RELIGION AND THE LAW IN ZAMBIA

BY

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DEDICATION

TO MY PARENTS AND
MILDRED M. STEPHENSON
FOR THEIR GREAT LOVE
AND CARE

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I hope that this manuscript will serve as a guide to the meaning of Law and religion in Zambia.

INTRODUCTION

Centuries ago, Religion was seen to hold the key to questions of life. But due to the advent of scientific explanation of phenomenon the concept of the state has overshadowed religion, and since its main mechanism of instituting desired behaviour and ensuring social control and social order is Law, Law has since then become the most widely used mechanism of control. Religion, on the other hand, still commands the realm of Mystical life and serves as a check and balance on Law.

The object in this essay is, first, to give an explanation of the meaning of Law and Religion in Society, dwelling mainly on the juristic approach to Law and the Scientific meaning of Religion, and, second, to give an awareness of the conflict of Religion and the Law in Zambia, emphasizing mainly on how Religion has acted as a check and balance to Law on the Law of Abortion and the question of morality.

This work is arranged in three chapters. Chapter one and two gives a juristic and scientific meaning of Law and Religion respectively and chapter three deals with the conflict of Religion and the Law, ending with a conclusion.

CHAPTER ONE

The Meaning of Law

Law, has no distinct defination. The best that we can do is to look at the various approaches that are of importance to us in trying to understand Law.

Some legal philosophers, in particular, the natural-Law theorists, have emphasized the relation of Law to some system of moral and religious principles. Others, frequently labeled 'positivists', have considered the legal and the moral to constitute two quite separate realms. Contemporary experts on jurisprudence appear to be in some confusion or disagreement as to precisely what points are Central to 'legal positivism'.[1] But at any rate, one important offshoot or branch of this positivistic orientation is an approach that can be termed alternatively a formalistic, conceptualistic, or analytical theory of Law. Most noted of the formalistic Schemes is that developed by the British legal philosopher John Austin (1790-1859), which is usually termed 'analytical Jurisprudence'.[2]

Austin is perhaps best known for his definition of Law as the Command of a Sovereign. While this definition has been an influence doctrine, it has been noted that Austin, compared with other analysts who have used the terminology of Sovereighty, such as Hobbes and Bodin, was much less interested in dealing with the substance of power and social relations.

His jurisprudence was labeled analytical because of his more central concerns - the development of a formal,

logical closed system of legal rules. As Julius Stone put it, Austin's main purpose was "to suggest a framework for viewing Law as a logically self-consistent system; it was not to provide a theory of how power was or ought to be distributed in Society".[3] Austin was not concerned with the goodness or badness of legal rules, considering such matters extralegal questions. To Austin moral Law was not legally important. According to one contemporary political theorist, the essence of formalism, of which Austin's work seems a prime example, lies in "treating law as an isolated block of concepts that have no relevant characteristics or functions apart from their possible validity or invalidity within a hypothetical system."[4]

Unfortunately, as critics of Austin are quick to point out, the reality of a legal system can never be fully contained within such a closed logical structure. Invariably any such hypothetical structure of norms would inhibit the flexibility needed for legal adaptation to changing social conditions and for dealing with totally new situations. And it would fail to account for the human as well as the social factors that invariably intrude themselves into the workings of an actual legal order.

Another influential example of the formalistic approach is the so-called "pure theory of Law" developed by Hans Kelsen (1881 - 1973)[5]. Kelsen views the legal system as a hierarchy of norms, with legal acts and rules at any level traceable to norms at still higher levels, culminating in the "basic norm", the 'Grundnorm', which is the major premise of the entire system. The validity of Law is determined solely through this process of authorization by higher norms

and ultimately by the norm. Kelsen's use of the term "pure" is significant, because it indicates his desire to proclaim law as an independent, self-enclosed realm or discipline. To this end, insists, along with Austin, on an absolute separation between the law and moral considerations. His theory has as its aim to show the law as it is, without legitimizing it as just, or disqualifying it as unjust; it seeks the real, the positive law, not the right law... It refuses to evaluate the positive law".[6]

Similarly, this approach can be seen in Kelsen's assertion of "unity of state and law" when emphasizing the concept of sovereignty. He writes:

'The attempt to justify the state of law is vain, since every state is necessarily a legal state. Law, says positivism, is nothing but an order of human compulsion. As to the justice or morality of that order, positivism itself has nothing to say. The state is neither more nor less than the law..."[7]

Critics wonder just what the basic norm consists of, and how its validity is to be determined. As one commentator states, "Kelsen refuses to answer, dismissing the question as irrelevant because it raises considerations which he regards as metajuristic. In the final analysis he assumes the validity of the basic norm a prion."[8] Although the basic norm seems to be viewed as residing in a given state's constitution, or in the principles on which such constitution is based, beyond that, Kelsen is rather vague. Furthermore, the extreme positivism reflected in his equation of state action and law raises some disturbing questions. Kelsen writes: Any content whatsoever can be legal; there is no human behaviour which could not function as the content of a legal norm.

A norm becomes a legal norm only because it has been constituted in a particular fashion, born of a definite procedure and a definite rule. Law is valid only as positive law, that is, status (constituted) Law.[9]

The impact of these formalistic and positivistic outlooks on modern legal thinkers and students of the social aspects of law has been a mixed one. Modern legal analysts consider the formalist's search for a self-enclosed body of legal concepts an exercise in wishful thinking. If fails to recognize both the inevitable openness of a legal system and the system's need for flexibility to cope with changing social conditions and legal situations.

In sharp contrast to formalism are those theories that emphasize that a legal order cannot be understood apart from the cultural and historical context within which it occurs. An outstanding theorist of this persuasion was Friedrich Karl von Savigny (1779-1861), who is generally credited with being the founder of "Historical jurisprudence". According to Savigny, Law is an expression of the common consciousness or spirit of a people. ("Volksgeist"). He insisted that all law "is first developed by custom and popular faith, next by jurisprudence - everywhere, therefore, by internal, silently - operating powers, not by the arbitrary will of a law-giver".[10] In line with this view, Savigny stressed the danger that arbitrary legislation might be out of line with the under lying spirit of the people, and he opposed major proposals for the systematic codification of the German Law of his time. Reacting against both universalistic and formally abstract

theories of Law, he insisted on the importance of examining the peculiar relationship between the Law and the structure and value system of any given society. Savigny was, in other words, alert to what any sociologist would now assert - that a legal system is but part of a larger social order, the various elements of which are interdependent.

Critics of Savigny's approach have questioned his concept of the Volksgeist. Is there actually such a common or public consciousness and if so, how important a factor is it in shaping Law? Noting a minor difference in the principles of contract law as applied in Massachussetts and New York in the early 1900's, the American Jurist John Chipman Gray asked:

"Is the common consciousness of the people of Massachussetts different on this point from that of the people of New York? Do the people of Massachussetts feel the necessity of one thing as law and the people of New York feel the necessity of the precise opposite? In truth, not one in a hundred of the people of either state has the dimmest notion on the matter (whether a contract by letter is complete when acceptance is mailed or when acceptance is received.) If one of them has a notion, it is as likely as not to be contrary to the Law of his state."[11]

Other issues raised concerning this theory include the following: Does Law simply reflect a common consciousness, or does it at the same time help to shape such consciousness? How can we know just what the common consciousness is? Is there a danger that notion of Volksgeist will take on mystical notions of the historic mission of a nation or even racial group as seen in the use of similar terminology during the Nazi regime?

Not withstanding these caveats, however, Savigny's attempt to place law in historical perspective must be viewed as an important step in the development of broadly social conceptions of the legal system.

Yet another strain of legal theory that has had, and continues to have, considerable impact is utilirarianism. Jeremy Bentham (1748-1832) is probably the most important representative of this school. Bentham applied in the legal realm the general principles of the utilitarian approach - most notably the proposition that men act in such a fashion as to maximize pleasure and minimize pain, and the ethical rule that an assessment of the happiness produced by a human act should be the major criterion for approving or disapproving of it. His significant work. "An Introduction to the Principles of Morals and legislation opens with the following statement:

Nature has placed mankind under the govenance of two sovereign masters, pain and pleasure. It is for them alone to point out what we ought to do, as well as to determine what we shall do. On the one hand the standard of right and wrong, on the other the chain of causes and effects, are fastened to their throne.'[12]

Certainly, not all of Bentham's formulations are fully acceptable today. Many social scientists would question the application to human behaviour of any simplified pleasure-pain psychology, although the assumption that an individual does rationally assess consequences before acting continues to be a basic underlying much of our present criminal law.

Another important juridical thinker placing emphasis on the consequences of law was Rudolph Von Ihering (1818-1892), whose philosophy is sometimes termed 'Social Utilitarianism'. In his major work, translated under the title Law as a means to an end.[13] Ihering viewed law essentially as the means whereby organized purposes of society are achieved. Unlike Benthem, he concentrated more on social than on individual purposes. He viewed the law as a device for controlling individual purposes and bringing them into line with social goals. To Ihering, law as ax significant instrument for promoting social change. He emphasized its positive effects, writing for example that 'It is not the sense of right that has produced law, but it is law that has produced the sense of right."[14]

Ihering repudiated absolutist standards of good law arguing instead that a legal order should be assessed in terms of the conditions and aims existing in a particular society and at a particular time. Indeed this relativism even contained the hint "that justice was itself only a relation between human purposes for the time being and the means, legal or other, existing for their fulfilment."[15]

Another legal theory of great importance is sociological Jurisprudence. The Austrian Jurist Eugen Ehrlich (1862-1922) is sometimes called the founder of 'Sociological Jurisprudence," and indeed his major work is titled 'Fundamental Principles of the Sociology of Law.[16] Ehrlich is probably best known for his distinction between the 'positive law and the 'living law'. Here again, we find a concern for the central issue of the relation between law and more general social norms. According to Ehlrich, the positive law could only be effective if it was in line with the living law, or

'social law', grounded in the 'inner order of the associations'. As one noted interpreter of Ehrlich has suggested, this concept of the inner ordering of social groupings was quite similar to what anthropologists now mean by 'culture pattern', as a result, it would not be entirely inappropriate to consider Ehrlich's work a kind of 'anthropological Jurisprudence'.[17]

Ehrlich stated that 'the centre of gravity of legal development lies not in legislation, nor in juristic science, nor in judicial decision, but in society itself.'[18] In its relation more general social forces, law tended to be, in Ehrlich's view, a relatively depedent factor. It could not provide control where the broader social basis for control was absent, and no amount of official proclamation and enforcement could, by itself, make a rule 'law' in the truly social sense. Likewise, Ehrlich asserted that order in human society is grounded in the social acceptance of certain rules for living, not on sheer compulsion by the state. Such order 'is based upon the fact that, in general, legal duties are being performed, not upon the fact that failure to perform them gives rise to a cause of action.'[19] Such law-following, in turn, is attributable to the underlying social rules and regularities which the legal measures tend to reflect.

Ehrlich's work had the merit of directing the attention of legal analysts to the larger social world. It was here rather then in legal documents, doctrines, or even court-rooms that the forces governing legal phenomena would be found. Unfortunately, it is not always easy to know just which living law should be adopted as a guide to formal legal action. Within a modern, heterogeneous society, there

engage in large-scale research on the legal system, did not really "catch fire at the time. We are just now beginning to see its fruits.

Another lasting influence on modern thinking about law was provided by the so-called legal realists. Two of the most notable of the American realists were Karl Llewellyn (1893-1962) and Jerome Frank (1889-1959) Justice Oliver Wendell Holmer (1841-1935) may also be included under this designation, although the 'sociological jurists' such as Pound insisted that Holmes was really an early representative of their School.[23]

The realists' approach was grounded in a radical conception of the judicial process. They asserted, with varying degrees of emphasis, that judges make law rather than find it. The judge always has to choose. He has to decide which principle will prevail and which party will win. According to the realists, this decision, as to the outcome of the case or the policy that shall be advanced, often precedes the recourse to, and elaboration of, formal legal principle. Judicial prededent and legal doctrine can be found or developed to support almost any outcome. The real decision is made first - on the basis of the judge's conception of justness, determined partly by his pre dilections, personal background, and so forth - and then it is 'rationalized' in the written opinion.

Since the law is always human, it cannot be absolute. Hence the grounds for Holme's famous comment that the law 'is not a brooding omnipresence in the sky...'[24] Legal realists argue that not only that the legal functionary does in fact decide cases according to his sense of justice, but also that he must face up to the responsibility of

are diverse living laws relating to particular sociolegal issues, as well as to more general social goals that might be implemented through the legal system.

Sociological jurisprudence became a major force in American legal thought through the extensive writings of Roscue Pound (1870-1964).[20] Pound asserted that law had to be viewed as a social institution designed to satisfy 'social wants', and he considered it a task of jurisprudence to develop a scheme whereby the maximum satisfaction of socially worthwhile purposes might be accomplished. This theme is evident in his view of legal history as

> 'the record of a continually wider recognizing and satisfying of human wants or claims or desires through social control, a more embracing and more effective securing of social interests, a continually more complete and effective elimination of the goods of existence - in short, a continually more efficacious social engineering.[21]

At the heart of Pound's entire program for developing a sociological jurisprudence lay the call for a study of law as it actually is - the "law in action", which Pound distinguished from the law in the books. As a leading disciple of Pound has noted, this distinction is applicable across the entire realm of legal substance and procedure. It encompasses the question of whether the enacted law is in line with prevailing behaviour patterns (Ehrlich's living law), but extended to other possible discrepancies as well, for example, those between what courts say and what they actually do, and between the express aim of a statute and its actual effects.[22]

Unfortunately, many of Pound's most important proposals, such as creation of special interdisciplinary institutes to

deciding as best he can what legal rules and policies should be in force.

Justice Holmer's often quoted and widely reprinted essay 'The path of the Law'.[25] Set forth some of the basic prepositions of the realist outlook. Stating that "a legal duty so called is nothing but a prediction that if a man does or omits certain things he will be made to suffer in this or that way by judgment of a court.'[26] Holmes asserted that if we really want to know the law we must look at it 'as a badman' does, that is, as one who cares nothing for general moral pronouncements and abstract legal doctrones. What is important to the 'bad man' is what the Massachussetts or English courts are likely to do in fact. I am much of his mind. The prophecies of what the courts will do in fact, and nothing more pretentions, are what I mean by the law.'[27] Applying this reasoning to some specific areas of the law. Holmes argued, for example, that there is nothing mystical about the basic principles of the law of contracts'. 'The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it and nothing else."[28]

Karl Llewellyn, who placed strong emphasis on the relation between legal rulings and the general and changing social context within which they occur, developed a moderate version of the legal realistic theory. The emphasis in his work on 'the law-jobs', major functions of legal institutions, having both a 'pure survival' or 'bare bores' aspect for the society and a 'questioning' or 'betterment' value as well.[29] Contributed significantly to the development of a modern, functional approach to the legal system, with respect to the judicial process. Llewellyn called for attention to the actual behaviour of courts; he stressed the need to determine 'how far the paper rule is real, how far merely paper.'[30]

Recognizing that the judge is both human and usually a lawyer, Llewellyn noted the continuous interplay between value judgement and rule by precedent. It is the business of the courts, he wrote:... to use the precedents constantly to make the law a little between to correct old mistakes, to correct mistaken or ill-advised attempts at correction - but always within limits severely set ~~x~~ no only by the precedents, but equally by the traditions of right conduct in judicial office.[31]

A more radical version of legal realism was developed by Jerome Frank. Frank urged that increased attention be paid to the work of the trial courts, for only if one examined the roles of judge and jury at this lower court level could gain a comprehensive understanding of the judicial process. Frank concluded that one must add what he termed 'fact skepticism' to the 'rule sketicism' already propounded by Llewellyn and others. In addition, he pointed out that the combat of the trial makes it almost impossible for them to remain detached as he pointed out:

... the lawyer aims at winning the fight, not at aiding the court to discover the facts. He does not want the trial court to reach a sound educated guess, if it is likely to be contrary to his client's interests. Our present trial method is thus the equivalent of throwing pepper in the eyes of a Surgeon when he is performing an operation.[32]

Eventually, and under the prodding of critics, Frank and other legal realists came to admit that there was a good deal more to the process of judicial decision-making than subjective whim colored by personal - background characteristics.

From what has been discussed so far one can tell just how difficult it is to define law. There are so many approaches to law that have been advanced by legal theorists, such that one wonders which one is close to the actual meaning of law. Each approach has its own merits and demerits and none of them can claim dominance on the actual meaning of law. It is this that leaves us with the question whether we should look at law as explained by the natural law theorists, positivists, historical jurisprudence theorists, utilitarianists, sociological jurists or legal realists.

Law like religion can not exist without individuals and it is these individuals who form a state or society. Whether one uses the positivists approach or legal realists' approach he would end up looking at individuals and it is only when the individual is understood that one moves closer to understanding the true meaning of law. It is this, then, that brings us to the key of life the individual holds, this time in relation to Law.

In an individual's life law is just a small fraction of the many factors that influence him. Due to industrialisation and modernisation law has become a necessity for without it there would be total chaos. This individual, being part of a people, has to know how to live in harmony with these people. As he grows up he gets to learn what is expected of him and gets to know basically what actions are out of goodwill and what actions are out of badwill. These may differ from society to society but it does not take long for him to realise that he still holds his own power of will. He learns that even if there is the law with its threat of sanctions including religion with its threat of hell he can still do the undesirable for nobody can take away his power of will unless he wills.

Other factors do influence him too for instance, the economical, political, social and cultural situation. But no matter how much influence thse have on him he still holds his key of life which is the power of will and has the power to stand against those forces. If his decision to stand against those forces is out of badwill he would easily and definately come into conflict with society for he is a 'bad man'. But not everyone who comes into conflict with society is a 'bad man' for one may decide to stand against the prevailing economical, political, social and cultural situation out of goodwill but if the individuals in control are acting out of badwill conflict again arises. So society is made up of a chain of struggles between goodwill and badwill and both these characteristics can be seen in each individual. "Human nature exhibits the qualities friendship, love, co-operation, the appreciation of beauty, the hunger for righteousness. But is also reveals aggressiveness, greed, lust, irrationality."[33]

The key to understanding law is in understanding human nature. The real meaning of law lies deep within each individual and it is only when this is understood that all the other approaches to law, whether positivists, legal realist or natural law theorists, can have meaning for whatever external factors society creats those forces still face a stronger force that comes from the internal law in each individual.

FOOT NOTES

CHAPTER ONE The Meaning of Law

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8. John H. Hallowell, Main Currents in Modern Political Theory New York, Hlot, (1950) p. 349.

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14. Von Ihering as quoted by Stone. op.cit. p.301

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28. Ibid., p. 462.

29.(i) K.N. Llewellyn and E. Adamson Hoebel, The Cheyenne Way: Conflict and Case Law in Primitive Jurisprudence, Noman Okla, University of Oklahoma Press,(1941).Chapter XI.

(ii) See also K.N. Llewellyn, "The Normative, the Legal and the Law Jobs." Yale Law Journal, Vol. 49 (1940), pp. 1355-1400.

30. K.N. Llewellyn, "A Realistic Jurisprudence: The Next Step". Columbia Law Review, Vol.30 (1930), as quoted in Cohen and Cohen, eds. Readings in Jurisprudence and Legal Philosophy Englewood Cliffs, N.J. Prentice Hall, (1951) p.473.

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CHAPTER TWO

The Meaning of Religion

"In dealing with a subject so complex and concerned with such a broad range of data as religion, a topic approached for many different purposes, we must relinguish the idea that there is any one defination that is 'correct' and satisfactory for all."[1]

So Religion, like law, has no distinct defination. This problem of defination can be best examined by considering religion from several different points of view or under several distinct aspects.

There are basically three kinds of definations in the study of Religion.

One type expresses valuation; such definations describe what religion "really" or "basically" is in terms of what, in a given writer's judgement, it ought to be. Clearly such definitions are inappropriate for the tasks of Science.

Other definations are descriptive or substantive. They designate certain kinds of beliefs and practices as religion but do not evaluate them, on the one hand, nor, on the other hand, do they indicate their function or seek to discover whether other beliefs and practices perform similar functions. Thus in Edward D. Taylor's words, religion is "belief in spiritual beings". One can proceed from it to a classification of the kinds of spiritual beings and the kinds of practices and organizations that are found in

various societies. Such a defination naturally draws attention to the differences among religious as distinct historical entities. The emphasis is placed primarily on religious as cultural systems. Their doctorines, rites, sacred texts, typical group structures, and the like, are described, contrasted, and compared. This is what religious is, such definations say, and these particular patterns indicate what Buddhism, judaism, christianity or the religi n of the muslims are:

Substantive defin tions can be of great value particularly for those who are concerned with religions as historical and cultural facts rather than with religion as a panhuman development.[2] They are of g greater value in the study of stable societies, where distintive and coherent religious systems are likely to develop than they are in changing societies, for the latter, religion itself is also in the process of changing, which contimually complicates any attempts to define what it is, but equally suggests new efforts to study what it does.

Some may prefer to define religion in terms of value or in terms of essence, but for analytic purposes the need is for a defin tion that focuses on process. This is particularly true if the kinds of question one is interested in refer not only to religion as a cultural fact but to religion as a manifestation of character and as one aspect of society. It is widely believed that for many purposes, it is a mistake to separate the analysis of culture (the system of norms and usuages designating "right" behaviour to the members of a society) from the analysis of character (the organized system of tendencies of an individual); and it

is equally a mistake to separate these from the analysis of social systems (networks of interactive relationships).

It is paradoxical that in order to focus attention more closely on religion as concrete behaviour, a defination must be more abstract. To define religion for example, simply as "belief in God", a defination that can be interpreted as either valuative or substantive or both, is to give it a fairly sharp referent; but such a definition raises no question of the relationship between the efforts to maintain social order and religion as defined. The more abstract definition that we shall develop holds an implicit concern for the analysis of actual behaviour. It points to major questions of human action; and thus; in our judgement, is more fruitful for the study of a Science of human behaviour.

The person who seeks to define religion in function terms faces a number of difficulties. He must avoid a definition that is tied specifically to his own religious experience or to cultures similar to his own. He must recognise that the intense specialization of modern societies gives him a perspective on religion very different from that obtained in less highly differentiated societies, where the infusion of religious elements into all phases of life is more obvious.

Paul Tillich has said that religion is that which concerns us ultimately.[3] Robert Bellah has expressed the same idea;"... religion is a set of symbolic forms and acts which relate men to the ultimate condition of his existence."[4] Questions appear because they are felt. The death of a loved one wrenches our emotions; the failure to achieve what we yearn for saddens and bewilders usl the hostility between ourselves and those around us infuses our social contacts with tenstion and prevents the achievement of mutual

values. Religion may develop an intellectual system to interpret and deal with these questions, but they must be seen first of all not as a group of rationally conceived problems, but as expressions of an underlying emotional need.

Religion then can be defined as a system of beliefs and practices by means of which a group of people struggles with these ultimate problems of human life. It expresses their refusal to capitulate to death, to give up in the face of frustration, to allow hostility to tear apart their human associations. The quality of being religious seen from the individual point of view, implies two things:

1. a belief that evil, pain, bewilderment, and injustice are fundamental facts of existence, and
2. a set of practices and related sanctified beliefs that express a conviction that man can ultimately be saved from those facts.

Still in the functional approach to the defination of religion another problem comes in whose religion will serve as the basis for the description? Religion as practised by the average member of society, with his particular level of concerns and his particular talent for handling them, is different from the religion of specialists, virtuosi, and those who feel most acute the discrepancies between the actual human condition and human experience as they dare to envision it, in history or beyond. The degrees of consistency, intrinsity, capacity for mystical experience, and other aspects of religion are unequally distributed. We must make clear, therefore, in any context, whether we are referring to a formal system, or to the life of an intensely religious person, or to the beliefs and practices of the average member of society.

By their emphasis on tragedy and frustration the definations we have suggested may seem to leave out a vital aspect of many religious. Where, we might ask, are the joyful celebration, the aesthetic experience, the serenity, the positive affirmation, the ectasy, and the simple thanks giving for the goodness of life that are found in many religious systems? Our understanding would be incomplete if we did not recognise that religion is expressed in many efforts to maximize joy as well as in efforts to handle tragedy. Once they become a part of a religious system, the joyful and aesthetic become the focus of attention for some adherents. The cultivation of art and of elaborate forms of celebration, infact, under many conditions can turn into sources of tension, appearing to some as primary sources of religious expression, but to others as disconcerting or even competing practices that endanger the true faith.[5]

Even in the healthiest and wealthiest and most rational of societies, however, ar responses cannot eliminate the problems of suffering, evil, and hostility. Realizing the gap between their hopes and realisies of their existence, men everywhere seek to close it by a leap of faith that says: This need not, this will not, be true, sometime, someplace, somehow, suffering and evil will be defeated.

In this sense religion can be thought of as a kind of residual means of response and adjustment. It is an attempt to explain what cannot otherwise be explained.

Dunlop uses the concept of "residual" in his defination of religion which he describes as "the institution, or feature of culture, which undertakes, in the service of

mankind, those functions for which there is no other institution or for the undertaking of which no other institution is as yet adequately prepared."[6]

However, the word residual need not carry the connotation of "unimportant final item" or "gradually dissappearing". It might better be thought of as "that which always remains". Malinowski writes:
"To us the most essential point about magic and religious ritual is that it steps in only where knowledge fails. Supernaturally founded ceremonial grows out of life, but it never stultifies the practical efforts of man. In his ritual of magic or religion, man attempts to enact miracles, not because he ignores the limitations of his mental powers, but, on the contrary, because he is fully cognizant of them. To go one step further, the recognition of this seems to me indispensable if we want once and for ever to establish the truth that religion has its own subject-matter, its own legitimate field of development; that this must never encroach on the domain where science, reason, and experience ought to remain supreme."[7]

Malinowski implies, in contrast to Dunlap, that religion as a residual mode of adjustment is unlikely to disappear. This inclines me to the view that religion is a permanent aspect of human society, which is no more likely to disappear than the family, however, much it may change or government, despite the enormous range of variation. Religion is an organized effort to make virtual of our ultimate necessities." Religion thus makes easy and felicitous what in any case is necessary..."[8]

A primary difficulty with a functional defination is that there is no obvious point at which one may draw a line and say: "Here religion ends and nonreligion begins." In a religiously heterogeneous and changing society, the question of "private" systems of belief and practice arises. Are these to be called religions? Are they not attempts to fulfill the same functions that shared and historically identified faiths seek to perform?

Joachim Wach holds that all religions, despite their wide variations are characterized by three universal expressions: the theoretical, a system of belief; the practical, a system of worship; and the sociological, a system of social relationships. Until all of these are found, one may have religious tendencies, religious elements, but not a full religion.[9]

If we take the functional approach to the definition of religion, it is not the nature of the belief, but the nature of the believing that requires our study. Even a quick glace over the vast range of phenomena that we call religion reveals an enormous variety. The only justification for referring to such diversity of belief, of worship, and of organization by one term is the assumption that the many forms represent different attempts to deal with the same problem. In Paul Tillich's words: "We are all laboring under the yoke of religion; we all, sometimes, try to throw away old or new doctrines or dogmas, but after a little while we return, again enslaving ourselves and others in their servitude."[10]

Many "nonreligions" persons object to such a statement. They explicitly reject beliefs, forms of

worship, and group associations that they identify as religious, It is unwise to argue this point, for from the perspective of the defination they use they are correct in claiming to be nonreligious.

It is highly likely, however, that such individuals, having left some traditional religion, will nevertheless affirm their faith in some "over beliefs," will fget emotional support from various symbols, acts, and ceremonies (workship), and will join with others in groups that seek to sustain and realize these shared beliefs.

This point of view is seldom argued when it refers to some of the intense political movements of our time. Communism is now considered by many observers to have a religious quality.[11] Few deny the religious element in nationalism. In multireligious societies (in the traditional sense) or in societies where an established religion has lost much of its appeal, nationalism as a religious force is particularly likely to appear. Faith, symbols, worshipful acts, and organizations built around the nation all appear. This is not simply the nationalization of religion, but the religionization of nation. When this happens, the likely effect would be that religious persons end up considering nationalism as a religion and therefore refuse even to sing the national anthem or salute the national flag as was the case in Feliya Kachasu's case. ZAMBIA HIG

Religion is as much an instrument of social control as is Law, morality and customs in society. But religion too, like Law should not be overemphasized. It is just a small fraction of the many factors that influence an individual's life. This individual, being part of a people, has to know

how to live in harmony with these people, especially in a country like Zambia where there are a lot of religions and even within some religions like christianity there are a lot of denominations. Worse still, from the discussion on the meaning of religion one can see how difficult it is to define religion. This calls for more flexibility to avoid the individual running into conflict with anything that is not within his religious realm. The key to understanding religion, just like law, lies in human nature. The real meaning of religion lies deep within each individual and it is when this is understood that all other approaches to religion, whether valuation, descriptive, substantive or functional, can have meaning for whatever external factors society creats those forces still face a stronger force that comes from the internal law in each individual and this internal law is the power of will for even though there is threat of sanctions from law or religion he can still do the undesirable as explained at the end of chapter one.

FOOTNOTES

CHAPTER TWO The Meaning of Religion

1. Milton Yinger, J. The Scientific Study of T Religion, London. The Macmillan Company (1970) p.4.

2. For an useful substantive defination that defers primarily to individual religiousness, see J. Paul Williams." The Nature of Religion". Journal for the Scientific Study of Religion, 2,(1962) pp. 3-14.

3. Paul Tillich, Christianity and the Encounter of the World Religions, New York. Columbia University Press,(1963).

4. Robert Bellah, "Religious Evolution," American Sociological Review, 29, 1964, p.358.

5. Max Weber, The Sociology of Religion, Translated by Ephraim Fischoff, introduced by Talcolt Parsons, Boston, Mass, The Beacon Press, (1963) espt. pp.242-245.

6. Knight Dunlap, Religion: Its Function in Human Life, New Yrok, McGraw Hill Book Co., Inc. (1946) p.3.

7. Malinowski Brownislaw. The Foundations of faith and Morals, London, Oxford University Press, (1936). p.34.

8. William James, The Varieties of Religious Experience. New York. The Modern Library. Originally published by Longmans, Green & Co., (1902). p.51.

9. Joachim Wach, The Comparative Study of Religions, New York, Columbia University Press, 1958.

10. Paul Tillich, The Shaking of the Foundations, New York, Charles Scribner's Sons, (1948), p.98.

11. This view is expressed by Tillich, ibid, by Erich Fromm, Man for Himself, New York, Holt, Rinehart & Winston, Inc. (1941), and by Jacques Maritain, True Humanism, Trans. by M.R. Adamson, London: Geoffrey Bles: The Centenary Press (1938).

CHAPTER THREE

Religion and the Law in Conflict

From the attempts to define Law and religion it is clear that, using the functional approach, both aim to institute accepted behaviour in an individual and both serve as mechanisms of social control and social order. However, their approaches are completely different from each other. Nevertheless, they both show how important it is to define them in as a set of social facts which depend not on state authority but on social compulsion.

Furthermore, Law is obviously the most important instrument which the state uses to keep control of the behaviour of the people to discourage deviate behaviour but it is not the only mehcanism used by society to control behaviour. Apart from other technics like morality, custom and ethics, Religion is also one of the major mechanisms of social control. In fact, in some moslem countries like Iran religion is the Law.

But in a country like Zambia, where the two are separate, and though a distinction can be made between Religion and the Law in Zambia, they both seem to try to institute accepted behaviour in an individual. However, Law may have its sanctions but not everyone who does not steal or kill is afraid of sanctions of Law but could be because of the religion that person belongs to.

It is the similarity in their function as mechanisms of social control that makes the two exist

hand in hand even though conflicts arise sometimes. A review of some of the conflicts between Religion and the Law in Zambia show that religion has had a positive effect on Law in that it has acted as an instrument of secretion of moral rules and principles in Law. So, religion, in this case, has acted as an instrument of social change. Among these conclicts of Religion and the Law in Zambia are the Law of Abortion and the use of condoms and contraceptives. In order to show the nature of the conflict and the importance of religion to Law, a discussion of the Law of Abortion is necessary, including the controversy on the use of condoms and contraceptives.

The Law of Abortion is governed by the Termination of Pregnancy Act, 1972. Section 2 in the Act recognises the following reasons for ending a pregnancy.

(i) that the continuance of the pregnancy would involve risk to the life of the pregnant woman greater than if the pregnancy were terminated.

(ii) that the continuance of the pregnancy would involve risk of injury to the physical or mental health of the pregnant woman greater than if the pregnancy were terminated.

(iii) that the continuance of the pregnancy would involve risk of injury to the physical or mental health of any existing children of the pregnancy were terminated.

(iv) that there is a substantial risk that if the child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped.

The christian churches in Zambia have spoken strongly against this Act and good reasons for doubting its adequancy are given by them in a book, produced by the Zambia National Council of the Lay Apostolate, called 'A Guide to Abortion in Zambia'.[1] According to the National Council the Act did the following:

(a) introduced a special class of places where abortions might be performed and forbade them to be done anywhere else except in an emergency.

(b) created a class of qualified abortionists - registered doctors - and forbade all others to perform abortions for whatever reason.

(c) obliged the doctor responsible to notify the Ministry of Health.

(d) added the following new grounds for abortion to those previously recognised.

(i) A comparison of risks. The old common Law said that the woman's life or health had to be in danger. Now there is a comparison of the risk involved in terminating the pregnancy, which may be almost non-existent, with the risk of allowing it to continue, which need not be grave. The previous

(standard was clear but the new one is so vague that it almost cannot be verified.

(ii) Abortion for the sake of the woman's existing children. This is abortion on'social grounds'; for reasons that have nothing to do with the health of the woman or the child in the womb. They suppose that she and it are perfectly healthy and look at the effect the birth might have on other people, the unborn child's brothers and sisters These grounds therefore allow abortion to be used for family planning.

(iii) Abortion because of the abnormality of the unborn child.

(e) Made illegal all abortions not done by a doctor in a hospital, except in an emergency. The implication of this is that necessity can be used as an excuse by a person not a doctor who wants to carry out an abortion. Abortions done by unauthorised persons would be prosecuted under Section 221 of the Penal Code on child destruction.

(f) Made it more difficult, if not impossible, to convict doctors acting in bad faith, that is doing an abortion just for money or some other advantage not connected with the health of the woman or her children.

> The courts may still question the facts of the case to see whether they point to good or bad faith on the part of the doctor. But almost any facts can now be made to justify the doctor's opinion.

In summary, the arguement of the churches is that the protection given to the child in the womb before October, 1972, when the Act was enacted, has been abolished. The unborn child is only protected from being killed by unqualified abortionists but he is not protected from doctors "acting in good faith". In addition, they argue that the Act allows doctors to kill a child in the womb on the day before its birth for the reasons in Section 2 of the Act. But if, on the day after its birth, the doctors do the same thing for the same reasons, they may be charged with murder and put to death. What then is the difference between the two killings? In fact the reasons given for abortion always also justify the killing of infants. Further arguement is given that the purpose of the conditions laid down by the Act for Termination of Pregnancy are defeated by Sections 3 and 4 of the Act which allows a doctor who thinks he has an emergency to decide by himself to end the pregnancy and may do it outside a hospital. As there are so few doctors and specialists in Zambia, this means that the decision is often going to be left to one doctor, especially in the rural areas. The exception may become the rule.

One questions too if whether there is any pregnancy which cannot be ended under the Act. Since there is

always some danger to a woman's health in every childbirth doctors may judge this to be greater than the danger in abortion.

"The almost non-existent risk to the life of a healthy woman in an abortion properly performed early on in pregnancy is indeed likely to be less than the present very low, but not wholly negligible, risk in child birth"[2] Worsestill, since Zambia's Termination of Pregnancy Act has been copied from the British Abortion Act what has been said by an expert about the British Abortion Act can also be applied to Zambia.

"As a result of the Act it is not possible to question in Law the Act of any doctor who ends any pregnancy before the 28th weeek of gestation, providing he follows a laid-down procedure. Obtaining the agreement of another doctor, carrying out the abortion in a 'recognised' institution and notifying the operation to the Minister of Health. The grounds upon which a pregnancy may be legally terminated have been drawn so widely that it is lways possible to find a legal justification."[3]

The Zambia Act differs from the British Act in that it allows a pregnancy to be ended at any time before its natural term, instead of forbidding it after the twenty-eight week, and requires the agreement of three doctors, instead of two. But even if the number of doctors' consent has been increased the ' 'emergency exception defeats its purpose.

The Act was made mainly to control abortions but one wonders whether the best way to control abortions is to make them 'legal'. To control illegal abortions means to reduce the number of abortions done and if possible to stop them altogether if "controlling illegal abortions" meant making them legal without reducing their number, this was only a solution in words, leaving the reality unchanged.

In one sentence, what the churches are saying is that abortion is morally wrong.

"The reason given for saying "Right" or "Wrong" will depend on our humanistic or religious beliefs. Some will say that it depends on "what effect our actions have on us as persons", others "on whether they are approved or condemned by the Bible". But even religious rules about right and wrong are based on what helps a man to develop fully, what is "good for men as man".[4]

It is clear from this that religious principles are used as the basis for deciding whether the action taken, in abortion in this case, is right or wrong. Religion is being used to ensure accepted behaviour. It is a mechanism not only used for social control but used too as a check on law. It is there to try to correct some loopholes in Law which could be taken advantage of and abused defeating the function of Law which is to ensure social order and social control. In this sense, religion, has a positive function to Law. Religion, therefore, can be used as a check and balance on the function of Law.

It seems, too, that Religion has a wider interpretation of responsibility making it morally wrong for any person who assists in any way in an abortion. The Catholic Church, for example, teaches its members just this. "Those who give a doctor or surgeon help without which he could not perform an abortion, giving an anaesthetic or handing him the instruments in the actual operation, share in the responsibility for his action."[5]

But a distinction here should be made between Law and Religion in terms of responsibility. Religion can afford to make such wide interpretation because there is no physical sanction involved in case of breach of religious principles and where there is it is negligeable. The kind of sanctions it uses to ensure compliance are psychological and not in a form of physical pain. On the other hand, if Law is going to put someone in prison for some act it deems unlawful, it has to have a narrow interpretation of guilt or responsibility because its sanction causes direct physical pain. However, its narrowness should not be so overemphasized such that it now loses its function as a deterrent to deviate behaviour.

Another controversy or conflict that has occurred recently and is still going on Law and Religion search to find ways and means of avoiding the Aids crisis which is now rapidly increasing. On this issue, the christian churches stood up against Dr. Baker's controvertial book on 'Aids information for secondary schools, Second Edition',[6] a book produced by the Health Education Unit and sanctioned by the Ministry of Health. Basically, the

churches are against page 15 of Dr. Kaber's booklet which allows one to have sex outside marriage as long as the person sticks to only one sexual partner and encourages the use of a new condom and family planning foam for every sexual act as way of reducing the risk of spreading or catching HIV infection, and also other sexually transmitted diseases, and of pregancy. The Christian Churches have condemned this booklet in their own booklet called 'choose to live, Reflections on the Aids crisis'[7] which they have recommended for free distribution to secondary schools. They argue that giving condoms even to the unmarried is immoral because it condones promiscuity and results in more of the very conduct which today is necessary above all else to discourage. That even if condoms reduce the risk of contracting AIDS in single actions, when used on a large scale they are likely to increase the incidence of the disease, because the number of acts, by which it is spread will be greatly multiplied. What might be a safeguard in particular cases thus becomes a hazard to public health when adopted on a large scale. That advising condoms gives people a false sense of security and encourages them to continue conduct they might otherwise have abandoned. The result then is more AIDS, the very opposite of what is needed.

"In this respect we find the otherwise excellent booklet produced by the Health Education of the Ministry of Health for schools and others highly misleading."[8]

The Law may find no reason in stopping people from using condoms, contraceptives and having sex outside marriage as long as these reduce the risk of spreading aids and having unwanted pregnancies. Religious principles, on the other hand, see all the reason in stopping people from using condoms and contraceptives and having sex outside marriage. This, to religion, is morally wrong. A closer look at the above arguement shows that Law is more concerned with the content of social control and would rather allow a lesser evil even if it is morally unacceptable, to reduce the risk of a greater evil. Religion emphasises more on the "goodness" of the means and ways of social control. This was the same case with the Termination of Pregnancy Act, 1972 and just as the Act has ended up being used as a justification for abortion, allowing use of condoms and contraceptives will not lessen but encourage promiscuity and therefore defeat the purpose of allowing such use.

Here again religion has come into conflict with Law not as an obstacle to the function of Law but as a help. Law, especially if interpreted in a strict positive sense, may sanction acts which are morally unacceptable in the rush to maintain order and social control. It is in such cases that religion plays an even greater role by injecting moral principles in legal systems.

Conclusion

Religious principles, mainly in the form of moral rules are being constantly secreted into the

intestines of legal systems. Hence to this extent Law in Zambia, is inseparable from Religion. Some important aspects of an individual's behaviour are regulated by one's moral conscience which, in the case of a religious person, would be based on religious principles. So, many aspects of an individual's life are regulated by morality not by Law. To this extent morality fills the gap left by Law and since morality and religion are the same things on different sides of a Coin religion plays an important moral role in social control and behaviour of individuals. Law cannot go to every detail of an individual's behaviour. Therefore, religion, being inseparable from morality helps shape Law into good moral Law.

The attempts to define Law and religion have also widened our awareness of how important it is to define Law and religion in terms of their function because it is here that the two either conflict or help each other. They may have different approaches and reasoning on the best way to institute acceptable behaviour but there is, at least, one common thing in them. They are both mechanisms of social control.

FOOT NOTES

CHAPTER THREE Religion and the Law in Conflict

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