Religion, Legal Scholarship, and a Christian Response

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"[W]e ought not to listen to those who warn us that 'man should think the thoughts
of man' or 'mortal thoughts fit mortal minds'; but we ought, so far as in us lies, to
put on immortality, and do all that we can to live in conformity with the highest
that is in us; for even if it is small in bulk, in power and preciousness it far excels
all the rest."
Aristotle, the nicomachean ethics 31 (J.A.K. Thomson trans., 1953)

Samevatting

Hierdie artikel ondersoek die wetenskap van regsgeleerdheid teen die agtergrond van 'n voorgestelde definisie van godsdiens, 'n tema wat deel vorm van die onbevare waters van die Suid-Afrikaanse regsleer. Ontwikkelinge elders bied ryke insigte en is aanwysend van die noodsaaklikheid en belang om die intieme verhouding tussen godsdiens en die reg aan te pak. So 'n ondersoek noodsaak ook 'n meer spesifieke en kritiese evaluasie van die rol van die regskool en die universiteit teen die agtergrond van godsdiens. 'n Christelike benadering tot bogenoemde tema word ook ondersoek. Gevolglik word die afleiding gemaak dat die Christelike lewensperspektief ook binne die wetenskap van regsgeleerdheid tot uiting moet kom. Die implikasies hiervan vir die verhouding tussen kerk en staat is, veral binne 'n hedendaagse liberalistiese demokrasie, van uiterste belang en relevansie.

1. Introduction

In contemporary jurisprudence there is a clear and largely successful intention to separate religion from the law. The result is clearly to be seen

in the contemporary approach of our law schools, where the inclusion of anything religious is, directly or indirectly, excluded. There is also a development towards a new "trans-modernist" set of values, which is thoroughly postmodernist and sceptical of moral absolutes. This development takes place amidst the already popular value of technological progress and material success as opposed to ideological and social issues (Colson, 2000: 25). Commenting on the position in the US, Mentschikoff and Stotzky state that in almost every law school in the nation, more professors than expected continue to require students to learn only rules of law (Mentschikoff & Stotzky, 1986: 698). Strong speaks of the notion of the "Apollonian lawyer" that enjoys surprising support, which focuses on the development of *analytical* thinking and is reflected in the image of the American lawyer as *homo analyticus* (Strong, 1998:760 - 761).[1] This staunchly analytical, technical and factual approach to the law finds support from the "Langdellian approach" to legal education (postulated by Christopher Langdell, Dean of Harvard Law School, 1870), which emphasises the law as a science, analogous to the physical sciences. Langdell believed that in a law school students should study only the law, and that all source material except for cases lay outside the boundaries of a law school education (Mentschikoff and Stotzky, 1986: 698).[2] Contrary to this observation is the developing emphasis on understanding the law in the context of both inter-disciplinary and transcendental insights. According to Pearce, interest in the relevance of religion to a lawyer's work is no longer limited to a small group of legal academics. He adds that in contemporary society, "religious lawyering" is attracting a growing number of lawyers and judges (Pearce, 1998: 1075).[3] It is against this background that the relationship between legal scholarship and religion is investigated. Such investigation is relevant to South African jurispru-

1 Strong adds: "There have, however, been calls from within the legal academy, once the temple of legal rationalism, for an appreciation of the importance of nonanalytical mental processes in the tasks of the lawyer. These calls reflect a growing awareness that the creative lawyer must draw upon the mental processes of the artist, as well as those of the scientist, and that the time is overdue for significant movement beyond a single-minded focus upon reason, logic, and analysis in legal education and the practice of law" (1998:762-763). These "nonanalytical" mental processes, and the "movement beyond a single-minded focus upon reason, logic, and analysis in legal education and the practice of law" can be interpreted as emphasising the religious/abstract/spiritual aspects.

2 Also see Berman, 1976:384.

3 Also see Samuel J. Levine, "Teaching Jewish Law in American Law Schools: An Emerging Development in Law and Religion", *Fordham Urban Law Journal*, 26 (1999), 1.

dence, where emphasis in this regard has been rather limited. Included is a proposed relationship between religion and legal education/scholarship in the law school/university, against the backdrop of a proposed definition of religion. Perspectives on a Christian approach to legal scholarship are also investigated. Consequently, it is postulated that a Christian approach to legal scholarship deserves its rightful place in a post-1994 South African liberal democracy.

2. Religion and the Law

A problematic aspect in jurisprudence regarding religion and the law is the fact that a uniform meaning of religion is wanting, and in many instances, religion is discussed without any attempt to define it.[4] For the purposes of this article, religion is understood as consisting of a religious belief, meaning a belief in something or other as divine ("divine" means having the status of not depending on anything else) (Clouser, 1991: 21-22), and therefore, this "divinity" acting as the source from which all presuppositions in determining the individual's worldview emanate (Hiebert *et al*., 14).[5] Religion in this context plays an important role in the hypothesising on ultimate questions of human existence "not explaining the basic forces of the universe but understanding why there is a universe, not how our bodies operate but why they do, not how they enhance the range of choices arrayed before us but what choices we should make"

4 For the confusion regarding a definition of religion in the US (whose jurisprudence on the matter is worth noting), see especially D. N. Feofanov, "Defining Religion: An Immodest Proposal", *Hofstra Law Review*, 23 (1995), 311-314, 321, 363-380; N. Lerner, *Religion, Beliefs, and International Human Rights*, (School of Law, Emory, 2000), 4-5; C. Evans, *Freedom of Religion Under the European Convention on Human Rights*, (Oxford University Press: Oxford, 2001), 62-63; R. O' Frame, "Belief in a Nonmaterial Reality – A Proposed First Amendment Definition of Religion", *University of Illinois Law Review*, (1992), 822-831; B. Clements, "Defining 'Religion' in the First Amendment: A Functional Approach", *Cornell Law Review*, 74 (1988-1989), 532, 536-539; and J. H. Choper, "Defining 'Religion' in the First Amendment", *University of Illinois Law Review*, (1982), 579, 587-594. Regarding the problematic nature of the definition of religion on the international and regional legal plane see Lerner, *Religion, Beliefs, and International Human Rights*, 3, 5-6, 37-39, 119; and Evans, *Freedom of Religion Under the European Convention on Human Rights*, 51, 60-62, 64, 102, 201-203, 208. Regarding the diverse approaches by commentators regarding the meaning of religion see O' Frame, "Belief in a Nonmaterial Reality – A Proposed First Amendment Definition of Religion", 836-841; and Feofanov, "Defining Religion: An Immodest Proposal", 380-385. In the South African context, research on this topic is limited, for example, G. van der Schyff, "The Legal Definition of Religion and its Application", *The South African Law Journal*, Vol. 119, 2 (2002), 288-294.

5 For further explanation on this view of religion see Clouser, 1991: 1 - 48.

(Carter, 1998: 497). Belief systems or life perspectives in this context of religion therefore, do not include only the "traditional" religions, such as Christianity, Judaism, Islam, but also the secular approaches such as humanism and atheism, amongst others. These secular approaches also include unchallengeable commitments born of faith, and extra-rational appeals to transcendent authority. In this regard, religion, among other things, determines the *good*, and whatever the *good* is, it cannot be justified by rational discourse, but only by irrational convictions.[6] Therefore, religion plays an important role in the formulation of theories, the latter understood as consisting essentially of hypotheses in order to explain something, such explanation prompted by the quest to find the answer to some question which is not *directly* discoverable. In this regard, the law forms an inescapable part of religion.[7] This is further illustrated by the fact that man finds himself inevitably in the value-centric predicament, because the very rejection of value judgments is itself a value judgment. The position of the thinker who is wholly clear of assumptions is one which is neither desirable nor possible (Trueblood, 1991: 27). Value judgments originate from religious presuppositions. Baillie rightly states that even the most detached and dispassionate of latter-day intellectuals have some working basis of belief (be it in God or progress, for example), however unconscious he or she may be of it, until it is directly challenged (Baillie, 1946: 20 - 21). This is also true for the legal scholar and academic.

Impartiality or neutrality of value judgments cannot exist, which makes the religious connotation inescapable. "Value judgment" refers to a person's view, opinion, assumption, or theory on something. The reason that it is a view, opinion, assumption, or theory is because it is not verifiable – in other words the possibility of counter argumentation *ad infinitum* can exist. Where else is the source of such a value judgment than that of the religious domain, more specifically the "divine" - whatever it may be. This "divinity" is the source of the transcendental axiomatic and presuppositional point of reference that justifies the law's content. Ventrella explains:

6 See, J. H. Garvey, "A Comment on *Religious Convictions and Lawmaking*", *Michigan Law Review*, 84 (1986), 1294. Garvey explains: "But while it may be impossible to prove that gray cats are sacred, it is also impossible to '[establish] on rational grounds' that they are not", 1986:1291.

7 See Clouser, 1991:51-73 for further discussion on this topic.

> In the nature of the case, a debate focuses on (at least) two positions. The advocates are contending as to each position that their position *ought* to be the law … Such evaluative claims are decidedly *moral* claims – determining the "oughtness" of a particular position. More importantly, resolving such claims requires and presupposes an appeal to a transcendent standard (such as the laws of logic) because that is the only way to truly answer a moral question … This is also true because no argument can prove everything; every argument must have a fixed starting point, such as the laws of reasoning, fundamental notions of human biology and the like " (Ventrella, 2005: 686).

Where is this fixed starting point other than from the individual's religion? Carter states that it is not possible to imagine a law of any kind that constitutes anything but a moral judgment (Carter, 1993: 588), which consequently necessitates some or other religious foundational perspective. The abortion debate also clearly illustrates this view. Carter comments that a pro-life statute enforces a moral regime on pregnant women; a pro-choice statute enforces a moral regime on foetuses (Carter, 1993: 588). Ferreira states that presuppositions are the very basis for what is known as our world-and-life-view, and that these world-and-life-views are intensely spiritual – "they are a religious phenomenon; its faith commitment" (Ferreira, 1997: 152).[8] Consequently, neutrality in thought is impossible – "the great neutrality lie of the so-called humanistic scientific reasoning" (Ferreira, 1997: 153). In fact, it is an error to think of education as purely intellectual, for it is closely related to moral and spiritual qualities (Forrester-Paton, 1946: 19). Therefore, religion understood in the above context, implies that the question as to the rightness or wrongness, validity or invalidity of any normative content, will always be taken back to a primary, transcendental, axiomatic point of authority, beyond which point no further justification can be sought. The validity of, for example, positivism, natural law theory, procedural/pragmatic/relative solutions to human rights issues, corporal punishment, pornography, abortion, the exclusion of traditional religion

8 Also see Ferreira, 1997: 155; "Worldviews are not theoretical in nature; they are pretheoretical answers to ultimate questions … Just as all scholarship presupposes a philosophical paradigm, so all philosophical paradigms presuppose a religious worldview of one kind or another. The paradigm describes the relations of each discipline to other disciplines in terms of its basic understanding of how reality is structured and interrelated".

and morality from human rights jurisprudence, and so on, have some or other final point of justification.

Religions offer coherent patterns of values and norms, visions of humanity, visions of the world; they concern ways of associating with others and of dealing with fundamental life questions, and provide ethical insights and approaches (Van Bijsterveld, 2001: 307). Law is always inescapably religious in its fundamental frame of reference and presuppositions (Taylor, 1966: 366). Bix states that legal theory is different from theory in the social and natural sciences because it is conceptual and not empirical. Therefore, regarding legal theory, it is not possible to say that a given conceptual theory is "right" or "true". Rather, all one can say is that a given theory is good or perhaps better or worse than another theory for a particular purpose. Even when two theorists seem to be in direct conflict, it would not be possible to say one was false and the other true (Roederer *et al.*, 2004: 5). The close relationship between law and the social structure brings into prominence the ideological background of any form of basic legal (normative) theorising (Freeman, 1994: 2). Law is a loose collection of propositions that constitute and reify ideas about such principles as rights, authority, obligations, and justice (Granfield, 1992: 2).

The Greeks, long before the modern era, understood that there was a dilemma between particulars and universals. It was not only Plato who wrestled with this, but he especially would have understood exactly what Jean-Paul Sartre meant in the modern generation when he said that a finite point has no meaning unless it has an infinite reference point. Shaeffer agrees with this understanding, stating that unless they have a universal over them, the particulars have no meaning – "Whether a particular is an atom, or a chair, or you, there must be a relationship to something which gives it meaning, or these things will become a zero" (Shaeffer, Vol. 4, 1982: 7). The meaning of law transcends the mere accumulation and systematisation of legal content. The true meaning in the normative context is in the metaphysical, the religious. In jurisprudential courses the law student is introduced to the contributions of the classics such as Plato and Aristotle. What goes by unnoticed is that just as there are the alternatives to jurisprudence itself, for example Western and Eastern jurisprudence, there are also the alternatives of embarking on a study in jurisprudence either from ancient Athens, or from Adam and Eve. The presuppositional angle to legal science needs to be rekindled. This also has implications for legal education.

3. The role of the Law School

Berman observes that it is important to be conscious that legal education in the West always had a very important religious dimension until the 19th century. In the US context, it was the rise of the university law schools in the late 19th century that eliminated the religious dimension of legal education (Berman, 1976: 382). Smolin comments that the field of law and religion has a marginal existence in the legal academy "apparently primarily due to a lack of interest and competence by law professors" (Smolin, 1996: 1507).[9] One of the reasons given as explanation for lawyers' reluctance to discuss moral assertions in the US is that it is not considered polite to argue about religion, "and assertions of moral position in law school sound religious and often are" (Shaffer, 1981: 174). Carter, on the demise of truth in the academic halls of Yale Law School, states that when law students come to university, they are taught that the law has nothing to do with morality. These students, in a culture of mere acceptance, should not even enter into debate regarding this issue (Colson, 2000: 24). Carter adds that of all the moral commitments that law schools would like to exclude, religion is perhaps the foremost among them (Panel Discussion, 1999: 1015). According to Berman, there are two things in our law schools today, namely idolatry of law and utopianism. Regarding the former, the law is studied (and taught) as a technique, in and of itself, self-contained. Regarding the latter, law and ethics are seen as two sides of the same coin, where law is viewed not in isolation but in terms of its purpose to achieve social justice, and the social justice itself (or the demand for social justice itself) becomes a kind of religion (Berman, 1976: 384 - 385). However, contemporary developments in legal education in the US are unveiling trends towards scrutinising the dissemination of legal education against the background of religion. This does not refer to practical teaching techniques, but rather deals with the close relationship between ideology and law in the context of legal scholarship and the law school. In addition, there are law schools in the

9 Smolin adds: "A January 1996 American Association of Law Schools (AALS) Mini-Workshop on developments in scholarship and law over the last ten years had a session on 'Perspectives on Law' with presentations on thirteen perspectives: critical legal studies, critical race theory, feminist theory, game theory, gay & lesbian theory, law & economics, law & literature, law & society, organizational theory, pragmatism, public choice, republicanism, and storytelling", Smolin, 1996:1507. Smolin adds: "There is certainly plenty of room in the legal academy for the application of secular legal philosophies to questions of law, including law and religion. Why, however, in a nation and world teeming with religious believers is there so little room for scholars and scholarship that take religion and theology seriously?", Smolin, 1996:1509.

US that have interdisciplinary programmes in law and religion. For example, the Columbus School of Law's interdisciplinary programme in Law and Religion is described as: "Providing a forum for study, research and public discussion of issues arising at the nexus of law and religion. These include questions of the separation of Church and State, public and private morality, and the relationship of concerns of the institutional Church to establish legal norms."[10] Frank Alexander (from Emory University), who founded the Law and Religion Program in 1982 with James Laney, states: "In the 1960s, 70s and 80s, law schools generally were not open to discussion of law and religion except in the area of First Amendment and narrow church-state issues. The result was a shallow jurisprudence and shallow historical perspective in legal education. Our program has made possible for law schools across the country to acknowledge that scholarly inquiry into matters of law and religion is indeed scholarship of the first order. We turned the tide."[11] Another example is the programmes provided by the University of Louisville's School of Law, consisting of a joint venture between the Brandeis School of Law and the Louisville Presbyterian Theological Seminary.[12] A growing number of legal educators and theologians in the US believe that interaction is necessary because the two disciplines share a common base, and that the inclusion of theology is an important way of dealing with legal ethics and social responsibility (Silas, 34). It is also reported that a small number of law schools in the US have established formal law and religion programmes or have integrated religion into certain traditional law courses (Silas, 34). Lee observes that many of the Deans of religiously affiliated law schools in the US agree that allowing greater vent to religious teachings would enhance the quality of the law school educational experience (Lee, 1985: 1180). Regarding the British context, Freeman states that there has been substantial development, from the identification of links between the law and other fields of study, to a situation where such interdisciplinary study and research have been greatly developed and expanded (Freeman, 1994: 4 - 5). Kahn-Freund

10 http://law.cua.edu/academic/institutes/institutes'ne.cfm (accessed on 31/10/2005). Courses included in this programme are: Source of Christian Jurisprudence, Law of Church/State Relations, First Amendment Seminar: Religious Liberty, Contemporary Social Issues Under Jewish Law, Canon Law for American Attorneys, Catholic Social Teaching and the Law, and the Catholic Natural Law Tradition.

11 http://news.emory.edu/Releases/CLSR1117744204.html (accessed on 31/10/2005).

12 http://www.louisville.edu/brandeislaw/academics/degrees.htm (accessed on 31/10/2005).

states that there ought to be no legal curriculum which does not include courses in other social sciences (Kahn-Freund, 1966: 128). This development, especially regarding the interplay between law and religion, has not been adequately addressed in the South African legal sphere. In the contemporary legal fraternity, with special emphasis on legal scholarship and the law school, such a study is most challenging amidst a dominating climate of secularist, pragmatic, empiricist, postmodernistic and positivistic legal approaches. In addition, scrutiny of the law in this regard assists in the development of a vibrant reconsideration of the content of a subject that is most accommodative of religious presuppositions.

Scholarship, understood as that which aims at the truth (See Kronman, 1993: vii), has important implications regarding the lecturer's responsibilities in teaching the law. This "aim at the truth of the law", for purposes of this investigation, is understood as allegiance to a specific religious point of departure of the law. Are practising lawyers (generally speaking) devoted to material gain in addition to learning the skill of persuasion *per se*, while legal scholarship is viewed as being moulded into a mere empirical exercise? Smith and Weisstub comment that one of the most interesting aspects of the law in contemporary society is the fact that most lawyers have no theory about what they do. Instead, they regard themselves as pragmatists, giving rise to a theory without a profession, and a profession without a purpose. Despite the fact that law may be viewed as a secularised theology with the lawyer as secularised high priest, many lawyers participate in legal institutions without the remotest sense of their own or the institution's social purpose. In other words, if a church ceases to exhibit its function in society and becomes deritualised to the point where its congregation loses a sense of mystique and greater design, the institution is no longer viable. According to Smith and Weisstub, the same fate may well await the law (Smith & Weisstub, 1983: 10). Law students bring a larger measure of idealism to law school than they leave with. Imagination in a broad sense is stifled rather than encouraged. The emphasis of the curriculum on business and finance, the areas in which there are the greatest opportunities for remunerative private practice, conveys the impression that law students' "future success and happiness will be found in the traditional areas of law" (Cramton, 1978: 260). Machen states that the vocational view of education, which is that the purpose of education is to enable a person to earn more money after graduation, is enormously overdone. For one thing, it is training so many people in the hope of their earning large salaries, that there are not enough large salaries to go around. Moreover, this view is hopelessly narrow and

inflexible, seeking to make people efficient machines. A more acceptable view of education is that it ought to "broaden" a person (Machen, 1987: 124 - 125).

The law student needs to understand the law in its wider context – a wider context which clarifies the relationship between the lawyer's life perspective and his or her profession. It is the fulfilment of this missing link that will counter the superficiality and the decrease in spirituality in the contemporary legal profession. The law is becoming more fragmented, more subjective, geared more to expediency and less to morality, concerned more with immediate consequences and less with consistency or continuity (Berman, 1983: 39). There is a tendency in the contemporary legal system with a rather superficial angle to it. The law is understood as a tool that fulfils the lawyer's needs, without deeper reflection regarding the law and its contents. Emanating from this is the alienation of the law from religion (and not the alienation of religion from the law), which has unfortunately entered the halls of tertiary legal education. Berman criticises the dominant view that the law is a technical trade rather than a "broader subject". The mere mention of religion in lecture halls of law, echoes with a sense of indiscretion. Students are taught about equity, equality, human dignity, rights, *bono mores*, and justice, while being prevented the dissemination of "alternative" *content* to these concepts. The content taught is accepted as final, and further scrutiny *via* ideological enquiry is subtly prohibited. Gerber rightly states that law school disrespect regarding theory and values needs to be reduced, and that serious study into theoretical bases of law is needed for context and value (Gerber, 1989: 48). According to Gerber, Hume's method, which was tied to a perception of the law as an autonomous inductive mechanism free of values (unconnected to and independent of the men and women who make it), is now a view that is outmoded (Gerber, 1989: 48). The search for moral truth remains a central commitment of the legal scholar, lawyer and public trustee (Gerber, 1989: 49). The law school should be responsible for cultivating the legal scholar's thoughts in this regard. Students should not: (i) be forced into a so-called "neutrality" (see Granfield, 1992: 78); (ii) be decentralised from the ethical implications of a case (see Granfield, 1992: 76 - 77, 79, & 89); or (iii) be opposed for trying to argue against that which confronts their values (see Granfield, 1992: 84). Peller rightly states that: "the violence of legal thought consists in the arbitrary exclusion of other ways of understanding the world" (Granfield, 1992: 73).

The view that law schooling represents a moral transformation through which students dissociate themselves from previously held notions about justice and replace them with new views consistent with the *status quo*

(Granfield, 1992: 73), should be approached with circumspection. Moral transformation should not imply that the student's previous conception of law and justice is untenable and inferior, resulting in views consistent with the *status quo*. Granfield states that the law school is where students undergo an identity transformation process in which they develop new insights of themselves and the world around them (Granfield, 1992: 83 - 84). This should not imply that the student has to surrender his original make-up of individuality at law school. At the same time, law school should provide alternative views which could actually enrich the student's original individuality without sacrificing such individuality. This also adds to the lecturer's responsibility not to blatantly influence the student's original perspectives of what is right and wrong. Of importance to the educator should be a respect for the soul as well as the body of the child, the sense of his inmost essence and internal resources (Moberly, 1949: 87). The lecturer's immediate task is to aid understanding rather than to impel his pupils towards, or away from, any prescribed type of action, to supply them with data for forming intelligent judgments of their own rather than to enlist them as disciples – but among those data should be his own conclusions and the reasons which have led him to them (Moberly, 1949: 110 - 111). According to Gerber, the acknowledgment of the value choices inherent in the work of the lawyer is not to actually make value choices for the student. A conscientious teacher may refrain from making a student's ultimate choice; it is another thing to refuse to come to grips with these fundamental issues (Gerber, 1989: 48 - 49).

Fuller's insistence that all law is not "a manifest fact of social authority or power, to be studied for what it is and does, and not for what it is trying to do or become" (Van der Merwe, 1992: 619), provides the law lecturer with added responsibility. Statements such as "…law should be taught as law and not necessarily as politics, philosophy or economics. The law must be the student's main focus" (Dlamini, 1992: 599), proclaim the wrong message regarding the separation between the religious and the empirical in the context of legal education. Nolan speaks of an adult's worldview, which is informed and nurtured by an understanding that contemplates the transcendent reality; this worldview being the product of one's social, cultural and family background, one's education, training and experience (Nolan, 1999: 1116). Bearing this in mind, the law school forms part of the educational aspect in not only maintaining the student's already existing worldview, but in developing (and even proposing alternatives to) this all-encompassing framework of the student within which all their knowing occurs, all their work is done and all their decisions are made (Nolan, 1999: 1116). According to Cramton, the university law school has

a broader function than "a cooking institute, a barber college, or some other trade-oriented technical school. In other words, beyond the mere emphasis on technique, there should be larger normative questions placed on the teaching agenda of the law school (Cramton, 1987: 510 - 511). The plethora of normative questions and answers are defined by a specific religious perspective, and, according to Smolin, whether it is a Christian contribution to normative scholarship or a neo-Kantian or feminist contribution to normative (ultimately religious) scholarship, makes no difference (Smolin, 1996: 1510).

Proposals to broaden the sphere of legal education in order to accommodate various religious perspectives are the following: The emphasis on the importance of a subject such as philosophy of law needs to be addressed. The dissemination of philosophy of law is said to develop rational and analytical skills, comprehension and expression in words, critical understanding of the human institutions and values with which the law deals, and creative power in thinking. In the US, the study of philosophy develops the skills that the American Association of Law Schools has identified as important for pre-law education as proven by the fact that philosophy majors consistently score very high on the Law School Admissions.[13] But beyond the practical advantages of this approach, philosophy of law necessitates the inclusion of an awareness and consequent critical thought regarding the religious. Philosophy of law is understood, among other things, as: (i) concerning thought about law on the broadest possible basis (Dias, 1976: 3); (ii) the study of general theoretical questions about the nature of laws and legal systems, about the relationship of law to justice and morality and about the social nature of law (Freeman, 1994: 4); (iii) dealing with a study of the nature of law, its source and purpose, and the nature of rights and duties and other questions related to it (Tripathi, 1975: 6); (iv) the knowledge of things divine and human, the science of the just and the unjust (Hosten *et al.*, 1983: 25); and/or (v) any philosophical enquiry about law and its relationship to disciplines such as anthropology, history, criminology, psychology, economics, ethics, politics and so forth (Hosten *et al.*, 1983: 27).

Then there is the possibility of inter-faculty/departmental interaction in which different sciences can participate, for example, collective research endeavours. Moberly states that for many years the work of universities

13 See http://www. clemson.edu/caah/philosophy/website/html/prelaw.html (accessed on 16/05/2005).

has tended to be done in an increasing number of separate water-tight compartments. He adds that, for students and for staff, the attainment of a synoptic view of the intellectual world and the relating together of the different disciplines of study, have largely faded (Moberly, 1949: 57 - 58). Forrester-Paton comments that scholars have very often given up the attempt even to understand one another outside the narrowest of groups – "…they seem like a number of people working in the same garden each with his back turned on the other; they meet at meals, or even live together, but rarely consult about the garden or compare notes, some of them apparently being convinced that they are really in separate gardens" (Forrester-Paton, 1946: 27). As referred to earlier, there are the developments in the law schools of various universities in the US, where interdisciplinary programmes are presented. At some of these institutions, students also have the option of creating a specialised interdisciplinary programme in conjunction with other university departments, such as theology, nursing, philosophy or the National Catholic School of Social Science.[14] Then there is the possibility of establishing elective courses (on under- and postgraduate level) dealing with issues related to legal ethics from a Christian perspective, for example, or to a Christian philosophy of the law. There are also certain subjects that exhibit a greater affinity to religious issues such as jurisprudence/philosophy of law, human rights, constitutional law, interpretation of statutes, constitutional interpretation, and criminal law. Consequently, it is especially in these subjects that religious perspectives must be taught. For example, the issue of human rights is prone to certain religious affinities, which in turn influence the learner. Currie and De Waal comment that in the western world the alliance between church and state proved to be an unholy one, and that it was in reaction to religious persecution by the state that the idea of human rights first developed (Currie & De Waal, 2005: 336 - 337).[15] This is incorrect. This view tends to understand the close relationship between church and state in a negative light, and sketches the frequently proclaimed message that we are not anymore living in barbaric times, where witch-hunting and religious fundamentalism were rife; the past is viewed as an era of religious bigotry, of religious persecution and murders. In human rights jurisprudence it has been asserted that the subject of

14 http://law.cua.edu/academic/institutes/institutes'ne.cfm.

15 Reference in this source is also made to Rawl's Political Liberalism which refers to the "Reformation and its aftermath" which gave rise to liberalism, Currie & De Waal, 2005:337, fn. 1.

religious human rights was shunned and neglected more than any other similar subject, "perhaps as a consequence to the generally acknowledged fact that no topic has divided humankind more (Lerner, 2000: 11). However, our century has seen the highest percentage of mankind perish from mass murders, death marches, detention camps, slavery, starvation, fatal epidemics catalysed by promiscuity, political oppression, racism, political hostilities, wars of unprecedented destructive power and hatred – all without the help of the church. Our humanistic overlords are convinced that, once Christianity was shoved into the closet, the age of peace and innocence was surely dawning (Rushdoony, 1999: 207 - 208). Many individuals and movements in the history of mankind, who showed no allegiance whatsoever to the mainstream religions, have committed the worst atrocities ever. The secular ideological wars of the 20th century have killed far more people than all the religious wars of history combined. Yet secular ideologies are not banned from the liberal public sphere because of their dangers (Carter, 2002: 27). Therefore, it would be unfair and biased for any course in human rights jurisprudence to teach that only the "so-called" traditional religions have not contributed to the development of human rights theory, as well as that they have had a negative effect on human rights jurisprudence. Explanation also needs to be given to the learners that atrocities exercised under the banner of a specific religion, does not necessarily confirm that such atrocities are qualified by the teachings of such a religion.

Additional illustrations of how religion can be effectively integrated into law courses are that the lecturer can, in addition to his formal lecturing commitments, give lectures in, for example, Christian legal ethics, to those interested. Also, the Christian law lecturer should also become active in providing guidance regarding dissertations and assignments in law courses that are by nature closely connoted to transcendental argument and/or themes more closely affiliated with belief systems. Also, those learners and members of academia who are of some or other specific religious affiliation, can establish associations, in order to provide a stronger voice and also to develop interest and participation among members that share the same perspectives on fundamental questions regarding reality.

4. Religion and the role of the University understood

The relationship between religion and the law school must also be understood against the background of the university, especially taking into consideration the view that one of the reasons for the establishment of

universities is to realise academic freedom (Currie and De Waal, 2005: 370). Freeman states that an academic tradition, as opposed to training by apprenticeship, is more likely to inspire more philosophical attitudes and less impatience with "mere theory" (Freeman, 1994: 3). According to Kahn-Freund, the student's mind must from the first day of his studies be adjusted to the acceptance of authority, while at the same time being taught how to question it (Kahn-Freund, 1966: 124). The contemporary university's predominant emphasis on the practical and utilitarian – the conquest of nature for the satisfaction of human needs, cannot be denied. The ends pursued are not mysterious, high-flown or elusive, but plain, practical, earthy and popular (Moberly, 1949: 44). The contemporary university relies on what "is", rather than what "ought to be". The scientist is cautious about appealing to first principles, and deals less in axioms than in provisional hypotheses (Moberly, 1949: 44). In the words of Moberly: "Education on this pattern has a mental discipline of its own, different from that engendered by Latin prose or by Euclid but, in its way, quite as real. It enjoins submission to fact in despite of all preconceptions and predilections" (Moberly, 1949: 45). According to Baillie, in most universities today, the students of the natural sciences vastly outnumber those in theology, law and liberal arts put together (Baillie, 1946: 17).

The university is unique, probably for many reasons, but especially in its endeavour towards the "why" of knowledge. The question "Why?" needs to be understood in its deepest sense. It is especially the normative character of the law (and its numerous epistemological options) that lends itself to the domain of the religious. In its provision of knowledge, the university must not forsake its duty to enhance and develop the values and beliefs of its students, the social capital of the future. The normative values and beliefs that are cultivated at university level, are the norms and values that will represent society in the future. What Tocqueville referred to as the "habits of the heart and mind", is not only relevant to the concept of a vibrant civil society, but is also applicable to a university. The forum of tertiary education, especially the university, is an important forum for the nurturing and development of the "habits of the heart and mind". Knowledge gained at university, should not only be geared towards the development of a specific skill, but must also involve the development of the total person, including the spiritual. Although it is not the duty of the university to inculcate any particular philosophy of life[16], it is its duty to

16 Although, in many instances, the university does so indirectly, for example the secular influences presented to students of non-secular affiliation.

assist its students to develop and maintain their own philosophies of life, so that they may not go out into the world maimed and useless. The university should stimulate and train students, not necessarily to think alike, but at least to think strenuously about the great issues of right and wrong (Moberly, 1949: 108). One of the qualities that a university education needs to produce is a mind which refuses to be content with mere information, and which tries to criticise and understand (Forrester-Paton, 1946: 17). More specifically, such a mind is aware that "the facts" which are so often appealed to, are rarely bare facts but usually include elements of interpretation, and knows that questions of meaning and value arise in all sorts of contexts in university study (Forrester-Paton, 1946: 17).

The role of the university is also enhanced in the context of education viewed as the laborious process in seeking to touch the inner core of the human person to impress upon the person a sense of truth, for truth is the direct object of all intellectual search (Nwatu, 2001: 156). This understanding requires a substantial loyalty to the application of religion to the sciences. What can take the knowledge of a student further away from the truth in the sciences than ignorance of religious presuppositions, especially regarding a substantially normative-laden science such as the law? In addition, it is in the essence and mission of a university to offer students both *scientia* and especially *sapientia*. *Scientia*, as explained by Nwatu, is concerned with the knowledge of factual/historical information, skills, and knowledge about the cosmos and its abundant contents (Nwatu, 2001: 156). *Sapientia* is knowledge as wisdom. In the words of Josef de Vries, *sapientia* is knowledge "about ultimate principles and ends of finite existence. It is a contemplation and judgment of all earthly things in the light of eternity (*sub specie aeternitatis*); it is a knowledge that shows its worth by assigning each thing to the place that belongs to it in the context of the whole universe…" (Nwatu, 2001: 156). The inclusion of religion gains importance when understanding theology as serving all other disciplines in their search for meaning, especially by bringing a perspective and an orientation not contained within their own methodologies (Nwatu, 2001: 161). The university deals with theories and theories are spiritual realities. An added impetus to the education role of a university and the law school implies the training of the powers of interpretation and judgment in the perspective of a faith or of a philosophy of life and value system. All education must be implemented within a basic concept of the human being and his relation to the universe. Freedom of education should be viewed in close relationship to freedom of religion. Those who wish for their children an education in harmony

with the religious and moral principles they inculcate in the home must be provided with the necessary facilities/opportunities (Taylor, 1966: 40).

According to Moltmann (1999: 257), what is on the agenda is the defence of scholarly and scientific freedom against the claims and bids of industry and commerce. The sphere of basic research must and can be kept free of exploitative economic interests as well. For these sectors, it is valuable that in the universities there should be faculties which seek for truth, without having to enquire about the utility or exploitability of that truth (Moltmann, 1999: 257). Buzzard states that education, especially in a university context, requires freedom to discover truth, and that no educational process begins *ex nihilo*. Education in a university context is driven by commitments and perspectives about mankind, and about truth as well as ultimates – "A university knows that education is ideological, inevitably theological … Legal education is especially ideologically rooted. Even to consciously seek to avoid ideology would itself reflect an ideological commitment" (Buzzard, 1995: 267 - 268).[17] The university as an institution dealing with the seeking of truth (Baillie, 1946: 10 - 11) entails that the religious aspect requires emphasis. Truth should not be limited to a utilitarian approach (Baillie, 1946: 11). The utilitarian and intellectual quests need to be accompanied by a profoundly spiritual quest. Baillie states that to assume that the world's greatest seekers after truth were motivated by mere curiosity would be as outrageous as to say that they had in mind only utilitarian ends. They were moved rather by the desire to know *how* to live. The nature of the universe was to be understood in order to know *how* to adjust themselves to it – this was a profoundly spiritual quest (Baillie, 1946: 12 - 13).

Contemporary society is reflective of a "supreme intellectualism". The percentage of literacy has risen in the 20th century to the highest point ever reached in modern European civilisation (perhaps in any period of civilisation). Intellectualism such as characterised the single city of Athens in antiquity, now rests upon our entire western world (Smith, 1945: 262). However, it is ironic that this "supreme intellectualism" is so averse

17 In this regard, Buzzard adds: "Law bears enormous ethical freight in our society. We live in a culture torn with controversies in which religion and law are major actors. The Brookings Institute's ten year study on religion and society has recently concluded that social institutions require religious underpinnings. Yet, our pluralism and constitutional principles have resulted in public confusion and dispute over the role of religion and law. Issues in bioethics, world peace, human rights, allocations of power, and environmental protection are all value laden. Lawyers play prominent roles in shaping public debate on these issues", Buzzard, 1995: 270.

towards religious enquiry. "Supreme intellectualism" rather implies an added sensitivity towards a contemplation of the religious. In the university, basic problems, cultural, social, political or religious, should be debated in their full perspective and with an attempt to transcend some of the partiality and prejudice that may attend their discussion in the political arena (although the university will share many of the preconceptions of its society and have, as well, a partial perspective of its own) (Forrester-Paton, 1946: 21 - 22). In understanding the role of the university in the context of freedom of religion, it is important to place an emphasis on an approach that reflects a positive neutrality. In other words, the university should not exclude or discourage discussion pertaining to philosophies of life, but should actively promote and stimulate it (Moberly, 1949: 107). The university must be "a community within which the chief contemporary intellectual positions…may enter into a living encounter with one another" (Moberly, 1949: 107). Kahn-Freund states that legal education does not deserve its name unless law is taught in conjunction with other disciplines, which can only take place in a university (Kahn-Freund, 1966: 128).

Not only in the dissemination of knowledge, but also in the research responsibilities of the lecturer/academic, should the importance of religious perspectives be kept in mind. Although the lecturer/academic might not realise what tools he is handling or what forces are finding expression through him, he is making his contribution towards creating or maintaining a climate of thought, an intellectual attitude, which has moral and spiritual implications (Hodges, 1946: 23). Research also gains added insight, in that it should not only consist of the search for new scientific knowledge to overcome some practical obstacle (Forrester-Paton, 1946: 20 - 21), but should also include investigation into ideology, values, ultimate measures of right and wrong, and truth. In this regard, academic scholarship becomes relevant. Such scholarship allows explanations to be found through exploring all angles, but particularly areas outside of the immediate field. In the context of law, this would imply, for example, that cases would be compared from a variety of cultures, contexts and judicial boundaries (Nicholls, 2004: 31). Religion would also play an important role in this regard. This would differ from what is referred to as polemic scholarship, which looks at evidence within the discipline and rarely goes outside the discipline. Regarding the discipline of law, polemic scholarship would mean, for example, that a particular case may be compared with similar cases within one judicial system, but not looked at from outside this context for different perspectives (Nicholls, 2004: 31). Carter comments that academic freedom is the jewel in the crown of the

modern university, for it enables professors to go where their research leads them (Carter, 1998: 493).[18]

Baillie states that an attempt by universities to coerce students into the adoption of a single philosophy of life (Christian, Communist, Fascist, Nationalist) would be an assault on liberty. In addition, while the public mind remains divided, a free university is bound to some extent to reflect this division. According to Baillie, a failure to provide students with an intelligent understanding of the alternatives between which they have to choose in forming a philosophy of life for themselves, is an abnegation of the very purpose for which universities exist (Baillie, 1946: 34). In fact, although a university may indeed be neutral regarding a public identification of itself with any particular philosophy of life, in practice it is impossible to plan its studies or its corporate life except by reference to some standard of values (Moberly, 1949: 114). In addition, it is impossible to have a rational standard of values in the absence of any clear image of the ends of human existence, and that entails some conception of the nature of man and of the world. In the absence of this, a university will be wanting in intellectual honesty; and it will be too timid to make clear even to itself the body of convictions by which it is really animated (Moberly, 1949: 114). The US judiciary, in *Abington School District v Schempp*[19] decided that it is fully constitutional for a public school to offer courses in morality or philosophy – "just as 'study of the Bible or of religion, when presented objectively as part of a secular program of education'." (Choper, 1982: 612). Not only should tertiary education pay heed to this, but it should also develop and present courses with religious

18 Carter refers to the following statement by Arthur Lovejoy (one of the organisers of the American Association of University Professors): "Academic freedom is the freedom of the teacher or research worker in higher institutions of learning to investigate and discuss the problems of his science and to express his conclusions, whether through publication or in the instruction of students, without interference from political or ecclesiastical authority, or from the administrative officials of the institution in which he is employed, unless his methods are found by qualified bodies of his own profession to be clearly incompetent to professional ethics", Carter, 1998: 493 - 494. From a South African perspective, Currie and De Waal state that, although the academic freedom right has been moved from its place in the interim Constitution (where it was part of the right to freedom of religion) to the right to freedom of expression in the Final Constitution, this change is insignificant. They add that at the core of the right to academic freedom is the right of the individual to do research, to publish and to disseminate learning through teaching, without government interference. The right to academic freedom is vested in individual academics and not the university (Currie and De Waal, 2005: 370).

19 374 U. S. (1963).

content for those learners who intend to know more about the subject. If tertiary institutions neglect the accommodation of religious content, if tertiary institutions were to try and convince (either directly or indirectly) learners to believe in an "ultimate truth" emanating from some or other secular ideological truth, for example,, then this would be contrary to freedom of religion and therefore unconstitutional (Choper, 1982: 612). It is to be emphasised that public schools are government-controlled seedbeds of belief formation, and the government possesses exceptional power to influence beliefs on any matters it touches (Mitchell, 1987: 663). The same applies to universities. Why may the secular religion be superior to any of the so-called "traditional" religions?

Colson states that institutions of higher learning have embraced postmodernism so aggressively, and that tolerance has become so important, that no exception is tolerated. However, if all ideas as well as many values are equally valid, then no idea (or value) is worth debating on (Colson, 2000: 23). If one has to be truly serious about tolerance of disparate ideas and beliefs then religious ideas also need to be accommodated (Lee, 1995: 256). Regarding the university (and the law school) as medium where ideas and theories are especially accentuated, the truth needs to be emphasised that these ideas and theories are not merely ideas and theories – in actual life they become symbols and slogans around which desires and prejudices come to the fore (Hodges, 1946: 17). The function of the university must be understood in the context of being a facilitator of the "trying out of ideas" (Moberly, 1949: 303). Religion also forms an important facet in terms of the search for meaning, and according to McCoy, the vital centre of higher education is omitted when we cease to wrestle with the problem of meaning (Buzzard, 1995: 274).

5. A Christian response to legal scholarship

The world of ideas and theories comprises an arena in which the spiritual struggle between light and darkness, between the truth and the lie, is continually fought – this mental fight must be the concern of both the lecturer and the student (Hodges, 1946: 17). "Thinking is a form of worship", said Hegel when reproved for not going to church. Is this true of the kind of thinking (or teaching) for which Christian lecturers are paid? (Hodges, 1946: 22). If the people at university must be deeply concerned with discovering a working philosophy of life, the religious issue is unavoidable, for every philosophy of life is either religious or secularist; it requires God or it leaves Him out (Moberly, 1949: 111). Man acts in this religious way by demanding an ultimate point of reference for his

thinking and doing. It is meaningless to distinguish between religious and non-religious areas of life or between religious and irreligious men. He who rejects one religion or god can only do so in the name of the other. We cannot escape our religious nature. We will place our final trust and faith either in the God and Father of the Lord Jesus Christ or in some idol of our own devising and, as Paul teaches, thus try to hold down the truth in unrighteousness (Taylor, 1966: 21 - 22). If, contrary to neutrality's demand, God's word demands unreserved allegiance to God and His truth in all our thought and scholarly endeavours (Bahnsen, 1996: 4), then an emphasis on the Christian view of the law is important. Paul infallibly declares in Colossians 2:3-8: "All the treasures of wisdom and knowledge are hid in Christ." In this regard, Bahnsen comments: "Note he (Paul) says *all* wisdom and knowledge is deposited in the person of Christ – whether it be about the War of 1812, water's chemical composition, the literature of Shakespeare, or the laws of logic!" (Bahnsen, 1996: 4). Bahnsen also states that one must be presuppositionally committed to Christ in the world of thought or else the persuasive argumentation of secular thought will delude one (Bahnsen, 1996: 5). For those who believe in the Gospel, we are commanded by Jesus to love God with all our mind. Skimped study and sloppy unexamined opinions dishonour Him (Forrester-Paton, 1946: 19). Nolan refers to the words of the prophet Micah, stating that one must do what the Lord requires of one – only to do right and to love goodness.[20] Nolan adds that a religious lawyer's horizon includes concern promoting God's plan for the world. This implies that the Christian lawyer will want to practise law with a view of God as the ultimate client (Nolan, 1999: 1117 - 1118). Taken by itself, the word "god" carries as little specific meaning as the word "good" –

> Both [these words] are empty receptacles whose content varies from man to man and religion to religion. They are functional words, the linguistic reflection of the fact that man is that creature who, in the exercise of his freedom, necessarily appeals to some criterion of good and evil. To ask whether a man believes in "God" is consequently to misunderstand the issue. The proper question, as the biblical writers never forgot, is rather What (or who) is his god? (Taylor, 1966: 18 - 19).

20 Micah 6: 8 reads: "He hath shewed thee, O man, what is good; and what doth the Lord require of thee, but to do justly, and to love mercy, and to walk humbly with thy God?", Authorised King James Version.

Therefore, we need to ask ourselves which of the various gods is the true God and, "what am I in fact, and not in theory, making my matter of ultimate concern in life?" (Taylor, 1966: 19). Faith and scholarship are always integrated, and the only real question is: "Which faith?" (Ferreira, 1997: 155). According to Ferreira, many Christians, unaware of the implicitly religious nature of scholarship, find themselves undertaking scholarship from a faith perspective which is antithetical to their Christian faith (Ferreira, 1997: 155). The Christian lecturer must bear in mind that it is not the business of the pluralistic or "neutral" university to impose on its members any ready-made philosophy of life, but to give them material for a genuine personal choice. For the Christian academic, research seems to take on a deeper meaning and seriousness as an attempt to understand God's creation and the human life and history which God has redeemed – it goes beyond being a fascinating game and becomes something like an act of worship; knowledge for God's sake (Forrester-Paton, 1946: 24). From the Christian lecturer's angle, it is emphasised that a Christian who draws no guidance for academic policy from his faith is especially failing in his integrity as a Christian (Moberly, 1949: 27). Smolin comments that in the US context, it is ironic that despite pleas for intellectual diversity, adherents of the traditional forms of the historically and culturally dominant faiths of the American people are virtually absent from most American law faculties. Smolin adds that the accepted voices of faith are generally those who propound a modernist version compatible with the relativist agenda (Smolin, 1988: 415). Smolin also states that Christian scholars need to remember that they represent a vast throng of people: "indeed, believing Christians are probably the most underrepresented group in the academy, and that Relativist New Class members are historically newcomers and remain numerically a minority" (Smolin, 1988: 416). This position is surely very close to the position in the South African sphere of tertiary education.

Allegretti observes that throughout much of Christian history, the concept of calling was reserved for the few who renounced secular life in complete dedication to God. The Reformation changed this, emphasising that any job can be a calling in service of God (Allegretti, 1996: 965). In the context of the history of the university, the emergence of a humanistic tendency from the end of the 14th century brought about a gradual loosening of the connection between the departmental studies and that central Christian conviction which had formerly given unity to them all (Baillie, 1946: 16). Baillie adds that, where formerly the whole of culture had been carefully kept under what may be referred to as the umbrella of the Christian view of God, the world and man, now almost every

department of it was to go its own way without much effort to ask how either its presupposition or its results were related to Christian commitment (Baillie, 1946: 16). Baillie states that the increasing specialisation and departmentalisation of university studies makes it increasingly difficult to see the wood for the trees. This development resulted from the humanism of the Renaissance, where each separate field was given liberty to develop "its own inside", to discover its own interior norms and laws, instead of attempting to conform itself to a pattern imposed upon it from above (Baillie, 1946: 18). Nwatu (2001: 166) comments that theology seems to have lost its place as the leading supreme science at the time when production and demonstration ran away and left cultivation and contemplation behind – all that mattered were machinery and materialism. If theology is on the decline, how much more is the decline of the religious aspect in the sciences taught at university? Colson, in his commentary on the value of work in the US context, states that Americans have lost a sense of higher purpose for work. In our materialistic culture, work is reduced to a utilitarian function: a means of attaining benefits for this world, this life – whether in terms of material gain or self-fulfilment. Work no longer has a transcendent purpose: it is no longer a means of serving and loving God (Colson, 2000: 392).[21] Moberly (as far back as 1949), comments that the universities are implicitly hostile to the Christian faith, and that therefore, Christians are in a radically false position: "We are trying to live at this moment in two worlds, in the world of our work occupying most of our time which assumes that the Christian faith is untrue, and the world of our spare-time Christian activity or prayer or praise which assumes it is true" (Moberly, 1949: 27).

Liberalism works in various guises in order to suppress true religious expression in many sectors of society, for example, tertiary education. This has an adverse effect on the exercise of religious scholarship in, for example, the law school. Gedicks comments that liberals, captured by the association of secularism, fail to see how thin the distinction is between knowledge and belief, and that these liberals seem to be ignorant of the possibility that religious claims might be rational or that secular claims might be irrational (Gedicks, 1992: 694). One has to be reminded of the fact that the basic response of liberal theory to serious religion is to try to speak words that seem to celebrate it (as part of the freedom of belief, or

21 Also see C. R. M. Dlamini, "The Law Teacher, the Law Student and Legal Education in South Africa", *South African Law Journal*, Vol. 109, 4(1992), 596 - 597.

conscience, or the entitlement to select one's own version of the good) while in effect trying to domesticate it – or, if it fails, to try to destroy it (Carter, 2002: 5). This speaks for itself in contemporary society, including in the sphere of tertiary education. In attempting to wash public education of religion, secularists are simply striving to quarantine that "which they recognize as contagious, define as contamination, and experience as disease" (Hiebert *et al*., 22). Commenting on the position in the US, Carter states that it is rather puzzling that a Communist or a Republican may try to have his worldview reflected in the nation's law, but that a religionist cannot; "that one whose basic tool for understanding the world is empiricism may seek to have here discoveries taught in the schools, but one whose basic tool is Scripture cannot; that one whose conscience moves him to doubt the validity of the social science curriculum may move to have it changed, but one whose religious conviction moves her to doubt the validity of the natural science curriculum may not" (Carter, 1987: 985 - 986). Carter also emphasises that it is not only ideologies such as communism that can be viewed as being totalitarian, but also the ideology of a liberal democracy. Liberal democracy includes the tendency by the state to want to make its people into "a people", and thereby to standardise them to a set of ideas that may or may not prevail (Panel Discussion, 1999: 989). What makes the norm in a liberal democracy supporting the morality of the lawyer's maximisation of the client's autonomy superior to a norm that does not ascribe to merely giving people what they want? (Panel Discussion, 1999: 992). In fact, liberalism finds it much easier to argue that it is "neutral" in the conflict between secularism and religion, than it is to proclaim an epistemological justification for secularism (Gedicks, 1992: 696). Gedicks adds: "Liberalism privileges secular ways of knowing and marginalizes religious ones by manipulating the boundary between public and private life. Liberalism politically privileges secularism over religion by naming public life (the realm of secularism) rational and orderly, and private life (the realm of religion) irrational and chaotic (Gedicks, 1992: 695 - 696). Liberalism, with its loyalties to pluralism, actually provides a threat against such pluralism *via* its near conquest of the field by the secular model.[22]

According to Carter, the resistance to which Christians are called is not necessarily active dissent, though it sometimes may be. The more

22 See Lee, 1995: 257 for a similar idea.

important form of resistance is active difference, living life in a way that sets the Christian apart from the culture – active difference is necessarily resistance in an era when cultural, political, and legal pressures combine in an effort to influence fundamental values (Carter, 2002:11). Carter states that Christianity has been at its best when it has resisted and at its worst when it has decided to make itself a pillar of the status quo – "It has been, you might say, more purely Christian when it is recognized itself as creating a different set of meanings than those that others might prefer" (Panel Discussion, 1999: 990). Religion and its accompanying resistance is something that is necessary in order to survive as a democracy, it develops dialogue and participation in opposition to a liberal democratic emphasis on a uniform set of values for everyone. According to Carter, one of the important features of religion in a democracy is precisely its ability to spark in its adherents different visions of the meaning of life, different insights as to what is and is not important (Panel Discussion, 1999: 989). In this regard, the law school, as the breeding and grooming ground of normative issues, plays an important role.

But the churches also have an active role to play. Carter states that religions best serve democracy when they provide independent moral voices, and in this way are able to challenge and to a certain extent weaken the competing claims of the state (Carter, 1994: 136). Modern "progressive" secular thought has corrupted the Christian citizens of the world to such an extent that Christians themselves no longer expect a unified directive to be available to them in the Word of God for matters pertaining to subjects, political, economic, educational or juridical (Taylor, 1966: 6). An example of a so-called Christian justification of such passivity and acquiescence in the pagan political and economic status is the following:

> … He (the Christian) can no more aim to be a Christian statesman than a Christian engineer. Politics has at any one time its own techniques, aims and standards, vary though they may, and in the light of them as they are in his lifetime, the Christian's effort must be to make a good politician and no more. He stands here on a par with the non-Christian, just as there are no denominations in the science of physics. His religion will give him no special guidance in his public task, as it will do within his personal relationship and close neighbours (Taylor, 1966: 6 - 7).

There is also a high sense of suspicion regarding the proper and effective preaching (and teaching, within the context of the visible church) on

theological issues beyond personal salvation, such as the relevance of biblical ethics and law, as well as the Christian view on political and jurisprudential theory. Rushdoony states that a corrupt nation (and many of its churches) goes into a frenzy of self-righteous indignation and hatred over the sins of Watergate, but it never stops to consider that it has banned biblical morality from the schools and courts, and has laboured to produce the immorality it professes hypocritically to hate (Rushdoony, 1982: 105). According to Rushdoony, the churches, too, hypocritically mourn the loss of morality without considering their guilt in the matter. The modernist churches have favoured situation ethics, and the Watergate scandal is situation ethics. The evangelical churches have denied the law and yet wonder at the national moral decline (Rushdoony, 1982: 105). Rushdoony states that the church's role has been dramatically altered, because, instead of being the teacher of morality, of the moral order required by God's law, the church has become more the morale builder than the moral teacher (Rushdoony, 1999: 182). On the one hand we find liberal democracy's support for excluding religion from the public sphere, and on the other hand the churches are not progressively vouching to participate in the public sphere. The church becomes more and more like an ancient mystery religion, trying to give some kind of hope for the after-life while irrelevant to this life (Rushdoony, 1999: 182). One wonders whether the churches in South Africa realise the impact of religion on political relationships and jurisprudential issues, especially on the assumption that: "religion poses a threat to the intellectual world of the liberal tradition, because it is a form of social life that mobilizes the deepest passions of believers in the course of creating institutions that stand between individuals and the state" (Carter, 1994: 139)? Therefore, a substantial influence (in whatever manner) on the individual within the visible church regarding the interconnectedness between matters of faith and matters political as well as jurisprudential issues, is so necessary to assist in the intellectual and spiritual development of the law school student (or potential law school student).

6. Conclusion

In an age which teaches the dangers of intolerance, absolutism and fundamentalism, what more convincing reason is there than that which inculcates openness and true accommodation? Rather this, than follow the prevailing wisdom of supporting a "so-called" religiously neutral (or irreligious) public education. Carter states that democracies need their communities of "resistance" because democracies thrive not on voting but on dialogue, on discussions among citizens (Panel Discussion, 1999: 988).

Liberal democracy has the tendency of the state to want to make its people into "a people", and thereby to standardise them to a set of ideas that you can and cannot express (Panel Discussion, 1999: 989). The aim of education (and of the South African Constitution) is not to have human beings conformed to some fixed standard, but to preserve individuality. A fixed standard in education produces a kind of education which reduces all to a dead level, which fails to understand the man who loves the high things that most of his fellow men do not love (Machen, 1987: 90 - 91). In fact, a liberal democracy should be unconcerned with how individual conscience is formed, and equally unconcerned with how individuals, in dialogue with one another, justify their moral positions (Carter, 1993: 587). Accommodating various religious approaches to law will assist in such dialogue and discussion among citizens, whilst also countering the "forced standardisation" of ideas of what is right and what is wrong. In the words of Carter: "One of the great and important features of religion in a democracy is precisely its ability to spark in its adherents different visions of the meaning of life, different understandings of what is important (Panel Discussion, 1999: 989). In this regard, Carter states that a liberal democracy, although supporting the separation between church and state, does not require a separation of church and self. Unfortunately, according to Carter, the courts do write as if there is a separation between church and self, resulting in a legal culture in which citizens whose moral conclusions are formed through important reference to their religious understandings are not welcomed and are condemned as illiberal (Carter, 1993: 600).[23] Carter rightly adds: "Religion is not simply important to democracy – religion is more important than democracy. In philosophical terms, religion is prior to democracy", "…liberal democracy without religion is less a theory of government than a lifeless, morally indifferent husk" (Carter, 1998: 497).

Regarding the US context, Lee observes that the majority of religiously affiliated law schools allow some room in the curriculum for reflection on religious teachings and the moral foundations of law (Lee, 1985: 1178). In contemporary South Africa there are no substantially religious universities, both in the sense that there are no universities that view

23 In this regard Carter rightly adds: "This cannot – this must not – be the state to which our liberal democracy falls, because if we allow it, then, far from cherishing religious belief, we are trivializing and discouraging it. We are, in effect telling the religiously devout that religious belief is aberrational and arbitrary and essentially undemocratic", Carter, 1993: 600.

themselves formally as religious, or who get substantial funding from the churches. However, South Africa has a substantial number of citizens who proclaim that they look to their religion for moral guidance. As Carter rightly states, in such a situation one should celebrate and carefully preserve the vital freedom of the religions to supply their adherents the values that their tradition deem best (Carter, 1994: 138). To negate, for example, the option of, a Christian normative content in legal education and scholarship, would negate such celebration and preservation. Popular opinion connotes issues such as religious rituals (such as prayer) and religious doctrine (such as creationism) as religious. This view ignores the fact that anything imposed on individuals that lies beyond these issues, does not necessarily result in non-interference (Carter, 1994: 133). According to Carter, religious groups are unique when compared to many other institutions that fill the gap between government and citizen, in that religious groups engage their members in the contemplation of ultimate questions (Carter, 1994: 136). This can only come to fruition when intellectual teaching and discourse is accommodated in the contemplation of these ultimate questions. Legal scholarship, as well as the many other sciences which find themselves in the sphere of pre- and tertiary education, cannot escape the accommodation of discussion on, and the search for, these ultimate questions. It is especially in this sphere, where representatives from the various religious affinities are found. When Lord Radcliffe stated that "if law is to be anything more than just a technique, it must be a part of history, economics, sociology, ethics and a philosophy of life" (Freeman, 1994: 1), he left out the most important part of them all, namely that it must be a part of religion.

The South African Constitution protects not only religion but also conscience, thought, belief and opinion.[24] The inclusion of the right to freedom of conscience would seem to indicate that the constitution aims to protect those systems of belief which are centred on a deity in terms of the right to freedom of religion, and those systems of belief which are not centred on a deity in terms of the right to freedom of conscience (Freedman, 2000: 99). In *Christian Education South Africa v Minister of Education*[25], the role of religion in a democratic society received some positive attention. In this regard, Judge Sachs stated that religion is not always merely a matter of private individual conscience or communal sectarian practice, adding:

24 Section 15 (1).
25 2000 (10) BCLR 1051.

> Certain religious sects do turn their back on the world, but many major religions regard it as part of their spiritual vocation to be active in the broader society. Not only do they proselytise through the media and in the public square, religious bodies play a large part in public life, through schools, hospitals and poverty relief. They command ethical behaviour from their members and bear witness to the exercise of power by State and private agencies; they promote music, art and theatre; they provide halls for community activities, and conduct a great variety of social activities for their members and the general public. They are part of the fabric of public life, and constitute active elements of the diverse and pluralistic nation contemplated by the Constitution.[26]

In the recent judgment by the Constitutional Court in *Minister of Home Affairs and Other v Marié Adriaana Fourie and Others CCT 60/04 & Lesbian and Gay Equality Project and Eighteen Others v Minister of Home Affairs and Others CCT 10/05*, Judge Sachs stated that although the rights of non-believers and minority faiths must be fully respected, the religious beliefs held by the great majority of South Africans must be taken seriously,[27] and that "religious organisations constitute important sectors of national life …"[28]. If "religious sects" play a large part in public life through schools, amongst others, if they form part of the fabric of public life, and if they constitute active elements of the diverse and pluralistic nation contemplated by the Constitution, then their relevance to

26 2000 (10) BCLR 1068. In *Prince v President of the Law Society of the Cape of Good Hope and Others* Judge Sachs stated: "One cannot imagine in South Africa today any legislative authority passing or sustaining laws which suppressed central beliefs and practices of Christianity, Judaism, Islam, and Hinduism. These are well-organised religions, capable of mounting strong lobbies and in a position materially to affect the outcome of elections" (2002 (3) BCLR 289).

27 par. 89. Judge Sachs refers to the judgment of Christian Education…. which reads: "For many believers, their relationship with God or creation is central to all their activities. It concerns their capacity to relate in an intensely meaningful fashion to their sense of themselves, their community and their universe. For millions in all walks of life, religion provides support and nurture and a framework for individual and social stability and growth. Religious belief has the capacity to awaken concepts of self-worth and human dignity which form the cornerstone of human rights. Such belief affects the believer's view of society and founds a distinction between right and wrong. It expresses itself in the affirmation and continuity of powerful traditions that frequently have an ancient character transcending historical epochs and national boundaries. For believers, then, what is at stake is not merely a question of convenience or comfort, but an intensely held sense about what constitutes the good and proper life and their place in creation", par. 89.

28 Par. 90.

the dissemination of legal knowledge and legal scholarship is clear. Bearing in mind that religious groups are of special value to a democracy, the state should nurture them rather than reject them (Carter, 1994: 136). Commenting on the US situation, Smolin states that the ignorance of law and religion would be understood if the US were an overwhelmingly secular society, which it is not – the US "remains a land where the vast majority of citizens have a personal interest and involvement in religion, and particularly in one of the three great monotheistic faiths of Christianity, Judaism, and Islam" (Smolin, 1996: 1508). Smolin also states that Christian scholars need to remember that they represent a vast throng of people: "indeed, believing Christians are probably the most underrepresented group in the academy, and that Relativist New Class members are historically newcomers and remain numerically a minority" (Smolin, 1988: 416). The same can be said about the position in South Africa.

It is submitted that a case for the integration of religion and the law is of the utmost importance. Religion *per se* implies the accommodation of a Christian jurisprudence in the legal curricula as well as the legal academia of the law school. Opposition to this from the secular plane will be counter-productive to the ideals of a liberal democracy and freedom of religion; and ignorance towards such integration from the church itself would be sinful.

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