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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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6 Minimalism in the jurisprudence of the SCC, CCSA and ECtHR

How minimalist are the standard interpretations for the freedom of religion and belief?

6.1 INTRODUCTION TO THIS CHAPTER

This chapter analyzes the case law of the three courts on the freedom of religion and belief through the prism of minimalism as developed by Sunstein and introduced in Chapter 2. First, the minimalist elements in each of the court's standard interpretations are discussed (sections 6.2 to 6.4), after which dominant parameters in the selected cases, which tend to trigger minimalist or maximalist reasoning are identified (6.5). The Chapter closes with a comparative analysis and intermediate conclusions (section 6.6).

6.2 MINIMALISM AT THE SCC?

Chapter 4 analyzed the jurisprudence of the SCC on the freedom of religion and belief, as manifest in the selected cases, in comparison to that of the other two courts. Chapter 5 identified the main guiding principles of the SCC and the other two courts' approaches to freedom of religion and belief, as well as the informing principles. We also encountered different concepts of religion and belief, the scope of the rights and the ways in which they are triggered. Based on this, which elements of minimalism can we identify in the SCC's case law?

The SCC has a generally consistent methodology concerning freedom of religion cases, which consists of fixed elements and a general view on religion and belief and the freedom granted to them within the context of other constitutional arrangements and constitutional theory. There are also explicit references to philosopher J.S. Mill¹ or the notion of the Constitution as a living tree.² Yet this does not make the approach maximalist. On the contrary, the fixed elements, the coherent approach and the integral view, all contain obvious elements of minimalism, as the following subsections demonstrate.

1 See, e.g., SCC, *Syndicat Northcrest v. Amselem*, Cases 29252 and 29253, [2004] 2 SCR 551, 30 June 2004, para. 61.

2 See SCC, *Reference re Same-Sex Marriage*, Case 29866, [2004] 3 SCR 698, 9 December 2004, para. 22.

6.2.1 Personal autonomy, subjective interpretation and sincerity test mandate

As shown, above all, by the *Amselem* and *Multani* cases (sections I1.7 and I1.4.10), the SCC defines religion in light of the freedom of religion and belief. The believer has personal autonomy to construct his or her own religion à la carte. A person's religion and belief are about subjective understanding of a precept, rather than objective evidence like official dogma, statements by official institutions or the practice of other believers. All passing of judgement on the practices by interveners or third parties in the evidence are declared to be out of order, disrespectful and contrary to the Canadian values based on multiculturalism.³ In the free and pluralist society, everyone works out for themselves what to believe and how to practice those beliefs. As "religious tolerance is a very important value of Canadian society",⁴ all choices and practices are greeted with respect, even when interference is justified.

Also, to trigger the freedom of religion and belief, the believer must show "sincere belief". This is because it is the "religious or spiritual essence of an action" and not "any mandatory or perceived as mandatory nature" or "religious dogma", which triggers the freedom of religion and belief.⁵ These elements mandate a case-by-case approach, because a focus on the individual believer, his or her belief, and the alleged infringement in the specific case are required. It also prevents a wide and deep analysis or assessment of the belief in question.

6.2.2 Balancing under the limitations clauses

The case studies show that the balancing done by the SCC under the limitations clauses is quite narrow. The proportionality test (rational connection, minimal impairment, effects of the measure), the functional and pragmatic approach (correctness, patent unreasonableness, reasonableness), and reasonable accommodation, are all applied by looking closely at the case at hand. Consider, for example, how explicit mention is made in *Multani* of the context of the school environment, Gurbaj's own character, and the reasonable accommodation proposed. Needless to say that in that specific case, the absolute (wide)

3 SCC, *Multani v. Commission scolaire Marguerite-Bourgeoys*, Case 30322, [2006] 1 SCR 256, 12 March 2006, paras 32-35, 71. SCC, *Braker v. Marcovitz*, Case 31212, [2007] 3 SCR 607, 14 December 2007, paras 36-37 and 93. *Syndicat Northcrest v. Amselem*, Cases 29252 and 29253, *supra* n. 1, paras 50 and 68.

4 *Multani v. Commission scolaire Marguerite-Bourgeoys*, Case 30322, *supra* n. 3, paras 74 and 76.

5 *Syndicat Northcrest v. Amselem*, Cases 29252 and 29253, *supra* n. 1, para. 47 and *Multani v. Commission scolaire Marguerite-Bourgeoys*, Case 30322, *supra* n. 3, para. 32-33, quoting SCC, *R. v. Big M Drug Mart Ltd.*, Case 18125, [1985] 1 SCR 295, 24 April 1985.

prohibition was not justified.⁶ In *Amselem*, the majority proceeds similarly concerning the safety interest. As the tenants wishing to erect the *succahs* on their balconies can be accommodated without endangering the safety of other tenants, there is no necessity to limit the right.⁷

6.2.3 Sticking to the case at hand

There are several cases in which the SCC assesses only what is necessary in terms of the concrete facts of the case and the legal considerations necessary to solve the case, refraining from speculations or broad future-oriented rulings. For example, in *TWU* (section I1.4.5) it considers that the facts do not show any discrimination by TWU educated teachers. If there is concrete discrimination by individual graduates, there are remedies to address it.⁸ This case also shows that the Court will reconcile rights in a specific case and not be tempted to issue a broad ruling on the relationship between equality rights and the freedom of religion and belief.

In *Bruker* (section I1.4.11), the SCC simply notes that Mr. Marcovitz did not show any interference with his sincere beliefs, refraining from assessing whether under similar circumstances a position like his could be fruitful if such sincere belief was proven. The majority in *Bruker* also takes a notably more minimalist approach than the dissenting judges. While the majority argues for a case-by-case approach as far as religious legal concepts in private law instruments are concerned, Deschamps and Charron reject outright a case-by-case approach in favor of a deep and wide ruling against the enforcement of religious concepts by (secular) courts. However, their approach would have created a situation in which Mrs. Bruker loses a great deal, whereas Mr. Marcovitz did not lose anything through the majority's approach. After all, his objections were not so much motivated by religious motives, as by personal bitterness.⁹

In *Lafontaine* (section I1.4.8), the conduct of the municipality is considered a breach of fairness, without spelling out what exactly the municipality should have to fulfill in its positive obligation towards the congregation looking for a place to build the church. Equally in *Chamberlain* (section I1.4.6), what is sanctioned is that the board did not take the equality rights of same-sex parents into consideration, while it did take the concerns of other parents into consideration. There is no wide and deep ruling there, which rejects religious

6 *Multani v. Commission scolaire Marguerite-Bourgeoys*, Case 30322, *supra* n. 3, paras 39-40, 45 and 56-67.

7 *Syndicat Northcrest v. Amselem*, Cases 29252 and 29253, *supra* n. 1, paras 82-90.

8 SCC, *Trinity Western University v. College of Teachers*, Case 27168, [2001] 1 SCR 772, 17 May 2001, paras 35-38.

9 *Bruker v. Marcovitz*, Case 31212, *supra* n. 3, paras 69 and 182.

considerations, unlike what the dissenting judges allege. However, admittedly the dissenting judges' position is even more minimalist; they believe either decision (to approve or not approve the books) would have been constitutional.

In *Hofer* (section I1.4.2), dissenting (Chief) Justice McLachlin's approach is arguably more minimalist than that of the majority. Instead of approaching the facts merely from the angle of the law, as one would with all kinds of other corporations, she takes the specifics of this community into consideration and reaches the conclusion that the procedures as adopted and applied by them in this case did meet the (minimal) standards required by law.¹⁰ This approach will normally grant religious communities a more meaningful degree of autonomy within the framework of the legal system.

6.2.4 Inter-institutional dialogue and democracy enhancement

Minimalism is said to be democracy enhancing, while unlike majoritarianism not adhering to a notion of democracy that is strictly majoritarian. In *Chamberlain* and *Bruker*, like in *Children's Aid Society, A.C. v. Manitoba* and *Alberta v. Hutterian Brethren* (sections I1.4.4, I1.4.12 and I1.4.13), we see the SCC referring explicitly to the intent of the legislature and the official statements of members of the executive. Hence, the Court attaches great value to the federal and provincial democratic processes.

In *TWU*, the SCC considers, for example, that the British Columbia legislature had passed acts in favor of *TWU*, showing that it did not consider them contrary to public policy.¹¹ Years later in the case of *TWU* against the Law Society of British Columbia, the SCC considers the referendum held amongst the LSBC members.¹² In *Same-Sex Marriage* (section I1.4.9), the SCC refuses to answer the fourth question on the constitutionality of judgments and provincial legislation allowing for same-sex marriage, prior to the federal law amendment. This exemplifies the democracy-enhancing function of minimalism. The federal Parliament has already adopted a position, and hence this question, while legally interesting, is practically irrelevant in light of democratic developments.¹³

10 SCC, *Lakeside Colony of Hutterian Brethren v. Hofer*, Case 22382, [1992] 3 SCR 165, 29 October 1992, pp. 78-79.

11 *Trinity Western University v. College of Teachers*, Case 27168, *supra* n. 8, paras 35-38.

12 SCC, *Law Society of British Columbia v. Trinity Western University*, Case 37318, [2018] 2 SCR 293, 15 June 2018.

13 *Reference re Same-Sex Marriage*, Case 29866, *supra* n. 2, paras 64-71.

6.2.5 The harm principle

In *Amselem*, the Court cited the utilitarian philosopher John Stuart Mill in formulating the so-called “harm-principle”.¹⁴ This principle is interpreted in many different ways by its protagonists and opponents. The SCC, however, tends to apply the harm principle in the authentic way to limit the freedom of one party – one needs to show that this is done in order to prevent harm to others. This must be actual and concrete harm, not hypothetical or fictional harm. We see this in *Amselem*, *Multani, A.C. v. Manitoba*, and *Children’s Aid Society of Metropolitan Toronto*. Although in the latter case, the actual harm remains a matter of dispute between the dissenting judges and the majority.

We also see the harm principle in *Sioui* (section I1.4.1) and *P.(D.) v. S.(C.)* (section I1.4.3). In the latter case, it remains a matter of dispute between the dissenting judges and the majority whether harm is actually a criterion in the assessment of the “child’s best interest”. Yet, whether it is the security of the tenants (allegedly compromised by the *succahs*), the schoolchildren’s safety (allegedly compromised by the *kirpan*), the infant’s or teenager’s life endangered by the refusal of a blood transfusion, or the preservation of nature in the national park possibly hindered by ritual use, without a thorough analysis of the (possible) harm, the limitation of the freedom of religion and belief cannot be justified.

6.2.6 The living tree

In *Same-Sex Marriage*, the SCC rejects a principally originalist “framer’s intent” understanding of the Constitution in favor of the “living tree” concept. Yet the “framer’s intent” is not rejected generally and totally; only for the purpose of interpreting a concept that evolved culturally and democratically, like marriage in this case.¹⁵ The interpretation of Canada’s Constitution as a “living tree” facilitates an incremental development of constitutional law and jurisprudence, providing another element of minimalism, and is far from being a perfectionist “ideal society” concept. The metaphor of the tree is telling. A tree’s branches do not grow linearly in accordance with a plan, but naturally and seemingly unexpectedly in many directions. Yet, they never become detached from the trunk and the roots. The living tree is therefore the ideal metaphor for minimalist interpretation as opposed to originalism/fundamentalism, but also perfectionism (and finally majoritarianism). After all, as Weinrib notes, the Charter was born from the “rejection of the legal theory, ideology

14 See, e.g., *Syndicat Northcrest v. Amselem*, Cases 29252 and 29253, *supra* n. 1, para. 61.

15 *Reference re Same-Sex Marriage*, Case 29866, *supra* n. 2, paras 22 and 25-30.

and the methodology that resort to 'original intent' and 'original understanding' in American constitutional law".¹⁶

But what to think of the underlying vision of a free and open society governed by the rule of law and human rights, in which multiculturalism is deduced from classical liberalism? Does this not give away a large constitutional theory which undermines all the minimalist elements? In my opinion, it does not for two reasons. First, minimalism is a democracy-enhancing theory. Multiculturalism is an official Canadian policy, enshrined in (constitutional) law by Canada's legislature (see e.g. the reference in the Charter and the Canadian Multiculturalism Act). Also, the SCC does not easily set aside laws or decisions between elected bodies, usually trying to reconcile opposing interests and rights.

Second, minimalism presumes a liberal constitutional government *a priori*. The entire notion of a constitution and judicial decisions as incompletely theorized departs from a theory of individual freedom, the rule of law, separation of powers and human rights. Minimalism is therefore not a theory for just any system, but for a liberal constitutional democracy. Hence, it is not contrary to minimalism to decide cases with reference to the roots of this system, and the (by definition incompletely theorized) ideals envisioned by this system.

If the sole purpose of a constitution is to "impede change" or "obstruct modernity", as Scalia argues,¹⁷ then the SCC has failed. But then again, if the constitutional instrument was designed to further societal change, a Court which impedes or obstructs such change can hardly be called minimalist. The SCC is largely minimalist because it neither tries to impede nor further change, but to solve the cases at hand.

6.3 MINIMALISM AT THE CCSA?

Chapter 4 analyzed the jurisprudence of the CCSA on the freedom of religion and belief, as manifest in the selected cases, in comparison to that of the other two courts. Chapter 5 identified the main guiding principles of the CCSA and the other two courts' approaches to freedom of religion and belief, as well as the informing principles. We also encountered the different concepts of religion and belief, the scope of the rights and the ways in which they are triggered. Based on this, which elements of minimalism can we identify in the CCSA's case law?

16 See L.E. Weinrib, 'The Canadian Charter's Transformative Aspirations', in *Supreme Court Law Review* (2nd), vol. 19, pp. 17-37 (2003), p. 22.

17 See A. Scalia, 'Modernity and the Constitution', in E. Smith (ed.), *Constitutional Justice under Old Constitutions*, Kluwer Law International, The Hague (Netherlands), 1995, p. 317.

In the cases discussed, the CCSA is on a jurisprudence journey to discover the meaning of the freedom of religion and belief as guaranteed by the Constitution for the cases at hand. While the approach is visibly a case-by-case approach, consistency in the methodology arguably develops over time, though it is not instantly evident in the first cases. Finding its way between judicial restraint on the one hand and being the guardian of a Constitution which explicitly and intentionally established transformative values and a new ethos on the other hand, the CCSA develops its freedom of religion and belief jurisprudence. This jurisprudence displays clear elements of pragmatic minimalism.

6.3.1 Judicial restraint

The CCSA is more inclined to judicial restraint than to judicial overreach.¹⁸ Yet judicial restraint as such does not necessarily lead to minimalism. Klare notes the “conservatism” of South African legal culture, not in the sense of political ideology, but a cautiousness in analysis. Indeed, the cases analyzed in this study show a very contextual approach, consequentialist reasoning, and hesitation to formulate abstract and broad conclusions from specific cases.¹⁹

6.3.2 The minimum necessary

The CCSA clearly has sympathy for judicial minimalism when it comes to constitutional interpretation. Explaining the attitude of the Court in the first certification judgment, which concluded that some provisions had to be redrafted in order to comply with the constitutional principles, Justice Sachs said: “Our basic decision was to give [...] not the full-flowing, sophisticated, precedent-based analysis that an ordinary judgment would have.[...]. [W]e were reluctant to go beyond the absolute minimum necessary to answer the questions that were asked.”²⁰

The second *Certification* case (section I2.4.1) also displays minimalism where the Court argues that in concrete cases, the derogation clause should be applied stringently, instead of ruling with the complaint that freedom of religion and

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

19 See K.E. Klare, ‘Legal Culture and Transformative Constitutionalism’, in *South African Journal on Human Rights*, vol. 14, no. 1, pp. 146-188 (1998), p. 168.

20 A. Sachs, ‘The Creation of South Africa’s Constitution’, in *The New York Law School Law Review*, vol. 41, no. 2, pp. 669-689 (1997), p. 673, cited in M.S. Kende, *Constitutional Rights in Two Worlds – South Africa and the United States*, Cambridge University Press, New York (USA) et al., 2009, p. 37.

belief ought to be put on the list of non-derogable rights.²¹ Minimalism is also evident in *Certification of the Western Cape* (section I2.4.3). The CCSA finds the words “[i]n humble submission to Almighty God” in the preamble to be “ceremonial deism”. Ceremonial deism, having no particular (legal) constitutional significance, can be no violation of the freedom of religion and belief.²² In fact, Sunstein himself argues that the ceremonial deism in the United States conforms to minimalism because it usually refers to God and religious symbolism in a non-denominational and thus inclusive way. In a diverse country, most of whose citizens are believers, there should be a heavy burden on striking down ceremonial deism in light of this diversity.²³

6.3.3 Judicial assumption

Christian Education (section I2.4.6) is another example of minimalist interpretation. Here, the CCSA assumes infringement of freedom of religion and belief. It never answers whether the prohibition of corporal punishment in all schools does indeed interfere with the freedom of religion and belief of those Christian schools that see corporal punishment as an essential part of Christian education. Treating the belief in corporal punishment respectfully as essential to the religious self-understanding of the schools and the parents, the CCSA nevertheless finds that the national legislation prohibiting corporal punishment must prevail. After all, the very purpose of the legislation would be undermined if an exception were created for Christian Education. Some commentators have said that the judgment “did not fully resolve the conflict”.²⁴ This was not necessarily meant as praise. Critics found the hypothetical approach, in which a limitation of religious freedom was assumed, “extremely artificial”.²⁵

Yet arguably, the judgment shows essential minimalism as intended by Sunstein. *Christian Education* lost a case, but not the world. It is true that some of the members may have been disappointed, but their belief system was treated with dignity and respect. If the Court had decided in a more drastic fashion, finding for example that corporal punishment is not covered by the

21 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. 36.

22 CCSA, *Certification of the Constitution of the Western Cape*, Case CCT6/97, 2 September 1997, para. 28.

23 C.R. Sunstein, ‘Celebrating God, Constitutionally’, in *University of Detroit Mercy Law Review*, vol. 83, pp. 567-578 (2005), pp. 567-568.

24 Kende, *supra* n. 20, at 228.

25 See 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. 153 at note 11.

freedom of religion and belief and/or inherently at odds with the rights of children, the Court may have been considered less artificial and the conflict would have been resolved fully. However, this would have possibly left Christian Education feeling marginalized and misunderstood. By doing what was necessary to solve the case and upholding freedom and diversity of religion and belief, the Court made optimal use of the instrument of incompletely theorized agreements.

6.3.4 Incrementalism in the Muslim marriage cases

Minimalism is furthermore present in many of the South African cases discussed in this study. The Muslim marriage cases *Amod*, *Daniels* and *Hassam* (sections I2.4.5, I2.4.8. and I2.4.12) show a gradual, incremental evolution towards treating the spouses of purely religious marriages as equal to other legal spouses.

The controversial question of whether or not polygamous Muslim marriages must be accepted by the private law system is left unanswered, when deciding that the spouse in a *de facto* polygamous marriage is to be seen as a “spouse” for the purpose of inheritance law. After all, this fundamental question which was also to be decided by Parliament when adopting a Muslim Marriages Act, was not instrumental or necessary to deciding the cases at hand.

6.3.5 Inter-institutional dialogue

Commentators have observed that “the Constitutional Court views its relationship with the legislature as a collaborative one, giving respect to the legislature’s interpretations of rights [...]”.²⁶ The Muslim marriage cases and *Fourie* (section I2.4.10) are cited in this regard.

In *Fourie*, the Court found that the impossibility for same-sex couples to get married violated the Constitution. The majority suspended its order for 12 months to give Parliament a chance to adopt legislation to address the issue first. If after 12 months there was no such legislation, then the order, making the marriages legally possible, would automatically enter into force. Dissenting Justice O’Reagan would have given immediate effect to the order, rather than

26 Lenta, *supra* n. 18, at 575.

suspend it for a year.²⁷ The Civil Union Act 17 of 2006 provides official legal status, either as a civil union or marriage, for same-sex couples.²⁸

While *Fourie* serves as a prime example of inter-institutional dialogue, the Constitutional Court giving Parliament a chance to address the inequality before the order comes into force, has of course led to criticism. Goodsell believes that the case was decided without due regard to the local customs and culture which are also protected as rights.²⁹

Indeed, one does not have to look hard to discover some perfectionism in the *Fourie* judgment. The Court discovered sexual orientation equality rights embedded in the Bill of Rights, which had not been made explicit. But as we saw, Sunstein himself recognizes that minimalism is not always the best option.³⁰ He supports “deep” decisions like *Roe v. Wade*³¹ and *Brown v. Board of Education*³² and wide ones like *Miranda*.³³ But even then, courts should proceed in as minimalist a way as possible, like Sandra Day O’Connor did with the “undue burden” in *Roe*.³⁴ The CCSA did just that when suspending the order in *Fourie*, to give Parliament the possibility to work on a system for same-sex marriage which would honor the rights of same-sex couples and those of other South Africans who believe only in opposite-sex marriages.

Criticism, as we have seen above, is also raised against *Solberg* and *Prince* (sections I2.4.4. and 5.4.7), in which the respective majorities placed much emphasis on the considerations of the legislature.³⁵ While this is certainly judicial restraint, it can be majoritarian in Sunstein’s theory, rather than minimalist.

The inter-institutional dialogue the CCSA likes to engage in, has rather minimalist features. In the first proceedings in *Prince*, the Court found that in order to determine the constitutional question, it needed more information

27 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, paras 161, 168 and 173.

28 See 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. 201.

29 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), p. 151.

30 C.R. Sunstein, ‘Beyond Judicial Minimalism’, in *Tulsa Law Review*, vol. 43, pp. 825-842 (2013), p. 837 and C.R. Sunstein, *One Case at a Time*, Harvard University Press, Cambridge (USA)/London (UK), 2001, p. 17. See also pp. 36-38.

31 US Supreme Court, *Roe v. Wade*, 410 US 113 (1973), 22 January 1973.

32 US Supreme Court, *Brown v. Board of Education*, 347 US 483 (1954), 17 May 1954.

33 US Supreme Court, *Miranda v. Arizona*, 384 US 436 (1966), 13 June 1966.

34 C.R. Sunstein, ‘Problems with Minimalism’, in *Stanford Law Review*, vol. 58, no. 6, pp. 1899-1918 (2006), pp. 1901-1902.

35 Goodsell, *supra* n. 29, at 148.

on the Rastafari religion and the significance of *ganja*.³⁶ Then, in the second case, the majority found that any carefully curtailed exemption for the Rastafari was impossible to administer. Such a system would also require the authorities to establish when *bona fide* Rastafari use was at stake and when it was not. This was inconsistent with the freedom of religion and belief.³⁷ Chief Justice Ngcobo, who disagreed with the majority, did find a violation but suspended the invalidity for 12 months so that the Government could work out a closely knit exemption.³⁸

In *Solberg*, dissenting Judge O'Reagan adheres to minimalism when she says that having established that the purpose of the closed day definition is not a secular one, the overall purpose and effect of the provision with regard to the freedom of religion and belief should be reviewed on a case-by-case basis.³⁹ In *Christian Education*, much regard is given to the intention of the legislature when issuing a general ban of corporal punishment.⁴⁰

In 2009, the Women's Legal Centre Trust sought a declaration from the Constitutional Court in accordance with section 167(4)(e) of the Bill of Rights that Parliament had breached a constitutional obligation by not enacting a Muslim Marriages Act. Such an Act could have resolved many uncertainties.

The Court argued in minimalist fashion that "'fulfill a constitutional obligation' must be given a 'narrow meaning'". If section 167(4)(e) were to have a broad meaning, it would render constitutional review by other courts of the conduct of the president and of the Acts of Parliament, which are also foreseen by the Constitution, superfluous. The CCSA also paid attention to the fact that because of the many interests and choices involved in adopting legislation recognizing Muslim marriages, it would not be appropriate for a Court of first and final instance to decide.⁴¹

6.3.6 Transformative values and new ethos

Fourie, the Muslim marriage cases, *Prince*, but also *Pillay*,⁴² are best indicative for the transformative values of the Bill of Rights, which have established a

36 CCSA, *Prince v. President of the Cape Law Society*, Case CCT36/00A, 12 December 2000, paras 10-18.

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

38 *Ibid.*, paras 83-90.

39 CCSA, *S v. Lawrence*; *S v. Negal*; *S v. Solberg*, Cases CCT38/96, CCT39/96 and CCT40/96, 6 October 1997, para. 127.

40 CCSA, *Christian Education South Africa v. Minister of Education*, Case CCT4/00, 18 August 2000, paras 39-40.

41 CCSA, *Women's Legal Centre Trust v. President of the Republic*, Case CCT13/09, July 2009, paras 11 and 23.

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

new ethos. The intention of the Constitution was to change the wrongs of history and to bring about a different kind of society. Hence, one might argue that there is a type of “founders intent” present in the interpretation, which also projects a desired (perfectionated) society.

The CCSA has made explicit or implicit reference to the drafters’ intent and the ambition of dismantling injustices of the past.⁴³ In Sunstein’s theory, it could be called a fusion between original understanding and perfectionist interpretation. But, does this exclude the possibility that the Court is overall minimalist? The Bill of Rights was the expression of the democratic turning point in South African history, which intended to bring about a society and political-legal order in which the dignity, freedom, and equality of all South Africans would be guaranteed for the first time. The Constitution, which in accordance with constitutionalism’s most popular fiction represents the “will of the people”, is itself quite clear and obvious in the values it represents and the fact that they must be used to interpret the rights contained in the Bill of Rights.

Irrespective of the transformative ambition of the South African Constitution, Currie and De Waal note that a restrained approach is necessary to maintain the checks and balances in a system of constitutional review which is as broad and all-encompassing as the South African one. The legislature must be able to respond to a judgment by amending a statute and even “within the limits of the Constitution undo a court order if dissatisfied with it”. “A court’s role should be confined to eliminating unconstitutional options rather than prescribing the alternatives it regards to be constitutional.” Currie and De Waal conclude that court rulings must be narrow, because broad rulings restrict the legislature’s ability to reform the law. In their eyes, the Constitutional Court seems to have complied with this.⁴⁴

Indeed, one can easily argue that while the CCSA often takes recourse to a value-based approach, which is informed by the perfect society, envisioned by the founders of democratic South Africa to transform into, the rights in the Bill of Rights are generally treated as incompletely theorized agreements, which are incrementally filled with more and more content.

6.4 MINIMALISM AT THE ECtHR?

Chapter 4 analyzed the jurisprudence of the ECtHR on the freedom of religion and belief, as manifest in the selected cases, in comparison to that of the other two courts. Chapter 5 identified the main guiding principles of the ECtHR and the other two courts’ approaches to freedom of religion and belief, as well as the informing principles. We also encountered the different concepts of

⁴³ See Klare, *supra* n. 19, at 186.

⁴⁴ Currie & de Waal, *supra* n. 25, at 183-185.

religion and belief, the scope of the rights and the ways in which they are triggered. Based on this, which elements of minimalism can we identify in the ECtHR's case law?

Evans notes that with the adoption of Article 9 ECHR, a variety of states agreed to freedom of religion and belief as a principle, while the Convention gives little or no guidance as to what the principle entails.⁴⁵ While this is most certainly the case with all human rights catalogues, especially supranational ones, it provides a starting point for minimalism. The freedom right started out as an "incompletely theorized agreement" as envisaged by Sunstein's theory. This, however, does not automatically make the Court a minimalist one.

Some of the ECtHR's case law shows clear elements of minimalism. Yet, there are features which on first sight resemble minimalism, but are not – features often related to the "margin of appreciation". The margin itself is not a minimalist feature, as shall be shown below. Some critics of the Court have lamented the inconsistency in the freedom of religion and belief case law of the Court. Inconsistency is not a feature of minimalism, to the contrary. One case at a time denotes focusing on the case at hand, while a "red thread" should still be visible in hindsight. Finally, there are also obvious maximalist features in some of the cases, as shall be seen.

6.4.1 Margin of appreciation as quintessential minimalism?

The margin of appreciation stipulates that determining facts and even assessing them is best left to the national institutions. This can be the assessment of whether a certain measure is actually taken to serve a legitimate aim, or whether the measure can realistically help achieve the aim. In *Movement Raëlien* (section I3.4.12), for example, the Court argued that the national judges are better equipped to give an opinion on the "necessity" of a specific restriction in order to fulfill the legitimate aims. Hence, only very serious reasons can lead to a reassessment of the national court's analysis.⁴⁶

In *Cha'are, Şahin* and *Sindicatul 'Păstorul Cel Bun'* (sections I3.4.3, I3.4.7 and I3.4.13), the Court asserts that the margin of appreciation is broad in matters of state/religion relationships. In *Lautsi* (section I3.4.10), the GC ruled that the question of whether or not a crucifix is displayed in a classroom falls within the margin of appreciation.⁴⁷ Interestingly, the Chamber had previously

45 See C. Evans, *Freedom of Religion under the European Convention of Human Rights*, Oxford University Press, Oxford (UK), 2001, pp. 18 and 31, referring to J. Rawls, *A Theory of Justice*, Revised Edition, Oxford University Press, Oxford (UK) et al., 1999.

46 ECtHR (GC), *Mouvement Raëlien Suisse v. Switzerland*, app. no. 16354/06, 13 July 2012, paras. 63 and 66.

47 ECtHR (GC), *and Others v. Italy*, app. no. 30814/06, 18 March 2011, para. 70.

regarded the margin to be less broad in the exact same case: a state may not order a religious symbol to be hung on every classroom wall. In *Yiğit* (section I3.4.9), the state asserted that the regulation of marriage falls within the margin of appreciation.⁴⁸ This was accepted by the Court.

In *Maestri* (section I3.4.6), the dissenting judges disagreed with the majority regarding whether there was a legal basis to discharge a judge who had refrained from ending his membership in a Freemason lodge. The majority saw no legal basis for dismissing the judge. In the dissenting judges' view, the principle of subsidiarity, the "fourth instance" doctrine and the "margin of appreciation" should have guided the Court towards a different assessment – namely that of leaving the assessment of the national authorities intact.⁴⁹ In *Bayatyan* (section I3.4.11), the Court rejected the state's assertion that whether or not to make conscientious objection to military service a criminal charge falls within the margin of appreciation, as the state had failed to "provide compelling reasons to justify" the interference. It did not "demonstrate that the interference corresponds to a 'pressing social need'".⁵⁰

The margin of appreciation safeguards the prerogatives of national legislatures and obviously of national courts, being the institutions "closer to the ground". After all, the Court was conceptualized as a supranational institution of human rights supervision and scrutiny. Any overreach would almost automatically trigger not only criticisms of usurpation of legislative power by a court, but of national sovereignty by an international body. Although the Court has structurally applied the margin of appreciation to manage this risk, it was unable to prevent this line of criticism. Indeed, the so-called Brighton process tells a story of the Strasbourg organs revitalizing the elements in the system which contribute to national sovereignty to strengthen support for the institutions amongst the member states.⁵¹

The margin of appreciation may strike some as a minimalist feature, *par excellence*. Indeed, narrow rulings favored by minimalism should permit inter-institutional dialogue.⁵² As the Court is a supranational institution, it is engaged in a dialogue with the national institutions – legislative, executive and judicial – and not so much with its counterparts in the CoE. The Court has stated many times that the margin of appreciation should go hand in hand with European supervision.⁵³

48 ECtHR (GC), *Terife Yiğit v. Turkey*, app. no. 3976/05, 2 November 2010, para. 60.

49 ECtHR (GC), *Maestri v. Italy*, app. no. 39748/98, 17 February 2004, *Joint dissenting opinion of Judges Bonello, Strážnická, Birsan, Jungwiert and del Tufo*, paras 8-9.

50 ECtHR (GC), *Bayatyan v. Armenia*, app. no. 23459/03, 7 July 2011, para. 123.

51 See High-Level Conference on the Future of the European Court of Human Rights, Brighton, United Kingdom, 19 April 2012.

52 See Sunstein, *supra* n. 34, at 1915.

53 See, e.g., *Lautsi and Others v. Italy*, app. no. 30814/06, *supra* n. 47, para. 70 and *Refah Partisi (The Welfare Party) and Others v. Turkey*, app. nos. 41340/98, 41342/98, 41343/98 and 41344/98, 13 February 2003, para. 100.

The degree of supervision is essential to let the “margin” work as a minimalist feature for narrow rulings which enable dialogue, as opposed to a majoritarian feature which wants to prevent interference with the democratic process. Majoritarians are skeptical towards invalidation of legislation by courts, because the democratic process should have primacy. Minimalists favor inter-institutional dialogue and balance adhering to discourse models of democracy, rather than majoritarianism. Leaving the assessment of a “legitimate aim” and “necessity” too much up to national institutions has little to do with “solving one case at a time”. Cases can very often be solved on their own merits without awarding semi-blank checks to other institutions. In any case, Harris et al. are not correct in assuming that the margin of appreciation is most narrow in cases where an individual’s identity is at stake, at least if religious/belief identity is concerned.⁵⁴ Cases like *Mouvement Raëlien, Lautsi, Cha’are* and *Şahin* (see above), much like *Fernández Martínez* and *SAS* (sections I3.4.14 and I3.4.15) display this. On the other hand, *Folgerø* (section I3.4.8) shows how the margin can also be narrower where religious/belief identity is concerned.

6.4.2 Making use of procedural review

An example of minimalist credentials can be found in *Maestri* where the majority opinion is focused on the foreseeability of the legal rule in question, reaching the conclusion that it was not foreseeable. Hence, the majority avoided the fundamental question of whether it is permissible under the Convention to categorically exclude members of a certain community from the office of judge.

The analysis of the cases in Chapter 4 shows that the Court treats the legitimate aim as a procedural element, which is procedurally marginally tested. For example, in *Cha’are*, *Şahin*, *Yiğit* (all mentioned above) and *Refah* (section I3.4.5), the Court assumes that the legitimate aim raised by the Government is given, or at least not disputed between parties. It then proceeds to discuss the material dispute under “necessity”. Interestingly, in all these cases the Court happens to find in favor of the state in the end. Hence, the question is whether this kind of procedural review does not make it far too easy for the state, leaving the individual without due protection whenever the true aim is not so legitimate.

Obviously, critically reviewing whether the state indeed serves a legitimate aim would require a substantial and in-depth analysis, which could hardly be called minimalist. But a minimalist approach could be to review critically whether or not the state has provided enough rationally connected arguments,

54 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. 13.

without an in-depth assessment of every argument. If the state has not provided enough rationally connected arguments, a violation can be found based on a minimalist approach.

There are also cases in which the Court takes a minimalist approach to the legitimate aim and still finds in favor of the claimant. In *Buscarini* (section I3.4.1), the GC considered it was unnecessary to look into the legitimacy of the aim. Clearly, the requirement of the oath was incompatible with Article 9 ECHR.⁵⁵ In *Thlimmenos* (section I3.4.2), the Court found no legitimate aim in the exclusion from the office of accountant, as the claimant had already served a prison sentence.⁵⁶ Yet in these two cases we see that the test, though handled in a minimalist manner, is no longer purely procedural and marginal, but substantiated. Equally in *Bayatyan* (mentioned above), the Court reasoned that the state can no longer rely on public order to justify the imprisonment of conscientious objectors to military service. After all, the same government had already pledged to introduce legislation recognizing conscientious objection.⁵⁷

Gerards proposes that the Court make structural use of a procedural assessment before turning to a substantive review. Her very interesting 2012 article on methodological reform can be read as both a criticism of current minimalism at the Court and a proposition for a new more principled minimalism. She critiques the Court's case-by-case approach, with incremental development of the jurisprudence through analogy as problematic, because it is exactly that, which leads to the ever growing number of rights and interests being covered by the Convention. This is what has triggered debates about the Court's legitimacy. "A step-by-step approach without a clear aim or a clear direction" she argues "can unconsciously lead the judge to a place where he did not want to be, or it can lead to outcomes that the judge would not have reached if he would have been able to foresee the consequences."⁵⁸

Gerards proposes more use of procedural review focus on individual interests in the case at hand instead of weighing the abstract interests claimed by the state against other abstract interests, and being more conscious of norms, principles and legal opinions in the community of law. She adopts the latter view from Dutch legal theorist and judge Wiarda.⁵⁹ There is, however, the question of whether such an approach borrowed from private law is useful in the same way in human rights law. Human rights are inevitably anti-establishment. Subsequently, opposition to human rights judgments is sometimes a sign of quality, rather than a sign of a lack thereof. Nevertheless, perhaps

55 ECtHR (GC), *Buscarini and Others v. San Marino*, app. no. 24645/94, 18 February 1999, para. 38.

56 ECtHR (GC), *Thlimmenos v. Greece*, app. no. 34369/97, 6 April 2000, para. 47.

57 *Bayatyan v. Armenia*, app. no. 23459/03, *supra* n. 50, para. 117.

58 J. Gerards, 'The Prism of Fundamental Rights', in *European Constitutional Law Review*, vol. 8, no. 2, pp. 173–202 (2012), pp. 197–201 and 179–183.

59 *Ibid.*, pp. 197–198, 201, and 170.

Gerards' views on a more consistent and transparent methodology can help the Court to develop a minimalism that leads to a decrease rather than an increase of the "margin of appreciation"⁶⁰ in freedom of religion and belief case law.

6.4.3 Fact-based and incremental

Many of the selected cases decided by the ECtHR have obvious minimalist credentials. The Court isolates the facts of the case before proceeding with the judicial analysis and keeps this close to the facts. When having discussed certain matters under one of the Convention rights, it will usually not discuss them again under another right. In addition, when tricky controversial (political or social) questions can be avoided, the Court will avoid them. Harris et al. note in reference to Mahoney that while the Court increasingly adopted an evolutive and dynamic interpretation of the Convention rights, it has been incremental rather than sudden in changing the meaning of terms.⁶¹

The case law regarding the conscientious objectors in military service possibly serves as the best illustration of "minimalist judicial policy" by the GC. In *Thlimmenos*, the GC carefully avoids the overall question regarding the permissibility of military service in Greece and the criminal punishment of conscientious objectors under the Convention. It also stays away from all facts surrounding the prison term. Instead, it focuses on the facts and merits of the impact of the prison sentence on eligibility to become an accountant. The Court then finds a violation of Article 14 ECHR (in conjunction with Article 9) because of the (in-)difference in treatment between "common criminals" and conscientious objectors instead of discussing the right to conscientious objection as such under Article 9.

In *Bayatyan*, the GC also builds a "narrow and shallow" judgment, which rests mainly on the pledge Armenia itself made to recognize conscientious objection, when joining the Convention. Given the factual situation in Europe, the Court argues, it is no longer feasible to reason that the exclusion of mandatory military service from the prohibition of forced labor also means that Article 9 cannot be invoked against it. A broader, deeper, or bolder judgment was not necessary because of how the situation of conscientious objection had become recognized by legislation in the past decades. Armenia was the last man standing and had already promised to address the situation legally.

In an article written in 2021, President Bratza of the ECtHR argued against defining religion and instead approaching matters on a case-by-case basis,

60 *Ibid.*, p. 200.

61 See Harris, O'Boyle & Warbrick, *supra* n. 54, at 7, referring to P. Mahoney, 'Judicial Activism and Judicial Restraint in the European Court of Human Rights: Two Sides of the Same Coin', in *Human Rights Law Journal*, vol. 11, pp. 57-88 (1990).

given the huge diversity within the Convention area; not only in religion as such, but also in religion-state relations.⁶² Justice Bratza, thus, mirrors the quintessential plea for minimalism as best suited in the context of diversity.

6.4.4 Inconsistencies

Gerards argues that the Court in general “discloses a rather nontransparent use of terminology and a tendency to confuse and mix distinct elements of judicial review”.⁶³ In Evans’ opinion, the Court uses “commitments to overly generalized principles such as neutrality and pluralism which have the potential to give useful guidance on religious freedom cases, but have not been sufficiently well developed”.⁶⁴ Others have echoed that the Court failed to realize the full potential of Article 9.⁶⁵

The following illustrates the point. The references to earlier case law and frequented notions like the state as “impartial organizer of pluralism”, “one of the most important rights”, and “pluralism depends on it” create the impression that the Court has a consistent approach. Yet the application of these concepts in the interpretation of Article 9 makes it difficult to find a red thread. While minimalists would treat any right as incompletely theorized agreements, the ECtHR has almost made the freedom of religion and belief so un-theorized that sometimes the agreement part seems to be missing.

It is extremely easy and therefore a little unfair to name the *Lautsi* Chamber and Grand Chamber judgments as proof of the Court’s inconsistency with regard to state-religion issues and freedom of religion and belief in the educational domain. Yet *Lautsi* is now standing case law and must be read in conjunction with, for example, *Şahin* and *Folgerø* (see above). It is extremely difficult to draw a consistent line from these three cases, even if one focused on the margin of appreciation, which is broad in *Lautsi* and *Şahin*, but substantially less broad in *Folgerø*.

Apart from conscientious objection, the Court is not consistently minimalist with regard to Article 9, nor is it consistent across the dimensions of the freedom of religion and belief as is shown in Chapter 4. “One case at a time”, as the positive example of conscientious objection shows, requires sticking to the facts at hand and consistency across the cases. Inconsistency is antithetical to minimalism. Perhaps the Court’s experience with conscientious

62 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), pp. 258–259.

63 J. Gerards, ‘How to improve the necessity test of the European Court of Human Rights’, in *I•CON*, vol. 11 no. 2, pp. 466–490 (2013), p. 467.

64 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. 340.

65 See Bratza, *supra* n. 62, at 257; Harris, O’Boyle & Warbrick, *supra* n. 54, at 441.

objection can serve as a guide for more minimalist consistency in state-religion issues and freedom of religion and belief in the educational domain, and elsewhere in the dimensions of the right.

6.4.5 Organizational freedom as substantive criterion

Unlike in some of the cases mentioned above, in *Hasan and Chaush* (section 13.4.4) the assessment of the legitimate aim is all substantial: “[...] the government’s modus operandi in the circumstances attested no legitimate aim”. Yet the facts show that the Government tried to stimulate, pressure, or even establish a religious community under unified leadership. It takes no in-depth analysis to establish that the aim is not legitimate, because it runs contrary to state neutrality. Yet, there is also an element of minimalism in the case. The Court leaves explicitly unanswered the question of whether the requirement of registration of religious denominations as such is a violation of Article 9.⁶⁶ The answer is not necessary to solve the case.

Interestingly, in all cases where the Court treats the test substantially, it finds in favor of the claimant in the end. So, the Court will treat the test marginally and procedurally whenever it finds in favor of the state, and in all cases where it treats the test substantially, it finds in favor of the claimant. There are, however, also cases where the test is marginal and yet the Court finds in favor of the claimant.

In *Sindicatul “Păstorul Cel Bun”* (mentioned above), the dissenters apply a decidedly more minimalist approach than the majority, arguing that essentially the refusal to register the trade union is premature.⁶⁷ Whether or not the trade union would really interfere with internal structure and authority, thereby threatening the autonomy of the Romanian Orthodox Church, would have to be seen. At that point, other Convention rights could still have been limited in order to protect the Article 9 rights of the Church.

6.4.6 Value judgements and wide rulings

Şahin, *Yiğit*, and *Refah* just like *Mouvement Raëlien* and to a lesser extent *Cha’are* (all mentioned above) serve as examples of a very non-minimalist trait of the Court, that of passing value judgements on the precepts, tradition, habitus and world view of a religion or system of beliefs. Whatever one may think

⁶⁶ ECtHR (GC), *Hasan and Chaush v. Bulgaria*, app. no. 30985/96, 26 October 2000, paras 68-69 and 77-78.

⁶⁷ ECtHR (GC), *Sindicatul “Păstorul Cel Bun” v. Romania*, app. no. 2330/09, 9 July 2013. *Joint Partly Dissenting Opinion of Judges Spielmann, Villiger, López Guerra, Bianku, Møse and Jäderblom*, para. 9.

of these judgements, the language used discloses “completely theorized” notions and sends a message to the claimants and many others much like them that the Convention does not protect them.

In *Şahin*, the majority, in spite of dissenting Judge Tulkens’ warning, called the Islamic headscarf a symbol which is hard to reconcile with gender equality.⁶⁸ How can a girl wearing a headscarf still trust in the objectivity of the ECtHR with regards to prohibition of their attire after what the Court said about the headscarf and its symbolic meaning? Luckily, the Convention is a living document (see section 6.4.7), and the judges are alive to reconsiderations of past errors. In *SAS* (section I3.4.15), the majority ruled in favor of France which had banned face coverings, but also acknowledged that religiously motivated face coverings are “the expression of a cultural identity” and are therefore a natural feature of “the pluralism that is inherent in democracy”.⁶⁹

In *Refah*, the majority of the Court suggested that the very idea of legal pluralism is at odds with the Convention, in spite of dissenting Judge Kovler’s iterations.⁷⁰ How could a political party advocating legal pluralism ever again feel that the ECtHR is a remedy against obscure and fabricated political arguments used to ban the party? Equally in *Yiğit* (mentioned above), the Court was strict in finding in favor of the member state which does not attribute the widow of a purely religious marriage any rights. The ruling is so wide that a woman who chooses for whatever reason to enter into a purely religious marriage and not also a civil one, could never hope that for some purposes she will be treated legally as a spouse/widow.

Such value judgements and other wide rulings are the very antithesis of minimalism. They send a message that makes the claimants feel like they lost the world, not just a case. Justice Kovler saw this. He warned the Court in *Refah* that its judgments must not imply dismissal of all political movements, which seek to assert the tenets of Islam in a political fashion, as *a priori* anti-democratic and not deserving of human rights protection.⁷¹

6.4.7 The living instrument

The dynamic or evaluative interpretation referred to as the “living instrument doctrine” mandates that the Convention not be interpreted in accordance with the social standards adopted when the Convention was adopted, but reflective of the policy of the law in European states.⁷² Examples are cases that deal,

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

69 ECtHR (GC), *S.A.S. v. France*, app. no 43835/11, 1 July 2014, para. 120.

70 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, *Concurring opinion of Judge Kovler*.

71 *Ibid.*

72 Rainey, McCormick & Ovey, *supra* n. 64, at 76.

for example, with treatment of prisoners, children born out of wedlock, homosexuals, the death penalty and conscientious objectors to military service.⁷³ Between *Şahin* and *SAS*, we also witness evolution in the view of the practices of minority religions. The Court, however, tends to emphasize incremental rather than sudden change.⁷⁴ Hence, in a very minimalist way the meaning of the Convention rights is not stuck in the past, while precedent is honored.

The incrementalist approach in the conscientious objection cases illustrates this. The Convention leaves it up to the High Contracting Parties' right to introduce military service.⁷⁵ In *Thlimmenos*, the Court rules that while this leaves the option to punish those who consciously object to military service, Article 9 read in conjunction with Article 14 still mandates that when it comes to career opportunities, conscientious objectors are treated differently from common criminals.⁷⁶

In *Batayan*, the conscientious objector asserted that over time, the meaning had evolved. By now, all High Contracting Parties except for Armenia had introduced alternative service for military service and/or a right to conscientious objection.⁷⁷ The Court agreed that based on the trend among the member states, the meaning had indeed evolved. The "living instrument" doctrine thus made it impossible to uphold the Commission's case law and mandated that Article 9 no longer be read in conjunction with Article 4 §3(b) in this regard.⁷⁸ Eleven years had passed between the two decisions.

Yet *Bayatyan* is the only Article 9 case in which the "living instrument" doctrine was applied.⁷⁹ Perhaps it is the absence of an "international trend" which commands following as with the recognition of sexual identity of transgender people⁸⁰ which explains why the Court's jurisprudence on Article 9 has yet failed to set a standard in accordance with the (dynamic and evolutive) objective and purpose of the Convention. In any case, the way in which the living instrument standard is applied to Article 9 qualifies as minimalist.

73 See Harris, O'Boyle & Warbrick, *supra* n. 54, at 7 and 33.

74 See Mahoney, *supra* n. 61.

75 *Bayatyan v. Armenia*, app. no. 23459/03, *supra* n. 50, para. 72.

76 *Thlimmenos v. Greece*, app. no. 34369/97, *supra* n. 56, paras 42-47.

77 *Bayatyan v. Armenia*, app. no. 23459/03, *supra* n. 50, paras 73-74.

78 *Ibid.*, para. 109.

79 *Ibid.*, para. 102.

80 ECtHR (GC), *Goodwin v. United Kingdom*, app. no. 28957/95, 11 July 2002.

6.5 COMPARING MINIMALISMS IN THE ADJUDICATION OF THE FREEDOM OF RELIGION AND BELIEF

6.5.1 Applying incomplete theorization

As shown in the sections above, each of the courts applied minimalist as well as less minimalist features in the selected cases. As explained in section 2.5, judicial minimalism will rely on incompletely theorized agreements, usually on mid-level or low-level principles. Incompletely theorized agreements can be based on abstract principles, a concrete outcome or a rule. Several of the cases illustrate this.

For example, in the balancing between freedom of religion and belief and equality of LGBT people in *TWU*, *Chamberlain*, *Same-Sex Marriage* and *Fourie* (see sections 6.2 and 6.3), we see that the abstract principle involved is equal concern and respect for believers (in exclusively opposite-sex relationships) and families and those same-sex couples and families. Without completely theorizing equal concern and respect, the courts solve the cases. The SCC makes use of the informing “harm principle”, while the CCSA employs its guiding principle of human dignity.

The concrete outcome was quite possibly determinative in two SSC cases: *Children’s Aid Society of Metropolitan Toronto* and *A.C. v. Manitoba* (sections I1.4.4 and I1.4.12). A unanimous Court regarded just one outcome possible, when the religious beliefs of the parents prevented a blood transfusion which could potentially save the life of their infant. The parental authority was overruled. When the belief was the same, the medical danger similar, but the child in question was a very mature young teenager, the outcome desired split the Court. A majority found no violation, but still found that her views should have been taken into consideration. One judge went so far as to say that not outcome, but principle should be determinative. A young teenager must be allowed to prove that she is capable of making her own decisions, even if most of us would regard the outcome undesirable. In the South African *Prince* case (see above), a majority found that an exemption from the general prohibition of cannabis for Rastafarians only would be impossible to administer. The outcome clearly determines the judicial appreciation.

In the Canadian *Chamberlain* case (see above), the dissenting judges asserted that the decision of the school board regarding the controversial books would have been constitutional both ways. The school board could have accepted or dismissed the book depicting same-sex families, because the rule was that the board gets to decide. Equally, a majority in the Strasbourg *Fernández Martínez* case (section I3.4.14) relied on the rule that the Catholic Church gets to decide whether a teacher is still eligible to teach Catholic religion in public schools. In *Alberta v. Hutterian Brethren of Wilson Colony* (section I1.4.2), the SCC relied on the rule that reasonable accommodation is not an obligation for

the legislator, when the Alberta Parliament revoked the previous exemption for the Hutterians, allowing them to have drivers' licenses without photos.

Multani and *Amselem* (see section 6.2) illustrate a different kind of incomplete theorization of a rule. The rule in *Multani* is that he cover, seethe and secure his *kirpan*, so it will not conflict with the security of his schoolmates. In *Amselem*, the rule is that the *succahs* can be positioned away from the fire escapes to allow for reconciliation of security interests and the freedom of religion and belief.

Minimalist judgments are supposed to treat the opposing viewpoints that may exist with respect, emphasizing the limits of various institutions and operating well for rules and analogies.⁸¹ The balancing cases cited above illustrate the respect shown for the opposing viewpoints. Similarly in *Prince*, all separate opinions illustrate respect for Mr. Prince's situation. Similarly in *A.C. v. Manitoba*, all judges showed deep respect for A.C.'s position as a deeply devout Jehovah's Witness, although they did not find in her favor.

Sometimes the incomplete agreements necessary for judicial minimalism involve certain abstractions which are hollow. The abstraction remains unfilled.⁸² Hollowness may be required by lack of information about future developments or by the fact that specification is not feasible or even controversial.⁸³ The case law of the CCSA on the freedom of religion and belief shows an incremental development from a hollow abstraction towards gradually more specification. As the Bill of Rights had started "from scratch", willingly erasing the precedents of the apartheid era, the Court required cases to fill the hollowness of the constitutional promise. In this sense, the cases illustrate Sunstein's description of how incomplete theorization worked well for building the post-apartheid constitutional order.⁸⁴

The abstraction of the state as impartial organizer of pluralism, employed by the ECtHR as guiding principle, has remained hollow to a certain degree. The abstraction is most specified when it comes to the organizational freedom and the protection Article 9 provides to religious communities and faith-based organization against outside interference or intrusion into their autonomy. In all other cases, the abstraction is first repeated, but seldom engaged in deciding the case. In *Şahin* and some Chamber cases, we even see that the abstraction is used to justify elimination of manifested pluralism in the educational environment in order to ensure abstract pluralism.

Narrow rulings permit inter-institutional dialogue, regarding the constitutional issues addressed in court cases. The "grand narrative" is then written

81 C.R. Sunstein, 'Incompletely Theorized Agreements in Constitutional Law', in *Social Research: An International Quarterly*, vol. 74, no. 1, pp. 1-24 (2007), pp. 3-4.

82 Sunstein, 'Beyond...', *supra* n. 30, at 828.

83 *Ibid.*

84 See C.R. Sunstein, *Designing Democracy. What Constitutions Do*, Oxford University Press, New York (USA), 2001.

not by the courts alone, but in interaction with the other powers.⁸⁵ The selected cases show quite a few examples. In *Fourie*, the court order is withheld in order to enable Parliament to craft legislation for same-sex marriage. In *Prince*, dissenting Chief Justice Ngcobo withholds his order to allow for a legislative scheme for the exemption, while the majority assesses an exemption scheme for the Rastafarians, and finds it to be unmanageable. There is also (room for) inter-institutional dialogue in the CCSA's Muslim marriage cases *Solberg* and *Christian Education* (all cases mentioned in section 6.3).

The SSC explicitly refers to provincial or federal legislation or executive statements and intent in *Chamberlain, Bruker, A.C. v. Manitoba, Children's Aid Society of Metropolitan Toronto, Alberta v. Hutterian Brethren of Wilson Colony, TWU* and *Same-Sex Marriage* (see section 6.2). There are no examples of suspended court orders, but in *Same-Sex Marriage*, the SCC does not answer whether the Charter actually mandated a possibility for same-sex couples to have their union recognized, because Parliament had already initiated the recognition.

The ECtHR is obviously more engaged in a dialogue with the national courts, legislative and executive institutions, than with the Parliamentary Assembly or the Committee of Ministers. The margin of appreciation is the instrument through which the Court creates *a posteriori* space for the national institutions. Leaving space for the national institutions to react to the ECtHR's judgments is more difficult given the position of the Court as a supranational tribunal. Nevertheless, in *Folgerø* (see section 6.4) the Court, having established that the current exemption procedure creates too high a burden for those parents not wishing their children to take KRL, leaves room for the Norwegian institutions to create a more fitting exemption regime.

The margin of appreciation features, for example, in *Maestri, Lautsi, Cha'are, Şahin, Yiğit, Mouvement Raëlien* and *Sindicatul "Păstorul Cel Bun"*, *Folgerø* and *Bayatyan* (see section 6.4). In *Lautsi*, the Chamber obviously regarded the margin to be less broad than the Grand Chamber did. In *Maestri*, the dissenting judges believed that the margin of appreciation should have guided the Court to decide in favor of Italy.⁸⁶ In *Bayatyan*, the Court rejected the state's assertion that whether or not to make conscientious objection to military service a criminal charge fell within the margin of appreciation.⁸⁷

Finally, an important foundation of minimalism is the conviction that "the spirit of liberty is that spirit which is not too sure that it is right".⁸⁸ The spirit of liberty then is cautious not to pass value judgements on religious beliefs

85 See Sunstein, *supra* n. 34, at 1915-1916

86 ECtHR, *Maestri v. Italy*, app. no. 39748/98, 17 February 2004, *Joint dissenting opinion of Judges Bonello, Strážnická, Birsan, Jungwiert and del Tufo*, paras. 8-9.

87 See *Bayatyan v. Armenia*, app. no. 23459/03, *supra* n. 50, para. 123.

88 C.R. Sunstein, *Radicals in Robes. Why Extreme Right-Wing Courts Are Wrong for America*, Basic Books, New York (USA), 2005, p. 35, quoting Judge Learned Hand.

and practices and to leave it up to believers themselves to determine whether or not a practice is central to their belief system. After all, courts cannot be too sure they are right. As we saw above, the CCSA and SCC have shown to be cautious in this regard in cases such as *Pillay*, *Prince* and *Christian Education* and in *Multani*, *Amsellem* and *Bruker*. The ECtHR, on the other hand, has from time to time been criticized by dissenting judges and scholars for passing value judgements on religious practices and trying to apply “objective” standards.⁸⁹

6.5.2 Realizing the purposes of minimalism

As discussed in Chapter 2, the advantages of judicial minimalism are:

- Minimalizing the political cost of a decision;
- Minimalizing error;
- Respect for democratic self-government; and
- Civic respect for people’s differences.

Minimalism, the theory argues, is optimally suited for pluralist societies. All three courts operate in a setting of pluralism. Canada and South Africa, as well as the CoE member states, within and between them are culturally, ethnically and religiously heterogenous. Most of the world’s religions are present in Canada, South Africa and the member states of the CoE. The discussion of the cases in sections 6.2 to 6.4 shows how minimalism applied by the three courts in several cases has indeed realized these advantages in these very cases.

Canada is made up of native Canadians and less native Canadians, Anglophone and Francophone Canadians, Canadians with European, African, South Asian, Southeast Asian, other Asian, Caribbean and Latin American roots. While bilingualism and multiculturalism are official policies, there is still dispute over diversity and secessionism.

89 ECtHR, *Terife Yiğit v. Turkey*, app.no. 3976/05, 2 November 2010, *Concurring opinion of Judge Kovler*; ECtHR, *Leyla Şahin v. Turkey*, app. no. 44774/98, 10 November 2005, *Dissenting opinion of Judge Tulkens*, paras 11-13. 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); 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. 31; 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. 43; 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; Rainey, McCormick & Ovey, *supra* n. 64, at 464.

South Africa is made up of many different communities, including the indigenous people (Khoisan, San Khoi, Khoikhhkoi) and other African peoples like the Zulu, Xhosa, Basotho, Bapedi, Venda, Tswana, Tsonga, Swazi, the Afrikaners, Anglo-South Africans and others of European origin, the Cape Malay, the Cape Colored and other colored communities, and finally different communities originating from the Indian subcontinent and other parts of Asia. While apartheid has been overcome and the Rainbow Nation has been built, racial, linguistic, cultural, religious and political differences are social facts. At times, there is tension along these differences.

The CoE nations range from moderately to relatively diverse, many of them familiar with minorities historically and in the recent past. During the lifetime of the Convention, the Iron Curtain first split Europe and then came tumbling down. As a result, the number of High Contracting Parties expanded drastically. Multi-ethnic nations collapsed, leading to a resurgence of the nation state. Migration to Europe increased; first from nations historically aligned with European nations, then for economic and humanitarian reasons from many places. While European nations and the CoE take pride in a common constitutional tradition of rule of law, democracy and human rights; extremist, xenophobic, racist and populist movements have gained ground in the past and recently.

When the respective courts make decisions which reduce the political costs of the judgment, they contribute to social stability. This requires approaching fundamental disagreements with the constructive use of silence, reconciling opposing interests through balancing, and making sure the losing party loses a case and not “the world”.⁹⁰

The three courts have all found guiding principles (see Chapter 5) that have remained more or less incompletely theorized, but still provide a basis for dynamically evolving standard interpretations of the freedom of religion and belief. The SCC’s individual liberty, the CCSA’s human dignity, and the ECtHR’s pluralism have all been translated into civic respect for people’s differences. Yet the CCSA and the SCC have given more substance to this civic respect for people’s differences than the ECtHR. Since the guiding principles remain incompletely theorized to a great degree, they do not obstruct, but facilitate case-by-case adjudication.

The SCC has on many occasions repeated the *Big M* promise that “a truly free society is one which can accommodate a wide variety of beliefs, diversity of tastes and pursuits, customs and codes of conduct”.⁹¹ Binnie, making the brave choice of finding a violation although the challenged decision saved the challenger’s 14-year-old life in *A.C.*, said: “The Charter is not just about

90 Sunstein, ‘Beyond...’, *supra* n. 30, at 833.

91 SCC, *Chamberlain v. Surrey School District No. 36*, Case 28654, [2002] 4 SCR 710, 20 December 2002, para. 135; and *Trinity Western University v. College of Teachers*, Case 27168, *supra* n. 8, para. 28, quoting *R. v. Big M Drug Mart Ltd.*, Case 18125, *supra* n. 5, pp. 336-337.

the freedom to make what most members of society would regard as the wise and correct choice. If that were the case, the Charter would be superfluous.”⁹²

Justice Sachs explains in *Prince*: “[t]he true test of tolerance comes when the practice exists on the margins of society and appears bizarre, even threatening to the mainstream”.⁹³ While Chief Justice Ngcobo added in the same case that many “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 fact that these are religious beliefs for the purposes of enjoying the protection guaranteed by the right to freedom of religion.”⁹⁴ The substance in these cases is thus not given by a complete theorization; the principles formulated remain abstract. The substance is given in the narrowness of the decision. Yet the judgment is certainly not shallow.

The ECtHR has struggled much more with substantiating the pluralism in its guiding principle. Yet in the area of organizational freedom, the Strasbourg case law has set robust protection. States who interfere in religious structures in order to eliminate pluralism and state-sponsored religious indoctrination or forced adherence are out of order. To that extent, the state must respect pluralism. However, states’ attempts to organize pluralism by controlling it in the public sphere or by letting religious structures control it in the community sphere, have been eagerly scrutinized.

Between the three courts, looking at the cases selected, the CCSA has arguably been best at minimalizing the cost of a decision, by showing much respect and understanding for each party’s position. In *Prince* and *Christian Education*, the Court made sure to treat the claimant’s beliefs with almost more concern and respect than the prevailing interest. In *Fourie*, the CCSA showed that state recognition of same-sex marriage and respect for religious objections to same-sex unions can go hand in hand. In *Same-Sex Marriage*, the SCC did the same. It also eliminated collision of interests in *Multani*, *Amselem* and *Chamberlain* as explained above.

Minimalism should enable moral development and progress, by accommodating social change and changing viewpoints.⁹⁵ All three courts have allowed for the accommodation of social change and changing viewpoints. In South Africa, the transformative values are seen as inherent in the Constitution which might be the conclusion of the transition from the apartheid system to a democratic order, but also the starting point of a transformation from a divisive to an inclusive society. The transformative values feature strongly in *Fourie*, *Pillay*, *Prince*, the Muslim marriage cases and *Christian Education*.

92 SCC, *A.C. v. Manitoba (Director of Child and Family Services)*, Case 31955, [2009] 2 SCR 181, 26 June 2009, para. 163.

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

94 *Prince v. President of the Cape Law Society*, Case CCT36/00B, *supra* n. 37, para. 42.

95 Sunstein, *supra* n. 82, at 15.

In the Canadian context, the Constitution as a “living tree” is the doctrine which accommodates change. Amongst the selected cases, the doctrine is only mentioned once explicitly, namely in *Same-Sex Marriage*. In that case, the SCC stipulated that frozen concepts are contrary to “one of the most fundamental principles of Canadian constitutional interpretation: that our Constitution is a living tree which, by way of progressive interpretation, accommodates and addresses the realities of modern life”.⁹⁶

The ECtHR employs the figure of the “living instrument”, for “dynamic or evaluative interpretation” which is “reflective of the policy of the law in European states”.⁹⁷ It features in the cases of the conscientious objectors to military service, also showing very nicely how with the passing of time the evolution in thinking about conscientious objectors took place. *Refah* and *Şahin*, however, show that the ECtHR was unable to assist the Turkish institutions in accommodating social change by democratic demand, which required more accommodation of religion and less rigid secularism.

All three courts have shown respect for democratic self-government, as we saw. All have sometimes let the legislator’s considerations prevail over minority objections, although the ECtHR is closer to a majoritarian reading of democracy than the CCSA and the SCC, who seem to adhere to more deliberative democracy conceptions. However in *Refah*, the concept of democracy is not the majoritarian one, but “vigilant democracy”, used on several occasions before in other cases.⁹⁸ Although the *Refah* party had been the largest in the election (majoritarian democracy) and formed a government with another party (deliberative democracy), the banning of the party was sanctioned by Strasbourg. The Court went along with the national constitutional court in finding that there was enough proof that the party’s agenda and action were opposed to a democratic society envisioned by the Convention.

Judge Kovler who concurs with the judgment⁹⁹ because *Refah*’s goals were in contradiction to Turkish secularism, assumed as a democratic pillar, is bothered by some elements of the judgment. In his opinion, there is use of political/ideological language in some of the arguments and legal pluralism and the entire Islamic legal tradition are falsely dismissed as being antithetical to human rights. He warns that the Court must leave room for political movements that seek to assert the tenets of Islam in a political fashion. Boyle, commenting on the judgment, argues that if “pluralism is a defining value of democratic societies, as suggested by the European Court, then there must be ‘pluralism of ideologies’, to include spiritual as well as secular traditions”.

96 Reference re *Same-Sex Marriage*, Case 29866, *supra* n. 2, para. 22.

97 See Harris, O’Boyle & Warbrick, *supra* n. 54, at 7 and 33.

98 V. Beširević, ‘A Short Guide to Militant Democracy: Some Remarks on the Strasbourg Jurisprudence’, in W. Benedek et al. (eds.), *European Yearbook of Human Rights 2012*, Intersentia and Neuer Wissenschaftlicher Verlag, Vienna (Austria) et al., 2012, pp. 248-257.

99 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, *Concurring opinion of Judge Kovler*.

"It also requires more caution and sensitivity in the Court that is mandated to protect the rights of secularists and religious believers alike."¹⁰⁰

6.5.3 Minimalizing error and the flexibility of minimalism

The application of the vigilant democracy in *Refah* while not being majoritarian, was indeed certainly not minimalist either. Prohibition of a political party, especially one which forms the government, requires disciplined minimalism in order to show respect for democratic self-government and pluralism of ideologies. *Refah*, *Şahin* and other judgments have left an impression amongst the Muslim populations of the CoE states, that the "Court makes no effort, in its thinking or language, to separate the vast majority of Muslim people and their religious practices from extremists".¹⁰¹

Minimalism is supposed to decrease error, while it can also increase error.¹⁰² How we define judicial error will often depend on our take on judgments. But when judgments leave the impression of "stereotyping of religious believers as well as ethnic groups",¹⁰³ this may objectively qualify as error. Subsequent political developments in Turkey have also shown that ignoring a sentiment amongst the people, and the systematic rejection of a tradition, culture, and religion, may in the end breed a more drastic response. Sunstein admits that disagreement "[i]n law, as in politics, [...] can be a productive and creative force, revealing error, showing gaps [...]. After all democracy requires a degree of turbulence because it is set against the stability produced by repression."¹⁰⁴

Hence, Sunstein admits to disadvantages of incomplete theorization. Social consensus or stability is not a consideration that outweighs all others.¹⁰⁵ If the existing order is unjust, it is necessary to destabilize and challenge it.¹⁰⁶ What do the selected cases teach us about destabilizing those practices which impair freedom of religion and belief greatly?

In *Cha'are*, the ECtHR suggested no interference with the freedom of religion because *glatt kosher* meat could still be imported from another country. While minimalist in its emphasis on effect, the outcome is undesirable: French citizens depend on third countries to have their human rights respected. In *Sindicatul "Păstorul Cel Bun"*, the Court assumed quite easily that non-recognition of the trade union of priests and laymen was the only way in which to respect the

100 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. 16.

101 *Ibid.*, p. 12.

102 Sunstein, 'Beyond...', *supra* n. 30, at 825.

103 Boyle, *supra* n. 101, at 12.

104 Sunstein, *supra* n. 82, at 21-22.

105 Sunstein, 'Beyond...', *supra* n. 30, at 840 and 341.

106 Sunstein, *supra* n. 82, at 20.

autonomy rights of the Church. Similarly in *Fernández Martínez*, the Court could, as the dissenting judges suggested, have made a difference between the act of the state and the decision of the Church. This would not have required abandoning a procedural approach. In *Yiğit*, the simple acceptance of the state of legislation and application of the margin of appreciation left Mrs. Yiğit without any rights after her husband's death. Equally in *Movement Raëlien*, the majority's application of the margin of appreciation ended up allowing "content-based expression control" which "ends up as pure speaker-based discrimination".¹⁰⁷

The CCSA's application of the transformative values, in order to realize the promise of social transformation the constitution makes, shows it has avoided the fallacy of providing stability where destabilization is needed. So did the ECtHR in *Bayatyan*, while further evolving the precedent on conscientious objection in light of social and political changes.

In *Solberg*, the CCSA decided that the prohibition for supermarkets to sell liquor on Sundays did not constitute interference with constitutional rights, because liquor could be acquired elsewhere on Sundays. And Sunday had lost its significance as a purely religious day of rest. While one might argue that the reasoning has minimalist traits, O'Reagan found the meaning given to the right to freedom of religion and belief by the majority too narrow. Freedom of religion does not only encompass a negative obligation, but also a positive one. All religions must be treated evenhandedly. As the challenged Act concerning the closed day favors one religion above all others, there was a breach of this obligation and consequently a breach of the freedom of religion and belief.¹⁰⁸

The Court could also have proceeded in another minimalist fashion. Du Plessis argues that the Court should have made the accommodation of certain Christian's objection to the sale of liquor on their holy day¹⁰⁹ the central question. It could have just found that the chosen accommodation contained too much favoritism, leaving it up to Parliament to find another accommodation.

In *Prince*, the CCSA treated the claimant with much respect, finding in his disfavor in the end because an exemption scheme for Rastafarians from the general prohibition of cannabis possession and consumption would be unworkable. It overlooked the possibility of granting Mr. Prince one minimalist remedy. Like the ECtHR in *Thlimmenos*, the CCSA could have found that treating Mr. Prince like a "common criminal" was uncalled for and therefore at least

107 ECtHR, *Mouvement Raëlien Suisse v. Switzerland*, app. no. 16354/06, 13 July 2012, *Dissenting opinion of Judge Pinto de Albuquerque*, p. 67.

108 *S v. Lawrence*; *S v. Negal*; *S v. Solberg*, Cases CCT38/96, CCT39/96 and CCT40/96, *supra* n. 39, paras 128-130.

109 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.

the restriction preventing him from becoming a lawyer, due to the punishment for cannabis possession, should be quashed.

In the *Women's Legal Centre Trust* case, the Constitutional Court explicitly mentions that "constitutional obligation" in section 167(4)(e) of the Bill of Rights, should be interpreted narrowly. The provision allows for declarations by the CCSA that parliament or the president have breached such obligations. The claimant sought such a declaration for the fact that Parliament had still not enacted a Muslim Marriage Act. The Court could have narrowly and shallowly declared that the non-existence contained a breach, suspending the order until the expiration of a reasonable deadline, which would allow for the adoption of a Muslim Marriages Act.

The SCC in *Hofer* decided in favor of Mr. Hofer, although he had willingly and persistently refused to abide by the decisions of the community's leadership. The majority chose to apply the outside law to the inside conflict, which is understandable because the inside law does not exist in an outside law vacuum. However, in dissenting Judge McLachlin's view "the problem lay not in unfair procedures or lack of opportunities for hearing"; the problem was the "fundamental divergence between the parties" which would have "doomed any proceedings, no matter how just, to failure".¹¹⁰ In Sunstein's opinion, disagreement is legitimate when people agree on general commitments, but disagree on particular outcomes. It is even legitimate when they agree on mid-level or low-level implications. Such disagreement can be genuine and sincere.¹¹¹ Such genuine and sincere disagreement caused the conflict between *Hofer* and his community.

Sincere disagreement is also shown in *A.C. v. Manitoba*, where all on the SCC seem to agree that a 14-year-old girl's conscience and beliefs matter – even when she is faced with potential harm – but seem to disagree as to how and to what extent. Obviously in the selected cases from all three courts, we saw many legitimate disagreements on particular outcomes and mid-level or low-level implications of the guiding principles.

In *Alberta v. Hutterian Brethren*, the provincial government revoked an exemption previously granted to the Hutterians to drive with licenses without photographs. The Court, relying on the absence of a reasonable accommodation duty for the legislator, decided in their disfavor. Minimalism can also raise political costs in some cases, as Sunstein explains. Minimalist rulings make predictability difficult. Predictability is an important value in a system based on the rule of law and democracy. The Alberta legislator had, to say the least, acted unpredictably when revoking the exemption without new reasons. Hence, dissenting Justice Abella found that the "province has therefore not discharged its onus of justifying the imposition of a mandatory photo requirement on the members of the Wilson Colony". Dissenting Justice Le Bel added that the

110 *Lakeside Colony of Hutterian Brethren v. Hofer*, Case 22382, *supra* n. 10, p. 83.

111 Sunstein, *supra* n. 82, at 21. See also Sunstein, 'Beyond...', *supra* n. 30, at 840.

“justification process under s. 1 is not designed to sidestep constitutional rights on every occasion. Rather, it seeks to define and reconcile these rights with other legitimate interests [...] The burden of justification rests on the state [...]”.¹¹²

Unpredictability may be raised against the incremental approach taken by the CCSA in the Muslim marriage cases. In the periods between the cases, no clear indefinite prediction was possible in which cases the CCSA will rule that purely religious marriages are to be treated identical to private law marriages, in light of dignity and equality. The maximalist ruling in *Fourie*, on the other hand, made it very predictable that it is inherently unequal – to paraphrase *Brown v. Board of Education*¹¹³ (a maximalist ruling Sunstein supports) – to withhold from same-sex couples the opportunity to have their relationships recognized before the law and to be treated legally equal to other families. Sometimes predictability requires a maximalist decision, especially when it relies on previous incrementalistic groundwork.¹¹⁴

6.5.4 Triggers or parameters of minimalism and maximalism

The comparison of the minimalist and maximalist elements in the jurisprudence of the three courts discloses that certain parameters trigger minimalism and/or maximalism in the selected cases. These can be conceptualized in the form of two poles, each with continuums between them. The first four of these continuums can be said to be general for many human rights cases. The fifth one is specific to freedom of religion and belief cases and exists between four, not two, parameters.

1. Judicial activism versus judicial restraint;
2. Substantive review versus procedural review;
3. Individual rights versus collective interests (be it the collective interests of society or the collective rights of a group); and
4. Negative obligations versus positive obligations.
5. Establishment versus laïcité (strict secularism) versus accommodation (open secularism), versus neutrality.

The discussion of the cases in the above sections as well as in Chapters 4 and 5, shows that optimal minimalism in freedom of religion and belief cases, requires the court deciding the case to keep the balance in each of these continuums (as far as relevant in the case) at the same time. If the ruling moves noticeably

112 SCC, *Alberta v. Hutterian Brethren of Wilson Colony*, Case 32186, [2009] 2 SCR 567, 24 July 2009, paras 116 and 187-190.

113 *Brown v. Board of Education*, 347 US 483 (1954), *supra* n. 32.

114 Sunstein, ‘Beyond...’, *supra* n. 30, at 837. Compare Sunstein, *One...*, *supra* n. 30, at 17. See also pp. 36-38.

towards one parameter instead of the other, the balance is lost, and the case shows maximalist features. The continuums are shown in the figure below.

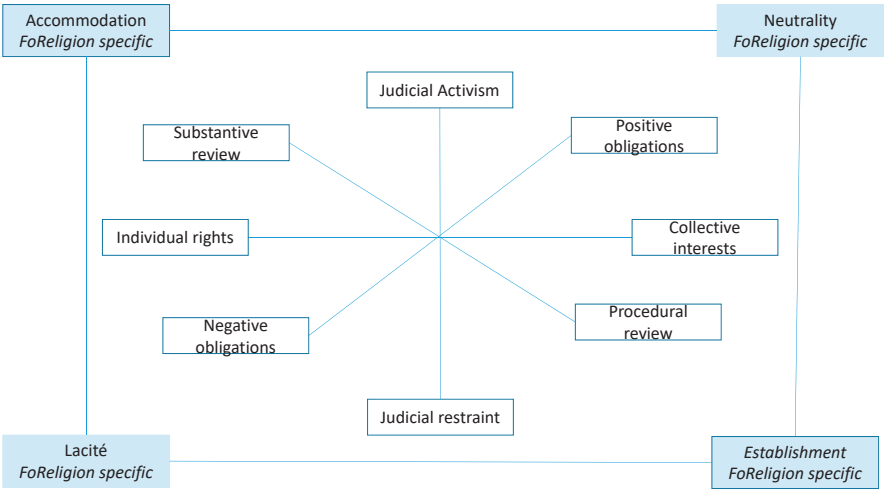


Figure 3: Parameters

The table and the end of this chapter shows the parameters as far as relevant the selected cases.

6.6 INTERMEDIARY CONCLUSION: BEST PRACTICES IN MINIMALIST ADJUDICATION OF THE FREEDOM OF RELIGION AND BELIEF

The above paragraphs show that each of the courts applied minimalist as well as less minimalist features in the selected cases. Each has shown that it can stick to the case at hand, leaving larger issues undecided, being focused on the outcome of the case. Each has shown that it will use incomplete theorization and incrementalist building of jurisprudence. Incomplete theorization is sometimes applied to abstract principles, the outcome, or a rule. All guiding principles have been treated as incompletely theorized agreements.

Several of the selected cases, analyzed in this chapter, have shown, each of the courts will at times try to realize the purposes of judicial minimalism, minimalizing the political cost of a decision; minimalizing error; respect for democratic self-government; and civic respect for people’s differences. All three have also used “deep” or “wide” rulings, setting aside the method of minimalism, to attain the purposes. Finally, each of the courts has adopted a notion of human rights and/or the constitutional being ‘alive’ and thus being adaptive

to changing circumstances. Where minimalist elements were present, they have generally aided optimal protection of believers.

The SCC's selected cases show clear elements of minimalism. Sometimes the majority took a more minimalistic approach, sometimes dissenting judges, sometimes the break-line represents genuine and sincere disagreement as envisaged by minimalism. The Charter values while often referred to in a fashion that resembles perfectionism, have remained incompletely theorized. The minimalist elements have aided consistency in the approach to freedom of religion and belief.

Between the three courts, looking at the cases selected, the CCSA has arguably been best at minimizing the cost of a decision, by showing much respect and understanding for each party's position. It has incrementally built a consistent jurisprudence, in which the guiding principles feature as incompletely theorized agreements. There is an ever present perfectionism, when the current constitutional order is placed against the injustices of the past. But this has never undermined minimalist methodology or purposes.

Arguably the ECtHR has most often used majoritarian or maximalist elements in its approach. The way the margin of appreciation is used, has often not aided in sticking to a minimalist method or purposes. Incrementalism is visible, but a times also *incidentalism*, which prevents consistency. However, in the selected cases it is not more originalist, perfectionist or majoritarian, than it is minimalist. Possibly, more focus on minimalist method and purposes, can help to develop more consistency in the approach to the freedom of religion and belief.

The comparison through the prism of minimalism also disclosed certain parameters which trigger minimalism and/or maximalism in the cases.

In light of the above some of the best practices for optimal protection enumerated in sections 4.8 and 5.7 can be reaffirmed, while we can add the following:

15. Making use of incomplete theorization, also with respect to the guiding principles in interpreting the freedom of religion and belief.
16. Incremental development of the jurisprudence, sticking to the case at hand.
17. Adherence to the purposes of minimalism, being flexible with regard to its methodology, going wide or deep where necessary after minimalist groundwork.

Case	Activism/ restraint	Substantive/ procedural review	Individual rights/collective interests	Negative/ positive obligations	Laïcité/ establishment/ neutrality/ accommodation
SCC					
<i>Sioui</i>		No need for a total ban, park authority free to set rules.	Interests can be reconciled		
<i>Hofer</i>		Majority: Even in autonomy of community procedural fairness must be upheld. Dissent: The problem was not procedure, but fundamental disagreement. Claimant did not accept authority of leadership.			
<i>P.(D.) v. S.(C.)</i>	Majority more activist, distress is harm, harm is not in the child's best interest. Dissent more restraint: actual harm needs to be shown.	Majority: distress caused by religious differences between parents is not in the child's best interest. Dissent: Knowing both parents as they are, causes distress. This is no harm.			
<i>B. (R.) v. Children's Aid Society</i>			State must regulate/intervene in interest of newborn's life. No internal limits, but limitation of freedom of religion under limitation clause.		
<i>TWU</i>		No evidence of actual discrimination of graduates	Interests of TWU and non-discrimination of LGBT students can be reconciled.		Faith-based institutions must not be forced to accept mainstream views.

Case	Activism/ restraint	Substantive/ procedural review	Individual rights/collective interests	Negative/ positive obligations	Laïcité/ establishment/ neutrality/ accommodation
<i>Chamberlain</i>		The school board needed to take the interests of LGBT families into account. It did not.	Interests of families with beliefs regarding same-sex families and same-sex families can be reconciled.	Positive obligation to instill tolerance.	Tolerance regarding social reality is not identical to instilling moral approval.
<i>Amselem</i>		No need for total ban. Regulations regarding safety still possible.	Interests of the orthodox Jewish and other tenants can be reconciled.		Courts should not assess the mandatory nature of a practice.
<i>Lafontaine</i>		Duty of procedural fairness.			Majority: Procedural fairness regarding communities' search for place of worship is required by neutrality and freedom of religion and belief. Dissenters: municipality is prohibited from actively assisting.
<i>Same-Sex Marriage</i>	Constructive use of silence of obligation to introduce same-sex marriage.		Rights of same-sex couples and believers can be reconciled.	Positive obligation to accommodate religious feelings. Private law marriage is a state institution, neutral from concrete beliefs.	

Case	Activism/ restraint	Substantive/ procedural review	Individual rights/collective interests	Negative/ positive obligations	Laïcité/ establishment/ neutrality/ accommodation
<i>Multani</i>		Earlier agreement disclosed willingness to accommodate. Blanket ban sends wrong message.	Rights of believer and safety interests of children can be reconciled.	Positive obligation to accommodate. Without accommodation rules are not neutral for believer. Neither school nor courts should assess the mandatory nature of a practice.	
<i>Bruker</i>		A contract between parties is binding unless there is reason not to uphold.			Upholding contract regarding religious divorce is not out of order, but secures freedom of religion and belief.
<i>A.C. v. Manitoba</i>		Some form of rebuttal of presumed immaturity should have been allowed. The more mature, the less far the state must go with paternalism.	Dissenters find interference with positive obligation.		
<i>Alberta v. Wilson Colony</i>		Majority: Community cannot claim a right to exemption from a generally applicable rule. As long as the community can continue its lifestyle, there is no violation. It can do so, because other drivers can be hired. Dissenters: For the community it is important to live independent. The interference is substantial and non-trivial.			

Case	Activism/ restraint	Substantive/ procedural review	Individual rights/collective interests	Negative/ positive obligations	Laïcité/ establishment/ neutrality/ accommodation
<i>R. v. N.S</i>				Majority: Depending on the circumstances of the case, a believer can be required to remove the face covering, worn in accordance with beliefs. Concurring: No face covering may ever be worn in a criminal case. Dissenting: Majority judgment forces believers to choose between loyalty to religious beliefs and pursuing justice against sexual abuse.	
<i>Mouvement laïque québécois</i>				Prayer conducted in the municipal council, never mind how neutral in wording and performance always sends a message to those uncomfortable with participating, that they are less welcome.	
CCSA					
<i>Certification Constitution</i>		Meaning of derogation clause cannot be definitely determined in abstract, but will have to be determined in concrete cases.			

Case	Activism/ restraint	Substantive/ procedural review	Individual rights/collective interests	Negative/ positive obligations	Laïcité/ establishment/ neutrality/ accommodation
<i>Gauteng Education Bill</i>			The right to participate in the cultural, linguistic and religious communities of one's choice does not mean that the state has an obligation to establish or maintain state-funded schools for separate communities. The aforementioned right coexists with the right to education (in a non-discriminatory learning environment).		
<i>Certification Constitution Western Cape</i>		Ceremonial deism does not have constitutional or legal significance.			Constitutional deism is not contrary to freedom of religion and belief or neutrality.
<i>Solberg</i>		Majority: The sale of liquor is prohibited on all closed days. Within the current context the rule does not enforce Christian views. Dissent: The rule has basis in Christian views, upholding it, enforces them			Majority: South Africa has no non-establishment rule. Dissent: Privileging one belief over others always ends a message that others are not welcome.

Case	Activism/ restraint	Substantive/ procedural review	Individual rights/collective interests	Negative/ positive obligations	Laïcité/ establishment/ neutrality/ accommodation
<i>Amod; Daniels; Hassam</i>	Refrained from recognizing (polygamous) Muslim marriages as such, just solving the case for the purpose of insurance or inheritance.	Individual rights of widows, rights of others and general regulation of marriage law can be reconciled.			Neutrality requires putting the individual dignity first.
<i>Christian Education</i>		Parliament had the right to adopt the legislation, also in view of international obligations.	Rights to religious education and to corporal punishment in school education can be reconciled.		Neutrality requires accommodation, but believers cannot be automatically exempted from law.
<i>Prince</i>	Cannabis prohibition left intact, while awarding claimant much respect.	Majority: Exemption scheme is unworkable. Dissent: suspension of order does leave room to work out exemption scheme.	Majority: The interests of Rastafarians cannot be reconciled with interest of preventing illicit drug use, but they can be treated with respect Dissent: opposing interests can be reconciled.		The state has a positive obligation to accommodate, if this does not undermine the other interest. Neutrality requires accommodation of sincere beliefs.

Case	Activism/ restraint	Substantive/ procedural review	Individual rights/collective interests	Negative/ positive obligations	Laïcité/ establishment/ neutrality/ accommodation
<i>Volks</i>	Majority: The Inheritance Act may distinguish between married and unmarried survivors, given the special obligations to protect marriage under constitutional and international law. Dissent: Historical, social, moral and cultural ingredients inform legal concepts a balanced, flexible and nuanced approach is required to correct past discrimination against survivors in unmarried relationships.				
<i>Fourie</i>	Absence of legal recognition of same-sex unions is contrary to equal dignity. Order suspended to leave Parliament room to legislate.	Interests of same-sex couples and believers can be reconciled.	The state has a positive obligation to recognize same-sex unions under equal dignity.		Religious beliefs and traditions must be respected in the constitutional order, but they are not a source of interpretation of (constitutional) law.
<i>Pillay</i>		A blanket ban was contrary to rights.		Positive obligation for accommodation of sincere beliefs, even if cultural. Culture and religion sing with the same voice. Neither school nor courts should assess the mandatory nature of a practice.	

Case	Activism/ restraint	Substantive/ procedural review	Individual rights/collective interests	Negative/ positive obligations	Laïcité/ establishment/ neutrality/ accommodation
<i>Women's Legal Centre Trust</i>	See Laïcité/ establishment/ neutrality/ accommodation.	Narrow interpretation of "constitutional obligation" when assessing whether Parliament had violated it.			The Constitution permits regulation of religious, personal and family law, but given all choices, the CCSA should not judicially legislate.
<i>DE v. RH</i>	Legal action against adultery no longer valid. The interference with the private life of exp-partner and new partner cannot be justified by protection of the dignity of the other partner.				
<i>De Lange</i>	Procedural review: the inconstancy in relying on constitutional arguments and rights in courts below, allows only for dismissal at the constitutional court. The real issue is thorny, and it is preferential for it to be solved by religious institutions and parliament before courts need to decide.				
ECtHR					
<i>Buscarini</i>		The legitimate aim does not need to be reviewed as the oath is clearly in violation of freedom of religion and belief.	Pluralism requires that all strands of society are able to be represented in Parliament.		In light of pluralism, making parliamentarians pledge allegiance to a particular religion is unacceptable.

Case	Activism/ restraint	Substantive/ procedural review	Individual rights/collective interests	Negative/ positive obligations	Laïcité/ establishment/ neutrality/ accommodation
<i>Thlimmenos/ Bayatyan</i>	Carefully crafted in order to not mandate a substantive right to conscientious objection.		In <i>Thlimmenos</i> : prison sentence is not faulted, but subsequent job restriction is. In <i>Bayatyan</i> : punishment of conscientious objection contrary to international trend and living instrument.	Do not treat conscientious objectors like common criminals but accommodate. Do not punish conscientious objectors, but allow alternatives to accommodate.	
<i>Cha'are Hasan and Chaush</i>			Choosing sides in an inter-community conflict is out of order, never mind the substance. The rights of differing factions within a religious community can be reconciled.	State cannot demand uniformity from a religious community and to enforce this via recognition.	
<i>Refah</i>	Although the potential risk to democracy may not have materialized, the prohibition of a political party is justified as necessary in a democratic society. The aims of the party amongst which establishing legal pluralism to allow for <i>Shari'a</i> family law for Muslims who follow it, is incompatible with the Convention.				The Turkish Constitutional principle of laïcité is seen as protecting the freedom of religion and belief. It is coherent with the Convention to maintain it as unalterable.

Case	Activism/ restraint	Substantive/ procedural review	Individual rights/collective interests	Negative/ positive obligations	Laïcité/ establishment/ neutrality/ accommodation
<i>Maestri</i>		The law in question was not foreseeable enough.	State interest in preventing subversion must be reconciled with individual rights.		
<i>Şahin</i>	Majority: Islamic headscarf cannot be reconciled with gender equality Dissent: Such value judgment is unbecoming for a court.	Dissent: There is no evidence that the claimant had a political or ideological agenda.	Majority: The state as impartial organizer of pluralism must take measures to ensure peaceful co-existence. Prohibition of religious attire in an educational institution may be such a measure.	<i>Şahin</i>	Majority: The Turkish Constitutional principle of laïcité is seen as protecting the freedom of religion and belief. It is coherent with the Convention. Dissent: There is no evidence that the claimant challenged the principle as such.
<i>Folgerø</i>		Opting out of a religion class must not be too burdensome.	Rights of children and parents belonging to religious mainstream can be reconciled.		State can facilitate subject in public school system under auspices of state church if not burdensome opting out is possible.

Case	Activism/ restraint	Substantive/ procedural review	Individual rights/collective interests	Negative/ positive obligations	Laïcité/ establishment/ neutrality/ accommodation
Yiğit		Regulation of marriage falls within margin of appreciation. Claimant was not married in accordance with state law. Given this in accordance with existing national law she is not treated as spouse in inheritance, pension and social security law. This does not violate the Convention.			
Lautsi		Broad margin of appreciation, due to lack of European consensus. Symbol goes hand in hand with no compulsory religious education and acknowledgement of religious minority holidays and practices. Rigid secularism is not required but the state should not profess a particular religion or belief, because that always sends the message of exclusion to others.			Majority: The crucifix is a neutral symbol and does not amount to indoctrination. Concurring: a liberal approach is more befitting for the Convention than rigid secularism. Dissent: The symbol is not neutral and highlights preferential treatment.

Case	Activism/ restraint	Substantive/ procedural review	Individual rights/collective interests	Negative/ positive obligations	Laïcité/ establishment/ neutrality/ accommodation
<i>Mouvement Raëlien</i>		Majority and dissent: no separate Article 9 evaluation needed as all is covered by Article 10 evaluation. Majority: broad margin of appreciation because of commercial speech. Dissent: Narrow margin of appreciation because of non-commercial speech and content based assessment by authorities.			Dissent: State neutrality requires great caution in restriction of group freedom due to the acts of members.
<i>Sindicatul "Păstorul Cel Bun"</i>		Unnecessary to blanketly refuse recognition of labor union of church personnel. Autonomy rights and labor rights of employed clergy and payment can be reconciled.			Autonomy rights of church can interfere with labor rights of church personnel but responsibility by delegating power to the Church.
<i>Fernández Martínez</i>		The state cannot discharge itself of responsibility by delegating power to the Church. Individual interest and church rights could have been reconciled, without interfering in the Church's own assessment.			Church approval of teachers of religion possible, but state cannot discharge itself of responsibility by delegating power to the Church.

Case	Activism/ restraint	Substantive/ procedural review	Individual rights/collective interests	Negative/ positive obligations	Laïcité/ establishment/ neutrality/ accommodation
SAS	See under Laïcité/ establishment, neutrality, accommodation.	Majority and minority: although claimant was not charged, the Act interferes with her rights. Majority and minority: State institutions should not assess the meaning of a religious precept as oppressive or make assumptions about those who follow it.	Dissent: majority sacrifices concrete individual rights guaranteed by the Convention to abstract principles.		Majority: The French notion of living together is compatible with the Convention and can serve to justify interference in a democratic society. Dissent: Living together is not a 'legitimate aim'.

Figure 1: Table of parameters

