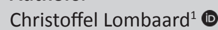
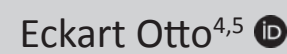
HTS Teologiese Studies/Theological Studies
ISSN: (Online) 2072-8050, (Print) 0259-9422

Faith, society and the post-secular: Private and public religion in law and theology

Authors:
Christoffel Lombaard[1] 
Iain T. Benson[2,3]
Eckart Otto[4,5] 

Affiliations:
[1]Department of Christian Spirituality, Church History and Missiology, University of South Africa, Pretoria, South Africa

[2]School of Law, University of Notre Dame, Sydney, Australia

[3]Department of Constitutional Law and Philosophy of Law, University of the Free State, Bloemfontein, South Africa

[4]Hochschule für Philosophie, Ludwig-Maximilians Universität München, Munich, Germany

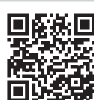
[5]Department of Old Testament Studies, Faculty of Theology and Religion, University of Pretoria, Pretoria, South Africa

Corresponding author:
Christoffel Lombaard,
ChristoLombaard@gmail.com

Dates:
Received: 14 Mar. 2018
Accepted: 10 Oct. 2018
Published: 22 Oct. 2019

How to cite this article:
Lombaard, C., Benson, I.T. & Otto, E., 2019, 'Faith, society and the post-secular: Private and public religion in law and theology', *HTS Teologiese Studies/Theological Studies* 75(3), a4969. https://doi.org/10.4102/hts.v75i3.4969

Copyright:
© 2019. The Authors. Licensee: AOSIS. This work is licensed under the Creative Commons Attribution License.

Read online:

Scan this QR code with your smart phone or mobile device to read online.

In pre-democratic – also pre-modern – times, religion had been at the centre of much of human life, filling the private as well as the public realm of people's daily existence. However, with the change to democratic rule in major countries in the modern world (see, most influentially, Article 1 of the French Constitution after the French Revolution and the First Amendment to the Constitution of the United States, influencing all other democracies in their wake), religion has for the most part reflexively been sidelined from public life. Or has it? Does religion not still hold a special place in law in democratic societies, but now in reverse? Firstly, whereas matters of religious faith had throughout the greater part of human history been included in matters of politics, it is now as a matter of course of law excluded, purposely so. Religion is thus still a 'special case', a unique aspect of humanity when compared to all other matters, in law as much as in politics and other aspects of public life. Secondly, in the post-secular cultural climate dawning across the world, matters of faith (religion, spirituality) are no longer as stringently excluded from public life, which impacts directly on how religion is touched upon in law, sociology, philosophy, music and other academic disciplines too. Our dawning post-secular age is bringing something new. Two scholars, who have been doing foundational work in this regard, have done so fully in parallel, not taking cognisance of the mutualities in their academic contributions. Otto in Munich, Germany, has been combining his two areas of expertise, the Pentateuch in the Hebrew Bible and the sociologist Max Weber, to indicate the trajectory through history of democratic impulses from Ancient Near Eastern founding documents into the current era. Benson in Sydney, Australia, has on his part been drawing on his expertise in law as practised in Canada and taught in Europe, South Africa and Australia to indicate how, in inclusively liberal democracies, law cannot justifiably be used to exclude religion from the public domain, as has been the usual modern case. Drawing together these parallel contributions, Lombaard places these initiatives within the emerging post-secular climate, which augurs a different way of being religious or non-religious, publicly as much as privately, in democratic societies in our time.

Keywords: Public religion; Law and theology; Secularisation; Post-modernism; Religion and politics; Association; Post-secularism; Faith and belief.

Introduction (C. Lombaard)

In August 2017, I had the opportunity to visit the Pergamon Museum in the German capital of Berlin. The largest of the prize pieces in the museum was the Gate of Ishtar. This metres-high architectural edifice is covered with gleaming deep-blue tiles featuring deific symbols of bulls and dragons, and dates from the first half of the 6th century BCE (excavation dated to the early 1900s). The gate had been an entrance, amongst a number of others, to the inner city of the ancient neo-Babylonian empire capital of Babylon, dedicated to Ishtar, goddess of matters of – interestingly – love and power. Leading up to the imposing gate was then, and is reconstructed now, an imposing corridor adorned with tiles in shades of (today) faded blue, yellow and grey, on which is depicted most prominently, on both sides of the corridor, a row of lions. In its heyday, doubtless in bright and captivating colours, the whole scene – the approach to the Ishtar Gate and the gate itself – was set up – to employ a modern Americanism – to shock and awe all who walked within those hallowed halls. Hallowed, here in a more literal sense than is usually found these days: gods were depicted everywhere,[1] as were large animals, in engravings and sculptures. The ambience had been one of respect and fear.

The Mesopotamian religio-politico-cultural understanding that the ruler was the representative of the divine on earth, unquestionably formulating as well as fully representing the heavenly will and executing it, at times heartlessly for the sake of the stability of the universe, is something

1.See the quotation attributed to Thales in the closing sentence of this contribution.

Note: The collection entitled 'Eben Scheffler Festschrift', sub-edited by Jurie H. le Roux (University of Pretoria) and Christo Lombaard (University of South Africa).

hardly conceivable in our times (cf. Lombaard 2011:74–93). Drenched as we are, *Deo gratias*, in the culture of human rights, with its two overriding principles of (1) political choice exercised by the citizenry (a legacy from ancient Athens, expanded) and (2) protection of the citizenry, individually and in various forms of corporate identities, against the power of the state (a legacy from ancient Jerusalem, detheologised) (Otto 2002a), we 'moderns' have difficulty in, through the practice of historical imagination,[2] understanding and imaginatively reliving what it might have meant in the ancient world to enter into such a passageway. Then, to pass through the gate, and perhaps to find ourselves in the presence of the living representation of the divine realm,[3] would ideologically – theologically and judicially – 'conspire' to leave one feeling at the mortal mercy of all that may shape our existence: God-and-Law defined all.

Included also in the collection of the Pergamon Museum, and exhibited close to the Gate of Ishtar, is a copy of the Codex Hammurabi, another Babylonian legacy predating the Ishtar Gate by some 1200 years but with the same direct divine-royal idealogical connection, the heritage of which still made its presence felt after more than a millennium in neo-Babylonian society in the ways in which society had been regulated. Encoded in cuneiform, one of the oldest extant systematic accounts of a set of laws is found (Harper 1904), some of which is quite infamous ('If a man destroy the eye of another man, they shall destroy his eye'). This may seem cruel, but was clearly justified in their eyes (as with the opening injunction: 'If a man bring an accusation against a man, and charge him with a [*capital*] crime, but cannot prove it, he, the accuser, shall be put to death'), or unnervingly and (perhaps in jurisprudence) humorously provocative (Harper 1904):

> If a judge pronounce a judgment, render a decision, deliver a verdict duly signed and sealed and afterward alter his judgment, they shall call that judge to account for the alteration of the judgment which he had pronounced, and he shall pay twelve-fold the penalty which was in said judgment; and, in the assembly, they shall expel him from his seat of judgment, and he shall not return, and with the judges in a case he shall not take his seat. (Harper 1904)

Such is the phenomenon of law-and-religion combined that, in their unity, those who 'embody' this combination gain immense power over those under their rule. In the current democratic world in which every person is regarded as equal to every other person (here, importantly, *equality* should not be confused with *sameness* [Erasmus & Lombaard 2017:1–7], as is too easily done on social justice matters), the separation of the administration of these two 'realms', institutionalised in state and church, seems entirely sensible. This separation is in current debate most often related historically to the French and US Constitutions[4] that set the philosophical–political scene in the light of which all subsequent democracies derive, but never simply copy, their own contextual nuances on the relationship between state and church or law and religion.[5]

However, regarding this separation, it has, firstly, never been absolute (nor would it ever be, given the oft-misrepresented origins of this separation as something total); secondly, in practice, to a substantial extent, there has been dramatic rivalry between these two realms, veering between a '*Hier stehe ich, ich kann nicht anders*'[6] stance on the part of the church and 'Thou shalt (not)' legislation on the part of the state. It is these two matters which will now be further explored.

The dialectics of secularisation and politicisation in the modern world, after passing the gates of emancipation of religion from state ideologies in antiquity (E. Otto)

After post-modernism: Secular societies missing their ethical foundations

'Post-modernism' had been a most successful way to characterise the intellectual climate of the latter decades of the 20th century, celebrating as it did an unbounded pluralism as a guarantee of freedom, creativity and non-violent coexistence. However, it became increasingly obvious that this post-modern ethos of coexistence was unable to provide a reliable foundation for such an ethos, whose foundation is only to be found in a metaphysical sphere. This ethos of tolerance, which was especially understood as a religious tolerance beyond any rigid dogmatism, was interpreted as a positive outcome of a Western societal secularisation and the disenchantment of nature and society, as it had been described by Max Weber (Conze 1984:789–829; Lübbe 1965; Weber 1920:1–16). The process of rationalisation and modernisation in Western societies was, in this understanding, leading to a weakening of religious impacts on society. Wherever Western technology accompanied by Western thinking succeeded, on every continent, their religious

2.'Historical imagination' is the way theorised by R.G. Collingwood – cf. Dray (1995:191–228) – by means of well-informed whole-life reconstruction, that is, intellectually living into the past, in which as full a sense as possible of the past may be approached, but never attained, given the pastness of the past; cf. Le Roux (1993:35–63).

3.The formulation most familiar in Western(ised) societies expressing this divine-royal 'representivity' comes from the so-called Yahwistic creation account in the Hebrew Bible, specifically in Genesis 1:26: וַיֹּ֣אמֶר אֱלֹהִ֔ים נַֽעֲשֶׂ֥ה אָדָ֛ם בְּצַלְמֵ֖נוּ כִּדְמוּתֵ֑נוּ [And He said, God, let Us make man, in Our image, in Our likeness …] (literal translation from Lombaard 2009 [334–347]). See Barton and Bowden (2004:63) for a representation of how this same royal ideology played out within broader Mesopotamia.

4.Article 1 of the French Constitution (1958) reads: '*La France est une République indivisible, laïque, démocratique et sociale. Elle assure l'égalité devant la loi de tous les citoyens sans distinction d'origine, de race ou de religion. Elle respecte toutes les croyances. Son organisation est décentralisée*'. The First Amendment to the Constitution of the United States on its part reads: 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances'.

5.To differentiate finely between the ever-entwined terms religion, spirituality, faith, belief, theology and the like is never easy, always involved and often determined as much by a poorly kept habit within a particular subject or tradition as by personal preference, mediated by the dynamics of writing or presentation. Within this contribution, we understand (in a necessarily limited manner) (1) religion as the phenomenon (expressions and institutions) that goes along with a formalised recognition of a relationship to the divine; (2) spirituality as both the broadest awareness and the deepest experience (personal, communal and societal) of the sense of the divine; (3) faith and belief as, more or less synonymously, the tenets – religious or a-religious – that people hold to, but with belief as a somewhat more formalised expression of the personal sense that is faith. As such, and often overlooked, faith and belief can include atheistic or agnostic forms of conviction; and (4) theology as the intellectual reflection on these and related matters.

6.The legendary quotation attributed (probably incorrectly) to Martin Luther.

heritages therefore lost their power and societal influence through a process called secularisation.

Richard Rothe, a 19th century German Protestant theologian, expected a kind of secularisation in which modern states would be pervaded by a Christian ethos to such an extent that the churches, as institutions separated from the state, would become superfluous (Rothe 1845–1848). This expectation did not turn out to be true in the 20th century. The churches indeed lost much of their public importance, but Western societies also lost much of their religious-ethical substance, namely by an *individualisation* of religion as a private matter.

In our time, these societies are furthermore confronted with a politicisation of religion, which can be observed in the US in one way, as a politicisation of Christianity (Joas 2009:229–240), and in Europe and the Near East in other ways, as a politicisation of Islam. Secularised European societies are lacking in a shared ethical groundwork from which to deal with this new religious plurality. This deficiency followed after these societies were thought to have overcome an inner-Christian plurality, initially of Catholics and Protestants, by a form of secularisation which included reducing religion to a private matter of the single individual.

One may ask if the world-wide movements of politicisation of religion represent a form of protest against this successful Western way of secularised thinking. This paradox, following on secularisation and the politicisation of religions, in the first decades of the 21st century gives reason to return to the topic of the separation of religion and state in ideology and in politics, finding in antiquity already important initial steps relating to humanity's ideas on human rights over against the state.

'We must obey God rather than men': The emancipation of religion from the function of legitimising the state in the Hebrew Bible

The literary history of the Hebrew Bible begins in the Assyrian crisis affecting the areas of Israel and Judah during the 8th and 7th centuries BCE, in which both these states became vassals of the Neo-Assyrian empire as hegemonic power. Subjugation to the Assyrian state, sworn to the gods of the Assyrian pantheon, inevitably roused resistance in Judah. This was in part with respect to religious politics, especially following the destruction of the area of Samaria between 722 BCE and 720 BCE. As the Assyrian state ideology was disseminated in royal inscriptions, Jewish intellectuals who resisted this ideology in the name of their god, YHWH (Maul 1998:65–77), also undertook such resistance in written form.

For instance, in the coronation hymn of the Assyrian king Ashurbanipal (669 BCE – *c.* 630 BCE), preserved on a tablet in the Museum of the Middle East in Berlin,[7] the gods of the Assyrian empire ascribe to him the tasks of ensuring economic prosperity and a balanced society, endowing the king with the ability to carry out these tasks (here slightly edited):

> May Ashurbanipal, King of Assyria, be favoured by the gods of this land! May he be given the talents of eloquence, understanding, law and justice! May the citizens of Assur buy 30 kor of grain for one shekel (*c.* 8 g of silver)! May the citizen of Assur buy 3 seah of oil for one shekel of silver! May the citizen of Assur buy 30 minas of wool for a shekel of silver! May the lowlier speak and the mightier listen! May the mightier speak and the lowlier listen! May harmony and piece be established in Assyria! The god Assur is king - truly, Assur is king, Ashurbanipal is the image of the god Assur. (n.p.)

The king, we see, was not only entrusted with ensuring the internal welfare of the state – as expressed in low prices and a balanced society – but also, as a tool of the god of the empire in whose image the king was made, with the task of securing said god's domination over the peoples of the world. 'May the gods' – so goes the hymn – 'give Ashurbanipal a mighty sceptre to extend his domination over land and peoples'. In a prayer that follows the hymn, the five leading gods of the Assyrian pantheon confer their power on the king. The gods Anu and Enlil, as the most ancient gods, provide him with crown and throne – thus the insignia of world domination – while the god Ninurta gives him his weapons. In the Assyrian myth Bin Sar Dadme (Otto 1999a:47–48), the god Anzu steals the Tablet of Destinies of the creator god, disturbing the order of the divine and earthly realms. Ninurta goes into battle against Anzu, restoring order by bringing under control the mythic chaos represented by Anzu. Equipped with Ninurta's weapons, Ashurbanipal has to battle the political chaos in the human world, spreading war over the land of those peoples who refuse to submit willingly to the imperial god Assur and his king Ashurbanipal. This just when, within the Assyrian empire, every rebellion is nipped in the bud, because such rebellion is understood as an expression of the chaotic disruption of the order of creation (Otto 1999b:180–203). The prayer that follows the coronation hymn thus ended with the words (Otto 1999b):

> Put the weapons of battles and wars in his hand, deliver to him the black headed ones (humankind), so that he reigns over them as their shepherd! (pp. 180–203)

Although the Assyrians did not wage religious wars to spread their religion, their wars, which the Assyrian king had to wage annually, did, in fact, have a religious foundation – one which represented difficulties to the Judean intellectuals in the priestly circles of Jerusalem. The oath of loyalty (Akkadian *adê*) to king Esarhaddon (681–669 BCE), Ashurbanipal's predecessor, which the elite of the Assyrian empire, amongst them the Judean king Manasseh (696–642 BCE) as a vassal of the Assyrians, had to swear in 672 BCE to secure the line of succession to the Judean throne, was sworn to the Assyrian imperial gods. Hence, the question of Judean identity was not only a political matter, but also a religious one. The Assyrian oath of loyalty of 672 BCE demanded

7.On the Akkadian text and its translation, see Otto (1999a:43–46, 2016:1267–1268).

absolute loyalty to the king and his designated successor. Section 10 of this *adê* accordingly stated (Otto 2016):[8]

> Should you hear a wicked, bad, inappropriate word, that is not fitting, not good for Ashurbanipal, the crown prince of the royal house, son of Esarhaddon, the king of Assyria, your master, whether from the mouth of his enemy or from the mouth of his friends, or from the mouth of his brothers, his uncles, his cousins, or his family, the descendants of his father's house, or from the mouth of your brothers, your sons, your daughters or from the mouth of a prophet, an ecstatic, one who questions the word of the gods, or from the mouth of any person, as many as there are, you shall not keep quiet about it, but come to Ashurbanipal, the crown prince of the royal house, son of Esarhaddon, king of Assyria, and report it. (pp. 1238–1259)

The obligation to report all forms of criticism of the king and crown prince is expanded in Section 12 into the obligation to immediately lynch that traitor (Otto 2016):

> Should someone tell you of an uprising, rebellion with the aim of killing, murdering, eliminating Ashurbanipal, crown prince of the royal house, son of Esarhaddon, king of Assyria, your master, who in his favour has subjected you to the oath of loyalty, and you hear it from the mouth of any person, you should seize the instigators of rebellion and bring them to Ashurbanipal, crown prince of the royal house. If you are in a position to seize them, kill them, eliminate their names and their descendants from the land. If you are not in a position to seize them, to kill them, you should report it to Ashurbanipal, crown prince of the royal house, assist him in seizing, in killing the instigators of uprising, in eliminating their names and their descendants from the land. (pp. 1238–1259)

As the 'flesh' of the god Assur and the incarnation of the divine task of combating and limiting chaos in the world, it was vital in this understanding to protect the king against rebellion at any price, that is, against any expression of chaos that went against creation. The idea that the individual might suffer at the hands of the king or his organs of state was alien to this manner of thinking, because the order represented by king and state was fully understood to be the only possible framework for prosperous life.

In the second half of the 7th century BCE, in the early literary layer of the Hebrew Bible document of Deuteronomy 13:2–10 (Otto 2016:1222–1234), Section 10 of the oath of loyalty to Esarhaddon, expanded by motifs found in Section 12 (see quotations above from both sections), was incorporated. These sections were received (i.e. calculatingly interpreted) subversively, namely, in such a way that the Assyrian king and his crown prince were now replaced by the Judean god, YHWH, as the object of the demand for absolute loyalty. In effect, thus construed, the oath was now *opposed* to the Assyrian state ideology (Dt 13, 1–9* [in Bible scholarship, the * sign indicates a critically reconstructed text, namely retracing historical lines of development]):

> If a prophet or dreamer of dreams arises among you and if he says, 'let us go after other gods and let us serve them', you shall not listen to the words of that prophet or that dreamer of dreams. But that prophet or that dreamer of dreams shall be put to death, because he has taught rebellion against YHWH, your God. If your brother, the son of your mother, or your son or your daughter or the wife you embrace or your friend, who is as your own soul, entices you secretly, saying, 'let us go and serve other gods', you shall not yield to him or listen to him, nor shall your eye pity him, nor shall you spare him, nor shall you conceal him. But you shall kill him. (n.p.)

This literal reception of the Assyrian oath of loyalty has a dissident character: by transferring the demand for loyalty to the Judean god, YHWH, this reinterpretation de-legitimises the rule of the Assyrian king and thus of the hegemonic power. As is apparent in the curses found in the Assyrian oath of loyalty received in Deuteronomy 28* (Otto 2017:1990–2012), the demand for loyalty to God in Deuteronomy 13* is also confirmed by oath. If the demand for absolute loyalty to the god of the Judeans is restricted in that the objects of the demand for loyalty are interchanged, with the Assyrian king now replaced by the Judean god, this subversive reception nonetheless picks up the thread of Neo-Assyrian motifs. An Assyrian manner of religious legitimation of political power is revolutionised by means of Assyrian motifs; in the recently published Neo-Assyrian oracles (Parpola 1997:22–27), which had been recited during Esarhaddon's ascension to the throne, the sworn pledge of a covenant (*adê*) between the king and the imperial god Assur takes centre stage. Thus, the 'Covenant' between divinity and human being was not, as Max Weber had influentially thought (Otto 2002b:135–151, 177–180, 252–258, 269–272, 276–280; Weber 1952), a specific feature of the Jewish religion in contrast to the religions of the Ancient Near East, whose gods – so Max Weber believed, following Old Testament scholarship of his time – functioned only as witnesses to contracts and the making of alliances. The specifically Jewish feature with respect to the idea of a covenant is rather *the creation of an alliance between the deity and the people while disregarding the king*, who had functioned in the Assyrian context as sole covenant partner, thus becoming the conduit of divine blessing for the people. This Judean version is therefore a rejection of the claim, characteristic of the legitimation of the Assyrian ruler, that the people have no access to the world of the divine pantheon other than through the king, that is, other than through the organs of the state.

The subversive reception of the legitimation of the Assyrian ruler in Deuteronomy set in motion a development of significance to the religion in the Hebrew Bible. In coming to terms with the political theology of Assyria – which, by binding the Assyrian king to the imperial creator god as one made in his image, links all prospects of a successful life to the obedience to the state organs as represented by the king – Deuteronomy puts the state in its proverbial place: absolute loyalty is due not to the state, but only to God.

This about-turn is the birth of a long-standing paradigm distinguished by the notion that it is more important to obey God than it is to obey human beings. In its Christian reception, this found its classical expression in the New Testament book, the Acts of the Apostles (Acts 5, 19), while its Greek

8. On the Akkadian text, its translation and interpretation, see Otto (2016:1238–1259).

counterpart is Sophocles' *Antigone* (lines 417–473), with its reference to the 'unwritten laws of God' as a critical authority *vis-à-vis* the positive law of the state.

As a result, stripped of all his political power, in Deuteronomy (17, 14–20) (Otto 2016:1480–1489), the king becomes the leading devotee of the *Torah*, or law, amongst his people. Moreover, their cohesion is no longer to be ensured by the organs of the state, but rather, according to Deuteronomy, they are constituted as a community of worship around the central shrine, common to all, in Jerusalem.

A decisive step in the 7th century for the development of the idea of human rights

It is a kind of paradox that with Deuteronomy 13, one of the most violent texts in the Bible, the liberation of religion from its function of state legitimation took an important step forward, towards the formulation of human rights limiting governmental rights in relation to the citizenry. Even classical Greek democracy of the 4th century BCE did not know of such a limitation of democratic exercise. It was, in modern times, Richard Hooker's 16th century legal and political theory which introduced a limitation of the public power of the state. This was done by differentiating 'common affairs', which relate to decisions of a democratic majority, and 'things necessary'. The latter is the innate sense of an inner decision of the conscience of the individual, in the sense of a 'foundation of faith' or the 'general ground whereupon we rest' – which matters are not subject to the orders of a state and even of democratic decisions. The formulations of human rights in the 16th and 17th centuries were based also on the Bible; these formulations, however, also prevented society from being bound to any kind of biblical fundamentalism, which would also regulate 'common affairs' in society with the Bible in hand. There are, we see, good reasons why only a metaphysical – that is, a religious – foundation of a society can prevent it from falling fully prey to religious fundamentalisms of all kinds.

The internal and external frames of law: Morality, associations and the limits of the state (I.T. Benson)

The relationships between law and religion have historically been subject to two main challenges or threats: the challenge or threat of merger and the challenge or threat of alienation. Merger, when one 'discipline' submerges the other; alienation, when one acts as if the other does not exist. In fact, law and religion, properly ordered, both have necessary and complementary roles. Religious associations remain, for instance, better equipped to answer some kinds of questions that contemporary law cannot properly address, given the requirement of the latter on objectivity and its operation in a multi-cultural setting. Objectivity means that law sees itself standing outside specific belief systems, *as if* it were administering that which has developed over time (in common law), been codified (in civil law or a Constitutional Bills of Rights) or has been framed as remedial statutory law (which, where it exists, takes precedence over common law), rather than making moral decisions.[9] With respect to multiculturalism, the law views itself as creating space within which diversity may be encouraged and even thrive. How these aspirations work out in practice varies across regimes and particular questions. Recent cases such as those involving the nature of marriage and the inclusion of same-sex marriage, conscience accommodation in relation to providers of services in medicine relating to controversial practices such as abortion or euthanasia, the accreditation of professional persons or institutions, the granting or maintenance of charitable status or the display of religious symbols all raise questions relating to how Western societies respond to challenges of genuine inclusion and genuine pluralism (genuine as opposed to simply the use of these terms rhetorically, but in ways that do not actually provide for accommodation).[10]

One of the results of the gradual and increasing fragmentation of education that has been a defining aspect of the past two centuries is that disciplines operate without attention to each other. Therefore, when law operates as if it has, through the mere handling of legal techniques, the capacity to articulate the moral ends that had historically been provided by religion and philosophy, we see the problem most clearly. Liberalism, in its various forms, has often been insecure about metaphysics in general and religion in particular, which is why such liberalism had become the ideal accompaniment to contemporary law, feeding the law's expansion into areas previously within the domains of theology and philosophy.

Liberalism, with its focus on the individual, suited a culture of 'rights' that had been cut off from the sacramentality of cosmos as created meaning and purpose, which alone gave frame to obligations and notions such as 'the common good'. Current identity politics shows most graphically where the separation of self-will from nature can take us. The assertion, for example, that a man can be a woman because he 'feels' like a woman is widely accepted under the plasticity of 'gender', and the fact that it cannot be true genetically is largely ignored. No argument from a moral framework, based on cogent metaphysical positions and expressed within a clear legal tradition, is in such cases offered. The semantics of emotion, expressed in the language of the social construction of identity, override a rational structure of quite

9. A striking example of the law's reticence to make moral claims may be viewed in the Canadian Supreme Court decision of *Tremblay v Daigle* (1989), 62 D L R (4th) 634 (SCC) at 650 a – c by the court (unsigned), that involved the status of an unborn child. Note how the court dealt with that question in the following passage (*author's added emphasis*): 'The court is not required to enter into 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. Metaphysical arguments may be relevant but they are not the primary focus of inquiry. Nor are scientific arguments about the biological status of the foetus determinative in our inquiry. The task of properly classifying a foetus in law and in science are different pursuits. Ascribing personhood to a foetus in law is a fundamentally normative task. It results in the recognition of rights and duties – a matter which falls outside the concerns of scientific classification. *In short, this court's task is a legal one. Decisions based upon broad social, political, moral and economic choices are more appropriately left to the legislature*'.

10. For a detailed examination of religious liberty and litigation in American, Canadian and European contexts, see Eberstadt (2016).

some coherence that finds expression in laws associated with the formative tenets of an awareness of justice, based explicitly on philosophical, scientific and religious considerations. This switch may occur without realising what is being done, yet its significance goes to the heart of the recent effulgence of self-will and the transvaluation of values.[11]

In the deracination that has been obtained for close to two centuries, positivist law continues, even where it has been shown to be of little practical use when questions of justice must be addressed,[12] to frame (implicitly more often than explicitly) the scepticism that dominates contemporary law in both education and practice.

The common law tradition – for so it is called in non-civil law jurisdictions – is a judicial-moral tradition that has emerged over centuries and develops in a tightly connected and gradualist way in relation to like cases being treated alike. Such a slow development, rooted in a pre-positivist conviction that law and morals were necessarily connected, no longer suited the justice through law movements in contemporary constitutional Bills of Rights. These movements depended upon abstracting 'justice' from historically rooted ideas informed by religion, to contemporary terms such as 'equality' and 'dignity' that could not be derived from the epistemological foundations of contemporary scepticism. Yet, having law as the plausible means of social re-ordering suited the utopian goals of moderns, and so law had become a most useful method for re-organisation when democracy proved either unwilling or too slow for revolutionary (often neo-Marxist) movements.

These groups were usually focused on incidents of what they considered injustice, and almost invariably these incidents have been related to identity, based on the newly recognised categories and theories of justice, as rooted in errors relating to 'race' or 'sex', and when that proved too narrow, 'gender' and 'sexual orientation'. These terms, in their de-natured and vague constructions, would give maximised flexibility to a judiciary that now had the authority to redefine cultural norms under the guise that these new – and utterly unargued for, or even excluded expressly – 'rights', which were regarded as essential to justice.[13] Note, however, that this sort of 'justice' was never placed in relation to differing moral conceptions or related to diversity and disagreement as an aspect of an 'open society'. It was not any conception of 'justice' as a moral good framed within a moral cosmos ordered to teleology,[14] but a legally forced outcome, of the kind more often than not crafted in response to a de-contextualised claim of 'exclusion' said to damage the 'feelings' of those now claiming inclusion, that is, acceptance. The inner world had thus replaced as a centre of authority for legitimate court decision what had been something less personal, more tangible and more transparently open to intellectual scrutiny: a legal tradition built on an express metaphysical framework and in relation to an ordered cosmos in which the nature of 'male' and 'female' could be, and eventually was, connected to rationally scientific verification. What has replaced this set of traditions – philosophical, theological and scientific – is without lineage or community and its early approaches seem increasingly authoritarian in nature. How will such authoritarian movements be contained and ordered once tradition, philosophy, theology and scientific rationality itself have been cast aside?

Moreover, by stigmatising opposition to, for instance, same-sex marriage or transgenderism as 'homophobic' or 'transphobic' when, contextually, they were nothing of the sort (there being no fear involved), the stage is set for further legal developments. The new challenges are to a redefined, in fact dirempted, notion of the 'public sphere' in which new claims are deemed to constitute the *only* acceptable public norm. Such attitudes and their legal changes are, in short, a recipe for civic totalism,[15] in which homogeneity and dominance would replace – in reality and most certainly not in theory – the more genuine scope for disagreement that preceded the new claims. Liberalism with its two faces, one of which was distinctly *illiberal*, turned out to be a low hurdle for new authoritarians to surmount once they had cast aside the religious and metaphysical traditions certain forms of liberalism took for granted or denied.[16]

If moral language forms how traditions understand the notions of right and wrong in relation to personal and group conduct, the frameworks – political and legal – within which

11. The relationship between the Greek conception of cosmos, the neo-Aristotelean tradition of realism, and this in relationship to what develops in and after Nietzsche is set out in various writings of the Canadian philosopher Grant (1959:1–18, 28–41); on the relationship between modern conceptions of justice and technology, see Grant (1986:11–34). On George Grant and Christian theology and the relationship between justice, liberalism and theology, see Athanasiadis (2001:112–118; 219–242).

12. The paradigm here is Nuremberg, following the positivist dominance of German jurisprudence. Only by invoking 'crimes against humanity' could the otherwise perfectly 'legal' (i.e. passed according to law) laws of the Third Reich be judged as unjust. This brief sojourn with natural law, however, was soon in wider circles submerged by the easy relativism and individualism of some forms of contemporary liberalism. For a discussion of the International Law in relation to 'crimes against humanity' and related concepts such as enslavement and genocide, see Hall (2016:534ff.).

13. The *Canadian Charter of Rights and Freedoms*, The *Constitution Act* (1982), for example, did not contain 'sexual orientation' as a protected right in the non-discrimination section (Section 15). The idea that sexual orientation should be included alongside 'race', 'religion' and 'disability' was debated and expressly rejected by the Joint Committee putting together the original document. That rejection was subsequently confirmed by Parliament. Despite that, in 1994, the Supreme Court of Canada, in the decision of *Egan and Nesbit v. Canada* (1995) 124 DLR (4th) 609 (SCC), claiming to exercise its remedial powers under the Charter, 'read in' sexual orientation as 'an analogous ground' to those enumerated in Section 15 (the non-discrimination provision). This sort of judicial legerdemain was not new, as it played a part in the U.S. Supreme Court's finding of 'the right to abortion' in the 'right to privacy' in the US Constitution, in *Roe v. Wade* 410 U.S. 113 (1973), the famous abortion decision overturning the abortion laws in all American states and more recently in the decision finding a Constitutional requirement to 'same-sex marriage' (by a bare majority of five judges to four) in *Obergefell v. Hodges* 576 U.S. – (2015) (also by a bare majority of five judges to four).

(footnote 13 continues...)

14. See the writings of George Grant referred to in footnote 11 above.

15. Galston (2004:43–50). The term is useful to identify those who claim that their viewpoints should dominate all others, particularly when the language of 'diversity', 'equality' or 'inclusion' is used to camouflage the political and legal moves to domination. Mary Eberstadt (see note footnote 10 above) has referred to the rise of anti-religious bigotry as a form of 'neo-puritanism' that is dogmatic, intolerant, and has its own saints, sacraments, demonology and heretics; in short, it is a form of neo-sectarianism with many parallels to religious fundamentalism. Some years earlier, Graham Good had described a nested set of ideologies related to gender, race and sexual orientation as a 'new sectarianism'; see Good (2001:22ff.).

16. Gray (2000) and Lauwers (2017:29–63, 33–35). See also Bussey's comments on what he, following Maurice Cowling, describes in the work of John Stuart Miller as the dogmatic and religious form of 'liberalism' that was not at all sympathetic to traditional forms of religion: 'The Charter is not a Blueprint for Moral Conformity' (footnote 20 [p. 413, ftn 218]).

rights and wrongs will be lived out, steer the way in which traditions will work out their beliefs in the public realm and shape the culture that is the result of that political and legal ordering. Our frameworks, therefore, in relation to such things as 'the nature of the state' or 'the nature of the public', or the relationship between philosophy and theology and law, and how we structure curriculum in these subjects and on how we envision what constitutes an educated person, will in very real terms shape the cultures we inhabit. What we imagine terms to mean – terms such as 'public', what Charles Taylor called 'social imaginaries'[17] or Robert Cover dubbed 'constitutional narratives'[18] – will also shape the worlds we then regulate through law and live within through our conduct and criticism.

Secular and secularism

Virtues exist within a universe understood as itself, ordered and with a purpose. Law was understood against this divine framework. The symbolism of law – the blind goddesses, the scales of justice – and its rhetoric – 'no one is above the law', 'natural justice' and, more recently, 'crimes against humanity' – that were based upon notions of innateness and described in such documents as the *Universal Declaration of Human Rights* are not framed within contemporary epistemological insecurity and doubt. The political had in such symbolism in large measure still been dependent on the moral and the transcendental. Yet, ceremonial trappings can cease to represent the reality that they once embodied: sacraments can become de-sacramentalised, and then they are but husks. Law becomes less confident about itself as a moral system related to confident articulations about objective goods shared widely within the community. Justice as a virtue becomes something vaguer and less precise – in which the 'values' of a community are invoked as justification for judicial decisions.[19]

This movement from meaning to formalism, in which law or ritual replaces a more or less slow diremption, is well captured in a verse by Lao Tzu dating from the 5th century BCE:

> When the Tao is lost, there is virtue.
> When virtue is lost, there is morality.
> When morality is lost, there is the law.
> The law is the husk of true faith,
> the beginning of chaos.[20]

Elsewhere, Alasdair Macintyre has noted that certain 'forms of narrative' (he mentions particularly the idea of teleology) can continue long after the justifications for the idea have been officially rejected (Macintyre 1990). The foundations of practice embody many stones, the location of the quarry for which has often been lost. Eric Voegelin has also noted that it is derivation of essentially Christian notions that drives what he defines in some detail as contemporary Gnosticism, one characteristic of which is the attempt to maintain the 'spiritual' after the passing away of the traditions and institutions which gave rise to the original meanings.[21]

Secularism, as I have discussed elsewhere (Benson 2004:83–98), was a term coined in 1851 by George Jacob Holyoake, which described a movement designed to remove the relevance of religion (and therefore express metaphysics) from the public sphere, leaving in place the illusion (for it could not be real) that only the measurable and empirical should and could govern public dimensions of culture such as education.

This illusion, typical of logical positivism, persists today, but there are signs that we are moving beyond the stricter forms of the separation. Not all contemporary legal regimes operate in relation to religion and the state in the same manner. South Africa, Canada and Australia, while all former colonies of Britain with their own distinctive histories and all within the Western tradition of 'the common law and its developments', have framed their legal regimes in different ways. While Canada and South Africa have entrenched Bills of Rights, Australia does not. The latter has refused so far to adopt a Canadian or South African type of Bill of Rights, largely because they fear (with some justification) the effect that such approaches have in transferring determinative power to the judiciary (as recent decisions in Canada on euthanasia and same-sex marriage and in the United States on same-sex marriage clearly show).

Yet, each is, despite the wording of the enactments, finding the 'imaginaries' of the 'public sphere' the basis of marked debates about law and associations; this, against a seeming hubris and inability or unwillingness – or a combination of these – to see the jurisdictional limits of law and politics in relation to subsidiary aspects of culture, such as the family and community (Benson 2017b:xxi–xl).

It is an adage well known to social commentators that where there is not sufficient self-governance, external governance

17. See Taylor (2007:171–176). As examples of 'social imaginaries', Taylor lists 'the public sphere', 'the economy' and 'civil society'.

18. Similar to Taylor's insight regarding 'social imaginaries', but preceding it by some decades, is the work on 'constitutional narratives' of Robert M. Cover. His *The Supreme Court, 1982 Term – Foreword: Nomos and Narrative* (1983) 97 *Harvard Law Review* 4, 4–69 sets out a masterful explication of the relationship between narratives and different conceptions of law. Cover (n.d.:18) observes that the conclusion one might draw from this set of principles 'is simple and very disturbing' and it is this: '[*that t*]here is a radical dichotomy between the social organization of law as power and the organization of law as meaning. This dichotomy, manifest in folk and underground cultures in even the most authoritarian societies, is particularly open to view in a liberal society that disclaims control over narrative. The uncontrolled character of meaning, exercises a destabilizing influence upon power'.

19. In Canada, the term 'Charter values' has been used on occasion by judges despite the fact that these do not feature as express parts of the Constitutional documents themselves. Various concerns have been expressed that recourse to 'values' in so far as it appears to give judges capacity to extend beyond the defined language of the Charter itself leads to a perhaps unrestricted judicial 'mandate' or that 'values', being inherently subjective and individualistic, cannot serve properly the principle of clarity important to the rule of law. See, on problems with 'Charter values', Justice Peter Lauwers' 'Liberal Pluralism and the Challenge of Religious Diversity' and Bussey's 'The Charter is not a Blueprint for Moral Conformity' in Benson and Bussey (2017:29–63, 56–63, 367–414). 'Charter values' have been analysed and rejected by the Ontario Court of Appeal in *Gehl v. Canada (Attorney General)* 217 ONCA 319 (Ont. C.A.) para. 76 'In our view a Charter values analysis would unnecessarily inject subjectivity and uncertainty into the legal analysis' (Justices Miller and Lauwers).

20. A variant reading of this famous passage (see http://nolallen.com/portfolio.html) has been rendered in this manner with 'ritual' replacing 'law' in the translation: When the Tao is lost, there is goodness. When goodness is lost, there is morality. When morality is lost, there is ritual. Ritual is the husk of true faith, the beginning of chaos.

21. See Voegelin (1968:99, 108). In an earlier work, Voegelin had noted the rise of civil theology as gnostic and its rise as necessarily related to authoritarianism (Voegelin 1952:163).

must increase. Thus, where there is (as has often been suggested) a 'crisis of liberalism', then law will be invoked to give the 'security' made necessary by the lack of internal checks on conduct. When the rule *of* law breaks down, the rule *by* law seems to be inevitable; where – as here where I write this in Johannesburg, South Africa – law and order become unreliable (because of, e.g., police corruption), walls and electric fences become necessary for citizens of all races. The difference being what sort of system can be afforded rather than whether protections are needed. Everyone knows that protections are essential, but not everyone can afford what is needed.

Conclusion

Conforming the self and the political community to the conception of order that is present or absent will show the nature of the regime. What we have seen is that a constellation of concepts has emerged to serve an illusion: that illusion is that metaphysics and morals are not centrally relevant to politics and law. The illusion also asserts, implicitly if not explicitly (sometimes both), that morals can exist apart from the idea of 'the neutral state', and that law and politics can provide an adequate substitute for religion and associational life that has been banished to the periphery, marginalised according to secularist (motivated by 'secularism') ideology.

Moral ideas of the person and community, essential to the development of the role and rule of law in the West, led to divergent streams, reflected in the rhetoric of division – with expressions such as 'separation of church and state', 'secular', and 'public (or state) neutrality'. This furthered two main divisions, namely, (1) the *privatisation* and (2) the *marginalisation* of religion (see the opening and closing remarks of Otto above).

This resulted, not surprisingly, in religion being less influential in public society and, slowly, less influential generally. Strident secularism advocating the removal not only of religion from politics but even morality from religion may come from high public quarters, but they show their low intent.[22] Emptying churches are mute testimonies to these cultural flows, and the drift of law and politics is its most obvious result. To paraphrase the lamentable result in the clever formulation of Jaroslav Pelikan, writing on the importance of tradition, what has happened is that we are all too often now surrounded by the dead faith of the living and not, as a proper engagement with tradition would have it, 'the living faith of the dead'.[23]

22. Warnock (2010). I discuss the anti-religious dimensions of this book in detail in Benson (2013:112–115). Warnock's frank secularism is directly in line with the exclusionary theory of the man who first coined the term 'secularism' – George Jacob Holyoake. See 'Considering Secularism' (Benson 2017b:xxi–xl), on how Holyoake claimed (falsely) that his theory was 'neutral' in relation to religion: it was anything but.

23. See Pelikan (1984:65). This living faith of the dead is echoed elsewhere in Martin D'Arcy's reference to Newman's *Essay on Development* which, as the Master of Campion noted, defined true development as '... permanence of type, continuity of principles and a power of co-ordination making for a chronic vigor' (D'Arcy 1959:261). All of these are absent from the contemporary scene, which employs shards of the past to attempt functional continuity.

Post-secularism enlivened (C. Lombaard)

Wherein lies the post-secular moment? Like all religio-cultural 'phases', post-secularism too is in one respect, like beauty, in the eye of the beholder. In another regard, however, once the (always relative) validity of a trend has been recognised and by scholarly agreement established,[24] it becomes impossible to un-see it; the mind's eye has been trained to see what (although, *Deo gratias*, not how)[25] others have seen.

The same with 'phases': although construed as historical 'developments' (Lombaard 2015), neither the identification of eras or periods nor the implication that progress of some sort is made in a manner that replaces some unique features with other, better ones, are valid. What might at best be said is that at certain times in certain places, what is reflexively held or felt to be most valid, foundationally 'true', alters[26] – at least, according to our insights, based on our perceptions.

Such tentative formulations do not negate understanding, leading to a sense of almost nihilistic relativism. Rather, relationality is highlighted – between what is said by whom on which subject matter. Such is the hermeneutic enterprise, always: as highly individualistic as people may be, understanding is in most of its dimensions shared. These are, namely, frames of reference, paradigms and models – for the most part unexpressed, and for precisely that reason, the greatest carriers of community, society and civilisation.

A good example of this is religion. In religious societies, where most people are adherents of religious traditions, it is hardly imaginable by most people that someone would not share this orientation. Much of human interaction in such societies is premised on this reflexive understanding – with the concept of spiritual capital (O'Sullivan & Flanagan 2012), which may be enlarged somewhat beyond its usual application to offer insight into this shared sense of the common good. This is paralleled precisely in non-religious societies (more accurately formulated: publicly non-religious societies). It is hardly imaginable that a publicly professed orientation to the divine in such societies – with the Czech Republic and Estonia in Europe and, differently but perhaps increasingly so, Canada and Australia in the countries of the Commonwealth – would render one the social capital (Gelderblom 2018:1–16) required for social advancement.

Both options are based on something like a national consensus, in a loose sense, that is, however, enforced in strict ways by laws and mores. Each of these options regards itself as infinitely better – more humane and as much to the greater benefit of society as individuals – than the other, at times finding the very existence of the other incomprehensible,

24. The philosophy of science of Thomas Kuhn lies in the background here – Kuhn (1962).

25. And here in the background lies Popper's falsifiability criterion (Popper 1963), and the ideals of intersubjectivity in science – cf., e.g., Froneman and Lombaard (2006:151–158).

26. See Deist (1994) as a very thorough case study.

even asking 'how could it be that people would want to *live* in such a society?' Naturally, in whichever of these societies, there are people who do not live according to the publicly accepted norm, and they find themselves often feeling uneasy, or disadvantaged, or subject to more extreme measures of exclusion.

Usually, when these two alternatives are discussed, it is done as a historical overview, which is certainly valid as an analysis of how matters had transpired in parts of Europe, but with wider translatability limited if one keeps to a chronological flow of argument. The latter runs in broadest strokes as follows:[27]

- Europe had been thoroughly religious, to the point that being non-religious was hardly conceivable. Being wrongly religious could result in death, such as being Catholic in a Protestant geography or vice versa. Heresies did not include much atheism, which may be found as a theoretical concept, but in daily life, the goods of God were everywhere to be seen (architecture, politics, health, nature and more). This kind of orientation is often called pre-modern or mythical. Everything could be related to the supra-human, metaphysical, or divine.
- Come the Enlightenment, however – as well as the Industrial Revolution and its technological posterities, the growth of the natural sciences, and the inhuman or inhumane ideological truths that would shatter the 19th and 20th centuries – reason reigned supreme. Rather than a 'holistic' interpretation, where all was explained from the Holy as the broadest possible interpretative category, the reverse was the strategy of reflexive understanding. In the physical world, the smallest identifiable units would explain how anything was constituted; in the psycho-social world, indicating the detailed historical processes by which the current state of affairs had been constituted (Freud, Marx, Weber) *was* understanding. Humans must be atomised and historicised to understand them and us. Clearly, there cannot be space for a God, ontologically, in such a mindset – that category is too large (in the language of logical positivism, it cannot be operationalised for investigation). Therefore, while earlier God was per definition to be perceived everywhere, now God was per definition to be found nowhere – a state of epistemology that must for the sake of logic also be worked out socially. Politics and society must therefore be godless. That is modernism.
- The post-modern as the recently highly influential phase of modernism may be explored in a similar manner. With physical atomism that was now (plus–minus from just after halfway through the previous century) increasingly replaced with an emphasis on relationality, and historicism with (community-building) language as prime explanatory category, understanding had to make place for dynamism as *the* force of life. Stability had hardly any place; all was, rather, something akin to energy. Thus, the idea of truth (usually thought of as static, unchangeable and eternal) had to be questioned deeply – a manner of interrogation that leaves little physical place for God, nor much socially.
- In the currently dawning post-secular religio-cultural climate,[28] the reflexive base and sentiments of understanding are shifting from what was revealed (pre-modern) to the smallest possible constituent and/or to historicism (modern), to language (post-modern), and now to *experience*. In religious practice, this is seen with a strong shift in emphasis to *spirituality* (what has frequently been called the 'spiritual turn' of our age) – a term which in, for instance, popular journalism is used much more positively than is the term *religion*. The latter is but one sign (amongst a host of others, e.g., in academia in the fields of sociology and philosophy, cf. Lombaard 2016b:1–6; Nynäs, Lassander & Utriainen 2012) that a sense for the religious, an estimation of some sort of faith, is occurring across Western(ised) societies. No longer marginalised, as would reflexively happen since the Enlightenment, nor its opposite, as was the prior case, a sense of greater[29] balance seems to be emerging over roughly the past decade. If meaning or fulness is *experienced*, with neither positive nor negative experiences of (the possibility of) the divine privileged societally, being of faith is a normal position to be in – with whichever contents one fills that experience (which is constituted by a continuum of forms of commitment).

To follow this kind of historical breadcrumb line has the value that the differences between theses 'phases' crystallise more clearly, perhaps because we are familiar enough with these histories that analyses echo within us with some form of recognition. To keep to only such diachronical analysis would be comfortable, but less productive than the possibilities of the post-secular propose, because the harder work of contemporary-synchronical work requires greater awareness of our own times and our own selves. Therefore, the attempt, next, is to place the respective contributions of Otto and Benson, summarised by themselves and extended above, within the currently dawning post-secular climate.[30]

The similarities between Otto and Benson as evidence of parallel post-secular engagements

Why would these two figures be examples of post-secular orientations? Because, in both cases, they move beyond the

27. Drawing here in various ways on Boersma (2011); Goosen (2007); Kearney (2010); Schrijvers (2016); Taylor (2007); Van Peursen (1987).

28. If one publication is to be marked as a starting point, it could be Habermas (2008:17–29). The term 'post-secular' predates this publication by Habermas, which, however, made the term known and used more widely than before. For instance, Rutler (1987:9) already expressed discontent with his time's failure to recognise the passing of the 'modern' in a very similar fashion when he said, '[*t*]he modern age is becoming outmoded, the thing it thought most unlikely. This poses a problem overwhelming to set minds: what happens when the age which was supposed to be the end of all ages ends itself? The stark reply is, modern man is the least equipped to know. While posturing as the breath of things to come, he was instituting the first civilized denial of the future. Modernity is worse that a rejection of the past; it is a defiant avoidance of that which is next, probably the first school of discourse to cancel tomorrow as a thing as vapid as part of yesterday. It is ungrateful to forget your last breath; it is suffocating to forget your next breath. And it is oppressively tedious'.

29. Certainly, perfect balance is not something to strive for. What would it be?

30. The point below is not to review critically the work of either Otto or Benson. Contributions critical to their research have, to be sure, been published, with awareness thereof here acknowledged. However, the purpose here is to characterise their respective contributions as examples of the rising post-secular awareness in quite different Western(ised) contexts.

strict Enlightenment division between the secular and the religious. In both cases, these two intellectuals, in different fields, fully unaware of each other's work, with hardly a source in common and using arguments that in no way overlap, indicate how religious dynamics enrich the recent past and unfolding future of (what would in the conceptions of modernism be) the 'non-religious world', namely *towards greater human freedom*. The latter move goes directly against the Enlightenment or modernist expectation that religious impulses would only inhibit freedom. To suggest the opposite would seem like heresy in the hustle of political debate and the bustle of barroom disputes – that is, across the spectrum of social interaction (the context of laws on burkas on French beaches illustrates this meeting of different worlds quite exquisitely.)

Otto's case is based on the pre-exilic Jerusalemite intelligentsia's response to enforced neo-Assyrian loyalty obligations. Impossible to strike back at the empire militarily, they reinterpret the imposed loyalty texts, inserting at once their God into these texts and in-between citizen and ruler. Thoroughly identity forming, religion becomes the bulwark of protection of the civilian against the sovereign, instead of – in still ever-recurring self-serving mode – religion supporting political malfeasance. This Jerusalem impulse towards human freedom combines with the Athenian heritage of the right to vote, in both cases now in altered form, to constitute two cornerstones of current human rights, namely, the right to choose and the protection of the individual, group, minority or society against the abuse of power, the potential of which always lies in political authority.

Benson's case is on the way law is pronounced, from the Enlightenment ever more without the assistance of religion. This leads in certain cases to judgements of courts on issues that have clear moral implications, but within the intellectual climate of the time, such concerns are deliberately omitted in coming to decisions. The effects of those verdicts, as they play out in society, are thus intended to be religion-free or morality-free or based upon a supposed 'neutrality'. This is understood to be a liberal position – one intended to enhance individual freedom in society. However, apart from the logical inconsistencies involved – the notions (1) that the exclusion of religious contributions does not itself entail a religious commitment, (2) that the exclusion of morality is not itself a moral position and, overall, (3) that the exclusion of metaphysical arguments is not itself a metaphysically based stance – the pool of possible considerations on which to draw in coming to such decisions is firmly delimited. An enlarged liberalism would, for the sake of human freedom, include all possible heritages; certainly, all major ones. A more open liberalism would not seek to exclude in a targeted way substantial parts of that which has contributed to what humanity is. The metaphysical lies concretely in almost all, if not all, aspects of the social and individual life of humanity. Religion here provides a strong test case of sorts on enlarging freedom: excluding this aspect of human life is certainly limiting, and therefore in the classic sense of liberalism – which seeks to maximise freedom – (ironically, given its intention) illiberal.

In both the Otto and Benson contributions, the exclusion of religion from an aspect of human freedom is undermined. Both indicate how religion has contributed to an aspect of human freedom and must continue to expand such freedom – respectively related to human rights and liberal (here, meant classically liberal) court judgement, with both oriented towards increasing freedoms. To exclude these religious impulses would be difficult to argue in liberal society. A post-secular sense, that religion (in all its possible forms) is a *normal* part of life, which should not merely because it is religion be either privileged or excluded, characterises such kinds of contributions. To exclude religion is feigned reality; to base freedom on such exclusion, is liberalism limited.

Otto and Benson have each in their own manner broken through the rules-of-play of modernist society, which would discount religion, most particularly for the sake of political wellbeing (again, the irony). Neither of them had set out 'to be post-secularist' in their contributions. For the greater part unaware of this unfolding religio-cultural climate, they had given expression to its emerging sensitivities while in their scholarship unpicking its settled (and erroneous) certainties. Precisely for such reasons do they constitute examples of tracing the currently emergent religio-cultural climate, in Western(ised) societies at present and in their foreseeable future. Namely, our fate now again includes faith.

In closing: The language of religious faith (I.T. Benson & C. Lombaard)

As pointed out, adjectivising 'religious' to 'faith' may well seem, initially, to be an awkward formulation. However, it does accentuate the point, fully post-secular in nature, that there is strictly speaking no 'outside' position on claims regarding religion. This runs parallel to insights in the philosophy of science that there is no such thing as a truth without a context (Lynch 1966:155–156) or a fact without a theory (Le Roux 2001:444–457). Namely, if 'faith' were to be viewed as fully coterminous with 'religion', then atheistic and agnostic positions would, for instance, be left unconsidered as to their nature as 'faith orientations'. All stances taken on the 'big questions' of life[31] – such as the existence of the divine or not, life after death or not, meaning in life or not – are dispositions of faith. This is acknowledged, for example, in the growing literature on the spirituality of atheism, as one instance.[32]

To afford prominence within society to any one of these positions on faith and in faith, as had become something of an instinct in democracies to afford atheism, is therefore not

31.A formulation from Lombaard (2008:94).

32.See, for example, the best seller in France, Comte-Sponville (2006) (the English translation is Comte-Sponville 2007). In the UK, De Botton (2013) drew wide attention, but many of the reviews were strongly disapproving. See also Bailey (2001) and Ingman et al. (2016).

a religion-free position, as is always claimed, but is better considered something akin to a religious stance. Atheism is a confessional orientation. A state, society or group professing atheism is taking something strongly akin to, but significantly different in other ways from, a religious or confessional stance.

To illustrate this on a personal level, a statement such as 'I am religious' (or more confessionally, 'I am Christian'; or more specifically, 'I am Calvinist' or 'I am a Catholic') means directly that one has (subscribes to, has inherited or was given) belief. The statement to the contrary ('I am not religious') is no less a statement of faith, namely, either that one answers in the negative to all or most of the 'big questions' of life or that, despite being aware of these questions, one does not take a committed position on them (in which case 'I do not take religion seriously' would be a more accurate statement). This remains, however, an orientation to faith and in faith (namely a non-religious faith); it is fully a position of belief.

Non-believing is not faith-free and is always itself an indication of belief in something else, and it is as much a confession or commitment as any other (not to make any evaluative judgment as to what sort of 'communities' are present or absent with more inchoate and unintentional belief forms). To believe one has no belief is to say one has no language.

That is part of the post-secular move – that the ubiquity of religion, the inevitably of faith be recognised for what it is. The blind spot of modernism or post-modernism or what was mistakenly characterised, at least for a time, as 'the secular', to matters religious (Ahdar 2011:611–637), rendering them, respectively, to the sociopolitical margins and as language games, seemed to make sense for a time within the major tenets of those two ways of understanding society. Different things were seen; hence, God was un-seen. As we know from the minor chords of religion in Western(ised) histories, however, the unseeable God[33] has been persistent – quietly so, too – in the impulses towards human rights from antiquity and across recent decades (see Otto above) and in the quest for a more inclusive liberalism in recent years (see Benson above). Whether acknowledged or not, religious faith or its analogues or pretenders permeate everything.[34] Impulses of the transcendent form and inform many of the most treasured bases on which we build our societies. Thales' 7th to 6th century BCE note,[35] the oldest of religious expressions from ancient Greece, remains as valid in post-secular times as it had been in antiquity: πάντα πλήρη θεῶν [Everything is full of gods].

33.As just the briefest of references, cf. on the unseen God, (1) in the Old Testament, England (2011:47–71), (2) in the New Testament, Van der Merwe (2015:1–11), and amongst the mystics McGinn (2004). There are signs that interest in this aspect is returning amongst exegetes: at the International Organisation for the Study of the Old Testament (IOSOT) 2016 conference in Stellenbosch, South Africa, there was a session entitled 'Seeing God: visual perception of the divine in the Hebrew Bible, the LXX and the New Testament', which included three presentations.

34.The concept of 'implied religion' coined by Edward Bailey captures this well; see, for example, Bailey (1998). See Lombaard (2016a:257–272). Similar attempts to bracket matters out of consideration prompted Aldous Huxley to observe that one can have good metaphysics or bad metaphysics, but one cannot have 'no metaphysic' (see Huxley [1937:252]; and the discussion generally in Benson [2000:519–549]; and more recently in Benson [2017:120–142]).

35.In Aristotle, *De Anima* 411a7-8; cf. Lombaard (2016a:257).

Acknowledgements

The authors acknowledge the financial support of the South African National Research Foundation and of the School of Ministry, Theology and Culture, Tabor College, Adelaide, for this research project. They also thank the colleagues at the Notre Dame School of Law, Sydney; the Australian Catholic University, Brisbane; Pilgrim Theological College, Centre for Research in Religion and Social Policy, University of Divinity, Melbourne; the School of Ministry, Theology and Culture, Tabor College, Adelaide; and the Adelaide Law School, University of Adelaide, Adelaide, without whose efforts the lecture tour around which this article came into being would not have taken place.

Competing interests

The authors declare that they have no financial or personal relationships that may have inappropriately influenced them in writing this article.

Authors' contributions

All authors equally contributed to the research and writing of this article.

Ethical consideration

This article followed all ethical standards for a research without direct contact with human or animal subjects.

Funding

This research received no specific grant from any funding agency in the public, commercial, or not-for-profit sectors.

Data availability statement

Data sharing is not applicable to this article as no new data were created or analysed in this study.

Disclaimer

The views and opinions expressed in this article are those of the author and do not necessarily reflect the official policy or position of any affiliated agency of the author.

References

Ahdar, R., 2011, 'Indigenous spiritual concerns and the secular state: Some New Zealand developments', *Oxford Journal of Legal Studies* 23(4), 611–637. https://doi.org/10.1093/ojls/23.4.611

Aristotle, 1994, 'De anima', in E.J. Brill (ed.), Aristotle's, Leiden.

Athanasiadis, H., 2001, *George Grant and the theology of the Cross*, pp. 112–118, 219–242, University of Toronto Press, Toronto.

Bailey, E., 1998, *Implicit religion. An introduction*, Middlesex University Press, London.

Bailey, E., 2001, *The secular faith controversy. Religion in three dimensions*, Continuum, London.

Barton, J. & Bowden, J., 2004, *The original story. God, Israel and the world*, p. 63, Darton, Longman & Todd, London.

Benson, I.T., 2000, 'Notes towards a (re)definition of the "Secular"', *UBC Law Review* 33(3), 519–549.

Benson, I.T., 2004, 'Considering secularism', in D. Farrow (ed.), *Recognizing religion in a secular society*, pp. 83–98, McGill-Queen's University Press, Montreal.

Benson, I.T., 2013, 'An associational framework for the reconciliation of competing rights claims involving the freedom of religion', unpublished PhD thesis, University of the Witwatersrand.

Benson, I.T., 2017a, 'Can law avoid creating culture and religion in its own image? The context for diversity, religion and culture in *MEC for Education: KwaZulu-Natal and Others v Navaneethum Pillay*: Reflections a decade later', *Journal for Juridical Science* 42(2), 120–142.

Benson, I.T., 2017b, 'Foreword: The limits of law and the liberty of religious associations', in I.T. Benson & B.W. Bussey (eds.), *Religion, liberty and jurisdictional limits of the law*, pp. xxi-xl, LexisNexis, Toronto.

Benson, I.T & Bussey, B.W. (eds.), 2017, *Religion, liberty and the jurisdictional limits of law*, Lexis Nexis, Toronto.

Boersma, H., 2011, *Heavenly participation. The weaving of a sacramental tapestry*, William B Eerdmans, Grand Rapids, MI.

Comte-Sponville, A., 2006, *L'esprit de l'athéisme. Introduction à une spiritualité sans Dieu*, Éditions Albin Michel, Paris.

Comte-Sponville, A., 2007, *The little book of atheist spirituality*, Viking, London.

Conze, W., 1984, 'Säkularisation, Säkularisierung', in O. Brunner, W. Conze & R. Koselleck (eds.), *Geschichtliche Grundbegriffe*, vol. 5, pp. 789–829, Klett/Cotta, Stuttgart.

D'Arcy, M., 1959, *The meaning and matter of history: A Christian view*, p. 261, Farrar, Strauss and Cudahy, New York.

De Botton, A., 2013, *Religion for atheists: A non-believer's guide to the uses of religion*, Penguin, London.

Deist, F., 1994, *Ervaring, rede en metode in Skrifuitleg. 'n Wetenskapshistoriese ondersoek na Skrifuitleg in die Ned. Geref. Kerk 1840-1990*, Raad vir Geesteswetenskaplike Navorsing, Pretoria.

Dray, W., 1995, *History as re-enactment. R.G. Collingwood's idea of history*, pp. 191–228, Clarendon Press, Oxford.

Eberstadt, M., 2016, *It's dangerous to believe: Religious freedom and its enemies*, Harper Collins, New York.

England, F., 2011, 'Sacred texts and mystic meaning: An inquiry into Christian spirituality and the interpretive use of the Bible', *Acta Theologica* 31(2), 47–71.

Erasmus, A. & Lombaard, C., 2017, 'When equal becomes the same. The spirituality of sex: Have we lost it?', *Verbum et Ecclesia* 38(2), 1–7. https://doi.org/10.4102/ve.v38i2.1613

Froneman, J. & Lombaard, C., 2006, 'Three broad approaches to the study of religious communication', *Tydskrif vir Christelike Wetenskap/Journal for Christian Scholarship* 42(3), 151–158.

Galston, W., 2004, 'Religion and the limits of liberal democracy', in D. Farrow (ed.), *Recognizing religion in a secular society*, pp. 41–50, McGill-Queen's University Press, Montreal.

Gelderblom, D., 2018, 'The limits to bridging social capital: Power, social context and the theory of Robert Putnam', *The Sociological Review* 66(6), 1309–1324. https://doi.org//10.1177/0038026118765360

Good, G., 2001, *Humanism betrayed: Theory, ideology and culture in the contemporary university*, pp. 22ff, McGill-Queen's University Press, Montreal.

Goosen, D., 2007, *Die nihilisme. Notas oor ons tyd*, Praag, Pretoria.

Grant, G., 1959, *Philosophy in the mass age*, pp. 1–18, 28–41, Copp Clark, Toronto.

Grant, G., 1986, 'Thinking about technology', in *Technology and justice*, pp. 11–34, Anansi, Toronto.

Gray, J., 2000, *The two faces of liberalism*, The New Press, New York.

Habermas, J., 2008, 'Secularism's crisis of faith: Notes on post-secular society', *New Perspectives Quarterly* 25, 17–29. https://doi.org/10.1111/j.1540-5842.2008.01017.x

Hall, S., 2016, *Principles of international law*, 5th edn., Lexis Nexis, Australia, 534ff.

Harper, R.F., 1904, *Hammurabi. The code of Hammurabi King of Babylon*, viewed 02 September 2017, from http://oll.libertyfund.org/titles/1276.

Huxley, A., 1937, *Ends and means*, p. 252, Chatto & Windus, London.

Ingman, P., Utriainen, T., Hovi, T. & Broo, M. (eds.), 2016, *The relational dynamics of enchantment and sacralization. Changing the terms of the religion versus secularity debate*, Equinox, Sheffield.

Joas, H., 2009, 'The religious situation in the USA', in H. Grant (ed.), *Secularization and the world religions*, pp. 229–240, Liverpool University Press, Liverpool.

Kearney, R., 2010, *Anatheism: Returning to God after God*, Columbia University Press, New York.

Kuhn, T.S., 1962, *The structure of scientific revolutions*, University of Chicago Press, Chicago.

Lauwers, P.D., 2007, 'Religion and the ambiguities of liberal pluralism: A Canadian perspective', The Supreme Court Law Review 37(2), 1–45.

Le Roux, J., 1993, 'The nature of historical understanding (or: hermeneutics and history)', *Studia Historiae Ecclesiasticae* XIX(1), 35–63.

Le Roux, J., 2001, 'No theory, no science. (or: Abraham is only known through a theory)', *Old Testament Essays* 14(3), 444–457.

Lombaard, C., 2008, 'Spirituality: Sense and gist. On meaning, God and being', in P.G.R. De Villiers, C.E.T. Kourie & C. Lombaard (eds.), *The spirit that empowers: Perspectives on spirituality*, pp. 94–107, *Acta Theologica* Supplementum 11, University of the Free State Press, Bloemfontein.

Lombaard, C., 2009, 'Translating human rights between the secular and the spiritual – Two recent attempts', in E.F. Coutinho (ed.), *Discontinuities and displacements: Studies in comparative literature*, pp. 334–347, Aeroplano Editora, Rio de Janeiro.

Lombaard, C., 2011, 'Biblical Spirituality and human rights', *Old Testament Essays* 24(1), 74–93.

Lombaard, C., 2015, '"And never the twain shall meet"? Post-secularism as newly unfolding religio-cultural phase and Wisdom as ancient Israelite phenomenon. Spiritualities and implications compared and contrasted', *Journal of Theology for Southern Africa* 152, 82–83.

Lombaard, C., 2016a, 'God's absence as characteristic of faith: Implicit religion and Edward Bailey (1935–2015)', *Stellenbosch Journal of Theology* 2(2), 257–272.

Lombaard, C., 2016b, 'Sensing a "second coming": An overview of new concepts in sociology, philosophy, law and theology on the re-emerging religious in private and public life', *Verbum et Ecclesia* 37(1), 1–6. https://doi.org/10.4102/ve.v37i1.1488

Lübbe, H., 1965, *Säkularisierung. Geschichte eines ideenpolitischen Begriffs*, Alber, Freiburg/Breisgau.

Lynch, M., 1966, *Truth in context: An essay on pluralism and objectivity*, pp. 155–156, MIT Press, Cambridge.

Macintyre, A., 1990, *First principles, final ends and contemporary philosophical issues*, pp. 58–59, Marquette University Press, Milwaukee.

Maul, S., 1998, 'Der assyrische König – Hüter der Weltordnung', in J. Assmann (ed.), *Gerechtigkeit. Richten und Retten in der abendländischen Tradition und ihren altorientalischen Ursprüngen*, pp. 65–77, Wilhelm Fink, Munich.

McGinn, B., 2004, *The foundations of mysticism: Origins to the fifth century*, Crossroad, New York.

Nynäs, P., Lassander, M. & Utriainen, T. (eds.), 2012, *Post-secular society*, Transaction Publishers, New Brunswick.

O'Sullivan, M. & Flanagan, B. (eds.), 2012, *Spiritual capital: Spirituality in practice in Christian perspective*, Ashgate, Farnham.

Otto, E., 1999a, *Krieg und Frieden in der Hebräischen Bibel und im Alten Orient. Aspekte für eine Friedensordnung in der Moderne*, pp. 43–46, Kohlhammer, Stuttgart.

Otto, E., 1999b, 'Die besiegten Sieger. Von der Macht und Ohnmacht der Ideen in der Geschichte am Beispiel der neuassyrischen Großreichspolitik', *Biblische Zeitschrift* 43, 180–203.

Otto, E., 2002, *Gottes Recht als Menschenrecht. Rechts- und literaturhistorische Studien zum Deuteronomium*, Beihefte zur Zeitschrift für altorientalische und biblische Rechtsgeschichte, Band 2 Harrassowitz Verlag, Wiesbaden.

Otto, E., 2002, *Max Webers Studien des Antiken Judentums*, pp. 135–151, 177–180, 252–258, 269–272, 276–280, Mohr Siebeck, Tübingen.

Otto, E., 2009, 'The departure and return of God: Secularization and theologization in Judaism', in H. Joas (ed.), *Secularization and the world religions*, pp. 77–107, Liverpool University Press, Liverpool.

Otto, E., 2016, *Deuteronomium 12,1–23,15*, pp. 1267–1268, Herders Theologischer Kommentar zum Alten Testament, Herder, Freiburg.

Otto, E., 2017, *Deuteronomium 23,16-34,12*, Herders Theologischer Kommentar zum Alten Testament, Herder, Freiburg.

Parpola, S., 1997, *Assyrian prophecies*, State Archives of Assyria 4, pp. 22–27, Helsinki University Press, Helsinki.

Pelikan, J., 1984, *The vindication of tradition*, p. 65, Yale University Press, New Haven.

Popper, K., 1963, *Conjectures and refutations*, Routledge & Kegan Paul, London.

Rothe, R., 1845–1848, *Theologische Ethik*, 3 vols., Kölling, Wittenberg.

Rutler, G.W., 1987, *Beyond modernity*, p. 9, Ignatius, San Francisco.

Schrijvers, J., 2016, *Between faith and belief. Toward a contemporary phenomenology of religious life*, SUNY, New York.

Taylor, C., 2007, *A secular age*, Harvard University Press, Cambridge.

Van der Merwe, D., 2015, 'The early Christian spirituality of "seeing the divine" in 1 John', *HTS Teologiese Studies/Theological Studies* 71(1), 1–11. https://doi.org/10.4102/hts.v71i1.2790

Van Peursen, K., 1987, *Cultuur in stroomversnelling*, 3rd edn., Elsevier, Amsterdam.

Voegelin, E., 1952, *The new science of politics: An introduction*, 1987 edn., p. 163, University of Chicago Press, Chicago.

Voegelin, E., 1968, *Science, politics and Gnosticism*, p. 108, Regnery Gateway, Chicago.

Warnock, M., 2010, *Dishonest to God: Keeping religion out of politics*, Continuum, London.

Weber, M., 1920, Vorbemerkung', in M. Weber (ed.), *Gesammelte Aufsätze zur Religionssoziologie*, pp. 1–16, vol. 1, Mohr Siebeck, Tübingen.

Weber, M., 1952, *Max, ancient Judaism*, p. 79, Free Press, Glencoe.