POST-COLONIAL ITERATIONS OF LAW AND RELIGION IN THE GLOBAL SOUTH
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"THE DOMINION OF RIGHTS, THE RESISTANCE OF DUTIES"

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I want to begin by thanking the Journal of Law and Religion for selecting this topic as the theme of the 12th annual Donald C. Clark, Jr. Law and Religion Lecture and for inviting me to share some of my thoughts on it. I must admit that when I was invited to deliver remarks alongside the esteemed Ngũgĩ wa Thiong'o, I insisted that the Journal seek out someone more worthy of sharing the stage with him. That sentiment has not changed for me despite my presence here. As someone whose formative years were spent in Kenya and Malawi, Professor wa Thiongo's writings have not only been familiar to me but have inspired for a very long time. As you will see in my remarks today, his intellectual contributions find echoes throughout my own ideas on the present topic.

In thinking about "Post-Colonial Iterations of Law and Religion in the Global South" there are numerous avenues of inquiry one might pursue. The impact of colonial domination on traditional religious and legal institutions had devastating consequences for patterns of life, social order and communal ties. The very structure of society—how it adjudicated disputes, what role it imagined for the sacred and what values it chose to emphasize—faced upheaval in the face of foreign rule. This is not to say that the story was necessarily black and white. In recent years, research on law in the colonial period suggests native populations creatively exercised a fair amount of agency despite foreign hegemony. In the places where Islamic law operated, the contexts I am most familiar with, jurists and judges managed to adhere to religious/legal prescriptions despite pressures to modify tradition to suit the management needs of colonial administrators.

But what has proved to be monumental for law and religion in the Global South, after the colonial experience, is, in my view,

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something far more consequential. A profound paradigm shift occurred, with implications for both law and religion; this shift became the path by which a perpetual subjugated state persists for many former colonies. What I am speaking of is the introduction of a "rights" framework into the realm of law in the Global South. For many colonial contexts, law was acutely informed by religion, and so the specter of rights also came to permeate the discourse on religion. In both instances, what the "rights paradigm" displaced was a framework premised on the idea of duty, where moral and legal obligation structured guidance on the expected and accepted behavior in society. In the post-colonial context, rights became ubiquitous with law and the core framework for understanding relationships in the community became the determination of what each individual was *entitled* to. Although Western ideas in colonized societies also departed from traditional priorities by elevating the individual to a station above community, it was instituting the dominion of rights in the colonies that transformed how the Global South *thought* about law, and inevitably religion.

This is not to say that the idea of "rights" was unfamiliar to colonized societies before the arrival of Western powers, but instead that it was duty that shaped their worldview and determined the behavioral choices they might make. Instead of a concern with what one was entitled to receive, a duty-based paradigm begins with a consideration of what it is that one *owes*. Law, then, in the pre-colonial period was premised on the idea of legal *responsibility* not legal rights.

Approaching the law from the perspective of responsibility or duty, as opposed to rights, fundamentally alters how legal problems are addressed. As Robert Cover notes, words like duty, obligation, and rights each derive their force from certain fundamental narratives or "stories" that underlie those concepts.[1] These narratives establish a vantage point from which legal problems are assessed. The story of a rights-based regime, Cover notes, is typically that of "social contract," where individuals concede a "portion of their autonomy for a measure of collective security." Duty-based regimes tell their own stories, often centering on "the assignment of responsibility."[2] It might be that these two regimes arrive at the same conclusion, but they do so from entirely distinct directions; the underlying rationales they offer for the legal solutions they propose are decidedly different. A duty-based

[1] Robert Cover, *Obligation: A Jewish Jurisprudence of the Social Order*, 5 J. L. & REL. 65, 65 (1987).
[2] *Id.*, at 66.

regime will begin with an inquiry into where the "burdens" lie for the performance of certain acts; a rights-based regime commences with the determination of who is entitled to perform those acts. Cover illustrates this with a useful example of women's participation in public prayer under Jewish law, also an obligation-based legal regime. He notes that it is misplaced to argue that women should have the "right" to be "counted in the prayer quorum, to lead prayers or be called to the Torah" because this misaligns with a duty-based approach. Instead, if one seeks to pursue goals around women's participation in public prayer, the argument must center on why the law "ought to impose on women" the obligations associated with public prayer.[3]

In the context of Islamic law, where religion and law converge, duty structures the entire legal enterprise and is central to both individual and communal life. As a result, two distinct types of duties exist: *fard 'ayn* (individual) and *fard kifaya* (collective). The former is what we conventionally understand when we think of duty: certain acts are obligatory for an individual to perform and failure to fulfill this responsibility leaves the individual liable. Collective duties present another dimension to the duty-based regime. Here, the idea is that responsibility for the performance of certain acts is held by everyone, but the responsibility can be satisfied as long as a sufficient number of people perform. In other words, the responsibility is shared and need only be satisfied by the collective as opposed to every individual. If enough people perform, the burden is lifted from everyone else. However, if no one steps forward to perform then everyone is held accountable. Collective action satisfies the obligation; collective inaction has consequences for everyone.

Let me provide an even starker illustration of how duty and obligation traditionally worked for significant portions of the Global South, specifically those falling within the Islamic ethos, before the rupture of colonialism. Like other legal systems, Islamic law articulated guidelines with regard to the conduct and initiation of warfare. The ability to gather armed forces and engage in hostilities was an authority exclusively reserved for the state and part of the duty of protection it owed to the inhabitants of its territory. This authority is the very backbone of the state's coercive power. Yet, an individual's ability to respond to the state's call for fighters was subject to another set of obligations: the duty to his parents. In general, no individual was able to exercise his right to join a military

[3] *Id.*, at 67.

campaign without first securing permission from their parents. The reason was explained by one medieval Muslim jurist when responding to a questioner who wished to join fighting on the Byzantine frontier despite his father forbidding it. He noted that "other fighters could be found" to battle on the frontier, but only the questioner could fulfill the responsibilities owed to his parents. Jurists extended this responsibility to one's guardians and even grandparents. Furthermore, if both parents were alive, even if one parent gave permission, it could not overcome the refusal of the other parent.

My point in presenting this example is to demonstrate just how powerful the specter of duty was in the Global South prior to colonialism. Duty not only structured how the state engaged its citizenry but how individuals engaged each other and set the limits for the state's ability to carry out its objectives. My contention is that in the post-colonial space, and the dominion it has given to rights in crafting the Global South's understanding of law, a dramatic altering of worldview has occurred. Were this alteration comprehensive then we might bemoan or be nostalgic for how society once was and come to terms with the new reality of rights. However, duties continue to mount a resistance. This is not simply because the vestiges of traditional society structured on obligation have proven resilient in the face of Western cultural hegemony and colonial efforts at restructuring native societies. It is also because religion in the Global South, despite itself being impacted by the rights discourse, continues to remain, at its core, a prescriptive endeavor that instructs people on what they are required to do. Law may have divorced itself from obligation, but religion has not. And because law and religion remain so intimately tied in the Global South, particularly in Islamic law jurisdictions, it is through religion that duties continue to resist the dominion of rights in law.

So, what does it mean when law and the society where it operates, both traditionally structured on duties, have a rights-based paradigm imposed on them? I want to point to two broad consequences. The first is evident from my prior remarks. The post-colonial Global South is now occupied by contending paradigms of rights and duties. This situation has led to a type of split personality, where legal argumentation often involves strained attempts at articulating traditional duty-based rules in the vocabulary of rights. The logic remains duty-based but the structures for legal expression are foreign and reliant on the rights paradigm. In other words, the introduction of a rights-based framework has altered the language that law uses to express its guidelines. The impact of this new

language is felt beyond any particular legal rule. As Ngũgĩ wa Thiong'o states in his acclaimed book, *Decolonising the Mind,* "the choice of language and the use to which language is put is central to a people's definition of themselves in relation to their natural and social environment, indeed in relation to the entire universe."[4] The language of rights then disrupts the universe of the Global South, fostering conflict between it and the contending language of obligation that has traditionally defined this universe. The Ghanaian philosopher Kwasi Wiredu, who passed earlier this year, has also noted, that language is infused with categories of thought and formulations that might "make sense in the foreign language" but could be quite "radically incoherent" in languages of the Global South.[5]

A second consequence of imposing a rights-based paradigm in the Global South is the development of the idea of universal rights. The inability to recognize the existence of other frameworks, namely those premised on duties, has allowed an assumption on the universality of rights to prevail. By way of background, there is broad agreement that human rights norms represent shared expressions of entitlements that are *universally* owed to every person, regardless of their physical location. Accompanying this position is a long-standing debate as to whether "genuine universality" is even possible considering the range of global perspectives on the topic of rights. What is often neglected though is the possibility that *multiple* conceptions of the universal exist. International law, built on a Eurocentric foundation, is widely considered the presumptive and exclusive representation of humanity's collective will. All other legal frameworks are marginalized; they are considered relevant only in specific localities. The prospect of other universal regimes, other than a rights-based international law, that address humanity broadly is essentially absent. Despite this, globally, many people continue to rely on alternative, transnational legal frameworks to evaluate the expectations they have of each other and of the societies they live in.

The idea of alternative universals complicates the standard picture of universality that is premised on an assumption, held by universalists and cultural relativists alike, that international law, and its associated rights-based paradigm, is the *exclusive* expression

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[4] NGUGI WA THIONG'O, DECOLONISING THE MIND: THE POLITICS OF LANGUAGE IN AFRICAN LITERATURE 4 (1987)

[5] KWASI WIREDU, CULTURAL UNIVERSALS AND PARTICULARS: AN AFRICAN PERSPECTIVE (1996), 3.

of the universal. Exclusive universality perceives widespread criticism from elsewhere, particularly the Global South, as the product of disconnected domestic contexts that have similar grievances arising out of a shared prior experience with colonialism. While in part true, this perception fails to adequately account for the strength of transnational ties that bind disparate locals in far greater ways than a vague notion of the "international community." Consequently, there is an inability to imagine the possibility of competing conceptions of the universal emerging out of other unions, which results in missed opportunities for mutual pursuit of shared values arrived at from different directions.

Islamic law provides a helpful illustration of the dynamic described. For most practitioners and scholars of international law, legal regimes such as Islamic law are akin to domestic law. They perceive the primary obstacle to conformity with international law to be the extent to which local sensibilities (in this case Islamic ones) can (or should) be accommodated by international law's universalism. On the other hand, populations committed to Islamic law view the relationship with international law in markedly different terms. Their resistance to international law's universalism is not simply a result of conflicting cultural values. The opposition stems from their recognition of Islamic law as a coextensive universal, that functions as a transnational law in its own right. While Islamic law manifests in a myriad of ways, reflecting the diversity of global Muslim populations, it is largely derived from the same core sources across disparate jurisdictions. Furthermore, even though Islamic law is articulated primarily as prescriptive for Muslims, its principles and guidance are considered aspirational for humanity as a whole. As such, international law's "conflict" with Islamic law is not entirely due to a dissonance with provincial "values," but a more enveloping tension with an alternative universal framework of norms.

The inability to imagine alternative universals is an extension of the dominion of rights. Universal norms are seen as arising out of an exclusive framework that is modern, secular, Western and premised exclusively on rights. In the post-colonial space, where the Global South has adapted its legal systems to align with dominant frameworks in Western countries, there is still resistance to the all-consuming dominion of the discourse on rights. Religion, despite mutations in its institutions, hierarchies and authorities, continues to present an alternative landscape within which human values and questions of morality are debated. This is a landscape of duties and obligations, one that, beyond religion, represents the traditional

approach to questions of life and society in the Global South. It continues to challenge and resist the foreign hegemony that once ordered the subjugation of territory and now demands the subjugation of ideas. Language, its categories of thought and associated concepts, is the terrain of contestation because it frames our understanding of law. In the post-colonial era, it is imperative then for the Global South to reclaim its language, especially that of duties, as an act of resistance.