

Religion in the classroom: Comparative observations

*Francois Venter**

1 Introduction

As a profound characteristic of humanity that cannot be circumvented or dismissed, faith, religion and religious practices are ubiquitous. There is a direct link between the propagation of religions and education. Despite the fact that faith is a matter of intensely personal conviction, religious practices inevitably have communal and public dimensions, whereby society is directly involved. Since religion is foundational to strong and often oppositional convictions, it is essential that the state as keeper of the social peace is involved in regulating the repercussions of religious practices in society. The question here is how successful the South African educational system currently is in its regulation of religion in the classroom for the purposes of maintaining balance in this multi-religious society.

When speaking of 'religion in the classroom' it is important to have a clear understanding of the meaning of religion and related concepts. The discussion below starts with some remarks on this theme, followed by a consideration of the linkage of state, religion and education against the background of the history of education. With reference to global trends of increasing religious plurality within states, brief reference is then made to international instruments before some constitutional approaches to religion in education are mentioned. This leads to the listing of essential demands made on the constitutional state for dealing with religion in education and finally an evaluation of the South African National Policy on Religion and Education.

2 The nature of religion and related concepts

As profound characteristics of humanity that cannot be dismissed, faith, religion and religious practices are ever-present in society. Ubiquity however does not

*Francois Venter, LLD, Dean, Faculty of Law, North-West University, Potchefstroom.

guarantee clarity. In fact, much can be said about placing, on an imagined continuum, a person's *Weltanschauung*, convictions, views, opinions, beliefs, faith, religion, loyalty, ethics, morals, culture, modality of worship and philosophy. Which one of these, or a combination of them, will determine the essentials of one's point of view? Arguments about this can hardly be conclusive, because every response will be related to the respondent's point of departure, which in itself is ineluctably determined by the individual's personal make-up.

What 'religion' entails, is no simple matter. John Witte¹ offers two approaches to the definition of religion, the first broad, the second more focused: In its broadest terms –

it embraces all beliefs and actions that concern the ultimate origin, meaning, and purpose of life, of existence. It involves the responses of the human heart, soul, mind, conscience, intuition, and reason to revelation, to transcendent values, to fundamental questions.

A narrower description is that religion embraces 'a creed, a cult, a code of conduct, and a confessional community'.² The broad definition is acceptable for dealing with religion as a phenomenon characteristic of the human condition, whereas the narrower description may be what is meant when one refers to 'a religion'.

'Faith' on the other hand is best understood to indicate that which a religious person believes. It is therefore subjective, personal, individual. It does become confusing when reference is made to 'a faith', in most cases intended to indicate an established or known religious system, since, in this sense, 'a faith' and 'a religion' are hardly distinguishable. For present purposes 'faith' will be used to indicate the subjective religious (in Witte's broad sense) belief.

Faith being a matter of such intensely personal conviction, it may be asked why it has such a powerful societal impact. The obvious reason is that one's faith is not merely related to one's understanding of one's own place in life, but of the origins, progress and future of everything within one's knowledge, experience, expectation and speculation. Such understandings are not established by the raw power of personal reason, but are developed on the basis of the individual's foundational life experiences, environment, parental and social teaching and social interaction.

'Belief' is an essential element of faith, but cannot be limited to the sphere of religion or confession. In general terms, 'to believe' really means to hold something

¹Witte *God's joust, God's justice – Law and religion in the Western tradition* (2006) 100-101.

²These elements he then goes on to describe in the following terms:

A creed defines the accepted cadre of beliefs and values concerning the ultimate origin, meaning, and purpose of life. A cult defines the appropriate rituals, liturgies, and patterns of worship and devotion that give expression to those beliefs. A code of conduct defines the appropriate individual and social habits of those who profess the creed and practice the cult. A confessional community defines the group of individuals who embrace and live out this creed, cult, and code of conduct, both on their own and with fellow believers.

to be true. Many mundane things, such as that rain falls from clouds, are believed as non-religious facts. The divine origins of clouds, weather, water and wind are however matters of religious belief. Faith in divinity presupposes belief.

'Confession' is an action closely associated with religious practice: it normally signifies a dogmatically structured religious system. Members of a particular confessional community share a confession, often in the form of predetermined formulae. Therefore mention is sometimes made to the confession of a particular religion. This is naturally to be distinguished from (although conceptually related to) 'a confession' made in court or to the police.

Thus one might go on to draw up a comprehensive thesaurus of terms related to religion. This is not presently called for, but it does indicate the need to be certain what is meant when one uses these various words and expressions.

Abstractly speaking, law and religion share certain characteristics: both are normative, call for obedience and are practised according to established procedures. Some significant differences lie in the nature of the coercive power inherent in each and the different forms of leadership required. Where law and religion are properly separated, disobedience to the norms concerned will lead – in the case of law – to direct sanction, and in the case of religion to less direct social consequences but certainly to believed transcendental consequences. An imperfect separation of law and religion brings about confusion and often both legal and religious injustice. Regarding the provision of leadership in the two spheres, a reading of the history of almost any society shows that in the less developed stages of a society, governmental (including legislative and judicial) and religious authority tend to be concentrated in the hands of the same person or people, whereas these elements of authority are eventually divided as societies become more developed and diversified. Thus, in many fully developed constitutional states of our era it has become unthinkable that the emperor is simultaneously *pontifex maximus* or that an elected president also chairs the synod of the most influential church. In fact, the separation of church and state is in some contemporary instances driven to absurd extremes in favour of an enforced belief in secularism which is falsely assumed to be neutral.³

It is hard to dispute the inherent need of the individual and society both for law and religion: law sets the primary parameters for one's conduct within society while religion addresses the irresistible human need to find explanations for the world. In 2000 the Constitutional Court put it this way:⁴

The result is that religious and secular activities are, for purposes of balancing, frequently as difficult to disentangle from a conceptual point of view as they are to

³Copley, cited by Watson 'Why religious education matters' in Barnes (ed) *Debates in religious education* (2012) 17 aptly posed the question: 'Why is it that we are on constant alert against religious indoctrination while at the same time almost completely unprepared for secularist indoctrination?'

⁴*Christian Education South Africa v Minister of Education* 2000 4 SA 757 (CC) para 34 per Sachs J.

separate in day to day practice. While certain aspects may clearly be said to belong to the citizen's Caesar and others to the believer's God, there is a vast area of overlap and interpenetration between the two. It is in this area that balancing becomes doubly difficult, first because of the problems of weighing considerations of faith against those of reason, and secondly because of the problems of separating out what aspects of an activity are religious and protected by the Bill of Rights and what are secular and open to regulation in the ordinary way.

Religion is not founded solely upon reason, but primarily upon belief, so it tends to be exclusive and under circumstances where different confessions co-exist in close proximity in a society, competitive. Despite the fact that love, tolerance and the pursuit of peace are frequent elements found in the teachings of the major religions, centuries of human warfare caused by or justified in the name of religion refutes any denial of the exclusivity and competitiveness of religion. This is where law (which incidentally is also not consistently based on rational thinking only) is called upon to keep the peace, especially under circumstances where religious plurality is a prominent feature of the citizenry of a state.

Religion is nothing if it is not practiced. Those with the same or similar religious convictions tend to practice their religion communally, at least partly. It follows that much energy is usually expended at home and in the religious community to propagate a particular religious doctrine and the underlying faith. Thus there is a direct link between the propagation of the practice of religion and education: in fact, the survival of any religious movement or doctrine is dependent upon teaching, especially children, the basic tenets of such a movement or doctrine. The vexed question in the diversified society of the 21st century is how religious and general education should be related to one another. Put differently: what is the place of religion in the education of children in a society where diversity of religious convictions and associations is constantly growing?

3 The state, education and religion

A key function of the state is to maintain social stability and peace. Religion and its manifestations in society, being founded on strong and often oppositional convictions, caused the state as keeper of the peace to be involved since time immemorial in regulating the consequences of religious practices in society. It is small wonder that freedom of religion is often said to be the first human right to have received recognition. What then should be the role of the state with regards to religious education, the regulation of religious practices in school and teaching in the classroom?

In modern times, that is, after the middle ages, education has not for very long been primarily the responsibility of the state. Little historical imagination is needed to assume that the education of the young started out as the passing on of knowledge and skills from parents to children, later becoming formalised as a community activity and, at least in the Western and Islamic worlds, eventually

an important task in which religious educators took the lead.⁵ As in other parts of the new world, that was the situation in South Africa in the first decades of colonial rule and the settlement of the interior.⁶ Education has however never been reserved for the state or parents or the church. Training, culture, belief, upbringing and imparting knowledge are all elements of education which can hardly be separated into silos. Elements of even the most remote historical phases in the history of education are woven into our present understanding of education and the main role players (parents, religious institutions, society, state) are still concerned with the nature, content and quality of education. None of these, including the state, has or should have a monopoly. Thus, for example, Elizabeth Lawrence wrote with reference to history:⁷

the Greeks, with their ideal of the whole man, and of education as concerned not with the intellect only, but with the good life, with wisdom. To the Greek and the Christian, education was as spiritual, not a commercial matter.

When considering the state-led governance of schooling in our day, one should not forget that the state as we know it today – as a consolidated entity which effectively exercises authority over most dimensions of human existence by means of nationally and regionally coordinated administrative and legislative infrastructure – really only emerged in the course of the 19th century and ripened throughout the 20th century.⁸ It may be that some of the Greek city states and empires founded in antiquity in the Middle East, Egypt, Rome, China and India were exceptions in this regard. Despite these classic examples having influenced modern thinking about the relationships between religion, culture, state and authority, the times immediately preceding the emergence of modern statehood saw a discontinuity in the development of the state and of its responsibility for education.

Thus it becomes useful to briefly consider the thinking which underpinned the shift of educational responsibility from local community and church to state in order to better understand the contemporary dilemma of religion in the classroom.

So much material is available on the history of the development of the modern state⁹ that it suffices here merely to emphasise the following characteristics of the contemporary constitutional state:

- judicially protected individual rights entrenched in a constitution;
- limitations on government regarding the exercise of its power; and

⁵Elizabeth Lawrence provides an interesting description of the history of education in *The origins and growth of modern education* (2007).

⁶Eg Roux 'European foundations shaping schooling in South Africa: Early Dutch and British colonial influence at the Cape' ch 4 in Booyse *et al A history of schooling in South Africa* (2011) 57-86.

⁷Lawrence (n 5) 21.

⁸Eg Venter *Global features of constitutional law* (2010) 11-29.

⁹An effort to present this in a compact form may be found in Venter *Constitutional comparison – Japan, Germany, Canada and South Africa* (2000) 8-15. Some more detail was provided in the same book *inter alia* 21-31, 59-79 and 195-200.

- delimitation of the sphere of authority legitimately allocated to the state and non-state entities.

An age-old theme particularly relevant here, is the 'separation of church and state'. This is another topic which has drawn much attention in the literature. It is commonly accepted that, in the European context (which has in recent centuries been hugely influential around the globe), the Peace of Westphalia of 1648 marks the establishment of the sovereign nation state, the freedom of religion and the subsequent growing separation between the authority of the state and the church, whatever form the latter may take.¹⁰ Article XXVIII of the Treaty of Westphalia, for example, provided that all who might demand it –

shall have the free exercise of their religion, as well in public churches at the appointed hours, as in private in their own houses, or in others chosen for this purpose by their ministers, or by those of their neighbours, preaching the Word of God.

Freedom of religion has since become a cornerstone fundamental right protected in constitutions, however not without limitations and always in a delicate balance with the rest of the entrenched fundamental rights. One competing right often afforded protection in recently adopted constitutions, such as the South African Constitution, is the right to demand from the state not only access to, but also the provision of, education.¹¹

According to Ward and Eden:¹²

State education systems, which began in Europe in the nineteenth century, became a feature of the nation state and the means of establishing nationalism and a commitment by the whole of society to the state.

They also quite correctly point out¹³ that globalisation has, since the second half of the 20th century, brought about a steady decline in the power of nation states to dictate educational policy in favour of 'the marketization of schooling and the development of education as consumerism to feed the requirements of the global marketplace'. In reaction to this trend, states tend in the 21st century to insist on controlling education through legislation and policies since their control over global commerce is declining steadily.

4 International perspectives on religious freedom

One of the most prominent consequences of globalisation is the unstoppable mobility of humanity brought about by, *inter alia*, the escalation of access to means of fast and mass global travel, unfettered access to information and

¹⁰A translation of the full text of the Treaty is available at http://avalon.law.yale.edu/17th_century/westphal.asp (accessed 2012-06-09).

¹¹Section 29 of the Constitution of the Republic of South Africa, 1996.

¹²Ward and Eden *Key issues in education policy* (2009) 2.

¹³*Id* 3.

expanding means of communication. The migration trends across the globe are significant. In this context a 'migrant' is understood to be someone living in a country where he or she was not born. William Lacy Swing, Director General of the International Organization for Migration (IOM), wrote in the foreword of the IOM's 2010 Annual Report:¹⁴

Ten years ago when we published our first *World Migration Report 2000* there were 150 million migrants. Now, the number of migrants has grown to 214 million, and the figure could rise to 405 million by 2050 ...

Migrants living in South Africa have almost doubled between 2000 and 2010.¹⁵

History clearly demonstrates the built-in risks for social stability in multi-religious populations. In a world where mono-religious countries are becoming rare or where the traditional prevalence in many countries of a single religion or compatible religions is dissipating, and the maintenance of social peace is becoming a growing priority for modern governments and civil societies. It is therefore to be expected that the protection of religious rights is an important theme in international law. Various well-known international and supra-national instruments exist in terms of which religious freedom is purported to be protected.¹⁶

Thus, for example, article 9 of the European Convention on Human Rights (Rome 1950) provides:

- 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 the protection of the rights and freedoms of others.

Similarly article 8 of the African Charter on Human and Peoples Rights of 1981 (the Banjul Charter) provides:

Freedom of conscience, the profession and free practice of religion shall be guaranteed. No one may, subject to law and order, be submitted to measures restricting the exercise of these freedoms.

More often than not the aims of directly opposing religious groupings are promoted by means of contesting interpretations of international instruments.

¹⁴International Organization for Migration *World Migration Report 2010* (2010) available at http://publications.iom.int/bookstore/free/WMR_2010_ENGLISH.pdf at xix (accessed 2012-05-18).

¹⁵*Id* 138: 1,022,000 migrants in 2000 and 1,863,000 in 2010.

¹⁶In addition to those cited in the text, see also art 18 of the Universal Declaration on Human Rights, art 18 of the International Convention on Civil and Political Rights, art 1(2) of the Declaration on the Elimination of all Forms of Intolerance and of Discrimination Based on Religion or Belief.

Thus, for example, the provision that 'no one shall be subject to coercion which would impair his freedom to have a religion or belief of his choice' in article 18(2) of the International Convention on Civil and Political Rights (ICCPR) and in article 1(2) of the Declaration on the Elimination of all Forms of Intolerance and of Discrimination Based on Religion or Belief is interpreted by some to guarantee the freedom of religious choice and by others as a prohibition on proselytism.¹⁷

In a similar fashion international fora are used by different groupings to promote specific religious positions. A prominent example is the campaign of the Organisation of Islamic Conference in the UN General Assembly, since 1998, to have resolutions passed to combat defamation of religion in order to counter measures limiting Muslim activities in countries where Islam is a minority religion.¹⁸

A prominent difficulty regarding the development of norms of international law on state-church relations is that whereas¹⁹ –

High Contracting States have to comply with international human rights which are codified within established international forums, these forums have no clear competence on the question of how to organize the state internally.

Nevertheless, the UN Human Rights Committee does not refrain from investigating internal state practices concerning religion.²⁰ Indicative of the subtle emergence of global norms, albeit in a 'soft' form, Temperman concludes²¹ that –

Though they may not be in a position to dictate in detail how states ought to organize their political system internally, their official interpretations and applications of internationally adopted fundamental norms could very well, in themselves, have a bearing on the legitimacy and, ultimately, the tenability of certain forms of political organization.

Various international instruments also relate the protection of religious freedom to educational rights. Thus article 26(1) of the Universal Declaration of Human Rights, which established a right to education, including free and compulsory education at elementary level, is followed by sub-article (3) which provides that parents have a prior right to choose the kind of education that their children receive. An elaboration of this right is found in article 18(4) of the ICCPR where states are constrained to maintain the freedom of parents 'to ensure the religious and moral education of their children in conformity with their own

¹⁷Taylor *Freedom of religion – UN and European human rights law and practice* (2005) 24.

¹⁸Paragraphs 5 and 7 of General Assembly Resolution 65/211 of 2009-12-18 *Combating defamation of religions* purported to note 'with deep concern the intensification of the overall campaign of defamation of religions, and incitement to religious hatred in general, including the ethnic and religious profiling of Muslim minorities in the aftermath of the tragic events of 11 September 2001' and to express 'deep concern, in this respect, that Islam is frequently and wrongly associated with human rights violations and terrorism'.

¹⁹Temperman *State-religion relationships and human rights law* (2010) 2.

²⁰*Id* 4.

²¹*Id* 339.

convictions'. Somewhat curiously these provisions focus on the rights of parents and are not concerned with the rights of the children.²²

5 Divergent state responses to the question of religion in the classroom

It speaks for itself that the manner in which a legal system deals with religion in the classroom is fundamentally determined by the prevailing constitutional doctrine, the history, composition and dynamics of the particular society and the influence in such a society of the religious movements and institutions active therein. In constitutional states where justice and equal treatment are pursued as desirable goals, finding a balance between the religious preferences of teachers, parents and their children is particularly problematic.

South Africa is in terms of its Constitution, as interpreted authoritatively by the Constitutional Court, a 'constitutional state'. Recent examples of *dicta* from the jurisprudence of the Court are (emphasis added):

the NPA Act expresses concern for constitutional rights. It does this out of recognition that South Africa is a *constitutional state*; a state founded on the respect for human dignity and dedicated to the pursuit of the achievement of human rights and freedom for all.²³

and:

In our *constitutional state*, comment on matters of public interest receives protection under the guarantee of freedom of expression.²⁴

The notion of the constitutional state was received into South African constitutional law from the German example. In contemporary comparative constitutional law the attributes of the constitutional state are generally considered to be desirable, especially in countries where liberal democracy underlies the constitutional foundations of the state. Having developed over centuries in Europe and North America, the effects of colonialism in the 19th century and the 20th century post-war dominance of Western politics and economic power, have

²²How to balance parents' religious rights regarding the education of their children and the rights and best interests of children is a notoriously vexed question. A recent example is the widely reported case in Köln, Germany in June 2012 where Muslim parents and a medical doctor who performed a circumcision on the parents' four year old son at their request were prosecuted for infant genital mutilation (available at <http://www.tagesschau.de/inland/beschneidung100.html> (accessed 2012-08-22)). The Court considered the procedure leading to permanent physical alteration to amount to people other than the child determining its religious affiliation. This has led to international uproar, especially in the Muslim and Jewish communities. For a sound South African and comparative perspective, see Robinson 'Children and the right to freedom of religion' (2004) *TSAR* 202. The issue cannot profitably be pursued in this paper.

²³*Thint v National Director of Public Prosecutions* 2009 1 SA 1 (CC) para 283.

²⁴Paragraph 84 of the judgment delivered 2011-04-08 in *The Citizen v McBride* 2011 ZACC 11.

caused liberal democratic thinking to become very influential in international discourse and has as yet not been replaced by any other approach. It has also been closely associated with the doctrine of the rule of law and now carries with it a wealth of meaning,²⁵ including the imposition on the state of the duty to ensure the protection and enforcement of the rights of all citizens and non-citizens.²⁶

As a matter of course the constitutions of contemporary constitutional states protect the various essential interests related to religious freedom and education, in most cases in the form of entrenched fundamental rights. These include the granting of rights to religious observance and expression, freedom of association, freedom of assembly and rights to cultural expression. However, constitutional protection and regulation, even where different constitutions express such protections in similar words and phrases, do not have a standardised effect. In fact, approaches vary widely in different jurisdictions and consistency of approach and application, even over time within jurisdictions, is hard to find.

These inconsistencies are caused by the complexity of the question how the structures of a society composed of adherents of diverse religious groupings should deal with the diversity. Ironically, it is impossible for social structures such as the state and its organs to avoid making choices concerning religious matters without committing themselves expressly or by implication to some premise based on a value-determined point of departure. Put differently, neutrality in these matters is unattainable, and a confession of neutrality is in itself a subjective position.

Nevertheless an assumed stance of neutrality is a typical (and popular) reaction to the difficulties facing the state, religious communities and individuals caused by the growing religious plurality of populations. A recent apologia for 'religiously neutral governance' is that of Temperman.²⁷ He casts it in the form of everyone's right that the state should be prohibited by law (constitutional and international) to discriminate directly or indirectly on grounds of religion or belief. Temperman's impressive comparative study of the manner in which states across the globe deal in theory and practice with religion and related matters, however, reveals how deeply intermingled law and religion are and how much historical and contemporary predilections will have to be overcome if religious neutrality is to be achieved in governance. In fact, religious neutrality appears to be beyond the reach of humanity and where it is propounded, it does not produce the sought-after results. Karl-Heinz Ladeur and Ino Augsberg identify²⁸ a global 'revitalisation of religion' including 'a re-politicisation of religion' and describe the approach of judiciaries as follows:

²⁵Venter 'South Africa: A Diceyan Rechtsstaat?' (2012) *McGill LJ* 1.

²⁶Eg, *De Lange v Smuts* 1998 3 SA 785 (CC) para 31.

²⁷Temperman (n 19).

²⁸'The myth of the neutral state: The relationship between state and religion in the face of new challenges' (2007) *German LJ* 143-152.

the neutrality principle increasingly serves yet another purpose. The courts use it as an exit-option in order to avoid addressing problems which appear to be too complex for the law relegating religion to sociological study. In this context, state neutrality merely functions as a chiffre for indifference. But this strategy of avoidance, though understandable in the light of the complexity of religious pluralism, undermines the law's function of conflict resolution.

Another particularly influential contemporary response to the challenges posed by the governance of multi-religious communities, is the designation of the state as being 'secular'. State secularism is, if not a cop-out, a profound philosophical (or even religious) stance. The promotion of secularism is therefore not as neutral as many an adherent would have it. In fact, secularism expresses a particular fundamental stance comparable to that of a religion, at least in its broad sense, founded in 19th century liberalism and positivism.²⁹ It has become ingrained in the language of the constitutional jurisprudence of leading liberal democracies such as Canada, France and the United States, often employed in vague and imprecise terms. To describe a particular state as being 'secular' has no precise meaning, and leads in practice to different outcomes. A useful distinction may be drawn between 'secularity' and 'secularism', the latter being a sceptical ideological stance usually critical of religion and everything associated therewith. State secularity may be described as an expression of the belief that the authority of the state and its commanding conduct should not to be explained in religious terms.³⁰ The origins and justification of state authority should however be considered to be the most profound question in law and politics, thereby rendering secularity thus defined equally ideological, if indeed not religious.

Writing from a Canadian perspective John von Heyking provided the following comment on secularism:³¹

Secularization has led to a brand of liberalism that posits religion as private and as the result of an arbitrary choice, which means that only liberal ideas may be regarded as rational and as the only principles allowed in public discourse. Further, secularism is often seen as an appropriate basis for public discourse at a time when Canada, and the public morality upon which it rests, are no longer predominately Christian. It goes further than the principle of non-sectarianism found in classical liberalism, when it is faced with the plurality of religions, because non-sectarianism favours no single religion, while secularism remains neutral between religion and irreligion, and even favours irrelegion. However, secularism's view that religion is merely a private and arbitrary choice makes it easier to suppress religion, whether by limiting religious freedom or by defining it in exclusively secular terms. Secularism undermines perhaps the most basic freedom upon which liberal democracy lies.

²⁹Von Heyking 'The harmonization of heaven and earth?: Religion, politics and law in Canada' (1999-2000) 33 *University of British Columbia LR* 663-697. Also Temperman (n 19) 139.

³⁰Temperman (n 19) 112, 140.

³¹Von Heyking (n 29) 665.

Neither neutrality nor secularism therefore provides the desired balance between the state's responsibility to maintain social order and religious freedom. A simple formula providing a universal solution useful in diverse societies is in fact inconceivable. Despite the relevance of the international human rights regime and the nuances of various constitutional approaches purporting to promote justice for all, insight into a desired approach may perhaps be gained by the simple means of considering what the individual, regardless of opinion or creed, might reasonably require of the state. This would imply an understanding on the part of the 'reasonable individual' of the difficulties facing the authorities of a state governing a multi-religious society, and on the part of the state authorities an acceptance of the need to develop a just and objective approach to the maintenance of social, including religious, order. The further development of an approach of this nature will have to be left for another occasion.

An exhaustive comparative exposition of the current status of what is traditionally (albeit inaccurately) referred to as the relationship between church and state as the background of the approach to religion in the classroom is not possible here. For present purposes it must suffice to paint a picture with broad strokes of the brush, selecting some representative examples.

Quite early in the constitutional history of the United States the notion of a 'civil religion' detached from any established religion and based on the elevated Constitution took root. Thus in 1839, for example, when the 50th anniversary of the inauguration of George Washington as first president was celebrated, John Quincy Adams stated enthusiastically:³²

Fellow-citizens, the ark of *your* covenant is the Declaration of Independence. Your Mount Ebal, is the confederacy of separate state sovereignties, and your Mount Gerizim is the Constitution of the United States.

The First Amendment (1791) to the American Constitution famously provides that 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof'. Over time many different interpretations have been given to these provisions. In broad terms the free exercise component is taken to include an absolute protection of religious belief, the protection of religious speech and the protection of religiously motivated conduct, the latter being the most controversial. The non-establishment component has been summarised by the Supreme Court in *Lemon v Kurtzman*,³³ in three parts, which has become known as the '*Lemon* test'.³⁴

³²Cited by House in 'A tale of two kingdoms: Can there be peaceful coexistence of religion within the secular state?' (1999-1999) 13 *Brigham Young University Journal of Public Law* 203-291 at 204.

³³403 US 602 (1971).

³⁴Laycock *Religious liberty* vol 1 (2010) 103-122 (containing an excerpt from *Religion in American law: An encyclopedia*).

First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an excessive government entanglement with religion.

The test did not resolve the vagueness of the notions around which it revolves, *viz* 'secular', non-advancement or inhibition and 'excessive government entanglement'.

Religion in education in the United States has since the end of World War II been a battlefield involving fierce politics, litigation and profoundly split court judgments and it does not seem to have produced concrete and lasting results. One of the outcomes has however been a bloom of private schools and home schooling where the limitations of the First Amendment cannot reach.³⁵

In contrast to the United States, a particular religion or church is explicitly favoured in some states and expressed in a variety of modalities, such as an official state religion (eg, as in Ireland and Greece) or a conceptual subsumption of law and governance under a particular religion (the Islamic Republics).

In its preamble the Irish Constitution unambiguously sets out the Christian convictions under which Éire is established.³⁶ At least nominally some other European states also award a special status to 'national' churches³⁷ as does Argentina.³⁸

In Greece, the Christian Eastern Orthodox Church is associated closely with Greek statehood and article 3 of the Constitution of 1975 provides *inter alia* that the 'dominant religion in Greece' is that of the Church. Proselytism is a punishable crime.³⁹

In the case of the Islamic Republics, the constitution and all law is made subservient to Shari'ah. Thus, article 2 of the Constitution of Pakistan provides that 'Islam shall be the State religion of Pakistan'⁴⁰ and articles 10, 22(a) and 25 provide as follows:

- 10 Islam is the religion of unspoiled nature. It is prohibited to exercise any form of compulsion on man or to exploit his poverty or ignorance in order to convert him to another religion or to atheism ...

³⁵See, eg, Carper and Hunt (eds) *The Praeger handbook of religion and education in the United States* (2009) especially 29-34.

³⁶BUNREACT NA hÉIREANN, 1937:

In the Name of the Most Holy Trinity, from Whom is all authority and to Whom, as our final end, all actions both of men and States must be referred,
We, the people of Éire,

Humbly acknowledging all our obligations to our Divine Lord, Jesus Christ,

Until 1972 the Catholic Church was expressly allowed a privileged constitutional status in Ireland.

³⁷Eg, the Church of England in the United Kingdom and the Lutheran Church in Norway.

³⁸Section 2 of the Constitution of the Argentine Nation of 1853 provides: 'The Federal Government supports the Roman Catholic Apostolic religion'.

³⁹Eg, *Kokkinakis v Greece* European Court of Human Rights case no 14307/88 (1993-05-25).

⁴⁰Hassan 'Religious liberty in Pakistan: Law, reality, and perception (A brief synopsis)' (2002) *Brigham Young University LR* 283-299, however, argues that Pakistan is essentially a secular state.

- 22(a) Everyone shall have the right to express his opinion freely in such manner as would not be contrary to the principles of the Shari'ah ...
- 25 The Islamic Shari'ah is the only source of reference for the explanation or clarification of any of the articles of this Declaration.

Despite the apparent radicalism of these provisions, Farooq Hassan⁴¹ argued in 2002 that Pakistan, in the practical application of the Constitution, tends towards secularism. He maintains that the Islamic emphases primarily serve the purpose of appeasing the lesser developed section of the population.

In Germany there is a well-established body of law regulating the relationship between church and state (known as *Staatskirchenrecht*). Among the established principles of *Staatskirchenrecht* are freedom of religion, the equality of all religions,⁴² neutrality of the state regarding religion, no church may be declared to be a national church nor may any religious confession be privileged.⁴³ Religious services and spiritual support (*Seelsorge*) in state institutions such as the military, hospitals and jails are expressly provided for,⁴⁴ and religious communities qualify to be granted the status of public juristic persons (*Körperschaften des öffentlichen Rechtes*) whereby state infrastructure is made available to the churches to raise 'church tax'⁴⁵ and church property used for religious purposes enjoy special protection.⁴⁶ Sundays are protected by law as days of rest from labour and for the purposes of spiritual worship.⁴⁷

Article 7 of the German Constitution (the *Grundgesetz* of 1949) deals extensively with school education as a basic right, providing amongst others that parents have the right to decide whether their children should receive the religious instruction forming part of the school curriculum drawn up in accordance with the doctrine of the religious community concerned.

South African society is one which demonstrates a very high degree of religious pluralism. Since the inception of the South African constitutional state in 1994, remarkable strides have been made towards the clarification of questions relating to religion in the classroom. The relevant constitutional provisions, legislation, policies and litigation on the matter have drawn an impressive volume of both descriptive and incisive scholarly comment.⁴⁸ Against

⁴¹*Ibid.*

⁴²Sachs *Grundgesetz kommentar* 2. Aufl (1999) Art 140 Randnr 7.

⁴³Sachs (n 42) (Kokott) Art 4 Randnr 5; *BverfGE* 1, 206 (216).

⁴⁴Article 141 *Weimarer Reichsverfassung* (WRV) as incorporated by art 140 of the German *Grundgesetz* of 1949.

⁴⁵Article 137 WRV.

⁴⁶Article 138 Abs.(2) WRV.

⁴⁷Article 139 WRV.

⁴⁸In addition to the sources of this nature cited elsewhere, see also *inter alia* Currie and De Waal *The Bill of Rights handbook* (2005) (5th ed) ch 15; De Waal, Mestry and Russo 'Religious and cultural dress at school: A comparative perspective' (2011) *PER* 62-95; Du Plessis 'Affirmation and celebration of the "religious Other" in South Africa's constitutional jurisprudence on religious and

that background the following summary of the current position may be offered:

- The Constitution does not prohibit or discourage the practice of religion in school.⁴⁹
- The South African Schools Act explicitly allows religious observances in public schools under rules made by the governing body of the school concerned.⁵⁰
- A detailed policy on religion and education exists, in which religion education, religious instruction and religious observances are dealt with in some detail.⁵¹
- Authoritative judicial guidelines have been provided on matters relating to religion in schools, in the context of litigation dealing with voluntary participation, corporal punishment, religious dress and limitations on the freedom of religion.⁵²

The South African constitutional approach is one which should promote religious tolerance. In the authoritative words of the Constitutional Court⁵³ –

religious and cultural practices are protected because they are central to human identity and hence to human dignity which is in turn central to equality.

Despite the attachment of descriptive terms such as ‘secular’ and ‘neutral’ associated with this approach by some commentators, it is to be doubted whether such descriptions are apposite. The following comment by Woolman and Fleisch,⁵⁴ particularly taking the political environment into consideration and written from a social democratic perspective, confirms this:

No iron wall exists between the public and the private, or the sacred and the profane, in South African politics. That said, the Constitution’s active encouragement of diversity and pluralism in the public realm does not diminish its equally aggressive commitment to the rooting out of discriminatory practices. As a result, the ability of communities to maintain institutions that rely upon exclusionary

related rights: Memorial constitutionalism in action?’ (2008) *African Human Rights LJ* 376-408 and Dickenson and Van Vollenhoven ‘Religion in public schools: Comparative images of Canada and South Africa’ (2002) *Perspectives in Education* 1-19.

⁴⁹Sections 15(2) and 29 of the 1996 Constitution.

⁵⁰Section 7 of Act 84 of 1996. In addition, s 21A of the *Gauteng School Education Act* 6 of 1995 provides *inter alia* that the religious policy of a public school determined by the governing body must ensure that the ‘development of a national, democratic respect of our country’s diverse cultural and religious traditions’ is promoted and that the MEC for Education is empowered to determine whether the policy conforms with this ‘principle’.

⁵¹This is discussed further in para 7 below.

⁵²In addition to the cases cited elsewhere, see also *S v Lawrence* 1997 4 SA 1176 (CC); *Wittmann v Deutscher Schulverein*, Pretoria 1998 4 SA 423 (T); *Prince v President of the Law Society, Cape of Good Hope* 2002 2 SA 794 (CC), and *Fourie v Minister of Home Affairs* 2005 3 SA 429 (SCA).

⁵³*MEC for KwaZulu-Natal v Pillay* 2008 1 SA 474 (CC) para 62.

⁵⁴Woolman and Fleisch *The Constitution in the classroom – law and education in South Africa 1994-2008* (2009) 59-60.

admissions or membership practices, and still receive state support, is, as a constitutional matter, quite limited. The egalitarian commitments of our basic law also suggest that community-based institutions that rely upon exclusionary practices, but which do not receive a penny of state support, must likewise ensure that they do not offend constitutional and statutory norms designed to promote the dignity of all South Africans.

6 Criteria for regulating religion in education in a constitutional state

In order to formulate criteria according to which a state should deal with religion in general, and more particularly with religion in education, the constitutional foundations of the state – mostly determined by the history of the state concerned and its citizens – must be taken as the point of departure. However, despite the key importance of constitutions, constitutional frameworks often do not guarantee consonant policies. Even where a constitution is consistent in its wording regarding its foundational values and principles, political reality often challenges those constitutional imperatives. It may in fact be argued that an underlying tenet of constitutionalism is the acknowledgment of the fact that those in power will tend to deviate from the prescripts of a constitution and therefore an effective constitution would provide for the means to curb the very human tendency of rulers to overreach the boundaries of regulated authority.

Although full consensus on the content and meaning of constitutionalism and the attributes of the constitutional state is unachievable, general agreement on the broad characteristics of the constitutional state does exist. For the purpose of developing criteria for the regulation of religion in education, the following essentials typifying a constitutional state are relevant:

- The state is required to ensure the equal protection of the rights of all its citizens, including those relating to religion.
- The requirement of equal protection of rights precludes the state from affording one or only some religions, religious institutions or worldviews preferential treatment or protection.
- The state's authority to curb or limit the exercise of religion is necessary, but only permissible for the purposes of protecting the legitimate interests of the population and the maintenance of social order.

These essentials have the following practical implications:

- While the notion of a 'national church' or a preferred religion is inconsistent with constitutionalism, the banishment of religion from state activity, that is, the purging from the state of anything related to religion, is not required.
- The juridical balancing of religious interests may not be based on religious, ideological or other subjective considerations (of which a claim

of 'neutrality' is one), but must result from demonstrable objectivity.⁵⁵

- Bland, generalised measures may under some circumstances have unjust consequences for some or all legitimate religious interests.

As has been suggested above, a credible criterion for the regulation of matters of a religious nature, including religion in the classroom, may be the objective consideration of what the individual, regardless of opinion or creed, might reasonably require of the state. The application of such a criterion would obviously not be without its difficulties: it would require objectivity on the part of the state and reasonableness on the part of the individual. Development of the criterion will entail acceptance of the position that neutrality is not objectivity, that secularism is neither neutral nor objective and that the reasonable religious citizen would be one that is also tolerant of other religions. The current South African constitutional and legal arrangements provide some scope for the development of such a criterion for a just approach of the state towards religion but it must also be noted that government policies are driven by politics, rendering policies subject to the vagaries of incumbent political role-players. Consistency of policy is therefore not fully guaranteed by the Constitution.

7 Evaluation of the South African policy regarding religion in the classroom

In 2003 the Minister of Education (at the time Professor Kader Asmal) determined the National Policy on Religion and Education (the Policy).⁵⁶ The Policy is a wordy document containing a ministerial foreword, an introduction, the policy itself, a conclusion, a list of definitions and a National Curriculum Statement (Grade R-9) on 'Religion Education'. It is assumed here that all these elements of the Policy should be understood to be integral components thereof, none having more weight than others. Key elements of the Policy include the following:

- Religious instruction in school as part of the formal school programme is prohibited, but encouraged in school facilities subject to certain limitations.
- Religion education is regulated as part of the 'Life Orientation Learning Area'.
- Regarding religious observances in school extensive provision is made with a view to allow such observances in the context of schools, requiring

⁵⁵According to Langa CJ in *Pillay* (n 53) para 65: 'That falls short of our constitutional project which not only affirms diversity, but promotes and celebrates it. We cannot celebrate diversity by permitting it only when no other option remains'.

⁵⁶Promulgated in terms of s 3(4)(l) of the National Education Policy Act 27 of 1996 in GN 1307 in GG no 25459 of 2003-09-12.

the acknowledgment of religious diversity and promoting voluntary participation in such observances.

The following passages from the Policy are representative of the approach in the document regarding religion and education:

We do not have a state religion. But our country is not a secular state where there is a very strict separation between religion and the state.

The Policy recognises the rich and diverse religious heritage of our country and adopts a co-operative model that accepts our rich heritage and the possibility of creative inter-action between schools and faith whilst, protecting our young people from religious discrimination or coercion.

What we are doing through this Policy is to extend the concept of equity to the relationship between religion and education, in a way that recognises the rich religious diversity of our land.⁵⁷

The state must maintain parity of esteem with respect to religion, religious or secular beliefs in all of its public institutions, including its public schools.⁵⁸

This policy for Religion and Education upholds the principles of a cooperative model for relations between religion and the state, by maintaining a constitutional impartiality in the formal activities of the school, but encouraging voluntary interaction outside of this.⁵⁹

As a general conceptual framework for a policy, these passages set out the choices that were apparently made clearly enough. However, where the Policy deals with 'religion education', some ideological choices were clearly made. Despite the Policy's protestation that it 'does not promote religious relativism, religious syncretism, or any other religious position in relation to the many religions in South Africa and the world',⁶⁰ teachers responsible for the curricular programme of 'religion education' are, at least by implication required to subscribe to certain value-laden choices. These include 'the constitutional values' of citizenship, human rights, equality, freedom from discrimination, and freedom of conscience, religion, thought, belief, and opinion⁶¹ and certain 'core values in education' including equity, tolerance, multilingualism, openness, accountability, and social honour.⁶²

Many may consider these 'values' to be self-evident characteristics of a sound society. However, what is being required is for the teacher to subscribe to the listed 'values' when teaching about religion and faith. Religious belief is after all the product of believers' profound views and understanding of the world. The Policy's demand on the teacher is to propound the listed values regardless

⁵⁷From the Minister's Foreword to the Policy.

⁵⁸Paragraph 64 of the Policy.

⁵⁹Paragraph 71 of the Policy.

⁶⁰Paragraph 68 of the Policy.

⁶¹Paragraph 11 of the Policy.

⁶²Paragraph 14 of the Policy.

of the nature of the values underpinning the teacher's own beliefs or those characteristic of the various religions about which the children are to be taught. Requiring a teacher thus to discard or suppress personal belief in their teaching⁶³ amounts to a demand for the impossible.⁶⁴ An obvious example would be how the teacher should deal with equality as a guiding value when teaching the facts about various religions notorious for their dogmatic stance on matters of gender which, measured in terms of liberal-democratic doctrine, must be labelled discriminatory. After all, the Policy justifies "religion education"... by its contribution to the promotion of social justice ...'.⁶⁵

Not only teachers, but by implication the children also are required to set aside their religious convictions in favour of something approaching the civil religion advocated in 1839 by John Quincy Adams for the USA, in effect, elevating the values of the Constitution to the level of everyone's 'ark of the covenant'. In the education of very young children this amounts to state indoctrination. In the case of children having developed their own religious sensibilities (often occurring at a tender age), the Policy requires teachers regardless of their own conviction to infringe upon the religious freedom of the children they teach by promoting neutrality regarding religion and by inculcating a 'civil religion'.

Another impossible choice that the Policy requires teachers, school governing bodies, children and their parents to make, is to respect not only all religions, but also all other 'worldviews'.⁶⁶ Despite the ostensible attempt to promote objectivity regarding religion in the classroom and the school, the result is an effort to impose unachievable neutrality in teaching about religion. This is a situation which does not pass constitutional muster. The Constitutional Court has made the position quite clear:⁶⁷

the State should, wherever reasonably 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.

The verbosity of the Policy is in a sense its saving grace (no pun intended). Grasping the intent reflected by the document demands interpretative skills that are normally not required of school teachers. This is not to say that the members of the teaching profession are generally incapable of dealing with complex documents. It is merely stating the obvious fact that no one called upon to teach about religion in

⁶³Paragraph 35 of the Policy.

⁶⁴According to the Constitutional Court in *Pillay* (n 53) para 95: 'It is no doubt true that even the most vital practice of a religion or culture can be limited for the greater good. No belief is absolute, but those that are closer to the core of an individual's identity require a greater justification to limit'.

⁶⁵Paragraph 18 of the Policy.

⁶⁶Paragraphs 3, 5, 14 (in the description of the 'value' of tolerance), 19, 21, 69 of the Policy and in its definition of 'religion' as including 'certain worldviews'.

⁶⁷*Christian Education South Africa v Minister of Education* 2000 4 SA 757 (CC) para 35.

terms of the Policy will be able to conform to its demands. Consequently, the inevitably subjective interpretation may either promote, against the stated intention, to be either 'negative nor hostile towards any religion of faith',⁶⁸ a sterile approach to religion education, or an acceptance that the impracticability of the Policy leaves the school to follow a route to suit the particular school community.⁶⁹

Applying the criteria set out above for regulating religion in education in the constitutional state, the following evaluative remarks regarding the Policy may be offered:

- A credible attempt was made with the formulation of the Policy to provide equal protection of religious rights.
- The Policy does not promote or undermine any specific religious institution or denomination. However, were the Policy an effectively enforceable instrument, the design of 'religion education' is such that it would have promoted a secular or non-religious understanding of the world in the classroom.
- The limitations imposed on schools by the Policy regarding religion in the classroom, viz that confessional religious instruction is prohibited, are bland and therefore ineffectual. However, allowing religious observances in school facilities limited by considerations of voluntary choice and equity among religions, is, despite some confusion in the wording,⁷⁰ consistent with the requirements for a constitutional state.
- The terms of the Policy regarding 'religion education' would, if they were effectively enforceable, have amounted to unjust religious discrimination by the state in the name of a supposed neutrality, in effect in a secularist manner, against all involved in school education.

8 Conclusion

Given the dominant role that the state currently has in the provision and management of education, it is crucial to find clarity on how this should be done in this era of rampant globalisation and the concomitant increase of religious plurality. How the legal regulation of religion in the classroom is currently dealt with in different parts of the world produces the overall impression that satisfactory solutions are sorely lacking.

⁶⁸Last paragraph of the Minister's Foreword.

⁶⁹According to Van der Walt 'Religion in education in South Africa: Was social justice served?' (2011) *South African Journal of Education* 381-393, this is exactly the route that is being followed in many instances.

⁷⁰Paragraph 61 of the Policy, eg, allows religious observances to be held at any time determined by the school, even as part of a school assembly, but para 55 prohibits religious instruction as part of 'the formal school programme' of which assemblies presumably form part in terms of the definition of 'the school day'.

In South Africa the Constitution provides clear guidance in the form of religious accommodation, tolerance and impartiality as requirements for state conduct. However, to date a leaning towards secularism is visible in legislation, adjudication and policy-making. The national policy on religion in the classroom is partly consonant with the guidance that should be taken from the Constitution, but also contains elements, specifically relating to the teaching of or about religion that are either so vague or confusing that they cannot be made effective. The Policy also suggests a preference for secularity which, if satisfied, would be prejudicial to the constitutionally protected rights to religious freedom. If tested judicially, this aspect of the Policy should be found to fail the standards of constitutionality. The circumstance that the enforcement of the secularist components of the Policy do not seem to be a priority for the educational authorities, may in due course allow the establishment of sound and sensible practices in schools that are practicable and in conformity with the Constitution.