

Foreword: Law and religion in Africa - Comparative practices, experiences and prospects

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Africa presents a world of contrasts. All too representative is the following, culled from a recent Associated Press (AP) report:¹

The latest attack by suspected Islamic extremists in Nigeria's northeast has left 115 people dead, more than 1 500 buildings razed and some 400 vehicles destroyed ... Sitting among the smoking ruins of his palace, the *shehu*, or king, of Bama ... charged that the government 'is not serious about halting the Islamic uprising ...'

In a video message from one of the uprising's leaders, the chief assailant declares: 'The reason I will kill you is that you are infidels, you follow democracy.' The report goes on to note, however, that²

many more Muslims than Christians have been among the thousands killed in the four-year-old rebellion by ... Boko Haram – the nickname means 'Western education is forbidden' – which aims to transform Nigeria into an Islamic state.

In quiet contrast, a case study published in August 2013 by Georgetown University's Berkley Center for Religion, Peace and World

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1 H Umar '115 killed, 1 500 buildings razed in Nigerian town' *Associated Press* 20 February 2014, <http://bigstory.ap.org/article/islamic-extremist-leader-threatens-nigerian-oil> (accessed 21 March 2014).

2 As above.

Affairs concludes the following with regard to South Africa's post-apartheid Truth and Reconciliation Commission:³

[O]ne cannot wholly grasp the features of this painful yet peaceful transition without understanding the prevalence of Christian beliefs among the majority of the populace, the highly respected role of clerics in the society, the joint application of Christian and traditional African principles of restorative justice, forgiveness and reconciliation, and the role of religious symbols and rituals like prayer in the TRC process. South Africa's TRC and the personnel associated with it have become world figures through their efforts to resolve intractable conflict.

Thus, religion continues to play an ambivalent role on the world stage – and not less in Africa. One need not look far for examples of Muslims, Jews, Hindus, Buddhists, Christians and others making extraordinary sacrifices for the good of humanity. But, unfortunately, neither must one look far for large-scale abuses committed in the name of religion. If secularisation theories of the nineteenth and twentieth centuries are not dead, surely they are moribund. Predictions, whether by Marx or Morgenthau, that modern economies, communications and technology, and a new age of ratiocination would place religion in the backseat (and eventually out the door) have proven themselves invalid. The death that was supposed to befall religion has felled secularisation theories instead.

The resurgence – or perhaps the rediscovery – of religion in recent decades has caused policy makers worldwide to re-evaluate the relationships of conscience and religious belief with law, politics, international relations, education and with most other social institutions. Those relationships have proven complicated, with religion sometimes walking the high road in the company of institutions that foster the expansion of social goods and amenities, and sometimes taking the lower path of violence and regression. Regardless, the appearance today of religion on the agenda of virtually all governments – at both global and local levels – demonstrates that the interaction of law and religion cannot be ignored. It is this recognition that has given the discipline of law and religion new salience. This issue of the *African Human Rights Law Journal* makes important contributions to this burgeoning field.

In one sense, the interaction of law and religion has posed challenging issues as long as law and religion have existed. In some of its earliest forms in many African societies, law was difficult to distinguish from religion – the two were intertwined often to the point of being identical. Modernity has brought a sharper sense of the hazards of such fusion, and the need to make room for diverse beliefs. Although the unity of religion and government in some cases has fostered virtue in political leaders and the citizenry, all too often it has

3 Berkley Center *South Africa: The religious foundations of the Truth and Reconciliation Commission Religion and Conflict Case Study Series*, August 2013, <http://repository.berkeleycenter.georgetown.edu/130801BCSouthAfricaReligiousFoundationsTruthReconciliationCommission.pdf> (accessed 21 March 2014).

led to hypocrisy at the top and oppression of conscience the rest of the way down. The result has been the emergence of a range of configurations of law and religion that implement, with varying degrees of effectiveness, the widely-accepted norms of freedom of religion or belief embodied in international human rights documents and in constitutions worldwide.

Law and religion began to emerge as an identifiable field of study about 40 years ago. One of its earliest manifestations was in the formation of the Law and Religion Section of the American Association of Law Schools which was founded at that time. It was a small section which was, in some ways, very quiet, not drawing much attention to itself. The section saw some growth during the 1980s, but things did not really begin to change until the collapse of communism, which triggered a transformation of legal systems from Central Europe to Eastern Siberia, and produced consequences throughout much of the rest of the world, including the collapse of apartheid in South Africa.

With the end of East-West political polarisation came transformations in the way people thought about law and religion. The euphoria that came with the 1990s, however, gradually gave way to retrenchment and greater restrictions on religious freedom. Part of this is the result of a variety of concerns with religious extremism and security concerns after the terrorist attacks of 11 September 2001. Whether as a result of these events or due to other ironies of history, the global resurgence of religion has sometimes brought setbacks for religious freedom, not so much as a result of direct attacks on the idea of religious freedom, but through a steady process of erosion by exception. The notion that ordinary laws can override religious freedom claims has expanded. Courts seem increasingly inclined to allow other state interests to outweigh religious freedom claims. The range of competing rights is constantly expanding. The result is that commitment to the ideal of religious freedom remains strong, but its practical strength is suffering constant attrition.

Whether as a result of such attrition, or because of longstanding failures to live up to religious freedom commitments, the latest research shows that a remarkable percentage of the world's inhabitants live in countries with high or very high restrictions on religious freedom. Path-breaking research published by the Pew Forum for Religion and Public Life in 2009 showed that 32 per cent of the countries in the world today had high or very high restrictions on religious freedom, including some of the largest countries and encompassing 70 per cent of the global population.⁴ Follow-up studies in successive years show that the situation is getting worse. Now, 76 per cent of the world's population suffers high or very high

4 Pew Forum on Religion and Public Life *Global restrictions on religion*, <http://www.pewforum.org/files/2009/12/restrictions-fullreport.pdf> (2009) 1 (accessed 21 March 2014).

restrictions.⁵ Ironically, these increasing restrictions are occurring at precisely the time that new research demonstrates that religious freedom correlates and appears to be linked to the generation of countless other social goods,⁶ while increasing restrictions on religion are as likely to be a cause as an effect of religious violence.⁷

Now, of course, some of the constraints on freedom of religion are justified. Thoughtful observers should acknowledge what Scott Appleby has called the 'ambivalence of the sacred'.⁸ Religion has done bad things, but it has also made good and ennobling contributions to society. It appears that we live in an age in which we are beginning to forget the latter: the values that have made our age possible, including much of what is best about our age – values, even political values, which more often than not find their origins in religion.

1 Law and religion in Africa

This issue of the *African Human Rights Law Journal* brings the discussion of law and religion on the African continent together in unprecedented ways. In January 2013, Dean Kofi Quashigah of the University of Ghana and a handful of other leaders in the field of law and religion welcomed more than 40 scholars to Legon, Ghana, for the first annual multi-national conference on law and religion in Africa. Participants came together for two days of frank yet respectful discussions on the relationships between religion, conscience, belief, law, politics and government in sub-Saharan Africa.⁹ Contributors to this issue of the *African Human Rights Law Journal* explore a range of issues in law and religion, including some that Africans share more widely with others and some that are unique to Africa.

Bishop Musonda Trevor Selwyn Mwamba inaugurates the present volume with the suggestion that, as law and religion are both ultimately concerned with justice, law should allow itself to be nurtured by spiritual and moral values. The meaning with which religion infuses life can fuel the duties and respect for human rights demanded by law. Mwamba's perspective clearly suggests why, as the world wrestles with questions of church, mosque, synagogue and state, it is more natural that outsiders might look to Africa for insights, successes and cautionary concerns regarding religion's role in society.

5 Pew Research Center *Religious hostilities reach six-year high*, <http://www.pewforum.org/files/2014/01/RestrictionsV-full-report.pdf> (accessed 21 March 2014).

6 BJ Grim & R Finke *The price of freedom denied: Religious persecution and conflict in the twenty-first century* (2011) 206.

7 Grim & Finke (n 6 above) 215-222.

8 R Scott Appleby *The ambivalence of the sacred* (2000).

9 For a more complete report on the conference, see D Kirkham 'Law and religion in Africa: Comparative practices, experiences and prospects' (2013) 15 *Ecclesiastical Law Journal* 219-222.

An observation of Christian-Muslim feuds in Nigeria or the infusion of clearly religiously-rooted spiritual values into governmental institutions, such as South Africa's Truth and Reconciliation Commission, to good effect, may leave non-Africans either impressed or nonplussed. Nevertheless, it should not leave anyone unclear that Africa is rich terrain for the exploration of new ways for understanding legal and religious relationships, both traditional and modern. Significantly, this volume consists of contributions from various corners of Africa, placing local concerns in shared and universal perspective. Bishop Mwamba and Dean Quashigah set the stage, raising somewhat conflicting perspectives, with the Bishop, as noted, seeking more accommodation of law and religion, whereas the Dean promotes a more strict separation of religion and state.

Other contributors emphasise African historical forces as they have played out over time and geographical space. Jean-Baptiste Sourou examines, for example, the relationships between the Roman Catholic Church and traditional African religions. Sylvia Tamale offers a provocative assessment of how outside religions and cultural forces have affected traditional African law and religion to the point of altering the sexuality of African peoples with potentially serious consequences. Christian Green pays particular attention to social hostilities towards religious minorities, an aspect of the complex relationship of religion, state and society warranting particularly careful attention. According to Green, although religious persecution has been aggravated in a number of African countries as a result of social hostilities, developing social media outlets and technology are providing the means by which such hostilities can be addressed and perhaps curtailed at the popular level.

Regional offerings in this volume include Daniel Mekonnen's analysis of the persecution of minorities in Eritrea who do not belong to the four officially-recognised religions: Sunni Islam; the Eritrean Orthodox Tewahdo Church; the Eritrean Catholic Church; or the Eritrean Evangelical Church. He offers a human rights challenge to the religion-state *status quo* in that country. A trio of Nigerian contributions include Is-haq Olanrewaju Oloyede's assessment of the historical evolution toward a present-day Nigeria 'with politics defined along religious lines and religion itself highly politicised'. The result is a Muslim-Christian division and a nation where personal insecurity is a constant in many regions. One possible contributing factor to Nigeria's religious complexity emerges from Enyinna Nwauche's discussion of the Nigerian police force's constitutional obligation to enforce Islamic penal codes in 12 Northern Nigerian states. Another Nigerian perspective, provided by Allswell Osini Muzan, sees the threat of a failed Nigerian state as potentially emanating from the religiously and ideologically fueled insurgencies of Northern Nigeria.

From another corner of the continent, Pieter Coertzen provides a constitutional assessment of religion and the state in his analysis of the South African Constitution's religious freedom protections and those

guaranteed by the proposed South African Charter of Religious Rights and Freedoms. Coertzen makes special note of the variety of intellectual and legal sources of modern South African protections of conscience, stemming from African traditional law and religion as well as Roman-Dutch law. Mark Hill concludes the symposium with a European perspective, 'examining various ways of defining dominant and minority religions and various paradigms of church-state relations', and drawing comparatively on English religious establishment models for their possible relevance to African conditions.

Taken together, the articles here combine to suggest that, in many countries, people have lived so long with the benefits of religion and religious freedom that they forget the importance of these values when other problems arise. The research represented in this issue of the *African Human Rights Law Journal* buttresses work elsewhere, demonstrating that excessive government intervention and restriction regarding religion, far from being a method of stabilising societies, is often counterproductive. The basic insights go back to John Locke and other early liberal thinkers, but these articles provide cumulative evidence drawn from the best of current social science, and should have profound policy implications.

2 Conclusion: Secularism, secularity and religious freedom

Recent comparative work has emphasised the contrast between two approaches to religion in modern secular states.¹⁰ One approach pursues secularism as an end in itself, with an ideological fervour akin to that sometimes found in religion. The other approach has been called 'secularity', even a 'healthy secularity'. Where the secular becomes an end in itself, religion is excluded or confined in the private sphere alone; whereas secularity provides a more flexible framework capable of accommodating the rich differences of religious diversity. The differences between these approaches are often merely matters of degree. They have their roots in differing social, political and colonial histories. French-style *laïcité* tends to be more inclined toward secularism as an end in itself. The secular regimes that we see in many parts of the former British Commonwealth in the common law world are often more accommodating. One of the challenges, as we move into the twenty-first century, is to determine which model will prevail in different systems, and in how much detail those systems

10 J Martínez-Torrón & WC Durham Jr 'Religion and the secular state/*La religion et l'Etat laïque*' in *La religion et l'Etat laïque/Religion and the secular state: Interim reports prepared for the XVIIIth International Congress of Comparative Law* (2010), <http://www.iclrs.org/content/blurb/files/General%20Report.pdf> (accessed 31 March 2014) (analysing national reports from 46 countries).

will be structured. What is the place of religion in general and specific religions, in particular in African societies?

Part of the reason why religious freedom is good for societies is that it helps to unlock the social capital associated with religion itself, which is why many people care about the relationship of law and religion. This relationship is also changing the way people think of social, political and economic development. It used to be that people thought of development primarily as a secular enterprise, but development without taking into account the spiritual dimension of human beings cannot really be optimal. All of these considerations have had a profound significance for the field of law and religion, and one of the results is that that which was a quiet backwater in academia in the 1970s, has moved to the forefront in many disciplines. Law and religion stand at the crossroads between law, political science, theology, sociology, and a wide array of other disciplines that are now being energised and that are feeling the dynamism of this discipline. This volume reveals that dynamism as it is becoming readily apparent across the African continent.

Although some of the concerns expressed in this issue rise from a view of a particular religion being dominant in, and therefore posing a risk to, this or that society, the reality is that, in the current world, no society lives in religious or ideological isolation. There are obviously prevailing or majority religions in many countries, but no country is totally homogeneous. The world we live in is highly pluralistic. Indeed, if one looks beyond national boundaries, there is no religion on earth that constitutes more than a third of the world's population. We are all minorities. With that in mind, it is vital for all of us to find ways to work and live together in peace. It is hoped that this issue of the *African Human Rights Law Journal* will be a useful stimulus for ongoing and productive thought about these questions.

3 Acknowledgments

This volume of the *African Human Rights Law Journal*, and the conference in Ghana that inspired it, will help inaugurate the 'African Consortium on Law and Religion Studies', and enable it to take its place on the international stage in 2014 with counterpart consortia in Latin America, Europe and other world regions. The Ghanaian conference in 2013 concluded with a commitment to move toward the official organisation of the African Consortium at its second convocation in May 2014 at the University of Stellenbosch, South Africa. In addition to the contributors to this symposium issue, many other persons and institutions deserve recognition for the production of this volume and for seeing the dream of the African Consortium come to fruition. These include the steering committee of the 2013 conference, Dean Kofi Quashigah and Professors Rosalind Hackett, Johan van der Vyver, Pieter Coertzen, Cole Durham and Magnus Killander.

Other participants who raised the stature and impact of the original conference include Samuel Kofi Date-bah, Justice of the Supreme Courts of The Gambia and Ghana; Naa John S Nabila, Professor and President of the Ghanaian National House of Chiefs; Ernest Aryeetey, Vice-Chancellor and Professor at the University of Ghana; and James R Rasband, Dean and Professor at the J Reuben Clark Law School of Brigham Young University in the United States. Others who assisted with the organisation of the 2013 conference included Peter Atupare, Lecturer in Law at the University of Ghana; Professor Briged Sakey of the Centre for Social Policy Studies at the University of Ghana; Professors Robert Smith and David Kirkham of the Brigham Young University Law School; and the husband and wife lawyer team, Mark and Barbara Taylor.

In addition to the University of Ghana's Faculty of Law, sponsors of the Consortium and the conference included the Unit for the Study of Law and Religion, Faculty of Theology, University of Stellenbosch, South Africa; the Centre for Human Rights, University of Pretoria, South Africa; and from the United States, the Center for the Study of Law and Religion at Emory University, United States, and the International Center for Law and Religion Studies at Brigham Young University's J Reuben Clark Law School.

In the final assessment of this current volume, particular recognition goes to its guest editor, Christian Green, Senior Fellow at the Center for the Study of Law and Religion and an editor at the *Journal of Law and Religion*. Professor Green worked tirelessly, prompting and prodding contributors to provide materials in a timely manner and then working and reworking each piece, with the assistance of Isabeau de Meyer of the Centre for Human Rights at the University of Pretoria, to bring it into compliance with the *African Human Rights Law Journal's* editorial requirements. She brought more to this work, however, than an eye for the craft of good writing. An expert on law and religion in her own right, Professor Green understands the complexities of the subject as only one wholly immersed in the field can. Much credit for what is good and right about these articles can be credited to her excellent work.