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

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# Summary

## 1 CHAPTER 1: GENERAL INTRODUCTION: DIVERSITY OF RELIGION AND BELIEF AND JUDICIAL INTERPRETATION

“There are as many paths to God, as there are souls in this world”. The Sufi wisdom may inspire a lifelong spiritual journey or an array of debates. In a nutshell it also explains why various international and constitutional documents recognize the freedom of religion and belief. This human right protects every believer, which includes those defining themselves as unbelievers, from interference by others and the state.

The Canadian Charter of Rights and Freedoms, the South African Bill of Rights and the European Convention on Human Rights each recognize the freedom of religion and belief. They use partly similar, partly different words and legal concepts, but they share a common core, which may be summarized in Article 18 of the Universal Declaration of Human Rights (freedom of thought, conscience and religion) reads:

“Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.”

While the codifications of the right share this common core, cases in which believers, including non-believers, claim that their freedom of religion and belief has been interfered with, may be different in outcome. Differences, which can be understood and analyzed only by looking into the interpretation of the freedom of religion and belief by tribunals in various cases. This study is interested in finding and comparing the standard interpretation of the freedom of religion and belief of the Supreme Court of Canada (SCC), the Constitutional Court of South Africa (CCSA) and the European Court of Human Rights (ECtHR). The comparison should contribute to understanding how judicial interpretation matters for providing for optimal protection for all believers.

Optimal protection, is defined in Chapter 2. This study follows Cass R. Sunstein’s argument, that “judicial minimalism”, is the theory of interpretation best suited for human rights within a pluralist context and within the framework of liberal democratic constitutionalism. The study shall look into the

minimalist elements in the interpretation of the freedom of religion and belief of each court. The following categorization is used to analyze the selected cases:

1. personal freedom;
2. family law and family relations;
3. group autonomy;
4. education;
5. balancing freedom of religion and belief with other rights and;
6. secularism.

These are the not mutually excluding dimensions of the freedom of religion and belief which can be found in actual freedom of religion and belief cases.

Fifteen cases from each of the courts in the period from 1990 until 2015 were selected for this study. However, for reasons particular to each of the jurisdictions for the ECtHR, only cases after 1998 were selected and for the CCSA, only cases after 1996 were selected. The cases were selected as to represent a diverse selection of cases which raise the more difficult questions regarding the freedom of religion and belief as opposed more procedural or formal issues.

After the chosen period, new freedom of religion and belief were decided by the courts. Up to April 2022, these were roughly two more cases by the SCC, seven by the CCSA and three by the ECtHR. As these were not included in the analysis, this study cannot answer whether the current standard interpretation regarding the freedom of religion and belief in each of the courts is different from what was found in the cases. Nevertheless, the analysis and comparison still allows for conclusions regarding the impact of standard interpretations for the outcome, the implications for the concept of the freedom of religion and belief, its scope and when and how it is triggered. Moreover, even if the standard interpretations have changed in later cases, the study allows for the conclusion that the main and supporting guiding principles, found in the selected cases, will have been applied and used in any possible change.

While the ECtHR is the only international tribunal, as compared to the highest tribunals in two national constitutional orders, the comparison is still fair. Each of the jurisdictions has elements of common law and continental law and is characterized by multiple judicial and legislative layers. Even debates pertaining to authority and legitimacy in regard to judicial interpretation are very similar in each of the jurisdictions. The following research questions are answered in this study:

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?*

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

## 2 CHAPTER 2: THEORETICAL FRAMEWORK: CONCEPTS OF FREEDOM OF RELIGION AND BELIEF AND OF JUDICIAL MINIMALISM

The freedom of religion and belief is one of the oldest classical human rights. Different periods in history and different places in the world are cited for its origin. People from a number of the world's religious and philosophical traditions would argue that the values underlying human rights in general and the freedom of religion and belief stem from these traditions. While the existence and importance of the freedom of religion and belief as a human right can be explained from a historical perspective, several pragmatic, faith-based and pluralist arguments can be given. Either of these will show the importance of the freedom of religion and belief within a framework of several values, rights and or concepts all relating to peace, justice and liberty.

From a perspective of modern international and constitutional law and Western legal history, the Peace of Westphalia in 1648 CE (Common Era)<sup>1</sup> is a feasible starting point for a historical analysis. Modern human rights instruments after World War II, beginning with the Universal Declaration of Human Rights all include the freedom of religion and belief. Regional human rights instruments such as the European Convention of Human Rights and Fundamental Freedoms, the American Declaration of the Rights and Duties of Man, the African Charter on Human and Peoples Rights all include this right.<sup>2</sup> It has been affirmed by faith-based and/or interfaith initiatives like the Cairo Declaration of Human Rights in Islam and the Parliament of the World's Religions. It is included in most of the world's constitutions.

Most of the world's constitutions and human rights instruments recognize the freedom of religion and belief, while adjudication shows, there is always

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1 See M. D. Evans, 'Historical Analysis of Freedom of Religion and Belief as a Technique for Resolving Religious Conflict', in T. Lindholm, W.C. Durham Jr., B. Tahzip-Lie (eds.), *Facilitation Freedom of Religion or Belief, A Deskbook*, Marinus Nijhoff Publishers, Leiden (Netherlands), 2004.

2 See T. Lindholm, W.C. Durham Jr., B. Tahzip-Lie (eds.), *Facilitation Freedom of Religion or Belief, A Deskbook*, Marinus Nijhoff Publishers, Leiden (Netherlands), 2004, Appendix A.

need and room for judicial interpretation. The interpretation, as with any right, matters for the outcome. The principles of interpretation of the freedom of religion and belief, which the various members of a court agree upon, make up the standard interpretation, which can be reconstructed by analyzing the case law.

It is not difficult to make the case that interpretation matters. Generally, in cases of constitutional and/or human rights and specifically with regard to the freedom of religion and belief. Similar situations also lead to different outcomes in some of the selected cases even when only compared superficially. When courts adjudicate these cases, they engage in an internal discourse. With every new case, they continue the discourse. Even when the judges disagree, they make use of the same principles and conceptions, which function as a mid-level agreement between them. While these principles and concepts evolve, one case at a time, they are seldomly aborted completely. I call this the standard interpretation of the freedom of religion and belief.

Scholars of jurisprudence have long distinguished different theories of judicial interpretation. Cass R. Sunstein's typology distinguishes between "perfectionism", "originalism", "majoritarianism" and "minimalism". He positions himself as an advocate of the last, arguing it is most suited for pluralist societies, organized as liberal-democratic constitutional orders.

"Minimalism" is not associated with any particular political and/or philosophical project other than LDC generally. This makes minimalism as suitable standard to compare the three standard interpretations, once they have been reconstructed. This study follows Sunstein's argument and regards minimalism as the preferable theory of interpretation above its competitors, namely originalism, perfectionism and majoritarianism.

Minimalism favors "incompletely theorized agreements", "narrow" and "shallow" rulings and deciding one case at a time. It disfavors value judgments founded in specific traditions, politics and ideologies and "deep" and "wide" rulings. Being based in a principled pragmatism, it does acknowledge that from time to time deep and/or wide rulings can be necessary and useful to resolve a deeper issue and to make a red thread which was developed incrementally explicit.

Cases decided by courts, in which the freedom of religion and belief plays a major role often involve the "judicialization of mega-politics" (Hirschl).<sup>3</sup> This is to say they raise fundamental issues pertaining to constitutional, cultural and religious values, pluralism, social trends, individual and collective identity and so forth. The origins of the predominant codifications and judicializations in Western legal history are cited by some to argue that certain inherent flaws exist within the right and its application. Others will point out that while some flaws may exist as a result of the Western dominance in long

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3 R. Hirschl, *Constitutional Theocracy*, Harvard University Press, Cambridge (USA)/London (UK), 2010.

periods of modern global history and legal development, the Western bias can be fixed.

In a discussion of the relationship between the freedom of religion and belief and liberalism and/or secularism, some will argue that liberal democratic constitutionalism has an inherent secular bias. Hirschl argues that secularization by law even takes place in jurisdictions with strong establishment of religion and belief. The study distinguishes between institutional secularism, which is aimed first and foremost at even handedness, while ideological secularism is a direct competitor for religious and other beliefs. The freedom of religion and belief can aid in securing that institutional secularism is not interpreted as to favor ideological secularism.

Authors, departing from faith-based, pluralist, classical liberal and/or post-modern perspectives point to possibilities which the freedom of religion and belief created to develop genuine understandings of liberty which include a wide scope for believers to conduct themselves, individually and collectively, in accordance with their beliefs. Generally, the discussions of the jurisprudence of the SCC, CCSA and ECtHR include supportive, fairly critical and very critical voices from all the aforementioned positions. Authors tend to take into consideration the foundational values of each of these legal orders. As these are similar, in the sense of being founded in liberal-democratic constitutionalism, any rejection of these as by definition antithetical to religion necessarily includes all the jurisprudence of the three tribunals. More nuanced views tend to focus on the outcomes and analyses in specific cases.

While some of the newest materials in the current debate about the freedom of religion and belief were not incorporated into this dissertation, it still has a place in the current debate, because it relates to the various positions. They can be categorized into classical liberalism, religious (neo-)exclusivism, ideological secularism and (neo-)pluralism in freedom of religion and belief. This study combines a classical liberal outlook as a meta-narrative enabling peaceful co-existence of different worldviews, with a pluralist outlook that seeks to revert Western, mainstream and secularist biases in the *status quo*.

The position in the discourse on freedom of religion and belief and the choice for minimalism as a preferred theory of interpretation is indicative for how "optimal protection" is seen throughout the study: a broad and liberal concept and scope of religion and belief, the right being easily triggered. This means absolute protection of believers in holding beliefs and as much as possible protection of believers in manifestation of their religion or belief. Optimal protection 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.

3 CHAPTER 3: CODIFICATION OF THE FREEDOM OF RELIGION AND BELIEF IN THE THREE INSTRUMENTS AND METHODOLOGY OF HUMAN RIGHTS CASES FOR THE THREE TRIBUNALS

The three instruments – the Canadian Charter of Rights and Freedoms, the South African Bill of Rights, and the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) – have codified the freedom of religion and belief in different ways. The three instruments differ in the formulation and definition of the right to freedom of religion and belief, as well as its integration with other universal freedom rights. This leads to interesting parallels, but also noteworthy differences. The most important parallel is that within the core of the right as codified, there is a strong common denominator. All three instruments protect religious beliefs as well as other beliefs. They all protect the internal dimension, an external dimension and a collective dimension. They all allow for limitation of the right under similar circumstances.

The differences between the three instruments are amongst others, the grouping of freedoms into one or more rights, the elaborate or minimalistic character of formulating these, the wording of the limitation clause and equality provisions, or the explicit or implicit reference to certain (constitutional) values. For example, the Charter distinguishes between two freedoms: the freedom of conscience and religion and a freedom of thought, belief, opinion and expression. The Bill of Rights contains a provision which assembles the freedom of thought, opinion, religion, belief and conscience. The freedom of expression is codified in a separate and different right. The ECHR also creates the freedom of thought, conscience and religion, in one Convention right. The freedom of expression is a separate and different right.

There are important parallels in the approach or method of solving human rights cases. These can partly be derived from the parallels in codification. All three will determine whether there is a legal basis for interference, a legitimate aim followed and a justifiability of the measure. The latter includes “democratic society” to determine whether an interference fits with the entirety of the human rights-based legal order and elements like “proportionality”, “least restrictive” and “rational connection” to determine whether the interference is the proper restriction. Doctrines of direct and indirect application, including horizontal application, and positive and negative obligations are similar. The ECtHR seems most inclined to accept internal limits on rights, yet only if included in the codification. All tribunals reject a hierarchy of rights.

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

margin of appreciation for the ECtHR on the other hand. Difference in codification, therefore, is not sufficient to explain differences in outcome of cases.

#### 4 CHAPTER 4: COMPARATIVE ANALYSIS OF THE SELECTED CASES

The selected cases (Appendix I) of the three Courts are comparatively analyzed in order to find the parallels and differences in standard interpretation within the six dimensions of the freedom of religion and belief mentioned in Chapter 1. These six dimensions are: the individual dimension; the family and family law dimension; the collective and group autonomy dimension; the dimension of the educational system; the dimension of balancing with other rights and the dimension of secularism. Many of the selected cases feature several of these dimensions.

In section 4.2. regarding the individual dimension, deals with three of the selected cases by the SCC: *Multani* (I1.4.10), *Amselem* (I1.4.7) en *R v. NS* (I1.4.14). In the first two the SCC decided in favor of the believer, in the latter it decided against the believer. Of the selected cases before the CCSA two belong in this dimension: *Prince* (I2.4.7) en *Pillay* (I2.4.11). In the first, the CCSA after a long analysis if accommodation was possible did not decide in Mr. Prince's favor. Mrs. Pillay however did win her case. Nine selected cases of the ECtHR engaged the individual dimension: *Buscarini* (*Maestri*, *Şahin*, *S.A.S*, *Thlimmenos*, *Batayan*, *Cha'are Shalom*, *Folgerø* and *Lautsi* (sections I3.41; 4.6; 4.7; 4.15; 4.2; 4.11; 4.3; 4.8; 4.10). In five of these, the Court decided in disfavor of the believers in question, in the other four in favor of the believers. *Cha'are Shalom* is discussed under the dimension of freedom of religion and belief and group autonomy. *Folgerø* en *Lautsi* are analyzed in the dimension relating to education.

In section 4.2 we see that seemingly neutral laws, can have grave impact on the personal freedom of believers because of adverse affect discrimination. This leads to a feeling of being unwelcome at least and in the worst case, a painful choice. In adjudication this means, that the interference with the freedom of religion and belief has to be recognized, even if for whatever reason they cannot be accommodated.

Often enough accommodation of the practices of believers is possible, without undermining the general purpose of the law or regulation in question. Sometimes this can be easily done by exempting the believers from (certain aspects of) the law. Exemption or other means of accommodation will sometimes meet criticism from the mainstream. The selected cases highlight the need for public institutions to promote and instill tolerance and for courts to point to this. Protection of the personal freedom of religion and belief, always requires taking the sincere individual beliefs of believers as starting points, rather than practices "objectified" by expert opinions or statistics.

In paragraph 4.3 we see how parental authority and the best interests of the child can collide, especially where medical decisions are concerned, how

religious marriage and state marriage can collide and how the rights of same-sex partners to get married have a specific relationship with the freedom of religion and belief. Parents are the natural authority of children. Whatever parents believe or not believe is bound to impact the children. If parents believe differently and separate, this can cause conflicts in the upbringing. When parental authority is limited by state institutions, judicial review is necessary to assess the impact on the freedom of religion and belief of the parents and the children.

Five Canadian cases are discussed in this dimension: *P.(D)* (I1.4.3), *Children's Aid Society* (I1.4.4), *A.C. v. Manitoba* (I1.4.12), *Bruker* (I1.4.11) en *Same-Sex-Marriage* (I1.4.9). In the first three cases, the majority on the Court decides that restrictions of the freedom of religion and belief are justified. In *Bruker*, the case is decided in favor of the claimant, against her ex-husband. Both rely on their rights under the freedom of religion and belief. *Same-Sex-Marriage* decides that the introduction of same-sex marriage is not contrary to the Charter. Believers opposed to it, may under circumstances rely on the freedom of religion and belief to not participate in such marriages.

Seven of the South African cases in this dimension challenge the existing exclusivity of the civil marriage: *Amod* (I2.4.5), *Daniels* (I2.4.8) *Hassam* (5.4.12), *Fourie* (I2.4.10), *Robinson* (I2.4.9.), *Women's Legal Centre Trust*, (I2.4.13) en *DE v. RH* (I2.4.14). In the first five, the Court decides for a wide scope and against a restrictive reading of 'marriage'. The last two cases show, where the Court sees the limits of judicial interpretation.

The ECtHR decided two cases in this dimension. It decides in favor of the government in *Yiğit* (I3.4.9) en *Refah* (I3.4.5).

The selected cases show clearly that one case at a time review is necessary because of the thorny issues involved. Where parental decisions impact health or continuation of life of minors, adjudication must find limits to the parental freedom of religion and belief under the limitation clause. In parental conflicts of religion, confusion is unavoidable. Confusion and even cognitive dissonance are themselves not enough to conclude that it is in the best interest of the child not to know one of the parents as they are.

Religious marriage has existed longer than civil marriage/state marriage. It continues to exist alongside civil or state marriage and is for many people an alternative for state orchestrated marriage like other lasting relationships which form the foundations of families. Treating social reality as fact and preventing inequality in areas of inheritance, social security, insurance and so forth, limiting can be mandated by the freedom of religion and belief, as we saw in the selected cases. In order for the judiciary to respect the domain of the legislative, this requires a case-by-case contextual approach.

Upholding an exclusive and privileged position for state marriage on the other hand, seems difficult to reconcile with the freedom of religion and belief, while at times religious marriage and private law are bound to interact in a pluralist society governed by liberal democratic constitutionalism.

Both the South African and Canadian same-sex marriage cases show, how equality rights make it difficult to uphold an exclusive opposite-sex requirement, when it comes to civil/state marriage. The opposite sex requirement gives privilege to the belief that marriage is for opposite sex partners only, over all other beliefs. Both judgements do mention that the faith-based views on marriage cannot be a source of interpreting state-law or the constitution. Those who believe that marriage should only be an opposite-sex requirements can rely on the freedom of religion and belief to demand exemption from facilitating or aiding in same-sex unions. Based on the analysis I support a dynamic non-hierarchical co-existence of state marriage with faith- or culture-based marriage and other practiced forms of lasting relationships.

In section 4.4 we see the relationships between the individual and communal dimension of the freedom of religion and belief. Individuals and communities rely on the collective dimension when the state or others interfere with the group-autonomy on the basis of the freedom right. Sometimes individuals will claim that group-autonomy goes too far. Sometimes the dimension is about the co-existence of state law/national law and the “own law” of communities.

The collective dimension features in 13 of the selected cases. Six were decided by the ECtHR, five by the SCC, and two by the CCSA. In another South African case the collective dimension has an important supporting role.

Before the SCC are the *Sioui*-case (I1.4.1), *Hofer* (I1.4.2), *Trinity Western University* (TWU) (I1.4.5), *Lafontaine* (I1.4.8) en *Alberta v. Hutterian Brethren*, I1.4.13). In two cases the SCC finds a necessary and justified interference with the autonomy of the community in question.

The CCSA in *Christian Education* (I2.4.6) also finds a justified restriction of group-autonomy. In *De Lange* (I2.4.15) the case is decided on procedural grounds. In *Prince* (I2.4.7), already mentioned, the collective dimension had an important “supporting role”, as the CCSA assesses the workability of exemption from the prohibition of illicit drugs for the Rastafari community.

The ECHR decided *Cha'are Shalom* (I3.4.3), *Hasan v. Chaush* (I3.4.4), *Refah* (I3.4.5) *Mouvement Raëlien* (I3.4.12), *Sindicatul Pastorul Cel Bun* (I3.4.13) en *Fernández Martínez* (I3.4.14). Only in *Cha'are Shalom* and *Refah* did the ECtHR decide against the organization in question. *Sindicatul Pastorul Cel Bun* en *Fernández Martínez* are decided in favor of the churches in question and against the individual believers who have an opposite interest.

If tolerance only stretched to the beliefs, we find agreeable, acceptable or logical, this would render tolerance empty. Hence, the freedom of religion and belief enables communities to conduct themselves within their own law. The state should not try to eliminate pluralism, either within society or within a religious community, but evenhandedly protect all. “Own law” or legal pluralism which is compatible with liberal multicultural democracy may very well be an important answer to the demand for pluralism. Yet on the other

hand autonomy is not absolute. There can be no constitution/human rights free zones, in which the own law is absolute.

Section 4.5 deals with the dimension of freedom of religion and belief and education. The public education system may include education about the prevailing religion or secular ideology. It can also teach about different religions and beliefs. Private institutions may prefer beliefs that clash with those of mainstream society, while the graduates also want to participate in society at large.

In total nine of the cases examined are elements of religion and belief related to the education system. The European Court of Human Rights, the Supreme Court of Canada and the Constitutional Court of South Africa each ruled on three such cases. All these cases are also discussed within at least one other dimension.

Before the SCC were, *Multani* (I1.4.10), *Chamberlain* (I1.4.5) and *TWU* (I1.4.6). The CCSA decided *Christian Education* (I2.4.6), *Pillay* (I2.4.11) and *Gauteng School Education Bill* (I2.4.2). Of the ECtHR cases, *Sahin* (I3.4.7), *Folgerø* (I3.4.8), *Lautsi* (I3.4.10), and *Fernández Martínez* (I3.4.14) fall into this dimension. In the first two cases, the SCC ruled in the best interests of pupils and parents in a public educational institution. In the last case, the SCC ruled in favor of a religious university. The CCSA ruled in *Christian Education* that the religious educational institution could not obtain an exception to a general law. In *Pillay*, a decision was made in favor of the believer of an educational institution. In *Gauteng School Education Bill*, the CCSA upheld a law covering language and religious education in public schools.

The ECHR ruled against the individual (un)believer and in favor of rules for public education in *Sahin*, *Lautsi* and *Fernández Martínez*. In *Folgerø*, however, an infringement of the rights of children and parents was found in rules on religious education within public schools.

This dimension shows that freedom of religion and belief in the educational system relates to the believers in the public education system, religious instruction in the public education system and faith-based education. The public educational system should ensure the exposure to all of society, diversity on display. This might cause some cognitive dissonance, which is necessary for tolerance. The state's responsibility to ensure pluralism cannot be organized away by pointing to non-state schools. Part of the task of ensuring pluralism is to ensure religious literacy.

It can easily be assumed that religious symbols displayed in schools or classrooms do not have a neutral meaning. There are several possibilities for organizing religious instruction in the public education system in a way which reconciles majority and minority interests. Adjudication should take into consideration the effect of peer pressure and subtle forms of pressure on children (and their parents). Religious institutions on the other hand are not for everyone and follow a less pluralistic logic, but should be inclusive, if this does not conflict with their beliefs.

In section 4.6, balancing, which plays an important role in all the other dimensions, was revisited as a separate issue. In at least 18 of the cases examined, the balance between equal care and respect for all the rights and interests involved is central to the legal reasoning. Eight of these were decided by the SCC. The CCSA decided six of these cases. Four were decided by the ECHR. All these cases are also analyzed under some of the other dimensions.

The issues that fall into the dimension of balancing freedom of religion and belief with other rights are best divided into the following topics:

- the balance of pluralism: (religious) beliefs and LGBTQ+ equality rights;
- preventing the elimination of pluralism: individual rights and communitarian interests;
- the balance between individuals and faith communities;
- balance between parental authority and the rights of children.

Balancing is first and foremost achieving equal concern and respect through a procedural fairness, that gives all sides equal recognition in their rights and concerns. This implies that it is better to decide a case under the limitations clause, than to reject the claim as not being covered. Notions like the right to be different, equal religious citizenship and democracy based on pluralism help.

Balance requires the acceptance that mainstream society will have to sometimes give equal concern and respect to beliefs and practices that strike them as bizarre, illogical or irrational, or even shocking and offensive. Complexity is no reason not to accommodate. Balance can sometimes be achieved by finding purely procedural grounds to decide the case. Such rulings have a potential to be acceptable to both sides. Yet judges nor other state organs should discharge themselves, by delegation of the responsibility to protect human rights to others, be they faith-based or non-faith-based actors. On the other hand, judges nor other institutions should make assumptions or generalizations about beliefs and practices and certainly not substitute the choices of the believer(s) with their own. Balance can most easily be achieved in a case-by-case fashion. Deciding all future cases immediately, will always cause someone to lose for all future.

The final dimension discussed in section 4.7 was that of secularism. In a total of at least 25 cases, the state's relationship towards religion and belief is central. Five of these were decided by the SCC, 10 each were decided by the CCSA and ECHR.

This topic correlates with the discussion of marriage in sections 4.4.3–4.4.5 and raises the following questions:

- Must state institutions recognize religious marriage under some circumstances (South African cases *Amod*, *Daniels*, *Hassam* (sections I2.4.5, I2.4.8 and I2.4.12) and the Strasbourg case *Yiğit* (section I3.4.9))?
- Can secular courts enforce a contractual obligation to provide for a religious divorce (Canadian case *Bruker*; section I1.4.11)?

- Is there an obligation for Parliament to regulate religious marriages of a minority religion (South African case *Women’s Legal Centre Trust*; section I2.4.13)?

As discussed above, the answers given to the first question by the CCSA is affirmative, while the ECtHR’s question in negative. The SCC answers the second question affirmatively. With regard to the third question, the CCSA finds that it is not for the judiciary to force the legislative and executive powers to solve an ongoing debate by adopting a “Muslim Marriages Act”.

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

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

The ECtHR and SCC both answer the first question negatively. The ECtHR gives an affirmative answer to the second question. The ECtHR answers the third question to the negative, at least where general and abstract provisions are employed to do so. The SCC gives an affirmative answer to the last question.

Religious education is also a topic in this section. This topic correlates with the discussion of religious education in state schools in section 4.5.2 and raises the following question: may the state order the display of religious symbols in state schools and/or order the compulsory character of a religious instruction class (South African case *Gauteng School Education Bill*; section I2.4.2 and Strasbourg cases *Folgerø and Lautsi*; section I3.4.8 and 6.4.10)? The ECtHR is of the opinion that the ordained display of a religious symbol does not necessarily interfere with state-neutrality, but that religious instruction classes may not be paired with high obstacles for exemption. The CCSA is of the opinion that that religious instruction classes may not be compulsory.

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

- Can religious or secularist beliefs be sources of interpretation of legal concepts? Canadian case *Reference Same-Sex Marriage* (section I1.4.9) and South African *Fourie* case (section I2.4.10).
- Can religious or secular beliefs be a source of legislation to enforce certain behavior? South African cases *Solberg* and *DE v. RH* (sections I2.4.4. and

- I2.4.14) and Strasbourg cases *Şahin* (section I3.4.7) and *S.A.S.* (section I3.4.15).
- What does state neutrality require? Canadian case *Lafontaine* (section I1.4.8), South African cases *Final Certification* and *Certification Western Cape* (sections I2.4.1 and I2.4.3), and Strasbourg cases *Hasan v. Chaush* and *Fernández Martínez* (sections I3.4.4 and I3.4.14).

Both the SCC and the CCSA believe that the freedom of religion and belief does never entitle communities to have their faith-based doctrines be seen as sources of constitutional law or legal concepts like “marriage”. The CCSA is clear that legislation may not enforce faith-based norms. It does recognize that over time a religious norm, embedded in legislation can attain a secular understanding, for example when it comes to the sale of liquor on days of rest and holidays. On the other hand, faith-based norms embedded legislation can also become non-enforceable through changing circumstances, especially the transition towards liberal-democratic constitutionalism. The ECtHR accepts that official laicism may be employed by the state as a source of legislation. It does not see a fundamental collision between such a policy and the equal concern and respect the state must show to all, including religious believers.

With regard to the last question, the SCC answers that state neutrality requires that rituals in a state-legislature be as inclusive as possible towards all (un-)beliefs. According to the CCSA this does not mean that all freedom of religion and belief rights must be non-derogatory in emergencies, or that ceremonial deism is out of order. According to the ECtHR state neutrality requires non-interference by the state in the internal affairs of a minority religious community. State neutrality does not prevent an agreement with the dominant church to let the latter decide about eligibility of state personnel for the position of religious instruction teacher.

The selected cases show, that secularism, as much as religion and/or belief is no monolithic concept. With it many faces it can be both an enemy and a friend of freedom of religion and belief. Some authors propose to abort the term altogether in favor of “comprehensive pluralism” or related terms, based on reversible reciprocity, which signify an inclusive attitude towards religious, non-religious and secular beliefs.

While institutional secularism can be an aide of the freedom of religion and belief to ensure evenhandedness towards different religions and beliefs, ideological secularism if adopted by the state forms a risk for the freedom of religion and belief. Like (strong) establishment it can lead to preferential treatment of one group, secularists, above others. Open secularism on the other hand, emphasizes non-preferential treatment of all religions.

The exclusiveness of state marriage is not uncommon in many liberal-democratic constitutional orders and has a relationship with ideological secularism. Upholding it, will often interfere with the rights of believers. A more pluralistic and accommodating approach, which allows for the co-existence

of several religious and cultural forms of marriage next to state marriage, enables a reconciliatory protective approach towards faith based and LGBTQ+ communities.

When state institutions adopt a preference towards a certain faith, ideological secularism or any secular ideology, discrimination against all others is often the automatic result. In public education, as also mentioned above, several models are conceivable, which respect the freedom of religion and belief of all students (and teachers). They must respect individual choices and accommodate the pluralism present in the student body.

Freedom of religion and belief naturally leads to situations where beliefs, practices and religious precepts are part of the legal conflict. Consistent with institutional secularism, secular judges should not interpret the religious or belief-based let alone substitute the understanding of the believer in question. Doing so, is a grave violation of the freedom of religion and belief. In line with the above, neither religion, any other belief, nor ideological secularism can serve as sources of interpreting human rights or constitutional law (in the accomodationist or separationist model).

In light of the intermediary conclusions drawn in the previous section, conclusions regarding the adjudication of the freedom of religion and belief can be formulated. The following best practices were present in the selected cases:

1. Recognition of all sincere religious, cultural, or other beliefs as triggering protection without prior exclusion, limiting them where necessary under the limitations clause. No objectivation by dogma, officials, or statistics.
2. Preventing painful choices and allowing for or ordering accommodation and/or exemption, where reconciliation between freedom of religion and belief and other rights or important aims of public policy is needed. Where this is impossible, taking of the sharp edges of enforcing a law against conscientious objectors.
3. Absence of value judgement from any other perspective than the believers' own perspective. No substitution of the own understanding believers have of a belief or practice with that of judges or other state officials. Being weary of all forms of paternalism, directed at believers.
4. Inclusive protection: preventing division into insiders who belong, and outsiders who are tolerated. Recognition that all official state policies inspired by state religion and/or state secularism are potentially intrusive to all outside the mainstream. Concepts like the "right to be different", equal "religious citizenship" or a pluralist understanding of democracy aid in this.
5. Promoting tolerance and providing that other state institutions do so; tolerance requires some cognitive dissonance and always extends to the beliefs others find bizarre and even threatening.

6. Protecting human rights and pluralism, never delegating, or letting other state institutions delegate the responsibility to private institutions, faith-based or otherwise.
7. Being reflective of social reality and allowing for a flexible co-existence between state law and “own” law. Allowing for communities to govern themselves, while autonomy is never absolute.
8. Equal concern and respect for all sides, taking the losing party’s point of view seriously: showing real understanding for their point of view.
9. Balancing under the limitations clause: rather than finding no interference at all or *a priori* justifications of limits. If necessary, using judicial assumption.
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.

## 5 CHAPTER 5: COMPARATIVE ANALYSIS OF THE CONCEPTS OF THE FREEDOM OF RELIGION AND BELIEF AND THE STANDARD INTERPRETATIONS

According to H.L.A. Hart, it is imminent that judges develop principles which guide their interpretation of the law. All three courts have developed principles which guide their interpretation of the freedom of religion and belief. The guiding principles are supported by what will be called supporting principles.

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

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

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

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

The SCC and the CCSA mainly rely on the believers themselves to define their religion and belief and what it entails for them. The believer must show sincerity in the belief and practice which is at stake. The ECtHR has moved

away from trying to objectify beliefs and practices but cannot be said to have fully embraced a sincerity-based approach.

Regarding the scope of the freedom of religion and belief, the three courts recognize that the freedom of religion and belief entails a right to believe or not to believe. It also entails that religious as well as other beliefs must be respected. Unlike the other two courts, the ECtHR is not inclined to read a right to deviate from general norms into the right. It also runs the greatest risk of substituting the beliefs and opinions of believers with its own.

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

The differences in emphasis between the guiding and informing principles and the impact they have on concept, scope and application of the freedom of religion and belief can partly be explained from the background of the human rights instruments in which the right is codified.

The comparative analysis of the selected cases in the six identified dimensions does not support the general viewpoint put forward by some writers that the (adjudication of the) freedom of religion and belief, has contributed to the secularization of society/ societies. The selected cases show attempts to create space and opportunity for believers to (re-)claim agency over their lives and to contribute to a holistic pluralism.<sup>4</sup>

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

12. Applying a broad, liberal, and subjective-based concept of religion and belief that informs the scope of and the trigger points for the protection.
13. Embracing difference as the consequence and prerequisite 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.

## 6 CHAPTER 6: MINIMALISM IN THE JURISPRUDENCE OF THE SCC, CCSA AND ECtHR: HOW MINIMALIST ARE THE STANDARD INTERPRETATIONS FOR THE FREEDOM OF RELIGION AND BELIEF?

Chapter 6 shows that each of the courts applied minimalist as well as less minimalist features in the selected cases. Each has shown that can stick to the

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4 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.

case at hand, leaving larger issues undecided, being focused on the outcome of the case. Each has shown that it will use incomplete theorization and incrementalist building of jurisprudence. Incomplete theorization is sometimes applied to abstract principles, the outcome, or a rule. All guiding principles have been treated as incompletely theorized agreements.

Several of the selected cases, analyzed in this chapter, have shown, each of the courts will at times use “deep” or “wide” rulings, setting aside the method of minimalism to attain the purposes of minimalism. Finally, each of the courts has adopted a notion of human rights and/or the constitutional being ‘alive’ and thus being adaptive to changing circumstances. Where minimalist elements were present, they have generally aided optimal protection of believers.

The SCC’s selected cases show clear elements of minimalism. The minimalist elements have aided consistency in the approach to freedom of religion and belief. Between the three courts, looking at the cases selected, the CCSA has arguably been best at minimalizing the cost of a decision, by showing much respect and understanding for each party’s position. It has incrementally built a consistent jurisprudence. Even where the current constitutional order is placed against the injustices of the past, this has never undermined minimalist methodology or purposes. Arguably the ECtHR has most often used majoritarian or maximalist elements in its approach. The way the margin of appreciation is used, has often not aided in sticking to a minimalist method or purpose. Incrementalism is visible, but a times also *incidentalism*, which prevents consistency.

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

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

## 7 CHAPTER 7: CONCLUSION; FINDING COMMON GROUND AND DIFFERENCES – AN OPTIMAL INTERPRETATION OF A UNIVERSAL RIGHT?

### 7.1 Conclusions regarding the standard interpretations of the three Courts

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. Freedom and pluralism are the different sides of the same coin. Believers have a right to assert their difference from mainstream society.

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) 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 and thus the three jurisprudential narratives regarding the freedom of religion and belief coincide, diverge, and at times collide. This can be conceptualized by employing the guiding and informing principles, which are reconstructed in Chapter 5.

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. It may however demand reciprocal respect from individuals and communities, in the sense that they all acknowledge that the freedom they demand must also be given to others. This creates tolerance.

The SCC's case law is both praised and lamented in public debates and academic literature. 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. However, the many academic critiques base themselves on the interrelated values underlying the Charter, as interpreted by the SCC itself.

The CCSA's endeavor to develop jurisprudence on the freedom of religion and belief started shortly after the transition to democracy. 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 selected cases show a development of interpretation of the Bill of Rights as transformative values for a new society. 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.

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.

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 the jurisprudence of the Court clearly shows a unique and authentic South African understanding of liberal-democratic constitutionalism.

*Kokkinakis* is acknowledged by scholarly “court watchers” of the ECtHR to be the milestone when it comes to the freedom of religion and belief. Pluralism is always a question of otherness. 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.

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). 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, 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 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*, agnostics like the *Lautsis* and new faiths like the *Raëlians* 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 Pastorul Cel Bun* and *Fernández Martínez*.

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. 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. But a more principled and consistent minimalism, may help in decreasing the use of the “margin of appreciation”.

## 7.2 Answering the research questions

### – *Research Question 1*

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 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 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 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.

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.

### – *Research Question 2*

There are recognizable standard interpretations of the freedom of religion and belief present in the selected cases. The SCC is the most consistent. The CCSA

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 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.

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.

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.

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 and belief. All three courts recognize positive and negative obligations of the state under the freedom of religion and belief.

– *Research Question 3*

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.

The comparison of the minimalist and maximalist elements in the jurisprudence of the three courts discloses that certain parameters trigger minimalism and/or maximalism in the selected cases. These can be conceptualized in five continuums. Optimal minimalism in freedom of religion and belief cases, requires the court deciding the case to keep the balance in each of these continuums (as far as relevant in the case) at the same time.

– *Research Question 4*

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. All three courts have illustrated openness towards judicial borrowing.

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. 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.

Clear elements of minimalism can be found in several cases decided by the three courts. On the other hand, examples of non-minimalistic case-solving can also be observed in the selected cases from each court. Some of the potentials for judicial borrowing are closely related to the parameters for minimalism identified above. For example, the CCSA approach could have led to another outcome in SCC case *Alberta v. Hutterian Brethren*, looking deeper into alternative accommodation, or at least making sure, the colony lost only one case, not the world. Another example is the principled and pragmatic minimalist approach the CCSA took in the Muslim marriage cases, which could have inspired a different take on the ECtHR *Yiğit* case. The method applied by the ECtHR, could have been useful for the CCSA in Prince: when the offense is committed for faith-based reasons, there should be difference regarding the consequences. Thereby differentiating between the criminal and the believing offender.

The freedom of believers is inhibited by painful choices, not just outright suppression. Neutral rules of general applicability can seriously interfere with personal beliefs. Creating exemptions or otherwise accommodating believers, even when the practice is socially controversial, is a solution.

In the dimension of family law and family relations, interventions into the family sphere are best done under the limitations-clause, presupposing the protection of the freedom of religion and belief. Non-recognition of same-sex marriage, purely religious marriage, or cohabitation by the legal system can bring about serious inequalities, which must only be accepted if they endure the test of necessity in a democratic society. Minimalist adjudication leaves room for inter-institutional dialogue, and thus for the legislature to take some subsequent step after courts establish unconstitutional inequality.

The freedom of religion and belief naturally has a collective dimension. The individual and collective dimension depend on one another. Adjudication

must maintain the equilibrium, interpreting both as mutually supportive, not sacrificing either for the benefit of the other. This is especially necessary when it comes to relationship between inside and outside law. Legal pluralism, whether more organic and informal or more 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.

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. Instilling tolerance is one of the objects of public education under the freedom of religion and belief. Reciprocal pluralism requires reciprocal accommodation of faith-based education but also for faith-based communities to accept in some way the surrounding pluralism.

Balancing the freedom of religion and other rights is not a generalist zero-sum game, but requires operationalization of reciprocal tolerance. This requires 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. By judicially acknowledging in competing interests that constitutional rights have been triggered on all sides, constitutional relevance is given to all. While balancing determines the outcome, no party loses the world, but only a case.

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. State neutrality as informed by 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.

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.

The best practices found for optimal protection are the combination of those given in sections 8.4.7, 8.5.5 and 8.6.3.

### 7.3 Overall conclusion

The freedom of religion and belief is inherently connected to freedom as the incompletely theorized aspiration of individuals, groups and nations. 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.<sup>5</sup> Freedom of religion and belief is therefore essential for religion and belief itself. Governments, so the American Declaration of Independence tells us, have been instituted to protect life, liberty and the pursuit of happiness. The “spirit of liberty”, however, “is that spirit which is not too sure that it is right”.<sup>6</sup> 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.

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.

Law’s religion may not always be the dear, intimate and close friend believers instinctively recognize, but it may, nonetheless, be a friend. A friend that enables (re)connection with religious, cultural and philosophical traditions, which precede our modern understandings. This can indeed feed a dynamic and holistic understanding of pluralism, connected to an understanding of our existence as essentially diverse. This I sincerely believe, is to understand our true place in Creation.

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5 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.

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