases. Which of the three is most present in the reasoning, depends on the circumstances of the case. The freedom right component is informed by the "right to be different". The communitarian component is informed by the "respect for diversity". The constitutional principle is informed by "positive tolerance". These three components are the informing principles.

The main guiding principle of the ECtHR for the freedom of religion and belief cases is "pluralism". Pluralism, according to the ECtHR, depends on freedom of religion and belief. Therefore, the freedom of religion and belief is important for religious believers, other believers, non-believers and the unconcerned.[2] It is the state's role to organize this pluralism and to do so (as

2 ECtHR (C), *Kokkinakis v. Greece*, app. no. 14307/88, 25 May 1993, para. 31.

much as possible) in an impartial way. The state's role as "organizer of pluralism" and the impartiality of this organizer are therefore the informing principles which inform what pluralism implies for solving the cases.

The above can be summarized as follows:

FREEDOM OF RELIGION AND BELIEF			
	Canadian Supreme Court	*South African Constitutional Court*	*European Court of Human Rights*
Main guiding principle	*Individual liberty*	*Human dignity*	*Pluralism*
Informing principles	Harm principle Religion a la carte Sincerity of belief	Freedom right: right to be different Communitarian component: respect for diversity Constitutional principle: positive tolerance	State as organizer of pluralism Impartial organization of pluralism

Figure 2: Guiding and informing principles standard interpretations

The three guiding principles as applied by the three different courts in interpreting the freedom of religion and belief are neither opposing nor mutually exclusive. They do, however, differ in their emphasis and internal logic. This, in turn, can lead to very different outcomes in similar cases. Hence, these different guiding principles can create opposing or colliding outcomes, as well as parallel and even identical outcomes.

5.3 THE CONCEPT OF THE FREEDOM OF RELIGION AND BELIEF

This section looks at the concept of the freedom of religion and belief, adjudicated by each of the three courts and evident in the selected cases.

5.3.1 Objective standards for what constitutes religion?

The Canadian main guiding principle of individual freedom and informing principles are best summarized in the following *Big M Drug Mart* quote

> "With the Charter, it has become the right of every Canadian to work out for himself or herself what his or her religious obligations, if any, should be and it is not for the state to dictate otherwise."

Because of the strong emphasis on freedom, there is no need to objectify adherence to (external) obligations, dogma, the position of religious official or social convention. An individual's sincere belief, having a nexus with religion or a system of belief, which mandates action or inaction is enough to trigger protection.[3] This is because individual conscience and individual choice form a core of the Canadian constitutional tradition.[4] The Canadian constitutional tradition emphasizes a positive freedom which enables the individual to "live his or her own life and to make decisions that are of fundamental personal importance".[5]

For example, the fact that Sikhs other than Gurbaj Singh Multani (see section 4.4.10) wear no kirpan at all, or a wooden kirpan as surrogate, does not matter, because Gurbaj sincerely believes that he has to wear a metal one. Similarly, it is not relevant whether other Jews believe that women do not have to dwell in a *succah*[6] or dwell in a communal one; because he and the other claimants in *Amselem* sincerely believe that they must have their own *succah* on their own property and thus on their balcony (see section 4.4.7).

Whereas the SCC focuses on the subjective sincerity, purposely avoiding the "objective" evidence of dogma, experts or officials of the faith, the ECtHR struggles with "jurisprudential dogma" once created by the European Commission of Human Rights, which seeks objective evidence of a belief. The Commission created the Arrowsmith test[7] for freedom of religion and belief cases. The test's purpose was none other than to objectify the practice or manifestation in question, as a first step to determine whether it fell under the protection of Article 9. A person's belief must, according to this test, have a certain level of cogency, seriousness, cohesion and importance. Once this threshold is met, it is not for the state to determine whether the belief is legitimate.[8]

The Court has since abandoned the Arrowsmith test.[9] It is, however, still prone to objectify whether the manifestation in question is part of a set of

3 *Ibid.*

4 *See*, e.g., SCC, *Alberta v. Hutterian Brethren of Wilson Colony*, Case 32186, [2009] 2 SCR 567, 24 July 2009, para. 127, quoting *R. v. Big M Drug Mart Ltd.*, Case 18125, *supra* n. 3 and *Chamberlain v. Surrey School District No. 36*, Case 28654, [2002] 4 SCR 710, 20 December 2002, para. 135.

5 SCC, *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, Case 23298, [1995] 1 SCR 315, 27 January 1995, para. 80.

6 SCC, Syndicat Northcrest v. Amselem, Cases 29252, 29253, [2004] 2 SCR 551, 30 June 2004.

7 *See* EComHR, *Arrowsmith v. United Kingdom*, app. no. 7050/75, 12 October 1978.

8 D. Harris, M. O'Boyle and C. Warbrick (eds.), *Law of the European Convention on Human Rights*, 2nd ed., Oxford University Press, Oxford (UK) et al., 2009, p. 427, citing ECtHR (C), *Campbell and Cosans v. the United Kingdom*, app. nos. 7511/76, 7743/76, 25 February 1982 and ECtHR (GC), *Hasan and Chaush v. Bulgaria*, app. no. 30985/96, 26 October 2000. *See also* B. Rainey, P. McCormick and C. Ovey (eds.), *Jacobs, White & Ovey: The European Convention on Human Rights*, 8th ed., Oxford University Press, Oxford (UK), 2021, p. 462.

9 Harris, O'Boyle & Warbrick, *supra* n. 9, at 433.

objective manifestations that are core to the claimed (religious) belief. Previously, some critics have argued that in some instances the Court made the dangerous mistake of "substituting its judgment for the conscience of the persons involved, defining what was 'reasonable' for them to believe".[10] The current approach has thus moved in the direction of the Canadian approach which also contains the element of the "certain nexus" as a more objectifying feature. Yet, the ECtHR has still not embraced a fully "sincerity" focused approach until now.

"Sincere belief", as judicially borrowed from the SCC, can be said to feature in CCSA cases like *Christian Education*, *Prince* and *Pillay*, (section I2.4.6, I2.4.7 and I2.4.11). In the Constitutional Court's jurisprudence, however, any definitional dispute as to what (objectively) constitutes "a religion" or "the religious" is superfluous, because the right in subsection 15(1) of the Bill of Rights combines the freedom of religion with the freedom of conscience, thought and opinion. It therefore "protects an extremely wide range of world views". Yet for the other two subjections of section 15 it does matter, at least in theory, what defines religion and tradition. Subsection 15(2) is limited to "religious observances" and subsection 15(3) to "tradition" and "religion".[11] This invites, at least in theory, the application of objective standards. Nevertheless, the CCSA has not tried to create anything close to an objective standard.

5.3.2 Protecting individuals, communities and difference

The development of South African jurisprudence has been clearly inspired by the Canadian experience,[12] which becomes explicit in the reference the CCSA makes in its first freedom of religion cases to Canadian case law.[13] "Sincere belief" can be said to feature in CCSA cases as mentioned above. This results in taking very seriously and treating with respect any assertion of the claimant with regard to personal beliefs. For example, in *Christian Education* the sincere belief of the parents in the necessity of corporal punishment is treated with the utmost respect, while it is still seen as colliding with the freedom rights of the children. Mr. Prince's belief in consuming an marihuana

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

11 I. Currie and J. de Waal (in association with Lawyers for Human Rights and the Law Society of South Africa), *The Bill of Rights Handbook*, Juta & Co, Cape Town (South Africa), 2006, p. 316.

12 *See ibid*. *See also* N. Smith, 'Freedom of Religion in The Constitutional Court', in *The South African Law Journal*, vol. 118, pp. 1-9 (2001), p 2.

13 *See*, e.g., CCSA, *Christian Education South Africa v. Minister of Education*, Case CCT4/00, 18 August 2000, para. 18, quoting *R. v. Big M Drug Mart Ltd.*, Case 18125, *supra* n. 3.

for religious reasons is treated with the same respect, while according to the court the prevention of abuse of the same substance by others is an overriding public interest. Yet while the sincerity of the belief mandates respect, the "right to be different" is the actual informing principle in these cases. The "right to be different" follows directly from human dignity as the main guiding principle in the South African freedom of religion and belief jurisprudence. The right to be different is also strongly anchored in the "equal freedom" notion derived from "human dignity". The CCSA makes it clear that treating believers with equal concern and respect is to be distinguished from treating everyone exactly the same way.[14]

The jurisprudence of the ECtHR clearly shows that objectification is used as a prerequisite against abuse. Yet the sincere belief standard cannot easily be abused. The believer has to show that he or she is sincere. Also, while the Canadian emphasis on individual freedom gives Canadians the liberty to work out their own personal concept of their religion without any interference by the state, this does not mean that religion or belief becomes a purely individual affair. According to the SCC, religion "is a matter of faith, intermingled with culture. It is individual, yet profoundly communitarian. Some aspects of a religion may be so sacred that any significant limit verges on forced apostasy. Other practices may be optional or a matter of personal choice. Between these two extremes lies a vast array of beliefs and practices, more important to some adherents than to others."[15] R.W. Bibby speaks of "religion à la carte".[16] In a free and open society, different believers, even if they adhere to the same religion and or belief, will make different choices. The Charter enables and protects this.

From the perspective of the Canadian jurisprudence, one could argue that it is the search for objectivity which enables abuse. Do state and/or "official" religious institutions not acquire the possibility to make choices for individuals assisted by the courts in this way? What a human rights instrument must protect in the words of the SCC "is the religious or spiritual essence of an action, not any mandatory or perceived-as-mandatory nature of its observance". From the perspective of the SCC, "religion is about freely and deeply held personal convictions or beliefs connected to an individual's spiritual faith and integrally linked to his or her self-definition and spiritual fulfillment[…]".[17]

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14 *Christian Education South Africa v. Minister of Education*, Case CCT4/00, *supra* n. 14, para. 42.

15 *Alberta v. Hutterian Brethren of Wilson Colony*, Case 32186, *supra* n. 5, paras 89-90.

16 *See* R.W. Bibby, 'Religion à la Carte in Quebec: A Problem of Demand, Supply or Both?', in *Globe,* vol. 10, no. 2 (Special issue on Religion in Quebec,), pp. 151-179 (2007-2008). *See also* J. Woehrling, 'Appendix G: Examination and analysis of jurisprudence pertaining to reasonable accommodation in the schools', in Advisory Committee on Integration and Reasonable Accommodation in the Schools, *Inclusive Quebec Schools: Dialogue, values and common reference points*, Quebec Ministry of Education, Leisure and Sport, 2007, p. 123.

17 *Syndicat Northcrest v. Amselem*, Cases 29252, 29253, *supra* n. 7, paras 39-42.

The Strasbourg case law on individualized beliefs provides no definite answers. It is doubtful, to say the least, whether individualized beliefs fall within the protection of Article 9 under the Strasbourg jurisprudence. While "religion" in the case law of the ECtHR most definitely refers to something transcending merely personal beliefs and convictions, belief surely covers more than only religious beliefs.[18] The freedom of religion and belief entails "inter alia the freedom to hold or not to hold religious beliefs and to practice or not to practice a religion".[19] The European Court has accepted religious and non-religious or a-religious beliefs and beliefs based on various "world views".[20] Yet the freedom of religion and belief does not extend to such beliefs, in which an individual dimension as distinct from the collective dimension is absent.[21] Also, the freedom of religion does not cover "mere idealistic activities"[22] in the Strasbourg jurisprudence.

As shown above, the Canadian approach recognizes the profoundly communitarian character of religion and belief. For the South African jurisprudence, the strong focus on cultural and communitarian aspects is even a defining feature. The CCSA explicitly recognizes the collective dimension with "activities that are traditional and structured, and frequently ritualistic and ceremonial". After all "[r]eligious practice often involves interaction with fellow believers".[23] Not surprisingly, the Constitutional Court has no interest in making hard distinctions between culture and religion. They "sing with the same voice".[24] Religion is not only belief, but "a part of a way of life, of a people's temper and culture". Religious belief itself is important for the main guiding principle, human dignity: "[r]eligious belief has the capacity to awake concepts of self-worth and human dignity which form the cornerstone of human rights".[25]

There are critics who seem to argue that the Canadian liberal approach based on individual freedom, sincere belief, and religion à la carte favors "liberal" beliefs. Yet to the contrary, the *à la carte* concept is beneficiary to believers like Amselem and Gurbaj Multani who attach value to an orthodox understanding of religious precepts of their own religion. The SCC does not

18 *See* C. Evans, *Freedom of Religion under the European Convention of Human Rights*, Oxford University Press, Oxford (UK) et al., 2001, pp. 53 and 57-59.

19 *Kokkinakis v. Greece*, app. no. 14307/88, *supra* n. 2, para. 31.

20 *See* Rainey, McCormick & Ovey, *supra* n. 9, at 462-463.

21 EComHR, *Vereniging Rechtswinkels Utrecht v. the Netherlands*, app. no. 11308/84, 13 April 1986.

22 K. Reid, *A Practitioner's Guide to the European Convention on Human Rights*, 6th ed., Thomson, Sweet & Maxwell, London (UK), 2019, p. 1053.

23 *Christian Education South Africa v. Minister of Education*, Case CCT4/00, *supra* n. 14, para. 19.

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

25 *Christian Education South Africa v. Minister of Education*, Case CCT4/00, *supra* n. 14, paras 33 and 36.

require them to be "liberal" in adjusting their beliefs to "contemporary" society. It requires public institutions and/or society to be liberal in making adjustments so they can live their lives in accordance with their religion. Because a liberal society cannot allow itself to tolerate only "one relationship to the religious", but an approach to harmonization that is "contextual, deliberative and reflexive".[26]

As the SCC reiterates in many instances, the aspiration norm for a liberal approach must be a truly free society which can accommodate a wide variety of differing and opposing beliefs. Such a liberal approach would always guarantee equal freedom to the orthodox believer as to his liberal counterpart. Any approach that would favor "liberal" believers (or non-believers) over orthodox believers does not conform to the Canadian "truly free society" standard. One may therefore also inquire hypothetically whether any approach that favors one group of people over others, can be called liberal at all, even if it favors those people who understand themselves as liberal.

There are clear parallels in effect between the Canadian "religion *à la carte*" and the South African "right to be different". It is a principle that entitles people to make their choices which have to be met with "positive tolerance"[27] by others. The Constitutional Court refers to "celebrating diversity" which entails that it must be promoted rather than "permitting it only when no other option remains".[28] The "right to believe or not to believe, and to act or not to act according to his or her beliefs or non-beliefs", is also one of the "key ingredients of any person's dignity".[29] The components of human dignity and diversity in their synthesis inform the right to freedom of religion and belief to guarantee a "right to be different".[30] Religious tolerance is accordingly not only important to individuals, it "is deeply meaningful to all of us because religion and belief matter, and because living in an open society matters".[31]

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26 *See* G. Bouchard and C. Taylor, *Building the future, A time for reconciliation*, Government of Quebec, 2008, pp. 146 and 168.

27 *See* L. du Plessis, 'Freedom of or Freedom from Religion? An Overview of Issues Pertinent to the Constitutional Protection of Religious Rights and Freedom in "the New South Africa"', in *Brigham Young University*, vol. 2001, no. 2, pp. 439-466 (2001), p. 442.

28 *MEC for Education: Kwazulu-Natal and Other v. Pillay*, Case CCT51/06, *supra* n. 25, paras 64-65.

29 *Christian Education South Africa v. Minister of Education*, Case CCT4/00, *supra* n. 14, para. 36.

30 Currie & de Waal, *supra* n. 12, at 317.

31 CCSA, *Prince v. President of the Cape Law Society*, Case CCT36/00B, 25 January 2002, paras 164-170.

5.3.3 Diversity and/or pluralism

While the right to be different may be said to have a similar effect to the individual freedom-centered approach of the Canadian Supreme Court, human dignity is informed by respect for diversity in the more collective dimension and this at least superficially bares resemblance to "pluralism" in the Strasbourg jurisprudence. The selected cases clearly show that the CCSA uses the term "diversity" while the ECtHR uses the term "pluralism". The ECtHR regards (religious) pluralism as a prism through which to view the freedom of religion. Pluralism in the words of the ECtHR is "indissociable from a democratic society" and depends (amongst others) on the freedom of religion and belief.[32]

Interestingly, while the term "democratic society" plays a role in all three instruments, the term "democratic society" actually features only in the Strasbourg case law in the selected cases. The Canadian equivalent as we have seen is the "truly free society", whereas the CCSA uses "open society". While such differences seem purely semantic, these different terms correlate with the different guiding principles.

Essential to the ECtHR's approach is the role of the state as "neutral and impartial organizer" of pluralism.[33] This means that the state must at times actively intervene in one party's freedom of religion and belief in order to guarantee the pluralism which is regarded as so essential to democratic society. Arguably, "pluralism" in the Strasbourg case law is used as often to justify state interference as it is to mandate state temperance. In comparison, in CCSA case law, "diversity" is first and foremost an aide of the individual freedom of religion or belief claim. Strasbourg "pluralism", hence, may be regarded as an "organizational principle" whereas "diversity" in South Africa is a "human dignity"-centered value.

This notion of individual freedom in the Canadian approach which creates protection of individual spiritual self-fulfillment, through possibly but not necessarily voluntary rather than obligatory association with others, also informs the notions of state neutrality and evenhandedness in religious affairs. It affirms the idea that there can be "no faith-based content to public policy and no religious community that commands authority or privilege in the policy-making process".[34]

The South African approach defines neutrality mainly as "inclusion". This can be explained by the focus on human dignity-based diversity as guiding principle. The ECtHR's organizational pluralism seems to assume most strongly

32 *Kokkinakis v. Greece*, app. no. 14307/88, *supra* n. 2, para. 31.

33 ECtHR (GC), *Refah Partisi (The Welfare Party) and Others v. Turkey*, app. nos. 41340/98, 41342/98, 41343/98 and 41344/98, 13 February 2003, paras 93-94.

34 L.E. Weinrib, ' "This New Democracy ..." Justice Iacobucci and Canada's Rights Revolution', *University of Toronto Law Journal,* vol. 57, no. 2, pp. 399-413 (2007), p. 406.

of the three courts, that there is an objectively neutral position in matters of religion and belief, which the state can assume and claim.

5.4 What is the scope of the freedom of religion and belief, and what does it entail?

Not surprisingly, the guiding principles greatly influence the scope and content of the freedom of religion and belief in the case law of the three courts.

5.4.1 Expression and relations

All three courts recognize that the freedom of religion and belief entails a right to believe or not to believe. It also entails that religious as well as other beliefs must be respected. According to the Canadian case law, the freedom of religion must be seen as an expression of the right to believe or disbelieve, to manifest one's belief or lack thereof or to express agreement or disagreement with the beliefs of others.[35] It also incorporates a right to establish and maintain a community of faith.[36] The notion of the freedom of religion as interpreted by the SCC, thus, not only stresses individual autonomy, but includes a collective dimension. The collective dimension is based upon the notion that free individuals freely form collectives. Freedom of religion and belief is thus not only about beliefs and choice of action and inaction, but also about relationships.[37]

As both individuals and communities enjoy the right to be different, the CCSA makes no difference between the individual and the collective dimension of the freedom. Freedom of religion and belief is placed in alliance with other provisions "designed to protect the rights of members of communities". Yet CCSA case law also touches on the spiritual dimension of faith. For many believers "their relationship with God or creation is central to all their activities. It concerns their capacity to relate in an intensely meaningful fashion to their sense of themselves, their community and their universe".[38] Consequently, state interference with faith-motivated action or inaction, not only impairs the freedom of choice but intrudes on the spiritual identity of people and thus impedes their human dignity.

This spiritual dimension in the South African jurisprudence bares resemblance to the *forum internum* in the Strasbourg case law. The state may

35 *Alberta v. Hutterian Brethren of Wilson Colony*, Case 32186, *supra* n. 5, para 181.
36 *Ibid.*
37 *See ibid.*, para. 182.
38 *Christian Education South Africa v. Minister of Education*, Case CCT4/00, *supra* n. 14, paras 24 and 36.

never breach the internal dimension of belief.[39] This dimension, however, has a narrow scope, possibly because of the absolute character. The definition may be so narrow, that it is arguably not foreseeable that the Court will ever find a breach unless an individual is threatened explicitly to change his or her belief or face negative consequences.[40] Even the forced swearing of a religious oath for members of parliament was not seen as a breach of the internal dimension. However, it was considered an unjustifiable breach of the external dimension.[41]

As mentioned, Article 9 of the ECHR pairs "thought, conscience and religion" for the scope of the freedom and then pairs "religion and belief" when it comes to the right to change them and the right to manifest them. Irrespective of whether we must assume a distinction between those pairs, the ECtHR jurisprudence makes clear that religious beliefs, beliefs not motivated by religion as such, as well as non-belief are protected by Article 9. Article 9, read in conjunction with Article 14, guarantees equal treatment of religious and non-religious beliefs, thought and conscience, as well non-beliefs and connected conscience and thought. The Convention bodies have accepted claims by individuals, churches, and associations with religious and philosophical objectives.[42] However, Article 9 cannot be invoked[43] by ordinary legal persons,[44] nor by corporate profit-making bodies.[45]

5.4.2 Deviation from general norms?

The SCC's guiding principle of individual liberty emphasizes a positive freedom, which in turn means that not only coercion or restraint impair individual freedom. Any state action which compels an individual to action or inaction contrary to what he or she would have freely chosen in the absence of the state's measure, is an intrusion on personal freedom. Any such intrusion can only be justified in regard of legitimate aims as stipulated by the Charter. Unless the state can thus legitimately interfere, everyone is free to act in accordance with his or her own conscience. Well aware that such a broad individual freedom will lead to a situation where the choices of some appall or disturb others, the SCC reiterates time and time again that a "truly free society" can accommodate a wide variety of beliefs, even if they collide and

39 *See* Harris, O'Boyle & Warbrick, *supra* n. 9, at 428.
40 Compare Evans, *supra* n. 19, at 78 and Harris, O'Boyle & Warbrick, *supra* n. 9, at 428.
41 *See* ECtHR (GC), *Buscarini and Others v. San Marino*, app. no. 24645/94, 18 February 1999.
42 *See* Rainey, McCormick & Ovey, *supra* n. 9, at 462-464.
43 Reid, *supra* n. 23, at 1055.
44 EComHR, *Verein "Kontakt-Information-Therapie" (KIT) and Hagen v. Austria*, app. no. 11921/86, 12 October 1988.
45 EComHR, *Company X. v. Switzerland*, app. no. 7865/77, 27 February 1979.

contradict one another. This is because a truly free society aims at full equality in the enjoyment of freedoms.[46]

Human dignity, the guiding principle of the CCSA, is inspired and informed by the negative experience of exclusion, suppression, and intolerance in South Africa's constitutional and legal history. Freedom of religion and belief in the South African interpretation, protects "the right of people to be who they are without being forced to subordinate themselves to the cultural and religious norms of others". Both individuals and collectives enjoy the "right to be different". In each case, space has been found for members of communities to depart from a general norm.[47] Hence, the state is required by the Bill of Rights "to acknowledge the value of religious diversity and pluralism". It meant for individuals and communities to be who they are and not subordinate themselves to the cultural and religious norms of others.[48]

The CCSA makes it clear that treating believers with equal concern and respect is to be distinguished from treating everyone exactly the same way. Sometimes it implies treating people different, because a rule of general applicability has different effects for them. Believers cannot, however, claim an automatic right to be exempted from rules of general application. But it does mean that the state must "seek to avoid putting believers to extremely painful and intensely burdensome choices of either being true to their faith or else respectful of the law".[49] While holding beliefs, convictions and opinions may not be subjected to limits of any kind, the restriction of manifestations should be avoided and, if they cannot be avoided, the least restrictive means should be sought. Restriction is obviously only legitimate with regard to a legitimate aim. Such an aim follows from the possible harm[50] to identified goals of general interest and, of course, the rights and freedoms of others. For example, the South African Supreme Court of Appeal has held in *Nkosi v Bührmann* that the freedom of religion and belief does not confer the right to choose a grave site without the site owner's consent.[51]

Both the Canadian and the South African interpretations of the freedom of religion and belief entail a general affirmation that deviation from mainstream norms and behavior is to be respected. While the South African "right to be different" may be bolder than its Canadian counterpart based on choice to be respected, both interpretations include in the very essential scope of the

46 SCC, *Trinity Western University v. College of Teachers*, Case 27168, [2001] 1 SCR 772, 17 May 2001, para. 28, quoting *R. v. Big M Drug Mart Ltd.*, Case 18125, *supra* n. 3, at 336-337.

47 *Christian Education South Africa v. Minister of Education*, Case CCT4/00, *supra* n. 14, para. 24.

48 Currie & de Waal, *supra* n. 12, at 317.

49 *Christian Education South Africa v. Minister of Education*, Case CCT4/00, *supra* n. 14, paras 42 and. 35.

50 *See* Currie & de Waal, *supra* n. 12, at 322-324.

51 *See ibid*., p. 343.

right a basic freedom to be exempted from general rules if these breach the freedom of religion and belief unduly.

The ECtHR is certainly more restrained in this regard. With regard to the external dimension, the ECtHR will first determine if, and to what extent, the manifestation is connected to the core internal (religious) belief "in a generally recognized form".[52] If there is insufficient coherence and connectivity, the individual's actions are not seen as protected manifestations under the freedom of religion and belief. If the manifestation is too far removed from the core belief, it is also not protected because the (religious) belief as such can be manifested in other ways.[53]

Hence, the ECtHR jurisprudence does not include a general affirmation of individual choice/right to be different. Yet even manifestations in a generally recognized (according to the Court) form may bring the individual in conflict with neutral or general application. In these cases, the ECtHR tries to walk a thin line between protecting the individual while not affirming a right to be different.

The incremental approach the ECtHR took concerning the right to conscientious objection to military service[54] shows the struggle with this matter. First, conscientious objectors could be punished by criminal law and the only right they could claim was to be treated differently from ordinary criminals concerning job requirements. Only after many years, once the majority of parliaments in the member states had recognized a right to alternative service or done away with conscription altogether, did the Court become more affirmative. It recognized then that religious freedom is impaired when individuals are forced to choose between following their conscience or preventing conviction.

5.4.3 What determines what the right entails?

Whereas the ECtHR will try to determine in some objective way the generally recognized form, the highest courts of Canada and South Africa take the subjective standard of the individual as a starting point. Yet it has been said that the broad definition of the right to freedom of religion and belief increases the chance of infringement by the state. Therefore, the limitations clause is crucial in interpreting what the right entails. Consequently in all the selected cases, the CCSA never questions the sincerity of a belief or the centrality of the practice to a believer's system of beliefs. It has so far always referred to the system as a whole to justify the impairment of any manifestation.[55] In the

52 Reid, *supra* n. 23, at 1055.
53 *See ibid.*, pp. 1054-1056.
54 ECtHR (GC), *Thlimmenos v. Greece*, app. no. 34369/97, 6 April 2000; ECtHR (GC), *Bayatyan v. Armenia*, app. no. 23459/03, 7 July 2011.
55 *See* Currie & de Waal, *supra* n. 12, at 320-321.

selected cases, the ECtHR is the Court which most often decides that certain claims are not protected by the freedom of religion and belief at all.

As impartial organizer, the state, in accordance with the ECtHR's approach, may never breach the internal dimension of belief. It may, however, regulate and organize the external and collective dimensions. This may lead to justified interference. Both the objective standard and the limitations clause thus determine what the right entails. The ECtHR's recent case law has gradually moderated the rigidness of the Arrowsmith test.[56] However, the general idea that there must be some objectified and immediate connection between practice and belief has not been terminated. In some cases, there is thus still the risk that the Court will cross a line of "substituting its judgment for the conscience of the persons involved, defining what was 'reasonable' for them to believe".[57]

The objective standard which remains in the Strasbourg jurisprudence, always runs more risk of substituting judicial analysis for the individual's conscience. The South African and Canadian approaches do not run this risk. They try to manage the other risk of too broad freedom via the limitations clause. Yet, arguably, the right to freedom of religion and belief entails more freedom of action and inaction for individuals in Canada and South Africa than in the European Convention area. The same goes for collective freedom although, due to the codification of the collective rights, collective autonomy under the freedom of religion and belief might be broadest in South Africa.

5.5 How is the freedom of religion and belief applied, when is it triggered?

The freedom of religion and belief is triggered according to the Canadian case law if a sincere belief was interfered with. The South African case law also uses the interference with sincere belief as a trigger. In the Strasbourg case law, failure to act in accordance with a negative or positive obligation by the state triggers freedom of religion and belief.

In the Canadian case law, the freedom of religion and belief is triggered, as shown in section 5.3.1, if a believer can show that a practice or belief that he or she sincerely believes in is hindered or infringed by a law, regulation or act. It is not necessary, for the practice to be a recognized and objectified religious dogma or practice. While the sincerity test can be derived from *Big M*, it was solidified in *Amselem* and once again applied as a robust notion in *Multani*.[58]

56 Harris, O'Boyle & Warbrick, *supra* n. 9, at 433.

57 Martínez-Torrón & Navarro-Valls, *supra* n. 11, at 234.

58 L.G. Beaman, 'Defining Religion, the Promise and the Peril of Legal Interpretation', in R. Moon (ed.), *Law and Religious Pluralism in Canada,* UBC Press, Vancouver/Toronto (Canada), 2008, pp. 204-205.

Although in general the South African jurisprudence regarding freedom of religion and belief primarily relies on human dignity, individual autonomy does play an important role in triggering the freedom of religion and belief. In *Pillay*, Langa notes that the applicable test to trigger freedom of religion and belief is "sincerity" in South Africa as well as many foreign jurisdictions.[59] The ECtHR does not have an equivalent of the sincerity test. However, as already mentioned in section 5.3.1, the *Arrowsmith* test, once used to objectively establish the centrality of a practice to a certain belief, has gone out of use.[60] Freedom of religion and belief is triggered in the Strasbourg jurisprudence, when there are measures preventing an individual from manifesting his or her belief or penalizing him or her for acting in accordance with the belief. If said measures are taken by private individuals, the important question in order to trigger the freedom of religion and belief is whether the state violated a negative or positive obligation in this regard.

5.5.1 Sincerity of belief and non-trivial interference

If the freedom of religion and belief is triggered in the SCC's case law because there is interference with or infringement of a sincere belief, the SCC will first analyze the nature of the interference. If the interference is non-trivial or not insubstantial, the *Oakes* test will be applied to establish whether the interference can be justified.[61] "Trivial or insubstantial" interference is interference that does not threaten actual religious beliefs or conduct. The SCC will not accept "[t]he bare assertion by a claimant that a particular limit curtails his or her religious practice" as evidence of the seriousness. Instead, it will "evaluate the degree to which the limit actually impacts on the adherent".[62] The degree to which the limit actually impacts on the adherent is part of the analysis which is the Oakes test.

The sincerity approach also links the freedom of religion to the broader category of freedom of conscience, "which seeks to ensure that individuals are free to adopt the religious, spiritual or secular beliefs or fundamental reasons of their choice and that they are not compelled to act contrary to their convictions of conscience". It is for the court to inquire whether the practice in question is one of "conviction of conscience" or mere "personal preference". "Only the former are likely to underpin a legal duty of accommodation since they are closely linked to what we have called the moral integrity of indi-

59 *MEC for Education: Kwazulu-Natal and Other v. Pillay*, Case CCT51/06, *supra* n. 25, para. 52.
60 Harris, O'Boyle & Warbrick, *supra* n. 9, at 433.
61 *See*, e.g., *Multani v. Commission scolaire Marguerite-Bourgeoys*, Case 30322, *supra* n. 3, paras 34-35.
62 *Alberta v. Hutterian Brethren of Wilson Colony*, Case 32186, *supra* n. 5, paras 32 and 89-90.

viduals."[63] However, the SCC will not establish a hierarchy between convictions of conscience or make distinctions between "core" and "periphery" of the system of belief.

As shown in section 5.3.2, it also takes interference with sincere belief to trigger the freedom of religion and belief in South Africa. In *Pillay*, the sincerity test plays an important role in relation to the religio-cultural use of the nose-stud. The ratio given for the sincerity test is the neutrality of (secular) courts in religious and cultural matters. Questioning the importance or centrality of a practice "would require them to substitute their judgment of the meaning of a practice for that of the person before them and often to take sides in bitter internal disputes. This is true both for religious and cultural practices."[64]

The ECtHR does not have an equivalent of the sincerity test as mentioned above. On the other hand, the ECtHR is much quicker than the other two courts to assume that a certain law, regulation or government act has not triggered the freedom of religion and belief because the rule is general in this application or because the interference must "objectively" be seen as trivial. Even if the adherent objects to the rule out of a religious principle, the ECtHR may regard the freedom of religion and belief not to be triggered. However, if the act in question itself involves the making of a religious declaration or participation in religious activities, the freedom of religion and belief is always considered compromised. Requiring someone to prove that he or she professes a certain religion, which would be considered unjustified interference elsewhere can, however, be justified in the Strasbourg system.[65] Also, in Strasbourg jurisprudence the "minimal restrictions in which the authorities act within their margin of appreciation in striking the balance" will generally not constitute an interference".[66] This threshold is similar to the triviality/substantiality test in Canada and South Africa. Unlike in Canada and South Africa, if the threshold is not met, the freedom of religion and belief is not even triggered.

In the ECtHR cases reviewed, there is also evidence that the objections to participate in certain acts stand more chance of being protected under Article 9 if the act the believer is compelled to engage in has a religious character. This can be seen in *Følgero* and *Buscarini* vis-à-vis *Şahin* and *Thlimmenos* (see sections I3.4.1–2 and I3.4.7–8). The attitude or general outlook of the claimant also plays a role. *Refah* (section I3.4.5) suggests that a group holding beliefs that are incompatible or not entirely compatible with the "democratic society" envisioned by the convention cannot claim Convention protection.[67] This is the notion which has been called "vigilant democracy". The concept has been

63 Bouchard & Taylor, *supra* n. 27, at 176.
64 *MEC for Education: Kwazulu-Natal and Other v. Pillay*, Case CCT51/06, *supra* n. 25, para. 87.
65 ECtHR (C), *Kosteski v. the Former Yugoslav Republic of Macedonia,* app. no. 55170/00, 13 April 2006.
66 Reid, *supra* n. 23, at 1057.
67 Rainey, McCormick & Ovey, *supra* n. 9, at 543-544 and *Refah Partisi (The Welfare Party) supra* n. 34 paras. 92-93.

criticized because it allows for the impairment of rights in concrete situations for the purpose of an abstraction. Boyle, for example, lamented the *Refah* judgment because it allowed for the prohibition of the main government party, without any concrete evidence that the government would indeed violate Convention rights.[68] Similarly, the dissenting judges in *S.A.S.* bemoaned the majority's finding that the freedom of religion and belief of face-veil wearing women was impaired for the sake of "living together". Apart from being abstract, "living together" cannot be translated to concrete rights and freedoms of others. "Selective tolerance" is not reconcilable with the Convention, the dissenters argued in *S.A.S.*[69]

5.5.2 Ratio and working of the sincerity approach

Much like in the Canadian cases, the CCSA dismisses all reference to "objective" practices in *Pillay*. Sunali Pillay must not be compared to other South Indian Tamil Hindu girls, because "it is not for the Court to tell her that she is wrong because others do not relate to that religion or culture in the same way."[70] In *Christian Education*, the CCSA takes very seriously the belief of the parents that corporal punishment is important and central to them in their religious beliefs about proper education and upbringing. It does not dismiss the practice as trivial, but accepts a more than trivial interference with the freedom of religion and belief.[71] In the end, the decision is taken by balancing rights.

It could be argued that the South African "sincerity test" is in fact a sincerity assumption: the sincerity is assumed and seldom challenged, because this would involve unconstitutional questioning of personally held beliefs by a court. However evidence may be used to conduct a primary inquiry into the subjective centrality of the practice.[72]

According to the CCSA case law, the sincerity assumption may also follow from the very nature of a belief. The beliefs of one may strike others as "bizarre, illogical or irrational to others or are incapable of scientific proof". Hence, trying to objectify can be seen as an impossible enterprise. Putting believers through such a procedure may in itself involve an infringement of the freedom of religion, conscience, thought, belief and opinion. "Such should

68 K. Boyle, 'Human Rights, Religion and Democracy: The Refah Party Case', in *Essex Human Rights Review*, vol. 1, no. 1, pp. 1-16 (2004), p. 2.

69 ECtHR (GC), *S.A.S. v. France*, app. no 43835/11, 1 July 2014, *Joint partly dissenting opinion of Judges Nussberger and Jäderblom*, paras 2 and 14.

70 *MEC for Education: Kwazulu-Natal and Other v. Pillay*, Case CCT51/06, *supra* n. 25, para. 87.

71 *Christian Education South Africa v. Minister of Education*, Case CCT4/00, *supra* n. 14, para. 37.

72 *See* Currie & de Waal, *supra* n. 12, at 341.

be only done in case of a genuine dispute as to the centrality or sincerity of the practice."[73]

The "sincerity" approach in the Canadian standard interpretation clearly follows from the main guiding principle, individual liberty. If the autonomous individual sincerely believes, the protection of the constitutional rights is triggered. In the *Amselem* case, for example, the Supreme Court stresses the "personal choice". The freedom of religion and belief does not only protect "those aspects of religious belief or conduct that are objectively recognized by religious experts as being obligatory tenets or precepts of a particular religion". An adherent should only be asked to show whether his or her belief is sincere, not whether it is "valid". After all, an inquiry into the validity of the belief would be inappropriate for a (secular) court to make.[74]

Yet besides individual freedom, there might be a second ratio for the sincerity approach which is more practical in nature, though linked to individual autonomy and the notion of religious neutrality of state organs. Finding objective meanings and concepts for religious and other beliefs is difficult if not impossible in a religiously diverse society such as Canada or South Africa. The same certainly goes without a question for the Convention member states. Various religions and beliefs differ from one another, they are internally heterodox as shown by the many different strands under the same religion and/or belief system. Also, each of them evolve and change as they interact with other cultural elements in society. Finally, believers make personal choices. If judges and lawyers are to understand religion and belief in its own terms, they must – at least partly – rely on what the believer attests to being his/her belief.[75]

High level religious and conscientious pluralism also explains why there will always be some interference and infringement, and why some of it has to be considered as justified. After all, "[b]ecause religion touches so many facets of daily life, and because a host of different religions with different rites and practices co-exist in our society, it is inevitable that some religious practices will come into conflict with laws and regulatory systems of general application."[76] The three courts agree that the freedom of religion and belief, much like all other human rights, is not an absolute right. They also agree that while the freedom of belief may be broad, the freedom to act upon those beliefs is considerably narrower.[77]

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73 *Prince v. President of the Cape Law Society*, Case CCT36/00B, *supra* n. 32, para. 42.
74 *Syndicat Northcrest v. Amselem*, Cases 29252, 29253, *supra* n. 7, para. 43.
75 Beaman, *supra* n. 59, at 193-201.
76 *Alberta v. Hutterian Brethren of Wilson Colony*, Case 32186, *supra* n. 5, paras 89-90.
77 *See*, e.g., *Trinity Western University v. College of Teachers*, Case 27168, *supra* n. 47, para. 30.

5.5.3 Positive and negative obligations

Freedom of religion as guaranteed in Article 9 of the ECHR covers both negative and positive obligations by states. States must refrain from penalizing an adherent for his or her religious beliefs, and must certainly not take active measures to interrupt, disturb or prevent free and equal exercise of religious manifestation. Hence, non-recognition of a religion, church or community, can trigger the protection of Article 9.[78] The failure of the state to provide proper protection to a minority religious community against (physical) attacks by fanatics of the majority group is also seen as an infringement.[79] Also, the state may, under the positive obligation, limit free speech to protect the mainstream religious group against insult.[80] However, the obligation is not so strong that it makes such protection absolutely necessary. Case law shows that when the state fails to protect a minority religion against such insult, no positive obligation is neglected, irrespective of whether the majority is protected by blasphemy laws.[81]

The Canadian and South African case law show that indeed both the non-compliance with negative obligations and the non-fulfillment of positive obligations can trigger the freedom of religion and belief according to the SCC and the CCSA. In *Lafontaine* (section I1.4.8) all judges on the SCC agreed that the municipality did not do its best to assist the congregation of the Jehovah's Witnesses in providing for the required transparency and the appearance of procedural fairness, when it came to finding a place to realize their church. The majority believed that a positive obligation had been neglected because the municipality did not assist enough. The minority found that a positive obligation under state neutrality, derived from the freedom of religion and belief, kept the municipality from assisting more. In *Multani*, however, a unanimous Court believed that the school had been under a positive obligation to find a reasonable accommodation for the practice of wearing the metal *kirpan* rather than issuing a blanket ban.

The CCSA in *Prince* also assessed whether the Government had been under a positive obligation to provide for an exemption for the Rastafarian community from the general ban of marihuana. While the majority found that such an exemption would undermine the very purpose of the general ban, the minority was of the opinion that the freedom of religion and belief mandated a neatly tailored exemption. In *Christian Education*, however, a unanimous Court was of the opinion that any exemption from the general ban of corporal

78 ECtHR (C), *Metropolitan Church of Bessarabia and Others v. Moldova*, app. no. 25781/94, 13 December 2001.

79 ECtHR (C), *97 Members of the Gldani Congregation of Jehovah's Witnesses and Others v. Georgia*, app. no. 71156/0, 3 May 2007.

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

81 ECtHR, *Choudhury v. United Kingdom* (Admissibility decision), app. no. 17439/90, 5 March 1991.

punishment in schools would undermine the purpose of the ban. There was therefore no positive obligation under the freedom of religion and belief, which parliament failed to adhere to.

So, while all three courts recognize the concepts of positive and negative obligations, the application is slightly different. Arguably, the CCSA and SCC are more likely to see them as to sides of the same coin, while the ECtHR primarily looks at the freedom of religion and belief in terms of negative obligations and a higher threshold must be met to assume a positive obligation.

5.6 Instant secularization through human rights case law?

The comparative analysis of the selected cases and the conceptualization of the standard interpretation show that the three courts are receptive towards the claims of believers. While we may have our own opinions as to which standard interpretation is more preferable, if any, or which case should have been decided differently, we can conclude that the freedom of religion and belief is an important asset for believers in the context of the liberal constitutional state. Nevertheless, some commentators believe that, in the long run, believers have more to fear than to gain from the freedom of religion and belief. Hirschl, for example, argues that courts "reconstruct or format religion in several obvious ways". In the public mind, religion itself becomes defined by the court cases. Constitutional jurisprudence tends to not consider the "vast historical and sociological background of religion, the incredible richness of beliefs and interpretive nuances". Furthermore, generally speaking, constitutional law and constitutional courts are often appealing to "secularist, modernist, cosmopolitan, and other anti-religious social forces in polities". Part of this has to do with the very nature of constitutions and constitutional law. Constitutions are man-made and create a system of institutions governing the entire spectrum of society and a normative order from which no one can withdraw. They advance the rule of law by definition, sometimes in "lieu and at times in tandem with the rule of God".[82]

Hirschl regards the highest courts in South Africa and Canada as prime examples of a deified constitutionalism as an all-encompassing, overreaching civil religion.[83] Yet in his opinion in any state-religion system, even strong establishment, judges will always be found to enhance secular law at the expense of religion. While judges in strong establishment settings find interpretative solutions to facilitating the growth of the domain of public law at

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

83 *Ibid.*, p. 5. *See also* R. Hirschl, *Constitutional Theocracy*, Harvard University Press, Cambridge (USA), 2010, pp. 187 and 203.

the expense of religion/religious law, in the accommodationist model the competing claim of religious law is rejected, while in separationist states, the public sphere is by definition secular. As stakeholders in the civil religion of the state, courts feel obliged to take action to "restore the superiority of its sources of legitimacy, rules of engagement, methods, and style of reasoning that are state-driven and entrenched in the secular constitution". Hence, he concludes, a-religious or anti-religious forces, when faced with divides along religious or secular/religious lines will favor constitutional law and courts as the instrument and fora for such divides. After all, irrespective of the socio-cultural context, they show a tendency towards secularization.[84]

While in the premodern age legal, political, and social structures gave "religious legal regimes" an advantage, they now give states an advantage in their effort to "contain religion". Courts, Hirschl concludes, are "inherently unsympathetic toward alternative hierarchies of authority and adjudication, which they constantly strive to bring under check".[85] He is not the only one with a critical view of the impact of judicialization on religion and belief. Reuter observes that modernity's main tendencies, individualization and pluralization, have led to a "far-reaching diversification of the religious-denominational field". Amongst "other things" he attributes this to "the acceleration of globalization processes and increasing inter- and transnational migration". Parallel to that, the human rights culture developed which led to a juridification: moral claims are converted into legal human rights claims. This is why in today's religious cultural climate, human rights legal conflicts about religion seem to dominate.[86]

In Reuter's view, the modern state, unlike its predecessors, entered into domains previously not governed by the state like marriage, schooling, welfare and so forth. Previously, these belonged to the domain of faith-based communities, organizations, and structures. Many of the current legal conflicts decided under the freedom of religion and belief, still result from this "hostile take-over".[87] The freedom of religion and belief as a human right has automatically led to an individualization and "juridification". Because human rights are first and foremost individual rights, individualization is enhanced. Because rights must be claimed and enforced through legal procedures, "juridification" is accompanied by "justicialization" and "judicialization". Courts decide on what constitutes "religion" within the scope of the human right.[88]

However, Reuter argues that the self-understanding of religious communities should be essential in defining "religion" and "belief". After all, the state

84 Hirschl, *supra* n. 83, at 4-25.
85 *Ibid*., p. 25.
86 A. Reuter 'Charting the Boundaries of the Religious Field: Legal Conflicts over Religion as Struggles over Blurring Borders', in *Journal of Religion in Europe*, vol. 2, no. 1, pp. 1–20 (2009), pp. 1-4.
87 *Ibid*., p. 15.
88 *Ibid*., pp. 15 and 7-10.

would violate the independence of religious communities and churches if it did not take the self-understanding into consideration. On the other hand, this self-understanding cannot be absolute because that would lead to a ""dissolution of the religious" and to an "erosion of this fundamental right". Therefore, "those who claim freedom of religion must make a plausible case" that what they are claiming is indeed covered by an understanding of "religious" "in the sense of what law and jurisdiction define as religion". The state must then determine the scope of the freedom of religion. However, this immediately implies that the secular domain seizes control over the religious domain. According to Reuter, this makes it necessary for the liberal constitutional state to be self-critical and acknowledge the dilemma.[89]

Benson views secularism primarily as a movement directed at minimizing the relevance of religion and its role in the public sphere. Secularism understood in this way is an anti-religious ideology, which increasingly seeks to employ law to fulfill the function of a religion with one moral viewpoint. "By doing so, these approaches attack religious associations themselves and usurp the proper social roles that religions play including diversity in relation to moral debates of the day." Benson, like Hirschl, sees tendencies of a reductive definition of the freedom of religion in the jurisprudence and legal literature of particularly Canada and South Africa.[90]

In Benson's view, while legal debates about religious freedom use terms such as "pluralism" and "diversity", their very meaning is different from what believers might imagine them to mean. He associates them with "Pseudo-Liberalism", "Civic Totalism", "Egalitarian Absolutism" and "Making Law into a Religion". Law is being used to make a set of beliefs on, among other things, gender roles and sexual conduct to be dominant. But the threat comes not only from the divinization of law but also from a "diminution of the protections that exist in law for religious diversity". Part of the problem seems to be that in media, politics, and law, there is an overrepresentation of people "who have little time for religion at best and actively wish to attack it at worst".[91]

In Benson's view, there is an attempt to replace religion by law, by turning the law into the civil religion and "idolatrizing law and human rights". He views this as dangerous for culture, freedom, and peaceful coexistence. But he also views the project as inherently doomed to fail. Religion's true nature consists of voluntarism, allegiance by affection, and transcendental rules. The true nature of law and state is the diametrical opposite. The attempts to idolatrize law or human rights are inappropriate usurpations of the role

89 *Ibid*., pp. 10-18.

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

91 *Ibid*., pp. 112-114.

properly played by religions in societies. Religions, as diverse as they may be, stand outside the public, political and legal spheres, though they may also overlap with each of these spheres and each other. Yet, because religions believe in different things, they are likely to conflict. This is why associational freedom is necessary for social peace.[92]

True pluralism and accommodation, according to Benson, require the acceptation of co-existence with disagreement instead of the win all/lose all method of rights-based litigation. Benson, therefore, argues for a shift of focus from the courtrooms to the legislative and to civil society itself. As courts will doubtlessly continue to be confronted with legal conflicts related to the issues of freedom and equality, courts must find a way to enable rather than obstruct political and societal discourse.[93]

Hirschl, Reuter and Benson are familiar with the case law generated by the three courts, as present in the selected cases. They know that in a great many cases, the believers are triumphant and if not, there is often a balancing of rights in which the believer's claim is treated with respect. They acknowledge that in the context of the modern state, interests and beliefs can collide and that we need adjudication to solve them. They are united in their assertion of the need to find a new equilibrium for competing normative orders, of which (secular) constitutional law is one and religion and belief are others.

The question is whether the courts, made out to be "high priests of constitutionalism", are not also the ones who created space and opportunity for believers to (re-)claim agency over their lives and to contribute to the holistic pluralism that commentators desire.[94] Is the sincerity approach not designed to let believers themselves determine the essence of a religion or belief? Benson credits Albie Sachs with being a notable exception, a judge who understands religion, like believers do.[95] But does Sachs' clear and profound logic of the "right to be different" not echo in all those majority opinions, which had to relate to his dissenting and separate opinions. Does the echo not continue, even after he left the Court? Is the "right to be different" not the lifeline of all those who feel constrained by the totalism of modern society?

I would answer all these questions affirmatively. I agree with the commentators that the modern state and modern society contain many intrusive elements for believers. But I view the role of human rights and courts in a positive light. Many of the selected cases, especially from the SCC and CCSA showed awareness of the dilemma Benson mentions regarding the secular determining the scope of the religious. I was appreciation for religion and belief and diversity of spiritual life and I saw remedies against civic totalism.

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92 *Ibid*., pp.114-116.

93 *Ibid*., p. 117.

94 *Ibid*., p. 115, quoting R. Hirschl, *Constitutional Theocracy*, Harvard University Press, Cambridge (USA), 2010, pp. 187, 202 and 118-119.

95 Benson, *supra* n. 91, at 120.

In Hirschl's opinion, as we noticed, courts are "inherently unsympathetic toward alternative hierarchies of authority and adjudication"[96] and thus "own law". While this may not be untrue, we also saw room for group autonomy and own law in the selected cases. So even with judicial skepticism towards own law, a dynamic and flexible relationship is conceivable. This may require the acknowledgement of the states "hostile takeover" (Reuter[97]) of many areas in social life and the possibility for communities of faith to reclaim them as alternatives to the state.

Obviously, the selected cases also show us the boundaries of the freedom of believers. Generally speaking, these boundaries seem to be not static, but dynamic, developing as case law shapes and molds the standard interpretation. The boundaries, which have to be motivated under the limitations clause, relate to the rights and freedoms of others, the (risk of) harm to others. Holistic pluralism by definition demands an integral approach to freedom which structurally neither favors nor disfavors any (group of) believers or non-believers. It requires as Sachs said in *Fourie* "mutually respectful co-existence between the secular and the sacred. The function of the Court is to recognize the sphere which each inhabits, not to force the one into the sphere of the other."[98] As far as the constructive role of the courts is concerned to find a way to enable this, Cass Sunstein claims that judicial minimalism is just the instrument. In Chapter 6, we shall see to what extent the selected cases display such judicial minimalism.

5.7 Intermediary conclusions: similarities, differences and best practices

According to H.L.A. Hart, it is imminent that judges develop principles which guide their interpretation of the law. All three courts have developed principles which guide their interpretation of the freedom of religion and belief. They are related to in what may be called the theoretical foundations, contexts and/or history of the respective constitutional documents. The guiding principles are supported by what will be called supporting principles.

The main guiding principle applied by the SCC in the freedom of religion and belief cases is "individual liberty". The "harm principle", "religion à la carte" and "sincerity of belief" are informing principles.

"Human dignity" is the main guiding principle applied by the CCSA in the freedom of religion and belief cases. The "right to be different", "respect for diversity" and "positive tolerance" are the informing principles.

96 *Ibid*., p. 25.
97 *Ibid*., p. 15.
98 CCSA, *Minister of Home Affairs and Another v. Fourie (e.a)*, Cases CCT 60/04 &10/05, 1 December 2005, paras 93-94.

The main guiding principle of the ECtHR for the freedom of religion and belief cases is "pluralism". The state's role as "organizer of pluralism" and the impartiality of this organizer are therefore the informing principles which inform what pluralism implies for solving the cases.

The three guiding principles as applied by the three different courts in interpreting the freedom of religion and belief are neither opposing nor mutually exclusive. They do, however, differ in their emphasis and internal logic. This, in turn, can lead to very different outcomes in similar cases. Hence, these different guiding principles can create opposing or colliding outcomes, as well as parallel and even identical outcomes.

The SCC and the CCSA mainly rely on the believers themselves to define their religion and belief and what it entails for them. The believer must show sincerity in the belief and practice which is at stake. Often this will be a sincerity assumption, if there is no evidence to the contrary. This is especially so, before the CCSA. The ECtHR has moved away from trying to objectify beliefs and practices, but cannot be said to have fully embraced a sincerity based approach.

All three courts are alive to the communal dimension as prerequisite for the individual dimension and vice versa. While all three view difference (i.e. pluralism or diversity) in a positive light, the SCC and CCSA take it to be the natural situation in a free and open society, which must be celebrated and the state must leave alone as much as possible. In the ECtHR's approach, pluralism is something the state needs to organize.

Regarding the scope of the freedom of religion and belief, the three courts recognize that the freedom of religion and belief entails a right to believe or not to believe. It also entails that religious as well as other beliefs must be respected. Unlike the other two courts, the ECtHR is not inclined to read a right to deviate from general norms into the right. Much like with the concept of religion and belief, the CCSA and SCC let the believers themselves decide what the right entails in terms of manifestations. If they are sincere in their belief, the practice is protected, and can only be limited under the limitations clause. The ECtHR is more reserved and likely to try to formulate objective standards. It thereby runs the greatest risk of substituting the beliefs and opinions of believers with its own.

The subjective vs. objective approach also has an influence on how the freedom of religion and belief is triggered, and whether or not an interference is regarded as trivial. All three courts recognize the concepts of positive and negative obligations. However, the CCSA and SCC are more likely to see them as to sides of the same coin, while the ECtHR primarily looks at the freedom of religion and belief in terms of negative obligations and a higher threshold must be met to assume a positive obligation.

The differences in emphasis between the guiding and informing principles and the impact they have on concept, scope and application of the freedom

of religion and belief can partly be explained from the background of the human rights instruments in which the right is codified.

The European Convention was primarily directed against totalitarian ideologies which radically denied and/or undermined even the innermost plane of the *forum internum.* The identity-focused interpretation of elements of the freedom of private and family life only had a modest spillover to the freedom of religion and belief.

The Canadian Charter is closely linked with the repatriation of the Constitution and the ambition of developing a Canadian constitutional narrative. The Canadian values based on multiculturalism clearly influenced the development of the freedom of religion and belief jurisprudence to become an affirmation of individual liberty, association by choice and an inclusive public sphere.

The South African Bill of Rights is set within the new Constitution which held the promise of replacing racialism, exclusion and dominance with the new ethos of the Rainbow nation. The freedom of religion and belief jurisprudence was constructed visibly in the selected cases from this starting point.

The comparative analysis of the selected cases in the six identified dimensions does not support the general viewpoint put forward by some writers that the (adjudication of the) freedom of religion and belief, has contributed to the secularization of society/ societies. The selected cases show attempts to create space and opportunity for believers to (re-)claim agency over their lives and to contribute to a holistic pluralism.[99] The right to be different, being one of the informing principles of the CCSA, provides an escape for those who feel constrained by the totalism of modern society. Obviously, the selected cases also show us the boundaries of the freedom of believers. While these boundaries are static on a general and abstract level, the cases show that there is room for dynamics in specific and concrete situations.

In the next chapter, we look at judicial minimalism as an approach to adjudication that specifically provides for a specific and concrete approach to conflicts. It also claims that it prevents win all/lose all method of rights-based litigation, Benson sees as a danger, as we saw. Instead judicial minimalism is accepting disagreement as a feature of LDC.

In light of the above some of the best practices for optimal protection enumerated in section 4.8 can be reaffirmed, while we can add the following:

12. Applying a broad, liberal, and subjective-based concept of religion and belief that informs the scope of and the trigger points for the protection.
13. Embracing difference as the consequence and perquisite of freedom. Enabling dynamics for a holistic pluralism and awareness of the complex relationship between the secular and the religious in a free, open, and diverse society.

99 Benson, *supra* n. 21, at 115, quoting R. Hirschl, *Constitutional Theocracy*, Harvard University Press, Cambridge (USA), 2010, pp. 187 and 202; and at pp. 118-119.

14. Allowing faith-based communities to provide alternatives for state institutions like marriage, schooling, welfare and so forth.