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# Religion, legal scholarship and higher education: perspectives for the South African context

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This article investigates the relationship between religion (in both the traditional and the broader sense) and legal scholarship in South Africa, with special emphasis on the nature of Faculties of Law and universities. The contemporary approach of legal scholarship is overwhelmingly limited to the pragmatic and the empirical, and vehemently in opposition to anything religious. This has dire implications for the accommodation of religious views on reality, and particularly disadvantages adherents of religion in the traditional sense. In this context, critical views on the LLB curriculum pertaining to subject content are included. University education, being driven by commitments and perspectives about mankind and about ultimates, including the accommodation of religion (with specific reference to religion in the traditional sense), requires freedom if it is to discover truth. This is especially true for the dissemination of the law, and by implication for the humanities in general.

## Godsdiens, regsgeleerdheid en hoëronderwys: perspektiewe vir die Suid-Afrikaanse konteks

Hierdie artikel ondersoek die verhouding tussen godsdiens (in beide die tradisionele en die wye sin) en regsgeleerdheid in Suid-Afrika, met spesifieke klem op die aard van die Fakulteite van Regsgeleerdheid asook die universiteite. Die hedendaagse benadering van regsgeleerdheid word grootliks beperk tot die pragmatiese en die empiriese, in sterk opposisie met enige godsdiens. In hierdie opsig spruit daar kommerwekkende implikasies rakende die akkomodering van godsdienstige werklikheidsperspektiewe en dit is veral die aanhangers van godsdiens in die tradisionele sin wat gevolglik die onderspit delf. Veral wat laasgenoemde betref word aspekte van vakinhoud in die LLB-program gekritiseer. Onderwys, in 'n universiteitskonteks, vereis vryheid om die waarheid te ontdek, gedrewe deur verbintenisse en perspektiewe omtrent die mensdom en wat fundamenteel is, ingeslote die akkomodering van godsdiens, met spesifieke verwysing na godsdiens in die tradisionele sin. Laasgenoemde insig het veral betrekking op onderwys in die reg en by implikasie die geesteswetenskappe in die algemeen.

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Education law in South Africa is rapidly gaining momentum as a subject in legal scholarship, involving both teaching and research. In this regard, a relevant yet neglected topic is the analysis of the relationship between religion (in the broader as well as the traditional sense) and legal education at the tertiary level in South Africa. American trends in relation to the relevance of traditional religion (in particular) to legal scholarship provide especially valuable insights into the interplay between religion and legal education, possibly applicable to the South African context. The experience of lecturing courses such as Introduction to Philosophy of Law and Constitutional Law to final-year students also provides valuable insights, one being a reminder of the superiority of the positivistic approach in legal education. "Confronting" my students in Philosophy of Law with an abstract and ideology-laden section of the law involves a certain optimism and curiosity that connects with their innermost being. They realise the different shades of right and wrong, and that it is acceptable to be associated with a specific measure or view when it comes to distinguishing between right and wrong. Law students tend to "open up" when confronted with topics such as the interpretation of human rights, the relationship between the law and morality, and the meaning and purpose of justice. At times one witnesses in them a sense of seriousness and urgency concerning such "ultimate" topics, sometimes accompanied by a frustration emanating from internal conflict between what the student believes to be right or wrong, and what he or she has been taught as right or wrong. This is a serious matter, yet higher education — and more specifically legal scholarship — experiences some discomfort in connection with the inclusion of this "religious aspect".

My experiences in teaching have also confirmed that, in many instances, students perceive certain jurisprudential issues from an overwhelmingly theistic background, which causes me to think that Christian jurisprudential theory, for example, should enjoy its rightful place in legal scholarship. This is especially true if one bears in mind the unreserved accommodation in legal scholarship of other ideology-based topics, such as law and economics; pragmatism, law and society; feminist theory; critical legal studies, and the African concept of justice. In a class survey I recently conducted with my students, 80% replied that the Christian God is their axiomatic point of departure in distin-

guishing right from wrong. If this is the case, one must ask whether the dissemination of legal knowledge accommodates the normative affiliations of the students' theistic religion. Not all classes or students will have the same response; however, the fact remains that where such responses overwhelmingly point to an adherence to a specific religion in the traditional sense, the necessary accommodation needs to be made. On the other hand, I have observed that in South Africa there is a high probability of religious affiliation (in the traditional sense) among law students. Bearing this in mind, one could say that South African legal scholarship should be reminded of the religious (in the broader sense) foundations and relevance of the law, and should therefore accommodate the participation of religious views on the law in the traditional sense.

This prompts one to enquire to what extent legal scholarship in South Africa is directed merely towards the dissemination of rules of law.[1] Is the pursuit of knowledge of justice and truth limited solely to the empirical study of the law coupled with a pragmatic purpose? Henderson (2003: 48, 51) refers to the many students who leave law schools disillusioned, perceiving the law as a value-neutral instrument and lawyers as people who wield that instrument without regard for its impact on society. Henderson (2003: 49) also observes that criticisms of legal education demonstrate that today's law students perceive that education as alienating them from their values and ideals. This is surely contrary to the view that education should enhance and develop a student's personal values, interests and evaluations of what counts as good in life (Valenkamp & Van der Walt 2006: 9). Knowledge gained at university should not be geared only towards the development of a specific skill, but must also involve the development of the total person, including the religious aspect (Higgs 1991: 165).[2] The central function of education lies in assisting each student to develop and express his or her particular "identity" (Riley 2005: 230). This idea becomes increasingly important when one considers statistics such as those established by a survey on spirituality in higher education in the USA,

1 In USA law schools, for example, only the dissemination of rules of law is required. In this regard cf Mentschikoff & Stotzky 1986: 698, Strong 1998: 760-3, Berman 1976: 384.

2 Also cf Birks 1996: xviii.

which found that 75% of undergraduates were "searching for meaning or purpose in life" while 78% discussed religion and spirituality with their friends. Only 8% reported that their professors frequently encouraged classroom discussion of religious or spiritual matters, or provided opportunities to discuss the purpose or meaning of life (Riley 2005: 3).[3] This confirms the dire consequences of "irreligious" education, especially for those students who subscribe to a specific religion in the traditional sense.

The first principle of democracy is respect for individuality (attaining the objective of self-realisation). Education as growth must be understood to receive its direction from social as well as from individual demands (Henderson 1947: 244).[4] To what extent do South African lectures on the law provide an atmosphere in which students are free to voice and develop their opinions on normative matters? To consider the context of and the approaches followed by every South African Faculty of Law in each subject would be a Herculean task. However, I have gleaned enough evidence from conversations with colleagues, academics (including those from faculties other than Law) and the students themselves to be convinced of the importance of religion to legal scholarship in South Africa. This article therefore reconsiders the importance of religion (in the broader sense), with special emphasis on the accommodation of religion (in the traditional sense) in South African legal scholarship. This leads to an identification of the areas of South African legal education that require attention, as well as proposals for such improvement. It is by no means my intention to provide an exhaustive cohort of points of concern and possible solutions. However, enough will be provided to raise concern and to provide at least some potential solutions. This investigation is of the utmost importance in an age characterised by a concerted effort to separate metaphysics from the law; the development of a new "trans-modernist" set of values, which are thoroughly postmodern and sceptical of moral absolutes, and a predominant emphasis in tertiary education on pragmatic and utilitarian goals.[5]

3 A similar study for the South African context would make for interesting reading.
4 Also cf Higgs 1991: 166.
5 Cf Baillie 1946: 10-3, Colson & Pearcy 2000: 25, Crampton 1978: 260, Moberly 1949: 44, Moltmann 1999: 257.

## 1. Religion, the Faculty of Law and the university

A problematic aspect of contemporary jurisprudence is that religion is either open to various interpretations or discussed without any attempt at definition.[6] Religion is also met with the greatest suspicion when referred to in legal debate, as something supposedly posing a risk to the so-called neutrality of the legal sphere. However, this should not negate a relevant definition of religion in the context of legal scholarship (or any other discipline, for that matter). In this article, religion in the broader sense is to be understood as a belief in something which has the status of not depending on anything else (Clouser 1991: 21-2), in other words, a faith or belief in a first-principle applied, as a primary point of authority, by the believer in his or her ontological quest. Therefore, religion plays an important role in the formulation of theories (understood as consisting essentially of hypotheses, rather than facts) in order to explain something, such explanation being prompted by the quest to find the answer to some question which is not directly discoverable. Understood in this context, religion implies that any normative content will always be traced back to a belief in a primary, axiomatic and transcendental point of authority, beyond which point no further justification can be sought. Belief in this context of religion does not include only the "traditional" religions such as Christianity, Judaism, and Islam, but also the secular ones such as humanism and atheism, among others. Secular approaches also include unchallengeable commitments born of faith, as well as extra-rational appeals to transcendent authority. Benson (2005: 9) points to a recent decision in which the majority of the judges of the Supreme Court of Canada[7] determined that the common reference to "secular" as meaning "non-religious" is incorrect. The Court held that

6 For the dilemma regarding a definition of religion in the USA (whose jurisprudence on the matter is worth noting), cf especially Feofanov 1995: 311-4, 321, 363-80, Lerner 2000: 4-5, Evans 2001: 62-3, O'Frame 1992: 822-31, Clements 1988-1989: 536-9, Choper 1982: 587-94. Regarding the problematic nature of the definition of religion on the international and regional legal planes, cf Lerner 2000: 5-6, 37-9 119, Evans 2001: 51, 60-2, 64, 102, 201-3, 208. Regarding the diverse approaches of commentators regarding the meaning of religion, cf O'Frame 1992: 836-41, Feofanov 1995: 380-5. In the South African context, research in this regard is limited, for example Van der Schyff 2002: 288-94.

7 Chamberlain *v* Surrey School District No 36 [2002] S C J 87.

the "secular" must include religions and must allow scope for consciences animated by religious conviction as well as those that are not.

In opposition to Kelsen's banishment of any element of value judgment from the juristic study of law, Freeman (2001: 50) rightly comments:

> For not only, even in the realm of pure science, are valuations almost inescapable, but also the value judgments which enter into law, such as consideration of what would be a just rule or decision, even though not 'objective' in the sense of being based on absolute truth, may, nevertheless, be relatively true, in the sense of corresponding to the existing moral standards of the community.

One detects a kind of "metaphobia" (the fear of participation in transcendental discussion) in the South African halls of legal scholarship. This distaste and suspicion of anything religious in the law[8] probably has many historical causes (some of them understandable). Berman (1983: 31) states that the emphasis on rationality and the gradual withdrawal from "traditional religious" points of departure has progressively gained momentum, and that it was especially during the twentieth century that traditional religion was gradually reduced to the level of a personal, private matter. This reduction of traditional religion accompanied the development of positivism in the law, with concomitant relativism and opposition to the inclusion of the metaphysical. The result is a jurisprudence which, according to Domanski (2006), has undergone a radical and remarkable change over the past two hundred years. Jurisprudence, whose function throughout Western history was to inculcate clear ethical norms, has rapidly been transformed into a bewildering maze of conflicting juristic theories and hair-splitting academic controversies, with an almost total absence of the fixed values and principles that characterised Roman and Roman-Dutch law. Domanski (2006: 165) adds that jurisprudence has forgotten its function and lost its way:

> Is it any wonder, then, that our age is floundering aimlessly in a moral and ethical vacuum [...]? And this descent into disorder and ignorance has been the ineluctable result of the act of divorcing the human law from the higher law.

It surely cannot be denied that the South African situation in relation to the supremacy of positivism is very different; in terms of my

8 Either in the sense that 'traditional religion' has no place in law, or in the sense that transcendent/philosophical enquiry is not a priority when it comes to the law.

own experiences and research, this is evident on many fronts. It is enlightening at times, when I have committed myself to a neutral approach in my teaching, to find myself inundated with student participation which unashamedly subscribes to traditional religious affiliations — in many instances, accompanied by good argumentation. This reaction is encouraging, to say the least, when one takes into consideration the negative observations of some academics. For example, Stephen Carter comments on the demise of truth at the Yale Law School that when law students come to university, they are taught that the law has nothing to do with morality, and that they, in a culture of mere acceptance, should not even enter into debate regarding this issue (Colson 2000: 24).[9] The position in South Africa at large is not necessarily very different.

In modern times the staunchly analytical, technical and factual approach to the law finds support from initiatives such as the "Langdellian approach" to legal education,[10] which emphasises the law as a science, analogous to the physical (natural) sciences. Langdell believed that students at law school should study only the law, and that all source material other than cases lies outside the boundaries of a law school education (Mentschikoff & Stotzky 1986: 698).[11] However, the picture is not that bleak in terms of the development of a religious angle in legal education[12] (although the situation in South Africa requires similar development). In the United States, legal education is revealing trends towards scrutinising the dissemination of that education against the background of religion (especially in the traditional sense). This does not refer to practical teaching techniques, but rather deals with the close relationship between ideology and law in legal scholarship.[13] As early

9 Also cf Gerber 1989: 48-9, as well as Greenawalt 1985-1986: 356. Regarding the relevance of legal education and morality, cf Birks 1996: xiv, Clark & Tsamenyi 1996: 18.

10 Postulated by Christopher Langdell, Dean of Harvard Law School, 1870.

11 Also cf Berman 1976: 382.

12 Although religion in this regard needs to be understood as religion in the more traditional sense, this is still indicative of a positive development of the religious angle (in the broader sense) in tertiary education.

13 For example, 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" (<http://law.cua.edu/academic/institutes/institutes_e.cfm> accessed on 31 October 2005). Courses in

as the late 1950s, there were American jurisprudential endeavours to revisit the religious implications of the law. In this regard, Pike (1959: 45-7) comments that the law schools are developing a renewed sense of the importance of the complexity and richness of the law's involvement in other disciplines. In South Africa it is time to address seriously, yet with sensitivity and constructive dialogue, the religious implications of the law (also including traditional religion). Justice Davis, in his foreword to the first edition of Herbstein and Van Winsen *The civil practice of the superior courts in South Africa* (1954) states that the legal profession

> is a noble profession: it is the pursuit of justice and of truth, and these [are] surely well worth pursuing for their own sake, regardless of reward. And they should be pursued, too, regardless of consequences (Church 1988: 156).

In the pursuit of justice and of truth, the question needs to be asked: what theoretical framework should accompany this "pursuit"? How can religion (and, by implication, religion in the traditional sense) be excluded from the legal profession if that profession involves the pursuit of justice and truth? Education, especially in a university context, requires freedom to discover truth: no educational process begins *ex nihilo*. Education in a university context is driven by commitments and perspectives about humankind and about truth as well as ultimates. Legal education can by no means escape such perspectives. This is why Buzzard (1995: 267-

> this programme include: Sources 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. Frank Alexander (from Emory University), who co-founded the Law and Religion Programme in 1982 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" (<http://news.emory.edu/Releases/CLSR 1117744204.html> accessed on 31 October 2005). Another example is the programme provided by the University of Louisville's School of Law, a joint venture of the Brandeis School of Law and the Louisville Presbyterian Theological Seminary (<http://www.louisville.edu/brandeislaw/academics/degrees.htm> accessed on 31 October 2005). Also cf Lee 1985: 1180. For a similar development in Britain, cf Freeman 1994: 4-5. It has also been observed that the leading American law schools have transformed themselves into temples of scholarship, while the English law schools have striven to become stronger as training centres for the profession (Langbein 1996: 1).

8) states that legal education is ideologically rooted, and that seeking to avoid ideology would in itself reflect an ideological commitment. According to the Brookings Institute's ten-year study on religion and society, it has recently been concluded that social institutions require religious underpinnings, and that lawyers play prominent roles in shaping public debate on value-laden issues such as bioethics, world peace, human rights, the allocation of power, and environmental protection (Buzzard 1995: 270). A faculty of law should play an important role in shaping the minds of its students so that they can go into the world and contribute to the debate on such important value-driven issues.

A faculty of law should be responsible for cultivating the legal scholar's religious affiliation, therefore this affiliation may not be forced into so-called "neutrality"; decentralised from the ethical implications of a case, or opposed for trying to argue against that which confronts their values.[14] The faculty of law should not be viewed as an instrument for transforming the moral background of the student (Granfield 1992: 83-4).[15] One could add that the faculty of law may not transform the religious (including traditional religious) background of the student. However, it is also important that the law school should at the same time provide alternative views capable of enriching the student's original individuality without sacrificing it (Moberly 1949: 110-1).[16] This is not an easy task, yet it needs to be addressed. Bearing this in mind, the importance of religion, not only for legal education but also for the humanities, is emphasised. The principles of academic freedom and autonomy, as well as provisions of the South African Constitution such as Section 15 (regarding religion, opinion and conscience), confirm the fact that institutions of higher learning need to approach the dissemination of any knowledge with sensitivity regarding the relevance of such knowledge to transcendental information on points of interpretative departure.

14 Cf Granfield 1992: 73, 76-9, 84, 89. In the South African context, the present education authority's document on values does not really assist in clarifying the confusion regarding the meaning of values; the education authority, as well as other institutions and authors on values in education have neglected to state precisely what should be understood regarding the concept of values (Rens *et al* 2005: 190). This state of affairs is an additional negative factor in terms of the importance of religion in education.

15 Also cf Baillie 1946: 34.

16 Also cf Nolan 1999: 1116, Kahn-Freund 1966: 124.

Legal education and the faculty of law also need to be contextualised against the role of the university. It is no easy task to define precisely what a university is (Teichler 1996: 97-103), yet this is important in determining the relevance of belief to legal scholarship. Certain insights accompanying the contemporary understanding of the university are of concern to this investigation, namely: utilitarianism (and no longer truth) as the essence of its mission (Higgs 1991: 164 & 166); the university as an institution whose philosophy is based on universal rather than particular cultural values (Higgs 1991: 167); the university as an institution for the preparation of students for their future careers where intellectual curiosity is sacrificed (Harayama 1997: 15), and the university as the home of the natural sciences in particular and to a lesser extent of theology, law and the liberal arts (Baillie 1946: 17). Moberly (1949: 44-5) comments that 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. The university is unique for many reasons, but especially in its endeavour tomove closer to the "why" of knowledge. This question needs to be understood in its deepest sense (cf Forrester-Paton 1946: 17). The normative character of the law (and its numerous epistemological options) lends itself particularly 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 university, as is the case with civil society, should be viewed as the forum in which Tocqueville's "habits of the heart and mind" are nurtured and developed, including exposure to religion, especially in the traditional sense. According to Crampton (1987: 510-1), 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 emphasis on mere technique, larger normative questions should be asked about its teaching agenda.[17] This does not mean that technique should be banished from the university context, however.

One must also bear in mind that the university is a community of scholars and students which administers its own affairs regardless of its sources of funding and support: "Like the church it derives its autonomy (respected even by the state) from an imperishable idea of

17 Also cf Clark & Tsamenyi 1996: 21.

supranational, worldwide character: academic freedom" (Michaud 1991: 45). Therefore, the dissemination of knowledge at university level should also recognise the diversity of scientific cultures, with due regard to the cultural and religious dimensions of society and the individual. In the words of Richard Joel (Riley 2005: 99): "A great university must rebuild a spirit of free inquiry, while embracing the immutability of life values that are non-negotiable". In other words, within the bounds of civility, benevolence, fairness, equality and diplomacy, the university represents an unlimited, dynamic and flexible intellectual hub for the exercise and nurturing of theory, which not only supports the protection of the aforementioned values but also tends to the religious loyalties of all its members. In this regard, the relationship between lecturer and student is not merely a lecturer-client one, but something more far-reaching and valuable. From the lecturer's point of view, it involves the responsible task of assisting in the development and moulding of the student's Being. It is especially at the level of higher education that the student is orientated into a specific direction, whether on his or her own or with the assistance of the lecturer, and therefore the influence in terms of theory needs to be conveyed sensitively and responsibly.

## 2. Areas of concern

The following are areas of concern in relation to the integration of the religious aspect into legal education, especially religion in the traditional sense. Accompanying these areas of concern are proposals on how to apply knowledge of "ultimate principles and ends of finite existence" in legal scholarship, and how the legal education can be disseminated in such a way as to do justice to the aims of university education. A good, encompassing point of departure is that students need to be sufficiently exposed to ideological underpinnings in the law (as well as to be taught what such underpinnings mean) and to have the freedom to choose the meaning that best suits their religious backgrounds. Where possible, the lecturer should have the freedom to develop the students' insights in this regard, and also needs to be continuously attentive in terms of limiting the risk of influencing the students' original perspectives while responsibly and objectively providing alternatives for them to choose from. A student must have the freedom to disagree according to his or her religious views re-

garding the content and purpose of the law, as well as the freedom to do research from a specific religious point of departure (especially jurisprudential issues tackled from a traditional religious perspective). Unfortunately this might be difficult to apply in practice due to the compact nature of the LLB curriculum and the limited amount of expertise, which restricts the use of tutorials where students could, for example, discuss their views on the fundamental philosophical questions of the law. It is also important to teach students the skill of mastering reasoned diplomatic and constructive approaches when applying religious issues to a debate. Endeavours to develop stronger practical angles to legal scholarship require support, as long as this is not to the detriment of the truly theoretical and philosophical side of the law. Many of the subjects in the LLB curriculum include sections on practical knowledge; there are also practically-orientated internships for qualifying as a practising attorney, as well as courses for practical legal training. The practical foundation for the practice of law is provided by the Schools for Legal Practice, operated by the Law Society of South Africa. The Attorney's Act prescribes that for admission as an attorney, a candidate must have completed a course of vocational training and must have served a minimum of two years as an articled clerk. Upon successful completion of the School for Legal Practice's course, a candidate is credited with one year of articles so as to be able to satisfy the requirement by doing either one year's community service or one year's articled clerkship (cf Kaburise 2007). The practical side of legal education is thus well represented.[18] However, there should also be a substantial element of theoretical education accompanied by "deeper thought". This is especially relevant against the background that science (and therefore legal science) is all about critical thinking about (aspects of) the world we live in.

In the South African context (as indeed is the case everywhere else) there are legal (and related) subjects that exhibit a greater affinity with religious issues, such as jurisprudence, legal history, human rights, constitutional law, constitutional interpretation, criminal law, and even related subjects such as criminology, political theory and psychology.

18 Cf Church 1996: 119 and 1988: 160-1. Although the latter article was written some time ago, it contains interesting and relevant insights regarding the dissemination of practical legal knowledge.

These subjects therefore have to be taught with the necessary sensitivity and openness regarding their religious attributes and options. The importance of a subject such as jurisprudence needs to be more robustly emphasised (cf Birks 1996: xiv). In a recent study on the subjects typically presented in the LLB curriculum, Kaburisa (2007: 6) observes that jurisprudence ranks as secondary to no fewer than 26 other legal subjects. This is unfortunate, bearing in mind that jurisprudence necessitates the inclusion of awareness and thus critical thought regarding the law and the metaphysical — the law and religion.[19] In this regard, one may also ask whether the teaching of legal theory includes a true reflection of the transcendental "openness" or "flexibility" accompanying such theory. This is especially relevant in terms of the accommodation of an overwhelmingly theistic group of students, as is the situation on the campus where I teach. In the dissemination of a subject like jurisprudence, I have come to notice that in many faculties, students are introduced to classical contributions, such as those of Plato and Aristotle, when they are being taught the foundations of jurisprudence. What goes by unnoticed is that, just as there are the alternatives to jurisprudence itself (for example Western and Eastern jurisprudence), there are also alternatives in embarking on a study in jurisprudence either from ancient Athens, or from Adam and Eve, either from creationism or from evolutionism. The Book of Deuteronomy, for example, which dates back to approximately the thirteenth century BC, contains a plethora of valuable insights on constitutional theory (cf Elazar 2007). In this regard, being one-dimensional (especially to an overwhelmingly theistic audience) could have dire consequences for the student's perception of the religious foundations of the law, and the integration of these foundations with reality.

Students should be given the opportunity to understand and question rules of law in their historical and philosophical perspectives. Courses in legal philosophy would serve these ends (Church 1988: 160). Jurisprudence is a course that could easily be abused (intentionally or unintentionally) by a lecturer, since biased opinions on fundamental jurisprudential questions could be interpreted by students as the truth. The subject of jurisprudence is therefore not only important in itself;

19 Cf, for example, Dias & Hughes 1976: 63, Freeman 1994: 4, Tripathi 1975: 6, Hosten 1983: 25, 27.

that it is taught in an inclusive and balanced manner is just as important. Student textbooks for the first year LLB subject Introduction to the Law do not adequately address the relevance of religion (either in the traditional or in the broader sense) to the law.

Questions on the level of intensity as well as the year in which jurisprudence should be taught should also be approached with care. It is proposed that it needs to be presented first as a simplified introductory course in the first or second year, and then at a more in-depth level in the third or final year. The earlier the student is introduced to such a subject and understands its essential themes, the easier it will be for him or her to apply the essential themes to other subjects, as he or she will be able to view the subject in a more critical and profound manner. The student's own personal life and future career choice could also be enriched in this way. The nature of jurisprudence also provides the student with long-term recollection regarding general and fundamental principles, as opposed to many of the practical subjects which cram technical detail into the student's memory for test and examination purposes, only to be forgotten soon after the assessment has been done. This may result in fundamental weaknesses in the student's comprehension of the law and, ultimately, in his or her comprehension of life. Foundational aspects such as the ideological framework of the law, the myth of neutrality regarding the content of the law, an understanding of natural law and positivism (and the relationship between the two), and a balanced provision of the various schools of thought (historically speaking) are facets that may not be excluded from the LLB curriculum. Consequently, the student must be given the opportunity to choose a specific framework within the spectrum of ideologies relating to the law, something that constructively challenges the lecturer to be more than a mere provider of factual information.

Another misrepresentation in legal teaching concerns the philosophical background of human rights. To state 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, is not entirely correct (Currie & De Waal 2005: 336-7).[20] This selective and incomplete observation

20 Also cf Lerner 2000: 11. Reference is also made in this source to Rawl's political liberalism, which refers to the "Reformation and its aftermath" as giving rise to

gives students the idea that a close relationship between church and state (and by implication, between religion and the law) has a negative influence on society. It would be unfair and biased for any course in human rights jurisprudence to teach that only the so-called traditional religions have failed to contribute to the development of human rights theory. In fact, the ideology behind "rights" *per se* is not in agreement with the Christian jurisprudential understanding of "duty" and the emphasis on "virtue". The same vacuum in terms of religion is found at the first-year level, where students are taught that the sources of the law are limited to legislation, case law, common law, customary law, indigenous law, the works of modern authors, and the Constitution. In other words, it is never mentioned or explained that the sources of law include the foundational concept of religion. Following the contemporary approach to the dissemination of the sources of the law, a deification of those sources other than religion is accomplished. Thus a student's conscience is directed into believing that, for example, because the *nasciturus* fiction[21] does not ascribe protection to the unborn, the unborn should not be protected. The only inference I can draw from this is that students are not informed, in certain relevant subjects taught in the first few years, regarding the inextricably religious aspect of the determination of the legal status of the unborn. This I experience year after year in lecturing on the "right to life" in the subject Constitutional Law. In other words, in this example, Roman Law is believed to be superior to the student's own religious belief as to what "foetal" legal status should be. Contemporary abortion jurisprudence also draws our attention to a clear distaste towards anything religious/philosophical/transcendental/moral in law. What is more, students in law are being taught (whether intentionally or not) that this is the only correct view. In the 1998 South African High Court judgment of Christian Lawyers Association of South Africa and others *v* Minister of Health and

liberalism (Currie & De Waal 2005: 337, n 1). The latter source is a popular textbook on human rights from a South African perspective.

21 According to this Roman Law principle, any legal advantage (especially regarding an inheritance) that may have be awarded to the foetus in the period between conception and birth will be dealt with as if the "foetus" had already been born. The only condition is that the "foetus" is born alive. This principle was inherited by Roman-Dutch Law, and in contemporary South African jurisprudence the *nasciturus* fiction has been strongly relied upon.

others,[22] the plaintiffs sought an order declaring the Choice on Termisnation of Pregnancy Act[23] unconstitutional and invalid. The plaintiffs pleaded that the "life" of a "human being" commences at conception, and that the Choice Act was in conflict with the "right to life" clause of the Constitution,[24] because it allowed the termination of human life at any stage between conception and birth. The Court[25] stated:

> The plaintiff's cause of action, founded, as it is, solely on [section] 11 of the Constitution, is therefore dependent for its validity on the question whether 'everyone' or 'every person' applies to an unborn child 'from the moment of the child's conception'. The answer hereto does not depend on medical or scientific evidence as to when the life of a human being commences and the subsequent development of the foetus up to date of birth, nor is it the function of this Court to decide the issue on religious or philosophical grounds. The issue is a legal one to be decided on the proper legal interpretation to be given to [section] 11.

In similar fashion, the Canadian decision of Tremblay *v* Daigle[26] stated (Shaffer 1993-1994: 68):

> The Court is not required to enter the philosophical and theological debates about whether or not a foetus is a person, but, rather to answer the legal question of whether the Quebec legislature has accorded the foetus personhood [...] Decisions based upon broad social, political, moral and economic choices are more appropriately left to the legislature.

Surely the dissemination of these judgments as the (only) norm has serious implications for legal scholarship in the context of religion, the law, and religious and academic freedoms? Not everyone believes this: same-sex marriages are right; morality and the law are separate; the foetus is not human; euthanasia should be legalised; religion and the law are separate; the aim of the law is merely the betterment of society (without any further moral or religious aim); the law is aimed at pragmatic ends; there must be an instrumental approach to law and lawyering; there must be a "tough-minded" and analytical attitude toward legal tasks and professional roles; freedom of expression justifies the trade in adult pornography; rehabilitation is superior to punishment in penological theorising, and there must be an absolute faith that man, by the applica-

22 1998 (4) SA 1113.
23 92 of 1996.
24 Section 11, which states: "Everyone has the right to life".
25 1118 B-D.
26 [1989] 2 SCR 530, 62 DLR (4th) 634.

tion of his reason and the use of democratic processes, can make the world a better place (in contrast with faith in God, for example, and His will for mankind) (cf Elkins 1987: 523). Many more examples could be adduced, and those mentioned could be discussed in more detail. However, the fact remains that there are important areas of the law within legal education that do not seem to be open to other insights.

## 3. Conclusion

Far from proclaiming the university a sanctuary within which the scholar quietly pursues his bookish calling ("in which a footnote can wound as deeply as a sword and a book review crush with fatal force" [Michaud 1991: 46]), this article emphasises the importance of the law school and the university as institutions in which the dissemination of theoretical substance from a religious angle (especially in the traditional sense) should be accommodated. Herein lies the message that the principle key to genuine liberalism must avoid approaches that promote a common societal end. In addition, the value of equality is also emphasised — equality understood as equal concern and respect across difference. Benson refers to Judge Sachs's comment in National Coalition for Gay and Lesbian Equality *v* Minister of Justice[27] in these words:

> Equality therefore does not imply a levelling or homogenisation of behaviour but an acknowledgment and acceptance of difference. At the very least, it affirms that difference should not be the basis of exclusion, marginalisation, stigma and punishment (Benson 2005: 19).

Statements from the local front such as "[L]aw 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 a misguided message. The aim of education in a liberal democracy (and, indeed, of the South African Constitution) is not to have human beings conform to some fixed standard, but to preserve individuality. It is not law that must be deified but the religious aspect, of which law forms only one component. My experience with the students whom I teach has confirmed the importance of preserving and developing the individuality of each student, and a constructive sensitivity to the students' religious being plays an important part in this process.

27 1998 12 BCLR 1517 (CC) par 132.

When Lord Radcliffe and Justice Holmes, respectively, stated: "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) and

> If your subject is law the roads are plain to anthropology, the science of man, to political economy, the theory of legislation, ethics, and thus by several paths to your final view of life [...] To be master of any branch of knowledge, you must master those which lie next to it (Cowen 1988: 22),

although they proclaimed an important angle to the law, they overlooked the most important part of all, namely that the law must itself be a part of religion. Domanski (2006: 165) sheds some light on this, referring to the following statement by Lord Denning:

> I have said and I think it is right: without religion there can be no morality, and without morality there can be no law. That's how I understand the Hebrew Ten Commandments. They are a mixture of religious principle, moral precepts and legal precepts [...] They all come down to us from the past, and I am sure they help tremendously in our own upbringing and in our outlook. They are the foundation of a good and proper life.

In the context of the purpose of this article, Lord Denning's observation, although specifically referring to Judeo-Christianity, says much regarding the importance of religion. The relevance of religion to law and to the student in his or her personal development should be treated with accommodative sensitivity. Bearing this in mind, in the South African context, (tertiary) education needs to aim to accommodate the spirit of a true liberal democracy and therefore to reflect the normative ideologies accordingly, especially in the humanities and, more specifically, in Law. I sincerely believe that research on this topic in other academic disciplines, particularly within the humanities, would unveil similarly critical findings. Tertiary students who adhere to the traditional religions require extra care in terms of the accommodation of their views during the attainment of knowledge. This is due not only to the current vehement opposition to anything transcendental in education, but also to the strong presence of a kind of phobia concerning the integration of traditional religion and education. It also needs to be noted that continued neglect of traditional religion in higher education will result — even if unintentionally — in inequality based on religious preference (in the broader sense). This cannot be healthy for a truly liberal democratic dispensation.

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