# 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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# Appendices

# Appendix I1

# The SCC and case studies of the selected SCC cases



## 1 Introduction to this chapter and reading aide

This chapter introduces the Canadian legal system, the SCC, the Charter, as well as the selected cases. Section 2 briefly introduces the Canadian constitutional and legal history. It also gives an impression of the current constitutional and legal system. In section 3, the selected cases are introduced and an overview is provided. Section 4 contains the case studies of the selected cases in chronological order.

## 2 Introducing the Canadian legal system, the SCC and the Charter

This section gives an impression of the constitutional and legal order of Canada and the position of the Supreme Court and the Charter's therein. It provides an overview of Canada's modern constitutional and political history in a nutshell, outlines Canada's contemporary constitutional and legal system and provides an insight into judicial review before the Charter, and the Charter's and the legal impact of other human rights legislation.

Canada has been a pluralist society since colonial times, traditionally consisting of three large groups – the French-Canadians, the English-Canadians and the aboriginal peoples (Inuit and First Nations) – as its constituent population. Ever since colonial times, Canada has also provided a home to several minorities, including people of African/Afro-Caribbean origin, people of Chinese and other East Asian origin, people originating from the Indian sub-continent and various minorities from the Europe and Latin America. Especially since the second half of the 20th century, immigrants from all over the world have contributed to the increasingly multicultural, multi-religious and multi-ethnic Canadian society.

The Canadian Multiculturalism Act was adopted in 1985. The preamble of the Act recalls, amongst other things, the constitutional rights of Canadians, including the prohibition of discrimination, the recognition of the multicultural heritage of Canadians in the Charter, the constitutional recognition of the rights of the aboriginals,[1] and the legal recognition of Canada's bilingualism.

The SCC itself has reiterated on several occasions the importance of multiculturalism as a principle: "Canada rightly prides itself on its evolutionary tolerance for diversity and pluralism. This journey has included a growing appreciation for multiculturalism, including the recognition that ethnic, religious or cultural differences will be acknowledged and respected. Endorsed in legal instruments ranging from the statutory protections found in human rights codes to their constitutional enshrinement in the Canadian Charter of Rights and Freedoms, the right to integrate into Canada's mainstream based on and notwithstanding these differences has become a defining part of our national character."[2]

### 2.1 The constitutional and legal history of Canada in a nutshell

For any constitutional order, it is no easy task to determine where to begin a sketch of the (constitutional) history. Depending on preference and context of the overview, in the case of Canada one could for example start with the history of the peoples who inhabited the territory prior to colonization by European powers. One could start with British constitutional legal history prior to the colonization of North America, French Canadian history prior to the 1763 Treaty of Paris. Arguably for the purpose of this study, the earliest relevant event is the British North America Act (BNA).

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1 *See* Canadian Charter of Rights and Freedoms, s. 7, Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, s. 25.

2 SCC, *Bruker v. Marcovitz*, Case 31212, [2007] 3 SCR 607, 14 December 2007, p. 12.

The BNA was the act that established the Dominion[3] of Canada by the fusion of the North American British colonies. Quebec and Ontario (formerly the subdivisions of the province of Canada) were given equal footing with New Brunswick and Nova Scotia in the Parliament of Canada.[4] This was done to counter the claims of manifest destiny made by the United States of America. The rest of Canada's current provinces and territories acceded to the confederation between 1870 and 1999, as the table shows.

| Provinces of Canada | Entered Confederation |
|---|---|
| Ontario | July 1, 1867 |
| Quebec | July 1, 1867 |
| Nova Scotia | July 1, 1867 |
| New Brunswick | July 1, 1867 |
| Manitoba | July 15, 1870 |
| British Columbia | July 20, 1871 |
| Prince Edward Island | July 1, 1873 |
| Saskatchewan | September 1, 1905 |
| Alberta | September 1, 1905 |
| Newfoundland and Labrador | March 31, 1949 |
| **Territories of Canada** | **Entered Confederation** |
| Northwest Territories | July 15, 1870 |
| Yukon | June 13, 1898 |
| Nunavut | April 1, 1999 |

*Figure 1: Provinces of Canada accession into Confederation*

Like other British dominions, Canada achieved full legislative sovereignty with the passage of the Statute of Westminster 1931, which repealed the Colonial Laws Validity

3 In 1926 Lord Balfour, chairman of the inter-imperial relations committee declared famously about dominions: *"They are autonomous Communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs, though united by a common allegiance to the Crown, and freely associated as members of the British Commonwealth of Nations."*; F. Venter, *Constitutional Comparison; Japan, Germany, Canada and South Africa as Constitutional States,* Juta & Co, Ltd, Cape Town (South Africa), 2000, p. 72.

4 *See further* Venter, *supra* n. 3, at 71.

Act and expressly empowered dominion parliaments to amend or appeal British law and legislation.[5]

In 1949, the UK Parliament passed the British North America Act 1949 that confirmed and gave effect to the Terms of Union agreed to between the then-separate Dominions of Canada and Newfoundland on 23 March 1949.

In the early 1960s, the Quiet Revolution, a reawakening of Quebecois identity, changed the face of Quebec's institutions. The federal government feared a possible unilateral declaration of independence. In 1967, a provincial first ministers' conference was held in Toronto to discuss the Canadian confederation of the future. Amongst numerous initiatives, the conference members examined the recommendations of a Bilingualism and Biculturalism Commission, the question of a Charter of Rights, regional disparities, and the timelines of a general review of the Constitution (the British North America Act).

The 1971 Victoria Conference, a meeting between the federal government and the provinces, brought about the Victoria Charter. The provinces were supposed to confirm their acceptance by June 28, 1971, but a change of premiers in Saskatchewan and the reluctance of the federal government to recommend the Charter to Quebec's legislature, led to the failure of this initiative.

In 1976, the Parti Québécois won the provincial election in Quebec, and in the 1980 Quebec referendum it sought a mandate from the people of Quebec to negotiate new terms of association with the rest of Canada. With an 84% voter turnout, 60% of Quebec voters rejected the proposal.

In 1980, the newly reappointed Prime Minister Pierre Elliott Trudeau and the provincial premiers set an agenda and gave their ministers responsibility for constitutional issues and a mandate to proceed with exploratory discussions to create a new Canadian constitution. However, this met resistance from the separatist government of Quebec. Subsequently, an agreement between the federal government and all provincial governments, except that of Quebec, agreed to Canada's assumption of full responsibility for its own constitution in 1982 (formerly the responsibility of the Parliament of the United Kingdom). The agreement was enacted as the Canada Act 1982 (contains the Constitution Act, 1982) by the British Parliament, and was proclaimed into law by Queen Elizabeth II on April 17, 1982. This was called the *patriation of the Constitution*.[6]

The Canadian Constitution Act 1982 adopted consequently (including the creation of a new Canadian Charter of Rights and Freedoms) came from an initiative by Prime Minister Trudeau to create a multicultural and bilingual society in all of Canada.

5 *See ibid*., p. 73.

6 For a detailed discussion of the process and the Patriation Reference ruling by the SCC, *see* P.C. Oliver, *The Constitution of Independence, Development of Constitutional Theory in Australia, Canada, and New Zealand,* Oxford University Press, New York (USA), 2005, pp. 162-184.

## 2.2 Canada's contemporary structure of government

Following the Canada Act 1982,[7] the UK parliament no longer had any powers with regard to Canada whatsoever[8] and the Canadian Constitution as reiterated and amended by the Constitution Act is the supreme law of the land.[9]

According to the Constitution Act 1982, Canada is a federation which is governed as a parliamentary democracy and a constitutional monarchy with Queen Elizabeth II as its head of state. The Queen's representative, the Governor General of Canada, carries out most of the royal duties in Canada. Canada is a bilingual nation with both English and French as official languages at the federal level.[10]

In the Westminster tradition, Canada does not formally distinguish between the head of state and the head of government. All executive power is vested in the Crown,[11] represented in Canada by the Governor General.[12] Yet in practice, the Governor General represents the head of state and government. The executive powers rest in practice with the head of government, the Prime Minister and the cabinet, which consists of the Ministers of the Crown (official title) and is headed by the Prime Minister.

While the Prime Minister is appointed by the Governor General, the Governor General is appointed by the Crown on the advice of the Prime Minister. Traditionally, there is a rotation between Anglophone and Francophone incumbents for the function of the Governor General. The Prime Minister also advises the Crown with regard to the appointment of lieutenant governors, senators, federal court judges, and heads of Crown corporations and government agencies. To ensure the stability of government, the governor general will usually appoint as Prime Minister the person who is the current leader of the political party that can obtain the confidence of a plurality in the House of Commons[13] and the Prime Minister chooses the Cabinet.

The legislative branch consists of the House of Commons and the Senate. There are 105 Senate seats. Seats are assigned on a regional basis. In conformity with the British model, the Senate is not permitted to originate bills imposing taxes or appropriating public funds. In addition, the House of Commons may, in effect, override the Senate's refusal to approve an amendment to the Canadian Constitution; however, they must wait at least 180 days before exercising this override. Other than these two exceptions, the power of the two Houses of Parliament is theoretically equal.

In practice, however, the House of Commons is the dominant chamber of Parliament, with the Senate very rarely exercising its powers in a manner that opposes the will of the democratically elected chamber.

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7 For an interesting discussion of the development of the legal system in Canada in the 20th century *see* P. Girard, 'Who's Afraid of Canadian Legal History?' in *University of Toronto Law Journal*, vol. 57, no. 4, pp. 727-754 (2007).

8 *See* Canada Act 1982 (UK), 1982, c.11, s.2.

9 *See* Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c. 11, s. 51(1).

10 *See* Canadian Charter of Rights and Freedoms, *supra* n. 1, s.16(1).

11 *See* Constitution Act, 1867 (UK), 30 & 31 Victoria, 1867, c. 3, s. 9.

12 *See ibid.*, s. 10.

13 On the notion of responsible government *see* Venter, *supra* n. 3, at 117.

## 2.3 Canada's contemporary judicial structure

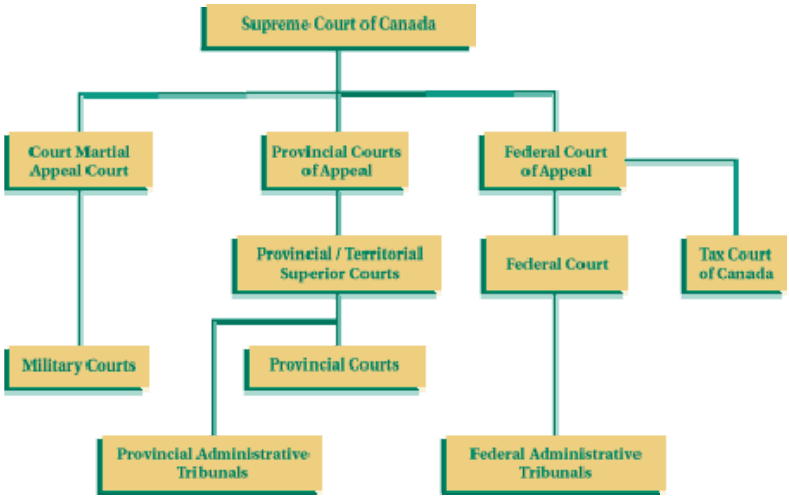


*Figure 2: Structure of the Canadian court system*

The federal judiciary[14] is formed by the Supreme Court, the Federal Court of Appeal, the Federal Court and the Tax Court of Canada. There are also federal administrative tribunals like the Federal Labour Board.

The Supreme Court of Canada is not established in terms of the Constitution but is a creature of ordinary Federal Statute, namely the Supreme Court Act of 1985.[15] Since 1949, the Court consists of nine judges appointed by the Governor General on the advice of the Prime Minister to be representative of the various provinces; three from Quebec, three from Ontario, two from the western provinces and one from the Atlantic provinces. The Chief Justice is appointed alternately from French and English speaking members of the bench.[16] On appeals, the minimum number of judges is five[17] though more often seven or nine judges hear a case.

The Court has "an appellate, civil and criminal jurisdiction within and throughout Canada",[18] and is therefore the hierarchically highest court. It can hear appeals from the Federal Court of Appeals as well as the provincial courts of appeal in cases where constitutional law, federal law and/or provincial law is raised.[19] It can also hear

14 For the figure *see* https://www.justice.gc.ca/eng/csj-sjc/ccs-ajc/02.html.
15 Preceded by the Supreme and Exchequer Courts Act of 1875. *See further* Venter, *supra* n. 3, at 94.
16 *See further ibid.*, p. 95.
17 *See* Supreme Court Act, R.S.C., 1985, c. S-26, s. 25.
18 *Ibid.*, s. 35.
19 *See further* P.W. Hogg, *Constitutional Law of Canada*, Carswell, Toronto (Canada), 5th ed., 2007, ss 8-2. – 8-7; Venter, *supra* n. 3, at 95.

constitutional appeals from the Court Martial Appeal Court. Furthermore, under section 53, the Governor in Council may request advisory opinions from the Court.

### 2.4 The provincial and territorial levels

The provinces and territories have their own executives and legislatures. The provincial court systems consist of provincial or territorial courts, superior courts and appeal courts. The territorial courts are only competent where statutes explicitly permitted this.

### 2.5 Legal system

Acts passed by the Parliament of Canada and by provincial legislatures are the primary sources of law in Canada. Sections 91 and 92 of the Constitution Act 1867, enumerate the subject matters upon which either level of provincial legislatures or the federal Parliament may legitimately pass legislation. These include different areas of private and public law. The federal government has exclusive jurisdiction for the federal legislature, like criminal law, except for the constitution of courts of criminal jurisdiction, but including the procedure in criminal matters[20] and acts relating to Indians and Indian land.[21] Law enforcement, however, including the constitution of criminal courts, is a provincial responsibility. However, in rural areas of all provinces except for Ontario and Quebec, policing is contracted to the federal Royal Canadian Mounted Police.

Except for Quebec, where civil law predominates in private law matters, common law prevails in all other provinces and at the federal level. This also goes for the foundations of Canadian administrative law.[22] While the civil law in Quebec is codified in the Civil Code of Quebec, given the legal history of Quebec, common law prevails in public law matters. Therefore, legislation enacted by the provincial legislature of Quebec should be interpreted following the common law tradition. Likewise, legislation enacted by the federal Parliament in matters of private law, such as the Divorce Act, is to be interpreted following the civil law tradition and in harmony with the Civil Code of Quebec.

The role of the treaties as agreed between the Crown and Aboriginal nations was reaffirmed by section 35 of the Constitution Act 1982, which "recognizes and affirms existing Aboriginal and treaty rights". Section 88 of the Indian Act stipulates that provincial law does not override treaties in force between the government of Canada and any of the First Nations, or the Indian Act and related legislation.

20 *See* Constitution Act 1982, *supra* n. 9, s. 91(27).
21 *Ibid.,* ss 91(27) and 91(24) respectively.
22 *See* Venter, *supra* n. 3, at 114.

## 3 Introducing the selected SSC cases

### 3.1 Introduction: Big M's promise under the new Charter

The right to freedom of religion in Canada is, as mentioned in the previous chapter, enshrined in the Canadian Charter of Rights and Freedoms as well as in instruments of the various provinces and territories.

The SCC has interpreted the freedom of religion in many cases, some of which are dealt with below. The first landmark case regarding the freedom of religion[23] under the newly adopted Charter was *Big M Drug Mart*.[24] This case dealt with the Lord's Day Act, a federal act, which prohibited most commercial activity and work on Sunday. The same act had been subject to a challenge, once before under the 1960 Bill of Rights, in *Robertson and Rosetanni v. the Queen*.[25] Then, the Supreme Court had ruled in favor of the act. Now, however, it struck down the act as being inconsistent with the religious freedom guaranteed by the Charter.

*Robertson and Rosetanni* was explicitly rejected as a precedent in *Big M*, since otherwise the Charter would be circumscribed by "frozen concepts" which existed before it entered into force. The meaning of Charter rights should be determined in light of a generous rather than legalistic interpretation of their purposes.[26] Instead of "frozen concepts", the SCC adheres to the concept of the Constitution as a "living tree", a concept which appears in several of the selected cases.[27] It allows for "progressive interpretation, accommodates and addresses the realities of modern life".[28]

In *Big M*, the Lord's Day Act had as primary purpose to ensure sabbatical observance. Thus, its very purpose was in violation of the freedom of religion. Yet, in this case the court also accepted that where the purpose of an act itself was not unconstitutional, an act could still be null and void if its effects violated the Constitution.[29]

In words repeated many times in subsequent cases (including those selected), the *Big M* judgment, by the pen of Chief Justice Dickenson, sets the spectrum of freedom of religion and belief in Canada:

"A truly free society is one which can accommodate a wide variety of beliefs, diversity of tastes and pursuits, customs and codes of conduct. A free society is one which aims at equality with respect to the enjoyment of fundamental freedoms and I say this without any reliance upon s. 15 of the Charter. Freedom must surely be founded in respect for the inherent dignity and the inviolable rights of the human person. The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination. […] What may appear

23 C.P. Manfredi, *Judicial Power and the Charter, Canada and the paradox of liberal constitutionalism,* Oxford University Press, Don Mills, Ontario (Canada), 2001, p. 54.

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

25 SCC, *Robertson and Rosetanni v. The Queen*, [1963] SCR 651, 18 October 1963.

26 *Ibid.,* paras 361-362. *See also* Manfredi, *supra* n. 23, at 54.

27 *See* SCC, *Reference re Same Sex Marriage*, Case 29866, [2004] 3 SCR 698, 9 December 2004, para. 22.; SCC, *R. v. N.S.*, Case 33989, [2012] 3 SCR 726, 20 December 2012, para. 78.

28 *Reference re Same Sex Marriage*, Case 29866, *supra* n. 27, para. 22.

29 *Robertson and Rosetanni v. The Queen, supra* n. 25, paras 352-353, *see also* para. 372. *See further* Manfredi, *supra* n. 23, at 55.

good and true to a majoritarian religious group, or to the state acting at their behest, may not, for religious reasons, be imposed upon citizens who take a contrary view. The Charter safeguards religious minorities from the threat of 'the tyranny of the majority'."[30]

*Big M* was a milestone which in subsequent judgments was not only cited and reaffirmed, but also further evolved.

### 3.2 Overview of selected cases

In the period from 1990 until 2015, 26 cases regarding the freedom of religion and belief were decided by the Canadian Supreme Court (see section 1.7). From these, the following 15 cases were selected.

| | |
|---|---|
| 1. | R. v. Sioui, [1990] 1 S.C.R. 1025; 24 May 1990 |
| 2. | Lakeside Colony of Hutterian Brethren v. Hofer, [1992] 3 S.C.R. 165; 29 October 1992. |
| 3. | P. (D.) v. S (C.), [1993] 4 S.C.R. 141; 21 October 1993. |
| 4. | B. (R.) v. Children's Aid Society of Metropolitan Toronto, [1995] 1 S.C.R. 315; 27 January 1995. |
| 5. | Trinity Western University v. College of Teachers, 2001 SCC 31; 17 May 2001. |
| 6. | Chamberlain v. Surrey School District No. 36, 2002 SCC 86; 20 December 2002. |
| 7. | Syndicate Northcrest v. Amselem, 2004 SCC 47; 30 June 2004. |
| 8. | Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v. Lafontaine (Village), 2004 SCC 48; 30 June 2004. |
| 9. | Reference same sex marriage, 2004 SCC 79; 9 December 2004. |
| 10. | Multani v. Commission scolaire Marguerite-Bourgeoys, 2006 SCC 6; 2 March 2006. |
| 11. | Bruker v. Marcovitz, 2007 SCC 54; 14 December 2007. |
| 12. | A.C. v. Manitoba (Director of Child and Family Services), 2009 SCC 30; 26 June 2009. |
| 13. | Alberta v. Hutterian Brethren of Wilson Colony,2009 SCC 37; 24 July 2009. |
| 14. | R. v. N.S. - 2012 SCC 72 - [2012] 3 SCR 726; 20 December 2012. |
| 15. | Mouvement laïque québécois v. Saguenay (City) - 2015 SCC 16 - [2015] 2 SCR 3, 15 April 2015. |

The selection only includes cases in which the freedom of religion and belief features as the central right. 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. This includes cases in which the freedom of religion is raised as a major

30 *R. v. Big M Drug Mart Ltd.*, Case 18125, *supra* n. 24, at 336-37.

argument, although the central right is equal treatment of gender of sexual orientation or in which the freedom of religion is raised in combination with equal treatment, freedom of opinion or another right.

4 Case studies of the selected cases

4.1 R. v. Sioui, [1990]

| | |
|---|---|
| Essence: | Treaty rights of members of First Nations to practice their culture and religion within a protected park area, where their actions are prohibited by the park regulations. |
| Dimension: | Freedom of religion and belief and group autonomy. |
| Lower courts: | First and second instance found against the Hurons, Court of Appeal found in their favor. |
| Majority: | 9:0. Found in favor of the Hurons. Majority opinion by Lamer. |
| Dissenting: | None |

In *Sioui*,[31] the invoked rights do not follow from the Charter, but from the freedom of religion as guaranteed by a treaty between the Hurons and General Murray which was signed in the 18th century. A couple of members of the Huron band on the Lorette Indian reserve were camping in the Jacques-Cartier Park, had a campfire, and cut down trees for the purpose of the camp and fire. According to the Regulation of the park, adopted in the Quebec Parks Act, this was not allowed. They were convicted by the first instance court[32] for cutting down trees, camping, and making fires in places not designated in Jacques-Cartier Park contrary to the Regulation respecting the Parc de la Jacques-Cartier, adopted pursuant to the Quebec Parks Act. Yet the respondents believed that they were entitled by the aforementioned treaty to act as they had done, in practice of ancestral customs.[33] The respondents appealed to the Superior Court against this judgment by way of trial *de novo*. They admitted committing the acts with which they were charged in the park, which is located outside the boundaries of the Lorette reserve. However, they alleged that they were practicing certain ancestral customs and religious rites which are the subject of aforementioned treaty.[34]

The first and second instance courts did not find in favor of the defendants, because respectively the issue of the treaty had not been raised and because it was not found to be a treaty. The Court of Appeal found in favor of the defendants and considered the treaty to be valid and relevant.

31 SCC, *R. v. Sioui*, Case 20628, [1990] 1 SCR 1025, 24 May 1990.

32 The provincial court of Quebec, the Court of Quebec was formally referred to as the Court of Sessions of the Peace.

33 *R. v. Sioui.*, *supra* n. 31, pp. 8-13.

34 *Ibid.*

The SCC unanimously found the treaty to be valid[35] and relevant.[36] It also found unanimously that under the Indian Act and the treaty, the defendants had the right to practice their culture and religion within the boundaries of the park.

The SCC first established that the treaty still had legal force under Canadian law.[37] Pursuant to section 88 of the *Indian Act* and section 35 of the Charter, treaties between the First Nations and the Crown were still binding for the government. Canada respects these treaties as a matter of moral and legal principle. Such treaties can be a source of collective rights. The treaty in question, as many similar ones, explicitly recognizes the rights of the Hurons to practice their ancestral customs.[38]

But the fact that the treaty was still valid, did not necessarily still mean that the conduct in the Park was protected. After all, the treaty did not establish in which territory the rights to freely "carry on their customs and their religion" could be exercised. On the other hand, "[…] for a freedom to have real value and meaning, it must be possible to exercise it somewhere."[39] Hence, the case touched upon a legal pluralism which followed from the legal recognition of the treaties with Canada's First Nations.

The "liberal and generous approach that must be adopted towards Indians rights" which the SCC adopted in such matters,[40] and which led to the conclusion that the treaty was still valid, also required taking into account the traditions and the history of the tribe concerned[41] when establishing the scope and meaning of the rights.

Back when the treaty was concluded, it served to reconcile the competing interests of the English to expand and the Hurons to preserve their customs and way of life. Hence, even nowadays it must be interpreted to guarantee the Hurons the free exercise of their culture and religion in the entire territory unless incompatible with the other interests of the state.[42] The interest of the state with regard to the Jacques-Cartier Park was the preservation of nature for the benefit of society as a whole. This interest did not at all collide with the interest of the Hurons.

Absolute prohibition of the exercise of rites and customs could only be justified if they were not only "contrary to the purpose underlying that occupancy, it must prevent the realization of that purpose". "Exclusive use is not an essential aspect of public ownership."[43] The SCC concluded that neither the nature nor the purpose of recreational use were threatened or prevented by the use of the site by the members of the Hurons.[44] Hence, the blanket prohibition was unjustified. The purposes of the regulation could be reconciled with the rights of the Hurons to practice their customs. This resulted in a different law to be applied for members of the Huron nation, vis-à-vis all other users of the park.

35 *Ibid.*, p. 21.
36 *Ibid.*, pp. 39-40.
37 *Ibid.*, pp. 45-46.
38 *Ibid.*, pp. 8-13.
39 *Ibid.*, p. 47.
40 *Ibid.*, pp. 45-46.
41 *Ibid.*, p. 48.
42 *Ibid.*, pp. 50-51.
43 *Ibid.*, p. 53.
44 *Ibid.*

## 4.2 Lakeside Colony of Hutterian Brethren v. Hofer [1992]

| | |
|---|---|
| Essence: | Legality of the expulsion of a member of a religious community following a conflict, in accordance with the internal rules of that community. |
| Dimension: | Freedom of religion and belief and group autonomy. |
| Lower courts: | Found in favor of the community. |
| Majority: | 6:1. Found in favor of Hofer. Majority opinion by Gonthier. |
| Dissenting: | McLachlin. |

In *Hofer*,[45] a member of the Lakeside Colony, Daniel Hofer, was expelled by the leadership of his community. The expulsion was triggered by a conflict between Hofer and others with the leadership. Hofer CS were of the opinion that the leadership had wrongly accepted to make payments to another community, as to compensate for a patent-infringement. Hofer himself claimed to be the inventor of the patented mechanism.

The Hutterites are a minority religious sect, a communal branch of Anabaptists who, like the Amish and Mennonites, trace their roots to the Radical Reformation of the 16th century. A number of questions arose as to the interaction of the various parts of the church framework. A key question was whether expulsion could be effected by a Board of Managers operating under the church's constitution, or whether it could be effected by a traditional church council not provided for in the constitution.[46]

The matter of expulsion was dealt with explicitly in Article 39 of the statute of the Hutterites which reads:

> "Any member of the Colony may be expelled or dismissed from the Colony at any general or special meeting of the Colony upon a majority vote of the voting members thereof for his or her having left or abandoned the Colony or having refused to obey the rules and regulations of the Hutterian Brethren Church or of the Colony.[…] We acknowledge that all Canadians have the right of freedom of religion, but we hereby covenant, promise and agree that if any of us shall change his or her religion and shall cease to be a member of the Hutterian Brethren Church, that he or she shall leave the Colony".[47]

Consequent to the expulsion, the colony went to court and asked that the court order Hofer Sr. and his associates to vacate the colony land permanently and return all colony property to the colony. The colony also asked that the court make a declaration that Daniel Hofer Sr. and his sons were no longer members of the colony. This case was thus not about the freedom of religion proper, but about the autonomy of religious communities and how courts should deal with internal disputes.

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

46 *Ibid.,* pp. 2-3.

47 *Ibid.,* pp. 22-23.

The trial judge found in favor of the colony and the judgment was upheld on appeal.[48] The SCC found in favor of Hofer and allowed the appeal, with only justice McLachlin dissenting. The majority opinion was delivered by Gonthier.
The majority found in the interest of Hofer and his sons and allies.[49] Mr. Hofer felt his rights were unduly restricted and refrained from obeying the community's authority. The majority of the court found that his right of procedural fairness in the light of the state's secular law had been breached. This outweighed autonomy considerations.

McLachlin found in the interest of the community.[50] She made a great effort to understand the structures and procedures of the Hutterites as they understood them themselves, and considered them "open and eminently fair".[51] She concluded that "the problem lay not in unfair procedures or lack of opportunities for hearing; the problem lay rather in the fundamental divergence between the parties, a divergence which doomed any proceedings, no matter how just, to failure"[52] and that Hofer was not willing to accept the decision taken by the community leadership.[53] This touched on the very essence of autonomy of the community.[54]

### 4.3 P. (D.) v. S. (C.) [1993]

| | |
|---|---|
| Essence: | Criterion of best interests of the child in a dispute between divorced parents over the intensity in which the father may teach their daughter his religion as a Jehovah's Witness. |
| Dimension: | Freedom of religion and belief, (family law) and family relations. |
| Lower Courts: | Found in favor of the mother. |
| Majority: | 5:2. Found in favor of the mother. Majority opinion by L'Heureux-Dubé. Separate concurring opinion of Cory and Iacobucci. |
| Dissenting: | Sopinka and McLachlin. |

The parties lived together over a period of three years. In the last year, their daughter C. was born. Upon separation, the parties agreed in writing that the respondent (the mother) would have legal custody of the daughter and that the appellant (the father) would exercise his right to access on 24 hours' notice. This agreement was ratified by judgment of the Superior Court.

Subsequently, relations between the parties deteriorated, mainly because of problems involving the exercise by the appellant of his right to visit C. In particular,

48 *Ibid.*, p. 13
49 *Ibid.*, p. 73.
50 *Ibid.*, pp. 78-83
51 *Ibid.*, p. 82.
52 *Ibid.*, p. 83.
53 *Ibid.*
54 *Ibid.*

the mother, a Roman Catholic, accused the father of indoctrinating their daughter, who was 3½ years old at the time in the Jehovah's Witnesses religion.

Consequently, the appellant made a motion to the Superior Court to set aside the agreement. He asked for the child's custody or, alternatively, to be given greater access rights. The Superior Court dismissed the appellant's motion and ordered restrictions on request of the mother. That judgment was affirmed on appeal.[55]

The majority of the SCC moved to dismiss the appellant's appeal. L'Heureux-Dubé delivered the majority opinion. Justices Cory and Iacobucci delivered a joint concurring opinion. Beverly McLachlin authored the dissenting opinion for herself and Justice Sopinka.

*P. (D.) v. S. (C.)* in essence was about whether or not C.'s father was (1) indoctrinating the child; and (2) whether this created any kind of adverse effects on C. The child repeated what her father had told her that it was "Jehovah [who] made [C.], [who] made […] everything". The child also repeated what her father had taught her about the celebration of holidays deemed pagan by Jehovah's Witnesses theology (Christmas). Here, there was a conflict with the upbringing as intended by the mother.

Obviously, the child's utterances reminded the mother of the faith of her ex-partner, and the frequency of the utterances contributed to a certain level of irritation. The order given by the lower courts restricted the appellant in seeing his daughter and teaching her his faith. The appellant argued that the order did not only violate his freedom of religion to propagate his religion to his daughter, but also that of his daughter to be exposed to his propagation of his religion.[56] The respondent held that the appellant could not rely on their daughter's freedom of religion, as one cannot plead in another's name.[57]

In interpreting what the child's best interest was, the majority rejected the notion that harm alone should be the factor, but argued that it was merely one of the factors which a court should take into account when estimating the child's best interest.[58] They believed that the evidence which showed the impact the fathers propagation had on the child, showed that the level of influence was not in her best interest.[59]

According to the majority, there was neither an infringement of the freedom of religion, nor was there any infringement of his freedom of expression as the court orders only prohibited him from indoctrinating the child.[60] The majority also rejected his claim that the lower courts discriminated against Jehovah's Witnesses, and as he had not shown that his freedom of association was infringed, they rejected that claim as well.[61]

The concurring judges, like the dissenting judges, agreed with the majority that the best interest of the child was the applicable standard. However, they were not convinced that differences of opinions of parents regarding religious questions or the frank discussion of their differing religious perceptions by both parents with the

55 SCC, *P. (D.) v. S (C.)*, Case 22296, [1993] 4 SCR 141, 21 October 1993, pp. 12-17.
56 *Ibid.*, p.19.
57 *Ibid.*, p. 21.
58 *Ibid.*, pp. 47-48.
59 *Ibid.*, p. 51.
60 *Ibid.*, p. 52.
61 *Ibid.*, p. 53.

children would automatically be harmful.[62] Nevertheless, they did not grant the appeal because they believed that in the end the trial judge was best equipped to analyze the evidence.[63]

McLachlin wrote the dissenting opinion for herself and Sopinka. They agreed with the majority that the best interest of the child was the right and constitutional standard.[64] But when applying the best interest based on the facts, McLachlin reached a conclusion that while the situation must have created complexity for the child, this did not mean that there was harm. Ergo, her best interest was not at stake. The evidence did not suggest that she was adversely affected by getting to know "her father fully, including his religious values".[65] "[…] The fact that the mother wanted, as she put it, her child to grow up with the same joy in Halloween and Christmas as she had grown up with […] is insufficient to support an order forbidding the father to impart his views on such holidays. Nor is the fact that the mother felt the father spoke too much about his religion with the child sufficient in itself to justify an order restricting him from 'continually' doing so."[66]

### 4.4 B. (R.) v. Children's Aid Society of Metropolitan Toronto [1995]

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|---|---|
| Essence: | Criterion of best interests of the child in overruling the parent's decision to refuse medical treatment for their infant based on objections grounded on religious beliefs. |
| Dimension: | Freedom of religion and belief, (family law) and family relations. |
| Lower Courts: | Found against the parents. |
| Majority: | 9:0. Dismissed the appeal of the parents. Majority opinion by La Forest also on behalf of Gonthier and McLachlin. Joint sperate opinion by Iacobucci and Major. Separate opinion by Lamer. Sperate opinion by Sopinka. |
| Dissenting: | L'Heureux-Dubé was dissenting on the cross-appeal which was not of relevance for the constitutional questions. |

In *Children's Aid Society of Metropolitan Toronto*, Jehovah's much like *A.C. v. Manitoba* (see below), the central features were the religious objection of Jehovah's Witnesses to blood transfusions even in emergency cases, on the one hand, and the "best interest of the child" criterion, on the other hand. In this case, Jehovah's Witness parents had a prematurely newborn who was seriously ill. Within the first few weeks of her life, Sheena exhibited many physical ailments and received a number of medical treatments. At the parent's request, the doctors avoided the use of a blood transfusion. When Sheena was one month old, the attending physicians believed that her life was

62 *Ibid.*, pp. 62-63.
63 *Ibid.*, p. 64.
64 *Ibid.*, pp. 64-68.
65 *Ibid.*, p. 65.
66 *Ibid.*

in danger and that she might require a blood transfusion to treat potentially life-threatening congestive heart failure.

The Provincial Court (Family Division) granted the Children's Aid Society a 72-hour wardship, based on the Child Welfare Act. A second Provincial Court order then terminated the respondent's wardship, and the child was returned to her parents. The appellants appealed both orders to the District Court, which dismissed the appeal and awarded costs against the Attorney General of Ontario, who had intervened in the proceedings. The Court of Appeal dismissed the appellants' appeal and the Attorney General of Ontario's cross-appeal on the issue of costs.

The SCC unanimously upheld the lower court's judgment, while Justice L'Heureux-Dubé was dissenting on the cross-appeal which was not of relevance for the constitutional questions. The majority opinion was delivered by La Forest, also on behalf of Gonthier and McLachlin. Iacobucci and Major delivered a joint separate opinion, Lamer and Sopinka each delivered a separate opinion.

According to La Forest's majority opinion, the freedom of religion and belief of the parents was legitimately limited under the limitations clause. The majority argued that while the freedom of religion does encompass a right to make choices for the children, the state had to assume a role in protecting the rights of infants who were not yet in a position to speak for themselves. This was especially the case when the decision to be made by the parents might involve the death of the infant. Hence, there was an infringement of the freedom of religion which was justified by the limitations clause.[67]

The majority opinion noted that the Charter did not afford protection to the integrity of the family unit as such. "The Canadian Charter, and s. 7 in particular, protects individuals". The liberty of parents followed from this. From the parental liberty, the concept of integrity of the family unit could be derived. "[L]iberty does not mean mere freedom from physical restraint. In a free and democratic society, the individual must be left room for personal autonomy to live his or her own life and to make decisions that are of fundamental personal importance."[68]

The challenged Act infringed upon the parental "liberty" protected in the Charter.[69] However, the majority was of the opinion that this had been done in accordance with the principles of fundamental justice, because they were entitled to fair and reasonable notice, access and information, with due regard for the nature of the proceedings and the urgency of the medical situation.[70]

With regard to the freedom of religion and belief, the majority reiterated that it did encompass the right of parents to educate their children in accordance with their religious beliefs. Similarly, this freedom included the right to choose medical and other treatments for one's children. While the purpose of the challenged Act did not interfere with said rights of parents, the Act did have effects which could interfere with these rights.

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

68 *Ibid.*, para. 72.

69 *Ibid.*, para. 87.

70 *Ibid.*, para. 102.

However, the majority noted that in accordance with standing case law, the freedom of religion was not absolute; it had its limits especially when it comes to acting on the basis of beliefs.[71] Rather than formulating any internal limits to the freedom of religion, the majority deemed it proper to let the state justify its interference under the limitations clause.[72] The necessity of the medical treatment was taken as fact, and the parents conceded that there was a pressing and substantial objective for the Act. Given the fair and reasonable procedure set out in the Act, the interference must also be considered proportional and thus justified under the limitations clause.[73]

The majority rejected the parent's reference to the religious freedom of the child, because S. was not old enough to entertain religious beliefs of her own.[74]

The separate concurring opinion of Justices Iacobucci and Major stated that the parents, who were overruled in accordance with the Children's Welfare Act, could not benefit from the protection of the liberty interest in section 7 or freedom of religion. Hence there was no infringement, and thus no need for justification by the limitations clause.[75] They believed that because the Act was instrumental to securing the life, liberty and security of the child, the parental decision to withhold treatment was outside the sphere of "liberty".[76] This was the limit of the freedom of religion of the parents.[77]

They also believed the freedom of religion could not be invoked on behalf of the child because she had never expressed "agreement with the Jehovah's Witnesses faith" and that her freedom of religion and conscience required that she lived long enough to make her own choices. "Freedom of religion" should not encompass activity that so categorically negated the "freedom of conscience" of another.[78]

Lamer is of the opinion that the liberty interest and the freedom of religion and belief had not been infringed because it included neither the right of parents to choose or refuse medical treatment for their children, nor a general right to bring up or educate their children without interference by the state.[79] In his analysis he explained why, in his opinion, the majority construed the meaning of liberty too broadly.[80]

Sopinka concurred with the majority, yet disagreed with them in one regard. She was of the opinion that it was unnecessary to determine whether a liberty interest was engaged, because in order to do so one must first establish a breach of fundamental justice, which was not the case.[81]

71 *Ibid.,* para. 107.
72 *Ibid.,* para. 109-110.
73 *Ibid.,* para. 112-113.
74 *Ibid.,* para. 103.
75 *Ibid.,* para. 208.
76 *Ibid.,* paras 213-221.
77 *Ibid.,* paras 224-230.
78 *Ibid.,* paras 224-230.
79 *Ibid.,* para. 1.
80 *Ibid.,* paras 5-39.
81 *Ibid.,* para. 206.

## 4.5 Trinity Western University v. College of Teachers [2001]

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|---|---|
| Essence: | Refusal by the British Colombia College of Teachers to accept graduates from a faith-based university which obliged staff and students to sign an agreement, encompassing amongst others to not engage in same-sex relationships. |
| Dimension: | Freedom of religion and belief and balancing with others' rights. Freedom of religion and belief and education. Freedom of religion and belief and group autonomy. |
| Lower Courts: | Found that the BCCT had no authority to deny the application of TWU on the basis of discrimination. |
| Majority: | 8:1. Affirmed the challenged judgment and found in favor of TWU. Majority opinion by McLachlin. |
| Dissenting: | L'Heureux-Dubé. |

Trinity Western University (TWU) is a Christian private university, which obliges students to sign a "Community Standards" document. It contains a paragraph in which students declare to refrain from biblically proscribed conduct, including homosexual behavior. Faculty and staff are required to sign a similar document.

TWU offers a teacher training program. In order to assume full responsibility for the teacher education program, TWU applied to the British Columbia's College of Teachers (BCCT). The Council of the BCCT rejected the application on the grounds of discriminatory practices of TWU, among other things. BCCT's denial is based on the argument, that labeling homosexual behavior as sinful has the effect of excluding gay people and therefore amounts to discrimination.

Both the Supreme Court of British Colombia and the Court of Appeal decided that BCCT did not have the authority to deny the application on alleged discriminatory practices.[82] A majority of eight justices in the SCC rejected the appeal by BCCT. Justice L'Heureux-Dubé dissented. Chief Justice McLachlin authored the majority opinion. Essentially, two questions were before the Court: whether BCCT had jurisdiction to take discrimination into account; and if so, given the evidence, whether it had taken the right decision with regard of the application of TWU.[83]

The SCC majority found that "teachers are a medium for the transmission of values"[84] and that it "is obvious that the pluralistic nature of society and the extent of diversity in Canada are important elements that must be understood by future teachers because they are the fabric of the society within which teachers operate and the reason why there is a need to respect and promote minority rights".[85] Hence, BCCT was entitled to take alleged discrimination into account under the reference to public interest.[86]

82 SCC, *Trinity Western University v. College of Teachers*, Case 27168, [2001] 1 SCR 772, 17 May 2001, paras 1-7.
83 *Ibid.*, para. 8.
84 *Ibid.*, para. 13.
85 *Ibid.*, para. 13.
86 *Ibid.*, paras. 13-14.

The majority was of the opinion that the standard for the second question was "correctness".[87] At issue was "to determine the scope of freedom of religion and conscience and to weigh these rights against the right to equality in the context of a pluralistic society". "The Council of BCCT is not a legal body, but the accommodation of beliefs is a legal question."[88]

Applying this standard, the Court, taking into account that TWU was a private institution and could also rely on the freedom of religion, found that the existence of the code of conduct as such did not provide enough evidence to conclude negatively on the application of TWU. Also, the Canadian Charter was not applicable because TWU was a private institution.[89] In the majority's assessment, the Community Standards expressed that "TWU is not for everybody; it is designed to address the needs of people who share a number of religious convictions". "A homosexual student would not be tempted to apply for admission and could only sign the so-called student contract at a considerable personal cost." "That said, the admissions policy of TWU alone is not in itself sufficient to establish discrimination as it is understood in our s. 15 jurisprudence."[90]

The Court acknowledged that gays and lesbians "whether as individuals or couples, form an identifiable minority who have suffered and continue to suffer serious social, political and economic disadvantage",[91] and that it was therefore necessary to take into account whether TWU had an adverse effect on realizing the goal of ensuring equality of this group in the educational environment. However, the Court also noted that BCCT had to take the freedom of religion and the prohibition of discrimination on grounds of religion into account. Enforcing a majority view on same-sex activity onto a religious minority was also not the purpose of the Charter: "The Charter safeguards religious minorities from the threat of the tyranny of the majority."[92]

Because neither of the two rights was absolute, the correct decision needed to reconcile the "religious freedoms of individuals wishing to attend TWU with the equality concerns of students in B.C.'s public school system".[93] Reconciliation was possible through "proper delineation of the rights and values involved".[94] The Court found that BCCT did not take the freedom of religion into account properly. Without concrete evidence, it simply assumed that the religious views held by the institution would limit the consideration with regard to LGBTQ+ students. BCCT thereby placed a burden on the members of a particular religious group. Instead, BCCT should have determined whether in reality there was a conflict between rights.[95]

If individual teachers, whether or not graduates from TWU, were found to discriminate against LGBTQ+ students, disciplinary measures were called for.[96] Also,

87 *Ibid.*, paras. 15-19.
88 *Ibid.*, para. 19.
89 *Ibid.*, para. 25.
90 *Ibid.*
91 *Ibid.*, para. 27.
92 *Ibid.*, para. 28, citing *R. v. Big M Drug Mart Ltd.*, Case 18125, *supra* n. 24, at 336-37.
93 *Ibid.*
94 *Ibid.*, para. 29.
95 *Ibid.*, paras 31-33.
96 *Ibid.*, paras 35-37.

because TWU was not the only institution supplying graduates to become teachers in British Colombia, there was no risk that their acceptance would negatively impact the number of LGBTQ+ people who become teachers.[97]

Dissenting Justice L'Heureux-Dubé warned that to wait until discrimination actually materialized was taking a risk. Rejecting the application would ensure that TWU graduates had to follow a year at a different institution first. So, one also ensured a period of reflection to a certain degree. She noted that especially for homosexual and bisexual students, an educational environment in which they could rely on support from their teachers was essential. After all, these students might also experience distress from finding a way to "come out" to their parents, family and friends.[98]

She was of the opinion that the proper standard of judicial review was not "correctness" but "patent unreasonableness".[99] Therefore, she believed that BCCT under the Teaching Profession Act had a wide discretion.[100]

Unlike her colleagues, L'Heureux-Dubé was of the opinion that BCCT did not have to take the freedom of religion into account when making its decisions, because compared to equality, other values, like the freedom of religion, were not germane to the public interest in ensuring that teachers had the requisites to foster supportive classrooms environments in public schools.[101] Equally, BCCT did not have to balance rights, which was the task of a human rights body and not of an institution for the benefit of the public school system.[102]

The religion of TWU did not play a role in the decision, nor should it have, because that would have been discriminatory and an error of law. But BCCT did have to take the impact of a discriminatory practice into account.[103] L'Heureux-Dubé compared this case to the case of Bob Jones University before the US Supreme Court.[104] Bob Jones University discouraged interracial dating on religious grounds. Because this was contrary to the racial equality envisaged by the Constitution, the tax exempt for educational institutions was withdrawn.

97 *Ibid.*, paras 35-38.
98 *Ibid.*, paras 86-91.
99 *Ibid.*, paras 50-51.
100 *Ibid.*, para. 54.
101 *Ibid.*, para. 60.
102 *Ibid.*, para. 65.
103 *Ibid.*, para. 63.
104 *See* US Supreme Court, *Bob Jones University v. United States*, 461 US 574 (1983), 24 May 1983.

## 4.6 Chamberlain v. Surrey School District No. 36, [2002]

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|---|---|
| Essence: | Refusal by the School Board to approve learning material for Kindergarten 1 (K1) which depicted same-sex families. This was argued on the basis of conflict that children raised in accordance with certain beliefs might experience. |
| Dimension: | Freedom of religion and belief and balancing with others' rights. Freedom of religion and belief and education. |
| Lower Courts: | The British Columbia Supreme Court overruled the School Board. The Court of Appeal overruled this and found the decision within the School Board's jurisdiction. |
| Majority: | 7:2. Overruled the denial. Majority opinion by McLachlin. Justice LeBel separate concurring opinion. |
| Dissenting: | Justice Gonthier and Bastarache dissented. |

The B.C. School Act confers on the Minister of Education the power to approve basic educational resource materials to be used in teaching the curriculum in public schools and confers on school boards the authority to approve supplementary educational resource material, subject to Ministerial direction. Mr. Chamberlain, a Kindergarten-Grade One ("K-1") teacher twice requested the Surrey School Board to approve three books which depicted same-sex parented families.

The board passed a resolution declining to approve the books. The board's overarching concern was that the books would engender controversy in light of some parents' religious objections to the morality of same-sex relationships. The board also felt that children at the K-1 level should not be exposed to ideas that might conflict with the beliefs of their parents.

The British Columbia Supreme Court found the School Board's resolution violated the School Act, because members of the board who had voted in favor of the resolution were significantly influenced by religious considerations. The Court of Appeal set aside the decision of the BC Supreme Court on the basis that the resolution was within the board's jurisdiction.[105]

A majority of six judges found in favor of the appellants to quash the decision of the School Board, Chief Justice McLachlin writing for the majority. Justice LeBel concurred with the majority. Justice Gonthier and Bastarache dissented.

The majority and the dissenting judges agreed that the proper standard of review was reasonableness and not correctness or patent unreasonableness.[106] They disagreed whether the decision by the School Board was reasonable.[107] The reason the majority regarded the decision as being opposed to the School Act was because the board, while considering the possible religious objections of parents to the books,

105 SCC, *Chamberlain v. Surrey School District No. 36*, Case 28654, [2002] 4 SCR 710, 20 December 2002, Introduction, paras 2-3.

106 *Ibid.*, para. 3.

107 *Ibid.*

did not consider the possible interest of LGBTQ+ parents and the fact that children need to know about the diversity in Canadian society.[108]

While the standard was one of administrative law, the decision to approve or not approve the books clearly had a human rights dimension according to the majority. After all, the "[…] board must decide whether to accommodate certain parents' concerns about the books at the risk of […] denying certain children the chance to have their families accorded equal recognition and respect in the public school system".[109]

The School Act provides that "[a]ll schools […] must be conducted on strictly secular and non-sectarian principles." According to the majority, this did not rule out taking religion and belief into consideration, but it did rule out any attempt to use the religious views of one part of the community to exclude from consideration the values of other members of the community. The School Act's emphasis on secularism reflected the fact that Canada is a diverse and multicultural society, bound together by the values of accommodation, tolerance and respect for diversity.[110]

The School Board's decision did not pass the standard of reasonableness, because the board had not inquired into the relevance of the books for the curriculum and had not taken the position of children of same-sex families seriously.[111] The majority did not deny that the materials could cause some cognitive dissonance amongst children who grew up in households with morality concerns regarding homosexual relationships.

But, the majority argued, "[e]xposure to some cognitive dissonance is arguably necessary if children are to be taught what tolerance itself involves. […] [T]he demand for tolerance cannot be interpreted as the demand to approve of another person's beliefs or practices. When we ask people to be tolerant of others, we do not ask them to abandon their personal convictions. […] Children cannot learn this unless they are exposed to views that differ from those they are taught at home."[112]

Besides depicting quite factually the diversity of family relationships in Canada in the books, the "only additional message of the materials appears to be the message of tolerance. Tolerance is always age-appropriate".[113]

The concurring opinion of LeBel stated that while the majority was right in analysis and outcome, according to him the decision of the board could not even withstand the most deferential of the standards, because it was illegal. The board assumed an authority it did not have, because it stepped outside the secular and non-sectarian confinements of the public school system.[114]

Gonthier and Bastarache agreed with the standard of review as applied by the majority. Yet exactly because of this, they dismissed the appeal. In their opinion, the School Act neither required nor opposed learning material which would teach children about same-sex families. Hence, the School Board was at liberty to decide either way.

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108 *Ibid.,* paras 1-3.
109 *Ibid.,* para. 11.
110 *Ibid.,* para. 21.
111 *Ibid.,* para. 55.
112 *Ibid.,* para. 66.
113 *See ibid.,* para. 69.
114 *Ibid.,* paras 188-215.

Parents were the primary actors in education, while the state played a secondary role.[115] Thus, parents had the right to "[…] rear their children according to their conscience, religious or otherwise, as a fundamental aspect of freedom of conscience and religion, protected by s. 2(a) of the Charter".[116] Both the group which believed that same-sex relationships were morally equivalent to different-sex relationships and the group which rejected same-sex relationships on moral grounds, were protected by the Charter.[117] "A truly free society is one which can accommodate a wide variety of beliefs, diversity of tastes and pursuits, customs and codes of conduct. […]."[118] "Nothing in the Charter or a proper understanding of pluralism demands that atheistically based moral positions trump religiously based moral positions on matters of public policy."[119]

Accordingly, the School Board had to strike a balance between the competing rights.[120] Either way, the decision would have been constitutional.[121] In order to prevent cognitive dissonance, the School Board could rightly come to the conclusion that the books were not appropriate given the local context. Even more so, because the school also maintained a staunch anti-discrimination policy.[122]

### 4.7 Syndicate Northcrest v. Amselem, [2004]

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|---|---|
| Essence: | Dispute between the syndicate administering an apartment building and Orthodox Jewish tenants over *succahs* (ceremonial huts for Sukkot holiday) on their balconies. |
| Dimension: | Freedom of religion and belief and personal freedom. |
| Lower Courts: | Superior Court found for the syndicate. The Court of Appeal affirmed. |
| Majority: | 5:4. Found for Amselem C.S. (appellants) and overruled the Court of Appeal. Majority opinion by Iacobucci. |
| Dissenting: | Jointly Bastarache, LeBel and Deschamps. Separately Binnie. |

The appellants in this case were all Orthodox Jews and co-owners of residential units in "Place Northcrest", a luxury building in Montreal. According to the by-laws, the balconies of the apartments were common property, yet reserved for the exclusive use of the owners. The conflict between the syndicate and the owners involved *succahs* on balconies during the Jewish holiday of *Sukkot*. A *succah* is a small enclosed temporary hut, in which Jews are commanded to "dwell" temporarily during *Sukkot*.

After Mr. Amselem had put up his *succah* on the balcony for the first time, the Syndicat Northcrest requested its removal, claiming it was in violation of the resid-

115 *Ibid.*, para. 102.
116 *Ibid.*, para. 104.
117 *Ibid.*, para. 126.
118 *Ibid.*, para. 135.
119 *Ibid.*, para. 137.
120 *Ibid.*, para. 141.
121 *Ibid.*, para. 147.
122 *Ibid.*, paras 169-185.

ence's by-laws. The year after, Mr. Amselem requested permission from the syndicate to set up a *succah* on his balcony. The syndicate refused. In a letter, the syndicate proposed to allow Orthodox Jewish residents of the building, including the appellants, to set up a communal *succah* in gardens. The appellants declined the offer and promised to set up their *succahs* "in such a way that they would not block any doors, would not obstruct fire lanes, [and] would pose no threat to safety or security in any way". The syndicate refused their request and filed an application for permanent injunction prohibiting the setting up of *succah*s and, if necessary, permitting their demolition.[123]

The application was granted by the Superior Court. The Court of Appeal agreed.[124] The Superior Court based the decision amongst others on a testimony by a rabbi, who explained that Jewish law requires no one to build his own *succah* near his own home.

The SCC by a majority of 5 to 4 decided that the appeal should be allowed. The majority opinion was delivered by Justice Iacobucci. A joint dissenting opinion was authored by Bastarache also on behalf of LeBel and Deschamps. Binnie authored a separate dissenting opinion.

The key questions were:[125] whether the by-laws infringed the appellants' freedom of religion and belief; whether the syndicate could legitimately refuse the request of the appellants; and whether the appellants had waived their rights to freedom of religion by signing the declaration of co-ownership?

The majority begins by defining the freedom of religion and belief as a "personal or subjective conception of freedom of religion, one that is integrally linked with an individual's self-definition and fulfillment and is a function of personal autonomy and choice, elements which undergird the right".[126] Because of this, courts should not choose one rabbinical interpretation over the other. "[T]he State is in no position to be, nor should it become, the arbiter of religious dogma. Accordingly, courts should avoid judicially interpreting […] the content of a subjective understanding of religious requirement, 'obligation', precept, 'commandment', custom or ritual. Secular judicial determinations of theological or religious disputes, or of contentious matters of religious doctrine, unjustifiably entangle the court in the affairs of religion."[127]

Instead, the proper test was that of "sincerity". "Assessment of sincerity is a question of fact that can be based on several non-exhaustive criteria, including the credibility of a claimant's testimony […]." "Religious beliefs, by their very nature, are fluid and rarely static. [A] court's inquiry into sincerity, if anything, should focus not on past practice or past belief but on a person's belief at the time of the alleged interference with his or her religious freedom."[128] Any "[…] intrusive inquiry into the nature of the claimants beliefs would in itself threaten the values of religious

123 SCC, *Syndicat Northcrest v. Amselem*, Cases 29252 and 29253, [2004] 2 SCR 551, 30 June 2004, paras 4-17.
124 *Ibid.*, paras 19-34.
125 *Ibid.*
126 *Ibid.*, para. 42.
127 *Ibid.*, para. 50.
128 *Ibid.*, para. 53.

liberty",[129] indeed "requiring proof of the established practices of a religion to gauge the sincerity of belief diminishes the very freedom we seek to protect."[130]

Yet the majority admitted that one person's freedom cannot be construed so broadly that it embarks on the freedom of others, because (citing J.S. Mill) "the only freedom which deserves the name, is that of pursuing our own good in our own way, so long as we do not attempt to deprive others of theirs or impede their efforts to obtain it."[131]

The majority believed the evidence supported that the appellant sincerely believed that they had to build their personal *succah's* even though the position, like others of the applicants, could not be supported by theological doctrine (for example women apparently have no "obligation" to dwell in the *succah*). The freedom of religion and belief protects those individuals who "may personally deny the modern relevance of literal biblical 'obligation' […] despite the fact that for some reason he or she sincerely derives a closeness to his or her God by sitting in a *succah*".[132]

Alternatives for the personal *succahs* would have resulted in distress which "is even objectively substantial and would undoubtedly, as the appellants assert, detract from the joyous celebration of the holiday and thus constitute a non-trivial interference with and thus an unjustified infringement of their rights to religious freedom".[133] The reason for this was, amongst others, that because of the prohibition to use electricity and thus elevators, the appellants including elder people would have been forced to take the stairs throughout each meal.

Iacobucci considered the freedom of religion of the appellants to be significantly impaired whereas the impact on the other owners' rights was at best minimal.[134] Amongst other things, this was because the *succahs* were there only for nine days a year, they had been set up in a way that they did not block emergency routes and it was possible to build *succah*s that conformed with the general aesthetics of the building.[135] Lastly, Iacobucci argued that the appellants did not waive their rights[136] because, amongst other things, there was no explicit, voluntary and freely expressed waiver.

Three dissenting judges, Bastarache, LeBel and Deschamps, believed firstly that freedom of religion was not infringed, as there were other possibilities to eat meals in a *succah* during Sukkot, for example in a communal *succah* or one that belonged to friends or relatives. Secondly, if was sincerely believed that only an own *succah* would do, which had to be erected on the balcony, the freedom of religion conflicted with rights of others (property and life/safety). In this case, the latter rights must prevail.

129 *Ibid.*, para. 55.
130 *Ibid.*, para. 54.
131 *Ibid.*, para. 61.
132 *Ibid.*, para. 68.
133 *Ibid.*, para. 77.
134 *Ibid.*, para. 64.
135 *Ibid.*, paras 82-90.
136 *Ibid.*, paras 91-102.

The dissenting judges believed that an objective test had to be applied: "a practice must be connected with the religion, the connection must be objectively identifiable."[137] Also, the freedom to manifest one's religion was much narrower than the freedom to hold a religion.[138] In this regard, Bastarache also referred to the two dimensions of the freedom of religion; one being inward and having almost inclusively a private aspect, one regarding manifestation having genuine social significance. While the first is very broad, the second is narrower.

With regard to most of the appellants, the three dissenting judges did not believe that the freedom of religion had been infringed, because the practice they adhered to required them to dwell in a *succah*, not in one built on their own property or near their home. With regard to Mr. Amselem himself, they acknowledged that he had acted on the assumption of a divine commandment to build a *succah* on his own property.[139] Drawing attention to the fact that the Canadian Jewish Congress considered the compromise as suggested by the syndicate of co-owners to be reasonable, they reached the conclusion that Mr. Amselem's freedom of religion could not be exercised in harmony with the rights of others or the general well-being, making the infringement legitimate.[140] Hence, the question of waiver of rights did not need to be addressed.[141]

Binnie's approach differed from that of the other dissenting judges because he attached much value to the private law contractual relationship between the appellants and the respondents.[142] He accepted that Mr. Amselem had at least met the threshold of bringing his claim within the protection granted by the freedom of religion, because he sincerely believed in building his own *succah*.[143] But even Amselem admitted in the proceedings before the trial judge that he would go to friends and family if he was not permitted to build his own *succah* on his balcony. Binnie concluded that rather than speaking of a waiver of rights, the appellants could not insist on their own personal *succahs* on the balconies, because, by signing the declaration, they had assured their co-owners that they would comply.[144]

137 *Ibid.*, para. 135.
138 *Ibid.*, para. 137.
139 *Ibid.*, paras 162-163.
140 *Ibid.*, paras 176-180.
141 *Ibid.*, para. 181.
142 *Ibid.*, para. 184.
143 *Ibid.*, para. 185.
144 *Ibid.*, para. 206.

### 4.8 Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v. Lafontaine (Village) [2004]

| | |
|---|---|
| Essence: | Municipality refuses request by congregation to allow for place of worship in non-designated area. Congregation experiences lack of cooperation from the municipality. |
| Dimension: | Freedom of religion and belief and group autonomy. Freedom of religion and belief and secularism. |
| Lower Courts: | Superior Court dismissed the application of the Congregation on factual analysis. The Court of Appeal set aside this finding of fact but dismissed the appeal on legal grounds. |
| Majority: | 5:4. Found in favor of the congregation. Majority opinion by McLachlin also on behalf of Iacobucci, Binnie, Arbour and Fish. |
| Dissenting: | Joint dissenting opinion by LeBel also on behalf of Bastarache, and Deschamps. Separate dissenting opinion by Major. |

This case concerns a congregation of Jehovah's Witnesses in the town of Lafontaine. They were looking for a lot to establish a place of worship in the municipality. The zoning by-law allowed places of worship to be built in a zone called P-3. There was no lot in P-3, but there was a lot in residential area where the construction of churches was permitted and another place of worship was already in the area.[145] However, the application to build on this land was denied by the municipality with reference to the fact that P-3 lots were available.

The Congregation took up its search for available land in Zone P-3. As the search was unsuccessful, it took the search to other zones and found a lot in a commercial zone that was only 400 meters from another place of worship.[146] The Municipality denied this request without giving reasons for the decision. It also told the Congregation that P3 lots were available.[147] The Congregation then once again renewed its search for a P-3 lot. Having found out that no P-3 lot was available, it filed a third request supported by a written confirmation from P-3 property owners attesting the unavailability of land. Yet the Municipality again denied the request, once again offering no reasons.[148]

The Congregation then started court proceedings under the Charter. The trial judge dismissed the application after finding that lots were still available in P-3. The Court of Appeal set aside this finding of fact, but the majority dismissed the appeal on the grounds that the municipality was not responsible for the unavailability of land and was under no positive obligation to preserve freedom of religion.[149]

A 5:4 majority of the SCC found in favor of the Congregation. McLachlin delivered the majority opinion also on behalf of Iacobucci, Binnie, Arbour and Fish. LeBel

145 SCC, *Congrégation des témoins de Jéhova de St-Jérôme-Lafontaine v. Lafontaine (Village)*, Case 29507, [2004] 2 SCR 650, 30 June 2004, para. 18.
146 *Ibid.*, para. 21.
147 *Ibid.*, paras 22-23.
148 *Ibid.*, paras 26-27.
149 *Ibid.*, paras 17-27.

delivered a dissenting opinion, also in the name of Bastarache and Deschamps. Justice Major delivered a separate dissenting opinion.

According to the majority, the Municipality's second and third decision amounted to denial in an arbitrary manner, because no reasons were given and no alternatives were communicated.[150] This "breached the duty of procedural fairness it owed to the Congregation – a duty heightened by the expectations established by the Municipality's own conduct and the importance of the decision to the Congregation, impacting as it did on the right of the Congregation to practice the religion of its choice".[151]

The minority opinion delivered by LeBel which found in disfavor of the Congregation, contains a much longer discussion of the freedom of religion than the majority's reasoning. According to him, the state's neutrality which was required by the freedom of religion, prevented the Municipality from aiding the Congregation in finding a lot which would conform to their wishes.[152] Hence, he fundamentally disagreed with the majority which suggested that a cooperative attitude was required.[153] Yet, LeBel conceded that "more detailed reasons would have given the appellants a better understanding of the municipality's decision".[154]

Justice Major agreed with LeBel in result, but only agreed with the reasons concerning the finding of facts, and absence of any infringement to freedom of religion and belief. He distanced himself from the reasoning that the state's neutrality prevented a more constructive attitude by the Municipality.[155]

### 4.9 Reference same-sex marriage [2004]

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|---|---|
| Essence: | Advisory opinion whether the Constitution permits the introduction of same-sex marriage at federal level. |
| Dimension: | Freedom of religion and belief and balancing with other rights. Freedom of religion and belief and secularism. |
| Lower Courts: | Not applicable. Advisory opinion directly referred to the SCC by Parliament. |
| Majority: | 9:0. Found that introducing same-sex marriage is coherent with the Constitution. |
| Dissenting: | None. |

Pursuant to section 53 of the Supreme Court Act, the Supreme Court of Canada can be asked to give advisory opinions concerning the constitutionality of proposed legislation. In 2003, the SCC received the questions below which concern proposed legislation introducing same-sex marriage. In Canada, as elsewhere in the world,

150 *Ibid.*, paras 1-7.
151 *Ibid.*, para. 30.
152 *Ibid.*, para. 71.
153 *Ibid.*, para. 29.
154 *Ibid.*, para. 92.
155 *Ibid.*, para. 36

there was/is opposition to the introduction of same-sex marriage, based on religious grounds.

The proposed legislation read as follows[156] and the following questions were put to the SCC by the Governor in Council:[157]

*Sections proposed*

1. Marriage, for civil purposes, is the lawful union of two persons to the exclusion of all others.
2. Nothing in this Act affects the freedom of officials of religious groups to refuse to perform marriages that are not in accordance with their religious beliefs.

*Questions*

1. Is the annexed Proposal for an Act respecting certain aspects of legal capacity for marriage for civil purposes within the exclusive legislative authority of the Parliament of Canada? [….]
2. If the answer to question 1 is yes, is section 1 of the proposal, which extends capacity to marry two persons of the same sex, consistent with the Canadian Charter of Rights and Freedoms? […]
3. Does the freedom of religion guaranteed by paragraph 2(a) of the Canadian Charter of Rights and Freedoms protect religious officials from being compelled to perform a marriage between two persons of the same sex that is contrary to their religious beliefs?
4. Is the opposite-sex requirement for marriage for civil purposes, as established by the common law and set out for Quebec in section 5 of the Federal Law–Civil Law Harmonization Act, No. 1, consistent with the Canadian Charter of Rights and Freedoms? [….]

The Court concluded that section 1 of the proposed Act was within the exclusive legislative authority of the parliament, while section 2 was not. Section 1 was also held to be consistent with the Charter. With respect to Question 3, the Court concluded that the freedom of religion afforded religious officials protection against being compelled by the state to perform marriages between two persons of the same sex contrary to their religious beliefs. The Court declined to answer the fourth question.[158]

Considering the distribution of legislative powers between the federal parliament and provinces, as envisioned by the constitutional system, the Court reached the conclusion that federal parliament had exclusive legislative authority.[159]

Some interveners had argued that the Constitution Act incorporated the meaning of marriage as understood in common law in 1867. In common law, they argued, the meaning of "marriage" was fixed to refer to opposite sex couples.[160] In support, they cited a case in which the judge referred to the Christian understanding of

156 *See Reference re Same Sex Marriage*, Case 29866, *supra* n. 27, para. 1.
157 *See ibid.*, para. 2.
158 *Ibid.*, paras 4-7.
159 *Ibid.*, para. 19.
160 *Ibid.*, para. 20.

marriage as incorporated in common law. Yet according to the SCC, the judge in said case "spoke to a society of shared social values where marriage and religion were thought to be inseparable. This is no longer the case. Canada is a pluralistic society. Marriage, from the perspective of the state, is a civil institution".[161] According to the SCC, "frozen concepts" reasoning "runs contrary to one of the most fundamental principles of Canadian constitutional interpretation: that our Constitution is a living tree which, by way of progressive interpretation, accommodates and addresses the realities of modern life." "A large and liberal, or progressive, interpretation ensures the continued relevance and, indeed, legitimacy of Canada's constituting document […] in times vastly different from those in which it was crafted."[162]

Unlike the interveners, the SCC believed that no legal concept can evade legal redefinition. Therefore, it did not accept that redefining marriage should fall outside the natural limits of the federal parliament.[163]

Regarding the second question, the SCC found that the purpose of the proposed legislation was far from violating the Charter because it enhanced the Charter values by extending equal rights to same-sex couples.[164] The recognition of equal rights of same-sex couples could in itself never amount to discrimination of those who for faith-based reasons believed in exclusive opposite-sex marriage.[165] For the same reason, the proposed Act could not be said to violate the freedom of religion.[166]

Regarding the third question, the SCC noted that as the proposed Act was limited in its effect to civil marriage, it could not be interpreted as affecting religious marriage or its solemnization.[167] Freedom of religion included harboring thoughts consistent with one's religious beliefs, as well as performing religious rites. "It therefore seems clear that state compulsion on religious officials to perform same-sex marriages contrary to their religious beliefs would violate the guarantee of freedom of religion under s. 2(a) of the Charter. It also seems apparent that, absent exceptional circumstances which we cannot at present foresee, such a violation could not be justified under s. 1 of the Charter."[168] Freedom of religion and belief also protected against the compulsory use of sacred places in the celebration of same-sex marriages. The Court concluded that the freedom of religion also extended protection to these concerns.[169]

The Court found it unwise and inappropriate to answer the fourth question, because the federal government had already decided to redefine marriage and same-sex couples had already relied on lower court judgments to *get* married.[170]

161 *Ibid.*, para. 22.
162 *Ibid.*, paras 22-23.
163 *Ibid.*, paras 25-29.
164 *Ibid.*, para. 43.
165 *Ibid.*, para. 46.
166 *Ibid.*, para. 48.
167 *Ibid.*, para. 55.
168 *Ibid.*, para. 58.
169 *Ibid.*, para. 59.
170*Ibid.*, paras 64-71.

### 4.10 Multani v. Commission scolaire Marguerite-Bourgeoys, [2006]

| | |
|---|---|
| Essence: | Governing Board of school's decision to refuse accommodation of a Sikh student, wearing a metal *kirpan* at all times. |
| Dimension: | Freedom of religion and belief and personal freedom. Freedom of religion and belief and education. |
| Lower Courts: | Superior Court found in favor of Gubaj Singh Multani. Court of Appeal found in favor of school. |
| Majority: | 8:0 (Major, 9th Justice took no part in the judgment). Found in favor of claimant and overruled the Court of Appeal. Majority opinion by Charron. Joint concurring opinion Deschamps and Abella. Separate concurring opinion by LeBel. |
| Dissenting: | None. |

Gurbaj Sing Multani and his father B are both orthodox Sikhs, who believe that their religion requires them to wear a *kirpan* at all times. A *kirpan* is a metal dagger which is of religious importance to Sikhs. In 2001, when Gurbaj accidentally dropped the *kirpan* he was wearing under his clothes in the schoolyard, the School Board sent the parents a letter in which, as a reasonable accommodation, it authorized their son to wear his *kirpan* to school provided that he complied with certain conditions to ensure that it was sealed inside his clothing. Gurbaj and his parents agreed to this. The Governing Board of the school refused to ratify the agreement on the basis that wearing a *kirpan* at the school violated the school's code of conduct, which prohibited the carrying of weapons. The School Board's council of commissioners upheld that decision, but notified Gurbaj that a surrogate *kirpan*, made from "harmless" material would be acceptable.

Gurbaj's father then filed a Superior Court motion. The Superior Court granted the motion and authorized Gurbaj to wear his *kirpan* under certain conditions. The Court of Appeal set aside the Superior Court's judgment and restored the original decision. It concluded that the decision in question infringed Gurbaj's freedom of religion under the Canadian Charter of Rights and Freedoms and the Quebec Charter of Rights and Freedoms Charter, but that the infringement was justified by the limitations clause.[171]

The Supreme Court unanimously held that Multani's freedom of religion had been unjustifiably infringed. Justice Charron delivered the majority opinion. Deschamps and Abella issued a joint concurring opinion. LeBel delivered a separate concurring opinion.

The school's Governing Board based part of its arguments on internal limits of the freedom of religion. Charron, however, relying on *Children's Aid Society of Metro-*

171 *See* for the reproduction of the Superior Court judgment, SCC, *Multani v. Commission scolaire Marguerite-Bourgeoys*, Case 30322, [2006] 1 SCR 256, 2 March 2006, paras 3-12.

*politan Toronto*[172] stressed that reconciling competing rights in light of the limitations clause was to be preferred to reconciling them based on internal limits.[173]

Before arriving at the section 1 test, Charron set out to explain why the decision clearly infringed the freedom of religion, citing earlier cases. The freedom of religion and belief, "is the right to entertain such religious beliefs as a person chooses." "With the Charter, it has become the right of every Canadian to work out for himself or herself what his or her religious obligations, if any, should be and it is not for the state to dictate otherwise […]." The fact that different people practiced the same religion in different ways did not affect the validity of the case of a person alleging that his or her freedom of religion has been infringed. "What an individual must do is show that he or she sincerely believes that a certain belief or practice is required by his or her religion".[174]

Evidence suggested that Gurbaj, like many other orthodox Sikhs, believed that he had to wear the five religious symbols required for Sikh males, including a metal *kirpan* at all times.[175] Gurbaj's assertion that he sincerely and genuinely believed that he could only comply with the religious precept by wearing a metal *kirpan* was not contested. The fact that other Sikhs compromised and wore a replica instead was not deemed relevant by the Court, as people of the same religion could adhere to dogma and practice in varying degrees of rigor.[176]

Much of the board's argument is based on its submission that "the *kirpan* is essentially a dagger, a weapon designed to kill, intimidate or threaten others."[177] Yet the Court argued that "Gurbaj Singh does not have to establish that the *kirpan* is not a weapon. He need only show that his personal and subjective belief in the religious significance of the *kirpan* is sincere."[178]

Hence, there was an interference which the Court deemed neither trivial nor insignificant, as Gurbaj had to transfer to a private school in order to wear the *kirpan* and was thus denied his right to be educated in the public school system. Therefore, there was an interference, which had to be justified under the limitations clause.[179]

Protecting school safety has a basis in the law and Charron accepted that the board was motivated in its decision by a pressing and substantial objective, namely security. Yet, between the extremes of total security and total lack thereof lies "a concern to ensure a reasonable level of safety".[180] Hence, the question was which measures were necessary to achieve this reasonable level of safety.

In the proportionality analysis, the SCC accepted a rational connection between the decision and the objective of ensuring a safe school environment.[181] The question of minimal impairment had to be addressed in correlation with the "reasonable

172 *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, Case 23298, *supra* n. 67.
173 *Multani v. Commission scolaire Marguerite-Bourgeoys*, Case 30322, *supra* n. 171, para. 26.
174 *Ibid.*, paras 32-35.
175 *Ibid.*, para. 36.
176 *Ibid.*, para. 39.
177 *Ibid.*, para. 37.
178 *Ibid.*
179 *Ibid.*, paras 40-41.
180 *Ibid.*, para. 45.
181 *Ibid.*, para. 49.

accommodation" doctrine according to Charron.[182] Statistical evidence pointed out that the *kirpan* had not been used in violent incidents in Canadian schools for 100 years, Gurbaj himself had no violent track record at all, and the analogy with planes and courts disregarded the personal relationships between teachers and students present in a school, absent in the cited situations. Therefore, the assertion that *kirpan*s were inherently dangerous had to fail.[183] The assertion that the *kirpan* was a symbol of violence was also "disrespectful to believers in the Sikh religion and does not take into account Canadian values based on multiculturalism."[184]

The school also relied on the affidavit of a psycho-educator who believed that allowing Gurbaj Singh to wear a *kirpan* would engender a feeling of unfairness among the students, who would perceive this permission as special treatment. The Supreme Court argued that "[r]eligious tolerance is a very important value of Canadian society. If some students consider it unfair that Gurbaj Singh may wear his *kirpan* to school while they are not allowed to have knives in their possession, it is incumbent on the schools to discharge their obligation to instill in their students this value that is […] at the very foundation of our democracy."[185]

Justice Charron noted that assessing the effects of the measures was legally unnecessary as the Court had already established the unreasonableness of the measure. Yet, because of the importance, he assessed them anyway. He considered that "absolute prohibition would stifle the promotion of values such as multiculturalism, diversity, and the development of an educational culture respectful of the rights of others. [It] sends students the message that some religious practices do not merit the same protection as others. On the other hand, accommodating Gurbaj Singh and allowing him to wear his *kirpan* under certain conditions demonstrates the importance that our society attaches to protecting freedom of religion and to showing respect for its minorities. The deleterious effects of a total prohibition thus outweigh its salutary effects."[186]

The separate but consenting opinions of Deschamps and Abella (jointly) and of LeBel (see below) did not deal with the content so much, but more with the methodology as favored by the majority.

Dechamps and Abella, believed the majority had wrongly applied the *Oakes* test and should instead have relied on the administrative review approach. Deschamps and Abella took the view that Courts should only apply the Charter limitations clause if a statute itself infringed the Charter rights, not if a decision based on a statute infringed Charter rights. In their administrative law review, they reached the conclusion that the decision taken was unreasonable, because "[the] *kirpan*, which, while a kind of 'knife', was above all a religious object whose dangerous nature was neutralized by the many coverings required by the Superior Court."[187]

The doctrine of "reasonable accommodation", as applied by Charron in this case, in the opinion of Deschamps and Abella, belonged to the realm of administrative

182 *Ibid.*, paras 52-53.
183 *Ibid.*, paras 56-67.
184 *Ibid.*, para. 71.
185 *Ibid.*, paras 74 and 76.
186 *Ibid.*, paras 78-79.
187 *Ibid.*, para. 98.

law, while "minimal impairment" was part of the constitutional justification analysis. The distinction must be maintained, although, as the majority stated, the doctrines had a high degree of similarity.[188]

LeBel in his separate opinion argued that a flexible approach concerning the relationship between administrative law and constitutional law should be applied.[189] Hence, methodologically he aimed at the middle ground between the majority and the two concurring judges.

### 4.11 Bruker v. Marcovitz [2007]

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|---|---|
| Essence: | Legal enforceability of provision in divorce agreement, obliging the ex-husband to grant a religious divorce (*get*). |
| Dimension: | Freedom of religion and belief, (family law) and family relations. Freedom of religion and belief and secularism. |
| Lower Courts: | The Superior Court found in favor of the wife. The Court of Appeal found in favor of the husband. |
| Majority: | 7:2. Found in favor of the wife. Majority opinion by Abella. |
| Dissenting: | Joint dissenting opinion by Deschamps and Charron. |

The case concerns a divorced former couple, who are both of the Jewish faith. Mr. Marcovitz, the husband, and Ms. Bruker, the wife, voluntarily negotiated and signed a divorce agreement. One of the commitments made in the agreement was that the husband would grant the wife a *get*, a Jewish religious divorce, which only the husband can initiate. When he does not, she is without religious recourse.

The husband refused to give the *get* for 15 years. He challenged the very validity of the agreement, claiming that its religious aspect rendered it unenforceable under Quebec law, and arguing that his right to freedom of religion protected him from being compelled to comply.[190]

According to Mr. Marcovitz, Ms. Bruker had repudiated the consent between them, by "[…] continually seeking increases in child support payments" and because he saw his daughters irregularly. He also questioned Ms. Bruker's devotion to the Jewish faith.[191]

The Superior Court found that the agreement was valid and binding and within the domain of the civil courts. The Court of Appeal allowed the husband's appeal. It found that because the substance of the obligation was religious in nature, the obligation was a moral one and was therefore unenforceable by the courts.

A majority of seven justices found in favor of Ms. Bruker, Abella delivering the majority opinion. Justices Deschamps and Charron dissented, the former delivering the joint dissenting opinion. The Court had to answer whether the agreement was a valid legal agreement, and if so, if the husband could rely on the freedom of religion

188 *Ibid.*, paras 129-134.
189 *Ibid.*, paras 151-152.
190 SCC, *Bruker v. Marcovitz*, Case 31212, [2007] 3 SCR 607, 14 December 2007, paras 10-11.
191 *Ibid.*, para 27.

to avoid the legal consequences?[192] The majority answered the first question affirmative, and the second question negative.

Abella argued that "agreement between spouses to take the necessary steps to permit each other to remarry in accordance with their own religions constitutes a valid and binding contractual obligation under Quebec law. As the comments of the former Ministers of Justice reveal, such agreements are consistent with public policy, our approach to marriage and divorce, and our commitment to eradicating gender discrimination." Any harm with the husband's freedom of religion was outweighed by the harm caused by his unilateral decision not to honor the agreement. Unlike the dissenters, the majority did not regard this "an unwarranted secular trespass into religious fields […]".[193]

The dissenting judges disagreed with line of reasoning by the majority, as we shall see below, but deciding in favor of Mrs. Bruker in their opinion required the endorsement of a religious norm by a secular court. The majority countered the allegation, because the "Court is not asked to endorse or apply a religious norm. It is asked to […] to determine whether the husband is entitled to succeed in his argument that requiring him to pay damages for the breach of a legally binding agreement violates his freedom of religion. No new principle emerges from the result in this case. Courts are routinely asked whether a contract is valid."[194]

The majority was indeed of the opinion that the Court may not intervene in strictly internal, spiritual, or religious law matters of religious communities. However, when there was a civil or property relationship between followers of a faith, the courts have jurisdiction.[195] As the agreement was "negotiated between two consenting adults, each represented by counsel, as part of a voluntary exchange of commitments intended to have legally enforceable consequences",[196] courts may legally enforce the agreement.

Mr. Marcovitz, argued that holding him to the agreement would be a violation of his freedom of religion "[…] because it would condemn him ex post facto 'for abiding by his religion in the first place'."[197] The majority was not convinced that he "in good faith, sincerely believed that granting a *get* was an act to which he objected as a matter of religious belief or conscience". Rather, they drew attention to his testimony regarding the alleged alienation of the kids, disputes over money and artifacts. This seemed to affirm that his refusal to provide the *get* was based less on religious conviction than on the fact that he was angry at Ms. Bruker.[198]

The majority also referred to the CCSA case *Christian Education*. Justice Sachs explained in that judgment that an open and democratic society "can cohere only if all its participants accept that certain basic norms and standards are binding". Hence "believers cannot claim an automatic right to be exempted by their beliefs from the laws of the land". At the same time, the state should, wherever reasonably

192 *Ibid.*, para. 12.
193 *Ibid.*, paras 16-18.
194 *Ibid.*, para. 20.
195 *Ibid.*, paras 41-45.
196 *Ibid.*, para. 47.
197 *Ibid.*, para. 65.
198 *Ibid.*, paras 68-69.

possible, seek to avoid putting believers to "extremely painful and intensely burdensome choices of either being true to their faith or else respectful of the law."[199]

The Divorce Act, which gives a court discretionary authority to rebuff a spouse in civil proceedings who obstructs religious remarriage, is a clear indication that it is public policy in Canada that such barriers are to be discouraged. "Legislative history proves that these amendments received overwhelming support from the Jewish community, reflecting a consensus that the refusal to provide a *get* was an unwarranted indignity imposed on Jewish women."[200] Hence, "[a]ny infringement of Mr. Marcovitz's freedom of religion is inconsequential compared to the disproportionate disadvantaging effect on Ms. Bruker's ability to live her life fully as a Jewish woman in Canada."[201]

The two dissenting judges, Deschamps and Charron, found that the question of whether or not Mr. Marcovitz was required to do his part so that Ms. Bruker could acquire the *get*, was not within the jurisdiction of a (secular) Court, because courts should not come to the aid of any religious undertaking in a secular state. "Despite the religious foundations of Roman law and French civil law, from which Quebec civil law is derived, there should be no doubt today that in Quebec, the state is neutral where religion is concerned."[202] "[The Charter] reflects a 'negative' view of freedom of religion according to which the state must not infringe a fundamental right any more than is necessary."[203]

Although Ms. Bruker deviated in many ways form the doctrines and precepts of the Orthodox Jewish Community "her abortion, extra-marital affairs, use of contraceptives, etc." the dissenting judges were convinced that she was and remained a member of the Orthodox branch of the Jewish community, and "that she therefore had the right to remarry before a rabbi of that community and to do so, would have needed a *get*."[204]

But on the other hand, the dissenting judges argued, Ms. Bruker, could remarry under civil law, or have children outside of wedlock, which would be equal to children born in wedlock under Canadian law. As a Canadian, she did not depend on a *get*, to effectuate any rights. As a Jewish woman she might, but that should not be an issue in which the government and judges specifically should become involved. "Canada opens its doors to all religions. All of them are entitled to receive the same protection, but not, I believe, to be provided with weapons."[205]

199 *Ibid.*, para. 74.
200 *Ibid.*, para. 81.
201 *Ibid.*, para. 93.
202 *Ibid.*, para. 120.
203 *Ibid.*, para. 121.
204 *Ibid.*, para. 113, quoting the Superior Court Judge.
205 *Ibid.*, para. 182.

## 4.12 A.C. v. Manitoba (Director of Child and Family Services) [2009]

| | |
|---|---|
| Essence: | Criterion of best interests of the child in overruling the 14-year-old teenager's own decision to refuse medical treatment on objections grounded on religious beliefs. |
| Dimension: | Freedom of religion and belief, (family law) and family relations. |
| Lower Courts: | Applications judge and Court of Appeal found against teenager. |
| Majority: | 6:1. Found against teenager, but also found more consideration should have been given to determine her maturity to make own medical decisions. Majority opinion by justice Abella also on behalf of LeBel, Deschamps and Charron. Joint separate concurring opinion by McLachlin and Rothstein. |
| Dissenting: | Binnie. |

In this case the appellant was admitted to a hospital when she was 14 years and 10 months old, suffering from Crohn's disease. Being a devout Jehovah's Witness, she had in advance signed a medical directive stating she did not wish to receive a blood transfusion under any circumstances. Her doctor believed that internal bleeding created an imminent, serious risk to her health and perhaps her life. As she still refused to consent to a blood transfusion, a brief psychiatric assessment took place. Later, the Director of Child and Family Services sought a court order for treatment under the Manitoba Child and Family Services Act. Under this Act, a court may authorize treatment that it considers to be in the child's best interests.

However, the Act also presumes that the best interests of a child of 16 years or older will be most effectively promoted by allowing the child's views to be determinative, unless it can be shown that the child does not understand the decision or appreciate its consequences. Where the child is under 16, however, no such presumption exists.

The applications judge ordered that A.C. receive blood transfusions, concluding that when a child is under 16, there are no legislated restrictions of authority on the court's ability to order medical treatment in the child's "best interests". The appellant and her parents appealed. They argued that the Act and subsequent procedure unjustifiably infringed her rights under sections 2(a), 7 and 15 of the Charter. The Court of Appeal upheld the constitutional validity of the impugned provisions and the treatment order.[206]

A majority of six judges decided to dismiss the appeal. The majority opinion was delivered by Justice Abella. McLachlin and Rothstein submitted a joint separate concurring opinion. Binnie dissented.

The appellant in her appeal did not challenge the cut-off age of 16. She did challenge the constitutionality of depriving those under 16 of an opportunity to prove

206 SCC, *A.C. v. Manitoba (Director of Child and Family Services)*, Case 31955, [2009] 2 SCR 181, 26 June 2009, paras 5-20.

that they are sufficiently mature to decide their medical treatment for themselves. She believed this to be arbitrary and hence discriminatory on the basis of age.[207]

Abella, for the majority, argued that the Act already incorporated the doctrine of "mature minors" by stating that from the age of 16, the wishes of the child were indicative of the "best interest". Nevertheless, the Act also conferred on institutions the responsibility such is consistent with Canadian and international jurisprudence.[208]

The majority accepted there was no constitutional justification for ignoring the decision-making capacity of a minor under the age of 16. However, unlike the Court of Appeal, the majority was of the opinion that the Act, properly read, already called for due regard of the child's decision-making capacity, when it was apprehended by the state. However, under 16 the child's own wishes were not as such determinative.[209] Mature minors were not entitled to make all medical decision themselves because that would stifle the limits on the ability to "accurately assess maturity in any given child".[210]

The majority then spelled out a few factors which might be of relevance in determining the maturity of an adolescent and the impact his or her wishes should have in medical decision-making. If this careful balancing was applied, as the majority found that it was prescribed by the Act and common law in general, the results could neither be discriminatory nor violative of the freedom of religion.[211] "A child's 'religious heritage' is one of the statutory factors in determining 'best interests'. Expanding the deference to a young person's religious wishes as her maturity increases is a proportionate response to her religious rights and the protective goals of s. 25(8)."[212]

In applying this to the case at hand, the majority reached the conclusion that in all proceedings no one had determined whether A.C. was able to make a mature, independent judgment, and the psychiatric report was never submitted to review of any kind. Therefore, the Supreme Court could not evaluate whether she had the capacity or not. Furthermore, the emergency was long since over and A.C. had reached the age of 16.[213] Because A.C. had never had the chance for rebuttal of the psychiatric assessment the majority awarded her all costs throughout the judicial proceedings.[214]

The concurring judges stressed that "[w]hether a child is in need of protection requires a case by case analysis with a review to the relevant statutory criteria […]".[215] "It will be apparent that the statutory scheme requires the judge in each case to make an independent analysis of all relevant considerations […]. For this reason, it is dangerous to speculate on whether a judge would ever […] decline to

207 *Ibid.,* paras 25-27.
208 *Ibid.,* paras 21-22.
209 *Ibid.,* para. 29.
210 *Ibid.,* para. 47.
211 *Ibid.,* para. 98.
212 *Ibid.,* paras 112-113.
213 *Ibid.,* para. 120.
214 *Ibid.,* paras 121-122.
215 *Ibid.,* para. 128.

order medical treatment for a child under the age of 16 where the result would be probable death […]"[216]

In McLachlin and Rothstein's opinion it "is common sense to suggest, however, that the more dangerous the situation from the perspective of the child's security of person, the more compelling must be the case that the child is fully mature"[217] to allow the own decision to be determinative. The concurring judges argued that the Act, when making a distinction between minors under and over the age of 16, does not violate the Charter provisions on "life, liberty and security of the person" and "equal treatment".[218]

With regard to the freedom of religion, the concurring judges accepted that A.C had a sincere belief against receiving blood transfusions and that this right had been interfered with. However, they believed that the interference was proportionate to the pressing and substantial objective of ensuring the health and safety of minors.[219]

The dissenting justice Binnie disagreed with the majority, including the concurring judges. He would have allowed the appeal and argued that A.C.'s autonomous decision based on her religious beliefs should have been respected. After all, the "Charter is not just about the freedom to make what most members of society would regard as the wise and correct choice. If that were the case, the Charter would be superfluous." It gives A.C. the religious freedom to "refuse forced medical treatment, even where her life or death hangs in the balance".[220]

For Binnie, it was evident on the basis of the evidence that A.C. was a mature minor at the time, who could make well-informed mature decisions about her medical treatment.[221] The fact that most in society would put (the sanctity of) life over religious convictions does not take away that Charter rights of freedom of religion and belief and liberty and security of the person "are given to everyone, including individuals under 16 years old".[222] Binnie believed that unlike in *Children's Aid Society*[223] (see above section 4.4), this case concerned the own religious convictions and physical integrity of the child, and not that of her parents. Moreover, there was no evidence that she was somehow acting under parental influence.[224]

Binnie was of the opinion that the Act as it stands did violate the freedom of religion and the liberty and security of the person of A.C. because it did not allow her the rebuttal of the presumption that she was not mature enough to make her own decisions. Under the majority's approach it was still the judge who took the decision. In Binnie's opinion, the Charter mandated that if a young person was able to prove his or her maturity, the decision should be theirs.[225] This was not to say that the judge should not decide the default position. Judges should take the final decision if "there is any doubt, on a balance of probabilities – that the young person

216 *Ibid.*, para. 133.
217 *Ibid.*, para. 133.
218 *Ibid.*, paras 134-152.
219 *Ibid.*, paras 153-156.
220 *Ibid.*, para. 163.
221 *Ibid.*, para. 173.
222 *Ibid.*, para. 192.
223 *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, Case 23298, *supra* n. 67.
224 *A.C. v. Manitoba (Director of Child and Family Services)*, Case 31955, *supra* n. 206, para. 195.
225 *Ibid.*, paras 208, 225, 233-234 and 236-237.

is capable".[226] What was unfair in his view was "the presumption of incapacity to remain irrebuttable […]".[227]

It was the non-rebuttable character of the presumption that constituted an unjustifiable and disproportionate infringement of Charter rights, according to Binnie.[228] He reminded the other judges that the SCC "has long preached the values of individual autonomy. In this case, we are called on to live up to the […] promise in circumstances where we instinctively recoil from the choice made by A.C. because of our belief (religious or otherwise) in the sanctity of life. But it is obvious that anyone who refuses a potentially lifesaving blood transfusion on religious grounds does so out of a deeply personal and fundamental belief about how they wish to live, or cease to live, in obedience to what they interpret to be God's commandment. As such, A.C.'s [..] liberty interest is directly engaged."[229]

### 4.13 Alberta v. Hutterian Brethren of Wilson Colony [2009]

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|---|---|
| Essence: | An exemption granted by the province to Hutterians to carry drivers licenses without photographs was withdrawn. The Hutterians objected to carrying photographs for religious reasons but depended for their way of life on using motor vehicles. |
| Dimension: | Freedom of religion and belief and group autonomy. |
| Lower courts: | Found in favor of the community. |
| Majority: | 4:3. Found in favor of province. Majority opinion by McLachlin C.J. also on behalf of Binnie, Deschamps and Rothstein. |
| Dissenting: | Separate dissenting opinion by Abella. Separate dissenting opinion by LeBel. Separate dissenting opinion by Fish. |

In the province of Alberta all drivers of motor vehicles on highways have to hold a driver's license. Since 1974, a photograph of the license-holder was required. However religious objectors were granted a non-photo license. In 2003, the Province adopted a new regulation and made the photo requirement universal. More than 50% of the non-photo licenses were held by members of Hutterian Brethren colonies. They sincerely believe that the Second Commandment[230] prohibits them from having their photograph willingly taken. The Wilson Colony of Hutterian Brethren maintains a rural, communal lifestyle, carrying on a variety of commercial activities.

The Province proposed two measures to lessen the impact of the universal photo requirement:[231] (1) The license would display a photo, but be carried in a sealed envelope. A digital photo would be placed in the Province's facial recognition bank;

226 *Ibid.*, para. 225.
227 *Ibid.*, para. 225.
228 *Ibid.*, paras 233-234.
229 *Ibid.*, para. 219.
230 "You shall not make for yourself an idol, or any likeness of what is in heaven above or on the earth beneath or in the water under the earth" (Exodus 20:4).
231 *See* SCC, *Alberta v. Hutterian Brethren of Wilson Colony*, Case 32186, [2009] 2 SCR 567, 24 July 2009, para. 12.

(2) A digital photo would be placed in the bank, with no photo accompanying the driver's license. But options did include having photos willingly taken. Which is why the Hutterites objected and proposed to continue the existing exemption, while their photo-free licenses would be marked: "Not to be used for identification purposes". When an agreement seemed unreachable, the members of the Wilson Colony challenged the constitutionality of the regulation alleging an unjustifiable breach of their religious freedom.

The claimants asserted that if members could not obtain driver's licenses, the viability of their communal lifestyle would be threatened. The Province, for its part, led evidence that the universal photo requirement was connected to a new system aimed at minimizing identity theft. Both the chambers judge and the Court of Appeal held that the infringement of freedom of religion was not justified under section 1 of the Charter.[232]

The majority of the Supreme Court found a justifiable infringement of religious freedom. The majority opinion was delivered by Chief Justice McLachlin, also on behalf of Binnie, Deschamps and Rothstein. Abella, LeBel and Fish dissented, each issuing their own sperate opinion. They each found the infringement was not justified because it was not proportional.

The majority accepted that the Hutterites have a sincerely held belief[233] against having their photo taken, even for official purposes. The new requirement thus interfered with their freedom of religion and belief. Also, for the proportionality analysis the majority took into consideration the impact the requirement had for the lifestyle of the community, which depended on motor vehicles. But "[the]. Community impact does not, however, transform the essential claim – that of the individual claimants for photo-free licenses – into an assertion of a group right."[234]

The majority drew attention in order to trigger the proportionality analysis, actually also the requirement of non-trivial and not insubstantial interference had to be met, while the evidence submitted contained no proof with regard to this criterion.[235] Even so, "[m]uch of the regulation of a modern state could be claimed by various individuals to have a more than trivial impact on a sincerely held religious belief. Giving effect to each of their religious claims could seriously undermine the universality of many regulatory programs […]."[236]

Yet, the majority also concluded that in this case the interference was proportional to the overall aim of the proposed legislation to prevent identity theft.[237] The measure was rationally connected to the goal. In the majority's opinion, the lower courts and the dissenters on the SCC did not distinguish properly between "rational connection" and an analysis of positive and/or negative effects of the measure.[238]

In the second step of the proportionality analysis, the government had to show that the measures minimally impaired the right (*Oakes test*). However, according to

232 *Ibid.*, paras 1-26.
233 *Ibid.*, paras 7 and 29.
234 *Ibid.*, para. 31.
235 *Ibid.*, para. 32.
236 *Ibid.*, para. 36.
237 *Ibid.*, paras 41-42.
238 *Ibid.*, paras 48-52.

McLachlin this must not be confused with the doctrine of reasonable accommodation (*Multani*), which must only be used when applying human rights, not when analyzing the constitutionality of a law.[239] The legislator was not required to provide for "reasonable accommodation", but only to minimally impair the rights in question. The government had offered two measures to decrease the impact. McLachlin concluded that because all other options that would have satisfied the Hutterites, increased the risk of identity theft, the universal photo requirement minimally impaired the section 2(a) right.[240]

When analyzing if the law was also proportionate in its effects, the salutary and negative effects had thus to be weighed against each other. Although there was no proof as of that moment that there would be salutary effects, McLachlin found this a safe assumption.[241] The negative effects had to be viewed in light of the essence of the freedom of religion which "[...] revolves around the notion of personal choice and individual autonomy and freedom".[242]The question was whether the limit left the adherent with a meaningful choice to follow his or her religious beliefs and practices.[243]

"The incidental effects of a law passed for the general good on a particular religious practice may be so great that they effectively deprive the adherent of a meaningful choice."[244] "The absence of a meaningful choice in such cases renders the impact of the limit very serious. The limit may impose costs on the religious practitioner in terms of money, tradition or inconvenience. However, these costs may still leave the adherent with a meaningful choice concerning the religious practice at issue."[245]

The case at bar did not concern a case of direct compulsion. After all, if the Hutterites chose not to drive, they need not comply with the photo requirement. Such a limit "does not preclude choice as to religious belief or practice, but it does make it more costly".[246] According to the majority, it did not follow from the evidence that the measure would necessarily end the Colony's rural way of life. They could hire or contract drivers with valid licenses.[247] "Driving automobiles on highways is not a right, but a privilege."[248] Of course this produced additional costs for the colony and would go against their traditional self-sufficiency. But they still had a choice.

Therefore, according to the majority, the goal of minimizing the risk of fraud associated with driver's licenses was pressing and substantial. The limit was rationally connected to the goal. The limit impaired the right as little as reasonably possible in order to achieve the goal; the only alternative proposed would significantly

239 *Ibid.,* para. 61.
240 *Ibid.,* para. 62.
241 *Ibid.,* para. 85.
242 This part is a quote from *Syndicat Northcrest v. Amselem*, Cases 29252 and 29253, *supra* n. 123, para. 40.
243 *Alberta v. Hutterian Brethren of Wilson Colony*, Case 32186, *supra* n. 231, para. 88.
244 *Ibid.,* para. 94.
245 *Ibid.,* paras 93-95.
246 *Ibid.,* para. 93.
247 *Ibid.,* paras 97-98.
248 *Ibid.,* paras 97-98.

compromise the goal of minimizing the risk. Finally, the measure was proportionate in terms of effects: "[...] the impact on the claimants, while not trivial, does not deprive them of the ability to follow their religious convictions."[249]

The three dissenting justices agreed with the majority that the measure limited the freedom of religion, that there was a pressing and substantial objective, and that there was a rational connection. However, they did not agree that the impairment was minimal and/or that the salutary effects outweighed the deleterious effects for the Hutterites.[250]

According to Justice Abella "[t]he harm to the constitutional rights of the Hutterites, in the absence of an exemption, is dramatic. Their inability to drive affects them not only individually, but also severely compromises the autonomous character of their religious community."[251] Hence, the detrimental effects for the community were much greater than the benefits for the Province from not exempting them.[252] The alternatives proposed by the province did not address the religious objection to photos.

Citing the *Big M* judgment, Abella reminded us that "[A]n emphasis on individual conscience and individual judgment [...] lies at the heart of our democratic political tradition."[253] In light of this, she also referred to the liberal concept of the freedom of religion and the Strasbourg *Kokkinakis* judgment[254] (see section I3.3.1), because the very requirement of the photo "offends the religious beliefs of the Wilson Colony members". It is "difficult to conclude that it minimally impairs the Hutterites' religious rights".[255] With regard to the salutary effects, she noted that the system with the non-photo licenses had worked without incident in the past, and as there were so many other Albertans who (did not have driver's licenses and thus) were not in the database, the effect of not including the Hutterites would be minimal.[256]

LeBel agreed with Abella's reasoning. He felt the majority had understated the nature and importance of the communal aspect of the freedom of religion and belief. LeBel then gave much attention to the ratio, philosophy and tradition behind the *Oakes* test. Drawing, among other things, on *St Thomas Aquinas* he reminded the reader that it was necessary to limit the power of government en ensure that that the lawgiver's laws are just.[257]

Justice Fish gave no reasoning of his own, but stated agreement with the reasoning and methodology of Abella and LeBel.[258]

249 *Ibid.*, paras 104.
250 *Ibid.*, paras 176, 202, and 203.
251 *Ibid.*, para. 111.
252 *Ibid.*, para. 116.
253 *Ibid.*, para. 127.
254 ECtHR (C), *Kokkinakis v. Greece*, app. no. 14307/88, 25 May 1993.
255 *Alberta v. Hutterian Brethren of Wilson Colony*, Case 32186, *supra* n. 231, paras 147-148.
256 *Ibid.*, paras 157-158.
257 *Ibid.*, paras 183-187.
258 *Ibid.*, para. 203.

## 4.14 R. v. N.S. [2012]

| | |
|---|---|
| Essence: | Wish of a Muslim witness in a sexual assault case to testify with a *niqab* based on sincere religious belief regarding the covering of the face. Balancing with the requirements of trial fairness. |
| Dimension: | Freedom of religion and belief and personal freedom. Freedom of religion and belief and secularism. |
| Lower courts: | Trial Judge ordered N.S the victim in the assault case to remove the *niqab*. Superior Court overruled the order. Court of Appeal referred back to the trial judge after deciding freedom of religion and belief and trial fairness could be reconciled in this case and priority depended on circumstances. |
| Majority: | 6:1. Found against the appellant. Majority opinion by McLachlin, also on behalf of Deschamps, Fish and Cromwell. Separate concurring opinion of LeBel also on behalf of Rothstein. |
| Dissenting: | Abella. |

N.S, who was the appellant in this case accused her uncle and cousin of sexually assaulting her several times when she was a child. The two now face trial for this. N.S. is a Muslim who believes she has to wear a face-covering in public. She wanted to testify wearing her *niqab,* a garment, which covers most of the face and leaves only the eyes uncovered. At the trial, she admitted that she had removed the *niqab* before when a lady photographer took her photos for the driver's license, and she would remove it at a border crossing. The inquiry judge ruled that N.S's religious belief was "not that strong"[259] and ordered her to remove her *niqab*. N.S appealed to the Superior Court which ruled in her favor. The Court of Appeal held that the witness may be ordered to remove the *niqab* if her freedom of religion and the accused's fair trial interests could not be reconciled, depending on the context. The Court of Appeal returned the matter to the preliminary inquiry judge.[260] N.S. appealed to the SCC.

A majority of 6 found against N.S. The majority opinion by McLachlin, also on behalf of Deschamps, Fish and Cromwell affirmed the Court of Appeal's ruling that it depends on the circumstances whether the freedom of religion rights of a *niqab* wearing witness or the fair trial rights of the accused are reconcilable and which must prevail. Concurring justice LeBel and Rothstein found that witnesses could always be ordered to remove their *niqab*. Abella, who dissented, found that the negative result that she would likely not testify without the *niqab* was a significantly more harmful consequence than the accused not being able to see a witness's whole face.

The majority rejected an "extreme" approach that would always require the witness to remove her *niqab* while testifying, or one that would never do so. Hence, the majority rejected a "secular response that requires witnesses to park their religion at the courtroom door". This "is inconsistent with […] the Canadian tradition, and

259 *R. v. N.S.*, Case 33989, *supra* n. 27, para. 4
260 *Ibid.*, paras 4-6.

limits freedom of religion where no limit can be justified". On the other hand, always allowing witnesses to testify with their face covered "may render a trial unfair and lead to wrongful conviction". "What is required is an approach that balances the vital rights protecting freedom of religion and trial fairness when they conflict. The long-standing practice in Canadian courts is to respect and accommodate the religious convictions of witnesses, unless they pose a significant or serious risk to a fair trial."[261]

According to McLachlin, four questions needed to be answered in this case:[262] (1) Would requiring the witness to remove the *niqab* while testifying interfere with her religious freedom? (2) Would permitting the witness to wear the *niqab* while testifying create a serious risk to trial fairness? (3) Is there a way to accommodate both rights and avoid the conflict between them? (4) Do the salutary effects of requiring the witness to remove the *niqab* outweigh the deleterious effects of doing so?

Concerning the first question, the majority found that N.S.'s objection to remove the *niqab* was based on a sincere religious belief. Sincerity was the correct criterion. "Strength" of belief which the inquiry judge took into consideration, was not the correct criterion, though it may be relevant in the rest of the analysis. "Inconsistent adherence to a religious practice may suggest lack of sincere belief, but it does not necessarily do so." N.S. seems to have made earlier compromises in order to participate in some facet of society.[263] Nevertheless, the majority was convinced that her belief in wearing a *niqab* was sincere.

Concerning the second question, the majority argued that there was "a strong connection between the ability to see the face of a witness and a fair trial". Yet seeing a face was not the only or the most important factor. But because seeing the face was "deeply rooted in our criminal justice system" it should not be set aside unless there was "compelling evidence".[264] The witness had to provide such evidence. "If wearing the *niqab* poses no serious risk to trial fairness, a witness who wishes to wear it for sincere religious reasons may do so."[265]

Concerning the third question, the judge had to assess how to reconcile the rights. This included determining whether there were reasonably available alternative measures that would conform to the witness's religious convictions while still preventing a serious risk to trial fairness.[266] If no accommodation was possible, then the fourth question had to be answered: Do the salutary effects of requiring the witness to remove the *niqab* outweigh the deleterious effects of doing so?[267]

Amongst the negative effects, was the harm done by limiting the witness's sincerely held religious practice. Chief Justice McLachlin gave suggestions in making the difficult assessment of the effects based on earlier case law. "How important is the practice to the claimant? What is the degree of state interference with the religious

261 *Ibid.*, paras 1-2.
262 *Ibid.*, paras 8-9.
263 *Ibid.*, para. 13.
264 *Ibid.*, para. 27.
265 *Ibid.*, para. 29.
266 *Ibid.*, paras 30-33.
267 *Ibid.*, para. 29.

practice? How does the actual situation in the courtroom […] affect the harm to the claimant of limiting her religious practice?"[268] "The judge should also consider broader societal harms, such as discouraging *niqab*-wearing women from reporting offences and participating in the justice system."[269]

These negative effects had to be weighed against the positive effects of requiring the witness to remove the *niqab*. Salutary effects included preventing harm to the fair trial interest of the accused and safeguarding the repute of the administration of justice.[270] The nature of the proceedings may also be taken into consideration[271] as well as the nature of the evidence given by the witness.[272] Where "the liberty of the accused is at stake, the witness's evidence central and her credibility vital, the possibility of a wrongful conviction must weigh heavily in the balance favoring removal of the *niqab*."[273]

A clear rule that would always or never allow for ordering the removal of the *niqab* when testifying was not compatible with the engaged rights, according to the majority opinion.[274] Always permitting a witness to wear the *niqab* would "offer no protection for the accused's fair trial interest and the state's correlative interest in avoiding wrongful convictions".[275] On the other hand, never allowing the *niqab* was inconsistent with "Canadian jurisprudence, courtroom practice, and our tradition of requiring state institutions and actors to accommodate sincerely held religious beliefs insofar as possible".[276] For over half a century, this tradition of accommodation had served Canada well, argued McLachlin. To depart from it would set the law down a new road, with unknown twists and turns.[277]

LeBel and Rothstein drew attention to "the tension and changes caused by the rapid evolution of contemporary Canadian society and by the growing presence in Canada of new cultures, religions, traditions and social practices".[278] The Charter protected the freedom of religion and belief and the rights of the accused in a criminal justice case.[279] While they accepted the sincerity of N.S.'s beliefs and acknowledged the discomfort caused by a sexual assault trial, especially one involving relatives,[280] they believed that balancing the rights and interests worked in favor of the accused. This was because he must be allowed full cross-examination for the purpose of his defense. This required the removal of the veil "while giving evidence at the preliminary inquiry and at trial".[281]

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268 *Ibid.*, para. 36.
269 *Ibid.*, para. 37.
270 *Ibid.*, para. 38.
271 *Ibid.*, para. 39.
272 *Ibid.*, para. 43.
273 *Ibid.*, para. 44.
274 *Ibid.*, paras 47-48.
275 *Ibid.*, para. 48.
276 *Ibid.*, para. 51.
277 *Ibid.*, para. 54.
278 *Ibid.*, para. 59.
279 *Ibid.*, paras 62-63.
280 *Ibid.*, para. 65.
281 *Ibid.*, para. 68.

LeBel and Rothstein did favor a clear rule instead of the case-by-case approach favored by the majority. Given the underlying values of the Canadian justice system, they proposed never allowing a witness to wear a *niqab*.[282] The Charter protected the multicultural heritage of Canada. The "'living tree' keeps growing, but always from its roots".[283] Part of the roots was the independent and open justice system.[284] Because a trial is an "act of communication with the public at large",[285] a "clear rule that niqabs may not be worn would be consistent with the principle of openness of the trial process".[286]

Abella, in her dissenting opinion, drew attention to the controversy regarding the appellant's *niqab.* For the appellant, it was part of her faith, while many of the same faith did not see it as required or even a religious practice as such. In broader Canadian society, some were fearful that it might marginalize women, while others defended it as a woman's choice; some see it as enhancement of multiculturalism and others are opposed to it. But all this was not the issue at hand, reasoned Abella. The only question for the SCC was whether a "witness' sincerely held religious belief that a niqab must be worn in a courtroom, yield to an accused's ability to see her face".[287]

Abella readily conceded that the *niqab* imparted seeing the facial expression.[288] However, she did not regard this impairment to be so compelling on assessing the credibility of a witness, that the witness would have to choose "between her religious rights and her ability to bear witness against an alleged aggressor".[289] Only in cases where the face was directly related to issues at trial, would she order the face to be shown.[290]

The appellant's sincerity of belief was not contested and therefore there was no risk that she was wearing it for a strategic advantage in de trial.[291] Unlike the majority, she believed that "strength" of the belief could never be an issue in such a case.[292] Ordering the witness to remove the *niqab* while testifying was a far greater harm than the harm done to the accused, if she were able to wear it while testifying.[293] Especially since in the interest of justice there had already been an evolution of practices in testimony. Children could testify behind screens, there were witnesses with visual, oral, or aural impediments and witnesses who required an interpreter. In all these exceptions, the credibility of the witness could still be assessed. The same would go for a *niqab.*[294] A witness wearing a *niqab* could still be cross-examined

282 *Ibid.,* para. 69.
283 *Ibid.,* para. 72.
284 *Ibid.*
285 *Ibid.,* para. 76.
286 *Ibid.,* para. 78.
287 *Ibid.,* para. 80.
288 *Ibid.,* paras 81-82.
289 *Ibid.,* para. 82.
290 *Ibid.,* para. 83.
291 *Ibid.,* para. 88.
292 *Ibid.,* para. 89.
293 *Ibid.,* para. 86.
294 *Ibid.,* paras 91- 92.

in the courtroom, where gestures, tone of voice and so forth were visible and audible.[295]

Abella let the rights of the appellant weigh so heavily because of the serious consequences not allowing accommodation for *niqab* wearing women would have. It would send them a message that they were not welcome. Consequently, they might not turn to the criminal justice system if they had been victimized.[296] Especially after sexual assault, forcing victims to choose between justice and their sincere beliefs was "no meaningful choice at all".[297] It "undermines the public perception of fairness not only of the trial, but of the justice system itself".[298]

### 4.15 Mouvement laïque québécois v. Saguenay (City) [2015]

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|---|---|
| Essence: | A municipal council practice of opening its meetings with a prayer accompanied by religious rituals in light of state neutrality which follows from freedom of religion and belief and the rights of the claimant not to be discriminated against as a sincere atheist. |
| Dimension: | Freedom of religion and belief and secularism. |
| Lower courts: | Human Rights Tribunal found in favor of Mr. Simoneau and the MLQ. The Court of Appeal found in favor of the City. |
| Majority: | 9:0. Found in favor Mr. Simoneau and the MLQ Majority opinion by Gascon. Separate concurring opinion by Abella. |
| Dissenting: | None |

Mr. Simoneau regularly attended the public meetings of the municipal council of Saguenay. He describes himself as an atheist and felt discriminated because[299] that at the beginning of each meeting, the mayor would recite a prayer after making the sign of the cross while saying "in the name of the Father, the Son and the Holy Spirit". The prayer also ended with the sign of the cross and the same words. Other councilors and City officials would cross themselves at the beginning and end of the prayer as well. Also, in some of the council chambers there were artifacts like statutes and paintings with a religious meaning.[300]

Under the Quebec Charter, Mr. Simoneau initiated proceedings with the Quebec Human Rights Commission. The Commission limited its investigation to the question whether the prayer was discriminatory. It considered the evidence to be sufficient to submit the dispute to the Human Rights Tribunal, but it did not do so itself. Mr.

295 *Ibid.*, para. 105.
296 *Ibid.*, para. 94.
297 *Ibid.*, para. 96.
298 *Ibid.*, para. 95.
299 SCC, *Mouvement laïque québécois v. Saguenay (City)*, Case 35496, [2015] 2 SCR 3, 15 April 2015, para. 2.
300 *Ibid.*, paras. 3-8.

Simoneau, with the support of the *Mouvement laïque québécois* (MLQ), applied to the Tribunal.[301]

In the meantime, the City adopted a by-law regulating the prayer, which changed the wording of the prayer and provided for a two-minute delay between the end of the prayer and the official opening of council meetings. The mayor and the councilors continued to act in the same way as described above.[302] The applicants amended their motion to ask the Tribunal to declare the by-law to be inoperative and of no force or effect. The City and mayor argued that their freedom of religion and belief entitled them to the practice.[303]

The Tribunal found in favor of the claimants, finding that the payer and the way it was conducted amounted to showing a preference for one religion to the detriment of others which constituted a breach of the state's duty of neutrality.[304] The Court of Appeal found that the issue of religious neutrality of the state was a matter of importance to the legal system. Hence, this mandated review under the standard of "correctness". It held that there had been no discrimination and that any possible interference was trivial or insubstantial. In its opinion, the prayer at issue expressed universal values and could not be identified with any particular religion.[305]

The Court unanimously found in favor of Mr. Simoneau and the MLQ. Justice Gascon authored the majority opinion also on behalf of McLachlin, LeBel, Rothstein, Cromwell, Moldaver, Karakatsanis, and Wagner. Abella did not agree with the majority concerning the standards of review, but also found in favor of the appellants.

Gascon argued different standards of review apply to the different elements in the case. Hence the Court of Appeal was in the wrong in applying "correctness". Tribunal functions vary comparable to a court, but this was still an administrative tribunal. The correctness standard applied to the state's duty of religious neutrality that flows from freedom of conscience and religion. The reasonableness standard applied in answering whether the prayer was religious in nature, the extent to which the prayer interfered with the complainant's freedom and the extent of its discriminatory nature.[306] With regard to the religious symbols, the majority agreed with the Court of Appeal that the Tribunal could not consider them, because the Commission had not conducted an investigation into this question.[307]

Gascon derived the state's duty of religious neutrality from an evolving interpretation of freedom of conscience and religion. The Canadian concept of neutrality "requires that the state neither favor nor hinder any particular belief, and the same holds true for non-belief". It requires the state to "abstain from taking any position".[308] "Sponsorship of one religious tradition by the State in breach of its duty of neutrality amounts to discrimination against all other such traditions." This is because "it imports a disparate impact that is destructive of the religious freedom

301 *Ibid.*, paras 8-13.
302 *Ibid.*, paras 12-13.
303 *Ibid.*, para. 2.
304 *Ibid.*, para. 15.
305 *Ibid.*, paras 18-22.
306 *Ibid.*, paras 49-50.
307 *Ibid.*, paras 53-60.
308 *Ibid.*, para. 72.

of the collectivity".[309] "Religion is an integral part of each person's identity. When the state adheres to a belief, it [….] is creating a hierarchy of beliefs […]. It is also ranking the individuals who hold such beliefs [..]."[310]

The protection of the Quebec Charter, under which the case was filed, and the Canadian Charter extended to the freedom not to believe, manifest one's non-belief and to refuse to participate in religious observance. Hence "belief" and "religion" for the purposes of the Charter protection "encompass non-belief, atheism and agnosticism".[311]

The pursuit of the ideal of a free and democratic society required the state to encourage everyone to participate freely in public life, regardless of their beliefs. A neutral public space free from coercion, pressure and judgment on the part of public authorities in matters of spirituality was intended to protect every person's freedom and dignity, and it helped preserve and promote the multicultural nature of Canadian society.[312]

The majority found the Tribunal's reasoning "reasonable" that there had been discriminatory interference with Simoneau's freedom of conscience and religion. The recitation of the prayer at the council's meetings was, above all else, a use by the council of public powers to manifest and profess one religion to the exclusion of all others. This was true regardless of whether the practice had a traditional character.[313] Evidence showed that the mayor and others had explicitly referred to the legal conflict in terms of quest for their religion. The prayer recited, resulted in a distinction, exclusion and preference based on religion, in this case of the claimants sincere atheism. The circumstances in which the prayer was recited, turned the meetings into a preferential space for people with theistic beliefs.[314] Although non-believers could refrain from participating, the price for doing so was isolation, exclusion and stigmatization. This impaired Mr. Simoneau's right to exercise his freedom of conscience and religion.[315]

On the other hand, barring the municipal council from reciting the prayer would not amount to giving atheism and agnosticism prevalence over religious beliefs. Gascon was aware that "secularism" was not more neutral than other positions regarding belief and religion. "True neutrality" presupposed abstention, but it did not amount to a stand favoring one view over another.[316] "A practice according to which a municipality's officials, rather than reciting a prayer, solemnly declared that the council's deliberations were based on a denial of God would be just as unacceptable."[317] True neutrality was not a favoritism of unbelief. But the concept of "benevolent neutrality" adhered to by the Court of Appeal was not compatible with "true neutrality". According to this concept, the state could use religious ex-

309 *Ibid.,* para. 64.
310 *Ibid.,* para. 73.
311 *Ibid.,* para. 70.
312 *Ibid.,* paras 74-75.
313 *Ibid.,* para. 87.
314 *Ibid.,* paras 116-120.
315 *Ibid.,* paras 120-126.
316 *Ibid.,* paras 130-133.
317 *Ibid.,* para. 133.

pression in light of cultural or historical reality or heritage. That was not compatible with freedom of religion and belief.[318]

Unlike what the City and the mayor alleged, the prayer in this case was not non-denominational, and thus not aimed at inclusion. Evidence supported a very different analysis.[319] There was no evidence before the SCC concerning the payer in the House of Commons and the practice also falls within certain parliamentary privileges.[320] The Constitutional preamble, which asserts the "supremacy of God", expressed the political theory under which the Constitution was drafted and could not lead to an interpretation of freedom of conscience and religion that authorized the state to consciously profess a theistic faith. Hence it could not be used to justify the prayer in question.[321]

Abella agreed with much of the content of the majority's opinion. However, she disagreed with using the multiple standards for different aspects of the Tribunal's decision. She believed that the majority's reasoning undermined a "holistic approach".[322] The majority distinguished between "the question of the state's duty of religious neutrality that flows from freedom of conscience and religion and other aspects of the Tribunal's decision". But, argued Abella, they themselves acknowledged that one flows from the other, and deciding whether discrimination based on freedom of religion had taken place was the Tribunal's "daily fare". None of the elements of this right deserved more heightened scrutiny than the right itself.[323]

318 *Ibid.,* para. 134.
319 *Ibid.,* paras 135-140.
320 *Ibid.,* paras 141-143.
321 *Ibid.,* paras 144-149.
322 *Ibid.,* para. 172.
323 *Ibid.,* para. 166.

# Appendix I2

# The CCSA and case studies of the selected cases

## 1 Introduction to this chapter and reading aid

This chapter introduces the South African legal system, the Constitutional Court of South Africa (CCSA), and the Bill of Rights, as well as the selected cases. Section 2 briefly introduces the South African constitutional and legal history. It also gives an impression of the current constitutional and legal system. In section 3, the selected cases are introduced and an overview is given. Section 4 contains the case studies of the selected cases and discusses them in chronological order.

## 2 Introducing the South African legal system, the CCSA, and the Bill of Rights

This section gives an impression of the constitutional and legal order of South Africa and the Constitutional Court's position therein. It provides an overview of South Africa's modern constitutional and political history in a nutshell, outlines South Africa's contemporary constitutional and legal system and introduces the Bill of Rights and other Human Rights legislation.

South Africa is a highly pluralist country, consisting of many ethnic, cultural, religious, and linguistic communities. Before 1994, a "minority population had aggressively held a monopoly of political power for three centuries".[1] With the Interim Constitution and later the 1996 Constitution, South Africa re-invented itself as the "Rainbow Nation". The right to self-determination of the South African people does "not preclude recognition of the right of self-determination of any community sharing a common cultural and language heritage, within a territorial entity in the Republic or in any other way determined by national legislation".[2]

The Constitution protects the right of everyone to use the language and to participate in the cultural life of their choice, and protects the rights of cultural, religious, and linguistic communities. It explicitly provides for the recognition of customary and religious family and personal law. It also provides for individual and collective freedom of religion and belief, including the accommodation of religious observances.[3] The Constitution also recognizes six official languages of the republic,[4] while also containing provisions regarding the promotion, protection and use of minority languages of aboriginal minorities, other linguistic minorities (of European and South Asian origin), and languages for religious use such as Hebrew, Arabic and Sanskrit.

The recognition of such collective rights and the group identities is seen as a precondition for the exercise of individual rights, yet also a consequence of the exercise of the individual freedom of association.[5]

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11 I. Currie and J. de Waal (in association with Lawyers for Human Rights and the Law Society of South Africa), *The Bill of Rights Handbook*, Juta & Co, Cape Town (South Africa), 2006, p. 623.

2 Constitution of the Republic of South Africa, 10 December 1996, s. 235.

3 *Ibid.*, ss 30, 31 and 15.

4 *Ibid.*, s. 6.

5 *See* Currie & de Waal, *supra* n. 1, at 624.

## 2.1 The constitutional and legal history of South Africa in a nutshell

For any constitutional order, it is no easy task to determine where to begin a sketch of the (constitutional) history. Depending on preference and context of the overview, in the case of South Africa one could, for example, start with the history of the peoples who inhabited the territory of what is currently the Republic of South Africa prior to colonization by European powers, or with the Boer Republics, or with the British colonization of South Africa.

Because the "Rainbow Nation" was constituted in contrast to the apartheid regime which had preceded it, it is necessary to briefly discuss the history of apartheid in order to understand the current political order. Apartheid was formally introduced in South Africa after the National Party had won the 1948 elections in the British dominion, then called Union of South Africa. Apartheid's constitutional aim was to establish sovereign black ethnic nation states, leaving the rest of the territory "white", "colored" and Asian (mainly originating from former British India), while the government would be dominated by "whites".[6]

In the 19th century, South Africa had been systematically absorbed by the British Crown, following various conflicts between British forces and Afrikaner settlers. The Afrikaners of mainly Dutch, but also German, Huguenot and other non-British European heritage, entered into conflicts with African tribes as they established "Boer Republics". British acquisition of territory had begun with the occupation of the Cape of Good Hope in 1795, annexed in 1809 as a Crown Colony.[7] In 1899, when the Anglo-Boer War broke out, Natal and the Cape were British colonies, while Transvaal and the Orange Free State were Boer republics. These four territories were merged by the South Africa Act of 1909 into the Union of South Africa,[8] which became a dominion[9] in 1931 in accordance with the Statute of Westminster.[10]

Racism and racial segregation began in colonial times in South Africa, first under Dutch and then under British rule.[11] However, under the Union constitution, in the Cape and Natal there was a non-racial, yet qualified franchise (which factually led to a large part of the African and colored population not being eligible to vote). The

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6 *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. 27.

7 *Ibid.*, p. 26.

8 *See* I. Currie, 'Electoral Democracy in South Africa: A brief History, in G. van der Schyff (ed.) *Constitutionalism in the Netherlands and South Africa, A Comparative Study*, Wolf Legal Publishers, Nijmegen (Netherlands), 2008, p. 67.

9 In 1926 Lord Balfour, chairman of the inter-imperial relations committee declared famously about dominions: *"They are autonomous Communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs, though united by a common allegiance to the Crown, and freely associated as members of the British Commonwealth of Nations."*; F. Venter, *Constitutional Comparison; Japan, Germany, Canada and South Africa as Constitutional States,* Juta & Co, Ltd, Cape Town (South Africa), 2000, p. 72.

10 *See* D. Van Wyk, J. Dugard, V.B. de Villiers, D. Davis (eds.), *Rights and Constitutionalism, The New South African Legal Order*, Clarendon Press, Oxford (UK), 1996, p. 131. *See also* Venter, *supra* n. 6, at 26-27.

11 *See* Van Wyk et al., *supra* n. 10, at 131; Venter, *supra* n. 6, at 26.

former Boer republics, however, confined the franchise to white men (and in 1930 to white adults).[12] After the Union was formed, Afrikaner nationalists moved to gradually segregate politics and society.[13]

In the run-up to the 1948 elections, the main Afrikaner nationalist party, the *Herenigde Nasionale Party* (Reunited National Party, HNP) under the leadership of Protestant Minister Daniel Francois Malan, campaigned based on its proposed policy of "apartheid". The HNP narrowly defeated (former prime minister) Smuts' United Party and formed a coalition government with another Afrikaner nationalist party, the Afrikaner Party. The two parties later merged to form the National Party (NP). Malan became the prime minister.

The first grand apartheid law was the Population Registration Act of 1950, which formalized racial classification ("native", "white", "colored", and "Asian"). This caused difficulty, especially for colored people, separating their families as members were allocated different races.[14] Another important law was the Group Areas Act of 1950, which segregated residential areas. The Prohibition of Mixed Marriages Act of 1949 prohibited marriage between persons of different race.

Under the Reservation of Separate Amenities Act of 1953, municipal grounds could be reserved for a particular race, creating, among other things, separate beaches, buses, hospitals, schools and universities. The Promotion of Black Self-Government Act of 1959 entrenched the National Party's policy of nominally independent "homelands" for black people. The Black Homeland Citizenship Act of 1970 changed the status of black people living in South Africa so that they were no longer citizens of South Africa, but became citizens of one of the ten autonomous territories.[15]

Apartheid sparked significant internal resistance. Hence, further laws had the aim of suppressing any resistance to apartheid. The government responded to popular uprisings with the use of violent police action and secret service operations. One of those protests was held in the township of Sharpeville, where 69 people were killed by police in the infamous Sharpeville massacre. In the wake of the Sharpeville incident, the African National Congress (ANC) and its offshoots were banned. The resistance went underground, with some leaders in exile abroad.[16] In the infamous Rivonia trial of 1964, leaders of the resistance – Nelson Mandela, Walter Sisulu and Ahmed Kathrada – were sentenced to death (turned into life imprisonment). The Soweto uprising in 1976 and the "mysterious" death of imprisoned Black Consciousness activist Steve Biko in 1977 are also landmarks in the struggle.

Criticism against apartheid also came from the United Kingdom and the Commonwealth of Nations. As Afrikaner nationalism had always had an anti-British and republican outlook,[17] the apartheid government organized a referendum. More than 90% of eligible voters (in accordance with Apartheid law) participated in the referendum, and 52.3% of those who did, voted in favor of a republic. Hence, South Africa

12 Currie, *supra* n. 8, at 67.
13 *See ibid.,* p. 68.
14 *See* Venter, *supra* n. 6, at 27.
15 *See ibid.*
16 *See* Van Wyk et al., *supra* n. 10, at 134.
17 *See* Venter, *supra* n. 9, at 75.

left de Commonwealth and changed its name from Union of South Africa to Republic of South Africa in 1961.[18]

In the 1980s, national and international opposition to apartheid increased. Early in 1989, President Botha suffered a stroke and resigned from office. He was succeeded by F.W. de Klerk. Despite his reputation as a conservative, De Klerk moved towards negotiations to end the political stalemate.[19] He lifted the 30-year ban on leading anti-apartheid groups such as the ANC and the United Democratic Front.[20] In 1990, Nelson Mandela was released and negotiations concerning a process of political reforms were started. In September 1991, the government and representatives of 27 political organizations and national and homeland governments signed the National Peace Accord. In a referendum held on 17 March 1992, a white electorate voted 68% in favor of dismantling apartheid through negotiations.[21]

Eventually the Multi-party Negotiating Process finally led to the text of the Interim Constitution and a set of constitutional principles for a final constitution.[22] On 22 December 1993, the tri-cameral Parliament adopted the Interim Constitution.[23] In 1993, De Klerk and Mandela were jointly awarded the Nobel Peace Prize for their work for the peaceful termination of the apartheid regime. From 26 to 29 April 1994, the South African population voted in the first universal suffrage general elections. Nelson Mandela was elected President on 9 May 1994 and formed – according to the Interim Constitution of 1993 – a government of national unity, consisting of the ANC, the NP and the Inkatha, with Thabo Mbeki and F.W. de Klerk as his vice-presidents.

### 2.2 South Africa's contemporary constitutional and legal system

The current Constitution is the one of 1996. It was preceded by the Interim Constitution of 1993. The Interim Constitution provided for a Constitutional Assembly, which would adopt a constitution in accordance with the Constitutional Principles. These principles had emerged from the pre-1993 negotiation process. The final constitution had to be certified by the Constitutional Court, which was established by the Interim Constitution. The Constitutional Assembly adopted a text in May 1996. Following the first review by the Constitutional Court, amendments had to be made because certain provisions did not conform to the Constitutional Principles. The improved adopted text was then certified by the Constitutional Court (CC) on 4 December 1996 and took effect on 4 February 1997.[24]

The Constitution of 1996 is the longest in the world.[25] Its essence is the creation of a post-apartheid democratic constitutional state, based on equality, fundamental

18 *See* Venter, *supra* n. 6, at 27.
19 *See* Venter, *supra* n. 9, at 77.
20 *See* Van Wyk et al., *supra* n. 10, at 131.
21 *See ibid.,* pp. 134-143.
22 Currie, *supra* n. 8, at 71.
23 *See ibid.,* p. 70.
24 *See* Venter, *supra* n. 6, at 30-31.
25 *See* Van Wyk et al., *supra* n. 10, at 158.

rights, national unity, and restructuring of the state.[26] Under it, South Africa is a parliamentary republic, with both centralist and federalist elements. The national legislative branch consists of the National Assembly and the National Council of Provinces. The National Assembly is elected every five years using a party list proportional representation system where half of the members are elected proportionally from nine provincial lists and the remaining half from national lists so as to restore proportionality.[27]

The National Council of Provinces (NCOP) is elected indirectly. Citizens vote for provincial legislatures, and each legislature then nominates a delegation of ten members to the NCOP. Each provincial delegation consists of six permanent delegates, who are nominated for a term that lasts until a new provincial legislature is elected, and four special delegates.

The national executive branch is formed by the President, Deputy President and the Ministers and Deputy Ministers. The leader of the political party or coalition of parties that wins a majority of the seats in the National Assembly is named President. The President is both Head of State and Head of Government. The President appoints the Deputy President and the Ministers. The President and the Ministers are responsible to the Parliament, of which they must be elected members.[28]

## 2.3 South Africa's contemporary judicial structure

The judicial branch is not subdivided into a federal and provincial level and consists of the Constitutional Court, the Supreme Court of Appeal, and the High Courts and the Magistrates' Courts. Next to these, Section 166(e) of the Constitution also provides that by Act of Parliament other courts may be established or recognized, "including any court of a status similar to either the High Courts or the Magistrates' Courts".

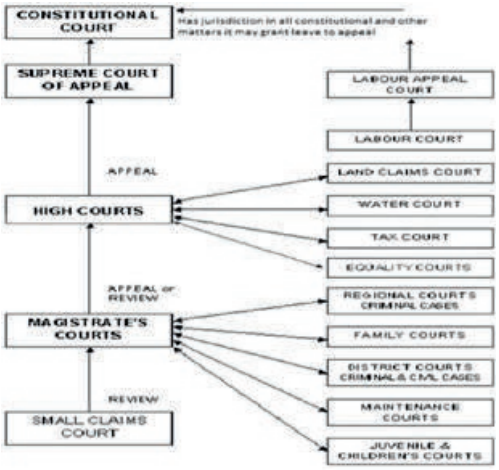


*Figure 3: South African Court system*

26 *Ibid.*, p. 159.
27 *Ibid.*, p. 160.
28 *Ibid.*, pp. 162-164.

The Constitutional Court is the highest court of appeal in all constitutional cases. It consists of the Chief Justice of South Africa, the Deputy Chief Justice and nine Constitutional Court judges. A case must be heard by at least eight judges.[29] The CCSA has exclusive jurisdiction in[30]

- disputes between organs of state in the national or provincial sphere concerning the constitutional status, powers or functions of any of those organs of state,
- constitutional review during the national or provincial legislative process,
- deciding the constitutionality of any amendment to the Constitution,
- determining whether President or Parliament failed to fulfil a constitutional obligation, and
- certifying a provincial constitution.

The Supreme Court of Appeal is the highest court in respect of all other matters other than constitutional matters. Since a court reform in 2013, there is a single South African High Court which hears cases. A high court has jurisdiction in its own area over all persons residing or present in provincial divisions of the Court. The Magistrates' Courts are the lower courts which deal with the less serious criminal and civil cases. They are divided into regional courts and district courts. In Criminal Courts, the state prosecutes people for breaking the law. There are also specialist courts, the Land Claims Court, the Tax Court and the Equality Courts.

### 2.4 The provincial level

South Africa is not a federation. However, the provinces do have features "reminiscent of federal principles".[31] Provinces have a "distinctive, interdependent and interrelated" relation with the central government This is what is called "cooperative government" in South African constitutional law.[32]
The legislative organ of each province is the provincial legislature.[33] The executive power is vested in the premier of each province[34] who exercises this power together with the members of the Executive Council.[35] Provincial constitutions need to be certified by the Constitutional Court.[36]

### 2.5 Legal system

Historically, South African public law has been dominated by the English common law tradition. South African legal scholars and practitioners closely followed and applied the English legal traditions and concepts. The apartheid regime attached great

29 *See* Constitution of the Republic of South Africa, *supra* n. 2, s. 167, subss (1) and (2).
30 *See ibid.*, s. 167, subss (3) and (4).
31 Venter, *supra* n. 9, at 244.
32 *See* Venter, *supra* n. 6, at 33.
33 *See* Constitution of the Republic of South Africa, *supra* n. 2, s. 104.
34 *Ibid.*, s. 125.
35 *Ibid.*, s. 125(2).
36 *Ibid.*, ss 142 and 144.

value to the "supremacy of parliament".[37] It provided a doctrinal legitimacy for apartheid rule under the National Party. Yet, already in the apartheid era, ideas of "*rechtsstaat*" (rule of law) and human rights were discussed in legal academic literature and presented as alternatives which would enable a non-apartheid society.[38] The Constitution of 1996 was indeed intended to be an instrument of change in South African society.[39] "[U]nlike ordinary legislation, a Bill of Rights talks to society and informs it, not only what kind of society it is, but also of the one it ought to be. It contains not only constraints but also aspirations."[40]

Typical of the constitutional state or *rechtsstaat*, Section 2 of the Constitution declares the Constitution to be the supreme law of the land, while any "law or conduct inconsistent with it is invalid".[41] This provision is far more explicit than equivalent provisions in most other constitutions, especially because not only laws, but also conduct contrary to the Constitution is declared invalid.[42]

One of the effects of the Constitution is that legal norms originating from common law and Roman Dutch law, or for that matter traditional or religious law, which may be recognized are subject to modification by constitutional norms, including the Bill of Rights.[43]

### 2.6 Recognition of customary and religious marriage and personal law

Section 31 of the Constitution provides for the collective rights of cultural, religious or linguistic communities. While Section 31 is not explicit about customary law, other sections of the Constitution explicitly refer to customary, indigenous and religious law. However, Section 39(2) obliges courts to promote the spirit, purport and objects of the Bill of Rights, when *inter alia* developing customary law. This section also makes clear that the Bill of Rights cannot be read to deny any rights recognized or conferred by *inter alia*, customary law, to the extent that they are not inconsistent with the Bill of Rights.

Religious law and tradition have a somewhat less prominent status under the Constitution. Section 15(3) does not recognize them as such, but it stipulates that the right to freedom of religion does not prevent the legislative recognition of marriages concluded under any tradition, or a system of religious, personal or family law and systems of personal and family law under any tradition, or adhered to by persons professing a particular religion. Therefore, the possibility of recognizing religious law by legislative means is not ruled out but enabled.

As far as marriage is concerned, a legally recognized marriage can be solemnized by a religious minister, registered as a marriage officer or by officials registered on

37 Venter, *supra* n. 9, at 75.
38 *See* Venter, *supra* n. 6, at 28-29.
39 *Ibid.*, p. 34.
40 Van Wyk et al., *supra* n. 10, at 2-3.
41 *See* Venter, *supra* n. 6, at 33.
42 Venter, *supra* n. 9, at 33 and 118.
43 *See* Venter, *supra* n. 6, at 33, referring to CCSA, *Government of the Republic of South Africa and Others v. Grootboom and Others*, Case CCT11/00, 4 October 2000 and CCSA, *Minister of Health and Others v. Treatment Action Campaign and Others (No 2)*, Case CCT8/02, 5 July 2002.

the part of the state. The Recognition of Customary Marriages Act 120 of 1998 grants official status to customary marriages. The Civil Union Act 17 of 2006 provides official legal status, either as a civil union or marriage, for same-sex couples[44] (see also *Fourie*[45] case discussed below). In 1998, Parliament adopted the Recognition of Customary Marriages Act. However, while being debated endlessly, there is still no Muslim marriage Act[46] (see also cases *Amod*,[47] *Daniels*,[48] *Hassam*[49] below and the *Moosa*[50] case decided more recently).

## 3 Introducing the selected CCSA cases

### 3.1 Introduction: How the freedom of religion and belief contributed to the new ethos

As explained in section 2 both the interim and the final Constitutions included the freedom of religion and belief, both as individual and as community rights. South Africa's struggle against the injustices of apartheid may primarily been seen as a struggle against racial and ethnic discrimination, but any closer look immediately reveals the cultural and religious dimension in both apartheid and the struggle against it.

Apartheid, as conceptualized by the National Party, had always been justified as a means to secure the cultural and religious beliefs and identity of the Afrikaner people and as an expression of a theological order of things. Several of the Afrikaner Calvinist churches provided the policy with theological underpinnings.[51]

While Afrikaner nationalism was the cradle of apartheid theory, it could easily tap into British colonialist conceptions of non-European cultures, religions and beliefs. While this affected the native people of South Africa, infamous historical judgments dealing with Muslim marriages, such as *Seedat's Executors*, show how South Africans of mixed-race and South Asian origin were affected. The case stereotyped Muslim marriage "as repugnant to the policy and the legal institution both of Holland and England" and "reprobated by the majority of the civilized peoples, on grounds of

44 J. D. van der Vyver, 'Multi-Tiered Marriages in South Africa', in J. A. Nichols (ed.), *Marriage and Divorce in a Multicultural Context Multi-Tiered Marriage and the Boundaries* of C*ivil Law and Religion,* Cambridge University Press, Cambridge (UK), 2012, pp. 201 and 204.

45 CCSA, *Minister of Home Affairs and Another v. Fourie; Lesbian and Gay Equality Project and Eighteen Others v. Minister of Home Affairs*, Cases CCT60/04 and CCT10/05, 1 December 2005.

46 Currie & J. de Waal, *supra* n.1, at 356.

47 CCSA, *Amod v. Multilateral Motor Vehicle Accidents Fund*, Case CCT4/98, 27 August 1998.

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

49 CCSA, *Hassam v. Jacobs NO and Others*, Case CCT83/08, 15 July 2009.

50 CCSA, *Moosa and Others v. Minister of Justice and Correctional Services and Others,* Case CCT25/17, 29 June 2018.

51 *See* A. Toit, 'Puritans in Africa? Afrikaner "Calvinism" and Kuyperian Neo-Calvinism in Late Nineteenth-Century South Africa', in *Comparative Studies in Society and History*, vol. 27, no. 2, pp. 209-240 (1985).

morality and religion".[52] Apartheid Courts drew on these precedents, for example in *Ismael v. Ismael* in1983.[53]

While some religious beliefs were instrumental to the apartheid regime, the religious beliefs of others were important in the struggle against apartheid. The early Indian civil rights movement in South Africa was amongst other things directed against the legal non-recognition of Muslim and Hindu marriages. Within the anti-apartheid resistance movement, faith-based principles played an important role as shown by the ANC anthem, "Nkosi Sikelel' iAfrika", which is now part of the South African national anthem. While Bishop Tutu was possibly the most well-known religious dignitary to become active in the struggle, the movement was religiously pluralist and included people of different faiths and denominations, including staunch (philosophical) non-believers.

The selection of cases displays how the freedom of religion and belief found its way not only in rejecting past bigotry and intolerance, but in formulating a new ethos which would contribute to recreating South Africa as the "Rainbow Nation". Importantly, time has not stood still since 2015 – the final year for the selection of cases in this study. In the *Moosa*[54] case, the CCSA built further on the case law of the Muslim marriage cases *Amod*, *Daniels* and *Hassam*, discussed below. In this case, the two surviving spouses of a deceased Muslim husband filed the complaint together. The unanimous Court ruled that excluding them from the meaning of spouse for purposes of the Wills Act was unconstitutional.

### 3.2 Overview of selected cases

In the period from 1996 until 2015, 17 cases which feature the freedom of religion and belief in a substantial way were decided by the CCSA (see section 1.7). From these cases, the following selection of 15 cases was made:

| | |
|---|---|
| 1. | Ex parte Chairperson of the Constitutional Assembly: In re Certification of the amended text of the Constitution of the Republic of South Africa (Certification of the Constitution of the Republic of South Africa), 1996, |
| 2. | Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995 Case Number: CCT39/95, 4 April 1996 |
| 3. | Certification of the Constitution of the Western Cape, 1997, Case CCT6/97, 2 September 1997 |
| 4. | S v Lawrence; S v Negal; S v Solberg, Cases CCT38/96; CCT39/96; CCT40/96, 6 October 1997 |
| 5. | Amod v Multilateral Motor Vehicle Accidents Fund, Case CCT 4/98, 27 August 1998 |

52 Supreme Court of South Africa (Appellate Division), *Seedat's Executors v. The Master (Natal),* 1917 AD 302, at 307-308.

53 Eastern Cape High Court (South Africa), *Ismail v. Ismail,* 1983 (1) SA 1006 (A).

54 *Moosa and Others v. Minister of Justice and Correctional Services and Others,* Case CCT25/17, *supra* n. 50.

| | |
|---|---|
| 6. | Christian Education South Africa v Minister of Education, Case CCT4/00, 18 August 2000 |
| 7. | Prince v President of the Cape Law Society and Others, Case CCT36/00A, 12 December 2000 & Prince v President of the Cape Law Society and Others, Case CCT36/00B, 25 January 2002 |
| 8. | Daniels v Campbell NO and Others, Case CCT 40/03, 11 March 2004 |
| 9. | Volks NO v Robinson and Others (CCT12/04) [2005] ZACC 2; 2005, 21 February 2005. |
| 10. | Minister of Home Affairs and Another v Fourie and Another; Lesbian and Gay Equality Project and Others v Minister of Justice and Constitutional Development, Cases CCT 60/04 and CCT 10/05, 1 December 2005 |
| 11. | MEC for Education: Kwazulu-Natal and Other v Pillay, Case CCT 51/06, 5 October 2007 |
| 12. | Hassam v Jacobs NO and Others, Case CCT 83/08 [2009] ZACC 19, Case CCT 51/06, 15 July 2009 |
| 13. | Women's Legal Centre Trust v President of the Republic of South Africa and Others, Case CCT 13/09 [2009] ZACC 20, 22 July 2009 |
| 14. | DE v RH (CCT 182/14) [2015] ZACC 18; 2015 19, June 2015 |
| 15. | De Lange v Presiding Bishop of the Methodist Church of Southern Africa for the time being and Another (CCT223/14) [2015] ZACC 35; 2016. 24 November 2015 |

The selection only includes cases in which the freedom of religion and belief features as the central right. 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. This includes cases in which the freedom of religion is raised as a major argument, although the central right is equal treatment of gender or sexual orientation or in which the freedom of religion is raised in combination with equal treatment, freedom of opinion or another right.

4 Case studies of the selected cases

4.1 Certification of the amended text of the Constitution - Final Certification [1996]

| | |
|---|---|
| Essence: | Certification of the Constitution. Previous text was not entirely in conformity with constitutional principles. Conformity of derogable status of right to freedom of religion and belief with the Constitutional Principles. |
| Dimension: | Freedom of religion and belief and secularism. |
| Lower courts: | Not applicable. Only the CCSA has jurisdiction for certification. |
| Majority: | 11:0. Constitution certified, list of derogable rights is in accordance with Constitutional Principles. No author of the majority opinion mentioned. |
| Dissenting: | None. |

Under South Africa's Interim Constitution of 1993, the CCSA had the task to certify the text for the permanent Constitution[55] in order to assure compliance with the Constitutional Principles stipulated by the Interim Constitution.[56] Prior to the certification in the present case, the CCSA had already assessed a prior draft text of the Constitution[57] in which it had raised objections against the text, based on the Constitutional Principles.[58]

In the Final Certification, the Court reached the unanimous conclusion that the text conformed to the Constitutional Principles and had addressed the earlier objections adequately. The judgment did not deal with the freedom of religion as such, but freedom of religion played a role in an intervention made by the province of KwaZulu Natal (KZN).[59]

Constitutional Principle II stipulated that "[e]veryone shall enjoy all universally accepted fundamental rights, freedoms and civil liberties, which shall be provided for and protected by entrenched and justiciable provisions in the Constitution". In Section 37 of the Bill of Rights, discrimination on the grounds of race, color, ethnic or social origin, sex, religion or language was made non-derogable, but not discrimination on the grounds of gender, pregnancy, marital status, sexual orientation, age, disability, conscience, belief and culture. This while all these grounds for discrimination are prohibited by Section 9(3). Also, Section 15 contains one right which encompasses the freedom of thought, opinion, religion, belief and conscience. Hence, freedom of religion which is made non-derogable is paired with the freedom of belief and conscience, which are made derogable. The province of KZN contended that there were no rational grounds for the exclusion of all the aforementioned rights from

55 *See* Interim Constitution of the Republic of South Africa [Act No. 200 of 1993], 27 April 1994, s. 71(2).

56 *See ibid.,* s. 71(1) referring to Schedule 4, containing the Constitutional Principles.

57 *See* CCSA, *Certification of the Constitution of the Republic of South Africa*, Case CCT23/96, 4 September 1996 paras. 1-16.

58 *Ibid.,* paras. 29-30.

59 *Ibid,* para. 31.

non-derogation.[60] The CCSA concluded that the distinction between non-derogable rights and derogable rights in case of emergency as drafted was not in violation of Constitutional principle II.[61]

KZN argued that there might be aspects of the right to freedom of conscience, religion, thought, belief and opinion, which could be legitimately curtailed during emergency situations, but argued that the core of these rights should be inviolable. This core, the province argued, consisted of the right to hold particular religious, moral and other beliefs and opinions, and it was this core which should be included in the table of non-derogable rights.

The Court conceded that the criticism raised against the compiling of the table of non-derogable rights was "not without substance".[62] However, the Court discussing the rights in abstract was difficult and their concrete meaning was to be determined by courts in future (constitutional) cases. Defining the core of rights in abstract terms was difficult and the Constitutional Assembly had to draft the provisions before any judicial determination could take place. "It chose to protect […] as non-derogable certain core rights such as the rights to life and dignity and freedom from torture and cruel punishment."[63]

While the Court understood that those who were protected by Section 9(3) but had not been included in the non-derogable clause expressed concern in this regard, it drew attention to the fact that the Constitutional Assembly did not have an obligation under Constitutional Principle II to include particular rights in a non-derogation clause. What the Principle did require was that "universally accepted protection be accorded to particular rights".[64]

The Court continued its analysis by noting that any derogation required a stringent test since according to the Constitution any derogation must be strictly required by emergency. Accordingly, all rights were provided with extensive protection. In the case of emergency, courts would be able to review the derogation of those derogable rights. Furthermore, the fact that a distinction between rights was made in the case of emergency, did not imply a hierarchical distinction, let alone in situations outside of emergency.[65]

60 *Ibid* para. 33.
61 *Ibid.,* para. 40.
62 *Ibid.,* para. 36.
63 *Ibid.,* para. 36.
64 *Ibid.,* para. 37.
65 *Ibid.*

## 4.2 Constitutionality of Certain Provisions of the Gauteng School Education Bill of [1996]

| | |
|---|---|
| Essence: | Referral case regarding the constitutionality of Gauteng School Education Bill concerning language and religion. |
| Dimension: | Freedom of religion and belief and secularism. Freedom of religion and education. |
| Lower courts: | Not applicable. Only the CCSA has jurisdiction for certification. |
| Majority: | 11:0. Provisions are constitutional. Majority opinion by Mahomed also on behalf of eight others. Separate concurring opinion by Kriegler. Separate concurring opinion by Sachs. |
| Dissenting: | None. |

The case was referred to the CCSA by the speaker of the legislature of Gauteng. One third of the legislature questioned the constitutionality of the new Gauteng School Bill.[66] This bill prohibited language competence testing in public schools and provided that they should encourage use of several official languages. It also provided the religious policy of a school to be reviewed by administrative bodies. All students would have the right to be exempted from religious instruction. The petitioners in the legislative were aided by the South African Foundation for Education and Training, admitted as *amicus curiae*. The foundation is dedicated to Christian religion and Afrikaans language education.[67]

During apartheid, whites-only Afrikaans language public schools, based on a Reformed Christian outlook, existed in Gauteng as elsewhere in South Africa. Post-apartheid, these schools were still the most affluent ones. The aim of the Bill was to ensure that admission requirements for public schools did not unfairly discriminate on grounds of race, ethnic or social origin, color, gender, sex, disability, sexual orientation, religion, conscience, belief, culture or language.[68] Some members of the Afrikaner community were afraid that the Bill would diminish the Afrikaans language in Christian public schools. This, in turn, could threaten the existence of their community based on a common culture, language or religion.

The Constitution provided at the time that everyone had the right to "establish, where practicable, educational institutions based on a common culture, language or religion, provided that there shall be no discrimination on the ground of race".[69] Currently, the provision is replaced by one which provides that everyone "has the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable".[70]

The CCSA unanimously found no fault with the bill. It found no positive obligation on the part of the province to provide for public schools based on common

66 CCSA, *In Re: Dispute Concerning the Constitutionality of Certain Provisions of The School Education Bill of 1995*, Case CCT39/95, 4 April 1996, para. 1.
67 *Ibid.,* paras 3-4.
68 *Ibid.*
69 *Ibid.,* para. 6.
70 *See* Constitution of the Republic of South Africa, *supra* n. 2, s. 29 (2).

culture, language or religion.[71] Deputy Chief Justice Mahomed authored the majority opinion, also on behalf of eight others. Justices Kriegler and Sachs each authored a concurring opinion. Justice Kriegler's separate concurring opinion is in Afrikaans. Of the selected cases, this is the only opinion written in Afrikaans.

The majority opinion explained that the article of the Constitution providing for the right to education, consists of three elements: everyone's right to education; the rights to have instruction in the language of choice where reasonable and practicable; and the right to establish where practicable educational institutions based on common culture, language or religion as cited above.[72] The first element is a positive obligation on the part of the state. The second element also creates a positive right, which is subject to the condition of practicability.[73] The third element by contrast is a negative obligation, a freedom right "to establish educational institutions based on a common culture, language or religion". Hence, the Constitution does not demand that the state establish or maintain such schools based on common culture, language or religion.[74]

The Constitution also protects the right to participate in the cultural, linguistic and religious communities of one's choice.[75] Furthermore, it protects the freedom of religion and belief, which does not prevent religious observances at state-run or state-aided educational institutions. However, all this does not infer a positive obligation on the part of the state to provide for educational institutions based on a single common culture, language or religion.[76]

Given the fact that the South African Constitution explicitly provides for judicial borrowing from other jurisdictions, the petitioners relied on Canadian legislation and case law mandating the government to provide for English as well as French language schools.[77] The CCSA noted that the Canadian example did not show an international law obligation to provide for educational institutions based on a single common culture, language or religion.[78] The petitioners also argued that "public schools must be allowed to insist that a learner be compelled to attend religious classes and religious practices at the school". According to the majority, this position could not be deducted from the right to education and such practice might also be a direct violation of the freedom of religion and belief as guaranteed by the Constitution.[79]

In his separate opinion, in Afrikaans, Kriegler re-emphasized that if racial prejudice was an element in a community's understanding of its own culture, language and religion for the purpose of operating an educational institution, there was no constitutional protection whatsoever. There was, however, constitutional protection

71 *In Re: Dispute Concerning the Constitutionality of Certain Provisions of The School Education Bill of 1995*, Case CCT 39/95, *supra* n. 66, para. 7.
72 *Ibid.*, para. 6.
73 *Ibid.*, para. 11.
74 *Ibid.*, para. 9.
75 *See* Constitution of the Republic of South Africa, *supra* n. 2, s. 31.
76 *In Re: Dispute Concerning the Constitutionality of Certain Provisions of The School Education Bill of 1995*, Case CCT 39/95, *supra* n. 66, para. 12.
77 *Ibid.*, para. 13.
78 *Ibid.*, para. 15.
79 *Ibid.*, para. 21.

for linguistic communities. If their number was substantial and it was practicable, they could demand that the government provide them with education in their language of choice. Kriegler noted the fluidity of the term "practicability" in this regard. Finally, there was the right for communities to operate their own private educational institutions, bearing their own costs. Such institutions may be founded on common culture, language and religion, but may not otherwise discriminate.[80]

In his separate opinion, Sachs stipulated, that international legal standards for minority protection must inform the interpretation of the constitutional rights in question. He explored historical and current marginalization fears of the Afrikaner community, which had made so many contributions to the broader South African culture. Yet, many other communities had made contributions and felt the threat of marginalization, past and present. The claims of all groups must be considered in combination and "multi-culturalism has to be looked at in a multi-cultural way".[81]

Sachs noted that the evidence attempted to "eliminate members of the Afrikaans speaking community or to wipe out their culture". The group which successfully launched such a claim was the San/Khoisan community, which through history had been marginalized and pushed from its ancestral lands. Afrikaans speakers were protected by the Constitution as much as members of any other community. However, neither could successfully claim a privilege based on the Constitution.[82]

Because there was still enormous inequality in access to education, the principle of equality must be operated to end this. Yet in a pluralist society based on democratic values, equality and diversity should not compete but cultural diversity should be "accomplished on the secure basis of justice and equity". Also, in education the rights of children were central.[83] There was no obligation on the part of the state to "promote the separate development of minorities (as opposed to the duty of preventing discrimination against them)". However, there was a tendency to recognize the "right to be different",[84] and a sound legal obligation to "ensure the survival and continued development of the cultural, religious and social identity of minorities".[85]

Given the existence of Afrikaans medium schools, one must assume that the practicability of instruction in Afrikaans was given. Therefore, the continuation of Afrikaans education in these public schools could be constitutionally enforced. However, this did not mean an exclusively Afrikaans educational environment. Multilingualism, as envisioned by the Constitution, benefited from multi-language schools. Cultural interaction between different groups may very well be to their mutual benefit.[86] An obligation on the part of the state to provide communities with distinct schools should be rejected because in South Africa's history, racial exclusion and dominance had always been justified on grounds of cultural incompatibility. The Constitution was designed to overcome this past. Furthermore, there was no

80 *Ibid.*, paras 38-43.
81 *Ibid.*, paras 44-51.
82 *Ibid.*, paras 70-72.
83 *Ibid.*, paras 52-53.
84 *Ibid.*, para. 65.
85 *Ibid.*, para. 67.
86 *Ibid.*, para. 74.

clear majority population in South Africa against which minorities needed to be protected. Everyone was part of one or more minorities.[87]

International law aimed at minority protection "would favor those groups seeking admission to Afrikaans medium schools" rather than any "claim of Afrikaans community groups to have the State subsidize what, objectively speaking, are privileges in terms of exclusive access to affluent schools".[88] Citing the ECtHR's Belgian Linguistics case,[89] Sachs stipulated that the right to education, within the South African context did not imply a right to be educated in the language of the parents with aid of or provided for by the state.[90]

In his conclusion, Sachs reiterated that the challenge for South Africa was to balance between "overcoming systemic inequality inherited from the past" and "preventing […] assimilation of groups wishing to preserve and develop a distinctive identity". In his opinion, however, this was "a matter for democratic resolution in the legislatures" more than "adjudication by the courts".[91]

### 4.3 Certification of the Constitution of the Western Cape [1997]

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|---|---|
| Essence: | Certification of the Provincial Constitution of the Western Cape. Consistency of a preamble referring to God with the freedom of religion and belief. |
| Dimension: | Freedom of religion and belief and secularism. |
| Lower courts: | Not applicable. Only the CCSA has jurisdiction for certification. |
| Majority: | 11:0. Constitution certified; preamble is constitutional. No author of the majority opinion mentioned. |
| Dissenting: | None. |

The case concerns the certification of a provincial constitution. The Constitution confers on the provinces of the Republic the power to make their own constitutions. However, these constitutions must be certified by the Constitutional Court in order to become law.[92] In the Certification procedure, the text was supported by the Speaker of the Western Cape legislature, while the national government opposed the text. In this regard, it should be noted that the Western Cape at the time was one of only two provinces which was not governed by an ANC executive (the other being KwaZulu-Natal), while the national government was also headed by the ANC.

87 *Ibid.*, paras 80-81.
88 *Ibid.*, para. 83.
89 ECtHR, *Case "Relating to Certain Aspects of The Laws on the Use of Languages in Education in Belgium" v. Belgium,* app. nos. 1474/62, 1677/62, 1691/62, 1769/63, 1994/63, 2126/64, 23 July 1968.
90 *In Re: Dispute Concerning the Constitutionality of Certain Provisions of The School Education Bill of 1995*, Case CCT39/95, *supra* n. 66, para. 78.
91 *Ibid.*, para. 92.
92 *See* Constitution of the Republic of South Africa, *supra* n. 2, ss 104(1)(a) and 144(2).

The certification case dealt with a number of issues falling outside the scope of this study. However, one of the questions raised in argument[93] was whether the preamble of the Western Cape constitution was consistent with Section 15 of the Constitution. The preamble of the Western Cape constitution commences with "In humble submission to Almighty God". The phrase echoes the prefatory words to the preamble of the Constitution "May God protect our people. Nkosi Sikelel' iAfrika. Morena boloka setjhaba sa heso. God seën Suid-Afrika. God bless South Africa. Mudzimu fhatutshedza Afurika. Hosi katekisa Afrika." A unanimous court found the preamble to be constitutional.

According to the Court, "ceremonial deism" as contained in the preamble had no particular (legal) constitutional significance. It showed "time-honored means of adding solemnity used in many cultures and in a variety of contexts".[94] The words in the Western Cape constitution had "no operative constitutional effect". Therefore, they were not incompatible with the spirit and objects of the Constitution. The phrase could also not be used to interpret the provisions regarding freedom of religion and belief restrictively. Hence, the preamble had no effect on the rights of believers and non-believers. Consequently, there was no inconsistency between the Western Cape constitution and the Constitution in this regard.[95]

### 4.4 S v Lawrence; S v Negal; S v Solberg [1997]

| | |
|---|---|
| Essence: | The question whether the prohibition of selling liquor on Sundays for holders of grocer's wine license is contrary to the freedom of religion and belief. |
| Dimension: | Freedom of religion and belief and secularism. |
| Lower courts: | The Magistrates Court and Provincial Division of the Supreme Court convicted the accused and refused the direct leave to the Constitutional Court. |
| Majority: | 6:3 (Solberg). The challenged Act was upheld. Majority opinion by Chief Justice Chaskalson. Langa, Ackermann and Kriegler concurring. Separate opinion by Sachs. Mokgoro concurring. |
| Dissenting: | O'Reagan, only with regard to the Solberg case. Goldstone and Madala concurring. |

The judgment dealt with three combined criminal cases. All three appellants were charged with violations of the Liquor Act 27 of 1989. They each held a grocer's license for the sale of wine. They each sold wine in deference of the days and times specified in the license. All three argued that the provisions which they had allegedly infringed were contrary to the Interim Constitution, which was still in place at the time they were charged. The freedom of religion and belief was only raised in the case of

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

94 *Ibid.*

95 *Ibid.*

Solberg, as that defendant was charged with violating the restrictions on selling liquor on Sundays.[96]

The three defendants had each admitted to the material allegations in the lower courts, but challenged the constitutionality of the Act. As the Magistrates' Court has no jurisdiction in constitutional matters, they requested leave to the Constitutional Court and a postponement of the criminal trial. All three requests were denied and they were convicted. The Provincial Division of the Supreme Court upheld the judgment and dismissed the appeals.[97]

At the Constitutional Court, the justices unanimously dismissed the Lawrence and Negal case. In the Solberg case, a majority of four found no interference with the freedom of religion and belief. The majority opinion was authored by Chief Justice Chaskalson. Deputy President Langa and Justices Ackermann and Kriegler concurred. In his separate opinion, Justice Sachs explained that he found an interference which was justified. Mokgoro concurred. Justice O'Reagan, on behalf of herself and Justices Goldstone and Madala authored a dissenting opinion. She found an unjustified interference with the freedom of religion and belief.

In the majority opinion, Chaskalson extensively explored foreign constitutional law and case law, concerning "rational basis" for regulating and controlling the trade in liquor in an "open and democratic society" and thus the limitation of any freedom guaranteed by constitutional rights in this matter.[98] Mrs. Solberg relied on the Canadian *Big M*[99] case (discussed in section 4.3.1) to support her view that the restrictions on the sale of wine on Sundays were motivated by sectarian views regarding the Christian Sabbath. The applicant contended that all prohibited days (Sundays and certain public holidays) had a religious significance for (a part of) the Christian population of South Africa.[100] Hence, the restrictions in her view constituted unjustified interference with the freedom of religion and belief.

Chaskalson, expressing agreement with the *Big M* judgment, saw a significant difference between *Big M* and the case at hand. In his opinion, the South African Act did not prohibit the sale of liquor in grocery shops on Sundays merely for religious purposes. The Canadian Lord's Day Act did have the purely religious purpose of compelling people to observe the Christian Sabbath as a closed day. South African law did not compel supermarkets to be closed on closed days, it merely compelled them not to sell liquor. The Act permitted the selling of liquor under some licenses on closed days (e.g. restaurants and hotels), but prohibited the selling of liquor under other licenses on these days (e.g. supermarkets, sports facilities). Sundays as a closed day, in his opinion, also no longer had an exclusive religious significance, having instead become (secular) days of rest from work for all.[101]

As the purpose was also not directed at constraining the practice of other religions, he did not see why the purpose would be unlawful simply because Sunday

96 CCSA, *S v. Lawrence*; *S v. Negal*; *S v. Solberg*, Cases CCT38/96, CCT39/96 and CCT40/96, 6 October 1997, paras 1-2.
97 *Ibid.*, paras 3-4.
98 *Ibid.*, paras 36 and 41-56.
99 SCC, *R. v. Big M Drug Mart Ltd.*, Case 18125, [1985] 1 SCR 295, 24 April 1985.
100 *S v. Solberg et al.*, Cases CCT40/96 et al., *supra* n. 96, para. 87.
101 *Ibid.*, paras 90-97.

is the Christian Sabbath.[102] There might be an original connection between the Christian religion and the public rest days and holidays in South Africa. The sale of liquor by supermarkets was prohibited on these closed days. Nevertheless, Chaskalson found the connection too tenuous to speak of compelling people to observe Christian religion. Liquor could be consumed elsewhere on Sundays and shops in general were not forced to close.[103]

Even if the challenged Act interfered with the freedom of religion and belief, the majority opinion argued, it would pass the limitations test. In this regard, Chaskalson deemed it relevant that unlike the United States, South African constitutional law did not contain an anti-establishment clause, but instead approached the relationship between religion and state from the equality angle.[104]

O'Reagan disagreed with the majority judgment as well as with the minority opinion by Sachs.[105] Extensively citing US jurisprudence, she supported a reading of the South African right to freedom of religion and belief which centers on both freedom and equality of treatment. While this interpretation did not prevent the state from taking measures to protect the adherents of any particular religions nor for religious observance at national level, such observances should not favor one religion to the exclusion of others.[106] In her opinion, the challenged Act did just that.

O'Reagan drew attention to legislation endorsing or even enforcing Christianity in South Africa's history, but this was no longer constitutional.[107] Given this history, O'Reagan was certain that the selection of closed days for the purpose of prohibiting wine sale in supermarkets had been inspired by their significance for Christians. Inevitably, she believed this resulted in Christianity's endorsement by legislative measures, to the exclusion of other beliefs and religions. This contravened the equal treatment requirement in the Constitution.[108]

Having established that the purpose of the closed day definition was not a secular one, she suggested reviewing on a case-by-case basis the overall purpose in the challenged Act. O'Reagan found the meaning given to the right to freedom of religion and belief by the majority too narrow. It not only encompassed a negative obligation on the part of the state, to abstain from coercion, but also a positive one, to treat all religions evenhandedly. As the closed day legislation favored one religion to the exclusion of all others, there was a breach of this obligation. Consequently, there was a breach of the freedom of religion and belief which must be justified in order to be constitutional.[109]

An analysis of justifiability must include an analysis of the necessity and proportionality and thus of the precise purpose of the challenged provision. O'Reagan noted that the government had not provided evidence regarding the purpose of prohibiting certain types of sale of liquor on closed days. However, one of its pur-

102 *Ibid.*, para. 89.
103 *Ibid.*, paras 99-105.
104 *Ibid.*, paras 98-101.
105 *Ibid.*, para. 109.
106 *Ibid.*, paras 116-122.
107 *Ibid.*, para. 123.
108 *Ibid.*, paras 125-126.
109 *Ibid.*, paras 127-130.

poses must surely have been to restrict liquor consumption on the closed days as compared to other days. Given the relationship between the closed days and Christianity, this purpose further displayed an endorsement of Christianity and hence constituted an unjustifiable, though not a severe or egregious, infringement.[110]

Justice Sachs concurred with the majority that there was no unconstitutional interference. He concurred with O'Reagan that there was an interference, but deemed it justified. He noted that on the face of it, the challenged provision did not infringe the freedom of religion, because there was no belief, religious or secular, that actually required the sale or consumption of liquor on a closed day. However, going deeper, there are two ways in which the provision might indeed violate the freedom of religion. First, because it affected the choice of non-Christian liquor sellers, who because of their religion kept a different Sabbath and thus had a competitive disadvantage. Secondly, by symbolically endorsing the Christian religion to the exclusion of all others.[111]

Sachs explicitly rejected recourse to foreign case law as a solution in this case, but instead advocated an indigenous South African approach.[112] His rejection of judicial borrowing in this case was noteworthy because in other cases, as we shall see, he was more than ready to base part of his arguments on foreign case law.[113]

Sachs highlighted the multi-faith accommodation outlook which the South African Constitution had, as opposed to the exclusively Christian outlook of the past and the separationist outlook some foreign constitutional orders took.[114] While the preference for Christian holidays originated in the past, continuance did not necessarily serve the same purpose as before. The days continued to have religious significance for Christians. They had also acquired a secular significance as days of pause for example in labor law.

Hence, the Christian origins did not automatically bring the recognition of these days into conflict with the freedom of religion and belief.[115] This would only be the case if non-Christians were to suffer substantial (commercial) disadvantages as a result, or the result would be "state-imposed observance of the Christian Sabbath in any significant way". He believed it did not do either. The main problem, according to Sachs, was a different one. The challenged provision's objective was to restrict the consumption of liquor on the closed days which coincided with Christian holidays. Hence, even though the message might not be very powerful, it was inescapable: the provision displayed the requirement of temperance and thus special observance.[116]

Returning to the South African perspective, Sachs argued that the correct perspective was that of the "reasonable South African" rather than "for example, of the

110 *Ibid.*, paras 130-132.
111 *Ibid.*, paras 136-138.
112 *Ibid.*, para. 141.
113 *See*, e.g., the reference to the *R. v. Big M Drug Mart Ltd.*, Case 18125, *supra* n. 99, in CCSA, *Christian Education South Africa v. Minister of Education*, Case CCT4/00, 18 August 2000, paras 18-19.
114 *S v. Solberg et al.*, Cases CCT40/96 et al., *supra* n. 96, paras 148-152.
115 *Ibid.*, para. 156.
116 *Ibid.*, paras 158-159.

reasonable Jew, Muslim, or Hindu, [or] the reasonable atheist". The reasonable South African was of any faith or none, and "neither hyper-sensitive nor overly insensitive to the belief in question, but highly attuned to the requirements of the Constitution". From this perspective, the public holidays (as such) no longer represented state endorsement of religion. But the prohibition of the sale of liquor on these public holidays did represent state endorsement of religion, which put the challenged provision in conflict with the freedom of religion and belief.[117] Hence, the limitations clause must be applied.

In accordance with the limitations clause, the limitation must be not only reasonable and justifiable but also necessary, in a way which is not "unduly burdensome, overbroad or excessive, considering all the reasonable alternatives".[118] The limitations clause required proportionality between breach and justification; the graver the breach, the more compelling the justification must be.[119]

Applying the aforementioned to the facts, Sachs concluded that while there was a clear favoritism towards Christianity, it was reduced by the marginal economic effects. The favoritism was further restricted by the fact that liquor is available elsewhere on the closed days and that many shops and places of leisure did thriving business on these days. Finally, the prohibition of the sale of liquor as such had little sectarian significance.[120] On the other hand, the dangers of excessive drinking on days in which the general public was off work was relatively high, which made the restriction both reasonable and necessary.

### 4.5 Amod v Multilateral Motor Vehicle Accidents Fund [1998]

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|---|---|
| Essence: | Insurance rights of a widow in an Islamic marriage not registered as civil marriage. |
| Dimension: | Freedom of religion and belief and family law and family relations. Freedom of religion and belief and secularism. |
| Lower courts: | The High Court applied the law under the 1996 Constitution but found in disfavor of Mrs. Amod. Direct leave to the CCSA was denied. She appealed nevertheless. Subsequent to the CCSA judgment the Supreme Court of Appeal ruled in favor of Mrs. Amod. |
| Majority: | 11:0. Direct appeal not allowed. Majority opinion delivered by Chaskalson. |
| Dissenting: | None. |

The Amod case was the first of several cases regarding Islamic marriages not registered as civil marriages. During apartheid, Islamic marriages as such were deemed contrary to public order (because of their potentially polygamous nature) and therefore missing any legal significance.

117 *Ibid.*, para. 163.
118 *Ibid.*, para. 166.
119 *Ibid.*, para. 168.
120 *Ibid.*, paras 169-173.

Mrs. Amod had married her husband in accordance with Islamic law in 1987. They had not registered the marriage as a civil marriage in terms of the Civil Marriages Act. The couple had lived a married life since, the husband providing for the income. He died in 1993 following a traffic accident faulted by the other party.[121] As a spouse, Mrs. Amod would have been entitled to compensation under the Motor Vehicle Accidents Fund Act. The question was whether she had to be considered a spouse for legal purposes.[122]

The events in the case spanned three constitutional orders. The accident itself had occurred before even the interim Constitution was adopted. The action was instituted in the High Court during the interim Constitution, but was heard and decided after the 1996 Constitution had come into effect. In accordance with the 1996 Constitution, legal matters concerning facts which took place before its enactment had to be disposed of under the valid law of the time, unless it was in the interest of justice that the matter was dealt with in accordance with the 1996 Constitution.

Apartheid era precedents[123] determined that Islamic marriages were contrary to public order because of their potentially polygamous nature. Mrs. Amod claimed before the High Court that the line of reasoning was no longer valid. According to her, the case law had to be modified to comply with the Constitution which demands a development of law in accordance with its purpose, spirit and values and in particular the Bill of rights.[124]

The judge at the High Court reached the conclusion that in this case justice mandated the application of the 1996 Constitution.[125] Nevertheless, he ruled in disfavor of Mrs. Amod, finding that it was not up to judges, but merely the Parliament to change existing laws of parliament.[126] The appellant appealed for leave directly to the Constitutional Court[127] which was not granted.[128] The appellant appealed to the CCSA nevertheless. Hence, the CCSA had to decide whether it had jurisdiction and if there was simultaneous jurisdiction with the Supreme Court of Appeal whether the latter could definitely decide the case.[129]

President Chaskalson delivered the unanimous judgment. The High Court explicitly applied the current Constitution of 1996 in the interest of justice. Having decided the case as it did, Chaskalson questioned whether this interest of justice was actually served.[130] He also stated that the importance of the issue necessitated a decision

121 *Amod v. Multilateral Motor Vehicle Accidents Fund*, Case CCT4/98, *supra* n. 47, para. 1
122 *Ibid.*, paras 2-3.
123 Supreme Court of Appeal of South Africa, *Suid-Afrikaanse Nasionale Trust en Assuransie Maatskappy Bpk (Santam) v Fondo 1960 (2) SA 467 (A Assuransie Maatskappy Bpk v. Fondo,* 1960 (2) SA 467 (A). *Ismail v. Ismail,* 1983 (1) SA 1006 (A) *supra* note 53.
124 *Amod v. Multilateral Motor Vehicle Accidents Fund*, Case CCT4/98, *supra* n. 47, para. 7.
125 *Ibid.*, para. 8.
126 *Ibid.*, para. 9.
127 *Ibid.*, para. 1.
128 *Ibid.*, para. 10.
129 *Ibid.*, para. 11.
130 *Ibid.*, para. 9.

by a higher court.[131] But the Supreme Court of Appeal should have first heard the case, therefore the direct leave to the CC was refused.[132]

While not disclosing any precise thoughts on the merits, Chaskalson did make very clear that the development of common law under the new democratic constitutional order may mandate deviations from earlier doctrines.[133] The Supreme Court of Appeal consequently decided that a *de facto* monogamous Muslim marriage had to be considered a marriage for the purposes of the Act and that there was no reason to deny Mrs. Amod her legal entitlements.[134]

### 4.6 Christian Education South Africa v Minister of Education [2000]

| | |
|---|---|
| Essence: | School Act disallows corporal punishment in all schools. For appellants, corporal punishment is essential for Christian education and they deem their freedom of religion and belief infringed. |
| Dimension: | Freedom of religion and belief and education. Freedom of religion and belief and group autonomy. Balancing freedom of religion and belief with other rights. |
| Lower courts: | Direct application to the CCSA denied. High Court found against the appellants. Direct appeal to the CCSA granted. |
| Majority: | 10:0. Upheld the Act. Majority opinion by Sachs. |
| Dissenting: | None. |

The appellant was an association of 196 independent schools. The parent body was established in the USA and had operated in South Africa since 1983. The member schools were dedicated to a Christian ethos and learning environment. The case was triggered by the new South African Schools Act, prohibiting corporal punishment in both public and private schools. For Christian Education, corporal punishment was an integral part of their Christian ethos. They considered the blanket prohibition a violation of their individual, parental and community rights to freely practice their religion and beliefs.[135]

After the Schools Act was adopted, the appellant sought direct access to the CCSA.[136] This was refused. They then applied to the High Court. The High Court judge, while not doubting the sincerity of the appellant's beliefs concerning corporal punishment, was not convinced that delegation to teachers was essential to the belief and that the ban interfered with the beliefs in a substantial way. The ban was con-

131 *Ibid.*, para. 14.
132 *Ibid.*
133 *Ibid.*, para. 31.
134 Supreme Court of Appeal of South Africa, *Amod v. Multilateral Motor Vehicle Accidents Fund*, (Commission for Gender Equality Intervening), 1999 (4) SA 1319 (SCA), 29 December 1999.
135 *See Christian Education South Africa v. Minister of Education*, Case CCT4/00, *supra* n. 113, para. 2.
136 CCSA, *Christian Education South Africa v. Minister of Education*, Case CT13398, 14 October 1998.

sidered justified to protect the dignity and security of children. The appellant applied for direct leave to the Constitutional Court which was granted.[137]

The central question before the Court was whether Parliament, by prohibiting corporal punishment, violated the rights of parents of children in independent schools who, in line with their religious convictions, had consented to the use of corporal punishment in school.[138] The Court unanimously answered this question in the negative, in a unanimous opinion delivered by Justice Sachs.

The appellant contended that corporal punishment was a vital aspect of the Christian religion. They drew on Bible verses referring to parental authority or corporal punishment independently or combined.[139] The respondent was the Minister of Education. While not doubting the sincerity of the belief of the appellant, he contended that granting an exception from the prohibition of corporal punishment, thereby enabling corporal punishment in private schools, would constitute a violation of constitutional rights of children. Hence, because the prohibition was necessary to protect constitutional rights, it could not at the same time be in violation of constitutional rights.[140]

According to Sachs, the constitutional values and interests involved in the case were partly overlapping, partly competing. The parents wished to live their lives and raise their children within a community according to their religious beliefs. The children were central to the conflicting rights. They were probably believers and part of the same community as their parents. Yet, they were also individuals and thus "entitled to the protections of [constitutional rights]".[141]

Part of the dispute between the appellant and the respondent was about which section of the Constitution was applicable. Christian Education asserted that both Section 15 – which protects the individual freedom of religion and belief – as well as Section 31(1) – which guarantees *inter alia* collective rights – apply. The Constitution specifies that collective rights must be exercised in a manner consistent with the Bill of Rights. As the parents gave consent to corporal punishment of their children, this was the case, Christian Education asserted. Hence, any exemption had to be justified by a compelling state interest.[142]

According to respondent minister, the individual freedom was not applicable in this case. The collective rights, according to the government, were not infringed. Corporal punishment violated the constitutionally protected rights to equality and dignity. Therefore, corporal punishment could not be administered consistent with the Bill of Rights, even if consent had been given. If however, the minister asserted, there should indeed be an interference with the collective rights, this was reasonable and justified in an open and democratic society with the aim of protecting the rights of the children.[143]

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137 *Christian Education South Africa v. Minister of Education*, Case CCT4/00, *supra* n. 113, paras 6-7.
138 *See ibid.*, para. 8.
139 *Ibid.*, paras 4-5.
140 *See ibid.*, paras 8-14.
141 *Ibid.*, para. 15.
142 *Ibid.*, para. 16.
143 *Ibid.*, para. 17.

Referring to the quotation of the Canadian *BigM* case in *Lawrence* (see section 4.4) Sachs reiterated that the freedom of religion consists of the right to have a belief and the right to act in accordance with that belief. In many instances, these two cannot be separated, just as the individual and collective dimension can often not be separated.[144] He then thoroughly explored the relationship between individual and collective rights in South African constitutional law and international human rights law,[145] coming to the conclusion that the two are co-dependent. After all, individual rights – religious, cultural and linguistic – were annihilated if the community "dies whether through destruction or assimilation". On the other hand, the community depended on individuals and thus on individual rights.[146]

"There are a number of other provisions designed to protect the rights of members of communities. [...] Taken together, they affirm the right of people to be who they are without being forced to subordinate themselves to the cultural and religious norms of others. Individuals and communities both enjoy the 'right to be different'. In each case, space has been found for members of communities to depart from a general norm". Larger communities could more easily rely on the legislative process than small communities. This was especially so if "they express their beliefs in a way that the majority regard as unusual, bizarre or even threatening".[147]

For the purpose of the case at hand, Sachs, assumed two things, while explicitly mentioning that this was done without deciding. He assumed that both individual and collective rights were engaged, and that corporal punishment as practiced by the appellants was not *prima facie* contrary to the Bill of Rights (given that collective rights must be exercised consistent with the Bill of Rights).

Hence, this left the question to be considered whether the prohibition of corporal punishment was a reasonable and justifiable limitation of the protected rights.[148] The appellant's position that the state needed to show a compelling interest relied on American "strict scrutiny" jurisprudence. The Court, however, rejected this. The strict scrutiny test had been rejected by the US Supreme Court itself in matters of religion.[149] But more importantly, under South African constitutional law a "nuanced and context-sensitive form of balancing is required". As a general rule, the more serious the impact of the measure on the enjoyment of the right, the more persuasive or compelling the justification must be.[150]

Hence, the state must show whether the failure to accommodate Christian Education could be accepted as reasonable and justifiable in a democratic society, based on human dignity, freedom and equality.[151] In this regard, it must be taken into consideration that religion "is not just a question of belief or doctrine. It is part of

144 *Ibid.*, paras 18-19.
145 *Ibid.*, paras 20-26.
146 *Ibid.*, para. 23.
147 *Ibid.*, paras 24-25.
148 *Ibid.*, para. 27.
149 *See ibid.*, para. 29, referring to US Supreme Court, *Employment Division, Department of Human Resources of Oregon et al. v. Smith et al.*, 494 US 872 (1990), 17 April 1990.
150 *Christian Education South Africa v. Minister of Education*, Case CCT4/00, *supra* n. 113, paras 29-31.
151 *Ibid.*, para. 32.

a way of life, of a people's temper and culture".[152] The balancing must combine two basic considerations: (1) believers have no automatic right to exemption, (2) where possible, it must be avoided to put believers in extremely painful and burdensome choices between respecting the law and the articles of their faith.[153]

The interference with the rights of the parents was far from trivial.[154] After all, they regarded corporal punishment as essential to their way of life and parenting. When they set up independent private schools in order to be able to educate their children in accordance with their beliefs and the state banned an integral element, this had a far-reaching impact. However, the ban did not preclude the parents from administering corporal punishment at home.[155]

The state relied, among other things, on its international law obligations (Convention on the Rights of the Child) and its general obligation to restrain violence and to prohibit corporal punishment. Only a general ban, without any exemptions could achieve such a goal.[156] Sachs noted that courts the world over had generally shown a certain solicitude for protecting children from potentially harmful religious practices. He cited the Canadian *P (D)* case[157] (see section I1.4.3) in this regard.[158]

While the state referred to the principle of equality in defense of the general ban, the Court noted that equality does not always mean treating everyone the same way, but treating everyone with equal concern and respect.[159] The Court found the argument that the international trend was to abolish corporal punishment in the educational system out of dignity concerns, much more convincing than the equality concern.

Not only with regard to schools but for state organs in general, there was a growing international consent amongst legislators and courts that corporal punishment of (juveniles) was degrading and contrary to universally recognized human rights. The states' concern regarding corporal punishment in schools was therefore mandated, also given the pre-constitutional history of state ordained violence in South Africa.[160] The purpose of a new legislative scheme for all schools was to "establish uniform educational standards" because "educational systems of a racist and grossly unequal character" had to be "integrated into one broad educational dispensation". The uniform prohibition of corporal punishment in all schools served this purpose: it was "deliberately designed to transform national civic consciousness in a major way".[161] Allowing for an exemption would seriously undermine this purpose.

Furthermore, providing for an exemption would put children in a vulnerable position, because it was difficult to monitor when corporal punishment exceeded a level deemed acceptable by parents and because parents would only be able to

152 *Ibid.,* para. 33.
153 *Ibid.,* paras 34-35.
154 *Ibid.,* para. 37.
155 *Ibid.,* para. 38.
156 *Ibid.,* paras 39-40.
157 SCC, *P. (D.) v. S (C.),* Case 22296, [1993] 4 SCR 141, 21 October 1993.
158 *Christian Education South Africa v. Minister of Education*, Case CCT4/00, *supra* n. 113, para. 41.
159 *Ibid.,* para. 42.
160 *Ibid.,* paras 43-47.
161 *Ibid.,* para. 50.

complain at the risk of angering the school and the community.[162] Sachs reiterated that he did not question the special meaning of corporal correction in school for the self-definition and ethos of a religious community. Yet, he believed that it was not unduly burdensome for the schools to accommodate themselves to the secular law. The parents were free to incorporate corporal correction at home. They were prevented from delegating this to teachers. Therefore, not providing for an exemption was not disproportional and the Act was constitutional.[163]

### 4.7 Prince v President of the Cape Law Society and Others [2000 & 2002]

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|---|---|
| Essence: | Conviction of an aspiring lawyer for the possession of marihuana. He is a practicing Rastafarian and the use of *ganja* is part of the practice of his religion. |
| Dimension: | Freedom of religion and belief and personal freedom. Freedom of religion and belief and group autonomy. |
| Lower courts: | High Court and Supreme Court of Appeal found against Mr. Prince. In 2000 the CCSA unanimously ordered parties to submit additional evidence. Case was resubmitted in 2002. |
| Majority: | 5:4. Found against Mr. Prince. Majority opinion by Chaskalson, Ackerman and Kriegler. Goldstone and Yacoob concurring. |
| Dissenting: | Ngcobo. Mokgoro, Sachs and Madlanga concurring. Separate dissenting opinion by Sachs. Mokgoro concurring. |

Mr. Prince was a Rastafari. Rastafarianism is an Afro-centric religion originating from Jamaica, which has followers all over the world including in South Africa. The use of cannabis, called *ganja* (or *dagga* in South Africa) is sacramental in Rastafarianism. Mr. Prince was a law school graduate, qualified to become an attorney. Only his prior convictions for cannabis possession stood in his way.[164] He challenged the refusal of the Law Society to register him in the High Court and then Supreme Court of Appeal. His constitutional challenge was directed against the absence of an exemption for religious purposes in the Drug Act.[165]

The case was brought before the CCSA twice. In the first proceedings at the CCSA in 2000, the Court unanimously ordered Mr. Prince to submit more information on cannabis use and its significance for his religion. The respondents in turn were ordered to submit evidence regarding the practical difficulties of granting an exemption for religious use and how the administration of such an exemption would differ from the existing exemption for medical and scientific purposes.[166] A good year later, the CCSA decided the merits based on the evidence submitted. A majority

162 *Ibid.*
163 *Ibid.*, paras 50-51.
164 *See* CCSA, *Prince v. President of the Cape Law Society and Others*, Case CCT36/00A, 12 December 2000, paras 1-5 and *Prince v. President of the Cape Law Society and Others*, Case CCT36/00B, 25 January 2002, paras 1-6.
165 *Prince v. President of the Cape Law Society*, Case CCT36/00A, *supra* n. 164, para. 8.
166 *Ibid.*, paras 10-18.

of five judges found against Mr. Prince. The majority opinion was authored by Chaskalson. Ackermann, Kriegler, Goldstone and Yacoob concurred. The minority opinion opening the judgment was authored by Ngcobo. Mokgoro, Sachs and Madlanga concurred with the minority opinion. Nevertheless, Sachs authored a separate dissenting opinion, with which Mokgoro concurred. Having lost his case at the CCSA, Mr. Prince pursued a human rights claim at the African Human Rights Commission and the UN Human Rights Committee, albeit without success.[167]

Ngcobo's minority opinion began by stating that Rastafarianism was undisputedly protected by the freedom of religion and belief. Rastafarians in South Africa were not centrally organized, but formed several independent communities. Additionally, they could be members of a House of Rastafari (i.e. denomination). Recently, the Rastafari National Council had been formed to advocate common interests. The lack of formal and hierarchical structures was inherent in the religious doctrine of the Rastafari.[168]

The Rastafari follow the Nazarene Code, according to which cannabis is central to collective rituals and ceremonies as well as to individual mediation. Cannabis itself has a sacramental status, being the "holy herb" provided to man by God for spiritual and physical healing and to come closer to God. Being purists, the Rastafari were prohibited from using all other intoxicants such as liquor, tobacco or (street) drugs. Mr. Prince was a practicing Rastafari. He wore dreadlocks, performed all rituals, observed religious ceremonies, and he consumed cannabis as part of rituals and ceremonies and at home.[169]

Mr. Prince did not challenge the prohibition of cannabis as such, but the absence of an exemption for religious use. This, he claimed, violated the Constitution. The government accepted that the general prohibition limited the freedom of religion and belief of those who used cannabis for *bona fide* religious purposes. Yet, they argued, the limitation was justified. In addition, they contended that any exemption would be impossible to administer. Ngcobo, however, noted that the evidence submitted in this regard related to the smoking of cannabis and not all the other uses common for Rastafari.[170]

Hence, the Court had to consider whether the prohibition was too broad as Mr. Prince suggested, or proportionate as the government asserted.[171] This required determining whether goals of the prohibition could have been achieved by less limiting means.[172] The freedom of religion and belief could be impaired when the law forced people to act contrary to their religious beliefs.[173] As the prohibition forced Rastafari believers to choose between following their religion or the law, it manifestly limited their right to practice their religion. Such a limitation had to be

167 African Commission on Human and People's Rights, *Prince v. South Africa*, Communication no. 255/2002, 7 December 2004 and UN Human Rights Committee, *Prince v. South Africa*, Communication no. 1474/2006, 14 November 2007.
168 CCSA, *Prince v. President of the Cape Law Society*, Case CCT36/00B, *supra* n. 164, paras 15-16.
169 *Ibid.*, paras 17-21.
170 *Ibid.*, paras 27-28.
171 *Ibid.*, para. 29.
172 *Ibid.*, para. 36.
173 *Ibid.*, para. 38.

justified.[174] In Ngcobo's view, the central question was whether an exemption would undermine the overall purpose of the general prohibition.[175]

Ngcobo dismissed the government's questioning of the centrality of cannabis to Rastafari beliefs and the sincerity of Mr. Prince. The evidence supported that Mr. Prince was a *bona fide* Rastafari and the use of cannabis was central to Rastafarianism.[176] Sacred beliefs central to a faith may seem "bizarre, illogical or irrational to others or are incapable of scientific proof". Nevertheless, they were beliefs protected by constitutional rights. "Believers should not be put to the proof of their beliefs or faith". It was "undesirable for courts to enter into the debate whether a particular practice is central to a religion unless there is a genuine dispute as to the centrality of the practice".[177]

The limitation was required to be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. This required balancing the state interests and the rights of the individual. In this case, the government interests were: (1) the importance of the limitation; (2) the relationship between limitation and underlying purpose; (3) the impact of a possible exemption for the overall purpose. The applicant's interest consisted of (1) the nature and importance of his rights in an open and democratic society; 2) the importance of cannabis to Rastafari practice; (3) the impact of the limitation on the right and on the practice.[178]

Freedom of religion was closely related to the recognition and protection of diversity and was "one of the most important human rights". Protection of diversity was required by human dignity which was a central constitutional value of South Africa. The dignity of the Rastafari was at stake because the law did not distinguish between religious use and drug abusers. The effect was that "in the eyes of the legal system all Rastafari are criminals. The stigma thus attached is manifest." For Mr. Prince, the consequences were even worse: "He is now prevented from practicing the profession of his choice." This was "a palpable invasion of their dignity", saying that "their religion is not worthy of protection. The impact of the limitation is profound indeed."[179] In the minority's opinion, the blanket ban which made no distinction between sacramental and recreational use of cannabis was unconstitutional.[180]

Ngcobo accepted that given the effects of drug abuse and related crimes, the prohibition served a pressing social need. But an exemption was reconcilable with this.[181] Allowing for limited and controlled religious use in small quantities, would reconcile the rights of the Rastafari and the overall purpose of the Drug Act. For example, priests could be licensed to grow it and administer its use.[182] A neatly tailored exemption should be worked out by Parliament. It would not automatically

174 *Ibid.*, para. 44.
175 *Ibid.*, para. 47.
176 *Ibid.*, para. 42.
177 *Ibid.*, para. 42.
178 *Ibid.*, paras 45-46.
179 *Ibid.*, paras 48-51.
180 *Ibid.*, paras 77-82.
181 *Ibid.*, paras 52-53.
182 *Ibid.*, paras 55-70.

violate the international obligations of South Africa, as the majority stated.[183] Relying on *Christian Education* (see section I1.4.6), Ngcobo reminded us that religious communities must also accommodate general society as much as society must accommodate them. Nevertheless, the opinion suspended the invalidity for 12 months for the government to work out a closely knit exemption.[184]

Chaskalson's majority opinion expressed agreement with Ngcobo' s analysis of the facts – the finding that Rastafari was a religion whose practices were entrenched by the Drug Act.[185] However, he disagreed that the Constitution obliged an exemption for Rastafari.[186] They also disagreed that an exemption was reconcilable with the purposes of the Act.[187] The difference between harmful and non-harmful use was not the sacramental or recreational nature of the use, but the quantity and intensity of use.[188]

Citing the (in)famous US Supreme Court *Smith* case,[189] the majority argued that the freedom of religion and belief did not entitle a believer to automatic exemption to comply with an otherwise valid neutral law.[190] However, they did admit that the minority's approach in *Smith* was more consistent with South African constitutional law. This approach sought to reconcile the general prohibition of drugs and the use of *peyote* (a natural and traditional hallucinogen) by the Native American Church. But according to Chaskalson, the major difference between *peyote* in *Smith* and cannabis, was that the latter was also used as a recreational drug by the mainstream. This, in turn, made it impossible for the authorities to distinguish between recreational and religious use and acquisition.[191]

An exemption was unworkable, according to the majority, also because international obligations prevented it. A system parallel to that for medical use would not work because of the loose organizational structures of the Rastafari community. Also, such a system would require the authorities to establish when *bona fide* Rastafari use was at stake and when it was not. This was inconsistent with the freedom of religion and belief.[192] Even if the exemption only included non-smoking use of cannabis, the very possession by Rastafarians would still undermine the purpose of the general prohibition. Because of the impossibility of any realistic exemption which could serve the needs of the Rastafari religion, the majority found that the limitation was reasonable and justified.[193]

Sachs in his separate opinion, concurring with Ngcobo, began by noting that intolerance comes in many forms, not just those intended to stigmatize and exclude. The criminalization of cannabis was not directed against the Rastafari, but the effect was the same as if they were singled out: they were forced to make an intolerable

183 *Ibid.,* paras 70-72.
184 *Ibid.,* paras 83-90.
185 *Ibid.,* para. 97.
186 *Ibid.,* para. 111.
187 *Ibid.,* para. 114.
188 *Ibid.,* para. 118.
189 *Department of Human Resources of Oregon v. Smith*, 494 US 872 (1990), *supra* n. 149.
190 *Prince v. President of the Cape Law Society*, Case CCT36/00B, *supra* n. 164, para. 121.
191 *Ibid.,* paras 128-130.
192 *Ibid.,* paras 131-138.
193 *Ibid.,* paras 139-142.

choice between their faith and the law. Also, the effect for Mr. Prince and possibly others was that they might not be able to exercise the profession of their choice, because they had come into conflict with the law.[194] By ruling out an exemption, however neatly tailored, the majority subjected the Rastafari to a continual choice between their faith and the law. Exemptions may be inconvenient, yet required by the "basic notion of tolerance and respect for diversity that our Constitution demands". A modest exemption as proposed by Ngcobo, would still be a "meaningful measure of dignity and recognition". "The fact that they cannot be given all that they ask for is not a reason for giving them nothing at all."[195]

Fully agreeing with Ngcobo, Sachs added some observations. He highlighted the origins of Rastafarianism as a spiritual movement of the African *Diaspora* informed by the history of cultural alienation and suppression. Cannabis was used for mystical communion with the universe, which revived use in (ancient) African cultures. This was crushed by the general prohibition of cannabis.[196]

The South African sensitivity to careful balancing and proportionality must lead to a rejection of the *Smith* precedent (see above). The Constitution required "maximum harmonization" of competing interests on a "principled yet nuanced and flexible case-by case basis". This required a central role for courts with a heavy responsibility. "Undue judicial adventurism can be as damaging as excessive judicial timidity. […] Both extremes need to be avoided."[197] The constitutional organs must lead the way in putting oneself in the other's shoes.[198]

Sachs noted that mainstream society and the Rastafarians were mutually distrustful of one another. The Rastafari cultivated withdrawal from mainstream society was seen as the corrupt "Babylon system". The mainstream, including the state, saw the Rastafari as defiant outsiders, distinct in looks, dress and rituals. The *Prince* case could create change towards mutual recognition and respect.[199] Religious tolerance was important "because religion and belief matter, and because living in an open society matters".[200] Reminding the others of the unanimous ruling in *Christian Education*, Sachs closed by stating that tolerance was not accepting the easily acceptable, but respecting what was "unusual, bizarre or even threatening".[201]

194 *Ibid.,* para. 145.
195 *Ibid.,* paras 147-148.
196 *Ibid.,* paras 151-154.
197 *Ibid.,* paras 155-156.
198 *Ibid.,* para. 157.
199 *Ibid.,* paras 161-162.
200 *Ibid.,* paras 164-170.
201 *Ibid.,* para. 172.

### 4.8 Daniels v Campbell NO and Others [2004]

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|---|---|
| Essence: | Inheritance rights of a widow in an Islamic marriage not registered as civil marriage. |
| Dimension: | Freedom of religion and belief and family law and family relations. Freedom of religion and belief and secularism. |
| Lower courts: | High Court found in favor Mrs. Daniels, although finding her marriage not legally valid. Direct leave to CCSA granted. |
| Majority: | 10:0. Challenged Act unconstitutional. 8:2. Remedy was interpreting Act to include partners in Muslim marriage. Separate majority opinions by Sachs and Ngcobo, concurring with one another. Six others also concurring with both. |
| Dissenting: | Partly dissenting opinion by Moseneke. Mandla concurring. Rejecting remedy proposed. |

Mrs. Daniels married her husband by Muslim rites in 1977. Their (monogamous) marriage was never registered under the Marriage Act. The husband passed away in 1994. The main asset in the estate was a house in which the appellant had resided since 1969 even prior to her marriage. When being told that she could not inherit from her husband, because she was not a "surviving spouse" due to the fact that their marriage had not been a civil law marriage, Mrs. Daniels asked the High Court to declare that she was a "surviving spouse". Alternatively, she asked it to declare that the Intestate Succession Act and the Surviving Spouse Act be declared unconstitutional for discriminating against Muslim marriage.[202]

The High Court found Muslim marriages to have no legal consequence since they were potentially polygamous and thus contrary to public policy. To be valid as marriages, they had to be registered in terms of the Marriage Act.[203] However, the High Court judge also found that this situation denied the appellant a proper remedy in accordance with constitutional rights. Thus, as a remedy, the High Court read into the challenged Acts that "surviving spouse" would include spouses of *de facto* monogamous Muslim marriages, as long as the South African legislature had not taken measures to assure the equal treatment of Muslim spouses.[204] The appellant nevertheless requested direct leave to the CCSA which was granted.

At the CCSA, Mrs. Daniels argued that any interpretation of the word "spouse" which excluded parties to a Muslim marriage resulted in unfair discrimination on the grounds of marital status, religious practices and culture, and violated the right to dignity. The Minister supported the High Court order. The executors contended that "spouse" did not include parties to a Muslim marriage and that this was no unfair discrimination, as imams could be registered as marriage officers under the Marriage Act.[205]

202 *Daniels v. Campbell NO and Others*, Case CCT40/03, *supra* n. 48, paras 2-8.
203 *Ibid.*, para. 9.
204 *Ibid.*, paras 11-12.
205 *Ibid.*, paras 16-17.

A unanimous Court of judges found in favor of the appellant. Sachs authored a majority opinion with which Chaskalson, Langa, Ackermann, Mokgoro, Ngcobo, O'Regan, and Yacoob, concurred. However, Ngcobo also authored a separate opinion with which Sachs and the other six concurred. A partly dissenting opinion was delivered by Moseneke, with Mandla concurring. They disagreed with the remedy proposed by the majority.

Sachs noted that from a linguistic point of view, including the spouses in a Muslim marriage made more sense than exclusion. The exclusion of Muslim couples from the meaning was the result of a culturally and racially hegemonic appropriation of the term. In the apartheid era, Muslim marriages were intentionally discriminated against, sanctioned by courts. The present constitutional order, however, represented a break with this past. The Constitution had initiated a "spirit of transition and transformation". It was this spirit which pointed to a "broad and inclusive" meaning of the word spouse under the challenged Acts, which coincided with the ordinary linguistic meaning.[206]

Including the spouses of Muslim marriages under the Acts was further reinforced by a contextual analysis of the challenged Acts themselves. Their purpose was to provide relief to widows, left vulnerable after their husbands' passing. Although the Acts were gender-neutral, their substantive provisions were mostly favorable to women, which was consistent with the constitutional goal of substantive gender equality. Mrs. Daniels was illiterate and poor. She and her husband had lived simple lives, in which discussing legal matters or being advised therein, like drafting wills or inheritance, had no role. The Acts were designed to leave widows with the continued means to a livelihood. In light of this, there was no good reason to exclude a widow just because the marriage had not been solemnized under the Marriage Act.[207]

This was also the line of reasoning in *Arnod*[208] (see section 5.4.5), Sachs noted. Extending legal protection to marriages conducted under one faith or philosophy while excluding others, was unconstitutional. In *Arnod*, the Court also held that the possibility of registration for Muslim marriages, was irrelevant for the purpose of awarding legal protection. What mattered was whether the deceased was under a legal obligation to support the surviving spouse.[209] On the other hand, extending the application of the Act to spouses in a Muslim marriage, did not imply validity of Muslim marriages for all legal purposes. Hence, the constitutional values could be upheld without interfering with parliamentary jurisdiction regarding recognition of religious family law and/or marriages. Sachs also noted that many contemporary statutes explicitly included parties to Muslim unions, while the challenged Acts, however, were lastly amended before the constitutional era.[210]

In the High Court, the judge had also interpreted CCSA case law concerning (unmarried) same-sex partners. According to Sachs, however, the analogy was faulted because (pre-*Fourie*, see section I2.4.10) same-sex couples could not marry. But the

206 *Ibid.*, paras 19-21.
207 *Ibid.*, paras 22-23.
208 *Amod v. Multilateral Motor Vehicle Accidents Fund*, Case CCT 4/98, *supra* n. 47.
209 *See Daniels v. Campbell NO and Others*, Case CCT40/03, *supra* n. 48, paras 24-25.
210 *Ibid.*, paras 26-27.

partners in a Muslim marriage fell under the ordinary meaning of "spouse".[211] Having established that, it was not necessary to look into the fact that the imam performing Muslim weddings could register as a marriage officer. As Mrs. Daniel's marriage had been *de facto* monogamous, the Court did not have to look into polygamous Muslim marriages. Summarizing, the Acts must be interpreted to include a party to a monogamous Muslim marriage under the term "spouse".[212]

Ngcobo' s separate concurring opinion dealt with two further aspects of Sachs' opinion – the constitutional context and the case law regarding same-sex couples. This was possibly triggered by the partial dissent (see below). In regard to the constitutional context, he re-emphasized that the constitutional values required the interpretative injunction to break with the racist past.[213] During apartheid, courts had abided by or even openly supported the racially, culturally and religiously hegemonic philosophy.[214] This had led to discrimination against Blacks and other "non-European" South Africans as people, but also against their laws, customs, traditions, religions and culture at large.[215]

The infamous judgments dealing with Muslim marriages, such as *Seedat's Executors* and *Ismael*,[216] were informed by this. They considered Muslim marriage as repugnant to the dominant cultures of the time in the Netherlands and England.[217] The new constitutional order rejected demands for equal worth and equality of all South Africans. In accordance with this foundation, a spouse must be given a meaning "consistent with the foundational values of human dignity, equality and freedom". Hence, Ngcobo agreed with Sachs that "spouse" in the challenged Acts must be read to include the partners to a Muslim union.[218] He also agreed with Sachs that the difference with the same-sex precedents was the fact that in those cases, the partners were not married at all. Hence, the cases did not preclude the construction of spouse to include parties married by Muslim rites.[219]

Moseneke and Madala agreed with the majority that an exclusivist reading of "spouse" violated the equality and equal dignity of spouses in a Muslim marriage.[220] Moseneke noted that the non-recognition in common law of Islamic marriages[221] was a constitutional anachronism. It was informed by racism, bigotry and prejudice. Yet, the restrictive common law interpretation was not the issue. The break with the past did not mandate reading an inclusive meaning into the challenged Acts.[222]

211 *Ibid.,* para. 30.
212 *Ibid.,* paras 35-39.
213 *Ibid.,* paras 42-48.
214 *See Daniels v. Campbell NO and Others*, Case CCT40/03, *supra* n. 48, para. 50, quoting Appellate Division Cape Town, *Moller v. Keimoes School Committee and Another*, 1911 AD 635.
215 *Daniels v. Campbell NO and Others*, Case CCT40/03, *supra* n. 48, para. 51.
216 *Seedat's Executors v. The Master (Natal)*, 1917 AD 302; and *Ismail v. Ismail*, 1983 (1) SA 1006 (A), *supra* notes 52 and 53.
217 *Daniels v. Campbell NO and Others*, Case CCT40/03, *supra* n. 48, para. 51.
218 *Ibid.,* paras 54-56.
219 *Ibid.,* paras 60-63.
220 *Ibid.,* para 67.
221 *Ibid.,* para 69.
222 *Ibid.,* paras 74-79.

Moseneke and Madala argued that the Court must find invalidity as opposed to interpreting anew in compliance with the Bill of Rights.[223] They thus disagreed with the remedy of the majority.

"Spouse", in Moseneke' s opinion, had no "ordinary" meaning as the majority suggested. It had purely a legal meaning as far as it was used in law.[224] In South African law, it referred to people married in accordance with the Marriage Act. This had been affirmed by the CCSA in the aforementioned same-sex partnership cases.[225] A Court could not therefore read partner in a Muslim union into "spouse" without violating *stare decisis.* Furthermore, the reasoning of the majority undid the equality jurisprudence in relation to same-sex couples.[226]

The challenged Acts withheld from Muslim widows the economic protection enjoyed by widows of other faiths and secular civil marriages, and recently customary unions. This was unfair discrimination which had to be taken away by a proper recognition of Muslim marriages through law. As this legislation had yet to be enacted, the relief proposed by Moseneke in the meantime was a precisely defined, tailored "reading in", limited in time until proper legislation was enacted.[227]

### 4.9 Volks NO v Robinson and Others [2005]

| | |
|---|---|
| Essence: | Inheritance rights of a remaining life partner after the primary provider deceased. |
| Dimension: | Freedom of religion and belief and family law and family relations. |
| Lower courts: | High Court ruled in favor of surviving partner. Distinction between married and unmarried survivors is unconstitutional. |
| Majority: | 7:3. Act is constitutional. Majority opinion by Skweyiya, six others concurring. Separate concurring opinion by Ngcobo, rest of majority concurring. |
| Dissenting: | Joint dissenting opinion by Mokgoro and O'Regan. Separate dissenting opinion by Sachs. |

Mrs. Robinson was the surviving partner following the death of Mr. Shandling, her partner of 16 years. They had lived together, him providing the main income as a lawyer, she working as a freelance journalist and artist, while also running the household. She cared for him in times when due to his bipolar disorder he needed care. Shandling was a divorcee with two children from his prior marriage. He had been strong minded about not marrying again. His will provided that Mrs. Robinson and others inherit.[228]

223 *Ibid.,* para 83.
224 *Ibid.,* paras 85-89.
225 *Ibid.,* paras 91-92.
226 *Ibid.,* paras 102-103.
227 *Ibid.,* paras 106-108.
228 CCSA, *Volks v. Robinson,* Case CCT12/04, 25 February 2005, paras 1-19.

Subsequent to Mr. Shandling's death, Mrs. Robinson sought advice from the Women's Legal Center about her rights as a surviving life partner. The High Court decided the challenged Act was unconstitutional for excluding life partners. The executor, a partner in Shandling's firm, first appealed and then withdrew the appeal. Yet, as the CCSA had not been informed in time it decided nevertheless.[229] A majority of seven judges decided that the Act was constitutional. Skweyiya wrote the majority judgment with which Chaskalson, Langa, Moseneke, Ngcobo, Van der Westhuizen and Yacoob, concurred. Ngcobo also wrote a sperate opinion with which the other judges of the majority concurred. Two dissenting judges, Mokgoro and O'Regan, authored a joint opinion. There was a separate dissenting opinion by Sachs.

The case was not about the enjoyment of freedom of religion and belief as such, but about the question whether or not an inheritance Act may legally exclude survivors of life partnerships. The religious significance of marriage played an important role,[230] as did the belief to adhere to the institution of marriage while being in a committed relationship.[231] The majority was convinced that the challenged Act intended to define marriage as a union recognized by religion and/or law. Interpreting the Act to include life partnerships would unduly strain it.[232] The exclusion, admitted the majority, may amount to discrimination, but the discrimination was justified given the religious and social importance of marriage. Also, for married couples, the law fixed rights and responsibilities, while for unmarried couples all rights and responsibilities were open to agreement.[233]

The majority took issue with Sachs' comparison of marriage with long-lasting committed life partnerships. Even in such cases, the difference was much more than just a "piece of paper". But like Sachs, they had sympathy for surviving life partners who would end up economically vulnerable because the deceased partner had refused to marry them in spite of the sacrifice made and the support given by the survivor.[234] Nevertheless, the distinction between married and non-married couples was neither unfair nor violative of dignity. The plight of vulnerable women in life partnerships, argued the majority, could be served in other ways rather than declaring the challenged Act unconstitutional.[235]

Ngcobo separately concurred with the majority. He argued that the distinction the Act made followed from the recognition of marriage as a special institution in the Constitution and international law. The Constitution explicitly mandated the recognition of traditional and religious marriage. By giving a special status to marriage, one had to set it apart from other relationships. Hence, the discrimination was not unfair. The purpose of the Act was not unfair discrimination against survivors of permanent life partnerships. It merely did not regulate them.[236] Marriage, said Ngcobo, was a conscious choice, among other things, to accept all the legal conse-

229 *Ibid.*, paras 20-26.
230 *Ibid.*, para. 20.
231 *Ibid.*, para. 15.
232 *Ibid.*, paras 41 and 45.
233 *Ibid.*, paras 50-54.
234 *Ibid.*, paras 55-56.
235 *Ibid.*, paras 60-68.
236 *Ibid.*, paras 76-88.

quences. It was therefore more than a piece of paper. Posthumously imposing the marriage regime onto someone, who, one must assume, had made a conscious choice not to marry, may be violative of their dignity. It would undermine the right to freely marry and amount to the imposition of the will of one on another.[237]

In their dissenting opinion, O'Reagan and Mokgoro expressed their agreement with Sachs.[238] They pointed to the evolution of South African marriage law, which once discriminated against marriages solemnized under African traditional, Islamic and Hindu law, which had been changed by the Constitution. They also pointed to the fact that common law marriage, like many traditional and religious marriage institutions, discriminated on the basis of gender and sex.[239] The common law privileged civil marriage and religious marriage performed in accordance with the Marriage Act. The law regulated the duties of marriage, the property, the home, and the children born in a marriage. Only in some cases did the law regulate these issues for other relationships.[240] Hence, if this privilege was not unfair discrimination against life partnerships, then "marriage will inevitably remain privileged"; this while many life partnerships played a very similar role in society to marriages.[241]

The two judges established the unfairness of the discrimination through three factors. First, the position of the complainants. Surviving partners of life partnerships were more vulnerable than other surviving partners, exactly because of the lack of legal regulation. Second, the nature of the provision. It was aimed at regulating only the cases of those surviving partners who were married. Third, the effect of the discrimination. Through the lack of legal regulation, they may end up empty-handed after their partner had passed notwithstanding their commitment to support and sacrifice.[242] They also established that the unfair discrimination was not reasonable and was without justification. The distinction rested solely on "the religious attributes of marriage". "While marriage plays an important role in our society, and most religions cherish it, the Constitution does not permit rights to be limited solely to advance a particular religious perspective."[243]

Emphasizing that their findings were limited to those life partnerships which stood the test of certain criteria making them similar to marriage, O'Reagan and Mokgoro concluded that the Act was unconstitutional. They suspended their order to read the narrow category of life partnerships into the Act, so Parliament could take action first. They noted in this regard that such regulation need not be exactly like the regulation of marriages. As for Mrs. Robinson's case, they concluded that the will had provided her with enough to inherit, so that she was no longer vulnerable.[244]

Dissenting Justice Sachs drew attention to the "matrix made up of varied historical, social, moral and cultural ingredients". In cases like this one, these factors

237 *Ibid.,* paras 90-96.
238 *Ibid.,* para. 98.
239 *Ibid.,* paras 107-109.
240 *Ibid.,* paras 112-116.
241 *Ibid.,* paras 118 and 122.
242 *Ibid.,* paras 126-132.
243 *Ibid.,* para. 136.
244 *Ibid.,* paras 140, 139 and 141-142.

influenced the legal considerations on an invisible level and led to legal positions based on "unarticulated philosophical positions". He believed that the common law status of the relationship during the lifetime of the deceased should not determine the rights of the survivor. Rather, the survivor's rights should be looked at in a situational way, which was more in line with the development of family law in the new constitutional era.[245]

Drawing on Canadian jurisprudence, Sachs advocated a "balanced, flexible and nuanced approach" which would respect the choices people make on alternative lifestyles.[246] In the decontextualized approach a "survivor of an empty shell marriage" was protected, while the "survivor of a caring and committed life partnership" was not. This was unfair, Sachs argued. While racism wore "subtle masks", sexism and patriarchy were more "culturally and socially normal" thus more "legally invisible" and hence more difficult to be exposed.[247] In order not to fall for these invisible traps, he argued for a functional approach to family rather than a reinterpretation of the legal definition of marriage. Where marriage was regulated by general laws, the response to cohabitation needed to be circumstantial, taking into account factors such as time period, seriousness of the commitment, and the presence of children. Yet in the case of marriage, a dichotomy remained: a couple was either married or they were not; circumstances were irrelevant.[248]

Sachs related the functional approach to the new legal landscape mandated by the Constitution, which emphasized tolerance towards difference and concern for human dignity. Recalling *Daniels* (section I2.4.8), he pointed to the value of non-sexism which required a hard look at law and legally backed practices.[249] The past's "Calvinistic and conservative atmosphere" in which cohabitation was condemned or judged, should no longer inform the law of the constitutional era. The current institutions must not be bound by the original intent of pre-constitutional legislators.[250] Sachs noted that when the Constitution was adopted, most inequalities connected to being married had been eliminated. Hence, the main purpose of the discrimination on marital status was to protect people who were "vulnerable not because they were married, but because they were not married". "The obvious classes of people requiring protection against unfair discrimination in this category would be single parents, divorcees, widows, gay and lesbian couples and cohabitants."[251]

Sachs stressed that the value given to marriage by cultural and religious communities as a sacred institution was not the issue in this case. Based on their freedom of religion and belief, these groups also retained a right to "condemn those who are guilty of what they may regard as fornication and adultery". But their beliefs could not be considered a source of the law. South African history also taught why marriage deserved special protection. Like the other dissenters, he noted the history of discrim-

245 *Ibid.*, paras 147-149 and 151.
246 *Ibid.*, paras 156-157.
247 *Ibid.*, paras 162-163.
248 *Ibid.*, paras 169-174 and 179.
249 *Ibid.*, paras 181 and 186.
250 *Ibid.*, para. 189.
251 *Ibid.*, para. 200.

ination against African traditional, Muslim and Hindu marriage. But protection of marriages did not require the protection to be exclusive to marriages.[252]

Returning to the case at hand, Sachs argued that the Act should apply to cohabitation if the couple freely and seriously had committed themselves to a life of co-dependence financially, materially, and emotionally.[253] He also believed it should apply if this followed from the "nature of the particular life partnership". "The critical factor" being whether the (materially) weaker party depended to a great degree on the (materially) more potent party.[254] Whether or not Mrs. Robinson actually sought marriage and Mr. Shandling refused it, there was a direct link between their relationship and her current need. Excluding her from inheritance just because their relationship was not a marriage was "socially harsh and legally unfair".[255]

If the survivor's continued economic well-being was threatened by the passing of the partner, this affected her equal dignity. Constitutional law must convert misfortune to be endured into injustice to be remedied. By failing to do so, the Act discriminated against the "powerless and economically dependent party".[256] On the other hand, if people could rely on the law to provide basic justice, this could help to overcome fatalism and helplessness. According to Sachs, the message that people must take responsibility for their lives was important, as was the acknowledgment that "the law cannot ignore the fact that lack of resources has left many women with harsh options only".[257]

The blanket exclusion of life partnerships from the challenged Act was unfair and thus unconstitutional. It sent a message that such relationships were somehow unworthy of protection. Considering that there was no justification, the Act was unconstitutional.[258] Sachs proposed suspending the invalidity for two years so that Parliament could complete the process of regulating unrecognized relationships. He also concluded that Mrs. Robinson required no more remedies, because the will had sufficiently provided for her continued economic security.[259]

252 *Ibid.*, paras 204 and 206-208.
253 *Ibid.*, para 214.
254 *Ibid.*, para 218.
255 *Ibid.*, paras 219-220.
256 *Ibid.*, paras 221-222.
257 *Ibid.*, paras 224-225.
258 *Ibid.*, paras 226-236.
259 *Ibid.*, paras 237-242.

### 4.10 Minister of Home Affairs and Another v Fourie and Another; Lesbian and Gay Equality Project and Others v Minister of Justice and Constitutional Development, [2005]

| | |
|---|---|
| Essence: | Right of same-sex couples to get married. |
| Dimension: | Freedom of religion and belief and family law and family relations. Freedom of religion and belief and secularism. |
| Lower courts: | High Court ruled against the couple. Supreme Court of Appeal ruled in favor. Impossibility of marriage is unconstitutional. |
| Majority: | 9:0: Act is unconstitutional. 8:1 Majority suspension of declaration of unconstitutionality allow legislation. Majority opinion by Sachs. |
| Dissenting: | O'Reagan, regarding the remedy. |

Mrs. Fourie and Mrs. Bonthuys had been a couple for more than a decade and wanted to get married. In 2002, they asked the Pretoria High Court to declare that they had a constitutional right to marry.[260] Two years later, while the Fourie case was being heard in the Supreme Court of Appeal (SCA), the Lesbian and Gay Equality Project (hereafter Equality Project) launched an application in the Johannesburg High Court challenging the Marriage Act for excluding same-sex couples.[261] The judgment combined two cases.

In the *Fourie* case (first challenge), the High Court judge ruled against the couple and did not grant a direct leave to the Constitutional Court, but did grant leave to the SCA. When the couple approached the CCSA anyway, the Court affirmed that the case first had to be heard by the SCA.[262] The SCA ruled in favor of the couple, although the majority and the minority differed on the immediate remedy.[263] The CCSA combined the hearing of the Fourie case with that of the Equality Project (second challenge).[264]

A unanimous CCSA decided in favor of the couple and the Equality Project. However, Justice O'Reagan disagreed with the remedy. She would not have suspended the ruling. Justice Sachs authored the majority opinion with seven other justices – Langa, Moseneke, Mokgoro, Ngcobo, Skweyiya, Van der Westhuizen and Yacoob – concurring.

The Minister, being the opposing party in the case, argued that the Constitution did not protect the right to marry, but the right to establish family life.[265] The majority agreed with the Minister that the text of the Constitution did not include an explicit reference to the right to marry. However, this did not mean that the Constitution did not protect the right to marry and with the "concomitant right to

260 *Minister of Home Affairs and Another v. Fourie (et al.)*, Cases CCT60/04 and CCT10/05, *supra* n. 45, para. 1.
261 *Ibid.*, para. 34.
262 *Ibid.*, paras 7-9.
263 *Ibid.*, paras 12-32.
264 *Ibid.*, paras 34-44.
265 *Ibid.*, para. 46.

be treated equally and with dignity in the exercise of that right". The exclusion of same-sex couples from marriage, according to the CCSA, must be evaluated in light of the meaning given to privacy, equality and dignity by the Court in earlier cases concerning same-sex couples.[266] Sachs drew attention to the considerations in these cases of the heavy impact for LGBTQ+ people and same-sex partnerships of discrimination and social exclusion.[267]

Sachs approached the question of sexual orientation, freedom, and equality, from the angle of the right to be different. The right entailed in this context: (1) that no one family form may be entrenched as the only legally and socially acceptable one; (2) the acknowledgment of the history of persecution and exclusion of LGBTQ+ people, nationally and internationally; (3) the realization that although legal protection of sexual orientation equality has improved, there is no comprehensive legal regulation of the family law rights of same-sex couples; and (4) the appreciation of the fact that the Constitution represents a radical break with the history of intolerance and exclusion and a movement towards a society "based on equality and respect for all": "Equality means equal concern and respect across difference. […] Respect for human rights requires the affirmation of self, not the denial of self." The "right to be different" embedded in the constitutional rights and values, required removing obstacles that prevent people from living their difference and protecting departure from the majoritarian norm.[268]

Yet, this promise had not been fulfilled in regard to same-sex couples. Same-sex couples were denied what opposite-sex couples were offered: a legal recognition of their partnership. While marriage, in essence, was an intense private and voluntary commitment, its legal recognition brought this commitment into "the most public, law governed and state-regulated domain".[269] Consequently, the impact of the denial of this institution to same-sex couples was great. It represented a "harsh if oblique statement by the law that same-sex couples were outsiders, and that their need for affirmation and protection of their intimate relations as human beings was somehow less than that of heterosexual couples."[270] This could only be taken away if same-sex unions enjoyed the equal legal recognition as opposite-sex marriages and if that recognition had equal legal consequences.[271]

In discussing the remedy, the majority opinion turned to religious views on marriage and same-sex partnerships. The state contended that alteration of the institution of marriage was not the proper remedy to facilitate the equality of same-sex unions. Rather, alternative forms of recognition should be provided for.[272] Amongst the arguments brought forward in this regard was the respect for religion next to the procreation rationale, the recognition of heterosexual marriage in international law and the recourse to diverse systems of family law as provided for by the Constitution. The procreation rationale, however, was considered by Sachs as possibly persuas-

266 *Ibid.*, paras. 47-48.
267 *Ibid.*, paras 49-58.
268 *Ibid.*, paras 59-61.
269 *Ibid.*, paras 62-65.
270 *Ibid.*, para. 71.
271 *Ibid.*, para. 81.
272 *Ibid.*, para. 83.

ive in the context of a particular religious world view, but not definitive for conjugal relationships from a legal and constitutional perspective, because to "hold otherwise would be deeply demeaning to couples (whether married or not) who, for whatever reason, are incapable of procreating".[273]

The religious argument brought forward by *amici* and not by the state, was that the recognition of same-sex marriage would violate religious freedom because it would "disrupt and radically alter an institution of centuries-old significance for many religions". The argument was dealt with by Sachs in light of the Court's case law on the freedom of religion. Freedom of religion as protected by the South African Constitution, as Sachs pointed out, went beyond the protection of the inviolability of the individual conscience. "For many believers, their relationship with God or creation is central to all their activities. It concerns their capacity to relate in an intensely meaningful fashion to their sense of themselves, their community and their universe. [...] Religious belief has the capacity to awaken concepts of self-worth and human dignity which form the cornerstone of human rights. […] For believers, then, what is at stake is not merely a question of convenience or comfort, but an intensely held sense about what constitutes the good and proper life and their place in creation."[274]

Sachs acknowledged that it would be wrong to dismiss opposition to homosexuality on religious grounds "simply as an expression of bigotry".[275] After all, religious people while having nuanced views on homosexuality as such, may hold sincere beliefs which make it impossible for them to accept same-sex marriage. Yet, while these sincere beliefs were protected by the Constitution, they were not a source of interpreting the Constitution. Courts had the role of neutral arbiters in a free and open society capable of accommodating diversity: "In the open and democratic society contemplated by the Constitution there 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."[276]

The Marriage Act in fact recognized the diversity of belief that the Constitution envisioned, by permitting religious leaders to be designated as marriage officers, and religious buildings to be used for the solemnizations of marriages which could be performed in accordance with religious rites. It also recognized the right of marriage officers who are ministers of a religion or holders of any official position within a religious denomination to refuse to perform any marriage which would be contrary to the tenets of the denomination or religious organization in question. Hence, no minister of religion could ever be compelled to solemnize a same-sex marriage, if this was contrary to his or her beliefs and/or the beliefs of the religious community concerned.[277] While the freedom thus protects believers from any involvement in or assistance to the realization of same-sex marriage, it did not provide a valid argument to prevent legal recognition of same-sex marriage.[278]

273 *Ibid.*, para. 84.
274 *Ibid.*, paras 88-89.
275 *Ibid.*, para. 91.
276 *Ibid.*, paras 93-94.
277 *Ibid.*, paras 96-97.
278 *Ibid.*, para. 98.

Section 15(3) of the Constitution provided a basis for legal recognition of traditional or religious marriages. The section had been relied on in court cases seeking recognition of for example African traditional and Muslim marriages and (proposed) legislation regulating these marriage systems and personal law. The section showed that the Constitution was appreciative of diversity in family law, yet it was not the only constitutional basis for the recognition of same-sex unions, nor could it be used to bar them.[279]

The international law argument was only dealt with briefly in the majority opinion. While recognizing that international law explicitly protected heterosexual marriage, the majority saw no reason to conclude that it opposed same-sex marriage.[280]

Having established that as a matter of principle, rights of dignity and equality mandated recognition of the rights of same-sex couples to have their unions legally recognized, and that the freedom of religion, traditional concepts of marriage and international law did not bar this recognition, the Court turned to the question of whether the absence of recognition could be justified under Section 36. Two interrelated arguments brought forward by amici for justification, were that recognition would undermine the institution of marriage and offend strong religious feelings of certain sections of the public.[281]

The Court dismissed these arguments for justification as invalid. Granting same-sex couples access to the institution of marriage did not undermine the capacity of heterosexual couples to get married in any form they wished and in accordance with the tenets of their religion. Accordingly, Sachs reached the conclusion that the failure of common law and the Marriage Act to provide for marriage of same-sex couples constituted an unjustifiable violation of their rights to equal protection under the law and not to be discriminated against unfairly.[282]

Sachs then proceeded to formulate the remedy. While there was a legislative trend to recognize same-sex partnerships, there was still no comprehensive legislation regularizing relationships of same-sex couples leaving them with "piecemeal relief".[283] Yet in working out a remedy, the Court had to be conscious of a variety of important developments and factors. This included, among other things, the SALRC report and the democratic process which needed to be involved in the solution to be found.[284]

Consequently, the Court ruled that "or spouse" as a gender-neutral typology should be read into the relevant sections of the Marriage Act to enable same-sex marriage. In order to ensure freedom of religion, civil marriage officers with sincere religious objections to performing same-sex marriage should not be obliged to perform same-sex marriages if this were to violate their conscience. However, the order was suspended for 12 months to give Parliament the chance to first adopt legislation to

279 *Ibid.*, paras 106-109.
280 *Ibid.*, paras 99-105.
281 *See ibid.*, para. 110.
282 *Ibid.*, paras 111-114.
283 *Ibid.*, paras 115-117.
284 *See ibid.*, paras 111-157.

address the issue. If after 12 months there was no such legislation, the order would automatically enter into force.[285]

O'Reagan did not dissent with her colleagues on the merits, only on the remedy. She would have given immediate effect to the order, rather than suspend it for a year.[286] Before the year elapsed, the Parliament had adopted the Civil Union Act which provided for same-sex marriage and therefore made the coming into force of the order obsolete.

### 4.11 MEC for Education: KwaZulu-Natal and Other v Pillay [2007]

| | |
|---|---|
| Essence: | Right to manifest a cultural practice of wearing a nose stud. |
| Dimension: | Freedom of religion and belief and personal freedom. Freedom of religion and belief and education. |
| Lower courts: | Equality Court ruled that discrimination was not unfair. High Court ruled in favor of claimant. |
| Majority: | 11:0. Impermissible indirect discrimination. 10:1 majority on order. Majority opinion by Langa. Nine others concurring. |
| Dissenting: | O'Reagan agreed on impermissible discrimination, disagreed on the order. |

Sunali Pillay is of South Indian, Tamil and Hindu origin and in her final year in high school she started wearing a traditional nose stud. The Durban Girls High School's Code prohibited all jewelry except for ear studs and wristwatches, and she was ordered to remove the nose stud in school. She did not comply, claiming that the order violated her right to practice her cultural and religious traditions.[287]

Ms. Pillay went to the Equality Court which found that the school regulations were in fact discriminatory, though not unfair. The High Court found in favor of Pillay and qualified the prohibition as impermissible indirect discrimination.[288] The Constitutional Court affirmed this. The majority opinion (10 out of 11) was authored by Chief Justice Langa. Justice O'Reagan dissented, agreeing with the finding of unfair discrimination but not the order.

Ms. Pillay's claim was directed against the failure of the school to grant her an exemption from the Code's prohibition. As Langa saw it, however, it was the combination of the Code and the refusal to grant an exemption that resulted in the alleged discrimination. The Code provided no process or standard for exemptions. Hence, Sunali's request for exemption was denied.[289]

Discrimination on the grounds of culture and religion are both prohibited by the Constitution. The prohibition to discriminate is directed at state and private parties

285 *Ibid.*, paras 159-161.
286 *Ibid.*, paras 168 and 173.
287 CCSA, *MEC for Education: Kwazulu-Natal and Other v. Pillay*, Case CCT51/06, 5 October 2007, paras 3-10.
288 *Ibid.*, paras 14-18.
289 *Ibid.*, paras 36-38.

alike. The Equality Act guarantees the horizontal prohibition. The case was first argued under this Act.[290]

The school had argued that there was no discrimination as the Code applied to everyone.[291] Langa did not agree: "The ground of discrimination is still religion or culture as the Code has a disparate impact on certain religions and cultures. The norm embodied by the code is not neutral, but enforces mainstream and historically privileged forms of adornment [...]." Hence, if the Code's effect was that it imposed a burden on Sunali, it was discriminatory.[292]

While there is a difference between culture (traditions and beliefs of a community) and religion (personal faith and belief), the majorities found that the two concepts often overlap and that it was "equally possible for a practice to be both religious and cultural'".[293] The next step the Courts took in the analysis was to establish whether Sunali was part of an identifiable cultural and/or religious group. Sunali was considered by the Court to be part of an identifiable group of South Indian, Tamil and Hindu origin.[294]

The last step was then to establish the cultural and religious significance of the nose stud. Langa noted that the applicable test was "sincerity" in South Africa, as well as many foreign jurisdictions. Langa found that Sunali's persistence in refusing to obey the schools order and standing up for her belief in court and in the media, provided enough proof of the sincerity of her belief.[295] The school never contested the cultural relevance of the nose stud, but denied it had religious significance.[296] While Sunali admitted that the nose stud was not a mandatory tenet of her religion or culture, it was a voluntary expression of her South Indian, Tamil, and Hindu culture that was strongly intertwined with the Hindu religion. Whether the practice was more cultural or more religious was irrelevant: "culture and religion sing with the same voice".[297]

The voluntary nature made it no less worthy of protection. Religious and cultural practices were protected as they were "central to human identity which in turn is central to human equality". Voluntary practices were no less part of a human's identity just because they were not (perceived as) mandatory.[298] "Differentiating between mandatory and voluntary practices does not celebrate or affirm diversity, it simply permits it." But South Africa's constitutional project "not only affirms diversity, but promotes and celebrates it".[299]

Langa also explicitly referred to Canadian jurisprudence in order to highlight the importance of protecting voluntary religious practice.[300] The protection of voluntary practice applied equally to cultural and religious practices. Protection of

290 *Ibid.,* para. 40.
291 *Ibid.,* para. 42.
292 *Ibid.,* paras 44-45.
293 *Ibid.,* para. 47.
294 *Ibid.,* para. 50.
295 *Ibid.,* para. 55.
296 *Ibid.,* para. 58.
297 *Ibid.,* para. 60.
298 *Ibid.,* para. 62.
299 *Ibid.,* paras 64-65.
300 *Ibid.,* para. 65.

voluntary cultural practices may even be more necessary, because in cultures unlike religions, practices were often perceived as voluntary. Not protecting voluntary practices might then result in not protecting culture at all.[301]

Having established discrimination, the Court investigated whether the discrimination was unfair. Comparing the US and Canadian interpretations of "reasonable accommodation", Langa concluded that the Canadian interpretation was more in line with South African constitutional law. He also interpreted the duty of reasonable accommodation as "an exercise in proportionality that will depend on the facts". In this case, the proportionality depended on the importance of the practice for Sunali, on the one hand, and the hardship of an exemption for the school, on the other hand.[302] Refuting the school's reliance on the margin of appreciation doctrine in de *Şahin* case (section I3.4.7), the majority called the doctrine unfitting.[303]

Determining the importance of the practice for Sunali, Langa considered that the "symbolic effect of denying her the right to wear it for even a short period; it sends a message that Sunali, her religion and her culture are not welcome".[304] Also, courts should not substitute their assessment of importance for that of the individual in question. "If Sunali states that the nose stud is central to her as a South Indian Tamil Hindu, it is not for the Court to tell her that she is wrong because others do not relate to that religion or culture in the same way."[305] Langa found the purposes underlying the Code of discipline and education legitimate. But reasonable accommodation required the exemption, which would not have had any detrimental effect on the stated purposes.[306] Feelings of unfairness amongst other students should have been dealt with by explaining the values of the Constitution.[307] Hence, the majority set aside the school's order and the school was ordered to provide for exemptions in the Code for religious and cultural practices.

Justice O'Reagan concurred with the majority in the essence of its opinion, but disagreed with part of the majority's reasoning and with the order made. Unlike the majority, she believed that the Constitution recognized that culture was different from religion and should not be treated as if it was religion.[308] Hence, "sincere belief" was to be used when a cultural practice was concerned.[309] She stated three objections to the majority's approach which according to her:[310]

1. did not fully appreciate that culture is associative rather than individual;
2. led to a society of atomized communities rather than a unified diverse society;
3. underestimated that human dignity requires more than just toleration of sincerely held beliefs.

301 *Ibid.*, paras 67-68.
302 *Ibid.*, paras 76-77.
303 *Ibid.*, para. 80.
304 *Ibid.*, para. 85.
305 *Ibid.*, para. 87.
306 *Ibid.*, paras 99-102.
307 *Ibid.*, paras 103-104.
308 *Ibid.*, para. 143.
309 *Ibid.*, para. 147.
310 *Ibid.*, paras 154-156.

However, O'Reagan was convinced that the "neutral code" together with the refusal of an exemption did indeed discriminate against Sunali based on her culture.[311] Because there was no procedure in place which Sunali could use to request an exemption and no criteria on how such a request would be dealt with, the discrimination was unfair.[312] Yet because Sunali had already graduated, the declaratory order of the majority was superfluous in O'Reagan's opinion.[313] She did agree, however, that the Court needed to order the school to amend the Code to provide for exemption for religious and cultural reasons.[314]

### 4.12 Hassam v Jacobs NO and Others [2009]

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|---|---|
| Essence: | Inheritance rights of a widow in a de facto polygamous Islamic marriage not registered as civil marriage. |
| Dimension: | Freedom of religion and belief and family law and family relations. Freedom of religion and belief and secularism. |
| Lower courts: | The High Court found in claimants favor and asked the CCSA to confirm the constitutional invalidity of the Acts for excluding her. |
| Majority: | 11:0. Constitutional invalidity. Majority opinion by Nkabinde. |
| Dissenting: | None. |

Mrs. Hassam had married her husband in accordance with Muslim rites. Later, he married a second wife also in accordance with Muslim rites, without her knowledge or consent. When he passed away, Mrs. Hassam sought recognition as her husband's surviving spouse under the Intestate Succession Act, and the Maintenance of Surviving Spouses Act. The executor, however, contested that her marriage was still valid at the time of the death, citing among other things that she was part of a polygamous relationship.[315]

The High Court, considering the Constitutional Court's ruling in *Daniels*, held that the provisions of the Acts were in violation of the Constitution. It then asked the Constitutional Court to confirm its findings on constitutional invalidity. A unanimous Court found in favor of Mrs. Hassam. Justice Nkabinde authored an opinion which the other judges concurred with.

According to Nkabinde, the case was not about the constitutional validity of polygamous Muslim marriages as such, nor was it about incorporating Sharia law into South African law.[316] It was about the question of whether the exclusion of spouses in polygamous marriages from the Act constituted discrimination.[317] Nka-

311 *Ibid.*, para. 166.
312 *Ibid.*, para. 182.
313 *Ibid.*, para. 183.
314 *Ibid.*, para. 183.
315 *Hassam v. Jacobs NO and Others*, Case CCT83/08, *supra* n. 49, paras 2-5.
316 *Ibid.*, para. 17.
317 *Ibid.*, para. 20.

binde reiterated the importance of equality for the democratic constitutional order of South Africa, especially in light of its past.[318]

The past prejudice against the Muslim community was evident in judgments from the apartheid era, declaring Muslim marriages "void on the ground of it being contrary to accepted customs and usages".[319] Wrongly, courts in the past had simply ignored the hardship this would cause to the Muslim community. This "ignorance and total disregard of the lived realities prevailing in Muslim communities" was no longer acceptable under the new constitutional order and contrary to its values which prevented the imposition of one group's views on others in a pluralistic society.[320] The respect for diversity was reflected in the Preamble to the Promotion of Equality and Prevention of Unfair Discrimination Act, the goal of which was to facilitate the transition into "a democratic society, united in its diversity". The Court had repeatedly incorporated this in its interpretative approach in order to achieve the progressive realization of "transformative constitutionalism".[321]

Nkabinde examined why the polygamous Muslim marriages from the intestate succession regime violated the equality rights of the Constitution. Women in polygamous marriages such as Mrs. Hassam's suffered a comparative disadvantage: the Act worked to their detriment and not to that of men in such marriages.[322] The differentiation amounted to discrimination because it related to three of the listed grounds – namely religion, culture and gender. This was not, however, to imply that Muslim personal law if enacted would constitute discrimination, nor did it answer whether the Constitution mandated the recognition of polygynous Muslim marriages as such. It meant that the Constitution mandated affording women who are spouses in such marriages equal protection.[323]

While the Court's decision in *Daniels* had provided relief to spouses in monogamous Muslim marriages, the distinction between spouses in monogamous and spouses in polygynous Muslim marriages unfairly discriminated against the latter.[324] Excluding this group from the protection of the Act was contrary to the goal of equality set out by the Constitution, because women often had no power to prevent their husband from marrying a second or third wife. Discrimination was presumed to be unfair unless there was a justification.[325] As the Minister did not provide any justification for the exclusion, the assumption stood, and the discrimination against women who were spouses in polygynous Muslim marriages was unfair.[326]

The next step was to identify whether the possible remedy against the unfair discrimination was to read "spouse" in the Act to include a widow to a de facto polygamous Muslim marriage. This could not be answered on the basis of past precedents from the apartheid era, which denied Muslim marriages recognition

318 *Ibid.,* para. 24.
319 *Ibid.,* para. 25.
320 *Ibid.,* para. 25.
321 *Ibid.,* paras 27-29.
322 *Ibid.,* paras 30- 31.
323 *Ibid.,* paras 33-35.
324 *Ibid.,* para. 36.
325 *Ibid.,* paras 38-39.
326 *Ibid.,* paras 41-42.

because they were deemed potentially polygynous and therefore contrary to the ordered dominant public morality. Instead, the question had to be answered through the "prism of the Constitution".[327] In this regard, the Court considered that the significance "attached to polygynous unions solemnized in accordance with the Muslim religious faith is by no means less than the significance attached to a civil marriage under the Marriage Act or an African customary marriage. Similarly, the dignity of the parties to polygynous Muslim marriages is no less worthy of respect than the dignity of parties to civil marriages or African customary marriages."[328]

In accordance with this spirit of equality, Nkabinde noted a trend in judicial decisions such as *Daniels* (section I2.4.8), *Bhe*[329] and *Khan*[330] of interpreting marriage and family law consistent with the Constitution. In *Bhe*, the CCSA held that the Marriage Act applied to marriages formally governed by the Black Succession Act. In *Khan*, the Supreme Court of Appeal held that "partners in a Muslim marriage, married in accordance with Islamic rites (whether monogamous or not) are entitled to maintenance". The fact that Muslim marriages had not expressly been included in the relevant acts could not be interpreted to imply an indented exclusion "contrary to the spirit, purport and objects" of the Constitution. After all, such an exclusion would result in a violation of the widows' "rights to equality in relation to marital status, religion and culture and would therefore violate their right to dignity".[331]

The appropriate remedy then was "reading in" to the Act, after the word "spouse" "or spouses" as to include widows like Mrs. Hassam who are/were parties to a polygynous (Muslim) marriage.[332] The declaration of invalidity was to be applied retroactively to 1994 so as to provide remedies for those who had suffered injustice since.[333] Noteworthy was also that the Minister had to pay the appellants costs, because the state had still failed to provide for the necessary legislation to address the grievances of the Muslim community in the area of family and marriage law and had therefore forced Mrs. Hassam to assert her constitutional rights through court proceedings.[334]

327 *Ibid.,* paras 42-43.
328 *Ibid.,* para. 46.
329 CCSA, *Bhe and Others v. Magistrate, Khayelitsha and Others (Commission for Gender Equality as Amicus Curiae); Shibi v. Sithole and Others; South African Human Rights Commission and Another v. President of RSA and Another*, Cases CCT49/03, CCT69/03 and CCT50/03, 15 October 2004.
330 Supreme Court of Appeal of South Africa, *Khan v. Khan* 2005 (2) SA 272.
331 *Hassam v. Jacobs NO and Others*, Case CCT83/08, *supra* n. 49, paras 47-48.
332 *Ibid.,* para. 53.
333 *Ibid.,* para. 55.
334 *Ibid.,* para. 56.

### 4.13 Women's Legal Centre Trust v President of the Republic of South Africa and Others [2009]

| | |
|---|---|
| Essence: | Parliaments failure to adopt a Muslim marriages Act in light of its constitutional obligations. |
| Dimension: | Freedom of religion and belief and family law and family relations. Freedom of religion and belief and secularism. |
| Lower courts: | Not applicable. Direct application to the CCSA. |
| Majority: | 10:0. CCSA had no first instance jurisdiction. Majority opinion by Cameron. |
| Dissenting: | None. |

The Women's Legal Centre Trust launched a direct application to the Constitutional Court in 2009, to seek a declaration that the President and Parliament had failed to fulfill their obligation under the Constitution to *inter alia* prepare, enact and implement legislation providing for the recognition of all Muslim marriages under South African law.[335]

As is apparent from cases like *Amod*, *Daniels* and *Hassam* (sections I2.4.5, I2.4.8 and I2.4.12), South African law before apartheid was discriminatory against Muslim marriages. In the constitutional era, Muslim marriages performed by a religious minister who was licensed in accordance with the *Civil Marriage Act*, had the benefit of being considered legal marriages under relevant legislation such as inheritance and compensation for surviving spouses. Muslim marriages not performed as civil marriages, remained unrecognized under the law.

In 2003, the South African Law Reform Commission submitted a report on the matter, which included a draft bill.[336] However, the draft bill was not adopted due to controversies within and outside of the Muslim community of South Africa. Amongst the many opposing positions taken were those that deemed the bill intrusive of the internal affairs of the Muslim community, a deviation from Islamic law, uncalled for special treatment of a religious group, and potentially opposed to public policy. Others like the applicant in this case supported the bill for being beneficial for the rights of Muslims in general and Muslim women in particular.

The unanimous Court judgment, written by Justice Cameron, focused on two questions: whether indeed Parliament had breached an obligation, and whether the CCSA had first and only jurisdiction to decide on the matter. It answered both questions in the negative. As the questions before the Court were of a jurisdictional nature, the judgment did not deal with the substantive relief claimed.[337]

335 CCSA, *Women's Legal Centre Trust v. President of the Republic*, Case CCT13/09, July 2009, para. 1.
336 *Ibid.*, para. 8.
337 *Ibid.*, para. 3.

The relevant provisions of the Constitution[338] in Section 167 read:

> "(4) Only the constitutional Court may- […]
> (e) decide that Parliament or the President has failed to fulfill a constitutional obligation; or [...]
> (6) National legislation or the rules of the Constitutional Court must allow a person, when it is in the interests of justice and with leave of the Constitutional Court
> (a) to bring a matter directly to the Constitutional Court; or [...]"

The applicant claimed that since 2003 until 2009, no meaningful steps had been taken to further enact consequent implementation of legislation recognizing Muslim marriages, and this while the Constitution expressively permitted the legal recognition of a system of personal and family law, adhered to by the people of a particular religion.[339] The obligation on the part of the government organs that the applicant asserted, followed in her opinion from the fact that the absence of such legislation breached, among other things, the rights to dignity and equality and the freedom of religion, irrespective of the fact that imams may be recognized as marriage officers in terms of the Marriage Act.[340]

The Court argued that review of the CCSA in obligations of Parliament must be narrow. A broad meaning would render constitutional review by other courts of the conduct of the President and of the Acts of Parliament superfluous.[341] Hence, while the section in question should be given a narrow meaning, the provisions dealing with constitutional review by other courts must be interpreted widely.[342] The Constitutional Court's jurisdiction must furthermore be exercised, keeping in mind its function as guardian of the Constitution and its place within the separation and balance of power(s).[343]

Cameron further noted that the review section is actor-specific; it referred to Parliament and the President. Yet the obligation allegedly not fulfilled rested on the state as a whole according to the Constitution, not Parliament (or the President) specifically.[344] Hence, the jurisdiction of the CCSA was also not exclusive, and consequently the direct access could not be granted on the basis of exclusive jurisdiction of the Constitutional Court. Finally, the Court drew attention to the fact that because of the many interests and choices involved in adopting legislation recognizing Muslim marriages, it would not be appropriate to decide it in a Court of first and final instance.[345]

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338 Constitution of the Republic of South Africa, *supra* n. 2, s. 167.
339 *See ibid.*, s. 15(3).
340 *Women's Legal Centre Trust v. President of the Republic*, Case CCT13/09, *supra* n. 335, para. 9.
341 *Ibid.*, para. 11.
342 *Ibid.*, para. 12.
343 *Ibid.*, para. 15.
344 *Ibid.*, paras 16-17.
345 *Ibid.*, para. 23.

## 4.14 DE v RH [2015]

| | |
|---|---|
| Essence: | The continued legal enforceability of a legal action which a spouse can take against the adulterous spouse and involved third party. |
| Dimension: | Freedom of religion and belief and family law and family relations. |
| Lower courts: | High Court found in favor of husband taking legal action. Court of Appeal found on its own accord that the legal system should be rid of this claim. |
| Majority: | 10: 0. The legal action against adultery was no longer valid. Majority opinion by Madlanga, eight others concurring. Separate concurring opinion by Mogoeng; Cameron concurring. |
| Dissenting: | None. |

The applicant in this case had sued his former wife and her partner for adultery. His wife had left him and shortly afterwards had initiated divorce proceedings. She claimed she had found her new partner only after the separation and that the relationship had only become physical after the divorce. The applicant claimed that the adultery had caused the break-up. His ex-wife claimed that the relationship had begun to deteriorate two years prior to the split.[346]

South African common law still included legal actions which a spouse could take against the adulterous spouse and the third party involved in the adultery. The applicant based his claims against his wife's new partner on this. While the High Court found in his favor, the Supreme Court of Appeal (SCA) out of its own accord raised the question whether the claims were still valid, drawing the conclusion that they were not. The applicant appealed to the CCSA.[347] A unanimous CCSA agreed with the SCA. The majority opinion was authored by Madlanga. Chief Justice Mogoeng issued a separate concurring opinion with which Cameron concurred.

In his appeal to the CCSA, the applicant argued that the "question whether the delictual claim based on adultery should continue to exist is an arguable point of law of general public importance". The Court agreed and allowed the appeal. Setting aside an existing claim indeed raised important legal questions the CCSA must answer.[348] The SCA had based itself on the reasoning that public policy is infused with the values of the Constitution. According to these, the legal action against adultery was violative of the privacy rights and dignity of those against whom the claim was brought. The applicant contended that the SCA did not take the Constitution into account properly: common law needed to be developed in line with the Constitution, his dignity was also involved and the Constitution safeguarded and protected the institution of marriage.[349] The central legal question was whether adultery as such was still to be considered "wrongful" enough for it to create a

346 CCSA, *DE v. RH*, Case CCT182/14, 19 June 2015, paras 6-7.
347 *Ibid.*, paras 1-5.
348 *Ibid.*, paras 8 and 10.
349 *Ibid.*, para. 9.

liability against the spouse affected by the adultery.[350] The Constitutional Court, like the SCA, did not think so.

The roots of the claims directed against adultery, argued Madlanga, were in patriarchy. They were once open only to men, but were opened to women through case law, drawing on the gender neutral principles of Christian fidelity.[351] Courts developed the common law then, as they could now, as development by courts was part of its inherent nature.[352] In developing the common law now, recourse had to be taken to the values underlying the Constitution, which formed an important and integral part of the *mores* of society.[353] Pointing to a case from 1944, in which the judge had already viewed the adultery claims unmodern, Madlanga pointed to the long-standing continued softening attitude towards adultery.[354] He also pointed to the growing relaxation of divorce requirements over time.[355] Taking a journey through comparative law, Madlanga noted that in many legal systems, the legal actions for spouses against the infidelity of their partner had been abolished or softened, while others had retained them.[356] He cited a Namibian case in which the judge explained that growing respect for autonomy and individual agency of human beings has led society to accept that even a married person may meet and fall in love with someone else.[357]

Nevertheless, the case law regarding those who challenged existing marriage laws because they wanted to get married but could not, and those who wanted their marriage to be legally accepted, showed that marriage as an institution was still valued highly.[358] Several cases before the CCSA had concerned the legal obstacles couples experience who were or wanted to get married. The applicant had cited these cases to show that the legal action he wished to take should still have a place in the law. Yet, removing obstacles was different from taking legal measures to prevent the disintegration of a marriage. The Constitutional Court, however, felt that not legal rules but love, trust and fidelity, were the foundations of marriage. If they diminished, so did the marriage.[359]

Turning to international obligations towards family and marriage, Madlanga noted that the legal obligations in international treaties did mandate a protection of marriage as they did for family which is a concept which included "lesbian and gay couples, whether married or not, and with or without children".[360] International instruments did require the protection of marriage, and it could not be denied that adultery was detrimental to a marriage. Nevertheless, the international requirements, much like

350 *Ibid.*, para. 11.
351 *Ibid.*, para. 14.
352 *Ibid.*, para. 16.
353 *Ibid.*, paras 17-21.
354 *Ibid.*, paras 23-25.
355 *Ibid.*, para. 26.
356 *Ibid.*, paras 28-38.
357 *Ibid.*, para. 36.
358 *Ibid.*, para. 26.
359 *Ibid.*, paras 42-44.
360 *Ibid.*, para. 45.

the constitutional requirements, did not oblige the state "to strengthen a weakening marriage or breathe life into one that is disintegrating on its own".[361]

Deciding the case, the rights of all parties in this case – applicant, former wife and her partner – and the constitutional norms had to be weighed. The constitutional norms also informed present-day attitudes towards adultery, which in turn informed the *boni mores* of the new ethos.[362] The former wife and the partner could rely on their rights to freedom and security of the person, privacy and freedom of association. In the case at hand, the procedure before the High Court showed how invasive the court case was. Details from the couple's intimate and sexual lives were presented, discussed and analyzed in public.[363]

The rights of the adulterous spouse and the partner had to be weighed in the context with the behavior of the non-adulterous spouse. Certain behavior may have triggered adultery on behalf of the spouse, and this affected the appreciation of the facts surrounding the adultery and thus the weight given to the rights of the adulterous spouse and partner. "Even where the adulterous spouse has not been wronged by the other, it is life's reality that sometimes marriages just do not work out. In those instances, the rights of the two that have committed adultery do not become irrelevant". And even where the fault clearly lay with the adulterous party and the partner, their rights still mattered.[364]

In any event, upholding liability towards the non-adulterous spouse would restrict the rights of consenting individuals to engage in sexual relations with another party of their choosing.[365] On the other hand, the non-adulterous party's right engaged is the right to dignity. The act of adultery intruded into the non-adulterous spouse's most intimate relationship, without their consent. The changing social attitudes did not change this.[366] Yet, weighing the rights of the adulterous spouse and the partner against those of the non-adulterous spouse, in light of the changing attitudes in society, must lead to the conclusion that liability for adultery could not be upheld. "At this day and age, it just seems mistaken to assess marital fidelity in terms of money".[367]

Chief Justice Mogoeng in his separate concurring opinion, with which Cameron concurred, stressed that marriage is a human institution, which the parties to the marriage needed to make work. The law regulated it, enforced obligations which flow from it and must take away obstacles which interfere with it. All the rest was the obligation of the spouses. Their loss of commitment would lead to the failure of the marriage. The law could not rescue an otherwise ailing marriage.[368]

361 *Ibid.*, para. 49.
362 *Ibid.*, paras 51-52.
363 *Ibid.*, para. 54
364 *Ibid.*, paras 55-57.
365 *Ibid.*, paras 58-59.
366 *Ibid.*, paras 60-61.
367 *Ibid.*, para. 64.
368 *Ibid.*, paras 67-71.

### 4.15 De Lange v Presiding Bishop of the Methodist Church of Southern Africa for the time being and Another [2015]

| | |
|---|---|
| Essence: | The constitutionality of the dismissal and subsequent internal procedure of a church minister for being in a same-sex relationship. |
| Dimension: | Freedom of religion and belief and family law and family relations. Freedom of religion and belief and group autonomy. Balancing freedom of religion and belief with other rights. |
| Lower courts: | High Court and Supreme Court of Appeal upheld the challenged arbitration agreement. |
| Majority: | 10: 0. Majority opinion by Moseneke. Separate concurring opinion by van der Westhuizen. |
| Dissenting: | None. |

Mrs. De Lange was an ordained minister of the Methodist Church. Since being ordained as a minister, she had been living together with her same-sex partner for five years, with the knowledge of the Church. When she publicly announced her intention to get married under the Civil Unions Act, she was suspended. The suspension led to a labor conflict, which the Church intended to solve via an arbitration procedure. Over time, the arbitration procedure itself became a source of and part of the labor conflict.[369] The agreement had never been signed by Mrs. De Lange herself, but by the convener. This was made possible by the procedural rules. The previous draft, which had been signed by her, had not been signed by the Church and amended by the Church later.[370] The arbitration itself never took place.

Mrs. De Lange first asked the Hight Court to set aside the arbitration agreement because the entire conduct and agreement showed bias against her. After the High Court ruled in favor of the Church, she took the case to the Supreme Court of Appeal (SCA) which confirmed the judgment. At the SCA, she first raised the claim of unfair discrimination. Before the CCSA, she claimed that at the heart of the decision to suspend her was unfair discrimination for her sexual orientation, which was unconstitutional.[371] A unanimous Court ruled not to grant Mrs. De Lange leave to appeal. Moseneke authored the majority opinion on behalf of himself and the other nine, while Van der Westhuizen issued a separate concurring opinion.

Moseneke set out the main reasons for not granting the leave. First, during the procedures at the High Court and the SCA, Mrs. De Lange had been inconsistent with regard to basing her claim on unfair discrimination. She dropped the unfair discrimination argument when the opponent argued before the High Court that she would have to take the claim to the Equality Court first. Now she was raising the claim again. Were the CCSA to decide the matter anyway, it would do so as a court of first and last instance, which was inconsistent with procedure and undesirable

369 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 1-9.
370 *Ibid.*, paras 10-16.
371 *Ibid.*, paras 17-25.

given the social importance of the matter. Secondly, with regard to the arbitration agreement, the CCSA saw no reason to depart from the SCA's findings. However, the CCSA reiterated the nation's commitment to diversity, equality and the freedom of religion and belief, before further iteration on the subject matter.[372]

According to Mrs. De Lange, the arbitration agreement, which she conceded was valid, must be set aside because the procedure leading to it was biased against her. In terms of the law, "good cause" to set aside the agreement must be shown.[373] Initially, Mrs. De Lange had denied the existence of a church rule prohibiting same-sex marriage for ministers. Now she conceded having transgressed a rule, albeit a vague one, which was applied unfairly, which is why arbitration had no practical effect. She also believed that the arbitration procedure would not deal with the constitutional issues. Moseneke disagreed. The arbitration would be useful and of practical effect. The arbitrator could look into how the rule was applied as much as whether there was a rule as such.[374]

Mrs. De Lange also criticized the Church's stand as hypocritical. The Church had not taken issue with her living together unmarried with a woman, but had suspended her for getting married to one. The Church, on the other hand, argued that this stance signified its balance between dogma and tolerance. According to the dogma, marriage was exclusively an opposite-sex institution. Moseneke, reasoned that the Court, on the other hand, cannot adjudge Church dogma. Hence, Mrs. De Lange's criticism of the line drawn between two situations did not deliver the "good cause" needed to set aside the arbitration agreement. Arbitration, on the other hand, can focus on the merit of this complaint. It was in itself very much the reasonable accommodation, which Mrs. De Lange asked the Court to compel the Church to.[375] Finally, the Court did not agree with Mrs. De Lange that the fact that the arbiter and convener were members of the Church made the procedure biased. In conclusion, the CCSA agreed with the High Court and SCA that the agreement must not be set aside.[376]

Mrs. De Lange had first raised unfair discrimination in the High Court. She declared that she felt discriminated against for her sexual orientation. When the Church argued that she would have to put this claim before the Equality Court, she dropped the claim. Debate was possible whether, by following the relevant legal steps, a High Court judge could have heard the combined claims in one case as High and Equality Court. The CCSA avoided taking a decision on this, merely stating that it was not possible to revive the claim only before the CCSA as first and last instance.[377]

Mrs. De Lange had also failed to file for the procedure which would have allowed interest groups on both sides to enter the proceedings as *amici curiae*. The Church claimed that this alone should be reason to reject the appeal. After all, the Court had never heard a case of this kind, which required balancing competing equality and

372 *Ibid.*, paras 30-31.
373 *Ibid.*, paras 32-37.
374 *Ibid.*, paras 38-40.
375 *Ibid.*, paras 41-43.
376 *Ibid.*, paras 44-45.
377 *Ibid.*, paras 46-59.

religious autonomy claims. The CCSA saw the great disadvantage of not following the procedure, but noted that it had also remedied the disadvantage. The fact that the procedure was not followed in itself, was insufficient to deny the appeal.[378] Turning to the unfair discrimination claim itself, Moseneke openly admitted that the issue was complex due to the competing constitutional claims and public repercussions. "If and when the unfair discrimination claim has been properly ripened, it will require all the judicial, if not Solomonic, wisdom we Judges can muster right through our court system." The appeal was refused for all the reasons given.[379]

In his separate concurring opinion, Van der Westhuizen addressed the underlying complex and challenging competing constitutional claims of equality and freedom of religion and belief. His opinion featured the role of courts in democratic constitutional orders, sometimes having to decide difficult constitutional issues. It also featured the question whether there was a constitution free zone for communities of believers and private interaction. His careful reasoning showed that rather than a constitution free zone, the Constitution itself created a free space for communities and individuals.[380]

The Constitution, which he cited as being called the "window to a nation's soul", "is the credo which binds our nation together". So, it did in fact also reach the religious and social spheres. But in doing so, it always "carries with it all the rights and values it recognizes". This included non-discrimination and equality as much as freedom of association and autonomy of choice, all going together with the recognition of human dignity.[381] As rights can compete, they needed to be balanced. But "courts are not necessarily the best instruments to balance competing rights and values in intimate spheres where emotions and convictions determine choices and association".

In the case at hand, the SCA, relying on the "doctrine of entanglement", held that the essence of the dispute was one which a secular court should try to avoid solving if possible. Van der Westhuizen iterated that the closer the tension between competing rights gets to "our inner sanctum the less suitable courts are to pronounce on the balancing of these rights". This was because judgments pronounce a winner and a loser.[382] He pronounced his hope that arbitration set within the community and founded on the free space guaranteed by the Constitution, would do justice to the complexity of the issue at hand. If thereafter several instances of courts had to decide, this would greatly benefit the CCSA if it to decide such a complex issue in last instance.[383]

378 *Ibid.*, paras 60-64.
379 *Ibid.*, paras 65-66.
380 *Ibid.*, paras 69-74.
381 *Ibid.*, paras 75-76.
382 *Ibid.*, paras 77-82.
383 *Ibid.*, para. 85.

# Appendix I3

# The European Court of Human Rights and the selected cases



## 1 Introduction to this chapter and reading aid

This chapter introduces the Council of Europe (CoE) legal system, the European Court of Human Rights (ECtHR) and the European Convention on Human Rights as well as the selected cases. Section10.2 briefly introduces the Convention system and legal history. It also gives an impression of the current constitutional and legal system. Section 10.3 introduces the selected cases and provides an overview. Section 10.4 discusses the case studies of the selected cases in chronological order.

## 2 Introducing the Council of Europe, the European Court of Human Rights and the European Convention on Human Rights

Consisting of 47 member states, the CoE covers most of the states on the European continent. The European Convention on Human Rights, officially European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR, Convention) is an integral and important part of it. The Strasbourg instruments are supranational. They exist in concert with the national constitutional systems of the member states, other international organizations they might be members of, and for many the supranational constitutional order of the European Union. However, the Strasbourg system has had a major influence on its member states because the focus on human rights (long before the EU adopted them as part of its framework) and of course the direct access to the Court and the binding nature of the judgments. In the Treaty on the Functioning of the European Union, the ECHR is affirmed as part of the common constitutional tradition of the member states and speaks of accession of the EU to the Convention.[1]

The nations which first signed the Convention were motivated by the recent experiences with dictatorship, genocide and war and a fast-developing division of Europe through ideology. The Convention was supposed to inspire values based on human rights. A second wave of nations joined after dictatorships in southern Europe collapsed, and finally a third wave after the end of the Cold War when Eastern and Southeastern European nations joined. The Convention and the Strasbourg institutions greatly contributed to the advancement of democracy and constitutionalism in Europe. In terms of European integration, the CoE contributed to the existence of the current European Union as the supranational structure that would eventually encompass the former adversaries of World War II and of the Cold War.[2]

The Convention itself, unlike for example the *International Covenant on Civil and Political Rights*, or the South African and Canadian constitutions, contains no provisions regarding the protection of cultural, linguistic or ethnic identity. Article 14 does, however, prohibit "discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status" in the "enjoyment of the rights and freedoms set forth in this Convention".

### 2.1 Legal history of the CoE, the ECHR and Convention bodies

The ECHR was adopted in 1950, within the framework of the CoE which was formed after World War II to support ideas of freedom and democracy and to combat totalitarian ideologies of fascism and communism.[3] The CoE was founded on 5 May

1 Consolidated version of the Treaty on the Functioning of the European Union, OJ L. 326/47-326/390, 26 October 2012, A. Declaration 1, and art. 218, para. 6(a)(ii).

2 *See* M. Heinrich, 'The Process that Led to the Creation of the COE', in T.E.J. Kleinsorge (ed.), *Council of Europe,* Wolters Kluwer, Alphen a.d. Rijn (Netherlands), 2010, p. 68.

3 *See* D. Harris, M. O'Boyle and C. Warbrick (eds.), *Law of the European Convention on Human Rights*, 2d. ed., Oxford University Press, Oxford (UK) et al., 2009, p. 1.

1949 by the *Treaty of London*, also called the *Statute of the Council of Europe*.[4] It was first signed by Belgium, Denmark, France, Ireland, Italy, Luxembourg, the Netherlands, Norway, Sweden and the United Kingdom.

The CoE developed out of a process aimed at European integration in order to prevent future conflict and war. While reconciliation between the adversaries of World War II was an important goal, another was to oppose a future ideological divide. While the first goal was realized with the creation of the CoE, the second was not, as the Communist nations did not join the CoE. Rather, given its focus on liberal constitutionalism, both sides may have viewed it as symbolizing the ideological division between Western and Eastern Europe at the time. Nevertheless, the CoE maintained a commitment to a pan-European community of values based on democracy, the rule of law, and human rights.[5] This explains the quick ascension of Eastern and South European member states after the end of the Cold War (and the conflicts in Southeastern Europe). With the end of the Cold War, the number of member states increased rapidly and significantly, leading to the current number of 47 members.

The CoE focused exclusively on political values of democracy, rule of law, and human rights, rather than on economic interdependence as in the case of the later European Communities. The ECHR was an expression of this. In order to ensure effective protection of the rights guaranteed in the Convention, the member states also agreed to establish institutions which could hear complaints, not only by states, as was (and still greatly is) customary in international law, but also by individuals.[6]

The Court was established on 21 January 1959 on the basis of Article 19 of the Convention. Currently, the jurisdiction of the Court has been recognized by all 47 member states of the CoE. In the beginning, the European Commission of Human Rights decided on the admissibility of cases. It was abolished by Protocol No. 11, after which the Chambers would decide admissibility and merits. The Grand Chamber (GC) was introduced to hear appeals or direct referrals from the Chamber. Protocol No. 11 was adopted as an answer to the increase in cases after the accession of member states following the end of the Cold War.

Protocol No. 15, adopted in 2013, codifies the principle of subsidiarity and the doctrine of the margin of appreciation into the Convention's preamble. In 2013, Protocol No. 16 was also adopted which allows the highest domestic courts and tribunals to request the Court to give advisory opinions on questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or the protocols thereto. Protocol No. 16 is optional.

Article 17 of Protocol No.14 allows the European Union to become party to the Convention. The Lisbon Treaty, which entered into force in December 2009, in turn provided for the accession of the EU.

4 *See* R.A. Lawson and H.G. Schermers, *Leading cases of the European Court of Human Rights,* Ars Aequi Libri, Leiden (Netherlands), 1999, preface xvi.

5 *For an elaborate discussion see* Heinrich, *supra* n. 2, part I.

6 *See* Lawson and Schermers, *supra* n. 3, preface xvii.

## 2.1 The CoE's contemporary legal system

The institutional structure of the CoE was the "result of a compromise" between those who favored a model of international organization dominated by democratic representation of the people and the conventional model of intergovernmental cooperation. Hence, the organization would consist of two primary decision-making organs, the Parliamentary Assembly composed of representatives of the national parliaments and the Committee of Ministers, consisting of the representatives of the national governments. Besides these two organs, the CoE consists of:[7]

- the Secretary General and Deputy Secretary General;
- the European Court of Human Rights;
- the Congress of Local and Regional Authorities;
- the Commissioner for Human Rights; and
- the Conference of INGOs.

There are 47 member states of the CoE which have all adopted the ECHR. In addition, there are five observers. The member states are:

| | | |
|---|---|---|
| 1. Albania | 16. Georgia | 32. Netherlands |
| 2. Andorra | 17. Germany | 33. Norway |
| 3. Armenia | 18. Greece | 34. Poland |
| 4. Austria | 19. Hungary | 35. Portugal |
| 5. Azerbaijan | 20. Iceland | 36. Romania |
| 6. Belgium | 21. Ireland | 37. Russian Federation |
| 7. Bosnia and Herzegovina | 22. Italy | 38. San Marino |
| | 23. Latvia | 39. Serbia |
| 8. Bulgaria | 24. Liechtenstein | 40. Slovak Republic |
| 9. Croatia | 25. Lithuania | 41. Slovenia |
| 10. Cyprus | 26. Luxembourg | 42. Spain |
| 11. Czech Republic | 27. Malta | 43. Sweden |
| 12. Denmark | 28. Republic of Moldova | 44. Switzerland |
| 13. Estonia | 29. North-Macedonia | 45. Turkey |
| 14. Finland | 30. Monaco | 46. Ukraine |
| 15. France | 31. Montenegro | 47. United Kingdom |

The Parliamentary Assembly has a total of 642 members (321 principal and 321 substitute) who are representatives of the parliaments of each member state. There are also 18 delegates from observers. The number of seats per member are determined by population size and budgetary contribution. Each delegation must be representative of the political make-up of the national parliament. Each state member selects its own method of designating its representatives to the Parliamentary Assembly. However, they must be chosen from among the members of the respective parliaments and must reflect the different political parties within the respective parliaments.[8]

7 *See* T.E.J. Kleinsorge, 'The Council of Europe's Institutional Structure', in T.E.J. Kleinsorge (ed.), *Council of Europe*, Wolters Kluwer, Alphen a.d. Rijn (Netherlands), 2010, pp. 69-70.

8 *Ibid.*, pp. 69-74.

Important statutory functions of the Parliamentary Assembly are the election of the Secretary General of the Council of Europe, the judges of the ECtHR and the members of the European Committee for the Prevention of Torture. The Parliamentary Assembly has few decision-making powers, but has effectively used its power of making recommendations to the Committee of Ministers.[9]

The Committee of Ministers is the CoE's decision-making body. It comprises the Foreign Affairs Ministers of all the member states, or their permanent diplomatic representatives in Strasbourg. Unlike in the Parliamentary Assembly, each member has one vote. In collaboration with the Parliamentary Assembly, it is the guardian of the Council's fundamental values.[10]

The Committee has the legislative and executive functions of the CoE, including admitting new member states, monitoring respect of commitments by member states and adopting recommendations to member states. It also supervises the execution of judgments of the ECtHR judgments (see Article 46 of the Convention).[11]

The Secretary General is elected by the Parliamentary Assembly on the recommendation of the Committee of Ministers for a period of five years. Although the Secretary General's powers are not clearly defined, in practice the holder has overall responsibility for the strategic management of the CoE's work program and budget, and oversees the day-to-day running of the organization and secretariat.[12]

### 2.2 The ECtHR, the Convention and Protocols

The Chambers of the Court hear applications in first instance, deciding admissibility or inadmissibility. They consist of 7 judges. The GC which will hear cases referred by the Chamber after a decision has been taken, or if the Chamber has relinquished hearing the case, consists of 17 judges. There are also single judge rapporteurs who will do the first examinations on clearly inadmissible applications and three-judge committees deciding on admissibility. A single judge may not examine applications against the state which nominated him. The three-judge committee has jurisdiction to declare applications admissible and decide on the merits of the case if it was clearly well founded and based on well-established case law.[13] The jurisdiction of the court is generally divided into:

1. inter-state cases (Article 33);
2. applications by individuals against contracting states (Article 34); and
3. advisory opinions (Article 47).

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9 *Ibid.*, p. 71.

10 *See* M. Kuijer, *The Blindfold of Lady Justice: Judicial Independence and Impartiality in Light of the Requirements of Article 6 ECHR,* (Diss. Leiden), E.M. Meijers Instituut, Leiden (Netherlands), 2004, p. 16.

11 Kleinsorge, *supra* n. 7, at 70. M. W. Janis, R.S. Kay and A.W. Bradley, *European Human Rights Law - Texts and Materials*, Oxford University Press, Oxford (UK) et al., 2008, p. 71.

12 *See* Kleinsorge, *supra* n. 7, at 69; B. Rainey, P. McCormick and C. Ovey (eds.), *Jacobs, White & Ovey: The European Convention on Human Rights*, 8th ed., Oxford University Press, Oxford (UK), 2021, p. 10.

13 *See* Janis, Kay & Bradley, *supra* n. 11, at 70-74.

Applications by individuals constitute the majority of cases heard by the Court. Applications by individuals against contracting states can be made by any natural person, a non-governmental organization or any group of individuals. Although the official languages of the Court are English and French, applications may be submitted in any one of the official languages of the contracting states.[14]

The judgment of the GC is final. Judgments by the Chamber of the Court become final three months after they are issued, unless a reference to the GC for review or appeal has been made. If the panel of the GC rejects the request for referral, the judgment of the Chamber of the Court becomes final. Judgments by the Court are binding on the respondent states concerned (Article 46 of the Convention). On the other hand, advisory opinions, by definition, are non-binding. Chambers and the GC decide cases by a majority. Any judge who has heard the case can attach a separate opinion to the judgment.

### 2.3 Convention Rights Review by the ECtHR

The following rights and freedoms are protected by the Convention and Protocols[15]

| *Convention* | *Protocols* |
|---|---|
| Article 2 - life | |
| Article 3 - torture | *Protocol 1* |
| | Article 1 - property |
| Article 4 - servitude | Article 2 - education |
| Article 5 - liberty and security | Article 3 - elections |
| Article 6 - fair trial | *Protocol 4* - civil imprisonment, free |
| Article 7 - retroactivity | movement, expulsion |
| Article 8 - privacy | *Protocol 6* - restriction of death penalty |
| Article 9 - conscience and religion | *Protocol 7* - crime and family |
| Article 10 - expression | *Protocol 12* - discrimination |
| Article 11 - association | *Protocol 13* - complete abolition of death |
| Article 12 - marriage | penalty |
| Article 13 - effective remedy | |
| Article 14 - discrimination | |
| Article 15 - derogations | |
| Article 16 - aliens | |
| Article 17 - abuse of rights | |
| Article 18 - permitted restrictions | |

Article 57 allows the High Contracting Parties to make reservations. Such reservations have been made by a great number of states and have been successfully invoked in cases before the Court.[16]

14 *Ibid.*, pp. 74-75.
15 *See for a short introduction* Lawson and Schermers, *supra* n. 3, preface xix-xxv.
16 Harris, O'Boyle & Warbrick, *supra* n. 3, at 21.

Under Article 1 of the Convention, the member states must undertake to "secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention". While this does not require states to incorporate the Convention into national law, by now all member states have done so in one way or another.[17]

The guarantee in Article 1 is to secure the rights to those "within the jurisdiction" of a Contracting Party. Hence, the jurisdiction must be established as a matter of threshold before the Court can examine a complaint.[18] The matter of extraterritorial application of the Convention was the subject matter of the *Banković* case[19] and has been discussed thoroughly in academic literature.[20] While the Court recognized in *Banković* that there were exceptions to the territorial principle of "effective control", airborne military action in an armed conflict was not one of them.[21]

The Convention has no retroactive effect in accordance with international treaty law. However, under certain circumstances a violation which has its origins prior to the accession of the member state to the Convention can still be considered.[22] Denunciation under Article 58 has no immediate effect. When a state ratifies the Convention, there is an initial commitment for five years. Hereafter a six-month notice is required to denounce the Convention.[23]

## 3 The selected ECtHR cases

### 3.1 Introduction: Kokkinakis and a right pluralism depends on

The *Kokkinakis* case of 1994[24] may rightly be called the first milestone case.[25] Not because it was the first Article 9 case, but because for the first time the Strasbourg institutions developed a theory of interpretation for Article 9, which has served as the foundation of the interpretation of the freedom of religion and belief under the Convention ever since.

Mr. Kokkinakis was a Jehovah's Witness and had been convicted for proselytism. For Jehovah's Witnesses, bearing witness is an integral part of their faith. This involves approaching strangers and/or going door to door to spread the word. One of the people Mr. Kokkinakis had approached was the wife of an Orthodox cleric. Proselytism, defined as trying to persuade Orthodox believers to join another faith,

17 *Ibid. See also* Rainey, McCormick & Ovey, *supra* n. 12, at 85.
18 Rainey, McCormick & Ovey, *supra* n. 12, at 89.
19 ECtHR (GC), *Bankovic and Others v. Belgium and 16 Other Contracting States* (admissibility decision), app. no. 52207/99, 12 December 2001.
20 *See further*, R.A. Lawson, *Het EVRM en de Europese Gemeenschappen: bouwstenen voor een aansprakelijkheidsregime voor het optreden van internationale organisaties*, (diss: Leiden), E.M. Kluwer, Deventer (Netherlands), 1999, pp. 248-263.
21 *See* Rainey, McCormick & Ovey, *supra* n. 12, at 91-92. *See further* R.A. Lawson, 'Life after Banković: On extraterritorial Application of the European Convention on Human Rights', in F. Coomans and M. Kamminga (eds.), *Extraterritorial Application of Human Rights Treaties,* Intersentia Antwerp (Belgium), 2004.
22 Rainey, McCormick & Ovey, *supra* n. 12, at 88-90.
23 *Ibid.,* p. 88.
24 ECtHR (C), *Kokkinakis v. Greece*, app. no. 14307/88, 25 May 1993, para. 31.
25 *See* Janis, Kay & Bradley, *supra* n. 11, at 323, calling it a "landmark judgment".

was punishable by law in Greece.[26] Mr. Kokkinakis challenged the criminalization of proselytism.[27] In his opinion the prohibition violated Article 9, which explicitly acknowledges the freedom to change one's religion.

Interestingly, the Court tried to draw a line between improper proselytism and "true Evangelism". While the first is a corruption or deformation of the latter, the latter is protected by the freedom of religion. Because the Greek courts had failed to establish in what way the accused had conducted himself improperly when trying to persuade the priest's wife, the Court found that a pressing social need had not been proven. Therefore, Article 9 had been violated.[28]

The *Kokkinakis* judgment included reasoning which would later be revisited every time a freedom of religion and belief case had to be decided. The Court held the freedom of religion and belief to be a foundation of a free and democratic society. It stipulated that "freedom of thought, conscience and religion is one of the foundations of a 'democratic society' within the meaning of the Convention. It is, in its religious dimension, one of the most 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."[29]

### 3.2 Overview of the selected cases

In the period from 1998 to 2015, 21 cases which feature the freedom of religion and belief in a substantial way were decided by the ECtHR (see section 1.7). From these cases, the following selection of 15 cases was made:

| | |
|---|---|
| 1. | Buscarini And Others v. San Marino, app. no. 24645/94, 18 February 1999. |
| 2. | Thlimmenos v. Greece, app. no. 34369/97, 6 April 2000. |
| 3. | Cha'are Shalom Ve Tsedek v. France, app. no. 27417/95, 27 June 2000. |
| 4. | Hasan And Chaush v. Bulgaria, app. no. 30985/96, 26 October 2000. |
| 5. | Refah Partisi (The Welfare Party) And Others v. Turkey, app. nos. 41340/98, 41342/98, 41343/98 and 41344/98, 13 February 2003. |
| 6. | Maestri v. Italy, app. no. 39748/98, 17 February 2004. |
| 7. | Leyla Şahin v. Turkey, app. no. 44774/98, 10 November 2005. |
| 8. | Folgerø And Others v. Norway, app. no. 15472/02, 29 June 2007. |
| 9. | Ţerife Yiğit v. Turkey, app. no. 3976/05, 2 November 2010. |
| 10. | Lautsi And Others v. Italy, app. no. 30814/06, 18 March 2011. |
| 11. | Bayatyan v. Armenia, app. no. 23459/03, 7 July 2011. |
| 12. | Mouvement Raëlien Suisse v. Switzerland, app. no. 16354/06, 13 July 2012. |

26 Rainey, McCormick & Ovey, *supra* n. 12, at 467.
27 *Kokkinakis v. Greece*, app. no. 14307/88, *supra* n. 24, para. 29.
28 *Ibid.*, paras 48-50.
29 *Ibid.*, para. 31.

| | |
|---|---|
| 13. | Sindicatul "Păstorul Cel Bun" v. Romania, app. no. 2330/09, 9 July 2013. |
| 14. | Fernández Martínez v. Spain, app. no. 56030/07, 12 June 2014. |
| 15. | S.A.S. vs. France, app. no 43835/11, 1 July 2014. |

The selection only includes cases in which the freedom of religion and belief featured as the central right. 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. This includes cases in which the freedom of religion was raised as a major argument, although the central right was equal treatment of gender or sexual orientation, or in which the freedom of religion was raised in combination with equal treatment, freedom of opinion, or another right.

## 4 Case studies of the selected cases

### 4.1 Buscarini And Others v. San Marino [1999]

| | |
|---|---|
| Essence: | Requirement for legislators to swear allegiance to the Constitution on the Holy Gospels. |
| Dimension: | Freedom of religion and belief and secularism. Freedom of religion and belief and personal freedom. |
| Lower courts: | Direct application to the European Commission of Human Rights, no national remedies to be exhausted. Commission found application admissible and found a violation of Article 9. |
| Majority: | 17:0. Oath was unjustifiable interference. |
| Dissenting: | None. |

The applicants in this case had been elected Members of Parliament of San Marino The Elections Act required them to swear allegiance to the Constitution on the Holy Gospels. Three parliamentarians requested to the Captains-Regent, who acts as the head of state of San Marino, that they be exempted from swearing on a religious text.[30] Subsequently they took the oath in writing, as required by law, but omitted the reference to the Gospels. However, the General Grand Council adopted a resolution a short while afterwards ordering the applicants to take the oath once more, but then on the Gospels. They would otherwise have to forfeit their parliamentary seats. The applicants complied, but with the complaint that their freedom of religion and conscience had been infringed. They launched an application to the European Commission of Human Rights shortly afterwards. Before they had launched the application, the law requiring the oath was changed to include a choice between taking the oath on the Gospels or the words "on my honor".[31]

30 ECtHR (GC), *Buscarini and Others v. San Marino*, app. no. 24645/94, 18 February 1999, paras 7-8.

31 *Ibid.*, paras 10-14.

The Commission found the application to be admissible and found a violation of Article 9.[32] The case was referred directly to the GC.[33] The GC unanimously found a violation of Article 9 of the Convention.

Before turning to the content of the claim, the Court first had to deal with preliminary objections by the Government of San Marino. The Government raised the following objections:

1. The application was an abuse of process, because the claim was of a political nature;
2. The application was lodged out of time; and
3. Domestic remedies had not been exhausted.

The GC dismissed all these preliminary objections. First, the fact that the applicants had announced their intention to bring the question to Strasbourg after taking the oath the second time, could not be regarded as an abuse of process. Second, It also explained why the applications had been submitted within the time period required by the Convention. Third, it argued that the applicants had no access to domestic remedies, as courts in San Marino had no power of constitutional review and therefore the *de jure* jurisdiction in such a case was irrelevant. Hence, there were no remedies to be exhausted, and in conformity with standing case law, the applicants could apply directly to the Court.[34]

The essence of the applicants' claim was that Article 9 had been infringed, as the exercise of the political right of holding parliamentary office was subject to "publicly professing a particular faith".[35] The Government claimed that the oath was not religious but traditional in nature, and that San Marino was a secular state with freedom of religion enshrined in law. Much like religious holidays had lost their exclusively religious character, so had the oath.[36]

According to the Court, the freedom of religion was triggered in this case. The applicants had to take an oath which required them to profess to a particular faith, on pain of losing their parliamentary seats. This was an interference which in order to be lawful had to be prescribed by law, serve a legitimate aim, and be necessary in a democratic society.[37]

The oath was required by the Elections Act, and therefore required by law. As far as the legitimate aim was concerned, the Government argued that the oath affirmed republican values and that because the history and traditions of San Marino were linked to Christianity, the oath had a religious connotation. However, in modern history its significance was strictly republican and secular. It was within a government's margin of appreciation to formulate such a republican oath.[38]

The CG considered it unnecessary to look into the legitimacy of the aim, as clearly the requirement of the oath was incompatible with Article 9. The oath, the

32 *Ibid.*, para. 15.
33 *Ibid.*, paras 3-4.
34 *Ibid.*, paras 19-28.
35 *Ibid.*, para. 30.
36 *Ibid.*, para. 32
37 *Ibid.*, para. 34.
38 *Ibid.*, para. 36.

GC held, was tantamount to requiring elected representatives of the people to swear allegiance to a particular religion. In light of the values of pluralism and non-discrimination, this was unacceptable. In a parliament, all different views present in society should have a chance to be represented. Hence, a requirement vis-à-vis elected representatives was not necessary in a democratic society.[39]

### 4.2 Thlimmenos v. Greece [2000]

| | |
|---|---|
| Essence: | Criminal conviction for conscientious objection to military service. Criminal conviction prevents eligibility for becoming accountant. |
| Dimension: | Freedom of religion and belief and personal freedom. |
| Lower courts: | Domestic Courts found against the applicant. European Commission of Human Rights found application admissible and found a violation of Article 9. |
| Majority: | 17:0. Unjustifiable interference of freedom of religion and belief in conjunction with prohibition of discrimination. |
| Dissenting: | None. |

Mr. Thlimmenos, a Jehovah's Witness, was convicted in Greece for refusing compulsory (unarmed) military service. He served his prison sentence. A few years later, he passed a test to become an accountant, a liberal profession in Greece, but was refused appointment by the responsible Board because he had previously been convicted for criminal charges. Domestic courts found that the Board had acted in accordance with the law.[40]

The Commission declared the application partly admissible and found that there had been a violation of Article 9 in conjunction with Article 14, because Greek law failed to differentiate between someone who had been convicted for conscientious objection to military service for religious reasons and "ordinary convictions".[41]

The GC unanimously found a violation of Article 9 in conjunction with Article 14. Before turning to the content of the claim, the Court first had to deal with a preliminary objection by the Government of Greece. The Government raised as objection that in the meantime a law had been adopted that allowed for conscientious objection to military service and also allowed for past convicts to apply for the status of conscientious objectors. The Government claimed that the applicant could have applied for this status and/or could have requested a pardon under the Constitution.[42]

The GC dismissed the objection, arguing that even had he received the recognition and subsequent removal of the criminal record, this would not have resulted

39 *Ibid.*, paras 38-40.
40 ECtHR (GC), *Thlimmenos v. Greece*, app. no. 34369/97, 6 April 2000, paras 7-13.
41 *Ibid.*, paras 3 and 38.
42 *Ibid.*, para. 29.

in reparation for past prejudice suffered, and there was no certainty that his request for a pardon would have been honored.[43]

Before the Court, the applicant argued that his non-appointment as accountant was directly linked to his manifestation of his religion as a Jehovah's Witness. Due to the pacifist tenets of his religion, he was unable to perform military duty, which was the reason for his conviction and, in turn, for his non-appointment. In his opinion, the law should have distinguished between his conviction relating to his manifestation of his religion, and that of ordinary offenders convicted for ordinary crimes.[44]

The Government disputed that Article 14 was applicable because the claim did not fall within the ambit of Article 9. After all, he had not been convicted for his religious beliefs, but for refusing to comply with a general and neutral law which made no distinction between religions. The sanction applied was not disproportionate to the offence committed as military service was linked to the safety and independence of the country and refusing it was considered a serious breach of civic duties. Even if Article 14 did apply, there would be no violation as the follower of any other religion would face the very consequences in the same position.[45]

According to the Court, there was no doubt that the applicant had refused to comply with military service for religious reasons, and religious reasons only. It was known that Jehovah's Witnesses adhered to doctrinal pacifism, and that such pacifism must lead to refusal to wear a military uniform. This was the reason he was convicted, and his conviction in turn prevented him from becoming an accountant. His claim was that based on Article 14 in conjunction with Article 9, the law should have differentiated between ordinary offenders and people like him who were convicted solely for adherence to their religious beliefs. The Court accepted that the "set of facts" fell within the ambit of Article 9.[46]

While previous case law on Article 14 stressed that in analogous situations people must not be treated differently without objective and reasonable justification, the reverse was also true: "The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different."[47]

In accordance with this principle, the Court found that there was no objective and reasonable justification to treat the applicant as any common offender, while his refusal to serve in the military was exclusively based on his religious and philosophical convictions. As he had already served a prison sentence, imposing a further sanction by excluding him from his desired profession was disproportionate and did not serve a legitimate aim. Consequently, Article 14 had been breached.[48]

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44 *Ibid.*, para. 34.
45 *Ibid.*, paras 35- 37.
46 *Ibid.*, para. 42.
47 *Ibid.*, para. 44.
48 *Ibid.*, para. 47.

### 4.3 Cha'are Shalom Ve Tsedek v. France [2000]

| | |
|---|---|
| Essence: | Refusal by Government to grant license for slaughter in *glatt kosher* tradition. |
| Dimension: | Freedom of religion and belief and personal freedom. Freedom of religion and belief and group autonomy. |
| Lower courts: | Domestic Courts found against the applicant. European Commission of Human Rights found application admissible and found a violation of Article 9. |
| Majority: | 12:5. No violation of Article 9 of the Convention taken alone. 10:7 no violation of Article 9 of the Convention taken in conjunction with Article 14. |
| Dissenting: | Joint Dissenting Opinion of Bratza, Fischbach, Thomassen, Tsatsa-Nikolovska, Panţîru, Levits and Traja. |

The applicant in this case was a French liturgical association of ultra-orthodox Jews, who operate a few synagogues and a few community institutions, including butcher shops, restaurants and catering businesses. They adhered to the rules of glatt kosher slaughter. Glatt kosher slaughter requires more and stricter rules to be applied when slaughtering than ordinary orthodox kosher slaughter.[49]

In France, the slaughter of animals is regulated and religious organizations can acquire exemptions. For the Jewish community, the exemption was given to the ACIP (*Association consistoriale israélite de Paris*) which is linked to the organization representing all Jewish communities in France with the exception of liberals and ultra-orthodox persons.[50]

The applicant had previously sold meat imported from Belgium or slaughtered and certified in accordance with its own religious prescriptions in France, therefore without the relevant authorization from ACIP. When the applicant applied to receive a separate exemption, the request was denied which subsequently led to the Strasbourg case.[51] The Commission declared the application partly admissible and found that there had been a violation of Article 9 in conjunction with Article 14.[52]

The GC found by twelve votes to five that there had been no violation of Article 9 taken alone and by ten votes to seven that there had been no violation of Article 9 in conjunction with Article 14. A joint dissenting opinion was authored by Judges Bratza, Fischbach, Thomassen, Tsatsa-Nikolovska, Pan??ru, Levits and Traja.

Before turning to the merits of the case, the GC had to address a preliminary question relating to the application itself. This concerned an attempt to withdraw the case by the former president of the applicant organization, an attempt contested by the lawyer representing the applicant. The Government left it up to the Court

49 ECtHR (GC), *Cha'are Shalom Ve Tsedek v. France,* app. no. 27417/95, 27 June 2000, paras 28-32.
50 *Ibid.,* paras 20-24.
51 *Ibid.,* paras 35-44.
52 *Ibid.,* para. 3.

to determine the validity of the claim. The Court ruled that it seemed that it had been proven that the applicant wanted to pursue the claim.[53]

The applicant claimed that preventing them from slaughtering in accordance with their religious rules infringed the Article 9 rights of their community, as they could not consume meat which fulfilled the requirements of the dietary rules they followed. The Government responded that ACIP shops also sold *glatt* meat, that the applicant could import *glatt* meat from Belgium, and that the applicant was free to reach an agreement with ACIP to slaughter under their supervision. The Government did not dispute that according to the applicant, the meat at ACIP shops did not qualify as *glatt*, but claimed that this was an internal religious dispute within the Jewish community which state authorities in accordance with the principle of secularism should not get involved in. The Government denied interference with the freedom of religion and belief as the only impact the decision had, was economic: the impossibility for Cha'are to sell meat themselves.[54]

Even if the freedom of religion had been infringed, the Government maintained that this was justified under the limitations clause. Regulating slaughter was mandated by public health and animal protection. Ritual slaughter derogated from the general rules, which justified limiting such derogation. Also the decision was covered by the margin of appreciation and the association's activity "was essentially commercial and only religious in an accessory way". The Government also made mention of the limited number of members of the applicant association.[55]

The Government lastly disputed that there had been discrimination. It claimed that if the applicant had been able to prove that it was essentially a religious body, and had wider support within the Jewish community, it might have been granted approval. ACIP had been given the exemption because it had been the recognized administrator of Jewish worship in France for 200 years. However, it did not have an intentional a priori monopoly.[56]

According to the Court, the applicant as a religious association could exercise the Article 9 rights on behalf of its followers and that the consumption of meat slaughtered in accordance with religious dietary rules fell within the ambit of Article 9. After all, ritual slaughter constituted a *rite* (French) which was synonymous with the English word "observance". Hence, the applicant could rely on Article 9. The Court then made the following observations:[57]

- The exemption for ritual slaughter represents a deviation from otherwise applicable rules, which serve the interests of public health and animal welfare.
- Given this fact it is understandable that the state aims to regulate ritual slaughter in a way that requires approval of bodies and authorization of slaughter by these bodies.
- The approval granted to ACIP is thus not an infringement of the freedom of religion and belief.

53 *Ibid.*, paras 54-57.
54 *Ibid.*, paras 65-67.
55 *Ibid.*, para. 69.
56 *Ibid.*, paras 70-71.
57 *Ibid.*, paras 72-79.

– Examination of applications by other organizations must include freedom of religion and belief as consideration.
– The ACIP's meat is accepted as *kosher* by the great majority of Jews living in France, except for the followers of the applicant. However, the difference in method is small.

According to the Court, there would only be interference with the freedom of religion and belief if it was impossible for ultra-orthodox Jews to eat meat which qualified as *glatt.* But as they could obtain meat from Belgium, this was not so. Also, the ACIP provided for *glatt* meat in its own shops. Article 9 did not entail the right to take part "in person" in the process of ritual slaughter. Given that there were other ways to obtain the meat which conformed to one's dietary rules, there had been no interference with the applicant's rights under the freedom of religion and belief. Yet, even if there had been an interference, this would be justified as it was prescribed by law, served the legitimate aim, namely public health, and fell within the margin of appreciation. It was not excessive or disproportionate, and therefore compatible with Article 9.[58]

The Court further observed that even when there was no breach of freedom of religion and belief, but cases fell within its ambit, a discrimination claim must be separately assessed. Yet, in this case, there was no interference with non-discrimination rights. As there was no interference with the freedom of religion and belief, any difference of treatment was limited in scope and, even if there was interference, could be justified by reference to the limitation clause.[59]

The dissenting judges disagreed with both the reasoning and the conclusion reached by the majority. They agreed that the approval granted to ACIP in itself did not violate the freedom of religion and belief. However, granting approval to one organization did not relieve the state from the obligation to also give one to other organizations of the same religion. Citing the prior *Serif* case,[60] they reiterated that divisions which exist in a religious community are "unavoidable consequences of the need to respect pluralism". "In such a situation the role of the public authorities is not to remove any cause of tension by eliminating pluralism, but to take all necessary measures to ensure that the competing groups tolerate each other." Hence, it was also inappropriate to mention that the applicant could have reached an agreement with the ACIP, because that would "discharge the State, the only entity empowered to grant approval, from the obligation to respect the freedom of religion". The fact that *glatt* meat could be obtained elsewhere – in Belgium or the ACIP shops – did not justify the conclusion that there had been no interference. Any denial of an application constituted an interference which must be justified by Article 9(2).[61]

With regard to the justification, the minority saw the main problem in the discrimination against which the applicant complained. It was not for the Court to hold that the interference was limited in scope and effect if the applicant held other-

58 *Ibid.*, paras 80-85.
59 *Ibid.*, paras 86-87.
60 ECtHR (C), *Serif v. Greece, app. no. 38178/97*, 14 December 1999, para. 53.
61 *Cha'are Shalom Ve Tsedek v. France,* app. no. 27417/95, *supra* n. 49, *Joint dissenting opinion of Judges Bratza, Fischbach, Thomassen, Tsatsa-Nikolovska, Panţîru, Levits and Traja*, para. 1.

wise, because the Convention protected "individuals' most private convictions". The minority found that there was a violation of Article 9, in conjunction with Article 14. Cha'are was a religious body, much like the ACIP, irrespective of its smaller size. It was in an analogous situation to that of the ACIP as its method of slaughter also required deviation from the general rule. There was no reason to regard Cha'are as more commercial than the ACIP, unlike what the Government stated, or to assume it would apply animal health and hygienic standards differently. Also, the argument of representativity must fail.[62]

Authorities had an interest in dealing with the most representative organization of a community in many instances. But in the current case "the applicant association has by no means challenged the role and function of the ACIP". It was "solely a matter of obtaining approval to practice ritual slaughter". Granting the request could not have undermined public order. Especially since other communities seemed to be granted such approvals quite liberally. The margin of appreciation which states have in this area, was limited by the need to "secure true religious pluralism, which is an inherent feature of the notion of a democratic society".[63] Hence, there was no objective and reasonable justification and the denial of approval to the applicant was disproportionate.[64]

### 4.4 Hasan And Chaush v. Bulgaria [2000]

| | |
|---|---|
| Essence: | Dispute within the Muslim community regarding office of Mufti, Government intervenes. |
| Dimension: | Freedom of religion and belief and group autonomy. Freedom of religion and belief and secularism. |
| Lower courts: | Domestic Supreme Court found in favor of applicant. European Commission of Human Rights found application admissible and found a violation of Article 9. |
| Majority: | 17:0. Government interference was infringement of Article 9. 11: 6 regarding the satisfaction. |
| Dissenting: | Partly opinion by Tulkens and Casadevall joined by Bonello, Strážnická, Greve and Maruste, concerning the satisfaction. |

The first applicant was the former Chief Mufti of the Bulgarian Muslims, the second applicant was his secretary who held other positions within the community as well. After the end of Communist rule, in 1989, the sitting Grand Mufti was removed when the Government declared his election null and void. While the communist era Mufti challenged the removal, the first applicant was elected by the National Conference of Muslims as new Grand Mufti. The events that gave rise to the application started in 1994.[65]

62 *Ibid.*, para. 2.
63 *Ibid.*
64 *Ibid.*
65 ECtHR (GC), *Hasan and Chaush v. Bulgaria*, app. no. 30985/96, 26 October 2000, paras 9-13.

The applicants' opponent organized an alternative conference in which he was elected. He then applied to the Directorate of Religious Affairs on behalf of himself and the council also elected to be registered as legitimate leadership of the Bulgarian Muslims. By then, the former communist party had formed the Government. In 1995, the first applicant was forcefully removed from his offices and his opponent was (re-)instated. The first applicant took administrative steps to repeal the removal. Despite a ruling of the Supreme Court in his favor, the Government refused to take necessary steps. In the meantime, a national conference had once again elected him as Grand Mufti.[66]

Subsequent to the formation of a new government by the parties that had formed the first democratic government, a unification conference for the Bulgarian Muslim community was organized. It elected, amongst others, members of the first applicant's former council and did not include his opponent. His opponent refused to accept the legitimacy of the outcome of these elections and challenged them and the subsequent registration of the new unified leadership in court. The Supreme Administrative Court found in his opponent's disfavor.[67]

The Commission declared the application admissible and expressed unanimously that there had been violations under Articles 9 and 13. The GC found unanimously that the applicants' rights under Article 9 and Article 13 had been violated. A majority of 11 judges found that the dictum itself represented a just satisfaction for the second applicant (while the first applicant was unanimously awarded pecuniary damages). A minority of seven judges disagreed.

In the applicant's opinion the freedom of religion and belief covered the right of religious communities to organize themselves in accordance with their own rules and opinions. The organizational structure was then "not simply a form of their existence but [has] a substantive meaning".[68]

The Government held that not every act motivated by religion fell under Article 9. As Islam was registered as an official religion, the denomination had several schools and a newspaper, and believers could freely attend mosques and worship and practice in freedom. Therefore, there was no interference with the freedom of religion and belief proper. The applicants had failed to claim a violation of Article 9 read in conjunction with Article 11 (freedom of association), which they should have done in accordance with standing case law. Hence, their claim had to be dismissed.[69]

The GC began its consideration by reasserting the *Kokkiankis* finding on the importance of religious freedom for pluralism (see section 10.3.1). It stressed that the freedom of religion and belief had a personal and a communal dimension. This did not mean that every act motivated by religion was protected.[70] However, "religious communities traditionally and universally exist in the form of organized structures. Religious ceremonies have their meaning and sacred value for the believers if they have been conducted by ministers empowered for that purpose in compliance with these rules. The personality of the religious ministers is undoubtedly of import-

66 *Ibid.*, para. 14-38.
67 *Ibid.*, paras 39-45.
68 *Ibid.*, para. 56.
69 *Ibid.*, para. 57.
70 *Ibid.*, para. 60.

ance to every member of the community. Participation in the life of the community is thus a manifestation of one's religion." This required Article 9 in the present case to be interpreted in light of Article 11.[71]

However, the organizational aspect was not only relevant for the community as such, but also essential for the individual believers.[72] As the first applicant was the elected leader of the Muslim community at the time that the events which gave rise to the application took place, and the second applicant was a practicing Muslim and active member of the community in its organizational structures, it was clear that Article 9 was applicable and must in this case be interpreted in light of Article 11.[73]

The applicants asserted that the state had arbitrarily interfered with the internal organization of the Muslim community and had done so in the absence of clear legal rules justifying the official's actions and positions. In the applicants' opinion, the absence of a legal framework and the failure to enact one itself gave rise to a violation of Article 9 obligations on the part of the state. The applicants further asserted that the decrees which recognized the alternative leadership and the removal of the first applicant from the premises of the Grand Mufti's office, constituted a breach of relevant law. Also, the Government's *modus operandi* in the circumstances attested no legitimate aim.[74]

The Government's position was that no organizational freedom whatsoever had been impaired. The first applicant's organization had been free to organize and meet, as was shown from the fact that they had organized a national conference. His replacement was the direct result of the free will of the Muslim community and hence, his opponent and not the applicant had qualified for registration in accordance with relevant law. In the Government's opinion, the nature of the conflict was political, not religious, and Bulgaria was well under way in furthering religious freedom by adopting a new law on religious denominations.[75]

The Court left the question undecided whether registration of religious denomination and their leadership in abstract constituted an interference. The facts of this case, however, showed that the state did not remain neutral vis-à-vis a conflict of leadership. The whole goal of trying to establish a religious community under a single unified leadership, whether by stimulation or pressure, ran contrary to this neutrality. The failure to implement court rulings was also deemed a relevant fault on the part of the Government by the Court. The Government taking sides in the internal conflict and failure of registration of the applicants' organization had serious implications for the applicants, at least as far as managing and representing their part of the Muslim community was concerned.[76]

Turning to the possible justification, the Court noted the absence of substantive criteria for the registration of religious denomination and procedural safeguards against arbitrary exercise of government power. Hence, there was no adequately

71 *Ibid.*, para. 62.
72 *Ibid.*, para. 62.
73 *Ibid.*, paras 64-65.
74 *Ibid.*, para. 67-69.
75 *Ibid.*, paras 70-73.
76 *Ibid.*, paras 77-82.

accessible and foreseeable domestic legal basis. The fact that every time that the registration changed, this was preceded by a change in government, was seen by the court as proof of arbitrary exercise of discretion. Consequently, the interference was not prescribed by a law as understood by the Convention.[77]

The Court further noted that the refusal on the part of the Government to comply with court judgments was clearly unlawful. In light of this, it was unnecessary to continue the analysis regarding the legitimate aim and necessity in a democratic society. After all, the standard for application of Article 9(2) could no longer be met.[78]

Given the findings under Article 9, in the Court's opinion no separate issue arose under Article 11.[79] The applicants also claimed that they had not had an effective remedy against interference with their human rights.[80] Given that the first applicant and his council could not launch an effective challenge against the state interference with the internal matters of their community, there was indeed a violation.[81] The Court found no separate violation of the right to fair trial.[82]

Judges Tulkens and Casadevall joined by Judges Bonello, Strážnická, Greve and Maruste, authored a separate opinion, arguing that because the second applicant had also suffered distress, he too should have received pecuniary satisfaction.[83]

### 4.5 Refah Partisi (The Welfare Party) And Others v. Turkey, [2003]

| | |
|---|---|
| Essence: | Ruling government party declared unconstitutional for violation of secularism. |
| Dimension: | Freedom of religion and belief and group autonomy. Freedom of religion and belief and secularism. Freedom of religion and belief and family law and family relations. |
| Lower courts: | Domestic Constitutional Court found unconstitutional. Chamber found justifiable interference. |
| Majority: | 17:0. Prohibition was justified interference. Separate concurring opinion by Ress and Rozakis. Separate concurring opinion by Kovler. |
| Dissenting: | None |

The applicants were the Refah Party and Mr. Necmettin Erbakan, former prime minister and leader of the party. Refah was founded following the subsequent prohibition of the National Order Party and the Salvation Party, its two predecessors.

77 *Ibid.*, paras 84- 86.
78 *Ibid.*, paras 87-88.
79 *Ibid.*, para. 90.
80 *Ibid.*, para. 93.
81 *Ibid.*, para. 100-104.
82 *Ibid.*, para. 108.
83 *Hasan and Chaush v. Bulgaria*, app. no. 30985/96, *supra* n. 65, *Joint partly dissenting opinion of Judges Tulkens and Casadevall joined by Judges Bonello, Strážnická, Greve and Maruste*, paras 1-4.

From 1991 until 1995, the party was represented in Parliament. After it came out largest in national elections in 1995, it formed the government together with the center-right True Path Party, under the leadership of Mr. Eberkan. In 1998 it was prohibited by the Constitutional Court, in response to the case brought by the Public Prosecutor's Office, which claimed that the party had become a center of unconstitutional activity.[84] Some of the facts raised by the prosecutors were:[85]

- Eberkan had challenged the constitutionally enshrined concept of secularism in favor of a different concept of secularism;
- He had said that religious believers should place the rules of their religions on a higher value than state law;
- He had received leaders of religious and political movements for a fast-breaking dinner (*iftar*) during Ramadan;
- He advocated the wearing of religious attire (headscarves) at state institutions like schools and universities (which is prohibited in Turkey);
- He called upon Muslims to make their religious donations (*zakat)* to Refah;
- He called for the introduction of legal pluralism in personal and family law, to allow Muslims, and other believers to have their family affairs governed by traditional religious law;
- He amended working hours during Ramadan to make allowances for fasting;
- He and other party members uses language which was interpreted to imply overturning the constitutional order and/or condoning violence.

Having been outlawed by the Constitutional Court, the Refah party, Mr. Eberkan and its members turned to the ECtHR. The Chamber declared the applications of the applicants partly admissible and held by four votes to three that there had been no violation. The GC unanimously found that there was no violation of Article 11. There had been an interference which was prescribed by law, served legitimate aims and was necessary in a democratic society.[86] Judges Ress and Rozakis issued a joint separate opinion. Judge Kovler also authored a separate concurring opinion.

The featured right in the *Refah* case was the freedom of association. However, the essence of the case was the prohibition of a political party, which was deemed by the highest national tribunal to be directed against the particular form of secularism, enshrined in the Turkish Constitution. Hence, much of the reasoning was relevant to the self-organization of a religious community in a political party, which had politico-religious goals, including the very explicit agenda to introduce legal pluralism.

The Turkish Constitutional Court, when declaring Refah unconstitutional, observed that the Turkish version of secularism as enshrined in the Constitution was to be regarded as "one of the indispensable conditions of democracy". It had been developed "on account of the country's historical experience and the specific features of Islam. The rules of *shari'a* were incompatible with the democratic regime." "Inter-

84 ECtHR (GC), *Refah Partisi (The Welfare Party) and Others v. Turkey*, app. nos. 41340/98, 41342/98, 41343/98 and 41344/98, 13 February 2003, paras 10-21.

85 *Ibid.*, paras 12, 16 and 26-44.

86 *Ibid.*, paras 4, 50, 64, 67 and 135.

vention by the State to preserve the secular nature of the political regime had to be considered necessary in a democratic society."[87]

The Court found that the prohibition was provided for by relevant national law. It was undisputed that anti-secular activities were prohibited in Turkey and could result in the disbandment of a political party. It also found the application of the relevant laws to the facts sufficiently clear and foreseeable.[88]

The Court also accepted that a legitimate aim was served by the prohibition: "Taking into account the importance of the principle of secularism for the democratic system in Turkey, it considers that Refah's dissolution pursued several of the legitimate aims listed in Article 11, namely protection of national security and public safety, prevention of disorder or crime and protection of the rights and freedoms of others."[89]

Refah's main argument was that it was not an anti-secular party, but a party that sought to redefine the principle of secularism in order to allow a broader concept of freedom of religion for Turkey's practicing religious citizens – not just Muslims, but people of all denominations. Refah was thus of the opinion that its actions and policies were not contrary to the Constitution. It regarded the national discussion of competing concepts of secularism as not only acceptable, but even necessary for the very survival of democracy.

Refah argued that the coalition government had been in power for a year, yet no initiative had been taken to introduce "a regime based on Islamic law". In Refah's opinion, the "rigorous European supervision" by the ECtHR itself was enough guarantee to safeguard that a government would comply with democratic principles. Hence, prohibition was not necessary. The proposed policy on legal pluralism in civil matters would have left public law intact. The Constitutional Court's judgment that the very notion of such a policy must be disqualified, in light of secularism amounted to discrimination against Muslims who wished to conduct their private lives in accordance with the precepts of their religion. Refah also argued that the Constitutional Court was inconsistent when it accused Refah of simultaneously wanting to replace the current legal system with *Shari'a* and wanting to introduce legal pluralism. Refah could not support proposals simultaneously.[90]

The Constitutional Court and the Chamber had both given significance to the term "just order" used by Refah on a structural basis. They interpreted the term to imply a religious law-based order to replace the existing constitutional order, if necessary, by violent means.[91] Refah pointed to the fact that many faith-inspired politicians used such terms. Making a distinction between Muslim and Christian use of terms, amounted to discrimination against Muslim democrats and the Muslim population of Europe by suggesting that their religious values were by definition anti-democratic.[92]

87 *Ibid.*, para. 25.
88 *Ibid.*, paras 59-63.
89 *Ibid.*, para. 67.
90 *Ibid.*, paras 70-73.
91 *Ibid.*, paras 80-84.
92 *Ibid.*, paras 74-75.

The Court assessed the situation in light of the jurisprudence regarding political parties and pluralism in a democratic society in general. It also reiterated the importance of freedom of religion, and that in a democratic open society, freedom of religion must sometimes be restricted to ensure equal treatment and respect for everyone. The Court then stressed the cases in which it had held that restrictions of the freedom of religion were necessary in a democratic society[93] such as:

- Obliging someone to wear a helmet for traffic security although his religious observance to wear a turban was stifled by this rule;
- Disallowing someone to take breaks from work in order to pray;
- Disallowing a teacher to wear a religiously motivated head covering.

According to the Court, the Turkish principle of secularism was respectful of the freedom of religion and belief, "being one of the fundamental principles of the State which are in harmony with the rule of law and respect for human rights and democracy. An attitude which fails to respect that principle will […] not enjoy the protection of Article 9." "In order to perform its role as the neutral and impartial organizer of the exercise of religious beliefs, the State may decide to impose […] the duty to refrain from taking part in the Islamic fundamentalist movement, whose goal and plan of action is to bring about the pre-eminence of religious rules." In light of this, reference was made to the fact that in Turkey the majority of the population was Muslim, and that fundamentalist groups may exercise pressure on those who did not follow the religion as they did or adhered to a different religion.[94]

Although the potential risk to democracy may not have materialized in the Court's eyes, the prohibition of a political party may be justified as being necessary in a democratic society.[95] In this case, the Court made the following assessments: it considered the proposed legal pluralism to be incompatible with the Convention and *Shari'a* to be incompatible with democracy; it considered that religious fundamentalist movements had previously seized power in some nations and the Turkish republic overcame the theocracy of Ottoman administration. The Ottoman Empire applied both *Shari'a* as legal pluralism, therefore it was not inconsistent to accuse Refah of pursuing both.[96]

The Court also believed that the freedom of religion and belief did not include a right to choose for a religious marriage and family law. "[F]reedom of religion, is primarily a matter of individual conscience" which is "quite different from the field of private law". "It has not been disputed before the Court that in Turkey everyone can observe in his private life the requirements of his religion. On the other hand, Turkey, like any other Contracting Party, may legitimately prevent the application within its jurisdiction of private-law rules of religious inspiration". The freedom to enter into contracts cannot "encroach upon the State's role as the neutral and impartial organizer of the exercise of religions, faiths and beliefs."[97]

93 *Ibid.*, paras 86-92.
94 *Ibid.*, paras 93-95.
95 *Ibid.*, paras 104-105.
96 *Ibid.*, paras 119-126.
97 *Ibid.*, para. 128.

The Court also followed the domestic authorities' reading that the use of the term *jihad* (struggle) had a "primary meaning [of] holy war and the struggle to be waged until the total domination of Islam in society is achieved".[98] Because the Court was convinced that Refah had political aims incompatible with a democratic society, there was a pressing social need to prohibit the party. Also, the measure was proportionate under the circumstances. Hence, there was no violation of Article 11. Because of the reasoning given, the complaints made under Articles 9, 10, 14, 17 and 18 of the Convention need not be addressed.[99]

The concurring opinion of Judges Ress and Rozakis explained the philosophy underlying what was called "vigilant democracy". Parties seeking to undermine democracy and rule of law, could not rightfully claim that their exclusion from the political process and legal sanctioning violated the principles they sought to undermine.[100]

While not disputing the assessment that Refah's goals were in contradiction to Turkish secularism, which is a pillar underlying its democracy, Judge Kovler was bothered by some elements of the judgment. He found the language of the judgment too political/ideological in nature. He believed that the majority was wrong to dismisses legal pluralism as opposed to convention freedoms. After all legal pluralism is used in many democratic nations of the world. In addition, he felt that the Court was out of order in treating *Shari'a*, a legal tradition of a world religion, which had existed for centuries, simply as a caricature that was antithetical to human rights. Lastly, he was unhappy with the use of opinion polls to support legal reasoning, as they are fit only for a political analysis.[101]

### 4.6 Maestri v. Italy [2004]

| | |
|---|---|
| Essence: | Judge dismissed for being a member of Freemasons. |
| Dimension: | Freedom of religion and belief and personal freedom. Freedom of religion and belief and secularism. |
| Lower courts: | Domestic courts found against applicant. Chamber relinquished jurisdiction in favor of the Grand Chamber. |
| Majority: | 11:6. Unjustified interference for lack of foreseeability of law. |
| Dissenting: | Joint Dissenting Opinion of Bonello, Strážnická, Bîrsan, Jungwiert and Del Tufo. Dissenting Opinion of Loucaides, joined by Judge Bîrsan. |

Mr. Maestri was an Italian judge. He was also a member of a Masonic Lodge. Following an investigation in 1993, disciplinary measures were taken against him because he had been a Freemason since 1981. This led to his dismissal. His membership of

98 *Ibid.*, para. 130.
99 *Ibid.*, paras 132-137.
100 *Refah Partisi (The Welfare Party) and Others v. Turkey*, app. nos. 41340/98 et al., *supra* n. 84, *Concurring opinion of Judge Ress joined by Judge Rozakis.*
101 *Refah Partisi (The Welfare Party) and Others v. Turkey*, app. nos. 41340/98 et al., *supra* n. 84, *Concurring opinion of Judge Kovler.*

the Lodge was deemed to be in violation of a regulation which stipulated that judges who failed to fulfill their obligations and act contrary to what may be expected of them, thereby undermining the prestige of the judiciary, could incur disciplinary sanctions. In Italy, Masonic lodges had previously been assumed to be collaborating with the mafia and organized crime. The judiciary organization issued internal directives in the early 1990s ordained that judges should not be members of Masonic lodges. The reasons for dismissing Mr. Maestri were the "incompatibility between the Masonic and judicial oaths, the hierarchical relationship between Freemasons, the 'rejection' of State justice in favor of Masonic 'justice' and, lastly, the indissoluble nature of the bond between Freemasons, even in the case of a member who wished to leave the organization".[102]

Mr. Maestri appealed against the disciplinary measures, but lost the national case at the national court of cassation. While he was still active as a judge, he argued that the procedures had impacted his career.[103] Hence, he turned to Strasbourg. Due to the fact that the application was transmitted to the Court when Protocol No. 11 came into force, changing the procedure, the application was allocated to the Chamber. The Chamber declared the application admissible, yet the Chamber relinquished jurisdiction in favor of the GC.[104]

The GC found in favor of the applicant by 11 votes to 6. Five of the dissenting judges authored a joint dissenting opinion. Judge Loucaides authored a separate dissenting opinion, in which one of the other five judges, Judge B?rsan, joined in.

The applicant alleged violations of his rights under Articles 9, 10 and 11 of the Convention. According to the GC, the complaint fell mainly within the ambit of Article 11, and it therefore considered the complaints of this article. As the Government did not dispute that there had been interference with the applicant's Convention rights, the Court assumed interference.[105]

The applicant submitted that there was no law prohibiting judges from being members of the Freemasons or, for that matter, any political party, trade union or church. The organizations prohibited by the Constitution were secret organizations that pursued political aims by military means. Yet the Freemasons was not a paramilitary organization but a private organization, which unlike other private organizations even made the lists of its members public. The Government held that there was a legal basis in Italian law, sufficiently accessible and foreseeable to meet the standard required by the Convention.[106]

The Court extensively analyzed the criteria "prescribed by law" and "in accordance with the law" as contained in the second paragraphs of Articles 8 to 11, revisiting the standing case law. The text of the regulation, on which the disciplinary measures had been based, was general in wording, interdicting in general terms behavior which could harm the judiciary function, without any reference to membership of organizations or, for that matter, Freemasonry. Hence, the Court concluded that the wording in the cited legislation was not "sufficiently clear to [inform] the applicant, […] that

102 ECtHR (GC), *Maestri v. Italy*, app. no. 39748/98, 17 February 2004, paras 11-13.
103 *Ibid.*, paras 14-16.
104 *Ibid.*, paras 4-7.
105 *Ibid.*, paras 23-26.
106 *Ibid.*, paras 28-29.

his membership of a Masonic lodge could lead to sanctions being imposed on him".[107] Having found that the interference was not prescribed by law, it was unnecessary for the Court to assess the other requirements of Article 11.[108]

Four dissenting judges, in their combined dissenting opinion, disagreed with the majority regarding the legal basis. In their view, the principle of subsidiarity, the "fourth instance" doctrine and the "margin of appreciation" should have guided the Court towards a different outcome.[109] The dissenters pointed to the fact that in Italy, Freemasonry had been implicated in plots to overthrow Italian democracy, and had allegedly aligned itself with organized crime, terrorism and the Mafia.[110]

Given the relevant legislation cited by the Government, Constitutional Court judgments regarding the restriction of the right to association for judges, and a directive of the National Council of the Judiciary explicitly mentioning the Freemasons, the dissenters were of the opinion that the applicant could have foreseen disciplinary measures before he joined the Freemasons in 1982.[111] The said directive had been explained by reference to "[…] the scandals rocking Italy at and prior to that time as a result of the infiltration of degenerate Freemasonry into all spheres of power, an infiltration which had resulted in a stranglehold of all democratic institutions, including the judiciary, and had compromised every sector of Italian public life and Italian Freemasonry as a whole".[112]

Furthermore, the dissenters found Freemasonry as such incompatible with the duties of the office of a judge, since judges are beholden only to the law whereas a Freemason is bound solemnly to "swear to obey without hesitation or dissent such orders as are given to me by the Sovereign Tribunal of the 31st Degree and by the Council of the 33rd Degree of the Ancient and Accepted Scottish Rite". Also, Freemasons are bound towards one another by oaths of loyalty, which according to the dissenting judges compromise judicial impartiality. The parliamentary report which had preceded the decree, in the dissenting judges opinion, should have convinced Mr. Maestri that Freemasonry and the office of a judge were incompatible, especially since the report had also registered popular opinion about the "noxious infestation of degenerate Freemasonry throughout the vital organs of the State".[113]

Judge Loucaides, with whom Judge Bîrsan agreed, did not disagree with the other dissenting judges, yet preferred to base his judgment on a specific line of reasoning focusing mainly on the foreseeability.[114] He was of the opinion that it was foreseeable before 1982 (when Maestri joined the Freemasonry, after having been a judge for more than 10 years) and certainly after the directive of 1990 that being a Freemason was incompatible with being a judge.

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107 *Ibid.*, para. 41.
108 *Ibid.*, para. 43.
109 *Maestri v. Italy*, app. no. 39748/98, *supra* n. 102, *Joint dissenting opinion of Judges Bonello, Strážnická, Bîrsan, Jungwiert and del Tufo*, paras 8-9.
110 *Ibid.*, para. 10.
111 *Ibid.*, paras 11-13.
112 *Ibid.*, para. 14.
113 *Ibid.*, paras 15-16.
114 *Maestri v. Italy*, app. no. 39748/98, *supra* n. 102, *Dissenting opinion of Judge Loucaides joined by Judge Bîrsan*.

## 4.7 Leyla Şahin v. Turkey [2005]

| | |
|---|---|
| Essence: | Student expelled for wearing headscarf at Turkish university. |
| Dimension: | Freedom of religion and belief and personal freedom. Freedom of religion and belief and the educational system. Freedom of religion and belief and secularism. |
| Lower courts: | Domestic courts found against applicant. Chamber found application admissible, but no violation of Article 9. |
| Majority: | 16:1. No violation Article 9. Separate joint concurring opinion by Judges Rozakis and Vajić. 17:0 No violation of Articles 8 and 10. |
| Dissenting: | Dissenting opinion by Tulkens concerning violation of Article 9. |

Leyla Şahin was a medical student at the University of Istanbul. She wore a headscarf as part of her adherence to the religious precepts of Islam. While at first, she could pursue her studies while wearing the headscarf, later on she was refused enrolment in certain classes. Subsequently, she left Turkey to pursue her medical studies in Vienna, where she could wear a headscarf at the university. Her claim was directed against a circular by the University of Istanbul, which ordered that students covering their heads or wearing beards must not be admitted to class. Her complaint was dismissed by the Administrative Court and the Supreme Administrative Court. Both courts also found against her in the procedures regarding the disciplinary measures taken against her.[115] The Chamber found the application to be admissible, but found no violation of Article 9, as the conditions of paragraph 2 had been met.[116]

A majority of 16 at the GC found that freedom of religion and belief and the right to education had not been violated. Unanimously, the Court found that there had been no violation of Articles 8 and 10. Judge Tulkens, the dissenting judge, wrote an elaborate dissenting opinion. Judges Rozakis and Vajić authored a joint concurring opinion.

The majority first analyzed the history and recent past of religious dress and secularism in Turkey. It recalled that modern European dress was mandated by law and that since the 1980s, religious attire had been prohibited in educational institutions.[117] The majority also observed that the headscarf had triggered many debates in many member states. While the Muslim majority countries of the member states had all regulated religious attire, the non-Muslim majority nations were not uniform in their approach. The United Kingdom was the most liberal nation when it came to the acceptance of religious attire and symbols in schools.[118]

The applicant did not contest that prohibition of religious attire would always constitute infringement of freedom of religion and belief, but that it did in her case. The Government endorsed the Chamber's findings that the interference was justified by the limitations clause.[119] The CG easily assumed interference with the freedom

115 ECtHR (GC), *Leyla Şahin v. Turkey*, app. no. 44774/98, 10 November 2005, paras 14-27.
116 *Ibid.*, paras 6, 8 and 71.
117 *Ibid.*, paras 30-35.
118 *Ibid.*, paras 55-65.
119 *Ibid.*, paras 72-74.

of religion and belief. The applicant claimed to be obeying a religious precept, thereby manifesting her desire to comply strictly with her religion's rules.[120]

The applicant claimed that there had been no legal prohibition. The circular had only come into force six months after she entered university.[121] Based on case law, the Court called the rule foreseeable. Ms. Şahin, according to the Court, could have anticipated that she would be forbidden to enter classes wearing the headscarf.[122] The majority also assumed that the interference was aimed at the protection of the rights and freedoms of others, noting that this was not in dispute between parties.[123]

The applicant challenged the version of secularism adhered to by the Government. She argued that democracies must be based on pluralism and broadmindedness. She pointed to the fact that the member states which had the longest tradition of parliamentary democracy did not prohibit the wearing of a headscarf in university. She also denied that there were any tensions in Turkey, which required such a measure. The argument that by wearing the headscarf she had somehow shown a lack of respect for the rights and freedoms of others was unfounded.[124]

The Court began its analysis by reiterating the relevant principles. First, it stressed the importance of the freedom of religion and belief for pluralism by reference to *Kokkinakis* (see section 10.3.1). It recalled the internal, external and collective dimensions of the right.[125] It furthermore recalled the role of the state as the impartial organizer of pluralism, stating that the state must ensure mutual tolerance between opposing groups and that this could not be done by eliminating pluralism. This required a balance "which ensures the fair and proper treatment of people from minorities and avoids any abuse of a dominant position". With regard to the relationship between religion and state, the majority noted, there was a broad margin of appreciation. This was due to the fact that there was no uniform approach among the member states. However, the margin of appreciation nevertheless went hand in hand with European supervision.[126]

The majority then turned to the Islamic headscarf, noting that restricting its wearing was compatible with the Convention. Recalling the *Dahlab*[127] Chamber case, it called the headscarf a "powerful external symbol" which "might have some kind of proselytizing effect" and seemed to be "imposed on women by a religious precept that [is] hard to reconcile with the principle of gender equality". Therefore, it concluded that it could not "easily be reconciled with the message of tolerance, respect for others and, above all, equality and non-discrimination".[128]

In its assessment of the Turkish principle of secularism, the majority noted that it guided the state in its role of "impartial arbiter". Secularism necessarily entailed freedom of religion and conscience and protected the individual against "arbitrary

120 *Ibid.*, para. 78.
121 *Ibid.*, paras 79-80.
122 *Ibid.*, para. 92.
123 *Ibid.*, para. 99.
124 *Ibid.*, paras 100-101.
125 *Ibid.*, paras 104-105.
126 *Ibid.*, paras 107-110.
127 ECtHR (C), *Dahlab v. Switzerland*, app. no. 42393/98, 15 February 2001.
128 *Leyla Şahin v. Turkey*, app. no. 44774/98, *supra* n. 115, para. 111.

interference by the State" as well as "external pressure from extremist movements". Hence, the freedom of religion could be restricted to defend this principle.[129]

Overall, the majority deemed the interference justified, given above considerations on the headscarf, gender equality and secularism. It also noted the existence of religio-political movements in Turkey that aspired to a society in which everything was founded on religious precepts. In light of all this, the Court was understanding of the fact that Turkish authorities considered it "contrary to such values [i.e. pluralism, equality] to allow religious attire to be worn".[130]

Given the consistent policy of the university reminding students not to wear religious attire in the university's premises, the Court rejected the argument put forward by the applicant that the absence of penalties for a breach of this rule effectively meant that no rules existed. Altogether, application of the principles to the case at hand led the majority to conclude that Article 9 was not violated.[131]

Ms. Şahin had also argued that the ban, which forced her to choose between following her religion and the university's rules, effectively denied her the right to education.[132] The Court, however, found that in principle disciplinary measures were no interference with the right to education. Given its findings concerning Article 9, the majority found the prohibition of religious dress in the university was proportional to the means pursued. As Mrs. Şahin could foresee these measures, there was also no impairment of the right to education.[133] As the applicant basically formulated the same complaints under Articles 8, 10 and 14 as she did under Article 9, the Court did not find any violation there either.[134]

Judges Rozakis and Vajić, who concurred with the majority, agreed with both the analysis and outcome under Article 9 as well as the analysis under Article 2 of Protocol No. 1. However, they would have refrained from addressing the freedom of education separately from the freedom of religion and belief, as the main issue was the wearing of the headscarf.[135]

Dissenting Judge Tulkens agreed with the majority regarding the importance of the freedom of religion for pluralism in a democratic society. She also agreed that in the interest of pluralism, individual freedom can sometimes be restricted. However, in her opinion the majority's approach granted too much room for the margin of appreciation in this case. As the margin of appreciation went hand in hand with the European supervision by Strasbourg, and the issue raised questions in many member states, she argued for more supervision in this case.[136]

Judge Tulkens also critiqued the way in which the majority seemed to have measured secularism and equality against liberty. In her opinion, these principles were mutually supportive and should have been applied in a reconciliatory fashion.

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129 *Ibid.,* para. 113.
130 *Ibid.,* paras 115-116.
131 *Ibid.,* paras 121 and 123.
132 *Ibid.,* para. 147.
133 *Ibid.,* para. 161.
134 *Ibid.,* paras 163-166.
135 *Leyla Şahin v. Turkey*, app. no. 44774/98, *supra* n. 115, *Concurring opinion of Judges Rozakis and Vajić.*
136 *Leyla Şahin v. Turkey*, app. no. 44774/98, *supra* n. 115, *Dissenting opinion of Judge Tulkens,* paras 1-3.

She also believed there was no "pressing social need" which mandated restricting liberty to uphold secularism. Seemingly criticizing the inconsistency of Article 9 jurisprudence, she highlighted that there was no clear case law on the wearing of religious symbols, "whose symbolic importance may vary greatly according to the faith concerned".[137]

Judge Tulkens argued that Ms. Şahin did not challenge the principle of secularism as such, nor was there any evidence that she did not support it. She also believed that the majority failed to take into consideration the difference between teachers and students when it came to applying secularism in public education. The freedom of religion and belief protected a broad liberty, to be restricted only when the rights and freedoms of others or public order were endangered. Hence, the Government had to show that somehow the headscarf worn by Ms. Şahin would provoke a reaction or was employed by her to exert pressure, proselytize or actually undermined the convictions of others. The Government had produced no evidence in this regard.[138]

Tulkens also referred to the *Gündüz* judgment,[139] in which the ECtHR found the conviction of a religious leader for insulting in strong language the secular part of the population, to be a violation of the freedom of expression. In Tulkens' eyes this implied that "manifesting one's religion by peacefully wearing a headscarf may be prohibited whereas, in the same context, remarks which could be construed as incitement to religious hatred are covered by freedom of expression".[140]

Tulkens argued that the majority assumed, easily and wrongly, that in view of combatting religious extremism, a personal interest in wearing a headscarf may be limited by rules, because it could be associated with extremism. Furthermore, unlike the majority's assessment, the headscarf had no single meaning but meant something different to women who wore it or did not wear it. It was these women's opinions that should have been central in the debate. For courts to make appraisals was uncalled for in her view. After all "equality and non-discrimination are subjective rights which must remain under the control of those who are entitled to benefit from them". "Paternalism of this sort" is counter to the personal autonomy jurisprudence developed under Article 8.[141]

Regarding Article 9, Judge Tulkens concluded that in the absence of relevant and sufficient reasons to prohibit Ms. Şahin from wearing the headscarf at the university, the interference was not necessary in a democratic society. Consequently, there was a violation of Article 9. Leyla Şahin was *de facto* deprived of her right when she was refused access to lectures and examinations under the precondition of removing her headscarf. Hence, the essence of the right to education was also infringed. Effectively, this deprivation may be considered discrimination on the basis of religion.[142]

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137 *Ibid.*, paras 4-6.
138 *Ibid.*, paras 7-8.
139 ECtHR (C), *Gündüz v. Turkey*, app. no. 35071/97, 14 June 2004.
140 *Leyla Şahin v. Turkey*, app. no. 44774/98, *supra* n. 115, *Dissenting opinion of Judge Tulkens*, para. 10.
141 *Ibid.*, paras 10-12.
142 *Ibid.*, paras 17-18.

Lastly, the dissenting judge raised the issue of tolerance. If Ms. Şahin and other women who wore a headscarf were admitted to university, this would create a pluralist environment in which women with and without headscarves would encounter one another and would have to solve whatever conflict would arise between them by dialogue. Imposing an obligation to wear no headscarf could never create tolerance: "Bans and exclusions echo that very fundamentalism these measures are intended to combat. "When rejected by the law of the land, young women are forced to take refuge in their own law. As we are all aware, intolerance breeds intolerance."[143]

## 4.8 Folgerø And Others v. Norway [2007]

| | |
|---|---|
| Essence: | Denial of request for exemption from religious/philosophical instruction class. |
| Dimension: | Freedom of religion and belief and personal freedom. Freedom of religion and belief and the educational system. Freedom of religion and belief and secularism. |
| Lower courts: | National courts found against applicants. Chamber found the complaint admissible and relinquished jurisdiction in favor of the Grand Chamber. |
| Majority: | 9:8. Failure to grant exemption was infringement of Article 9. 15:2 case was admissible. Separate opinion authored by Judges Zupančič and Borrego Borrego. 17:0 no separate issues under Article 14 of the Convention. |
| Dissenting: | Dissenting opinion by Wildhaber, Lorenzen, Bîrsan, Kovler, Steiner, Borrego Borrego, Hajiyev and Jebens. |

The applicants in this case sought an exemption for their children from the Norwegian school subject called KRL (Christianity, religion and philosophy). They were members of the Norwegian Humanist Association. The Association had also been an applicant originally, but it later withdrew. Up to the 1990s, legislation had provided that teachers had to teach pupils the tenets of Norwegian Lutheran faith. In 1990, a reform was introduced of which KRL was an integral part. While the subject was a compulsory course, children could be exempted from parts of the course, provided reasons were given. Norway has Lutheran Protestantism as the state religion and a state church, while the overwhelming majority of the Norwegian population (86%) is also a member of that church.[144]

Norwegian courts rejected the request for full exemption.[145] The applicants held that their rights under Article 9 and under Article 2 of Protocol No. 1 had been violated. The Chamber declared the application (partly) admissible (the Humanist

143 *Ibid.,* para. 19.
144 ECtHR (GC), *Folgerø and Others v. Norway*, app. no. 15472/02, 29 June 2007, paras 7-28.
145 *Ibid.,* paras 30-42.

Association's application being inadmissible) and relinquished jurisdiction in favor of the GC.[146]

The GC, by a slim majority of nine against eight, found that there had been a violation of Article 2 of Protocol No. 1, while unanimously holding that it was unnecessary to evaluate separately the complaints under Articles 14, 8 and 9 in conjunction with the right to education. In a sperate opinion, Judges Zupančič (who voted with the majority on the merits) and Borrego Borrego (who voted with the minority on the merits) explained their view that the case was inadmissible. There was a separate concurring opinion authored by Judges Wildhaber, Lorenzen, Bîrsan, Kovler, Steiner, Borrego Borrego, Hajiyev and Jebens.

The applicants maintained that KRL was neither objective, critical, nor pluralistic for the purposes of the right to education. Given the Lutheran predominance in Norway, the special status of the Lutheran state church, the presence of its officials in the educational system and the fact that no full exemption was given for KRL, amounted to violations of freedom of religion, freedom of privacy and prohibition of discrimination. Prior to KRL, there had been a right to full exemption from the Christian Knowledge subject. Since KRL, no such exemption existed. The Government maintained that only a few elements of the subject could be perceived as being of a religious nature. Exemption could be given from those. The applicants held that the entire subject was based on the intention to provide children with a "religious foundation".[147]

The partial exemption applied only to children whose parents adhered to "another religion" or another "philosophical conviction" if the reasons for exemption were stated. This implied that parents had to disclose personal convictions, while the information would be "examined by school teachers and administrators". According to the applicants, this was an assault on their dignity. In practice, the applicants held, the exemption procedure was too burdensome and difficult for many non-Christian parents, especially if they had an immigrant background and/or were not well-informed or well-versed. As a consequence, the children would also feel pressure.[148]

For the applicants, the better alternative would have been to retain the situation which had existed before KRL. Then, there was one subject for the Christian pupils set on teaching them their religion and information about other religions. There was also another subject for non-Christian children, teaching them in a neutral way about the history of religions and philosophies.[149]

According to the Government, the KRL subject struck a fair balance between transmitting knowledge about Christianity and its tenets such as cultural heritage, the Lutheran faith and other world religions and philosophies as well as ethical issues. If fundamental rights could be cited to receive full exemption, then this would also apply to other compulsory tuition and would even run counter to the Government's positive obligations under fundamental rights to transmit the underlying values.[150]

146 *Ibid.*, para. 4.
147 *Ibid.*, paras 55-60.
148 *Ibid.*, paras 63-66.
149 *Ibid.*, para. 69.
150 *Ibid.*, para. 73.

While the Convention could be raised to protect against indoctrination, it could not be raised against acquiring knowledge.[151] Also, in Norway there was an opportunity to set up private schools, in which an alternative curriculum could be taught.[152]

The Court began its assessment by setting out the principles underlying Article 2 of Protocol No. 1 which contained the right to education. The said right must be interpreted in light of the rights to private and family life, freedom of religion and belief and freedom of expression. Parents had a right to respect for their religious and philosophical convictions, while there was no distinction between private and state education. Respect in this regard was more than acknowledgement. It was a positive obligation on the part of the state. A balance must be struck between majority opinions and interests, and those of minorities in society. Expediency also had to be taken into consideration; the rights of parents could not seriously hinder the administration of compulsory general education. Knowledge, however, must be transmitted in an objective, critical and pluralistic manner. The state was prohibited from indoctrination. Parents' "religious and philosophical convictions must not be disregarded by carelessness, lack of judgment or misplaced proselytism".[153]

Before applying these principles to the present case, the Court noted that even the Norwegian Constitution conferred on adherents of the Lutheran faith the obligation to educate their children in this tradition.[154] The Court acknowledged that the intention of the school reform was to create "a meeting place for different religious and philosophical convictions where pupils could gain knowledge about their respective thoughts and traditions" instead of "an arena for preaching or missionary activities".[155] Yet, it was also the stated ambition of the subject to "transmit *thorough* knowledge of Christianity […] and the Lutheran Faith" and there was a clear preponderance of Christianity in the composition of the subject.[156] Consequently, the Court found that the curriculum insufficiently showed "a uniform pedagogical approach in respect of the different religions and philosophies".[157]

The Court also noted that the procedure for partial exemption was crafted in such a way that parents might prefer avoiding it because it would potentially cause conflict.[158] In addition, the Court noted it was "capable of subjecting the parents concerned to a heavy burden with a risk of undue exposure of their private life". "It must be remembered that the Convention is designed to guarantee not rights that are theoretical or illusory but rights that are practical and effective." The possibility of private schools, did not exempt the state from the obligation to safeguard pluralism in state-run schools.[159]

Accordingly, the refusal to grant full exemption was a violation of Article 2 of Protocol No. 1.[160] Given the examination and conclusion, the Court found it un-

151 *Ibid.*, para. 77.
152 *Ibid.*, para. 83.
153 *Ibid.*, para. 84.
154 *Ibid.*, para. 86.
155 *Ibid.*, para. 88.
156 *Ibid.*, paras 91-92.
157 *Ibid.*, para. 95.
158 *Ibid.*, para. 98.
159 *Ibid.*, para. 100.
160 *Ibid.*, para. 102

necessary to review separately the claims made under Articles 8, 9, and 14 taken in conjunction with Article 2 of Protocol No. 1.[161]

The separate opinion of Judges Zupančič and Borrego Borrego dealt only with the admissibility of the case. The two judges reached the conclusion that the Court could have and should have declared the application inadmissible, because another group of the same parents had already petitioned the (UN) Human Rights Committee.[162]

For the dissenting judges, "the notion of pluralism embodied in these provisions should not prevent a democratically elected political majority from giving official recognition to a particular religious denomination and subjecting it to public funding, regulation and control." "Conferring a particular public status on one denomination does not in itself prejudge the State's respect for parents' religious and philosophical convictions in the education of their children, nor does it affect their exercise of freedom of thought, conscience and religion."[163]

The dissenters were not convinced that there were qualitative differences regarding the teaching of Christianity as compared to other traditions, while the overemphasis was justified by the role played by Christianity in Norwegian history. Also, their appreciation of the procedure for partial exemption was different. They did not consider it *a priori* burdensome, transgressing the margin of appreciation. Hence, for them, the failure to provide a full exemption was no violation of the right to education.[164]

### 4.9 Şerife Yiğit v. Turkey [2010]

| | |
|---|---|
| Essence: | Widow in a purely religious marriage claimed social benefits and inheritance. |
| Dimension: | Freedom of religion and belief and family law and family relations. Freedom of religion and belief and secularism. |
| Lower courts: | National courts found against applicant. Chamber found the complaint admissible but no violation. |
| Majority: | 17:0. No violation. Rozakis and Kovler each issued separate concurring opinions. |
| Dissenting: | None. |

Mrs. Yiğit was a widow who had been married to her husband only by religious rites. After he passed away, she sought formal recognition of herself as widow and of her daughter to be entered into the registers as the deceased's daughter. She also requested to be treated as a widow and for her daughter to be treated as a partial

161 *Ibid.*, para. 105.

162 *Folgerø and Others v. Norway*, app. no. 15472/02, *supra* n. 144, *Separate opinion of Judges Zupančič and Borrego Borrego*.

163 *Folgerø and Others v. Norway*, app. no. 15472/02, *supra* n. 144, *Joint dissenting opinion of Judges Wildhaber, Lorenzen, Bîrsan, Kovler, Steiner, Borrego Borrego, Hajiyev and Jebens*, p. 49.

164 *Ibid.*, pp. 50-52.

orphan by the pension fund and the health insurance.[165] The national courts had found against her in reference to national case law that refused recognition as a marriage to relationships based solely on religious marriage. National law only recognized compensation, pecuniary and non-pecuniary damage, and compensation for loss of financial support to the surviving female spouse in a purely religious marriage. Such marriages were a social reality.[166]

Turkish law required a civil marriage in order for couples to be recognized as married and for their children to be automatically registered as children of both parents. Conducting a religious marriage without a prior civil marriage was prohibited for religious leaders.[167] Although Article 9 was not raised in the case, the merits concerned equal treatment of a widow in a religious marriage.

The Chamber held the application to be admissible, but found no violation.[168] The GC unanimously found no violation. Judges Rozakis and Kovler each issued separate concurring opinions.

The GC analyzed the legislative situation in the member states before going into the merits of the case, finding that the majority of nations did not recognize purely religious marriages, nor cohabitation. Most only provide social security benefits of a deceased to the surviving (legally married) spouse, if at all.[169] While the applicant had based her initial application solely on Article 8, both parties were invited by the Court to also reflect on the prohibition of discrimination in relation to the right to property – Article 14 in conjunction with Article 1 of Protocol No. 1. The Court found said provisions to be applicable.[170]

According to the Government, the regulation of marriage fell within the margin of appreciation. In Turkey, only the persons who had contracted a civil marriage could enjoy the rights that resulted from marriage. Because of the principle of secularism, enshrined in the Constitution, the Government could not attach any legal consequences to religious marriages. To the contrary, it had been the legislature's intent to prevent purely religious marriages, but also to "protect the most important building block of society, the family". Yet, while the right to marry was unrestricted, and legal consequences were only attached to a civil marriage, cohabitants could not be obliged to marry.[171]

The Government further explained that the non-recognition of religious marriage would protect women against polygamy. After all, traditional Islamic law would allow one husband to have four wives. If the applicant had chosen to get married in accordance with civil law, then she would have been entitled to the social security she now sought.[172]

The applicant explained that she herself had been born out of a purely religious marriage, which was why her name had not been entered in the civil status register

165 ECtHR (GC), *Ţerife Yiğit v. Turkey*, app. no. 3976/05, 2 November 2010, paras 9-17.
166 *Ibid.*, paras 28-33.
167 *Ibid.*, para. 40.
168 *Ibid.*, para. 4.
169 *Ibid.*, paras 41-44.
170 *Ibid.*, paras 51-53 and 59.
171 *Ibid.*, paras 60-61.
172 *Ibid.*, para. 62.

until 2002. This was one of the reasons she and her husband could not obtain a civil marriage. She denied that her application would tend towards the legal recognition of polygamy. She also argued that purely religious marriage was a social reality in Turkey and that her situation could be regularized by amnesty laws which were frequently applied to children born outside civil marriage for entry into the civil status register.[173]

The Court explained that discrimination was different treatment, without an objective and reasonable justification. Article 14 did not prohibit distinction in treatment, founded on an objective assessment of essentially different circumstances, which was based on public interest and struck a balance between the interest of the community and respect for individual freedom. In this, states enjoyed the margin of appreciation. With regard to (civil) marriage, the Court referred to earlier case law, saying that giving a special status and recognition to marriage, including conferring special rights on those who entered into it, was not contrary to the Convention.[174]

The Court then applied the principles to the facts, noting that the applicant and her husband had had a monogamous relationship for 26 years and had six children together. Her situation was comparable to that of a widow in a marriage. The legal consequences when it came to the desired social benefits, were fundamentally different. The question was whether this amounted to discrimination. As the nature of a marriage was not amongst the grounds for discrimination explicitly named in the list of Article 14, the Court examined whether it might come under "other status". In the Court's opinion, this was the case and it noted that other than the nature of the marriage, the Government gave no reason for the difference in treatment. Hence, the difference in treatment amounted to unlawful discrimination, unless covered by an objective and reasonable justification.[175]

The Court accepted that obligatory civil marriage was introduced to protect women against gender discrimination, which had been incorporated in traditional religious marriage. Hence, the Court accepted the legitimate aims of protection of public order and the rights and freedoms of others. The Court also found the interference proportional to the aim. Mrs. Yiğit was aware of the legal situation. Turkish law clearly prohibited solemnization of a marriage by religious rites, unless preceded by a civil marriage. In an earlier Chamber case, Spain had awarded a couple married in a traditional Roma way some of the legal consequences of a marriage, failing to grant it to others.[176] Turkey had done no such thing, and had consistently treated all purely religious marriages as not fulfilling the legally required perquisites. The amnesty laws raised by the applicant had been aimed solely at improving the situation of children born out of a relationship which was not legally recognized.[177] From this, the Court concluded that the measure was proportional, and thus that Article 14 had not been violated.[178]

173 *Ibid.*, paras 64-65.
174 *Ibid.*, paras 67-72.
175 *Ibid.*, paras 73-80.
176 ECtHR (C), *Muñoz Díaz v. Spain*, app. no. 49151/07, 8 December 2009.
177 *Ţerife Yiğit v. Turkey*, app. no. 3976/05, *supra* n. 165, paras 81-84.
178 *Ibid.*, paras 87-88.

As Article 8 applied to all families "legitimate" or "illegitimate", the family situation of the applicant was covered by Article 8. "Family life" covered issues of a social, moral, cultural as well as material nature.[179] While Article 8 entailed positive obligations on the part of the state, there was also a margin of appreciation. This margin of appreciation was wider as regards the state's planned economic, fiscal or social policy in which opinions within a democratic society may reasonably differ widely.[180]

The Court noted that the state did not effectively interfere with the applicant's family life with the deceased and their children. There were no negative civil law or penal consequences. As far as the consequences raised were concerned, the Court argued that Article 8 did not oblige states to establish a special regime for religious marriages or any relationship of unmarried couples. Consequently, there had been no breach of Article 8.[181]

Concurring Judge Rozakis believed that the Court overemphasized the nature of the applicant's relationship as a religious marriage. In his opinion, the comparison should have been between long-standing cohabitation and marriage. According to standing case law, it was within the state's margin of appreciation to treat long-standing cohabitation legally different to marriage. But Rozakis wondered whether the social reality of stable relationships outside of marriage in many member states should lead to a reconsideration of its stance where social security and related benefits were concerned.[182]

Judge Kovler thought that the freedom of choice aspect of Article 8 had been infringed by Turkey, by withholding from the applicant the social security benefits. But this had not been raised by the applicant, hence the Court could not consider it. What Kovler disagreed with, were the Court's pronouncements concerning Islamic religious marriage. In his opinion, no comments on Islamic marriage should have been made rather than portraying it in "a reductive and highly subjective manner". He then went on to remind the Court that he had called it to order before concerning prejudice against Islamic values. He warned his colleagues not to become entrenched in eurocentrism.[183]

179 *Ibid.*, paras 94-98.
180 *Ibid.*, para. 100.
181 *Ibid.*, paras 102-103.
182 *Şerife Yiğit v. Turkey*, app. no. 3976/05, *supra* n. 165, *Concurring opinion of Judge Rozakis*.
183 *Şerife Yiğit v. Turkey*, app. no. 3976/05, *supra* n. 165, *Concurring opinion of Judge Kovler*.

## 4.10 Lautsi And Others v. Italy [2011]

| | |
|---|---|
| Essence: | National legislation mandating crucifixes to be hung in every classroom in public schools. |
| Dimension: | Freedom of religion and belief and personal freedom. Freedom of religion and belief and the educational system. Freedom of religion and belief and secularism. |
| Lower courts: | National courts found against applicant. Chamber found claim admissible and a violation. |
| Majority: | 15:2. No violation. Joint concurring opinion by Separate concurring opinion by Rozakis and Vajić. Separate concurring opinion by Bonello. Separate concurring opinion by Power. |
| Dissenting: | Dissenting opinion by Malinvern, joined by Kalaydjieva. |

Due to an Italian national regulation, a crucifix had to be hung in every classroom, in every public school. Mrs. Lautsi brought the case to Strasbourg on behalf of herself and her two sons. She complained that the crucifixes fixed to every school classroom in the public school the boys attended violated her and her sons' freedom of religion as agnostics. The national courts did not find any violation of the freedom of religion.[184] The Chamber unanimously held that the case was applicable and that there had been a violation of Article 9.[185] Much controversy was caused by the Chamber judgment. Several member states made official complaints and the judgments and their implications for European nations were discussed extensively in popular media as well as in academic publications.

The GC by 15 votes to 2 found no violation. No other judgment has ever raised so many questions about the judicial impartiality of the Strasbourg Court. Three separate concurring opinions were issued. The dissenting opinion was authored by Judge Malinverni and joined by Judge Kalaydjieva.

In the vast majority of member states, religious symbols in schools were not regulated by law. Only Macedonia, France (except two administrative regions) and Georgia explicitly prohibited religious symbols in state schools. A few member states, namely Italy, some German *Länder*, some Swiss *communes*, Austria and Poland actually prescribed it. In Spain, Greece, Ireland, Malta, San Marino and Romania it was not prescribed, but religious symbols could be found in state schools. Also, in some member states the issue of religious symbols in classrooms had been brought before (the highest) courts. The results had been mixed:[186]

– Federal Court of Switzerland: unconstitutional;
– German Constitutional Court: unconstitutional when there is no procedure for objection; general prescription without any procedure for objection parents or students who disagreed;

184 ECtHR (GC), *Lautsi and Others v. Italy*, app. no. 30814/06, 18 March 2011, paras 10-16.
185 *Ibid.*, paras 4 and 30-32.
186 *Ibid.*, paras 27-28.

- Romanian Supreme Court: may only be displayed in classrooms for religious instruction;
- Polish Constitutional Court: constitutional if not compulsory;
- Spanish regional court: must be removed upon request.

The Government brought forward the following arguments against the Chamber judgment. While states must refrain from proselytizing, they must also not promote secularism or atheism. The crucifix was a passive symbol, it did not influence the lessons. It was an expression of Italian cultural history, which could be acknowledged and protected, given the Strasbourg case law regarding prevailing cultural and religious feelings of the population (*Otto Preminger*[187]). The Convention did not prohibit member states from showing a preference for a certain religion. The Italian legislation in question was the outcome of the democratic process. The crucifixes in the classroom made children understand the national community, while the curriculum helped them to develop the critical minds to form their own opinion regarding religion. Minority religions were accommodated[188] in schools. Finally, the Government asserted, crucifixes in the classrooms did not prevent the applicant from educating her children in accordance with her own convictions.[189]

The applicants agreed with the Chamber judgment. Religious symbols in classrooms expressed a preference for a certain religion in a place where conscience was formed. The crucifix was a religious symbol, and not a passive symbol as the Government argued. But it gave "material form to a cognitive, intuitive and emotional reality". Neutrality obliged the state to establish a neutral space in classrooms where everyone could live according to their own beliefs.[190] While not disputing that removing the crucifix from classrooms would impact Italian cultural identity, it was mandated by "the principles of the liberal state, and a pluralist, open democracy, respect for the individual rights and freedoms enshrined in the Italian Constitution and the Convention".[191]

Some member states had intervened as third parties. They argued that neutrality as mandated by the Convention was not to be confused with "secularism". Most nations in Europe were not secular and the Chamber judgment would introduce an "Americanization" of Europe. Other third parties argued that either the crucifix should remain in classrooms because it had first and foremost a cultural and historical meaning, or it should be removed because it interfered with state neutrality.[192]

The Court began by defining the scope of the legal question. This consisted only of the question whether Article 9 and Article 2 of Protocol No. 1 required the crucifix to be taken out of classrooms in state schools. Other places were not the issue here, and neither was the compatibility with the Italian Constitution. Without any doubt, agnostics and supporters of secularism could claim protection under Article 9. Also,

187 ECtHR, *Otto-Preminger-Institut v. Austria,* app. no. 13470/87, 20 September 1994.
188 The term 'accommodation' is not used, yet the measures resemble Canadian 'reasonable accommodation'.
189 *Lautsi and Others v. Italy*, app. no. 30814/06, *supra* n. 184, paras 35-40.
190 *Ibid.,* paras 41-43.
191 *Ibid.,* para. 47.
192 *Ibid.,* paras 47-56.

their views fell under "philosophical convictions", and they were worthy of "respect in a democratic society" as intended by Article 2 of Protocol No. 1.[193]

When setting out the general principles, the Court reemphasized that states have a duty of neutrality and impartiality vis-à-vis the various convictions existing in society and while this was primarily a negative duty, there was also a positive obligation on the part of the state.[194] On the other hand, parents and students were not protected against the transmission of knowledge, directly or indirectly of a religious or philosophical kind. What was prohibited, however, was the aim of indoctrination.[195]

Applying the principles to the case at hand, the Court noted that without any doubt the crucifix was primarily a religious symbol. Whether it had any other meaning beyond that was irrelevant. While no evidence was submitted showing that the state aimed to indoctrinate children at state schools, it was understandable that the first applicant saw in the crucifix's presence in the classroom a lack of respect for her philosophical convictions. The varying situations in the member states could be explained by reference to culture and history. Hence, the margin of appreciation was broad, while states could not cite tradition to be relieved of their positive obligations.[196]

Consequently, the question was whether the margin of appreciation, which does go hand in hand with European supervision, covered legislation regarding religious symbols in schools. The crucifix was undoubtedly connected to Catholicism, being the dominant religion in Italy. That, however, was not enough to establish indoctrination. Referring to earlier case law, the Court acknowledged that state preference for a certain religion was not in conflict with Convention obligations. The Court also regarded a symbol on a wall as essentially passive, as opposed to class religious activities.[197]

The Chamber had used the *Dalhab*[198] approach, calling it a "powerful external symbol". The majority of the GC disagreed. In *Dalhab*, the state itself had legislated against the wearing of religious symbols, while here the state had legislated in favor of the religious symbol on the wall. The Italian Government had shown it had weighed all interests concerned. The children taught by Mrs. Dalhab were young (kindergarten age), whereas the children in this case were teenagers.[199]

The majority considered that in Italy the crucifix in the classroom was not associated with compulsory education in Catholic religion and that other religions were accommodated in schools by "celebrating" their holy days and by giving them the opportunity to introduce optional religious education. Lastly, the first applicant was not restricted in her rights to teach her children her own philosophical convictions.[200] Hence, the Court concluded that Article 2 of Protocol No. 2 had not

193 *Ibid.*, paras 57-58.
194 *Ibid.*, paras 60-61.
195 *Ibid.*, paras 60- 62.
196 *Ibid.*, paras 66-68.
197 *Ibid.*, paras 70-72.
198 *Dahlab v. Switzerland*, app. no. 42393/98, *supra* n. 127.
199 *Lautsi and Others v. Italy*, app. no. 30814/06, *supra* n. 184, para. 73.
200 *Ibid.*, paras 74-75.

been violated and that no separate issue arose under Article 9. In view of these findings, there was also no violation of Article 14.[201]

Judges Rozakis and Vajić in their concurring opinion argued that the neutrality of the state was better served by a liberal and tolerant approach, than by rigid secularism. Such an approach allowed for all religions and convictions to manifest themselves in the public sphere. In their view, Italy lived up to this liberal approach by allowing all religions their "accommodation" in the public school system.[202]

Judge Bonello began with a sweeping opening statement, in which he warned of "historical Alzheimer's" if the "cultural continuum of a nation's flow through time" should be forgotten. A human rights court should protect human rights but "not ignore customs which evolve over time, harden over history into cultural cement. They become defining, all-important badges of identity for nations, tribes, religions, individuals."[203] Continuing, he noted that education was first organized by the Church and only later by the state, that fascists were not the first to ordain the crucifix in schools,[204] and that there was a difference between freedom of religion and belief on the one hand and secularism on the other. He believed that only national authorities should enforce secularism. He was convinced that the crucifix in the classroom had never hindered anyone from making own autonomous choices about their world view. Also in terms of numbers, Mrs. Lautsi would be indoctrinating if the crucifix was removed for the benefit of her two sons, while all other children who were "crucifix receptive" would have to suffer the consequences.[205]

Judge Power in his separate concurring opinion also referred to the pluralist as opposed to the secularist approach, when it comes to state neutrality. Secularism connoted the preference for one world view. Pluralism respected them all in the same way. He did think that symbols carry meaning, implicitly rejecting the "passive symbol" findings of the Court, but was convinced that Italy adhered to pluralism because it opened up the school system to a variety of world views.[206]

Dissenting Judges Malinverni and Kalaydjieva pointed to the fact that the majority mainly based itself on the margin of appreciation, due to the lack of European consensus. However, in Italy the crucifix in schools had a weak basis in law. Whenever Italian courts were asked to rule on crucifixes in classrooms, they emphasized state neutrality. Even the Italian Constitutional Court itself had previously recognized the principle of state neutrality and impartiality towards religious beliefs.[207]

The dissenters did not argue for rigid secularism as the only way for state neutrality, but argued that the educational system must reflect the "freedom and the spirit of understanding, peace, tolerance, equality of sexes, and friendship among

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201 *Ibid.,* paras 77-81.

202 *Lautsi and Others v. Italy*, app. no. 30814/06, *supra* n. 184, *Joint concurring opinion of Judges Rozakis and Vajić*.

203 *Lautsi and Others v. Italy*, app. no. 30814/06, *supra* n. 184, *Concurring opinion of Judge Bonello*, para. 1.1.

204 *Ibid.,* paras 1.4-1.6.

205 *Ibid.,* para. 3.6.

206 *Lautsi and Others v. Italy*, app. no. 30814/06, *supra* n. 184, *Concurring opinion of Judge Power*.

207 *Lautsi and Others v. Italy*, app. no. 30814/06, *supra* n. 184, *Dissenting opinion of Judges Malinverni and Kalaydjieva*, paras 1-2.

all peoples, ethnic, national and religious groups".[208] They also cited the Canadian Supreme Court in this respect.[209] Religious symbols hanging in classrooms were part of the educational environment. Paraphrasing the Swiss Federal Court, the dissenting judges argued: "[A]s guarantor of the denominational neutrality" the state should not "manifest its own attachment to a particular religion, be it a majority or a minority one, because certain people may feel that their religious beliefs are impinged upon by the constant presence at school of the symbol of a religion to which they do not belong".[210]

The crucifix was first and foremost a religious symbol and could be considered a "powerful external symbol" in the school environment. The Italian Court of Cassation itself rejected the argument that the crucifix had values independent of religious belief. Such a symbol was capable of infringing the religious freedom of schoolchildren, and even more so than a garment worn by another pupil.[211]

In conclusion, the dissenting judges pointed out that freedom of education in conjunction with freedom of religion and belief covered both the curriculum and the school environment. Children were not able to extract themselves from a symbol present in every classroom. Therefore, the practice violated Article 2 of Protocol No. 1 in conjunction with Article 9.[212]

### 4.11 Bayatyan v. Armenia [2011]

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|---|---|
| Essence: | Criminal punishment for faith-based conscientious objection to military service. |
| Dimension: | Freedom of religion and belief and personal freedom. |
| Lower courts: | National courts found against applicant. Chamber found claim admissible but no violation. |
| Majority: | 16:1. Violation of Article 9. |
| Dissenting: | Dissenting opinion by Gyulumyan. |

Mr. Bayatyan was an Armenian Jehovah's Witness. As pacifism was an essential part of his faith, he, like Mr. Thlimmenos (see section 10.4.2), refused mandatory military service. He did offer to perform alternative civilian service.[213] He was arrested, tried and convicted. All national courts found against him.[214] The Chamber found the

208 *Ibid.*, para. 3, citing UN Committee on the Rights of the Child, *General comment No. 1 (2001), Article 29 (1), The aims of education*, CRC/GC/2001/1, 17 April 2001, para. 19.
209 *Ibid.*, para. 3, referring to SCC, *Ross v. New Brunswick School District No. 15*, Case 24002, [1996] 1 SCR 825, 3 April 1996.
210 *Ibid.*, para. 4, referring to Swiss Federal Court, *Comune di Cadro*, ATF 116 Ia 252, 26 September 1990, para. 7.
211 *Ibid.*, para. 6.
212 *Ibid.*, para. 8.
213 ECtHR (GC), *Bayatyan v. Armenia*, app. no. 23459/03, 7 July 2011, paras 10-15.
214 *Ibid.*, paras 19-40.

application to be admissible, but held by nine votes to one that there had been no violation of Article 9.[215]

By a vote of 16 to 1, the GC held that the absence of a right to conscientious objection from military service violated Article 9. Judge Gyulumyan argued his dissent in a separate dissenting opinion.

The majority looked at the situation concerning conscientious objection and mandatory military service in all member states. All CoE member states, apart from Armenia and Turkey, had either abolished military service (in peacetime) altogether, introduced alternative civilian service, and/or recognized a right to conscientious objection (in peacetime).[216] A quite extensive overview of relevant international documents and practice was given to show that the right to conscientious objection was recognized in international (human rights) law.[217]

The Chamber observed that Article 9 had to be read in conjunction with Article 4 §3(b) of the Convention which leaves the right to introduce military service up to the High Contracting Parties. The applicant submitted that in his opinion the "living instrument" doctrine now implied that a right to conscientious objection was included in Article 9 and that Article 4 (3)(b) could not be used to limit Article 9. After all, the sole purpose of the provision was to delimit the prohibition of forced labor.[218]

The applicant further argued that the interference was not prescribed by law. When it joined the CoE, Armenia had taken on the obligation to pardon all conscientious objectors and, under international law, it was obliged to respect conscientious objection. Moreover, the punishment he had received was not necessary in a democratic society due to the disproportionality. He had been detained under harsh conditions, verbally abused, and treated like a criminal though he had no criminal record. Besides, Armenia had already pardoned others in his situation.[219]

While the Government did not dispute that the Convention was a living instrument, it referred to the earlier judgments on the matter in which the Court had time and time again refrained from formulation that Article 9 mandated an exemption from military service. It was convinced that Article 9 had still to be read in conjunction with Article 4 §3(b). Hence, there was no Convention obligation to grant exemption from military service. The Government also raised the practical argument that allowing for conscientious objection would increase the number of objectors, which could seriously harm the capacity of the armed forces. It also raised the danger of a "spill over" onto other civic duties like paying taxes. Finally, the Government argued that even if there had been interference, it was justified by Article 9(2).[220]

The third-party interveners, all religious groups and/or conscientious objection support groups, argued that conscientious objection should be recognized in Armenia due to international human rights standards and that Jehovah's Witnesses suffered

215 *Ibid.*, paras 4 and 72.
216 *Ibid.*, paras 46-49.
217 *Ibid.*, paras 50-70.
218 *Ibid.*, paras 72-74.
219 *Ibid.*, paras 75-77.
220 *Ibid.*, paras 79-84.

discrimination and maltreatment in Armenia due to their stand on armed service and violence.[221]

The Court revisited the former case law by Commission and Court. According to the case law of the Commission, the Convention could not be read to imply a right to conscientious objection from mandatory military service or a right to choose between military service and alternative civilian service. The case law even showed that the Convention did not prevent states from punishing those who refused military service. In *Thlimmenos*, the issue of Article 9 vis-à-vis conscientious objection was not raised and instead the Court had to answer questions related to Articles 14 and 3. Hence, unlike the Commission, the Court had not decided on conscientious objection as such under the Convention.[222]

The majority went on to argue that it was not convinced the Commission's connection between Article 9 and Article 4 §3(b) was correct, historically or legally. At the same time, the Commission's interpretation reflected prevailing opinion at the time in the member states. However, since then the overwhelming majority of member states had indeed recognized a right to conscientious objection and/or alternative civic service. Given all this, the Court concluded that the law had changed and changed in a foreseeable way for Armenia. After all, Armenia itself was a party to the ICCPR, which recognized the right and had pledged when joining the CoE to introduce legislation to recognize conscientious objection.[223]

The "living instrument" doctrine thus made it impossible to uphold the Commission's case law and mandates for Article 9 could no longer be read in conjunction with Article 4 §3(b) in this regard. This did not mean that Article 9 as such held a right to conscientious objection, but when opposition to military service was motivated by strong and genuinely held religious or philosophical convictions of "sufficient cogency, seriousness, cohesion and importance", it did attract the protection of Article 9.[224] Applying this to the applicant, a Jehovah's Witness, known for their theological opposition to military service, even if unarmed, the merits of the case fell under Article 9, and there was an interference with his freedom of religion.[225] Having established this, the Court turned to the possible justification under Article 9(2).

While the criminal law under which the applicant was convicted at the time was still valid law, Armenia was also a party to the ICCPR and had vowed to adopt legislation to recognize conscientious objection when joining the CoE. Hence, the Court left the question of whether or not the interference was prescribed by law unanswered.[226] Given the existing pledge to introduce legislation recognizing conscientious objection at the time, it was questionable whether it could still rely on public order and other related legitimate aims in this case. The Court did not consider it necessary whether or not there was a legitimate aim at the time.[227]

221 *Ibid.*, paras 89-91.
222 *Ibid.*, paras 93-97.
223 *Ibid.*, paras 100-108.
224 *Ibid.*, para. 110.
225 *Ibid.*, paras 109-112.
226 *Ibid.*, paras 113-115.
227 *Ibid.*, para. 117.

Necessity in a democratic society had to be viewed in light of the standing case law regarding the freedom of religion.[228] In this regard, the Court observed that the state's role "as the neutral and impartial organizer of the exercise of various religions, faiths and beliefs" was "conducive to public order, religious harmony and tolerance in a democratic society". "The State's duty of neutrality and impartiality is incompatible with any power on the State's part to assess the legitimacy of religious beliefs or the ways in which those beliefs are expressed."[229]

The margin of appreciation was limited in this case, because almost all member states which had compulsory military service had also introduced alternatives to accommodate conscientious objection. Hence, a state which had not done so had a limited margin of appreciation and must give "convincing and compelling reasons" to justify the interference, and must demonstrate that a "pressing social need" was present.[230]

The applicant refused military service on genuine religious grounds. He had offered to perform alternative service, but the legal system did not provide for any such alternative. That reasonable alternatives existed was demonstrated by the overwhelming majority of member states. Instead, he had to serve a prison sentence. Therefore the interference was not necessary in a democratic society.[231]

The Court rejected that providing for alternatives was far from privileging certain groups: "[P]luralism, tolerance and broadmindedness are hallmarks of a 'democratic society'. Although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of a majority must always prevail." This required "fair and proper treatment of people from minorities and avoids any abuse of a dominant position". "Thus, respect on the part of the State towards the beliefs of a minority religious group like the applicant's by providing them with the opportunity to serve society as dictated by their conscience might, […] ensure cohesive and stable pluralism and promote religious harmony and tolerance in society."[232]

Dissenting Judge Gyulumyan was not convinced that Article 9 was applicable. Citing the earlier case law, he argued that not every act motivated by religion was covered by Article 9. Article 9 was never amended to include conscientious objection and the living instrument doctrine did not require a different reading of Article 9 than it did before. In his opinion, the majority used the judgment to ensure that Armenia would implement its obligations under international law, while this was uncalled for and unnecessary. As in his opinion Article 9 was not applicable, it could not have been breached and hence there was no violation.[233]

228 *Ibid.*, paras 118-119.
229 *Ibid.*, para. 120.
230 *Ibid.*, para. 123.
231 *Ibid.*, paras 124-125.
232 *Ibid.*, para. 126.
233 *Bayatyan v. Armenia*, app. no. 23459/03, *supra* n. 213, *Dissenting opinion of Judge Gyulumyan*, paras 1- 6.

## 4.12 Mouvement Raëlien Suisse v. Switzerland [2012]

| | |
|---|---|
| Essence: | Refusal to allow posters of religious/spiritual movement. |
| Dimension: | Freedom of religion and belief and other rights. Freedom of religion and belief and group autonomy. |
| Lower courts: | National courts found against applicant. Chamber found claim admissible but no violation. |
| Majority: | 9:8. No violation of Article 10. Separate concurring opinion of Judge Bratza. 17:0: No separate evaluation under Article 9 needed. |
| Dissenting: | Joint dissenting opinion of Judges Tulkens, Sajó, Lazarova Trajkovska, Bianku, Power-Forde, Vučinić and Yudkivska. Joint dissenting opinion of Judges Sajó, Lazarova Trajkovska and Vučinić. Dissenting opinion Judge Pinto de Albuquerque. |

The applicant in this case was the national Swiss branch of the Raëlien Movement. This new religion/spiritual movement, founded by a French national in 1970, believed in extraterrestrials who in their opinion had created life on earth including the world religions. They advocated "geniocracy", rule by the people who have the highest intellect, free sexuality and human cloning.[234]

The legal proceedings were started when the applicant was denied a request to put up a poster near a road in Swiss Canton Neuchâtel. The refusal was based on the consideration that the posters contained a link to the movement's website, which in turn contained a link to a company owned by the applicant which offered human cloning services. The Swiss authorities and courts all ruled in favor of the municipality because, among other reasons, the movement theoretically advocated pedophilia and human cloning, both criminal law offences, and because the doctrine of geniocracy was antithetical to the democratic order of society.[235] The Chamber by a vote of five to two found no violation of Article 10 and no necessity to evaluate separately the claims under Article 9.[236]

By a vote of nine to eight, the GC held that Article 10 had not been violated, while finding unanimously that it was unnecessary to evaluate separately the claims under Article 9. Judge Bratza authored a separate concurring opinion. Seven dissenting judges authored a joint dissenting opinion. Judges Sajó, Lazarova Trajkovska and Vučinić who had participated in the joint dissenting opinion also issued a separate dissenting opinion. Judge Pinto de Albuquerque issued a separate dissenting opinion.

The applicant claimed that its rights under Article 10 had been violated. The Government raised a preliminary objection, arguing that the Court could have put aside a complaint if it had been examined in substance by the competent national bodies and if the proceedings had met all conditions of fairness and non-arbitrary

234 ECtHR (GC), *Mouvement Raëlien Suisse v. Switzerland*, app. no. 16354/06, 13 July 2012, paras 10-12.

235 *Ibid.*, paras 13-21.

236 *Ibid.*, paras 4 and 33.

handling. The Chamber had taken the view that the application was not manifestly ill-founded and the GC saw no reason to depart from this conclusion.[237]

The Chamber had considered that the poster could have multiplied visits to the website. The Swiss courts had carefully reasoned their decisions and the ban did not extend to the Association itself, nor the website. Therefore, the interference had not overstepped the wide margin of appreciation.[238]

The applicant argued that there should not be a wide margin of appreciation in such a case. After all, this would allow local or national governments to restrict the expression of minority groups. They pointed to the fact that the posters referred to a legal website of a legal organization. The interference was even graver as neither the poster nor the website referred to the concept of geniocracy and human cloning, which had so prominently been raised by the national authorities and courts. Also, the Association rejected the accusations of promoting pedophilia, claiming that any member ever convicted of related offenses had been evicted from the movement.[239]

The Government, while agreeing that freedom of expression was an important human right, mentioned that it was justified to limit advertising in public spaces and that authorities had a wide margin of appreciation, because the messages of the Raëlien Movement were capable of offending the religious and moral feelings of the public. The Government once again raised human cloning, geniocracy and "sensual awakening" as messages in direct confrontation with law, democratic principles and public "mores". Also, the ban had been limited in scope as it extended only to the poster and not to the website, nor any other activity or information.[240] A third party intervener, a freedom of speech NGO, argued that it was always disproportionate to prohibit a message referring to a website if the website was legal.[241]

According to the Court, the ban did without any doubt constitute interference. As the restriction was based on the local regulations and since the applicant had never disputed that the municipality had sought to prevent crime, protect morals and the rights of others, the Court concluded that the interference had been prescribed by law and served legitimate aims.[242]

As far as necessity was concerned, the majority noted that poster space was generally regulated and not open to everyone.[243] The margin of appreciation was broad, because the posters of the applicant were not political but closer to commercial speech. In such cases, the national judges were better equipped to rule on "necessity".[244] Hence, only very serious reasons could lead to overturning them.[245]

The Court, hence, turned to proportionality and whether the reasons given by the national authorities were "relevant and sufficient".[246] Taken together, all the facts convinced the Court that there was a pressing social need to ban the poster,

237 *Ibid.*, paras 28-31.
238 *Ibid.*, para. 33.
239 *Ibid.*, paras 34-37.
240 *Ibid.*, paras 39-45.
241 *Ibid.*, para. 47.
242 *Ibid.*, paras 49-55.
243 *Ibid.*, para. 58.
244 *Ibid.*, paras 62-63.
245 *Ibid.*, para. 66.
246 *Ibid.*, para. 69.

and the measure was proportionate because it did not involve the website or the Association itself. It saw no reason to substitute its own assessment for that of the Federal Court.[247] Also, the GC saw no reason to depart from the Chamber's finding that a separate analysis under Article 9 was not necessary.[248]

Judge Bratza agreed with the majority opinion. He found it important to stress that here there was no general prohibition, but a limited interference. It was the limited nature of the interference that led to the conclusion that there was no violation. Restricting a poster which referred to a website was much less of an interference than prohibiting a website, which required stronger reasons.[249]

The group of 7 dissenters led by Tulkens noted that the speech in question was neither commercial nor political, but did concern issues of public interest. They then approached each of the "controversial" messages one by one. The scientific atheism in the dissenters' view fell under the ambit of Article 9. The human cloning was one of those opinions which "offend, shock and challenge the establish order" and thus attracted the protection of the freedom of expression. Geniocracy ran counter to the Convention concept of a democratic society. But it was a utopia, not a concrete political project. Therefore, case law concerning political parties did not apply. With regard to the "sensual awakening", the dissenters found no evidence of clear and imminent danger regarding pedophilia. If there was, the Association could/would have been banned earlier; it had existed since 1977. The dissenting judges also noted that posters of the movement had not been banned in other places in Switzerland. While it has been accepted case law that a situation may vary within a member state, the prevention of abuse of children was certainly not greater in Neuchatel than elsewhere.[250]

Tulkens et al. found the reasoning concerning the limited scope of the interference paradoxical. If the reason for banning the poster was the reference to the unbanned website, this was not a limited interference.[251] There was also a certain view regarding the use of public space represented in the majority opinion, which the dissenting judges rejected. In public spaces, the neutrality of the state should be even greater than elsewhere. The majority judgment seemed to suggest that authorities were free to restrict expression in public space of messages they disagreed with.[252]

Sajó, Lazarova Trajkovska and Vučinić agreed with the first group of dissenters, but were most concerned by the "new standard" set by the majority in this case: the category of speech which was non-political, but "quasi-commercial" and less protected. In their view, it meant the diminishment of freedom of expression "in respect of the world view of a minority". That the speech was restricted to protect "prevailing

247 *Ibid.,* paras 72-76.
248 *Ibid.,* paras 78-80.
249 *Mouvement Raëlien Suisse v. Switzerland*, app. no. 16354/06, *supra* n. 234, *Concurring opinion of Judge Bratza*, paras 4-5.
250 *Mouvement Raëlien Suisse v. Switzerland*, app. no. 16354/06, *supra* n. 234, *Dissenting opinion of Judges Tulkens, Sajó, Lazarova Trajkovska, Bianku, Power-Forde, Vučinić and Yudkivska*, paras 2-7.
251 *Ibid.,* para. 9.
252 *Ibid.,* para. 11.

opinions of the local authorities and, perhaps, the majority of citizens of Neuchâtel" was incompatible with the goals of the Convention.[253]

The arguments given by Sajó et al. may be summarized as follows. The speech on the poster portrayed a world view. Hence, the standard of protection for non-commercial speech should apply. Public spaces required an even greater neutrality on the part of the state as impartial organizer of pluralism. In reference to allegations: "[r]eligious organizations are not banned in a democracy because some of their members commit crimes". Even if the website had a link to Clonaid which praised illegal cloning research, "[a] advocacy of criminalized behavior in the form of requesting legalization is not an inducement to crime". Furthermore, the link referred to a website which contained much more information that could be found with any search engine. The majority relied on a mosaic of facts when referring to "all the circumstances of the case", which introduced another new standard.[254]

In conclusion, the four dissenters argued that the Court had breached its obligation regarding European supervision: "The undeniably better knowledge of local circumstances and sensitivities" which point toward local authorities "must not become a fig-leaf for acquiescence in bigotry".[255]

Dissenting Judge Pinto de Albuquerque also used strong language. In his view, public space should be used as a public forum for all ideas including those that run counter to the majority opinion. The case should be reviewed under the negative obligation of the state not to interfere. Because the censorship in question was content based, the margin of appreciation should have been narrow. The margin was also narrow where content of websites on the internet is concerned. The speech was not commercial. It related to science, religion, politics and social issues and was therefore a "*Weltanschauung*".[256]

Regarding the proportionality test, he argued that the national authorities had ignored the applicable standard of clear and present danger. The Association had never been involved in any unlawful activity. Hence, the standard of proportionality was not met. Like the other dissenters, he criticized seeing "necessity" where no reference was made to a legal website. Also, the fact that in other cities in Switzerland the posters were allowed pointed to the absence of necessity. The limited scope of the interference was an excuse to interfere without a sufficient reason. Furthermore, banning the poster by reference to the website put the Association in uncertainty regarding a possible future ban on the website. In sum, he believed the "facts show an inadmissible pattern of content-based discriminatory conduct of public authorities towards a minority". "Content-based expression control ends up as pure speaker-based discrimination." Such "State conduct inevitably produces a chilling effect […] in regard to any person wishing to communicate ideas not shared by the majority."[257]

253 *Mouvement Raëlien Suisse v. Switzerland*, app. no. 16354/06, *supra* n. 234, *Dissenting opinion of Judges Sajó, Lazarova Trajkovska and Vučinić*, para. I.

254 *Ibid.*, paras II- IV.

255 *Ibid.*, para. IV.

256 *Mouvement Raëlien Suisse v. Switzerland*, app. no. 16354/06, *supra* n. 234, *Dissenting opinion of Judge Pinto de Albuquerque,* pp. 47-58.

257 *Ibid.*, pp. 64-67.

### 4.13 Sindicatul "Păstorul Cel Bun" v. Romania [2013]

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|---|---|
| Essence: | Refusal of registration of labor union for employees of Orthodox Church. |
| Dimension: | Freedom of religion and belief and group autonomy. Freedom of religion and belief and secularism. |
| Lower courts: | Court of first instance registered the applicant. County Court found against applicant. Chamber found claim admissible and a violation. |
| Majority: | 17:0 Interference with freedom of association 11:6. Interference was justified. Separate concurring opinion of Judge Wojtyczek. |
| Dissenting: | Joint dissenting opinion of Judges Spielmann, Villiger, López Guerra, Bianku, Møse and Jäderblom. |

The applicant in this case was a trade union, albeit potential trade union formed by priests and laymen of the Romanian Orthodox Church, called Păstorul cel Bun ("The Good Shepherd"). In accordance with Romanian law, the trade union had applied for registration with the Court of First Instance. The court registered the applicant. However, the Archdiocese of Craiova, which had intervened in the proceedings, filed an appeal. It requested annulment of the registration because the union had not received permission from the archbishop as required by Church rules. These internal rules were binding, given the legal status of the Church statute.[258] The County Court consequently allowed the appeal and found in favor of the Church. It ruled that allowing a trade union undermined the Church autonomy granted by the Constitution and national law.[259]

The applicant thus lodged their application with the ECtHR. The Chamber found the application admissible. It also found an interference with Article 11, the freedom of association, for which there was no justification as there had been no pressing social need in a democratic society.[260]

The GC unanimously found that Article 11 applied, and by a vote of 11 to 6 found no violation. Judge Wojtyczek issued a concurring opinion. The dissenting judges on the question issued a joint opinion.

In its assessment of relevant law and practice, the GC noted, among other things, that there were already two trade unions within the Romanian Orthodox Church. It also noted that standing Romanian case law provided that civil law including labor law was restricted, though not fully restricted in its application to the Romanian Orthodox Church in accordance with legally guaranteed autonomy in internal matters.[261]

In a great number of states, there were already trade unions for employees of religious organizations, including the clergy. In the practice of the member states

258 ECtHR (GC), *Sindicatul "Păstorul Cel Bun" v. Romania*, app. no. 2330/09, 9 July 2013, paras 10-17.
259 *Ibid.*, paras 21-22.
260 *Ibid.*, paras 4 and 82-84.
261 *Ibid.*, paras 45-55.

with regard to labor relations in faith-based organizations, there were three different groups:[262]

1. Majority of member states: The law does not define the labor relationship between a faith-based community and clergy. They are free to enter employment contracts but do not need to, and in most cases do not. This is the majority of member states.
2. Minority of member states: labor law is applicable, but members of the clergy are required to observe a heightened duty of loyalty towards the religious community that employs them.
3. Belgium, the UK and the Netherlands: Courts decide on a case-by-case basis whether there is a contractual relationship according to labor law.

The applicants contended that after the Chamber judgment, their members had been put under severe pressure against which the Government had not protected them. Consequently, they argued that the Government had breached Article 34 (right to individual complaint, prohibition of hinderance/reprisals). The Government denied this. It also complained about the anonymity of several members of the applicant, in light of admissibility.[263] The GC found neither of these preliminary issues justified.[264]

The applicants argued that they were employees of the Church. If they were denied the right to form a union, this would compromise their rights under the freedom of association (Article 11). While accepting that church autonomy could be a legitimate aim, they argued that a difference should be made between the religious, civil and commercial activities of the Church. A trade union for Church employees would not interfere with the religious activities.[265] There were also two other trade unions within the Church and in other nations, trade unions of church personnel operated freely.[266]

The Government conceded that there had been interference, yet claimed this was justified under the limitations clause.[267] By virtue of the statute of the Romanian Orthodox Church and the Religious Freedom Act, the relationship between clergy and the church fell outside labor law.[268] The fact that the Trade Union Act did not explicitly exclude priests, could not amount to the recognition of a right. Furthermore, the applicants could set up a union, but only after prior consent from the bishop. Upholding this rule was legitimate and necessary given the church autonomy. The Government also argued that by becoming priests, individuals had accepted a different status to that of other employees and that the lack of European consensus favored a wide margin of appreciation.[269] A number of third parties intervened supporting

262 *Ibid.*, para. 61.
263 *Ibid.*, paras 62-67.
264 *Ibid.*, paras 73 and 80.
265 *Ibid.*, paras 87-91.
266 *Ibid.*, para. 93.
267 *Ibid.*, paras 95 and 100.
268 *Ibid.*, paras 95-96.
269 *Ibid.*, paras 101-109.

the Government's side. These were mostly churches and states, with similar church autonomy rules to Romania.[270]

The majority reiterated that Article 11 "affords members of a trade unions the right […] to be heard […], but does not guarantee them any particular treatment by the State. What the Convention requires is that under national law trade unions should be enabled […] to strive for the protection of their members' interests."[271] On the other hand, Article 9 "encompasses the expectation that the community will be allowed to function peacefully, free from arbitrary State intervention. The autonomous existence of religious communities is indispensable for pluralism in a democratic society […]." It also repeated the *Hasan and Chaush* line that if the organizational life of a religious community was not protected by Article 9, the individual rights under the freedom of religion and belief would become meaningless.[272] Finally, the GC repeated the *Şahin* finding that in matters of the relationship between religion and state, there should be a considerable margin of appreciation.[273]

The majority found that the applicant fell under the protection of Article 11(1). The nature of the relationship between clergy and laymen within the Church showed enough analogy with ordinary employment. The special nature of the relationship did not justify excluding it entirely from Article 11. Furthermore, even under Romanian law, employees of the Church could set up trade unions within the limits of internal Church rules. The refusal to register the applicant was therefore an interference which must be justified under the limitations clause.[274] The GC agreed with both parties that the refusal pursued a legitimate aim, namely protecting church autonomy.[275]

With regard to necessity in a democratic society, the Court observed that "a mere allegation by a religious community" of "actual or potential threat to its autonomy is not sufficient" to justify any interference with trade union rights. The limitation must not be used for more than what is necessary to guarantee "the exercise of the religious community's autonomy". "The national courts must ensure that these conditions are satisfied, by conducting an in-depth examination" and "a thorough balancing exercise between the competing interests at stake".[276]

The majority also noted that the state must show "[r]espect for the autonomy of religious communities". This implied acceptance of the "right of communities to react, in accordance with their own rules and interests, to any dissident movements emerging within them". It was therefore not the task of the national authorities to act as the "arbiter between religious communities and the various dissident factions that exist or may emerge within them."[277]

The majority found that the limitation was justified for the following reasons. The acceptance of a trade union would seriously "imperil the freedom of religious

270 *See ibid.*, paras 110-123.
271 *Ibid.*, para. 134.
272 *Ibid.*, para. 136.
273 *Ibid.*, para. 138.
274 *Ibid.*, paras 141-150.
275 *Ibid.*, para. 158.
276 *Ibid.*, para. 159.
277 *Ibid.*, para. 165.

denominations to organize themselves in accordance with their own traditions" and would "undermine the Church's traditional hierarchical structure". In Romania all religions were allowed to make their own internal rules and there was no special status for the Romanian Orthodox Church. Given the stated ambitions of the union, the refusal was reasonable in "view of the State's role in preserving such autonomy". State neutrality required the state not to become involved in the internal organization of the Church. Finally, the internal rules required the consent of the archbishop and the applicant had not put forward any reasons to justify its failure to request permission formally from the archbishop. There was nothing that prevented the setting up a trade union in accordance with the internal rules or joining one of the existing trade unions.[278] Finally, the Court reiterated the broad margin of appreciation in such cases.[279]

Judge Wojtyczek essentially argued that with regard to members of the clergy, there was no employment relationship with the Church. Therefore, it was "difficult to conclude" that part of Article 11 applied to them.[280]

The dissenting judges agreed with the majority that there had been interference. They argued that justifications must be narrowly construed. They did find the refusal to be proportionate or necessary in order to protect religious autonomy. After all, the applicant had explicitly stated willingness to "observe and apply ecclesial rules". The applicant only aimed at protecting its members' professional, economic, social and cultural rights and interests. It did not aspire to any authority or decision-making capacity within the Church.[281]

The dissenters then turned to the relationship with the Government. Registration alone could not have led to any disruption internally. Whether or not this would have been the case, would have to be determined in the future on the basis of actual facts instead of speculation on the intentions of the applicant. Refusing registration would only be justified if the program or goals of the applicant had been unlawful or in violation of democratic principles. Even after registration, the individual members would still have been subject to the internal rules of the Church, which would have secured the autonomy of the Church. Also, in concrete cases the rights of such a union under Article 11 could have been limited in light of the autonomy of the Church.[282]

Finally, the dissenters observed that the existence of the other two trade unions within the Church had not jeopardized the autonomy of the Church, nor was there evidence that this was the case with other churches elsewhere where such unions were required by law for the personnel of churches.[283]

278 *Ibid.*, paras 161-170
279 *Ibid.*, para. 171.
280 *Sindicatul "Păstorul Cel Bun"*, app. no. 2330/09, *supra* n. 258, *Concurring opinion of Judge Wojtyczek*, para. 7.
281 *Sindicatul "Păstorul Cel Bun"*, app. no. 2330/09, *supra* n. 258, *Partly dissenting opinion of Judges Spielmann, Villiger, López Guerra, Bianku, Møse and Jäderblom*, paras 2-7.
282 *Ibid.*, para. 8.
283 *Ibid.*, paras 9-10.

### 4.14 Fernández Martínez v. Spain [2014]

| | |
|---|---|
| Essence: | Married former priest dismissed as public school teacher upon proposal by Catholic Church. |
| Dimension: | Freedom of religion and belief and group autonomy. Freedom of religion and belief and secularism. Freedom of religion and belief and the educational system. |
| Lower courts: | National courts found against applicant. Chamber found no violation. |
| Majority: | 9:8. No violation, interference justified. |
| Dissenting: | Joint dissenting opinion of Spielmann, Sajó, Karakaş, Lemmens, Jäderblom, Vehabović, Dedov and Saiz Arnaiz. Joint Dissenting Opinion of Spielmann, Sajò and Lemmens. Dissenting opinion by Sajó. Dissenting opinion by Dedov. |

Mr. Fernández Martínez was ordained as a priest in the Catholic Church. While canon law requires celibacy for priests, he applied to the Vatican in 1984 for dispensation from celibacy. Dispensation was granted in 1997, after the events which led to the case. However, in 1985 he got married in a civil law marriage and since then had become the father of five children. From 1991 onwards, he worked as a public school teacher in Catholic religion and ethics. In accordance with a treaty between the Holy See and Spain, such appointments by state authorities required a proposal from the Church. The relevant treaty provisions had been incorporated into Spanish law.[284]

In 1996, a newspaper article was published about the "Movement for Optional Celibacy" for priests (MOCEOP). The applicant was an active member and the article, which featured him and others, was illustrated by a picture of him with his family. It also explained the movement's position on matters including celibacy, divorce, sex, contraception and abortion. When Mr. Fernández Martínez' contract came up for renewal in 1997, the Bishop informed the Ministry of Education that the Church would not propose renewal. Reference was made to the newspaper article and the fact that the relevant legal provisions referred to "scandal". The ministry subsequently did not prolong the contract.[285]

Mr. Fernández Martínez fought the decision from 1997, even though he retired from his new job in a museum in 2003. The national courts all found against him.[286] The Chamber found no violation of Article 8 (private /family life).[287] The majority of the GC found no violation affirming the Chamber's judgment. The eight dissenting judges issued one joint dissenting opinion. Judges Spielmann, Sajò and Lemmens also issued a separate joint dissenting opinion. Judges Sajó and Dedov each also issued separate dissenting opinions.

284 ECtHR (GC), *Fernández Martínez v. Spain*, app. no. 56030/07, 12 June 2014, paras 11-13 and 48-57.
285 *Ibid.*, paras 14-20.
286 *Ibid.*, paras 58-61.
287 *Ibid.*, paras 4 and 68-71.

The applicant argued that the Chamber had created a new absolute right of the Catholic Church to which his private and family life had been sacrificed. The Church had dismissed him on trivial grounds, while he had never challenged any of the Church's doctrine in class. In accordance with standing case law (*Hasan and Chaush*, see section 6.4.4) not every act motivated by religion or belief is protected. The non-renewal decision following the publicity given to the applicant's situation had clearly been disproportionate. The Government agreed with the approach and findings of the Chamber. It also pointed to the mandatory nature of the proposal made by the Church according to the legislation, which the ministry could not have ignored. Whilst his public position regarding Church policy fell within the applicant's right to freedom of expression, it was also true that it was at odds with the Church's doctrine and thus with the suitability of its teachers. All third-party interveners supported the Government's position and the Chamber judgment.[288]

The applicant had complained that both the Constitutional Court and the Chamber had relied on facts other than those established by the Employment Tribunal. The GC saw no reason to assume that this was so. Articles 8 to 11 were all relevant according to the GC. Article 8 covered the applicant's private, family and professional life. Article 9 protected his freedom of religion and belief. Articles 10 and 11 protected his right to express his viewpoints and his membership of the MOCEOP. But as the essence of his complaint was that he could not remain a teacher, given the family situation and his membership of MOCEOP, his case was examined under Article 8.[289]

Unlike the Chamber, the GC took the view that the relevant question was not whether the state's positive obligations prevailed over the autonomy rights of the Church. The central question was whether the Ministry of Education's enforcement of the decision of the Church was an interference and, if so, whether it could be justified. The majority and the dissenting judges agreed that there had been an interference with the applicant's private and family life. This interference was provided for in the relevant legislation according to the relevant standard and pursued a legitimate aim, namely that of protecting the rights and freedoms of others, i.e. the Catholic Church.[290] Hence, the central question was whether the interference was necessary in a democratic society.

According to the majority, the interference was necessary. The majority considered standing case law regarding the autonomy of religious communities which highlighted the vice-versa importance of the collective and individual dimension of the freedom of religion and belief. Article 9 did not contain a right to dissent, whilst the "State's role as the neutral and impartial organizer of the exercise of various religions, faiths and beliefs" mandated "public order, religious harmony and tolerance in a democratic society, particularly between opposing groups" (reference is made to *Hasan and Chaush, Şahin*, see sections 10.4.4 and 10.4.7). The "principle of religious autonomy prevents the State from obliging a religious community to admit or exclude an individual or to entrust someone with a particular religious duty". Finally, the relationship between church and state can and does differ greatly in democratic

288 *Ibid.*, paras 71-100.
289 *Ibid.*, paras 106 and 107-112.
290 *Ibid.*, paras 114-121.

societies, given the differences between member states (here reference is made to *Sindicatul "Păstorul Cel Bun"*, see section 10.4.13).[291]

The majority acknowledged that based on their autonomy, faith-based organizations may demand "a certain degree of loyalty from those working for them or representing them". There may be a heightened duty of loyalty in relation to a specific mission of the person concerned. However, a "mere allegation by a religious community that there is an actual or potential threat to its autonomy is not sufficient to render any interference with its members' rights" compatible with the Convention. The interference with individual rights to protect a community from a risk which was "probable and substantial" "should not go beyond what is necessary to eliminate that risk". Also, the substance of the individual right should not be affected. Revisiting *Sindicatul "Păstorul cel Bun*, the majority pointed to the national courts to balance this properly, based on the "circumstances of the case and a thorough balancing exercise between the competing interests at stake".[292]

Applying this to the case, the majority considered the following. The status of the applicant was unclear when the dismissal took place. He was married, still ordained as a priest and had not received dispensation. Yet, when he had first signed his employment contract, he had willingly and knowingly accepted a heightened duty of loyalty to the Catholic Church. While Mr. Fernández Martínez had not given publicity to his situation as a married priest, he had willingly cooperated with the media. This was also the case with regard to the publicity given to his membership of MOCEOP. Through this publicity, attention was drawn to the discrepancies between Church dogma and his personal opinions. While he was legally an employee of the state, this did not discharge him from the heightened loyalty. In the majority of CoE members, churches have co-decision or exclusive decision in the appointment of religious education teachers. While the sanction of the non-prolongment was severe, Fernández Martínez had knowingly placed himself in the situation which had triggered the decision. In addition, he was entitled to unemployment benefits.[293]

Finally, the majority found that the domestic courts had taken all these factors into proper consideration. Given the margin of appreciation in such cases, the conclusion was that the interference was justified and not disproportionate.[294]

The dissenting judges disagreed with this last assessment, while not disputing that the Catholic Church had autonomy rights under Article 9. The difference of opinion concerned the role of the state (Ministry of Education) as distinct from the Church institutions and their appreciation of Mr. Fernández Martínez from a perspective of canon law. The issue before the ECtHR, according to the dissenters, was not the bishop's decision, but that of the Ministry of Education. While the bishop's decision had led to the decision not to renew the contract, the decision itself was taken by the Ministry. According to the dissenting judges, the state could not absolve itself of its obligations by delegating decisions to non-state bodies (in this case the

291 *Ibid.*, paras 126-129.
292 *Ibid.*, paras 130-131.
293 *Ibid.*, paras 133-145.
294 *Ibid.*, paras 146-152.

Catholic Church). Notwithstanding the obligation to comply with the bishop's decision, the state was bound by the Convention.[295]

The dissenting judges disagreed with the majority about what triggers the rights under Article 8 in this case. While the majority saw the consequences of the decision as the trigger, for the dissenters it was the reasons for the decision. His private life situation was the direct cause of the dismissal. A "person's manifestation of his or her private and family life is covered by the right to respect for private and family life". The dissenters agreed that interference was the failure not to reappoint. But in their view, the ministry should have evaluated whether giving effect to the proposal by the Church would violate the applicant's rights.[296]

Unlike the majority, the dissenters were not convinced that the interference was provided for by law. However, as they found the decision to be faulted elsewhere, they did not take a firm stand. They agreed with the legitimate aim of the interference. The center of their criticism was the "necessity" of the interference.[297] "The autonomy of religious communities is not absolute." Courts should not examine the religious reasons of a decision taken by a religious body; they must "verify that such a decision does not produce effects that constitute a disproportionate interference with the fundamental rights". The duty of scrutiny was higher, given the effects of dismissal from employment and the fact that the actual decision was taken by a state organ.[298]

While the Ministry had rightly left the decision whether Mr. Fernández Martínez was still suitable to teach Catholic religion and ethics to the exclusive jurisdiction of the Church, it took no other action but not to renew the applicant's contract. According to the dissenting judges, it was the Ministry's action and inaction which deserved scrutiny by the courts, in light of the applicant's right to respect for his private life. "Whatever the applicant's situation might have been under canon law, from an outside perspective he was in any event to be regarded as mandated by the Catholic Church to teach Catholic religion. As far as his secular position was concerned, he was a teacher appointed by the Ministry and had entered into a contract with it."[299]

The dissenting judges also took the following into consideration. They believed that neither the Church nor the Ministry had followed a due decision-making process, denying the applicant the right to be heard and taking such a decision without prior warning. They also believed that the essence of dismissal was his private life situation as a married priest and member of MOCEOP. This touched on the essence of Article 8. Yet these circumstances had all been known to the Church long before the decision was taken. The dispensation from celibacy requested by the applicant had been granted (and thus answered) only 13 years after he had applied for it. Furthermore, there was no evidence which suggested that Mr. Fernández Martínez had ever disputed any Church dogma in his teachings. Finally, while perhaps he was no longer

295 *Fernández Martínez v. Spain*, app. no. 56030/07, *supra* n. 284, *Joined dissenting opinion of Judges Spielmann, Sajó, Karakaş, Lemmens, Jäderblom, Vehabović, Dedov and Saiz Arnaiz*, paras 5-8.
296 *Ibid.*, paras 10-13.
297 *Ibid.*, paras 14-17.
298 *Ibid.*, paras 21-22.
299 *Ibid.*, paras 24-27.

eligible as a Catholic religious education teacher, it was never considered whether he could have held another position in the educational system. In sum, the Ministry's reaction to the proposal was not proportional and thus Article 8 rights had been violated.[300]

Three of the dissenting judges, Spielmann, Sajò and Lemmens, also expressed the view that the case should also have been examined under Article 14 of the Convention, taken together with Article 8, or under Articles 9 and 10 of the Convention, taken separately or together with Article 14. This would have been justified if the Court had also found a violation of Article 8.[301] Judge Sajò in his separate dissenting opinion reaffirmed and reiterated some of the arguments in the joint dissenting opinion. He highlighted that the Court should have made explicit the limits of autonomy of religious communities. He also highlighted that the failure of solid argumentation by the Church made the state's ("as proxy of the Church") legal process inadequate.[302]

Judge Dedov took the most far-reaching approach in his separate dissenting opinion. He did not believe that there was an autonomy for religious communities, to be derived from Article 9, which allowed for interference with other human rights. "If the Convention system is intended to combat totalitarianism, then there is no reason to tolerate the sort of totalitarianism that can be seen in the present case." He also explicitly criticized the rule of celibacy as interference with fundamental rights such as the right to have a family.[303]

### 4.15 S.A.S. vs. France [2014]

| | |
|---|---|
| Essence: | Ban on face-concealing clothing. |
| Dimension: | Freedom of religion and belief and personal freedom. Freedom of religion and belief and secularism. |
| Lower courts: | Direct application. Chamber relinquished jurisdiction on behalf of the Grand Chamber. |
| Majority: | 15:2 No violation of Articles 8 and 9. |
| Dissenting: | Joint dissenting opinion of Judges Nussberger and Jäderblom. |

The case was triggered by the French general ban on full-face veils. The applicant was a Muslim who wore face-concealing clothing in accordance with her beliefs. The applicant emphasized the personal spiritual choice she made to wear *burqas* and/or *niqabs* (face coverings of different cultural origins) on certain occasions of religious importance. The applicant did not argue for a right to leave the covering on for security or identity checks, but felt restricted by the general ban.[304]

300 *Ibid.*, paras 21-38.
301 *Ibid.*
302 *Fernández Martínez v. Spain*, app. no. 56030/07, *supra* n. 284, *Dissenting opinion of Judge Sajó*, (especially) paras 4-5.
303 *Fernández Martínez v. Spain*, app. no. 56030/07, *supra* n. 284, *Dissenting opinion of Judge Dedov*.
304 ECtHR (GC), *S.A.S. v. France*, app. no 43835/11, 1 July 2014, paras 10-14.

The French ban followed a report by a parliamentary commission and was passed unanimously. The report found the practice to coincide with radical and/or fundamentalist outlooks and to be at odds with French values. The French Human Rights Commission advised against a general ban. The advisory opinion of the *Conseil d'État* drew the conclusion that a ban could be justified. The *Conseil constitutionnel* also found the ban permissible, except for places of religious worship. Shortly after entry into force, the Court of Cassation found against a protestor who had worn face coverings to protest the ban.[305]

The applicant applied directly to Strasbourg without any prior national proceedings. The Chamber relinquished jurisdiction on behalf of the GC. The Court unanimously found the application admissible. A majority of 15 judges found no violation of Articles 8 and 9. Judges Nussberger and Jäderblom did find a violation and issued a joint dissenting opinion.

The Government argued that the applicant was not a victim for Convention purposes. They argued that there was no evidence that she was a Muslim and that she wore face coverings for religious reasons. They also viewed the absence of national proceedings as decisive. The applicant argued in response that the requirement to prove religious affiliation and beliefs in itself was a violation of human rights, and that given her beliefs and practices she was a potential victim. Also, the legislative process and the case decided under the act made it clear that French judicial institutions would not find against the ban as such. The Court found that indeed the state's "duty of neutrality and impartiality is incompatible with any power on the State's part to assess the legitimacy of religious beliefs or the ways in which those beliefs are expressed".[306]

The Court also found that given the context, it was not necessary for the applicant to be herself charged with violating the ban, to be regarded a victim. The Court also dismissed the Government's assertion that the case was an abuse of the right of individual application, launched by activists. Concerning the claims of the applicant under the freedom of religion and belief, private and personal life and under the freedom of opinion, the Court found them to be admissible.[307]

While the underlying documents of the legislative process showed a desire to uplift women, the applicant argued that the ban had been motivated by "stereotyping and chauvinistic logic, that women who wore veils were 'effaced'". "True gender equality, argued the applicant, required to respect the own choices women make about the way they want to dress". Paraphrasing Canadian jurisprudence, without actual reference, she argues that a "truly free society was one which could accommodate a wide variety of beliefs, tastes, pursuits, customs and codes of conduct, and that it was not for the State to determine the validity of religious beliefs". Doubting that the aims pursued were legitimate instead of discrimination hiding under other considerations, she argued that, even if legitimate, they could have been pursued by other, less infringing means.[308]

305 *Ibid.*, paras 16-30 and 34.
306 *Ibid.*, paras 53-61.
307 *Ibid.*, paras 62-75.
308 *Ibid.*, paras 76-78.

Also, according to the applicant, the ban amounted to indirect effect discrimination as it distinguished in effect between Muslim women who believed that their religion required face covering and other Muslim women who did not share those beliefs and also Muslim men. The Government acknowledged that the ban was a limitation, but argued that it pursued legitimate aims and that it was necessary in a democratic society. The Government raised public safety, gender equality and the notion of "living together".[309] While the Belgian Government intervened on behalf of the French Government, all non-governmental interveners, academic institutions, and human rights organizations, supported the claimant's cause.[310]

The Court viewed choices regarding an individual's appearance in public or in private, including the choice of clothes, to be protected by the right to private life. The ban, being a measure which restricted the freedom, would therefore constitute an interference. As the ban mostly affected individuals who wore a face covering for reasons of religion and belief, the ban mainly raised issues under that right.[311] Given the scope and character of the ban, the applicant found herself in a situation of "continued interference", a notion which has been recognized in Strasbourg case law. Such interference must be justified under the limitations clause. As the ban was issued by law, the interference being "prescribed by law" was no dispute.[312]

While "public safety" which was raised as an aim expressly recognized in Article 9(2), the "respect for the minimum set of values of an open and democratic society" also invoked was not. Yet the Government in the pleadings relied on "protection of the rights and freedoms of others" which was an aim recognized in both Article 9(2) and Article 8(2). However, the purpose of gender equality was not accepted by the Court. A "State Party cannot invoke gender equality in order to ban a practice that is defended by women – such as the applicant – in the context of the exercise of the rights enshrined in those provisions, unless it were to be understood that individuals could be protected on that basis from the exercise of their own fundamental rights and freedoms."[313]

Furthermore, respect for human dignity cannot be raised to justify a blanket ban for face coverings in public places. While face coverings may be perceived as strange by some, they were "the expression of a cultural identity which contributes to the pluralism that is inherent in democracy". Views regarding covering and uncovering of the human body can vary greatly. Also there was no evidence before the Court that "women who wear the full-face veil seek to express a form of contempt against" others or society. However, the notion of "living together" could be linked to the legitimate aim of protecting the rights and freedoms of others. But because the notion could easily be abused when restricting rights, the Court must conduct a full examination.[314]

Reiterating the standing case law about the importance of the freedom of religion and belief for pluralism, the role of the state as impartial organizer of pluralism and

309 *Ibid.*, paras 79-85.
310 *Ibid.*, paras 86-105.
311 *Ibid.*, paras 106-108.
312 *Ibid.*, paras 110-112.
313 *Ibid.*, paras 115-119.
314 *Ibid.*, paras 120-122.

the individual and collective dimension, the Court pointed to the fact that limiting freedom of religion and belief may be necessary to assure peaceful coexistence in pluralist societies. But the views of the majority could not prevail at all times. After all "pluralism, tolerance and broadmindedness are hallmarks of a 'democratic society'". As far as striking the balance was concerned, the Court reaffirmed the standing case law regarding the margin of appreciation in state-religion relationships. This margin is wide, but goes hand in hand with European supervision by the Strasbourg institutions.[315]

Revisiting earlier cases on religious clothing, including *Şahin* (see section 10.4.7), the Court pointed to the fact that the face-covering veils were different from all the other religious clothing in the case law, given the fact they conceal the entire face, with the possible exception of the eyes.[316] The Court also found that unlike what the applicant was claiming, the prime motive of the ban seemed not to be to restrict a practice (wrongly) assumed to be forced upon women, but to enhance public safety and the rights and freedoms of others (i.e. the notion of living together). Because the ban was general and unlimited, it failed to be proportionate to the public safety aim, as specific requirements to remove religious clothing in certain situations would have been.[317]

But the majority of the Court found that the ban was justified by the aim of protecting the rights of freedom of others (i.e. living together). It was possible for the state to give a certain weight to social requirements in this regard, like being able to see someone's face for living together in the French context. Given the wide margin of appreciation in which the outcome of a national democratic process must be respected, and the fact that within Europe there was no common ground regarding the full-face veil, the majority found the overall blanket ban proportional for the purpose of the limitation test. However, it also acknowledged the fact that the ban had a disproportional effect on Muslim women and that the Islamophobic remarks which featured in the national debate were unreconcilable with the Convention.[318] Given the entire analysis, the Court also found that there was no violation of Article 14 either in conjunction with Articles 8 and 9 or alone.[319]

The dissenting judges, Nussberger and Jäderblom, acknowledged the careful balancing of the majority opinion. Nevertheless, they could not agree because in their view it "sacrifices concrete individual rights guaranteed by the Convention to abstract principles". They agreed with the majority that neither reference to equality, human dignity, nor public safety, could justify a legitimate aim. The notion of living together was too "far-fetched and vague" to be linked to the rights and freedoms of others for Convention purposes.[320]

The dissenters viewed the ban in light of a pre-supposed symbolic meaning of the full-face veil given to it in the legislative process. It was assumed to be an ex-

315 *Ibid.*, paras 123-131.
316 *Ibid.*, paras 132-136.
317 *Ibid.*, paras 137-142.
318 *Ibid.*, paras 143-158.
319 *Ibid.*, paras 160-163.
320 *S.A.S. v. France*, app. no 43835/11, *supra* n. 304, *Joined partly dissenting opinion of Judges Nußberger and Jäderblom*, paras 1-4.

pression of subversive and exclusivist sentiments. But the claimant argued that she wore it for personal spiritual reasons. The dissenters reminded the majority that no one had a right not to be "shocked or provoked". "Pluralism, tolerance and broadmindedness", as case law on freedom of expression shows, includes everyone's right to "shock, offend and disturb". No one may be forced into social contact against their will by a notion of "living together", especially since such notions were very dependent on subjective cultural interpretations. Altogether, no concrete rights and freedoms were protected by the ban.[321]

What was problematic in their view, was the majority's assessment that in the end "pluralism, tolerance and broadmindedness as hallmarks of a democratic society" would allow for subjecting the practices of a religious minority to mainstream views. The very attempt of the ban was to restrict pluralism to remove social tension instead of ensuring that competing groups tolerated each other. In any case, the ban was disproportionate because it was so broad and general. In the dissenters' view, the majority also wrongly concluded an absence of consensus in its "margin of appreciation" analysis, as the majority of states in Europe had chosen not to legislate, and international law and expert opinions were directed against blanket bans and thus towards a far more narrow margin. Because of the possible reoccurring nature, the effect on the women in question was substantial and the Government had failed to show why less restrictive means could not attain the goal.[322]

321 *Ibid.*, paras 6-10.
322 *Ibid.*, paras 13-24.

# Appendix II

# The freedom of religion in the three instruments

1 Canadian Charter of Rights and Freedoms
1.1 Preamble

Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law:

1.2 Section 1

The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society

1.3 Section 2

Everyone has the following fundamental freedoms:
a) freedom of conscience and religion;
b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
c) freedom of peaceful assembly; and
d) freedom of association.

1.4 Section 15(1)

Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

1.5 Section 25

The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including
a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and

b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.

1.6 Section 26

The guarantee in this Charter of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exist in Canada.

1.7 Section 27

This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.

2 South African Bill of Rights

2.1 Preamble

We, the people of South Africa,
Recognise the injustices of our past;
Honour those who suffered for justice and freedom in our land;
Respect those who have worked to build and develop our country; and
Believe that South Africa belongs to all who live in it, united in our diversity.
We therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to -
Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights;
Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law;
Improve the quality of life of all citizens and free the potential of each person; and
Build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations.
May God protect our people.
Nkosi Sikelel' iAfrika. Morena boloka setjhaba sa heso.
God seën Suid-Afrika. God bless South Africa.
Mudzimu fhatutshedza Afurika. Hosi katekisa Afrika.

2.2 Section 6

1) The official languages of the Republic are Sepedi, Sesotho, Setswana, siSwati, Tshivenda, Xitsonga, Afrikaans, English, isiNdebele, isiXhosa and isiZulu.

2) Recognising the historically diminished use and status of the indigenous languages of our people, the state must take practical and positive measures to elevate the status and advance the use of these languages.
3) a) The national government and provincial governments may use any particular official languages for the purposes of government, taking into account usage, practicality, expense, regional circumstances and the balance of the needs and preferences of the population as a whole or in the province concerned; but the national government and each provincial government must use at least two official languages.
   b) Municipalities must take into account the language usage and preferences of their residents.
4) The national government and provincial governments, by legislative and other measures, must regulate and monitor their use of official languages. Without detracting from the provisions of subsection (2), all official languages must enjoy parity of esteem and must be treated equitably.
5) A Pan South African Language Board established by national legislation must –
   a) promote, and create conditions for, the development and use of –
      i) all official languages;
      ii) the Khoi, Nama and San languages; and
      iii) sign language; and
   b) promote and ensure respect for –
      i) all languages commonly used by communities in South Africa, including German, Greek, Gujarati, Hindi, Portuguese, Tamil, Telegu and Urdu; and
      ii) Arabic, Hebrew, Sanskrit and other languages used for religious purposes in South Africa.

2.3 Section 7

1. This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.
2. The state must respect, protect, promote and fulfil the rights in the Bill of Rights.
3. The rights in the Bill of Rights are subject to the limitations contained or referred to in section 36, or elsewhere in the Bill.

2.4 Section 9(3)

The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

## 2.5 Section 15

Everyone has the right to freedom of conscience, religion, thought, belief and opinion.
Religious observances may be conducted at state or state-aided institutions, provided that –

a) those observances follow rules made by the appropriate public authorities;
b) they are conducted on an equitable basis; and
c) attendance at them is free and voluntary.

a) This section does not prevent legislation recognizing-
   i. marriages concluded under any tradition, or a system of religious, personal or family law; or
   ii. systems of personal and family law under any tradition, or adhered to by persons professing a particular religion.
b) Recognition in terms of paragraph (a) must be consistent with this section and the other provisions of the Constitution.

## 2.6 Section 31

1. Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community-
   a) to enjoy their culture, practice their religion and use their language; and
   b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.
2. The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights.

## 2.7 Section 36

1. The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-
   a) the nature of the right;
   b) the importance of the purpose of the limitation;
   c) the nature and extent of the limitation;
   d) the relation between the limitation and its purpose; and
   e) less restrictive means to achieve the purpose.

2. Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

## 3 European Convention on Human Rights and fundamental freedoms

### 3.1 Article 9

1. 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 worship, teaching, practice and observance.
2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

### 3.2 Article 14

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

### 3.3 Article 2, 1st Protocol

No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.

# Curriculum vitae

Florian H. Karim Theissen was born in Cairo, Egypt, to German diplomat parents. When he was 11 months old, the family moved to Germany. Florian spent his early childhood years in the federal state of Hesse, Germany. He spent his later childhood and early teens in New Delhi, India and Jakarta, Indonesia, before moving to The Hague, Netherlands, at age 16. He graduated from the German International School of The Hague with the German Abitur, before starting university in Leiden.

At Leiden University Florian completed his Bachelor in Dutch Law, and in 2003 completed two Masters degrees. One in European and International Law; one in Legal Theory and Philosophy. He also followed courses in Political Science. Subsequently he worked at Leiden University's Faculty of Law until 2006 as a junior researcher and lecturer.

In 2007 he started his career in public sector consultancy at consultancy firm Berenschot in Utrecht. From 2007 until 2015 he worked at Berenschot, PriceWaterhouseCoopers and KokxDeVoogd in various consultancy positions. In 2015 Florian and two colleagues started 'PROOF Adviseurs', a consultancy firm based in Rotterdam, which specializes in collaborative governance for collaborations on public impact goals. Their philosophy is to combine institutional, procedural and cultural/relation-oriented governance. The majority of their projects focus on collaboration at the local and regional level.

Florian has strong affinity with projects which focus on health and wellbeing, youth care, participation in the labor market and environmental sustainability. He enjoys projects which focus on process-management and/or advice concerning governance in complex multi-stakeholder environments. Currently he leads the firm as managing partner.

Florian has published articles and book-chapters related to the topic of his dissertation and his everyday work. He lives in The Hague with his wife and daughter.

In the range of books published by the Meijers Research Institute and Graduate School of Leiden Law School, Leiden University, the following titles were published in 2021, 2022 and 2023

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