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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7 Conclusion

Finding common ground and differences – an optimal interpretation of a universal right?

"The spirit of liberty is that spirit which is not too sure that it is right".
Judge Learned Hand[1]

7.1 Introduction to this chapter

The world is full of examples of individual believers who had to suffer for what they believed in. Mary Dyer, whose statue stands in Boston, Massachusetts, is symbolic in this regard. She gave her life because she refused to give up her Quaker faith. Her persecutors, other Protestant Christians, were once themselves victims of persecution elsewhere in the world. The placard on the statue reads: "My life not availeth me in comparison to the liberty of the truth." She reminds us not only of the strength of heart sometimes required for conscientious objection, but also of the fact that, unfortunately, those who were once victims of persecution, can themselves become perpetrators of persecution and do unto others as they would not have had others do unto them.

History is also full of examples of religious minorities who could survive only because they pragmatically altered certain customs and rites, in order to live their lives in a way that would not provoke hostility from others. Such pragmatism would sometimes be theologically justified, by attributing the fault for deviations to the oppressors. While we might first think of the covert Jews and Muslims of Inquisition Spain, even today we can unfortunately observe this. For example, LGBTQ+ or gender and sexual orientation minorities who conform to "accepted" roles in order to be "accepted" – they belong in the very same category. Oppression of one's core identity is always a spiritual confinement.

Even today, unfortunately, believers of many faiths and identities suffer for their beliefs or are forced to choose between obeying the law and what they sincerely believe are precepts of their faiths. But the Sufi wisdom, which inspired Chapter 1, is as old as mankind: each soul follows its own path towards its Maker. While the soul is essentially free, oppression, restriction

1 Judge Learned Hand in his famous speech 'The Spirit of Liberty' in 1944 in celebration of *I Am an American Day*, quoted on the front pages by C.R. Sunstein, *Radicals in Robes. Why Extreme Right-Wing Courts Are Wrong for America*, Basic Books, New York (USA), 2005.

and persecution can make a person suffer on that path. The right which is called the freedom of religion and belief, recognized in a great number of international and national instruments is the guarantor that a person is free to follow his or her soul. As Chief Justice Ngcobo explained so eloquently in *Prince* (section I2.4.7), we should not put believers in a position where they have to make painful choices.[2]

The freedom of religion and belief, the classical universal human right, codified in the Canadian Charter of Rights and Freedoms, the South African Bill of Rights, and the European Convention on Human Rights, makes a promise to all believers – including those who identify themselves as non-believers. The promise that they may search for their own path free of constraints and impairments, by the state or others. This is the "truly free society" envisioned by Chief Justice Dickenson in the Canadian landmark case *Big M* (see section I1.3). Repeated many times in the selected SCC cases, he tells us that "a truly free society can accommodate a wide variety of beliefs, diversity of tastes and pursuits, customs and codes."[3] This includes those which "may strike non-believers as bizarre, illogical or irrational",[4] as we may learn again from Chief Justice Ngcobo in *Prince*.

Freedom and pluralism are the different sides of the same coin, as the ECtHR explained in the milestone case *Kokkinakis* (see section I3.3). Free people make different choices, and different people, when equally free will assert what differentiates them from others. When we embrace our freedom, we must embrace the equal freedom of others. The freedom of religion and belief is not only vital to protect the identity of believers, "but it is also a precious asset for atheists, agnostics, skeptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it."[5]

The three courts have each developed a jurisprudence out of the above considerations. Their standard interpretations each fit neatly into the constitutional chain novel (Dworkin[6]) each of them is writing, while each chain novel subsequently fits into the library of liberal democratic constitutionalism. The constitutional narratives of the three tribunals show parallels, but also stress different elements. Thus, the three jurisprudential narratives regarding the freedom of religion and belief at times coincide, diverge, or collide. This can be conceptualized by employing the guiding and informing principles, which are reconstructed in Chapter 5.

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2 CCSA, *Prince v. President of the Cape Law Society*, Case CCT36/00B, 25 January 2002, para. 76.

3 SCC, *R. v. N.S.*, Case 33989, [2012] 3 SCR 726, 20 December 2012, pp. 336-37.

4 *Prince v. President of the Cape Law Society*, Case CCT36/00B, *supra* n. 2, para. 42.

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

6 R. Dworkin, *Law's Empire*, Hart Publishing, Oxford (UK), 1998, pp. 228-232. Dworkin argues that constitutional law can be compared to a chain novel in which each chapter is written by others, but must fit with the previous chapters.

Calculated guessing allows conclusions, regarding a different outcome, had one of the selected cases been decided by one of the other two courts. Would the SCC have gone along with allowing for a blanket ban of the hijab in a university (*Şahin*, section I3.4.7)? Would the CCSA have done more to make sure the picture-less drivers of Alberta would not lose the world (*Alberta v. Hutterian Brethren of Wilson Colony*, section I2.4.2)? Would the ECtHR have made sure that a Rastafari who consumes *ganja* for religious reasons, would not suffer consequences for his choice of profession, like any "common criminal" (*Prince*, see above)?

The case studies of 15 cases by each Court, featuring the freedom of religion and belief, the comparative analysis of the cases in light of the six elements dominant in freedom of religion and belief case law, the reconstruction of the standard interpretation and finally identifying their minimalist (and non-minimalist) features, has allowed for answering the research questions. In the following section, the previous chapters will be revisited. Subsequently in sections 7.3, 7.4, 7.5, overall conclusions regarding the standard interpretations of the freedom of religion and belief by the SCC, the CCSA and the ECtHR are drawn. Section 7.6 contains the answers to the research questions. Finally, 7.7 contains the overall conclusions of the study.

7.2 Revisiting the previous chapters

In section 1.7, the research questions for this study were formulated. They can be answered making use of the findings and preliminary conclusions of the previous chapters. The study makes use of 15 cases from each of the three courts. Each features the freedom of religion and belief as the/ one of the central right(s). They are systematically reviewed in Appendix I. It was considered to be the central right, if the interpretation of the freedom of religion and belief was decisive in determining the outcome of the case. Appendix 1 also provides information regarding the workings of each of the legal systems.

Chapter 2 provides the theoretical framework for minimalism as a prism for the analysis. The freedom of religion and belief is a classical human right. It has been recognized in the most important international human rights documents. Its existence can be traced back to modern human rights thought, and further back to a variety of philosophical and religious traditions. Its core is inseparable from the overall modern concept of human rights and vice versa. The purpose of the right is to create not only a protection from persecution or coercion of believers (belonging to minorities), but to create a positive freedom. This positive freedom should enable believers to take agency in their own religious/philosophical identity, which they need not justify before the state or their fellow citizens. Like all human rights, the freedom of religion and belief is not absolute and exists in mutual interdependence with all other human rights.

This study has been positioned within the positions of the "classical liberal understanding of the freedom of religion and belief" and "(neo) pluralism in freedom of religion and belief", aiming to find space for a more pluralist understanding, interpretation and application of the right, thereby further evolving the classical liberal framework.

Interpretation of constitutional and human rights matters, few would doubt that. While there are a number of interpretation theories, which stipulate what good interpretation is, Cass R. Sunstein has categorized them into four general theories of interpretation. One of them, judicial minimalism is his favored approach. This study follows Sunstein's categorization and preference for judicial minimalism. Minimalism is not aligned with any particular political agenda or grand political philosophy, but sets itself apart from perfectionism, originalism and majoritarianism. Its aim is to strengthen constitutional checks and balances, the rule of law and social stability in pluralist societies. Minimalism thus adheres to liberal democratic constitutionalism and accepts a living constitutionalism, which fits very well with the aforementioned position combining "classical liberal understanding of the freedom of religion and belief" and "(neo) pluralism in freedom of religion and belief".

"Optimal protection" was defined as a broad and liberal concept and scope of religion and belief, the right being easily triggered. This includes absolute protection of believers in holding beliefs (internal dimension). This means as much as possible protection of believers in manifestation their religion or belief in teaching, practice, worship, and observance. The limits should only lie in rights of others or compelling specified purposes, when required in a LDC system and prescribed by law. Optimal protection thus, is a form of maximum protection, which also includes maximum protection of other human rights and compelling general interests. It thus assumes an optimum where all of these are carefully balanced.

In Chapter 3, the codification of the freedom of religion and belief in the respective instruments was discussed, as well as the legal and political systems in which they operate, their respective political and legal history and the general methodology of the three tribunals relevant to solving human rights cases. The freedom of religion and belief has similar, though not identical, codification in the three instruments. The right is grouped with other related rights in different ways.

Each of the three human rights instruments has a foundational moment, closely related to some historical momentum, which is important for the interpretation of human rights. The methodologies in solving human rights cases are similar but not identical. They allow for the limitation of human rights in restricted circumstances under similar criteria, which require a legal foundation, a legitimate reason to restrict them, and a restriction which is proportional to the reason for limitation and as limited as possible. Due to the similarities in codification, and the modest impact the differences have,

there is no reason to assume that the differences in codification alone account for any differences between the standard interpretations.

In Chapter 4 the selected cases were discussed in comparison along the lines of the six dimensions of the freedom of religion and belief which can be identified in the case law. These are the individual dimension, the family and family law dimension, the collective and group autonomy dimension, the education dimension, the dimension of balancing with other rights and finally the dimension of secularism (religion/ state relations). The comparative analysis made it possible to reconstruct the standard interpretations of the freedom of religion and belief by each of the courts. This is done by finding the similarities and differences in interpretation in the jurisprudence of each court. The comparative analysis also allowed for a comparison between the standard interpretations of each court, by comparing the solving of similar cases.

In Chapter 5, based on the comparative analysis in Chapter 4, the standard interpretations of the freedom of religion and belief by the three courts were described. For each of the courts, there is a guiding principle of interpretation, while there are informing principles which help to determine meaning, scope, and application of the guiding principle in concrete cases.

The principles between the courts are different in the aspects they stress, but they are not mutually exclusive or generally opposing. They serve to explain similarities and differences between the standard interpretations when it comes to concept, scope and application. Chapter 5 also includes a short discussion of the literature regarding the question whether the (judicialization of) freedom of religion and belief has contributed to secularization of society/ societies. The claim is that secular legal concepts are replacing notions which believers hold dear and are leaving only a shrinking private sphere to believers, while the public sphere shows a growing secularization. There is no support for this claim in the elected cases and the discussion of the six dimensions. Many cases show how adjudication created space for individuals and communities to live their lives in accordance with their beliefs.

In Chapter 6, the case law was reviewed through the prism of minimalism. All three courts have decided cases which qualify as minimalist, as well as cases which do not. Generally, where minimalism was applied, this helped to achieve the objects of minimalism, like minimizing the political costs of the ruling for the losing party and awarding optimal freedom to claimants. Whenever minimalism was not applied, this also showed some of the disadvantages of applying maximalist (perfectionist or originalist) or majoritarian rulings. Some cases also show that sometimes a wide and or deep ruling is needed to further the purposes of minimalism.

7.3 Conclusions regarding the SCC's standard interpretation of freedom of religion and belief

The SCC's standard interpretation of the freedom of religion and belief can be reconstructed from the selected cases. Based on the findings in chapters 4 and 5 we concluded that the guiding principle of the SCC in the freedom of religion and belief case law is individual liberty, with the harm principle, religion a la carte and sincerity of belief being the informing principles, providing for a broad and liberal approach This approach leaves it up to the individual believer and/or community to define their religion or belief in accordance with their conscience and work out their (religious) obligations for themselves.

What attracts protection is the choice of the individual believer, not a mandatory or perceived as mandatory nature, nor a religious dogma as presented by religious officials. Individual autonomy is central in this approach. Therefore, religion and/or belief need not be distinguished from either "culture" or "personal" identity. Law's definition of religion and belief in the SCC's approach, is not intended to be all-encompassing, rather it is "law's religion" designed to address the legal issues. Essentially, the freedom of religion and belief as a right defines what religion and belief are only for legal purposes.

The collective dimension of the freedom of religion and belief rests upon the individual autonomy of the believers who freely and willingly form communities in accordance with (religious) beliefs. Hence, the freedom of religion and belief cannot easily be turned into the assertion of a group right. In the private realm, religious groups are entitled to their "sub-culture" and may create homogeneity. However, they may not employ the public domain to impose their views on co-religionists or society at large.

In order for the right to the freedom of religion and belief to be triggered in the Canadian standard interpretation, the believer has to show that he sincerely believes in the practice, which they claim is hindered or prevented. If brought into a situation of having to choose between his sincerely held belief and a somehow compelling rule, formulated by the legislature, a government body or a private party, the legal assumption is that there is interference, which has to be justified.

In each of the selected cases, the majority of the SCC is not ready to accept any internal limits to the freedom of religion and belief. Where the freedom of religion and belief collides with other rights, the Court will often try to reconcile them through interpretation rather than assuming internal limits or choosing one right above the other.

In deciding whether an infringement of the freedom of religion and belief is justified, the SCC will perform some balancing act, which differs methodologically depending on whether the constitutional, administrative, or private law approach is followed. In this balancing, the "harm principle" as formulated

by amongst others classical liberal philosophers such as John Stuart Mill play some role of importance. The freedom of religion and belief finds its boundaries where the concrete demonstrable harm of others is concerned. In light of this, the Court reiterates continuously that the freedom of religion and belief is not an absolute right.

In the Canadian interpretation, the freedom to hold beliefs is broader than the freedom to act upon them, while beliefs as such may not be taken to imply any wrongdoing from the perspective of public policy. Equal treatment of religions and religious individuals may require differential treatment in order to enable "equal religious citizenship" (Ryder). Such equal treatment can be mandated by "reasonable accommodation" or minimal impairment/proportionality in effects.

"Open secularism" (Bouchard and Taylor) is mandated by the freedom of religion and belief, equal treatment of religion and the absence of state coercion. Apparently neutral laws with adverse effects on (minority) religions must be justified under the limitations clause. Equally, endorsement of a rigid secularism is contrary to this understanding of open secularism. Open secularism and equal religious citizenship do not prevent (private) religious considerations in the public sphere or fostering religious pluralism as long as the equal treatment of all citizens is not undermined or breached.

The Canadian standard interpretation is rooted in a classical constitutional liberalism. Canadian multiculturalism, as a constitutional concept, while containing a communitarian nuance of classical liberalism, is still very much rooted in the same traditions. It very much draws on classical liberal concepts, such as individual autonomy, freedom, and state neutrality. But on the basis of these notions, a rigid essentialist liberalism is also rejected.

A truly liberal state in accordance with the Canadian jurisprudence, creates an open society which enables identifiable minorities to hold different opinions, make different choices, and live different lives. This should not be regarded as the negative side-effects of freedom, but must be legally recognized and celebrated as a manifestation of freedom. Hence, the state may not even endeavor to "convert" its citizens to liberalism. However, citizens need to adhere to what Esau calls "reciprocal pluralism",[7] and what could be called "meta-level tolerance". It does not require everyone to be tolerant of everyone else in the private sphere, but it does require everyone to accept that society as a whole is tolerant of everyone in the public domain. In *Hofer* (section I1.4.2), a provision of the statutes of the Lakeside Hutterites is cited which exemplifies this. It acknowledges the right of freedom of religion and belief of all Cana-

7 A. Esau, 'Living by Different Law: Legal Pluralism, Freedom of Religion and illiberal Religious Groups', in R. Moon (ed.), *Law and Religious Pluralism in Canada*, UBC Press, Vancouver/Toronto (Canada), 2008, p.132.

dians, but also requires members of the community to leave the community if they ever change their faith.[8]

The SCC's case law is both praised and lamented in public debates and academic literature. As can be seen from the events that led to the Boyd and Bouchard & Taylor reports,[9] there are those who feel that public policy and courts have gone too far in facilitating religious pluralism. The perceived rise of religious fundamentalism casts religious equality rights in an alleged opposition to LGBTQ+ equality rights and security interests. Moreover, religious equality rights much like sexual orientation equality rights will often be challenged as "special rights" unfair to others.[10] In more ways than one, being religious is the "new gay".[11]

The criticism sometimes casts itself in liberal or secularist cloaks, warning of the dangers of illiberal religion and belief. On the other hand, the criticism of Canadian multiculturalism invokes communalism: the dominant cultural group will lose its cultural identity through harmonization and accommodation policies, Court mandated secularism and the liberal world view of the political elite, and in the case of Quebec, the perceived cultural dominance of English-speaking Canada. Yet below the criticism of harmonization and multiculturalism often lurk, xenophobia, racism, communalism and/or sectarianism.[12] Thus, it is not surprising that such criticisms often misrepresent the underlying values of harmonization and multiculturalism as well as the values employed by such critics for their own ends.

Academic discussion is far more nuanced. The interrelated values underlying the Charter, such as secularism, liberalism and multiculturalism as interpreted by the SCC itself, provide the normative framework for commenting and critiquing the Court's rulings. Various authors have done just that, emphasizing different values in their appreciation of some judgments and their criticism of others. As a matter of fact, the various majority, separate, and dissenting opinions in the cases discussed attest that the judges on the Court do the same.

McLachlin places the Court's rulings within Charles Taylor's theory of normative and hyper-goods:

> "The Charter has affected the way in which family units, classrooms and […] religious communities have talked about the import and purpose of religious

8 *See* SCC, *Lakeside Colony of Hutterian Brethren v. Hofer*, Case 22382, [1992] 3 SCR 165, 29 October 1992, p. 23.

9 M. Boyd, Dispute Resolution in Family Law: Protecting Choice, Promoting Inclusion, Government of Ontario, 2004 and G. Bouchard and C. Taylor, Building the future, A time for reconciliation, Government of Quebec, 2008.

10 *See* B. Ryder, 'The Canadian Conception of Equal Religious Citizenship', in R. Moon (ed.), *Law and Religious Pluralism in Canada,* UBC Press, Vancouver/Toronto (Canada), 2008, p. 89.

11 *See ibid.*, p. 100.

12 *Compare* Bouchard & Taylor, *supra* n. 9, at 67.

> liberties. Alongside the doctrinal law as delineated by the Court, the language of dignity, freedom, autonomy, and rights has permeated all aspects of the public sphere; each of these conversations impinges upon the next. Casting all of this back into Charles Taylor's theoretical framework, the Charter has articulated and laid bare, for discussion and application, both the good of religious freedom, and the hyper-goods and core values it reflects".[13]

In general, as Manfredi notes, both the public and academia are content with the rulings of the Supreme Court. He considers that this is mainly because its careful balancing and proportional approach made it less vulnerable to accusations concerning democracy-encroaching judges.[14] McLachlin's quote highlights that the Court sees for itself a role in identifying the values and principles underlying the Charter in general, and the freedom of religion and belief in particular. While the Court is an authority in this regard, it is also engaged in an open evolutionary discourse within itself, and with society and the rest of the body politic about the content and the application of these principles and values. This signifies the methodology and purposes of minimalism, and as Manfredi argues, this minimalism is part of the Court's success story.

As a matter of fact, minimalism could be identified as one of the hyper-goods underlying the Charter and the SCC's case law, interrelated with the meta-level tolerance apparent in the rulings and the meta-level liberalism of the Charter. After all, "[t]he development of the constitutional state can be understood as an open sequence of experience-guided precautionary measures against the overpowering of the legal system by illegitimate power relations."[15]

The freedom of religion and belief as interpreted by the SCC provides a procedural guarantee for equal freedom for very different people living together in one society, while it cannot be used to negate the legitimate claims of others under the same or other constitutional rights. We have no right whatsoever, to not encounter the other in the public domain. Tolerance, which is always age appropriate, is a hallmark of a free society and may require our cognitive dissonance, brought about by the encounter of the other. The incremental and cautious approach employed by the SCC allows for further evolution of these concepts with the help of constructive criticism and assertions by believers in concrete cases. To this extent, the SCC's judicial minimalism contributes to the meta-level liberalism of the Charter.

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13 *See* B. McLachlin, 'Freedom of Religion and the Rule of Law, A Canadian Perspective', in D. Farrow (ed.) *Recognizing Religion in a Secular Society*, *Essays in Pluralism, Religion and Public Policy*, McGill-Queen's University Press, Montreal/Kingston (Canada), 2004, pp. 32-33.

14 See F. Venter, Constitutional Comparison; Japan, Germany, Canada and South Africa as Constitutional States, Juta &Co, Ltd, Cape Town (South Africa), 2000, p. 97.

15 J. Habermas, Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy, MIT Press, Cambridge (USA), 1996, p. 39.

7.4 Conclusions regarding the CCSA's standard interpretation of freedom of religion and belief

The CCSA's standard interpretation of the freedom of religion and belief can be reconstructed from the selected cases. Based on the findings in chapters 4 and 5, we concluded that the guiding principle of the CCSA is human dignity. The three informing principles can be subdivided into a freedom right, a communitarian component and a constitutional principle. The freedom right is the right to be different; the communitarian component is respect for diversity; and the constitutional principle is positive tolerance.

The Constitutional Court's endeavor to develop jurisprudence on the freedom of religion and belief started shortly after the transition to democracy. Given the *apartheid* past, it could not draw on precedent. Rather, in *Amod* (section I2.4.5), it had to refute precedents like *Ismail v. Ismail*,[16] because they had been heavily influenced by *apartheid's* discriminatory outlook on non-European peoples, cultures, and religions. "True to their worldview, judges of the past displayed remarkable ethnocentric bias and arrogance at the expense of those they perceived different" says the CCSA in *Daniels* (section I2.4.8). "They exalted their own and demeaned and excluded everything else."[17]

But it was not always clear whether rules which had existed in the past were remnants of the past ideology, or acceptable from a democratic viewpoint. In *Solberg* (section I2.4.4), rules regulating the sale of liquor were challenged. Was this a remnant of Afrikaner Calvinist nationalism, or perfectly justifiable in a secular "Rainbow Nation"? The CCSA treated the Canadian milestone case *Big M* as near precedent in solving the case. As a matter of fact, there were "high expectations" that *Solberg* could serve as a "benchmark precedent on the protection of religious rights and freedom".[18] On the other hand, many religious groups and freedom of religion and belief advocates treated it as a commercial dispute.[19] While it is undoubtedly true that the commercial undercurrent is strong, this is no different from *Big M* which is doubtlessly the Canadian milestone visible in all the selected Canadian cases.

"Judges in South Africa are just as divided in how one should analyze questions of church/state relations as their counterparts in Canada and the United States".[20] Some readers may feel like agreeing with Beatty after having analyzed the selected cases. Not unlike on the SCC, the judges on the CCSA were sometimes heavily divided on the merits, interpretation, and outcome

16 *Ismail v. Ismail* 1983 (1) SA 1006 (A).

17 CCSA, *Daniels v. Campbell NO and Others*, Case CCT40/03, 11 March 2004, para. 74.

18 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. 452.

19 *Ibid*.

20 D. Beatty, *The Ultimate Rule of Law*, Oxford University Press, Oxford (UK), 2004, p. 64.

of the cases before them, while making use of a common frame of reference for their argument. Yet in comparison to the SCC, the selected cases show that the frame of reference was still "under construction" in the first few cases. Nevertheless, human dignity as a guiding principle was present from the beginning.

In *Christian Education* and in *Prince* (sections I2.4.6–7), the informing principle of the "right to be different" emerged. Further developed in later cases, it led the CCSA to be the most consistent of all three courts in the selected cases in showing equal concern and respect to the losing party. The standard interpretation was created from there, visibly case-by-case, into the arguably consistent methodology which is visible in the later cases. Obviously, Justice Sachs deserves personal credit for developing the right to be different to become an informing principle in the standard interpretation of the freedom of religion and belief. His consideration and persistence have earned him applause even amongst those who are critical of the way in which modern courts treat the freedom of religion and belief.[21]

The CCSA's soul-search regarding the freedom of religion and belief, conducted in the minimalist one case at a time approach, nevertheless had a clear "soul" to start from. The South African Constitution, the CCSA explained in *Prince*, requires the "maximum harmonization of all competing considerations on a principled yet nuanced and flexible case-by case basis".[22] The South African "collective soul" was set free when apartheid perished, and the supremacy of the Constitution was installed. "Human dignity" was a promise, for more than just one constitutional right and is certainly the guiding principle for the freedom of religion and belief.

The selected cases show a development of interpretation of the Bill of Rights as transformative values for a new society. Perhaps this value-based interpretation mirrors the influence of German constitutional theory, while the Bill of Rights itself was inspired by the Canadian Charter. In any case, the more value-laden interpretation manifests the post-liberal character of South African constitutionalism as opposed to the more classical liberal Canadian approach. Nevertheless, the outcomes are not entirely different.

The more value-driven standard interpretation of the CCSA has produced more perfectionist elements in the jurisprudence. However, the standard interpretation is also developed in a minimalist process of trying to find what these values mean for concrete rights in concrete cases. Set against the background of South African (political and constitutional) history, the Court is more outspoken about the negative meaning of the constitutional values (what they try to prevent) than on their positive content (what they are trying to achieve).

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21 I. T. Benson, 'The Attack on Western Religions by Western Law: Re-framing Pluralism, Liberalism and Diversity', in *International Journal for Religious Freedom*, vol. 6, no. 1-2, pp. 111-125 (2013), p.120.

22 *Prince v. President of the Cape Law Society*, Case CCT36/00B, *supra* n. 2, para. 155.

Perhaps the line of jurisprudence on Islamic marriage is the best example of the combination of incremental minimalism on the one hand, and a fusion of "perfectionist originalism" on the other hand. Given the fact that the Court had to deal with precedent qualifying Islamic marriage as opposed *to boni mores*, and the difficulty of breaking with precedent while preserving the common law system, in this jurisprudence it shows judicial courageousness. Such courageousness is seldomly seen elsewhere in the world, non-Muslim majority country or even Muslim majority country, wherever there is a "state monopoly on marriage".

In fact, judges the world over from nations that have not (recently) suffered the extreme oppression and exclusion that South Africa endured under apartheid, could very well learn from the CCSA in this regard. The judges are overall very sensitive to avoid ethnocentric bias and arrogance, while sometimes majorities on the Court have to be reminded of this sensitivity by the dissenters, as in *Solberg* and *Prince.* On the other hand, the massive amount of foreign jurisprudence cited in the cases, shows that while this is also a practical necessity because of the recent transition to constitutionalism, South Africa's highest court is very willing to learn from others. Overall, Justice Sachs' words in *Prince* describe the Court's jurisprudence accurately: There is a "heavy responsibility on the courts to be sensitive to considerations of institutional competence and the separation of powers. Undue judicial adventurism can be as damaging as excessive judicial timidity. […] Both extremes need to be avoided."[23]

Criticism of the Court comes from many angles; some find it too restrained, others too activist. Libertarians critique its timidity in revoking the pro-religious bias of the past, religionists grieve its libertarianism and individualism. While the advocates of traditional law and religious rights want more sensitivity to culture and religion, others warn of the potential consequences for (gender) equality. But it is hard not to agree with Venter in expecting a synthesis to develop over time in the form of a "uniquely South African understanding", which will fit "snugly into the mold of classical liberalism".[24]

7.5 Conclusions regarding the ECtHR's standard interpretation of freedom of religion and belief

The ECtHR's standard interpretation of the freedom of religion and belief can be reconstructed from the selected cases. Based on the findings in chapters 4 and 5, it can be concluded that the guiding principle of the ECtHR is pluralism.

23 *Ibid.,* para. 156.

24 *See* F. Venter, 'The Emergence of South African Constitutionalism: From Colonial Constraints to a Constitutional State', in G. van der Schyff (ed.), *Constitutionalism in the Netherlands and South Africa, A Comparative Study*, Wolf Legal Publishers, Nijmegen (Netherlands), 2008, p. 36.

The two informing principles are the state as organizer of pluralism and the impartiality of organizing pluralism.

Kokkinakis is acknowledged by scholarly "court watchers" of the ECtHR to be the milestone when it comes to the freedom of religion and belief. The case contains a promise, for those under the Convention member state's jurisdiction, that the Court will protect freedom of choice in the matters of heart, soul, and mind, and the actions resulting from it, because pluralism depends on this.

Pluralism is always a question of otherness, it requires thinking about political community not from the perspective of solving the matters of content, but relationality, "which is to say love".[25] Yet the "view from nowhere" might also be employed as the vehicle for empathy. In all societies, the mainstream majorities' views of minorities can be heavily influenced by bigotry, prejudice, and supremacism. Yet such views may be clad in rational concerns, less suspicious on first glance.

The nations which form the Council of Europe have each known their problematic past with the rejection of pluralism. Even more so, pluralism itself was seen as problematic through much of European history. Colonialism and imperialism were supported by notions of supremacy of European culture, European Christendom, and European statehood. Modern European nation states had official policies of eliminating regional and local languages and dialects for the benefit of a national language, creating a national identity to the detriment of cultural and religious identities, and creating state monopolies on education, welfare, marriage and so forth.

The Convention was adopted in rejection of fascist totalitarianism (which had just been overcome) and Stalinist totalitarianism (which was perceived as a major threat at the time). These regimes had explicitly and implicitly targeted freedom of choice in the matters of heart, soul, and mind, and the actions resulting from it. Freedom with regard to the internal dimension of the freedom of religion and belief was not a given for the High Contracting Parties at the time, as it might be to an extent for the contemporary member states.

Against the backdrop of totalitarian dictatorship, there was arguably not as much focus on the biases, self-evidence and monoculturalism which had taken root in Europe over a much longer period of time. Given the focus on preventing totalitarianism, the Court has been wary of state-meddling in organizational structures of faith-based communities, breach of positive obligations to protect minorities against violence, state sponsored religious proselytism in the public school curriculum and exclusion of "others" from parliamentary office.

On the other hand, on many occasions the ECtHR has not restricted state attempts to hinder practical and effective rights to religious attire, dietary rules,

25 Z. R. Calo, 'Pluralism, Secularism and the European Court of Human Rights', in *Journal of Law and Religion*, vol. 26, no. 1, pp. 261-280 (2010), p. 280.

family and personal law, or identity-related claims as such. In such cases, the Court is more likely to find in favor of the state. In the eyes of some "those who are not Christians but whose rights have been violated can gain no relief from the Court because the Court employs stereotypes and refuses to engage with the complexity of modem religious pluralism" as a consequence "religious freedom and pluralism are undermined and the notion of human rights degraded".[26]

The ECtHR itself has said that it intended to guarantee practical and effective rights and not rights that are theoretical and illusionary.[27] In order to develop a jurisprudence which gives greater protection against interference to non-Christian religionists like the association Cha'are Shalom Ve Tsedek, Ms. Leyla Şahin, and the claimant in *SAS* (sections I3.4.3, I3.4.7 and I3.4.15) agnostics like the Lautsis and new faiths like the Raëlians (see sections I3.4.10 and I3.4.12), a new understanding of pluralism might be required. Such a new understanding would also benefit the evenness of balancing in cases where individual freedom and group autonomy collide, like in *Sindicatul "Păstorul Cel Bun"* and *Fernández Martínez* (sections I3.4.13–14).

The Court's guiding principle is the "state as impartial organizer of pluralism". One of the informing principles is that pluralism needs organizing. When we view otherness as problematic, as European societies have tended to do historically, it is understandable to see pluralism as something that requires organization. But is this true? Is pluralism itself not the form of self-organization which results from freedom? Once individuals are free to choose their faith identities and associate themselves into less or more close-knit communities, with or without "own law", pluralism is the only possible outcome. That is why the Court itself has acknowledged that pluralism depends on the freedom of religion and belief.

However, there are also those who believe the Court has gone too far in many respects. The tension between activism and restraint is visible in many cases and the margin of appreciation serves as the often ill-fitting jacket to dress for the occasion. Some authors note that contemporary criticism that the Court is going too far, also comes from "fundamental rights friendly" states.[28] But this standpoint is debatable. Human rights are by definition directed to protect humans against the state (amongst others). From that perspective, the notion of a "fundamental rights friendly" state is either a paradox or proof that the human rights watchdog has not done enough. In

26 C. Evans, 'The *Islamic Scarf* in the European Court of Human Rights', in *Melbourne Journal of International Law,* vol. 72, no. 7, pp. 52-73 (2006), p. 73.

27 *See* D. Harris, M. O'Boyle and C. Warbrick (eds.), *Law of the European Convention on Human Rights*, 2nd ed., Oxford University Press, Oxford (UK) et al., 2009, p. 15.

28 J. Gerards, 'The Prism of Fundamental Rights', in *European Constitutional Law Review*, vol. 8, no. 2, pp. 173–202 (2012), p. 176.

other words, as long as there is criticism coming from many different institutions of the member states, the ECtHR must be doing something right.

On the other hand, the judiciary always has its own part to play in order to ensure that interinstitutional dialogue is not silenced by interinstitutional animosity. And for a supranational human rights court like the ECtHR, this part is even more crucial and difficult to play. The very authority of the Court depends on the perception of legitimacy by the national institutions, because it has no other means to ensure compliance and acceptance.

Not coincidently, the margin of appreciation plays an important role in the Court's methodology. The notion is supposed to create the right amount of national-supranational harmony, by leaving issues on which there is great diversity in the member states to be decided by national instances. Not coincidentally, the "margin" plays quite a prominent role in (some of the) selected cases on the freedom of religion and belief. This is the case where the relationship between state and religion are significant. After all, the great variety of state-religion models amongst the member states shows anything but a "European consensus". Where there is such a consensus, the margin of appreciation will be deemed to be less wide.[29]

Yet the rulings, which touch on the state-religion relationships, possibly due to the margin of appreciation paint a picture which looks confusing, even to some of the more supportive Court watchers. Italy may ordain a religious symbol in every classroom, while in Norway the need to motivate exception from a religious and philosophical instruction class, which is at least superficially pluralistic, creates too great a burden (*Lautsi*, mentioned above and *Folgerø*, section I3.4.8). A Turkish university may refuse students wearing attire closely associated to sincere beliefs, while Spain may discontinue the employment of a state employee after the Church found him to be disqualified as a religious instruction teacher due to his public utterances concerning his sincere beliefs (*Şahin* and *Fernández Martínez,* sections I3.4.7 and I3.4.15).

Arguably, the margin of appreciation fits well where the "pressing social need" concerning limitations of religious practices is involved and the Court is best advised to proceed on a case-by-case incrementalistic fashion so it can strike the necessary balance – being a supranational judicial structure in the pluralist constitutional arrangements of Europe.[30] But instead of weighing the abstract interests claimed by the state against abstract interests, Gerards proposes more use of procedural review focus on individual interests in the case at hand. This could help to develop a more principled and consistent minimalism, while decreasing use of the "margin of appreciation"[31] in freedom of religion and belief case law.

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29 *Compare*, e.g., ECtHR (GC), *Bayatyan v. Armenia*, app. no. 23459/03, 7 July 2011, paras 101-105.

30 *Compare* Gerards, *supra* n. 28, at 178.

31 *Ibid*., pp. 170, 178, 197-198 and 200-201.

Sometimes in a selected case, the supervision is superficial where the legitimate aim is concerned. But close supervision is required. After all, many illegitimate ambitions can be hidden behind aims that will be framed as legitimate. For example, in *Kokkinakis* the Greek government presented the laws against proselytism as aimed at protecting vulnerable people. Door to door proselytism if conducted in an aggressive fashion may very well be intrusive of people's religious and privacy rights. This could justify and even mandate state action. However, evidence suggests that the Greek law in question really served another aim, namely protecting the Orthodox Church against losing followers to the proselytism of other faiths. The law had evidently only been used against minority religions and never against the Orthodox Church.[32] While clad as a legitimate aim, the real aim may not have been legitimate after all.

The selected cases discussed clearly show that challenges to religious freedom come not only from theocracy and totalitarian ideologies, but also from democratic liberal systems with varying degrees of secularism and different church-state relationships. Every time an individual suffers negative consequences from following the commands of their conscience, belief or religion, their freedom is circumscribed. The ideological nature or ratio is irrelevant in this regard.

According to Harris *et al*, the Court is increasingly engaged in judicial borrowing,[33] yet the cases by the highest judicial tribunals of Canada and South Africa are strikingly absent from the comparative law paragraphs in the freedom of religion judgments by the Grand Chamber. Yet these judgements could inspire the ECtHR to develop a new pluralism-guided jurisprudence. This requires first and foremost regarding pluralism less as a problematic social phenomenon which needs "organizing".

7.6 Answering the research questions

Based on the previous chapters and the above sections, the research questions can be answered as follows.

1. *What are the standard interpretations of the freedom of religion and belief of the Canadian Supreme Court, the South African Constitutional Court, and the European Court of Human Rights; and how are they applied in the six dimensions personal freedom; family law and family relations; group autonomy; education; balancing freedom of religion and belief with other rights; and secularism?*

32 *See* C. Evans, *Freedom of Religion under the European Convention of Human Rights*, Oxford University Press, Oxford (UK), 2001, pp. 148 and 163.

33 *See* Harris, O'Boyle & Warbrick, *supra* n. 27, at 14.

There are recognizable standard interpretations of the freedom of religion and belief present in the selected cases. The consistency between the selected cases by each of the courts varies. The SCC is the most consistent. The CCSA, starting out right after the transition to democracy is searching for a consistent approach, which it seems to have found in the later cases. The CCSA is also most consistent in showing equal concern and respect to the losing party. In the selected cases decided by the ECtHR, consistency is greatest between the cases within one of the six dimensions rather than across the six dimensions. Examples of strong consistency on the ECtHR are organizational freedom and the rights of conscientious objectors to military service. All of the courts apply recognizable and reoccurring guiding principles in their interpretation of the cases.

Sections 7.3 7.4 and 7.5 provide more detailed conclusions regarding the freedom of religion and belief in the six dimensions on each of the courts. The individual dimension is arguably broader in the jurisprudence of the SCC and CCSA than it is in the ECtHR's jurisprudence. The same goes for the family and family law dimension. The CCSA may be said to go the furthest in this regard. It has deduced a right for same-sex couples to get married from the Bill of Rights, when same-sex marriage was not yet recognized. It has also ruled that in cases of insurance and inheritance, the law may not discriminate between those married in accordance with the law and those merely married by religious law/rites.

All three courts recognize a group autonomy and try to accommodate "inside law". All three also make sure that the "inside law" cannot determine its own scope and that human rights law, among other things, determines boundaries. The selected cases also show a great variety of different cases and thus outcomes. The ECtHR is ready to attest a bold group autonomy for faith-based organizations if they have a legal standing in the states' institutional law. They can even take priority over individual rights or other collective rights in such cases.

In the educational dimension, the ECtHR's jurisprudence is complex. The accommodation of the great variety of state-religion models has led to a variety of outcomes which do not easily show consistency. The SCC and CCSA both emphasize that public education must be inclusive and send a clear message of positive tolerance for all walks of life, including non-mainstream beliefs. The freedom for faith-based education is generally broad in both interpretations. The limits of this broad freedom are stipulated in case-by-case analysis.

All three courts try to balance the freedom of religion and belief with other rights and interests. They are led in this process by thoughts of pluralism and equal concern and respect. The ECtHR, however, is most likely to prioritize one right or interest in solving of the case, whereas the other two courts will make a greater effort to accommodate all interests. The CCSA makes the greatest effort to show the party which loses the case that it has lost the case and not the world.

Both the SCC and CCSA explicitly reject a militant or rigid secularism which can be as antithetical to the freedom of religion and belief as outright state preference of a certain faith. The ECtHR has not rejected rigid secularism. It has also supported the notion that the freedom of religion and belief prevents outright state preference of a certain faith. Yet it has also tried to accommodate, at least in one case, a very clear state-mandated preference, by interpreting the religious symbol in question as less faith-specific than most Catholics and non-Catholics would (*Lautsi*, section I3.4.10).

The comparative analysis of the selected cases in the six identified dimensions does not support the general viewpoint put forward by some writers that the (adjudication of the) freedom of religion and belief, has contributed to the secularization of society/societies. The claim is that legal concepts from secular law are replacing notions which believers hold dear and are leaving only a shrinking private sphere to believers, while the public sphere is displaying a growing secularization.

The selected cases show attempts to create space and opportunity for believers to (re-)claim agency over their lives and to contribute to a holistic pluralism.[34] The right to be different, being one of the informing principles of the CCSA, provides an escape for those who feel constrained by the totalism of modern society. Obviously, the selected cases also show us the boundaries of the freedom of believers. While these boundaries are static on a general and abstract level, the cases show that there is room for dynamics in specific and concrete situations.

2. *What concept of the freedom of religion and belief do each of the Courts apply, how broad is the scope of protection and how is the freedom of religion and belief triggered in the three standard interpretations and what are the reoccurring guiding principles within the standard interpretation?*

All three courts recognize that the freedom of religion and belief entails a right to believe or not to believe. It also entails that religious as well as other beliefs must be respected. All three courts recognize an individual and a collective dimension. Both the Canadian and the South African interpretations of the freedom of religion and belief include the right to be exempted from mainstream norms and behavior under certain circumstances. The South African "right to be different" is even more bold than its Canadian counterpart. The ECtHR is certainly more restrained in this regard. Its jurisprudence does not include a general affirmation of a right to be different. In cases where manifestations bring the believers in conflict with generally applicable norms, the ECtHR tries to walk a thin line between protecting the individual while not affirming a right to be different.

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

Whereas the ECtHR will try to determine in some objective way the generally recognized form, the highest courts of Canada and South Africa take the subjective standard of the individual as a starting point. The Canadian concept of "sincere belief" also materializes in the South African case law. Because of the emphasis on the subjective content of "belief", the right to freedom of religion and belief entails more freedom of action and inaction for individuals in Canada and South Africa than in the European Convention area.

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

The SCC takes individual liberty as its guiding principle, with the harm principle, religion à la carte, and sincerity of belief as informing principles. The guiding principle of the CCSA is human dignity, informed by the freedom right: the right to be different; the communitarian component: respect for diversity; and the constitutional principle: positive tolerance. For the ECtHR, pluralism is the guiding principle. The informing principles are the state as organizer of pluralism and the impartiality of organizing pluralism.

The principles between the courts are different in the aspects they stress, but they are not mutually exclusive or generally opposing. They serve to explain similarities and differences between the standard interpretations when it comes to concept, scope and application.

Sections 7.3, 7.4 and 7.5 provide detailed conclusions regarding the concept, scope, and application of the freedom of religion and belief by each of the courts.

3. *Which elements of minimalism are present in the standard interpretation and in which elements does the standard interpretation contradict minimalism and what is the effect of this on optimal protection for believers?*

Of the three courts, the SCC is most consistent in its interpretation of the freedom of religion and belief. The SCC and the CCSA are more minimalist than the ECtHR. The CCSA is most consistent in showing equal concern and respect, even to the side that loses the case.

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 purpose. Incrementalism is visible, but a times also *incident*alism, 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 selected cases show examples where minimalist methodology must be put aside to allow for a wide or deep element in order to further the purposes of minimalism. The minimalistic elements in the case law have generally contributed to optimal protection of believers, by enabling dynamics of balancing and ensuring that equal concern and respect is given to all interests, even when they lose a case. The analysis also shows that the ECtHR has struggled indeed to find an equilibrium between the varying models of state-religion relationships in the Convention area. Generally, it has tended to be more wary of state-sponsored religious beliefs than state-sponsored official secularism. However, the *Lautsi* case can be used to cast doubt on this. Where minimalist elements were present they have generally aided optimal protection of believers.

4. *What can the Courts learn from each others standard interpretation, when it comes to optimal protection of believers; what are the best practices?*

The guiding principles and informing principles the three courts use to decide the freedom of religion and belief cases before them are different in the aspects they emphasize. Yet, the guiding principles are not mutually exclusive. There are also similarities between the standard interpretations when it comes to concept, scope, and application of the freedom of religion and belief. Moreover, the similarities between the codifications of the freedom of religion and belief and methodologies of solving human rights facilitate judicial borrowing between the courts. Section7.1 provides examples of cases which might have been decided differently had one of the other standard interpretations been applied.

All three courts have illustrated openness towards judicial borrowing. The CCSA, partly due to missing useful precedents in the early years of the democratic order, has been most active in this regard. In several of the selected cases, case law from the SCC or ECtHR is referred to. The ECtHR does tend to focus on the member states when it comes to judicial borrowing. The selected cases, unfortunately, include no references to case law from the SCC or CCSA.

The differences in emphasis between the guiding and informing principles and the impact they have on concept, scope and application of the freedom of religion and belief can partly be explained from the background of the human rights instruments in which the right is codified, as can be seen in sections 7.3 to 7.5. The European Convention was primarily directed against totalitarian ideologies which radically denied and/or undermined even the innermost plane of the *forum internum.* The identity-focused interpretation of elements of the freedom of private and family life only had a modest spillover to the freedom of religion and belief. The Canadian Charter is closely linked with the repatriation of the Constitution and the ambition of developing a Canadian constitutional narrative. The Canadian values based on multiculturalism clearly influenced the development of the freedom of religion

and belief jurisprudence to become an affirmation of individual liberty, association by choice and an inclusive public sphere. The South African Bill of Rights is set within the new Constitution which held the promise of replacing racialism, exclusion, and dominance with the new ethos of the Rainbow nation. The freedom of religion and belief jurisprudence was constructed visibly in the selected cases from this starting point.

The SCC looks for optimal freedom for the believer unless there is (potential) harm to others. Such harm is not easily assumed, but a concrete analysis is made. In *Multani* (section I1.4.10), we see that even in a school environment, a complete blanket ban of the metal kirpan worn by the Sikh student is not an option. An accommodation which reconciles safety of the other students and the freedom of religion and belief has to be found. Equally, in *Amselem* (section I1.4.7), a ban of the *succahs* on the balcony is deemed disproportional. Safety of the other tenants and personal huts can be achieved simultaneously. In *Şahin* (see section 7.5 above), an SCC-inspired approach may have led the ECtHR to demand reconciliation between Leyla's personal liberty and the need to acknowledge the freedom of all those students who chose not to wear the *hijab*. Similarly, in *SAS* (see section 7.5 above), a Canadian-inspired approach may have led to more resoluteness towards the French government. Had all alternatives besides a blanket ban in public places been considered thoroughly enough?

In *Solberg*, (see section 7.4 above), the CCSA looked towards the SCC for inspiration. The SCC clearly inspired the dissenting judges to disqualify the latent favoritism towards one faith, which hid beneath the seemingly neutral rule against liquor sale in supermarkets on Sundays. Much later in *Mouvement laïque québécois* (section I1.4.15), the SCC called "sponsorship of one religious tradition by the State" a "breach of its duty of neutrality" as it amounts to "discrimination against all other such traditions".[35]

All three courts regard the freedom of religion and belief to be protective of a great variety of religious and philosophical traditions as well as individualized beliefs. The CCSA acknowledged in *Pillay* (section I2.4.11) the strong interdependence between cultural and religious beliefs. These two "sing with the same voice".[36] Leaving believers to define their own identity and world of belief, the CCSA will assume *a priori* that practices, even if controversial like corporal punishment or the use of illicit substances, are covered by the freedom of religion and belief. It depends on the analysis under the limitations clause whether interferences can be justified. The CCSA has aimed for optimal freedom for the believer, doing the utmost is done to ensure that even those believers who lose their cases see that they were treated with equal concern and respect.

35 SCC, *Mouvement laïque québécois v. Saguenay (City)*, Case 35496, [2015] 2 SCR 3, 15 April 2015, para. 64.

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

The South African approach could have led to another outcome in SCC case *Alberta v. Hutterian Brethren* (section I1.4.13) The CCSA might have walked the extra mile to look deeper into alternative accommodation, or have done more to ensure that the colony saw that it had not lost the world.

The principled and pragmatic minimalist approach the CCSA took in the Muslim marriage cases, could have inspired a different take on the *Yiğit* case (section I3.4.9). While the CCSA considered whether the difference between religious and state marriage was proportional for insurance and inheritance, the ECtHR only looked at the legal obligation for couples to register their marriages.

With a period of more than 10 years between them, the conscientious objection cases decided by the ECtHR show a principled pragmatism and minimalist approach by the ECtHR. In *Thlimmenos* (section I3.4.2), the unjustifiable interference lies not in the prison sentence for conscientious objection (which had already been completed when the case came to Strasbourg), but in the exclusion from the job of his choice for having served a prison term. In *Bayatyan* (section I3.4.11), political developments allow for a widening of the scope; prison terms for conscientious objectors to military service can no longer be justified. Differentiating between the criminal offense as such, committed for faith-based reasons, and the consequences of the punishment for a profession, would have been useful for the CCSA in *Prince*. While the majority focused on why an exemption from the prohibition of marihuana for the Rastafari is unworkable, it overlooked the possibility. Mr. Prince had been barred from becoming an attorney due to his conviction as a "drug offender", while he was indeed a conscientious objector.

The organizational freedom for faith-based communities is bold in the jurisprudence of the ECtHR. Not only must the state refrain from taking positions in intra-community disputes and stimulating developments, from time to time, individual members' freedom may be restricted in order to ensure the freedom of the community. Severely criticized by the dissenting judges, in *Fernández Martínez* (see section 7.5 above) and *Sindicatul Păstorul Cel Bun* (section I3.4.13), the majority found for the state organs which had found for the respective churches. In *Hofer* (see section 7.4 above), the majority on the SCC decided that the Hutterian community had breached procedural fairness with regard to the defiant member. The dissenting judge proposed an approach also visible in the ECtHR majority opinions in said cases: becoming a member of a faith-based organization includes the acceptance of "own law" which in times of dispute, might not work in one's favor.

In *SAS*, the ECtHR took a very cautious and careful approach to the practice in question, the wearing of a religiously motivated face covering. In earlier cases, the Court had attracted criticism from dissenting and concurring judges concerning value judgements regarding tenets of religious beliefs. The SCC (amongst others in *Multani*) and the CCSA (amongst others in *Pillay*) have explicitly rejected value judgements on religious precepts by secular judges,

who are neither qualified nor authorized to decide matters of "inside law". State neutrality requires the utmost respect for every believer's sincere belief, no matter how co-religionists or the mainstream may view them. And it is certainly contrary to the freedom of religion and belief for the judiciary or any other state organ to enforce mainstream views on religious communities.[37]

Obviously, whatever we find more or less desirable in the interpretation of the freedom of religion and belief, depends greatly on individual interpretation and preferences. In section 2.8 optimal protection was defined as a broad and liberal concept and scope of religion and belief, the right being easily triggered. Absolute protection of believers in holding beliefs and as much as possible protection of believers in manifestation their religion or belief either alone or in community with others and in public or private in teaching, practice, worship, and observance. The limits should only lie in rights of others or compelling specified purposes, when required in a LDC system and prescribed by law. Optimal protection thus, is a form of maximum protection, which also includes maximum protection of other human rights and compelling general interests. It thus assumes an optimum where all of these are carefully balanced.

The freedom of believers is inhibited by painful choices, not just outright suppression. Neutral rules of general applicability can seriously interfere with personal beliefs, some more commonly shared by groups of believers, some more individual. Creating exemptions or otherwise accommodating believers, even when the practice is socially controversial, is a solution. Optimal protection is afforded, when exemptions or accommodations are provided – unless the exemption or accommodation would somehow undermine the entire purpose of the rule of general application.

Exemptions or accommodations can, however, require great effort or cause unease in larger society. Such is the price of an open society, in which different tastes and pursuits are accommodated. "Pluralism, tolerance and broadmindedness" even includes everyone's right to "shock, offend and disturb".[38] Tolerance consists not only of the acknowledgement of the other's existence, but also of equal concern and respect for others' equal freedom. Tolerance does not require agreement with the beliefs of others and their subsequent practices. The promotion of tolerance by state organs in a pluralist setting is an important element of a democratic open society.

In the dimension of family law and family relations, thorny issues can arise when parents and authorities or (separated) parents disagree about beliefs and the best interests of the child. The freedom of religion and belief is certain-

37 SCC, *Trinity Western University v. College of Teachers*, Case 27168, [2001] 1 SCR 772, 17 May 2001, para. 28, citing SCC, *R. v. Big M Drug Mart Ltd.*, Case 18125, [1985] 1 SCR 295, 24 April 1985, pp. 336-337.

38 ECtHR (GC), S.A.S. v. France, app. no. 43835/11, 1 July 2014, Joint partly dissenting opinion of Judges Nussberger and Jäderblom, paras 6-10.

ly not absolute and there are situations where decisions based on beliefs irreversibly jeopardize the health or life of a minor. If courts intervene, this is best done under the limitations clause, acknowledging that the freedom of religion and belief is triggered, but must be limited in light of the rights and freedoms of others. Young individuals like AC in *AC vs. Manitoba* (section I1.4.12) are still minors or have not yet reached the legal age, where their own wishes need to be taken into account, but they have their own beliefs. Adjudication can take these beliefs into account, even though they might not be determinative in the medical case.

Tensions between separated parents regarding proper upbringing and instilling beliefs are bound to happen. This might lead to confusion for the child/children in question. As the dissenting justices McLachlin and Sopinka note in *P. (D.)* (section I1.4.3), "confusion" is not the same as "harm".[39] Confusion is not enough to justify interference with the freedom of religion and belief, while the freedom of religion and belief protects parents and their children so they can get to know one another as their true selves.

Both (purely) religious marriages and same-sex marriages endure non-recognition in some legal systems. Non-recognition implies the absence of legal benefits and protection. It is tied to the dominant view of marriage which is also dominant within legislation. Adjudication, based on the freedom of religion and belief and equality rights, might require judges to find that non-recognition interferes with freedom rights or that freedom rights require affording non-legal unions certain legal consequences. While the freedom of religion and belief affords protection to many different beliefs on marriage and family, it also requires that none of these may be imposed on others who believe differently.

The freedom of religion and belief naturally has a collective dimension. In fact "freedom of religion, as an individual right, may be nullified unless complemented by a collective human right of the religious group to construct the infrastructure".[40] Collective practices may collide with seemingly neutral laws of general applicability as in individual cases. Exemptions and accommodation can solve the problem, especially when opposing interests can be reconciled as in *Sioui* (section I1.4.1). Sometimes reconciliation is impossible as in *Christian Education* (section I2.4.6), because accommodation or exemption would undermine a purpose which is directed at the protection of the rights and freedoms of others; in that case, those of all children not to be subjected to corporal punishment.

Organizational freedom often raises complex issues of the relationship between inside and outside law. Whatever the relationship in different legal

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

40 Y. Dinstein, 'Freedom of Relgion and Religious Minorities' in Y. Dinstein (ed.), *The Protection of Minorities and Human Rights,* M. Nijhoff, Dordrecht (Netherlands), 1992, p. 152, cited Evans, *supra* n. 32, at 103.

systems, inside and outside law can never be regarded as totally distinct, and group members may in some cases approach the judiciary of the outside law and rely on their fundamental freedoms. This requires balancing between collective and individual rights and thus of voluntarism and the responsibility of state organs not to delegate their decisions to non-state faith-based bodies. Nevertheless, legal pluralism, whether more organic and informal or conceptual and formal, fits with the logic of human rights and liberal democratic constitutionalism and secular courts have no reason to shy away from it.

The dimension of education relates to both the public educational system and where existent, faith-based institutions. The major difference is that faith-based institutions are not for everyone, they are for people who share the beliefs of the particular institution.[41] Public educational institutions, on the other hand, are for everyone – believers of different creeds, non-religious believers, non-believers and the unconcerned. Optimal protection of the freedom of religion and belief does not deter religious education or religious manifestation in public educational institutions, but it does require inclusive equality in the sense that no belief should be taught or manifested to the detriment of all others. At least those who object must always have a viable opt-out possibility. Trying to neutralize religious symbols by redefining them as "traditional" as in *Lautsi* (section I3.4.10), is neither respectful to those who feel excluded, nor to those who attach important spiritual value to the symbol.[42]

Instilling tolerance is one of the objects of public education under the freedom of religion and belief. Tolerance is appropriate for every age[43] and arguably requires "religious literacy".[44] It is the task of courts to balance when conflicts arise between the pluralist cleavages. This includes the situations in which sincere believers collide with school rules, which adversely affect their practices. Exemptions and accommodations are part of the judicial "toolkit" for optimal protection as shown in *Multani* (section I1.4.10) and *Pillay*.

Faith-based institutions are often established to create a learning environment based on the beliefs of a faith-based community. Tension can arise when the affirmation of the group values leads to real or perceived rejection of the larger society. Reciprocal pluralism requires reciprocal accommodation: communities benefit from pluralism, but also accept the surrounding pluralism. The selected cases show the fine lines in adjudication. Voluntarism and autonomy need to be respected, but constitution-free or human-rights-free zones cannot be accepted (see the separate opinion of Van der Westhuizen in *De*

41 See Trinity Western University v. College of Teachers, Case 27168, *supra* n. 37, para. 25.

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

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

44 C. Evans, 'Religious Education in Public Schools: An International Human Rights Perspective', in *Human Rights Law Review*, vol. 8, no. 3, pp. 449-473 (2008), pp. 454-459.

Lange, section I2.4.15).[45] Different circumstances lead to different outcomes in a case-by-case approach. Balancing under the limitations-clause iterates that legitimate rights on both sides are involved.

Balancing the freedom of religion and other rights is not a generalist zero-sum game, but determining which should take priority over the other "under the circumstances and why".[46] LGBTQ+ equality and the freedom of religion and belief are not generally competing rights. To the contrary, in many of the equality cases, LGBTQ+ protagonists could easily rely on the freedom of religion and belief as much as on equality and privacy rights. The introduction of same-sex marriage to guarantee the rights of such couples, does not mean that those who hold (religious) beliefs against same-sex marriage must submit to it. They have a constitutional/human right not to be accessory or facilitating in the legal realization and ceremonies of such unions.

Tolerance in a pluralist society requires reciprocity and does require acknowledging the existence of the other, even if we do not agree with them. This goes for relationships between the mainstream and minorities as well, may they be minorities of believers or sexual orientation and/or gender minorities. After all, the principle is "majority rules, minority rights". Sometimes we must even accept a certain risk of harm, to enable all of us to live in accordance with our sincere beliefs and truly respect difference. By judicially acknowledging, in cases of competing interests, that constitutional rights have been triggered on all sides, constitutional (or human rights) relevance is given to all. While balancing determines the outcome, no party loses the world, but only a case. Legal assumptions can help to balance under the limitations clause, when not wishing to go into detailed analysis whether or not certain manifestations or practices are actually covered by the right.

Critics of balancing argue that it blurs rights into a general mélange of mutual respect.[47] But balancing, as we saw in many of the selected cases, requires giving robust meaning to all rights involved, while the outcome is measured in terms of equal concern and respect.

Where freedom of religion and belief meets secularism, which is in the majority of the selected cases from each of the courts, it is necessary to distinguish between secularism's many faces. Secularism can be a world view or belief which competes with other world views or beliefs. As such, state neutrality under the freedom of religion and belief requires that neither secularism nor any religious belief be manifested and professed by public institutions to the exclusion of all others.[48] Accommodation of religious and secular beliefs

45 CCSA, De Lange v. Presiding Bishop of the Methodist Church of Southern Africa for the Time Being and Another, Case CCT223/14, 24 November 2015, paras 69-74.

46 Evans, *supra* n. 32, at 164.

47 Harris, O'Boyle & Warbrick, *supra* n. 27, at 440, paraphrasing M.D. Evans, *Religious Liberty and International Law in Europe*, Cambridge University Press, Cambridge (UK), 1997, p. 365.

48 Compare Mouvement laïque québécois v. Saguenay (City), Case 35496, *supra* n. 35, para. 87.

must be fair and even.[49] All believers and non-believers must have equal access to the institutions of the state and be represented in them, if they so wish.

State neutrality as informed by the freedom of religion and belief and to guide adjudication, is best summarized by Justice Sachs' words in *Fourie* (section I2.4.10): "[T]here must be mutually respectful co-existence between the secular and the sacred. The function of the Court is to recognize the sphere which each inhabits, not to force the one into the sphere of the other."[50]

The discussion above shows that neither the courts, nor claimants, nor respondents, can escape a necessity of "law's religion", a definition of religion and belief by secular courts, who necessarily belong to the secular sphere, even in states where state law is greatly influenced by religious law.[51] Some believers may feel unrecognized by the marginal, instrumental, and subjective formulation of their (religious) beliefs in law's religion. But law's religion, depending on how it is defined in concrete cases, can aide optimal protection of believers, to live their lives in accordance with their beliefs, against the state, other societal institutions, and the members of different or the same faith-based community. This potentially opens the door for any endeavor to realize a more holistic pluralism[52] which escapes ideological secularism, totalizing liberalism's and/or modernity's potentially totalizing ambition.[53]

Literature shows that, generally, consistency in the standard interpretation of the freedom of religion and belief is appreciated because it creates transparency, predictability, and the possibility of critical review. Minimalism is helpful to create consistency and also optimal protection. Minimalism, however, does recognize its own limits: it is not always the best option in every case. Courts create a jurisprudence which fits into the legal-political values of the system in which they function; this, as such, is no deviation from minimalism. And if the courts maintain a balance in each of the five continuums mentioned above, minimalism is certainly possible as we see in Chapter 6.

In the jurisprudence, we can identify certain main guiding principles as well as subsequent informing principles for the standard interpretation of the freedom of religion and belief. They are connected to the legal-political values of the system in which they function. Between the courts, the guiding principles are neither opposing nor mutually exclusive. They do, however, differ

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49 E.E. Goodsell, 'Constitution, Custom, and Creed: Balancing Human Rights Concerns with Cultural and Religious Freedom in Today's South Africa', in *Brigham Young University Law Review*, vol. 21, no. 1, pp. 111-154 (2007), pp. 126-127.

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

51 *Compare* Hirschl, *supra* n. 34, at pp. 247-249.

52 *Compare* Benson, *supra* n. 21, at 115, quoting Hirschl, *supra* n. 34, at 187 and 202; and at pp. 118-119.

53 Compare J. Harrison, Pluralism and Disagreement. In Post-Liberal Religious Liberty: Forming Communities of Charity, Cambridge University Press, Cambridge (UK), 2020.

in their emphasis and internal logic. This, in turn, can lead to very different outcomes in similar cases. Hence, these different guiding principles can create opposing or colliding outcomes as well as parallel and even identical outcomes.

Given the similarities in codification of the freedom of religion and belief in the three instruments and the similarities between the guiding and supporting principles, judicial borrowing is certainly possible. The three courts could certainly benefit from each other's case law. This should be motivated by awarding individual believers and faith-based groups optimal freedom and protection within a system based on human rights, the rule of law and democracy, situated in pluralist societies.

The best practices established in sections 4.8.2, 5.7and 6.6 are as follows:

1. Recognition of all sincere religious, cultural, or other beliefs as triggering protection without prior exclusion, limiting them where necessary under the limitations clause. No objectivation by dogma, officials, or statistics.
2. Preventing painful choices and allowing for, or ordering accommodation and/or exemption, where reconciliation between freedom of religion and belief and other rights or important aims of public policy is needed. Where this is impossible, taking of the sharp edges of enforcing a law against conscientious objectors.
3. Absence of value judgement from any other perspective than the believers' own perspective. No substitution of the own understanding believers have of a belief or practice with that of judges or other state officials. Being weary of all forms of paternalism, directed at believers.
4. Inclusive protection: preventing division into insiders who belong, and outsiders who are tolerated. Recognition that all official state policies inspired by state religion and/or state secularism are potentially intrusive to all outside the mainstream. Concepts like the "right to be different", "equal religious citizenship" or a pluralist understanding of democracy aid in this.
5. Promoting tolerance and providing that other state institutions do so; tolerance requires some cognitive dissonance and always extends to the beliefs others find bizarre and even threatening.
6. Protecting human rights and pluralism, never delegating, or letting other state institutions delegate the responsibility to private institutions, faith-based or otherwise.
7. Being reflective of social reality and allowing for a flexible co-existence between state law and "own" law. Allowing for communities to govern themselves, while autonomy is never absolute.
8. Equal concern and respect for all sides, taking the losing party's point of view seriously: showing real understanding for their point of view.
9. Balancing under the limitations clause: rather than finding no interference at all or *a priori* justifications of limits. If necessary, using judicial assumption.

10. Deciding one case at a time, especially with thorny issues, embracing contextualism, deciding only what needs to be decided to solve the case, making use of procedural considerations, where possible.
11. Being conscious of the inter-institutional dialogue with the executive and legislative powers, but resolute protection of human rights: no state or state institution or legislative body has a natural inclination to protect human rights; it is the judiciary's role to check and balance.
12. Applying a broad, liberal, and subjective-based concept of religion and belief that informs the scope of and the trigger points for the protection.
13. Embracing difference as the consequence and perquisite of freedom. Enabling dynamics for a holistic pluralism and awareness of the complex relationship between the secular and the religious in a free, open, and diverse society.
14. Allowing faith-based communities to provide alternatives for state institutions like marriage, schooling, welfare and so forth.
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.

7.7 Overall conclusion of the study

Mary Dryer, mentioned in the introduction to this chapter, was forced to choose between life and liberty. Only truth made her free, and those who executed her asked her to renounce what she held to be the truth. Those who executed her, held a different truth to be true. And so, the essence of feeling unfree is to acknowledge as true what we deem not to be true, and to renounce what we hold to be true.

Societies are only free if no one has to choose between truth or life. However, freedom also requires that everyone can follow their own path to God, as in the proverb used in Chapter 1, in the absence of oppression, restriction and persecution. Even more so, societies can only be said to be truly free, if everyone enjoys a positive spiritual freedom. This freedom includes the freedom to reject the spiritual life.

It took a little more than a hundred years until not far from Mary's place of execution, a number of people (yes, all white and male) announced in the name of the people of the 13 colonies of Britain, that certain truths were "self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the Pursuit of Happiness. That to secure these rights, Governments are instituted

among Men." Any government, argued the Declaration of Independence, which conducted itself in negation of these truths, could be rejected by the people.[54]

The Declaration of Independence is entangled with the narratives of Enlightenment, the modern state, modern constitutionalism and modern law. It has been echoed many times since, not only in the United States, but elsewhere in the world. It changed not only the continent from which the (white Anglo -Saxon Protestant) Founding Fathers had originated. It also inspired the struggles for independence of the Latin American, Asian and African Nations from colonialism and imperialism. It further inspired past and present movements for justice and equality for all, irrespective of race, ethnicity, language, culture, religion, belief, gender, sexual orientation, physical and mental (dis)abilities, and whatever sociological distinction people make.

But the text also shows a clear and evident spiritual foundation. Whether one attributes this foundation to Protestantism, Christianity, Judeo-Christian tradition, Abrahamic faiths, theism, deism, agnosticism, functional religionism or all of the above, the Declaration mentions God, as a force *a priori* to all man-made governments. Indeed, a great variety of religions, denominations, faiths and creeds can identify with this idea, and the three rights mentioned. While militant secularists and some militant religionists are engaged in an eternal battle for legitimacy between state and religion, believers are as much the true heirs of modernity as are unbelievers, agnostics and the unconcerned. In this secular age (Taylor), people have the option not to believe in uncountable ways, but they also have the option to believer in accountable ways.[55] The freedom of religion and belief protects all the options, being quintessential for each and everyone's rights to life, liberty and the pursuit of happiness. This is what we learn from the old Sufi wisdom about the many paths to God and the story of Mary Dryer.

This Chapter began with a quote by Judge Learned Hand, used by Cass Sunstein to illustrate the importance of judicial minimalism. The judge tells us that the spirit of liberty values humility and the acknowledgement of human fallibility. Believers of many faiths as well as a-religious, irreligious, and even anti-religious convictions have, from time to time, accused the kindred spirits of Judge Learned Hand of a destructive moral relativism. But in fact, it is no such thing. Only those who believe in Truth with a capital "T" have reason to believe that they can never be too sure that they are right. For those who believe that they alone are the creators of truth, certainty in matters of truth seems natural.

The Declaration of Independence expresses the notion of human rights as the hyper-goods. We might not be able to agree at all times on ecclesial and metaphysical truths, but we can agree that every one of us would feel

54 Declaration of Independence of the Thirteen United States of America, 4 July 1776.

55 C. Taylor, *A Secular Age,* The Belknap Press of Harvard University Press, Cambridge (USA) / London (UK), 2007, pp. 1-4

unfree if given Mary Dryer's choice and that none of us would want to be in her position. The rights of life, liberty and pursuit of happiness are, if you will, a universal incompletely theorized agreement, based on our understanding of human history – ancient and recent, and our present condition.

The freedom of religion and belief is inherently connected to freedom as the incompletely theorized aspiration of individuals, communities, and nations. Because, if like for Mary, others dictate the truth to us and leave us with the choice between obedience and punishment, they assault freedom as such. Freedom of religion and belief has therefore featured in all important human rights documents. Far from being designed to secularize society, the Declaration of Independence makes it perfectly clear, that the freedom of religion and belief can be based on profound religious beliefs.

As the philosopher Abdolkarim Soroush explained eloquently, forced obedience to a religious precept deprives the act of performing the religious precept of its religious essence.[56] Freedom of religion and belief is therefore essential for religion and belief itself. It provides the protection so that all acts of worship, reverence, ritual, manifestation, practice and tradition are essentially religious and/or faithful. Paraphrasing Langa in *Pillay* this is why when it comes to sincere beliefs, "religion and culture sing with the same voice".[57]

Governments, so the Declaration of Independence tells us, have been instituted to protect life, liberty, and the pursuit of happiness. The "spirit of liberty", as said, "is that spirit which is not too sure that it is right".[58] This is why minimalism aims to operationalize caution, humility, and evenhandedness in the interpretation of rights. Equal concern and respect for all sides, including the side that loses a case, is quintessential to preserve the spirit of liberty. It is quintessential for the interpretation of the freedom of religion and belief. Equal concern and respect fits well with the guiding principles of the three courts, individual liberty, human dignity, and pluralism.

Because of the spirit of liberty, governments and courts should deal with the content of the freedom of religion and belief and not so much with the content of the religion or belief itself. In such a way the secular and the sacred can coexist in mutual respect, none forcing itself onto the other.[59] After all, the right to liberty is "self-evident" as the Founding Fathers say. It is self-evident, because it protects all believers in their search for less self-evident truths. Freedom of religion and belief, interpreted in a minimalist way to include equal concern and respect for all, has an innate message of tolerance.

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56 A.K. Soroush, 'Reason and Freedom', in *Reason, Freedom, and Democracy in Islam, Essential Writings of Abdolkarim Soroush,* M. Sadri and A Sadri (eds.), Oxford University Press, Oxford (UK) et al., 2000, pp. 100-105.

57 MEC for Education: Kwazulu-Natal and Other v. Pillay, Case CCT51/06, *supra* n. 36, para. 60.

58 Sunstein, *supra* n. 1, at 35.

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

Tolerance does not require us to accept the other's beliefs as true. It requires us to acknowledge the other, their beliefs, and that they are deserving of the same concern and respect as we and our beliefs are. "Tolerance is always age-appropriate."[60]

Minimalism aids to develop a consistent line in interpreting the freedom of religion and belief, while realizing optimal protection for believers. Sometimes this requires sticking to the methodology of minimalism, sometimes keeping the purposes in mind, sometimes being flexible with the methodology in light of the purposes. Minimalism provides the chance to treat the guiding principles as ever evolving incompletely theorized agreements, within the larger framework of human rights and constitutional instruments that are "alive". This enables judicial borrowing. All this allows for the judiciary to fulfill its place in liberal democratic constitutionalism.

Given its inherent relationship with individual liberty, human dignity and pluralism, the freedom of religion and belief is of fundamental importance to all human beings. It contains (in the words of the ECtHR) the "vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, skeptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it."[61]

If adjudicated in this way, the freedom of religion and belief will enable (in the words of the SCC) "a truly free society, which is one which can accommodate a wide variety of beliefs, diversity of tastes and pursuits, customs and codes of conduct".[62] The freedom of religion and belief then entails (in the words of the CCSA) "the right to be different". Someone's beliefs or those of a group of believers, may strike others 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".[63] "Religious tolerance is accordingly not only important for some of us, but "deeply meaningful to all of us because religion and belief matter, and because living in an open society matters".[64]

In Chapter 2, I positioned this study within the (neo) pluralist endeavor to find space and underpinnings for a more genuine, broad and meaningful pluralism which would allow a great variety of believers – individuals and communities – to enjoy more freedom to lead every aspect of their lives in accordance with their (religious) beliefs. I also positioned the study in the classical liberal understanding of the freedom of religion and belief, in the

60 See Chamberlain v. Surrey School District No. 36, Case 28654, *supra* n. 43, para. 69.
61 *Kokkinakis v. Greece*, app. no. 14307/88, *supra* n. 5, para. 31.
62 Chamberlain v. Surrey School District No. 36, Case 28654, *supra* n. 43, para. 135; and Trinity Western University v. College of Teachers, Case 27168, *supra* n. 37, para. 28, quoting R. v. Big M Drug Mart Ltd., Case 18125, *supra* n. 37, pp. 336-337.
63 *Prince v. President of the Cape Law Society*, Case CCT36/00B, *supra* n. 2, para. 42.
64 *Ibid*., paras 164-170.

sense that a more authentic, broad and meaningful pluralism is required by the demands of liberal-democratic constitutionalism and, vice versa, a new more authentic, broad and meaningful pluralism will require many of the achievements of liberal-democratic constitutionalism. Having said this, throughout the study I have been curious about and have embraced all post-liberal and post-secularist concepts and notions which try to evolve, rather than negating the achievements of liberal-democratic constitutionalism while fixing its fallacies.

Along every path dilemmas are encountered, and the greatest dilemma I encountered throughout the study is what I would call the "tolerance paradox". The selected cases, the related commentaries, and the broader literature used in this study are full of examples and arguments concerning tolerance. Many of the marginal and marginalized believers – individual and collective – request tolerance for their difference. Some may point to the intolerance of the tolerant, who for example attempt to enforce mainstream views about gender, sexual orientation, sexual morality and/or family, on those who hold different beliefs. Yet, some of them may not be as tolerant to others, as they would have others be unto them. The tolerance of an open society must stretch to those who in their "inside law" are less tolerant of difference. But the project of a new pluralism must not be a project to undo existing pluralism, but one that enriches it further. Hence, from time to time we must handle the tolerance paradox in concrete cases, by adopting reciprocal pluralism (Esau).

Believers – orthodox, heterodox, mystical, traditional, reformed or new – seek to carve new space into the building blocks of liberal constitutionalism, to create liberty for themselves. They want to live meaningful lives in accordance with their beliefs, create meaning by living with others, contribute to meaning by being part of a larger society. This is quite similar to others who are also trying to carve new space into the same building blocks: ethnic, cultural and linguistic minorities, indigenous peoples, the gender and sexual identity minorities, those with different physical and mental abilities and all others who have felt that mainstream modernity has thus far stifled their liberty and rejected their identity, who have long suffered from non-recognition and exclusion and sometimes worse.

In an interesting tercet article, devoted to finding post-liberal pluralism for religious worldviews, Ian T. Benson laments the absence of an "argument from a moral framework, based on cogent metaphysical positions and expressed within a clear legal tradition" in cases of current "identity politics". He tells us that "the assertion, […] that a man can be a woman because he 'feels' like a woman is widely accepted under the plasticity of 'gender', and the fact that it cannot be true genetically is largely ignored."[65] Forget for a

65 C. Lombaard, I.T. Benson and E. Otto, 'Faith, society and the post-secular: Private and public religion in law and theology', in *HTS Teologiese Studies/Theological Studies*, vol. 75, no. 3, a4969 (2019), p. 12

minute how to assess this opinion on a tolerance scale. Mr. Benson is falling into a recognizable trap of the very modernist totalizing worldview he is trying to save his co-religionists (and possibly other believers) from. Just because we cannot make something visible in the material world does not mean that it is not real! Are the (current) limits of modern science to be the hallmarks of what may or may not be ignored?

There is a universe full of wonders out there, some of which have been known throughout eras, only to be forgotten for subsequent epochs. In the rediscovery of our religious and cultural traditions before the dawn of modernity, we may find many things that surprise us.[66] For example, gender fluidity is far from an exclusively post-modern phenomenon. Before modernity forced us to rethink everything within the harsh limits of binary positivism, many of our authentic traditions already recognized a plurality of existences.

Law's religion may not always be the dear, intimate, and close friend we believers instinctively recognize, but it may, nonetheless, be a friend. A friend that enables our (re)connection with that first friend as a holistic system which inspires, challenges, and enlightens us to find new understandings of our lives, our world, and our existence in the very manifestations of our religions or beliefs in teaching, practice, worship and observance we share with many generations before us. It can invite us to free ourselves from those modern projections of our traditions caught up in uninspired institutions, soulless formalism, instruments of power and political ideology. This secular age may after all be our age as believers, because it enables us to let go of the modern desire to control others and our surroundings and instead, in faith create meaningful lives, relationships and communities.

In my personal opinion, the holistic pluralism believers should strive for in their endeavor to achieve further evolution of liberal democratic constitutionalism, should be connected to an understanding of our lives, world, universe and our existence therein as something extremely diverse. Diversity indeed going beyond everything we humans, each of us living as tiny fragments in all eternity, could ever know, conceive or understand. We should be loving wherever we encounter it, amazed by its potential and in awe of its miraculous beauty. Such is, I sincerely believe, to understand our true place in Creation.

66 Inspiration may be drawn from K. Amstrong, *The Lost Art of Scripture, Rescuing the Sacred Texts,* Vintage Publishing, London (UK), 2019.