

Religion in public schools: Comparative images of Canada and South Africa

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Abstract

This article examines the common roots of Canada and South Africa in order to explore issues regarding the role and place of religion in public schooling in both countries. Not only do Canada and South Africa share a common religious heritage that explains the historical prominence of Christianity in their school systems, but they also share the recent introduction of constitutionally entrenched human rights documents granting freedom of religion and the right to non-discrimination. The authors discuss how the introduction of the Canadian Charter of Rights and Freedoms in Canada has had an impact on policy and practice regarding religious exercises and curriculum in schools, and speculate about how new democratic constitutional values and the example of Canadian case law may help shape South Africa's approach to the place of religion in its schools.

Introduction

In this article we will focus on Canada and South Africa to consider some of the problems the relationship between education and religion poses in twenty-first century societies where human rights are at the core of the educational and political systems. In particular, we will highlight two especially contentious contemporary issues: religious observance and religious education in public schools.

Evidence of the prominent place of Christianity in English schooling can be found at least as far back as the eighteenth century, when the Bible was used as "the text" for study (Matthews, 1950, 1). Canada and South Africa share an important point in common: their school systems were developed during the nineteenth century when the two countries were under British colonial rule. The place of religion in schooling thus presents a useful and sensible point of comparison, especially as both nations have recently adopted entrenched human rights documents granting their citizens religious freedom and the right to be free from discrimination because of their religious beliefs and practices.

The Canadian case

A historical overview

The peculiar character of Canada's public school systems is a legacy of the nation's constitutional history. Canadian schools are characterised by a distinctive blend of modern secularism and selective public support for denominational education. There can be no denying, however, the powerful influence the church had in determining not only school curriculum but also the very structure of school governance contained in the Constitution itself. Under section 93 of the *Constitution Act, 1867*, exclusive power to make laws on education rests with the provinces in Canada. This plenary provincial power over education, however, is subject to certain protected denominational educational rights enjoyed by the religious minorities in the provinces at confederation in 1867. It has been observed many times, both by historians and Supreme Court of Canada judges, that confederation would probably never have occurred but for the political compromise that resulted in the ceding of power over education to the provinces, with the attendant protection of the denominational rights of the Catholic and Protestant minorities in Quebec and Ontario, respectively.

The meaning and impact of these denominational rights vary from province to province, largely due to the different dates and conditions under which the provinces joined confederation. Moreover, constitutional amendments within the last decade have meant these historical denominational rights have been eliminated in two provinces – Newfoundland and Quebec (Smith & Foster, 1999-00, 405-407). However, in this article, we are focusing on the situation in Ontario, Canada's most populous province, where the denominational school rights of the Roman Catholic minority still exist pursuant to section 93 and where, therefore, provincial laws impacting the place of religion in education are inoperative in Roman Catholic schools. Similarly, as explained later, freedom of religion and equality rights under the *Canadian Charter of Rights and Freedoms* cannot apply to Catholic schools in such a way as to abrogate denominational rights. Hence, the dramatic changes effected in Ontario by the *Charter of Rights* regarding religion in schools have been within the public (non-Catholic) school system. It is those changes that we examine below.

In the early nineteenth century political power was in the hands of those associated with the Church of England in Upper Canada (later Ontario). Given the immense input into local government exercised by the church in the province, it is not surprising that religion constituted a major dimension of the public school curriculum. As early as 1846, Dr. Egerton Ryerson, the architect and first chief superintendent of the public school system in Upper Canada between 1844 and 1876, issued a report devoting considerable attention to the advocating of the teaching of Christian morality in schools. It is clear from his report just how enormous was the role of religion in education in Ontario:

I do not regard any instruction, discipline, or attainments, as Education, which does not include Christianity. ... It is the cultivation and exercise of man's moral powers and feelings which forms the basis of social order and the vital fluid of social happiness; and the cultivation of these is the province of Christianity (Ryerson, 1846. In Hodgins, 1896-1910, 148).

It was imperative for Ryerson, who wished Ontario to avoid the worst of the sectarianism experienced in Europe, that this Christian instruction be of a non-denominational nature. Nevertheless, the message was clear: the moral template for Ontario schools was Ryerson's notion of a "common Christianity." In fact, a major theme in the history of public education in Ontario has been the ascendancy and decline of Christian influence in the province's schools.

In 1944 a society shocked by the moral wasteland of a horrific global war, demanded a return to Christian morality in the province's schools. In response, Ontario Regulation 30/44 mandated religious exercises and, for the first time, religious education in Ontario's public schools. In 1950, the *Report of the Royal Commission on Education in the Province of Ontario* (hereafter the Hope Report), which studied all aspects of education in the province, pointed out that the purpose of Regulation 30/44 was to indoctrinate public school learners in the Christian religion.

If the Hope Report reinforced the ascendancy of Christianity in Ontario schools, a subsequent report released in 1969, *Religious Information and Moral development: The Report of the Committee on Religious Education in the Public Schools of Ontario*, (hereafter the Mackay Report) reflected the moral relativism and secular Kohlbergian "values clarification" movement of the 1960s. According to Snowden (1993, 7) this report changed the emphasis in Ontario schools from "religious" to "moral" teaching. The Mackay Report opposed school opening and closing exercises that were doctrinal and indoctrinating. It also recommended that Scripture reading should be discontinued as part of these exercises.

The objections voiced in the Mackay Report over the inclusion of indoctrinating exercises and instruction in Ontario schools found legal expression in two landmark court decisions two decades later. Demographic changes provided the animus for the rejection of Christian hegemony in Ontario public life and the arrival of an entrenched *Charter of Rights* that included guarantees of religious freedom and equality provided the legal vehicle necessary to challenge the ascendancy of Christianity in public schools. We discuss these *Charter* challenge cases below.

The Canadian Charter of Rights and Freedoms

On 17 April 1982 Canada celebrated the arrival of a new Constitution with an entrenched *Charter of Rights*. It is useful, for present purposes, to consider those sections in the Charter which have religious implications.

True to the nation's European religious and political roots, the preamble to the *Charter* notes that Canada is founded upon principles that recognise the supremacy of God and the rule of law.

Section 1 guarantees all the rights and freedoms set out in the *Charter* within such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. Truly the policy crucible of the *Charter*, section 1 forces the courts to make judgments about important values issues in balancing individual rights with the collective welfare of society. The Supreme Court of Canada has established a test for applying section 1 that requires that a limiting law have a sufficiently important governmental objective, be rationally connected to that objective and be proportional in its impact on rights, given the importance of the legislative objective (impairing rights as little as possible) (*R. v. Oakes*, 1986).

Section 2 of the *Charter* protects the traditional civil liberties characteristic of western liberal democracies, including freedom of speech, expression, assembly association and religion.

The equality rights named in section 15 ensure that "[e]very 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" (emphasis added).

Under section 24 the courts may enforce all these rights; anyone whose rights and freedoms have been infringed or denied may apply to a court of competent jurisdiction to obtain a remedy, normally in the form of a declaration and an injunction.

Though not granting specific rights itself, section 27 states that "[t]his Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians." In other words, it provides a canon of construction for the rights and freedoms contained in the *Charter*. Designed to incorporate Canada's policy of official multiculturalism first announced in 1971 by Prime Minister Pierre Trudeau and formalised in the *Canadian Multiculturalism Act* of 1988, section 27 purports to celebrate the pluralism and egalitarianism of post-*Charter* Canada. However, the *Charter* paradoxically enforces the linguistic and denominational privilege enjoyed by historically dominant social groups – English speakers, French speakers and Christians. Section 29 makes it very clear that none of the rights in the *Charter* – including freedom of religion and equality rights – are to be applied to erode minority denominational school rights enjoyed by Catholics and Protestants in 1867. Similarly, minority language instruction rights guaranteed under section 23 of the *Charter* are limited to French- and English-speaking citizens of Canada.

Section 32 establishes the *Charter's* jurisdictional parameters, stating that it applies "(a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament ... and (b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province." "Thus, it has only 'vertical' application – between the state and individuals – and has no direct application to the private sector or between individuals ('horizontal' application)" (Beckmann, Foster & Smith, 1998-99, 168). This indicates that it is only with reference to legislation or government action that one can make application to the courts for redress under the *Charter*.

Finally, the supremacy of the Constitution, including the *Canadian Charter of Rights and Freedoms*, is addressed in section 52 of the *Constitution Act 1982*, which states that "any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect". This section arguably has effected a political revolution of sorts by vesting authority in the courts to invalidate, based on their own values and priorities, legislation duly enacted by the elected representatives of the people. The courts' power of nullification figured prominently in the *Charter* challenges to Ontario's opening exercises and religious instruction regulations, discussed below.

Statutes and regulations

Since, in Canada, education is a provincial matter under section 93 of the *Constitution Act, 1867*, there are ten distinct provincial education systems governed by individual provincial acts. As explained already, we intend to examine only the province of Ontario.

As recently as the 1990s the provisions in Ontario's education legislation dealing with the role of religion in the province's public schools still bore the imprint of Egerton Ryerson. In particular, and of most relevance to the present discussion, Regulation 262, section 28, provided for mandatory opening exercises that included devotional practices, such as Scripture reading and recitation of the Lord's Prayer, as well as mandatory religious instruction during the school day. Despite the historical imperative of inculcating Christian morality in Ontario's schoolchildren, the legislation included provisions for exempting the children of dissentient parents from religious exercises and instruction. The exemption provisions in Regulation 262 were consistent with the *Education Act*, itself, which were provided in section 50 (now section 51):

- (1) Religious instruction – Subject to the regulations, a pupil shall be allowed to receive such religious instruction as the pupil's parent or guardian desires or, where the pupil is an adult, as the pupil desires.

- (2) Religious exercises – No pupil in a public school shall be required to read or study in or from a religious book, or to join in an exercise of devotion or religion, objected to by the pupil's parent or guardian, or by the pupil where the pupil is an adult.

The exemption clauses were thought to be a sufficient safeguard of freedom of religion as it was understood in pre-*Charter* Canada.

With the enactment of sections 2(a) and 15 of the *Charter*, however, and the jurisprudence that soon emerged, the constitutionality of Ontario's religious education provisions fell into serious doubt. Under section 2(a) everyone has the fundamental freedom of conscience and religion. Section 15(1) ensures equality rights, which include the right not to be discriminated against because of religious beliefs or practices:

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 ... religion ...

Within eight years of the arrival of the *Charter* in 1982 section 28 of Regulation 262 was challenged on two fronts by parents who argued that the right to be exempted afforded an insufficient countervail to the Christian indoctrination mandated by the regulation. These two cases – *Zylberberg v. Sudbury (Board of Education)* (1986, 1988) ("Zylberberg") and *Corp. of the Canadian Civil Liberties Assn v. Ontario (Minister of Education)* (1988, 1990) ("Elgin County") – dealt a death blow to the aspirations of Ryerson and, after him, the 1950 Hope Commission, that Ontario be populated by citizens brought up with a "good Christian education."

Court cases

Zylberberg (1986)

Lawyer Philip Zylberberg, who is a Jew, along with other parents (adherents of non-Christian religious and atheistic philosophies) applied for judicial review of section 28 of Regulation 262, claiming that the section, along with the opening exercises practised by the Sudbury Board of Education, violated their rights to freedom of conscience and religion and to equality before and under the law. The applicants claimed that their personal religious beliefs were offended by section 28(1), which mandated religious opening exercises, including the reading of Scriptures and the repeating of the Lord's Prayer. The applicants also stated that the process of applying for, and exercising their right of exemption was a form of compulsion to conform to the majoritarian religion and therefore a violation of section 2(a) of the *Charter*. Because section 28(1) specified *reading the Scriptures* and praying the *Lord's Prayer*, the applicants also claimed discriminatory treatment in violation of section 15(1) of the *Charter*.

The application was dismissed in a 2 to 1 split decision by the Ontario High Court of Justice (Divisional Court), which upheld the constitutionality of the regulation. The applicants appealed to the Ontario Court of Appeal.

The Court of Appeal ruled in 1988 that section 28(1) of Regulation 262 infringed section 2(a) of the *Charter*. This meant that under section 52 of the *Constitution Act, 1982*, section 28(1) of the regulation was invalid. Although the Sudbury Board of Education and the Government of Ontario had conceded that, on its face, the regulation interfered with freedom of religion, they contended it was a reasonable and justified limit under section 1 of the *Charter*. They argued that section 28(1) served the important legislative purpose of teaching important moral values and that any interference with religious freedom that occurred was insubstantial. Moreover, the

exemption clause eliminated the element of coercion necessary for a violation of freedom of religion.

The court held, however, that the denigration of minority rights was not insubstantial and did not impair "as little as possible" the rights of the minority students, as required by an important part of the legal test for applying section 1 of the *Charter* (*R. v. Oakes*, 1986). The court noted that moral lessons could be imparted through opening exercises that utilised a variety of both religious and secular writings. They also found that the exemption clause stigmatised minority students who, in exempting themselves, were required to single themselves out as non-conformists to majoritarian beliefs. Hence, they would be subject to strong peer pressure to conform (Dickinson & Dolmage, 1996, 369).

Elgin County (1988)

In this case an application was made by the Corporation of the Canadian Civil Liberties Association (the C.C.L.A.), on behalf of several families whose children were enrolled in Elgin County schools, for judicial review of Regulation 262, claiming it violated the *Canadian Charter of Rights and Freedom*, sections 2(a) and 15. The application also requested an order enjoining the Elgin County Board of Education from offering its religious education curriculum on the grounds that it also violated the same *Charter* sections.

The applicants contended that the teaching of religion in the schools favoured Christianity to the exclusion of other religions. The nature of the curriculum was doctrinal and confessional and, hence, offensive to the rights of non-Christians and non-believers. Furthermore, recourse to the exemption clause tended to stigmatise those who used it. As in *Zylberberg*, the respondents argued that the regulatory provisions were not indoctrinating but merely used religion as a vehicle for teaching morality and that any interference with religious freedom was trivial and justified under section 1 of the *Charter*.

The application was dismissed by the Divisional Court, again in a split decision. The case went to the Court of Appeal in 1990, who specified that since the *Zylberberg* case (1988) had already dealt with the religious exercises issue, it would deal only with those parts of Regulation 262 that referred to religious education (subsections (4) to (16)).

The appeal court unanimously decided that section 28(4) of the Regulation, and the curriculum of the respondent Board, violated the *Charter's* s. 2(a) guarantee of freedom of conscience and religion. Section 28(4) was found to be of no force or effect under section 52(1) of the *Constitution Act, 1982*, and the court applied section 24(1) of the *Charter* to enjoin the Elgin County Board of Education from offering the offending curriculum in its schools.

After reviewing the history of religious instruction in Ontario and tracing the antecedents of section 28 to Regulation 30/44, whose role the Hope Commission had baldly proclaimed was to inculcate Christian values in the province's schoolchildren (Snowden, 1993, 42-43), the Court of Appeal had little difficulty concluding that the purpose of the regulation was indoctrination. Any law that *set out* to violate religious freedom could never be justified under the section 1 reasonable limits clause. The court also found Elgin County's religious education curriculum in violation of section 2(a) of the *Charter*. The lessons comprising the curriculum used almost exclusively Christian stories and parables and were clearly designed to make students believe in Christ as the only way to God and salvation of their souls. The court drew the following instructive distinction between religious instruction that is indoctrinating and education about religion that is not:

- (1) The school may sponsor the **study** of religion, but may not sponsor the *practice* of religion.

- (2) The school may **expose** students to all religious views, but may not **impose** any particular view.
- (3) The school's approach to religion is one of **instruction**, not one of **indoctrination**.
- (4) The function of the school is to **educate** about all religions, not to **convert** to any one religion.
- (5) The school's approach is **academic**, not **devotional**.
- (6) The school should **study** what all people believe, but should not **teach** a student what to believe.
- (7) The school should strive for student **awareness** of all religions, but should not press for student **acceptance** of any one religion.
- (8) The school should seek to **inform** the student about various beliefs, but should not seek to **conform** him or her to any one belief. (*C.C.L.A. v. Ontario*, 1990, 367) [emphasis in original]

This direction provided by the court was noteworthy in that the Canadian judiciary has traditionally given school curriculum matters a wide berth, preferring to defer to the wisdom of educational experts. The direction, moreover, did not go unheeded by educational policy makers, as explained below.

Implications

The invalidation of the challenged portions of section 28(1) of Regulation 262 has meant that it is now unconstitutional to open or close public schools in Ontario with religious exercises consisting solely or predominantly of Scripture readings or the repeating of the Lord's Prayer. Some might say that the results in the *Zylberberg* and *Elgin County* cases were pre-ordained by the expansive definition given freedom of religion by the Supreme Court of Canada. The Court of Appeal, in both *Zylberberg* and *Elgin County*, was heavily influenced by the following dicta of Justice Dickson in *R. v. Big M Drug Mart Ltd.* (1985) and *R. v. Edwards Books & Art Ltd.* (1986), respectively:

Freedom can primarily be characterised by the absence of coercion or constraint. If a person is compelled by the State or the will of another to a course of action or inaction which he would not otherwise have chosen, he is not acting of his own volition and he cannot be said to be truly free. Coercion includes not only such blatant forms of compulsion as direct commands to act or refrain from acting on pain of sanction, ... [but also] indirect forms of control which determine or limit alternative courses of conduct Freedom in a broad sense embraces both the absence of coercion and constraint, and the freedom to manifest beliefs and practices Equally protected ... are expressions and manifestations of religious non-belief and refusals to participate in religious practice (*R. v. Big M Drug Mart Ltd.*, 1985, 354, 362).

It matters not ... whether a coercive burden is direct or indirect, intentional or unintentional, foreseeable or unforeseeable. All coercive burdens on the exercise of religious beliefs are potentially within the ambit of section 2(a) (*R. v. Edwards Books & Art Ltd.*, 1986, 34).

Thus freedom of religion is viewed by the courts as comprising the "right to entertain such religious beliefs as a person chooses" and the right to be free from a compulsion "to conform to the religious practices of the majority". Religious minorities must thus be safeguarded constitutionally from the coercion or 'tyranny' of the majority and, in *Zylberberg* and *Elgin County*, this translated into the right to be free from the subtle, stigmatising effects of being forced to segregate oneself from the majority by seeking an exemption from participating in their religious practices in school.

The impugned parts of section 28 of Regulation 262 were constitutionally repugnant because they favoured a particular religion – Christianity – that also happened to be the historically

dominant one. As a general observation, these two cases exemplify the post-*Charter* judicial environment in Canada; as Sussel notes, the

... [t]raditional resistance and obstacles in the Canadian legal culture with regard to the expansion of rights ... [are] gradually being eroded by the impact of the Charter and the new mindset of Canadian legal professional and interest activists (1995, 142).

The current situation

The Ontario cases set important precedents and it was not long before similar rulings occurred in other provinces (e.g. *Russow v. British Columbia (A.G.)*, (1989)). These rulings, however, have not been greeted with universal approbation. Peters reflects the concern of critics who have decried the spiritual evisceration of public schools they say occurred in the wake of the court decisions:

... the resulting curriculum is totally secular in nature and appears to be unsatisfactory for a significant portion of the population. It is difficult to see how the religion curriculum which has evolved following these two rulings would differ in any way from what one might expect to receive in the United States – it is fine for a school to provide information about religion – about any or all religions – but one must say absolutely nothing about the question of whether one religion is better than another, about the goodness or the appropriateness or the value of any particular religion.

If public schools are permitted to reflect only the reality of the dominant sector of society it is inevitable that those who do not share this reality will be educationally marginalised. This, unfortunately, appears to be the fate of the significant element in Ontario society, and elsewhere, which is unable to find appropriate, value-based education in the public schools. The remaking and redefining of this element of our Constitution may also explain the steadily increasing numbers of students enrolling in private and independent schools (Peters, 1995-96, 244-5, 246).

The potential influence of the judiciary in the formulation of educational policy is obvious in the Ontario government's policy response to the *Zylberberg* and *Elgin County* rulings. Quoting almost verbatim the Court of Appeal in *Zylberberg*, the newly revised opening exercises regulation provided that these exercises may include the following types of readings that impart social, moral or spiritual values and that are representative of Ontario's multicultural society:

- (1) Scriptural writings including prayers.
- (2) Secular writings. (R.R.O. 1990, Reg. 298, section 4(3))

The regulation also provides that opening exercises may include a period of silence and that students may apply for exemption. The usefulness of an exemption provision as a hedge against violation of religious freedom remains dubious, however, given the Court of Appeal's treatment of a similar clause in the earlier version of the regulation.

The hand of the court is evident also in the amendments made to Regulation 298 (formerly 262) regarding religious instruction, which provide:

28. ...
 - (2) A program of education about religion shall,
 - (a) promote respect for the freedom of conscience and religion guaranteed by the *Canadian Charter of Rights and Freedoms*; and

provide for the study of different religions and religious beliefs in Canada and the world, without giving primacy to, and without indoctrination in, any particular religion or religious belief.

29. (1) Subject to subsections (2) and (3), a board shall not permit any person to conduct religious exercises or to provide instruction that includes indoctrination in a particular religion or religious belief in a school. (R.R.O. 1990, Reg. 298)

In the wake of the *Elgin County* decision provincial policy mandated a change in the content of religious education from Christian indoctrination or devotional study to a comparative study of world religions. As Peters (1995-96, 245) implied, however, it is anyone's guess what would happen if the comparative study involved making a judgment about the values underpinning the religions. Hence, such courses remain somewhat of an instructional minefield for educators. It is also significant that the revised regulation provides no exemption clause, likely because such courses are now elective rather than mandatory.

In summary, *Zylberberg* and *Elgin County* were two landmark *Charter* decisions that served notice that the judiciary would not blanch from reversing its historical stance to intervene in curricular matters in public schools where freedom of religion and conscience was involved. The courts also applied the Supreme Court of Canada's broad interpretation of freedom of religion that permitted them to characterise a legislated exemption from religious exercises and instruction as stigmatisation and subtle, indirect coercion to conform to majoritarian beliefs and practices. The practical upshot of the cases has been the secularisation of public schools; despite continuing provisions for some religious exercises, most school boards tend to steer a wide berth around such contentious issues and, as far as religious instruction goes, the system has been transformed from one that permitted 'opting out' to one that now permits, within limits, 'opting in' to such instruction both as part of the formal curriculum (via elective comparative religion courses) and as extracurricular activities (for example, devotional instruction before or after school, so long as it is not offered under the auspices of the school board).

Summary

Twenty-first century Canada has a much different face than it had a century and a half ago when the die was cast creating the new nation's public education systems. Today the nation is diverse and multicultural because of successive waves of immigration from all parts of the world. Its largest city, Toronto, is the most multicultural metropolis in the world. Hence, old assumptions about culture, religion and schooling have come into conflict with a new demographic reality. The creation of the 1982 Constitution, in particular the *Canadian Charter of Rights and Freedoms*, represented a compromise between old and new constitutional values (Dickinson & Dolmage, 1996, 363). As is the case everywhere, people have attempted to cling to and preserve the old and known ways of doing things and to resist change. However, the *Charter* began a process of change that cannot be resisted. In jurisprudential terms, courts have become the empowered and willing scrutineers, and in many cases the invalidators, of laws and policy decisions fashioned by legislators. In education, the courts have been willing to intervene in curricular matters to preserve religious freedom and linguistic and equality rights but they have been uniformly resistant to interfering with provincial governance structures on the basis of constitutional complaints (Dickinson, 2000, 235, 252). In the religious education arena, this has meant that while courts have shown themselves willing to strike down provisions permitting if not requiring religious indoctrination of pupils, they have refused, for example, to order a provincial government to fund independent religious schools (*Adler v. Ontario*, 1996) or religious schools as part of a public board (*Bal v. Ontario (A.G.)*, 1997).

The South African case

A historical overview

The teaching of religion in South African schools is inseparably intertwined with the impact of the Christian missionaries who arrived in South Africa in the seventeenth century. A Christian way of life was established by the government when the Cape was settled by the Dutch United East Indies Company (DUEC). Later, under English rule, members of the clergy continued to be employed by the government. The formal education that was given reflected the dichotomous influence of the conservative Dutch, who embraced a stern Calvinistic theology, and the English, who followed the more liberal Anglicanism of the Church of England. As it was the missionaries who began schooling in South Africa, the continuing prominence of the church in education in South Africa is understandable. Religious education has been an important part of the curriculum.

Following the Anglo-Boer War (1899-1902), Afrikaners opened their own schools on Christian National principles. After forming the Union in 1910 all government parties subscribed to a national Christian character for all public schools, an ethos that had been created by the pre-Union government. These schools had a strong emphasis on Christian teaching based on Calvinist doctrines. Although the *Christian Education Policy Act* of 1967 stated that "[e]ducation in schools should have a Christian character, founded on the Bible, enhanced by religious instruction as a compulsory, non-examinable subject", this program of Christian National Education did not allow for any minority religions or for other Christian denominations.

The traditionally central place of religion, especially Calvinist Christianity, in education is now being challenged in a new democratic and pluralistic culture where the human rights of all are protected. After the election of the democratic government in 1994, the new state adopted a position of non-alignment with any particular religion. This resulted in a model for religious education that recognised the right of all religions in South Africa to have a place in the curriculum. A school could choose, however, the perspective from which religious education would be offered as a non-academic, compulsory subject. Hence School Governing Bodies (hereafter SGBs) could decide the type of religious education to be offered in their schools as long as it conformed to the requirements of the *Constitution of the Republic of South Africa, Act 108 of 1996* (hereafter CRSA), discussed below.

The Constitution

South Africa was condemned and criticised internationally for many years because of its laws and policies that fostered a society characterised by inequality and discrimination. After the establishment of a democratic 'New South Africa' on 27 April 1994, the need for the creation of a human rights culture was imperative. Education is universally acknowledged as the basis for the cultivation of respect for human rights (Bray, 2000, 2).

Bray (2000, 1) also argues that with the adoption of the CRSA, with its Bill of Rights, South Africa made a fundamental and irreversible change from apartheid to democracy. It must be emphasised that the necessity of this change was widely acknowledged by most South Africans and that the process of change had already happened prior to the election of the democratic government. It was the result of a lengthy process of negotiations between the representatives of the Apartheid state and its opponents, which, according to De Waal, Currie and Erasmus (2001, 4) had already started in 1985 between the National Party Government and the imprisoned Nelson Mandela. On 20 December 1991 all-party negotiations formally began with the

convening of the Conference for a Democratic South Africa (CODESA). The process of change was conducted peacefully and the multiparty negotiations resulted in the adoption of the *Republic of South Africa Act 200 of 1993*, better known as the Interim Constitution, which blazed the trail to the acceptance of the current CRSA.

For the purposes of this article we will focus on those sections in the CRSA that have a religious orientation. To understand the ethos of the CRSA it is important to start with its 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 justices 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.
God bless South Africa.

The CRSA is acknowledged to be the supreme law of South Africa. This important foundation is re-emphasised in section 2, which spells out that any law or conduct inconsistent with it is invalid and that the obligations imposed by it must be fulfilled. The choice of the words "any law or conduct" means that the CRSA applies not only to national and provincial legislation, but also to regulations, rules and conduct – whether based in the state or private sector. This is also emphasised in section 8, which says that:

8(1) The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.

(2) A provision of the Bill of Rights binds a natural or a juristic person.

...

(4) A juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of the juristic person.

In other words, legal persons (juristic persons) enjoy the protection of the Bill of Rights. Section 8(2) binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right (Beckmann *et al.*, 1999, 168). This points out the horizontal application of the Bill of Rights; its scope of application is thus considerably broader than the Canadian *Charter's*.

In section 7 the Bill of Rights (Chapter 2) is said to form the cornerstone of democracy in South Africa: section 7(1) states that it "enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom". Section 7(2) confirms the vertical application of the Bill of Rights, thus protecting the individual against the abuse of state powers: "The state must respect, protect, promote and fulfil the rights in the Bill of Rights."

Equality rights are named in section 9, which states that:

9(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.

...

(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.

The fact that religion is one of the specifically named rights in section 9 emphasises the vertical and horizontal nature of the right to freedom of religion. In other words, every individual legally has the right to freedom of religion and must also respect the right to freedom of religion of others. Secondly, the right to freedom of religion also places a responsibility on the state (government) to provide positive circumstances for the exercise of religious freedom.

Under section 10 everyone has the right to have his or her dignity respected and protected. Interestingly, recent Supreme Court of Canada jurisprudence interpreting equality rights under the Canadian *Charter* recognises human dignity as the cornerstone of the concept of equality (e.g. *Law v. Canada*, 1999; *Granovsky v. Canada*, 2000).

Freedom of religion, belief and opinion in schools is constitutionally protected in section 15(1):

15(1) Everyone has the right to freedom of conscience, religion, thought, belief and opinion.

Section 15(2) provides that religious observances (school openings and closings) may be conducted at state and state-aided institutions, provided that such observances follow rules made by the appropriate authorities, are conducted on an equitable basis, and participation is free and voluntary. One's right to freedom of religion thus cannot be violated as a result of religious observances *per se* unless the observances do not comply with the provisions spelled out in section 15(2). This section places a responsibility on the state to interfere in religious matters in order to create conditions for the exercise of religious freedom without favouring a particular religion.

Section 29 of the CRSA spells out that education is a protected human right:

29(1) Everyone has the right –
(a) to a basic education, including adult basic education.

Cultural, religious and linguistic communities are protected under the terms of section 31, while under sections 33 and 34 respectively, everyone has the right to just administrative action and access to courts.

Section 36 – the Limitation of Rights – is particularly noteworthy. The Bill of Rights adheres to the concept that no right is absolute and provides various ways of limiting rights. Some rights may be limited in a state of emergency under section 37. Rights can be limited in themselves; for example, in section 29(1) the right to education is limited to basic education. Rights can also be limited, however, under the terms of section 36. The general limitation clause in section 36, the most common form of limitation in the Bill of Rights, applies to all rights in the Bill and indicates the circumstances under which the rights entrenched therein may be limited (Maithufi, 2000, 139). Section 36(1) reads as follows:

(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 relations between the limitation and its purpose; and
- (e) less restrictive means to achieve the purpose ...

The influence of the judicial test for applying section 1 of the Canadian *Charter*, discussed above, is evident in the language of section 36.

Finally, Section 39 deals with the interpretation of the Bill of Rights:

- 39(1) When interpreting the Bill of Rights, a court, tribunal or forum:
 - (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
 - (b) must consider international law; and
 - (c) may consider foreign law.
- (2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.
- (3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation to the extent that they are consistent with the Bill.

Statutes and regulations

Since the amalgamation of the South African education system under the new democratic government, there has been one national Education department, with one national curriculum. This was done to redress the inequalities and injustices that were part of the 'old South Africa' with its variety of educational departments. It is however, important to point out that the CRSA promotes a co-operative government – a type of co-operative federalism. Although the educational framework is national, education is actually a provincial matter. We shall, however, focus only on the national framework. In order to guide this national department of education the *South African Schools Act*, Act 84 of 1996 (hereafter SASA), was published. For the purpose of this article we will focus only on the sections relevant to religion in schools.

Regarding freedom of conscience and religion at public schools, section 7 of the SASA is consistent with section 15(2) of the CRSA, in stating that religious observances (openings and closings) may be conducted at a public school under rules issued by the school's SGB if such observances are conducted on an equitable basis and attendance at them by learners and members of staff is free and voluntary. Rules issued by the SGB are an extension of the state's function to provide religion in state institutions and must be consistent with section 9 of the CRSA (the equality provisions). According to Malherbe (1998, 79) this right to conduct religious observances in schools protects individual and collective Scripture reading, prayers, moments of silence, worship, messages by clerics, campaigns by religious organisations and the display of religious symbols. Bray (2000, 61) cites *S v Lawrence* (1997), a Constitutional Court judgment regarding the sale of liquor on Sundays (a 'closed day'), to highlight voluntariness as a concept that is central to freedom of religion:

... the Constitutional Court held that the requirement of free and voluntary attendance at religious ceremonies is an explicit recognition of the deep personal commitment that participation in religious ceremonies reflects. It also recognised that the freedom of religion requires that the state may never require such attendance to be compulsory.

Under section 20 of the SASA, one of the functions of a SGB is to develop the mission statement, as well as the Code of Conduct of the school, presumably including the particulars of the religious worship, observances and exercises to be conducted within the school. In terms of section 20(1)(a) of SASA, the SGB must promote the best interest of the school. Furthermore the SGB is a democratically elected body with representation of all the school's stakeholders, which include the principal, educators, parents, learners and those members of the staff who are not educators and learners (Section 23 of SASA). It can hence be argued that the SGB, through the requirement that it represent all the stakeholders, promotes the best interest of the school, specifically via its mission statement, Code of Conduct and religion interventions.

Court cases

Up to now there has been no court case under the CRSA ruling on freedom of religion in the context of religious observances and education in public schools. The only case where this issue has been addressed at all by a court is *S v Lawrence; S. v. Negal and S. v. Solberg* (1997), noted above. In this case the appellant, Solberg, argued that the prohibition against selling wine on Sunday in a grocery store was inconsistent with freedom of religion guaranteed by section 14 of the Interim Constitution (section 15 of CRSA). She "contended that the purpose of prohibiting wine selling by grocers on 'closed day[s]' was to induce submission to a sectarian Christian conception of the proper observance of the Christian sabbath and Christian holidays" (*S. v. Lawrence; S. v. Negal; S. v. Solberg*, 1997, par 85). This forced individuals to affirm a specific practice solely for a sectarian Christian purpose.

The case was dismissed. Judge Chaskalson held that section 14 of the Interim Constitution, unlike the U.S. Constitution, does not include an "establishment clause." Section 15(1) of the CRSA thus does not expect the state to abstain totally from religious matters. In *obiter dicta*, however, the judge mentioned specifically that compulsory attendance at school prayers would infringe freedom of religion. He also noted that voluntary school prayer could also amount to the coercion of pupils to participate in the prayers of the favoured religion because of peer pressure. To guard against this threat, and at the same time to permit school prayers, section 15(2) clarifies that there should be no such force. It requires the regulation of school prayers to be carried out on an equitable basis according to the character of each school. This concern about the impact of even subtle forms of coercion accords with the definition given the concept of freedom of religion by Chief Justice Dickson of the Supreme Court of Canada in *R. v. Big M Drug Mart Ltd.* (1985), discussed above.

Since the CRSA does not have an establishment clause, the onus lies on the government to create favourable circumstances for the exercise of religious freedom. Judge O'Regan held that:

... religious observances at public institutions will not give rise to constitutional complaint if the observances meet three requirements: the observance must be established under rules made by an appropriate authority; they must be equitable; and attendance at them must be free and voluntary. It seems appropriate to imply this provision and from the absence of an express establishment clause that a strict separation between religious institutions and the state is not required by our Constitution (*S. v. Lawrence; S. v. Negal; S. v. Solberg*, 1997, par. 119).

Despite the absence of an establishment clause, these dicta should be considered in the light of what Justice Black of the U.S. Supreme Court stated in *Engel v. Vitale* (1962), where it was held that state officials could not require recitation of a denominationally neutral prayer, even though students could remain silent or be excused from the classroom:

When the power, prestige and financial support of government is [*sic*] placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain (*S v Lawrence; S v Negal; S v Solberg*, 1997, par 120, quoting *Engel v Vitale*, 1962, par 88).

It is clear that although the state is permitted to allow religious observances, it should not be permitted to act inequitably or coercively.

The current situation

After taking his seat as national Minister of Education on 17 June 1999, Professor Kader Asmal highlighted a few issues that would receive his attention. One was the problem that religious education was being taught from the perspective of only one religion. Asmal stated that a new policy would aim to change schools' practice and require them to "reflect a South African identity in their culture, ethos, sport and teaching philosophy and practice" (Pretorius, 2000, 2). The planned national policy on religion in state schools indicates that religious education should be a comparative study of various religions as well as secular world views. The purpose of this new policy is to characterise South African society as one with "unity without uniformity and diversity with divisiveness" (Pretorius, 2000, 2).

Although South Africa has not had many court cases concerning freedom of religion, especially in education, judging by how the Minister of Education has been addressing it publicly, this issue is currently at the forefront of government attention. The Minister has indicated that a new policy will soon be released. He has also said that despite the wish of a majority of parents for different brands of religious education in individual schools, depending on parental preference, such a model would not necessarily be put in place under the new policy. He stated that religious indoctrination has no place in a school curriculum and should be addressed instead after school hours, at home or at church (Joubert, 2001, 1). These views of the Minister of Education are reflected in the Manifesto on Values, Education and Democracy, published in August 2001 that stated that the school is not responsible for the religious development of the scholars but for providing learners with knowledge about religion, morality, values and the diversity of religions. The Manifesto thus differentiates between the terms "religious education" and "religion education". Religious education, with specific spiritual aims, is the responsibility of the home and the community of the faith; religion education, however, provides for the study of religion in all its forms and hence has a place in the school curriculum. The sentiments expressed by the Minister and the Manifesto are not far afield from those stated by the Ontario Court of Appeal in the Elgin County case, discussed above.

They are, however, at odds with the current policy. The January 1999 report from the ministerial committee for religious education, when Dr. Sibusiso Bengo was Minister of Education, which stated that SGBs could determine the type of religious education in their schools as long as it was consistent with the CRSA, was well accepted. Hence a SGB could decide to offer religious education from a specific point of view. Second, the new policy could be seen as infringing upon the SGBs' right to develop a mission statement and ethos for their schools (section 20(1) of the SASA). However, one must clearly differentiate between the right to religious observance, as protected in section 15 (1) of the CRSA and section 7 of the SASA as a role or function of SGBs, on the one hand, and the right to religious education, on the other hand, which is not mentioned in the SASA or protected under the CRSA. Third, the policy can

be challenged on grounds of ordinary law that states that religious instruction must include a study of the various religions of South Africa that may, as part of the exercise of the right to religious freedom, be presented from the point of view of a particular religion as long as it is done equitably, freely and voluntarily.

The change from the Bengo to the Asmal policy seems basically to be one from an equitable religious education that may be offered from the point of view of a particular religion, to a comparative study of different religions. The major difference will be that SGBs will no longer be able to choose the religious ethos for their schools and the perspective from which they would like to offer religious education, which they will now be forced to offer from a neutral perspective. The new policy would bring South Africa more in line with Canada (Ontario, at least) where religious education must be academic and non-devotional. The Canadian and South African legislative contexts are somewhat different, however, and the courts will inevitably have to determine whether the proposed policy is an infringement on the functions of SGBs under section 20(1) of the SASA and the right to freedom of religion under section 15 of the CRSA.

Summary

As is clear from sections 15(2) of the CRSA and 7 of the SASA, the state is responsible for ensuring that conditions at schools guarantee freedom of religion. It is also clear that religious observances are protected under these two sections. Neither of the two sections refers explicitly to the instruction of religion. However, Malherbe (2000, 54) points out that, in terms of ordinary law, religious instruction in schools will not contravene the CRSA. He also points out that religious instruction, in terms of ordinary law, must include a study of the various religions of South Africa and it may still, as part of the exercise of the right to religious freedom, be presented from the point of view of a particular religion as long as this is done equitably, and participation is free and voluntary. It is important to note that section 15(2) of the CRSA does not require religious neutrality as in the United States. It prescribes only the conditions that religious observances must be equitable, free and voluntary.

Conclusion

Although education in South Africa is also a provincial matter, all legislation is subject to the national CRSA. This simplifies the implementation of the Bill of Rights in the CRSA. Nationally there is a better sense of what is expected from each school and SGB in order not to violate freedom of religion. On the other hand, that education in Canada is only a provincial matter is a potential hindrance to the country's transformation to a multicultural society where everyone's human rights are ensured, since provinces do not always interpret the Constitution in the same way. There is a tendency, then, to rely on the Supreme Court to establish and enforce national standards and, even then, some local boards and schools may resist their implementation. Moreover, to date, the courts – the Supreme Court of Canada included – have been reluctant to make constitutional rulings that interfere with a provincial government's decisions about educational structures and governance.

South Africa's brand new constitutional start, that included jettisoning almost all existing legislation, facilitated rapid change. Almost everyone understood that things needed to be changed and was willing to accept the change positively in order to create a better future for all citizens of South Africa. In Canada, because of the slow and evolutionary way that the process of constitutional change has occurred, and despite the traditional Canadian emphasis on negotiation and compromise, many still feel the need to resist change in order to preserve their own heritage and culture. During the last three decades Canada has attempted to establish

official multiculturalism as its national identity (Dickinson & Dolmage, 1996, 378). Its history of cultural dualism (in religion and language), embedded in the constitution, has provided, however, a considerable impediment to change.

Only time will tell whether a multicultural Canada can honour a supreme *Charter of Rights* while still clinging to section 93 of the *Constitution Act, 1867*, which originated from a 'confederation compromise' and the belief that the relationship between church (Christianity) and state was one of union and mutual support (Smith & Foster, 2001, 447). We fully agree with Smith & Foster (2001, 447) that

... [t]he advent of human rights legislation in Canada, and particularly the constitutional entrenchment of human rights in the Canadian Charter allow for a re-framing of the debate of the place of religion in school.

This debate has resulted in a wholesale reduction of traditional denominational school privileges in two provinces. Pressure has also been brought to bear in other provinces to bring educational structures in line with the nation's multicultural demographics and *Charter* rights. The basic problem is that there is little public consensus on what multiculturalism means for the role of religion in schools. Does it necessitate a US-style model of state-church separation where public schools are essentially secular institutions, or one of equitable (possibly even compulsory) state support for many different forms of religious education and religious schools, more along the lines of the South African model, despite the latter's points of potential contradiction? To date, at least as far as judicial rulings and ensuing government policy are concerned, the US model has been ascendant.

Since South Africa is only in the infant stages of implementing its Bill of Rights and, as people become accustomed to the fact that they indeed have human rights, more court cases can be expected. South Africa can then rely on Canadian court cases for guidance although the model of pluralism adopted by Canadian courts that has resulted in the secularisation of schools could render the cases somewhat inapposite in the South African context.

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