1 SQUARING THE CIRCLE: FREEDOM OF RELIGION AND SECULARISM IN THE NIGERIAN CONSTITUTION

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INTRODUCTION

Nigeria prides itself on being a liberal democracy and a well-ordered society² on account of its adoption of a written constitution with all the standard terms of a liberal constitution, such as a supremacy clause,³ guaranteed fundamental rights,⁴ independence of the judiciary with power of judicial review⁵ and a representative assembly elected by adult suffrage.⁶ Nigerian constitutions, starting from the 1960 Constitution to the current 1999 Constitution, have proclaimed citizenship and its bundle of rights.⁷ These rights are fashioned after international human rights instruments. Section 38 of the 1999 Constitution of the Federal Republic of Nigeria guarantees every Nigerian citizen the right to freedom of thought, conscience and religion in these words: “Every person shall be entitled to freedom of thought, conscience and religion, including the freedom to change his religion or belief, and freedom (either alone or in community with others, and in public or in private) to manifest or propagate his religion or belief, in worship, teaching, practice and observance.”⁸

This guarantee is complemented by Section 10 of the 1999 Constitution, to the effect that the “government of the Federation or of a State shall not adopt any religion as State Religion”.⁹ Recent developments, however, show that the Nigerian jurisprudence has not properly addressed the implications of Nigeria’s differing political and social contexts in the understanding and application of Sections 38 and 10 of the Nigerian Constitution. In the same vein, Nigerian policy makers have not acknowledged the implications of an entrenched right to freedom of religion and the guarantee of secularity of the state in formulating and managing public policy.

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2 John Rawls’s concept of justice in a plural society, “political liberalism”, is only possible in a “well-ordered society”, which he argues include every society where citizens are treated as free and equal. See Rawls J. 1999. *Political Liberalism*. New York: Columbia University Press, xlii.

3 Constitution of the Federal Republic of Nigeria, 1999, secs 1(1) and (3).

4 Constitution of the Federal Republic of Nigeria, 1999, ch 4.

5 Constitution of the Federal Republic of Nigeria, 1999, sec 6(6)(b).

6 Constitution of the Federal Republic of Nigeria, 1999, secs 5 and 66.

7 For more on the history of constitutional development in Nigeria, see Ezera K. 1964. *Constitutional Development in Nigeria*. Second Edition. Cambridge: Cambridge University Press; Osaghae EE. 1998. *Nigeria Since Independence*. Bloomington: Indiana University Press.

8 Constitution of the Federal Republic of Nigeria, 1999, sec 38(1).

9 Constitution of the Federal Republic of Nigeria, 1999, sec 10.

In this chapter, I argue that even as Nigerian leaders believe that the unity and stability of the state requires the recognition of the right of every Nigerian to freedom of religion, they do not fully understand the conflicts that a regime of freedom of religion can generate in the context where the state, through its legal framework, commits itself to promoting religious practices. That is, they fail to understand the tension inherent in proclaiming the secularity of the state as provided in Section 10 and the free exercise of religion as proclaimed by Section 38 of the Nigerian Constitution. These officials overlook the inherent conceptual conflict in a constitutional regime comprising anti-establishment and free exercise clauses. Although these conflicts are conceptually resolvable, the resolution requires a much more sophisticated analysis than Nigerian jurists and scholars have undertaken.

I further argue that the inherent conflict or tension in the application of the secularism and the free exercise clauses is accentuated by the provisions in the Nigerian Constitution which confuse the values underlying the relationship of the state and religion in Nigeria. The main argument is that the constitutional representation of state and religion relation in Nigeria is problematic, because it underserves the core values and principles which a regime of freedom of religion and its complementary disestablishment clause promote. In this way, this constitutional representation of the state and religion relationship in Nigeria damages the prospects of unity in diversity, which is the strategic goal of Nigeria's inclusion of a Bill of Rights in its constitution. In this light, the major challenge to the freedom of religion in Nigeria is how judicial officers and policy makers understand the idea of "freedom of religion" in the constitutional history of Nigeria, especially in reconciling the guarantees of freedom of religion and the concept of a secular or neutral state articulated in the Nigerian Constitution. Reconciling these two concepts in the context of Nigerian political and constitutional history will be the equivalent of "squaring the circle".

HISTORY OF FREEDOM OF RELIGION IN NIGERIAN JURISPRUDENCE

The first time a Bill of Rights featured in a Nigerian constitution was in the 1960 Constitution,¹⁰ under the heading of "Fundamental Human Rights". The history of fundamental human rights in the Nigerian Constitution is conterminous with the political history of Nigeria. Nigeria was one of the earliest African countries to adopt a bill of rights.¹¹ On the eve of independence in 1960, the various ethnic nationalities wielded together by British colonial rule as "Nigeria" were concerned

10 What a "bill of rights" is, can sometimes seem vague. But what is clear is that a bill of rights performs three important functions: (1) it sets out the rights that a class or group has by law; (2) it limits power to the extent of those rights; and (3) it provides for how those rights may be derogated or not. See Alston P. 2000. "A framework for the comparative analysis of bills of rights", in Alston P (ed). *Promoting Human Rights Through Bills of Rights: Comparative Perspectives*. Oxford: Clarendon Press.

11 See Fambad CM. 2011. "African Bill of Rights in A Comparative Perspective", *Fundamina* 17(1):33-64.

1. Squaring the circle: Freedom of religion and secularism

about the stability of the new nation-state in an era of self-determination. The minority ethnic nationalities trapped between the majority ethnic groups in the north and south of the new Nigerian state feared that they would be marginalised post-independence. To allay the fears of the minorities, the outgoing colonialists set up the Willink Commission to inquire into the fears of the minorities and to recommend constitutional framework that would guarantee justice to the minorities and ensure stability of the new Nigerian state. This committee came up with two critical recommendations. First, they recommended the inclusion of a Bill of Rights in the Nigerian Independence Constitution to guarantee that democratic politics would not result in the violation of the rights of the minorities. Second, they recommended a constitutional guarantee of minority representation in the legislature in order to secure trust in the emerging post-independence politics.¹²

The 1960 Constitution included the Willink Commission's recommendations. The Bill of Rights in that constitution included the freedom of religion as one of the fundamental human rights.¹³ The inclusion of a full guarantee of freedom of religion in the 1960 Independence Constitution expresses the determination of Nigerian founding leaders to resolve the religious crisis at the root of the new Nigeria's federation. This religious crisis was how to manage the turbulent religious ideas and identities clashing around the concept of the emergent Nigerian state. Identity politics had taken root before and during colonial rule.¹⁴ Even the nationalists who fought for independence played identity politics, mostly in the form of ethnic and religious identity.¹⁵

The 1959 Constitutional Conference: negotiating Nigerian religious freedom

At the pre-independence constitutional conference in London in 1959, leaders of the many ethnic, political and religious groups tangled over the constitutional character of the emerging republic. One issue that generated so much controversy was the status of *sharia* as the religious law of the Muslims in the country. Before then, the colonial authority had institutionalised a regime of legal pluralism. Legislation applicable in Britain since 1900 coexisted with native laws and customs

12 Colonial Office of Nigeria. 1958. *The Willink Commission Report: Conclusions and Recommendations* (Report of the Commission Appointed to Enquire into the Fears of the Minorities and the Means of Allaying Them). London: Her Majesty's Stationery Office, July, 98-104.

13 Constitution of the Federation of Nigeria, 1960, sec 23.

14 For extended discussion of identity politics in the context of the philosophical tenets of liberal political economy, see Fukuyama F. 2018. *Identity: The Demand for Dignity and the Politics of Resentment*. New York: Farrar, Straus and Giroux.

15 For a scholarly discussion of religion in Nigerian politics, especially northern Nigeria, see Kukah MH. 1993. *Religion, Politics and Power in Northern Nigeria*. Ibadan: Spectrum Books Ltd; and Nnoli O. 1978. *Ethnic Politics in Nigeria*. Nigeria: Fourth Dimension Publishing Company, for role of ethnicity in Nigerian politics.

and decisions of common law judges in England.¹⁶ Of course, religious norms and prescriptions constituted part of native law and customs. As Akintunde Obilade, a legal scholar, observes, “In the northern states, the principal law in the courts was Moslem law of the Maliki School the main sources of which were, and are still in writing. The territories now constituting southern States and in some part of the territories which now form the northern States the law in force was unwritten customary law.”¹⁷

Management of sharia in Nigerian constitutionalism

Colonial legal pluralism treated the “written” *sharia* and the “unwritten” customs and native laws of southern Nigeria and some parts of northern Nigeria as customary law. The management of *sharia* and customary and native law took two forms, one form preceding the other as Nigeria entered different stages in its political and constitutional history. The first management form is what I call *unrestricted authority*. This is the model of management of *sharia* before colonial rule took roots. In this period, Islamic law was entrenched in some parts of what was to become Nigeria. Acquisition and disposal of property by Muslims and marriage rites and adoption and other forms of domestic relations were all regulated by principles of *sharia*.¹⁸ These principles also regulated local administration. *Sharia* also determined civil and criminal proceedings in the areas of conquest by the imperial Islamic power. The justification for the ubiquity of Islamic law was the belief amongst clerics that administration of justice was to be integrated with religious belief. The moral agnosticism and epistemic abstinence that characterise liberal administration of justice did not exist in the precolonial period. In *sharia* justice, Islamic morality is the same as law’s morality. Rightly considered, *sharia* was the ground norm, the constitutional order, that legitimated other legal regimes, including customs of the indigenous people overrun by the Islamists. It determined the issues of basic justice, and native law and customs were fitted into its basic framework. So, in this period, implementation of *sharia* was unrestricted.

The second form of management of *sharia* and customary law is what I call *subordination*. This form began with the annexation of southern and northern protectorates in 1914 and continued until independence in 1960. Subordination means that *sharia* as Islamic law, like other customary law, was subordinated to statutes of general application in England and common law principles of equity, natural justice and good conscience derived from English cases. Subordination

16 For detailed discussion of history of Nigerian legal system, see Elias TO. 1963. *The Nigerian Legal System*. Second Edition. London: Routledge and Kegan Paul.

17 Obilade A. 1979. *The Nigerian Legal System*. Ibadan: Spectrum Law Publishing, 17.

18 Ostien P and Dekker A. 2010. “Sharia and National Law”, in Otto JM (ed). *Sharia Incorporated: A Comparative Overview of the Legal Systems of Twelve Muslim Countries in Past and Present*. Leiden: Leiden University Press (cited in Garba AS. 2016. “Nigeria’s Religion-State Relation and Its Legal Implications for Freedom of Religion”, in Coertzen P, Green MC and Hansen L (eds). *Religious Freedom and Religious Pluralism in Africa: Prospects and Limitations*. Stellenbosch: AFRICAN SUN MeDIA, 164).

1. Squaring the circle: Freedom of religion and secularism

required the modification of the status and operations of *sharia*. The British had to apply English law to some aspects of public transactions, but they allowed customary law to continue to determine the private transactions of natives across northern Nigeria. Thus, began the privatisation of *sharia* which would attain intensify after independence. *Sharia* lost its status as a public law and gradually receded to the status of private law. The displacement of *sharia* as a public law and its restriction to private law formed the context of the postcolonial state and religion relationship in Nigeria. The pre-independence consensus on the role of religion in Nigerian politics is best captured by the settlement on the vexed *sharia* question.

The 1959 settlement and the privatisation of sharia

The conferees at the 1959 Constitutional Conference agreed that *sharia* should remain the personal law of the Moslems in northern Nigeria. But *sharia* would not become a public law in the sense of operating in the realm of criminal law. The most insignificant component of the new legal order established by the 1960 Constitution was the exclusion of the applicability of customary criminal law. This was an attempt to separate the public from the private sphere in the relationship between religion and law in Nigeria. The 1960 Constitution incorporated the wordings of the resolution of the 1959 Constitutional Conference in the following terms: "No person shall be tried for criminal offence except for an offence which is codified under a written law."¹⁹ This provision has remained in every constitution since 1960. It is included in the Bill of Rights as one of the guarantees to protect minorities against the hazards of majoritarian politics.²⁰ But its greatest implication is setting a boundary between private and public realms. By this norm, *sharia*, like any other customary law, is restricted to the private realm.

Privatisation of sharia and limitation of Sharia Courts

The restriction of the applicability of *sharia* to civil proceedings was further complemented by the limitation of the jurisdiction of the Sharia Court of Appeal to civil matters. The "privatisation" of *sharia* in Nigeria was not an easy

19 "Unwritten" here means not enacted by a political authority. According to Nwabueze, it means "an Act of the national assembly or law made by a state house of assembly, or any subsidiary legislation under the provisions of such act or law" (Nwabueze B. 1982. *The Presidential Constitution of Nigeria*, London: C. Hurst & Co, 432). This provision has remained in all Nigeria's constitutions, including the extant 1999 Constitution (Section 36(12)). In one of the leading cases of that era, the rule was laid down that customary criminal law had been abolished in Nigeria, the implication being that Islamic offences can no longer be applied except as they have been incorporated into the Penal Code in the north. See *Aoke v Fagbemi* (1961) 1All N.L.R 400.

20 Section 36(12) states thus: "Subject as otherwise provided in this Constitution, a person shall not be convicted of a criminal offence unless that offence is defined and the penalty therefore is prescribed in a written law; and in this subsection, a written law refers to an Act of the National Assembly or a Law of a State, any subsidiary legislation or instrument under the provision of a law."

accomplishment. It came through several forms of legal review. Under military regimes, several commissions were set up to review the status of *sharia* law and the various courts established to apply Islamic laws.

Why would rejecting to create the Federal Sharia Court of Appeal be a denial of the right to freedom of religion? The reasoning here is interesting and illustrative of the contentious character of the freedom of religion in Nigeria. Both the pro- and anti-*sharia* arguments were premised on both the right to freedom of religion and conscience and the concept of federalism. Alhaji Yusufu Ban, a Muslim delegate to the 1959 Constitutional Conference, succinctly articulated the pro-*sharia* argument. First, he claimed that *sharia* was an integral part of a Muslim's life. According to Ban, unlike other religions, "Islam is a way of life. If you take away Sharia from a Moslem, you are taking his religion away".²¹ He also argued that refusing to entrench *sharia* would amount to effectively denying a Moslem the enjoyment of the right to religion guaranteed under the Constitution. Ban's argument, thus, was that *sharia* derives from the Holy Quran, the divine word of God. Since *sharia* is a divine component of the Holy Quran, its observance is integral to a true and complete experience of the Islamic religion. In a sense, the claim is that a holistic observance of *sharia* is constitutive of the experience of worshipping Allah according to the Quran. Ban thus argued that a true practice of federalism would grant Muslims in Nigeria the right to a full complement of the *sharia*. So, the case for *sharia* is twofold: (1) it is constitutive of the freedom of religion for a Muslim; and (2) it is also constitutive of true federalism.

The opponents of *sharia* made contrary claims, which were also based on the freedom of religion. Samuel Mbakwe, a Christian delegate from the South, drew a different inference from the right to freedom of religion. For him, freedom of religion means that,

You can go on and worship your God and pray to him in any way you like. There is nothing wrong in that which should be the concern of anybody else [sic]. Whatever you have between you and your God is nobody's business and it should not be allowed to come in at a place where it will cause disharmony and disunity in this country.²²

Whereas, for Alhaji Ban, the right of freedom of religion meant that the average Muslim should be afforded the opportunity to experience the fullness of Islamic law in the public place, Mbakwe believed that it simply granted the right to anyone to worship God in the manner they chose. These delegates had different understandings of the right of "free worship" in the context of public expression of religion.

21 Sharia Debate Verbatim Report of the Constituent Assembly, excerpted in *Daily Times*, 27 August 2000, 14.

22 Sharia Debate Verbatim Report of the Constituent Assembly, excerpted in *Daily Times*, 27 August 2000, 14.

The point of this short historical review of the state and religion in Nigeria is to underline three important points. First, the framework of freedom of religion in Nigeria is intrinsically linked to the struggle for justice and equity in the nation-state. Second, the rationale of freedom of religion is related to federalism in Nigeria. It is part of a package to address fear of domination and the dangers of majoritarian politics. Just as ethnic groups accepted federalism as the system of government that protect their diversity, they also accepted that religious diversity requires the restriction of religious laws and norms to the private domain.²³ The third point is that they further accepted that political stability requires the institutionalisation of a bill of rights in the Nigerian Constitution in a way that guarantees to every person equal rights to dignity, liberty and property and non-discrimination in matters of ethnicity and religion. This triple heritage defines the constitutional resolution of the distrusts amongst ethnic nationalities and religious groups in Nigeria and parallels the liberal concept of justice, equal regard, freedom of conscience and state neutrality.²⁴ But it opens up new vista of controversy on the implication and application of state secularism as a conceptual framework to secure the triple heritage.

SECULARITY AS A CONTESTED CONSTITUTIONAL NORM

The 1960 constitutional bargain on state and religion in Nigeria, described by the scholar of Nigerian *sharia* Philip Ostien as the “settlement of 1960”²⁵ entrenched freedom of religion in the Nigerian Constitution, but it did not touch on the separation of state and religion. The 1960 Constitution did not contain a clause prohibiting the establishment of religion by the state. This omission may be an indication that the conferees at the pre-independence constitutional conference may have believed that relegating *sharia* to the private domain would be sufficient to deal with the turbulence of state and religion in Nigeria or they did not fully understand the dimensions of religious and moral pluralism in Nigeria. For whatever reason, they failed to consider including a non-establishment clause in the Nigerian Constitution.

This omission did not last long. The post-independence struggle for power by Nigerian political elites unleashed an ethno-religious political consciousness that destabilised the “settlement of 1960”. By the end of the First Republic in 1966, adherents of the two major religions – Christianity and Islam – expressed strong dissatisfaction with the settlement. The Muslims felt that the relegation of *sharia* to

23 This was a weak consensus, or you can say, more of a *modus vivendi* rather than a *modus operandi*. Nigerian Muslim leaders continued to challenge this settlement even after the retention of the settlement in the 1999 Constitution. See Garba, “Nigeria’s Religion-State Relations”, 161-162.

24 See Maclure J and Taylor C. 2011. *Secularism and Freedom of Conscience*. Cambridge, MA: Harvard University Press.

25 See Ostien P (ed). 2007. *Sharia Implementation in Northern Nigeria, 1999–2006: A Sourcebook*. Ibadan: Spectrum Books Ltd (cited in Garba, “Nigeria’s Religion-State Relations”, 164).

personal law educed the exercise of religious freedom, as the experience of *sharia* as public law constituted an intrinsic part of the religious life of Muslims. On the other hand, Christian leaders complained against the recognition of the Sharia Court system in the Constitution. They saw it as an unconscionable preference for Islam. These disputes necessitated another look at the freedom of religion clauses when Nigeria started preparations for another constitution.

Section 10 of the Nigerian Constitution and non-establishment of religion

The 1979 Constitution went further than the 1960 Constitution by introducing a non-establishment clause in Section 10, which provided that “The government of the Federation of a State shall not adopt any religion as a state religion”. This is generally taken as the constitutional doctrine of state secularity.²⁶ The ordinary reading of the section is that it has entrenched the secular character of the Nigerian state. This clause is interpreted to make Nigeria a secular state.²⁷ It requires that the state should be a secular state and not identify with religion. In Nigeria, the debate has been between those who think that the Section 10 prohibition of state adoption of religion amounts to a prohibition against state interference in religious matters and those who think it merely prohibits the government from proclaiming a particular religion as an official religion.²⁸ The disputed reading of Section 10 poses challenge to coherent management of public policy as it relates to the protection of freedom of religion. Although Nigerian courts, especially the Supreme Court, have not dealt with cases bearing directly on the question and have not expressed opinions on the concept of secularity, we can predict that when they do, they will falter at this incoherence, unless the tension between the constitutional expression of the norms of secularism and the freedom of religion is resolved.²⁹

26 There is a big debate as to, first, whether this section talks about secularity and, secondly, what the meaning is of a secular state in the context of the Nigerian Constitution. See generally Nwabueze B. 1992. *Military Rule and Constitutionalism*. Ibadan: Spectrum Law Publication; Nwauche ES. 2008. “Law, religion and human rights in Nigeria”, *African Human Rights Law Journal* 8:568; Benson IT. 2000. “Notes towards a (re)definition of the ‘secular’”, *University of British Columbia Law Review* 33:520; and Ilesanmi SO. 2001. “Constitutional Treatment of Religion and Politics of Human Rights in Nigeria”, *African Affairs* 100:529-554.

27 Adeniran G. 1999. “Shari’a law in Zamfara negates rule of law”, *The Guardian*, 9 November (cited in Ilesanmi, “Constitutional Treatment of Religion”, 541).

28 Ben Nwabueze argues that the section prescribes the same state neutrality that the US Supreme Court has invested in interpreting the non-establishment clause, that is, state non-involvement in religious matters. See Nwabueze B. 2004. *Constitutional Democracy in Africa*, vol. 3. Ibadan: Spectrum Books Ltd, 138-139. Ruud Peters argues that the provision merely means equal treatment of all religions. See Peters R. 2003. *Islamic Criminal Law in Nigeria*. Ibadan: Spectrum Books Ltd, 33.

29 For a review of some of the cases on freedom of religion from the Nigerian Supreme Court, see Oloyede IO, Egbewole WO and Oloyede HT. 2016. “The Operational Complexities of the ‘Free Exercise’ and ‘Adoption of Religion’ Clauses in the Nigerian Constitution”, in Coertzen P, Green MC and Hansen L (eds). *Religious Freedom and Religious Pluralism in Africa: Prospects and Limitations*. Stellenbosch: AFRICAN SUN MeDIA, 49-52.

1. Squaring the circle: Freedom of religion and secularism

The debate over Section 10 has pitched the secularist against the anti-secularist. The non-secularists argue that Section 10 simply restrains the Nigerian state from projecting one religion as the official religion of the state, but that it does not intend that the Nigerian state should be completely agnostic of religious values and practices. In their view, Nigeria is a religious country and government has a responsibility to nurture and aid religion. In a much-quoted statement, Nigerian legal scholar, Mohammed Tabiu, argues that because the Nigerian Constitution does not use the word “secular” one cannot say that the constitution makes Nigeria a secular state.³⁰ The umbrella organisation of Muslims in Nigeria, the Jumma’atu Nasril Islam, agrees with the view that Nigeria is not a secular state, despite Section 10 of the Constitution. They consider that, notwithstanding the wordings of Section 10, other sections of the constitution, which express the fundamental objective of the Nigerian state in religious terms, recognise religious laws or support the creation and funding of courts that apply religious laws, mean that Nigeria is not a secular state.³¹ Noteworthy in this regard is the clear listing of the Sharia Courts in the definition and delineation of the judicial power of the federation.³²

Some of the anti-secularists associate secularism with godlessness and unbelief. In that sense, a secular state is an almost godless and atheistic state – one that is opposed to religion. The former Secretary General of Jumma’atu Nasril Islam, Lateef Adegbite, argues in this light that, “No Moslem will support a secular state. I want to say it with all emphasis at my command because as far as we are concerned, secularity means ‘godlessness’, and Moslems will never support that.”³³ The equation of secularism with godlessness or anti-religion gets the history of the idea wrong, but is not unusual. Historically, the concept of state secularity has been associated with ambiguous moral ideas relating to the place of religion in public life. Nevertheless, although some secular states may have developed strong anti-religious stance at a point in their history, the philosophical basis of secularism is neither belief or unbelief.³⁴ As a matter of history, the earliest theorists of what is not known as the doctrine of secularism or church and state are deists who were

30 Tabiu M. 2001. “Sharia, Federalism and the Nigerian Constitution” (cited in Oloyede et al., “The Operational Complexities”, 37).

31 See “Text of Press Conference by the Jumma’atu Nasril Islam (JNI) on the Nigerian Constitution and the Nigerian Ummah, February 13, 1999”, *The Guardian*, 15 March 1999, 16.

32 Constitution of the Federal Republic of Nigeria, 1999, secs 6(6)(f) and (g).

33 Commentary by Lateef Adegbite, Former Secretary General of Jumma’atu Nasril Islam at a seminar held at the Nigerian Institute of Advanced Legal Studies, Lagos, in 2001 (cited in Ogbu ON. 2014. “Is Nigeria a Secular State? Law, Human Rights and Religion in Context”, *Transnational Human Rights Review* 1:6).

34 France under the Jacobins mounted a strong resentment to religious beliefs and value and advocated a virulent form of secularism that amounted to strict separation, but at other times the French society has struck accommodation with religion in a manner that departs from the principle of *laïcité*. See Maclure and Taylor, *Secularism and Freedom of Conscience*, 2010.

concerned more with rescuing religions from the corruption of the political order than rescuing the state from religion.³⁵

The secularists argue that the Nigerian Constitution makes Nigeria a secular state, which should have no place to promote religion. In their view, the language of Section 10 builds an unsurmountable “wall of separation between church (and mosque) and state”.³⁶ So, who is right? How we define secularism determines who is right. If secularism means that the state does not concern itself with religion at all, then Nigeria is not a secular state, as the Constitution makes provisions concerning religious matters. But if, as legal commentator Osita Ogbu puts it, secularism does not require that a state be not concerned about religion, but rather it should not be involved in religion,³⁷ then Nigeria is a secular state. Then what is the difference between “concerned about religion” and “involved in religion”?

Many of those who think that Section 10 does not make Nigeria a secular state point to other sections of the Nigerian Constitution that make reference to religion or seems to provide aid or governmental support to religion. For example, in stating the fundamental objectives and directive principles of governance in Nigeria, the Constitution states that the “State shall direct its policy towards ensuring that ... (b) there are adequate facilities for leisure, social, religious and cultural activities”.³⁸ The Constitution also recognises *sharia* law by creating a Sharia Court of Appeal as one of the Superior Courts of Record.³⁹ References to Islamic personal law and the description of one of the fundamental objectives of state policy in religious terms convey the impression that Nigeria is a multi-religious rather than a secular state.⁴⁰

Comparative secularist perspectives and assessment of Nigerian secularism

Looking at different models of secularism across the world we see that there are different forms of interactions between the state and religion. Those interactions may range from the harmless and symbolic to the harmful and impactful. As political theorists Jocelyn Maclure and Charles Taylor observe, “A secular model

35 Thomas Jefferson, the author of the famous “wall of separation between church and state” lines defended the separation as a way of preserving the sanctity of religion. See Lankford J and Moore R. 2018. “The Real Meaning of the Separation of Church and State”, *Time*, 18 January.

36 This expression was reportedly first used by Thomas Jefferson in a letter to the Danbury Baptist Association and quoted by the US Supreme Court in *Lynch v Donnelly* 465 U.S. 669, 673 (1984). The Nigerian Supreme Court has never had the opportunity to use such phrase to describe state and religion relation in Nigeria.

37 Ogbu, “Is Nigeria a Secular State?”, 7.

38 Constitution of the Federal Republic of Nigeria, 1999, ch 2, sec 17(3).

39 Constitution of the Federal Republic of Nigeria, 1999, secs 6(5)(f) and (g), 262, 277 and 237(2)9.

40 Yadudu AH. 1994. “The Separation of Church and State: Nigeria’s Constitutional Contrivance”, *Journal of the Nigerian and Comparative Law* 1(2):14-37; Vishigh IR. 1998. “The Separation of Church and State: Nigeria’s Constitutional Contrivance: Another View”, *Current Jos Law Journal* 4(4):107-124.

1. Squaring the circle: Freedom of religion and secularism

may seek to promote the emancipation of individuals from religions and, therefore, the secularization or erosion of religious belief, or it may wish to consign religious practice strictly to the confine of private and associative life.”⁴¹ Scholars of religion and state have set forth typologies of these regimes, ranging from strict separation to integrationist or accommodationist regimes, based on the “type and form of interaction between the state and religion”.⁴² Law and religion scholars Rex Ahdar and Ian Leigh categorise such regimes based on a continuum of structural institutional, belief, legal stance and regulation. From this scheme, they developed a topology of monistic, hybrid and strict separationist models, observing that the monistic model can take a theocratic (religion controls the state) or an Erastian (the state controls religion) form. At the other end of the spectrum is complete separation, institutionally speaking of religion and government. Both extreme are pure and ideal types.⁴³

In the non-ideal type, we expect varying interactions and intermingling between religion and government. As we shall see later, one of the tests of secularism is the degree of entanglement of the state in religious matters. All entanglements are not equal. There are entanglements that are within the acceptable boundaries of “secularism” and there are those who transcend the boundaries of “secularism” or even state neutrality. But we can safely argue that no matter where in this continuum we locate the Nigerian specialty of religion and state relationship, the combined reading of Sections 10 and 38 of the Nigerian Constitution does not approximate a monistic model.

So, in what sense is Nigeria a secular or a multi-religious state? Those who argue that Nigeria is not a secular state argue first that the words of Section 10 do not describe Nigeria as “secular”. But, more importantly, they argue that the recognition and promotion of religious activities and practices in the Constitution puts the country beyond the pale of secularity. The Nigerian Constitution clearly recognises religious law – specifically, *sharia* – and provides for its administration, including funding of religious jurists. In one case, the Nigerian Court of Appeal hinted that the use of public fund to hire Islamic teachers without availing similar treatment to Christian pupils would be unconstitutional. This decision was not based on possible violation of the principle of secularity or religious neutrality, but rather on discriminatory treatment in favour of adherents of one religion to the detriment of adherent of another.⁴⁴ It is arguable that by using public funds to pay for justices who adjudicate cases on Islamic personal laws the Nigerian state is impermissibly deeply entangling itself in the religious affairs.

41 Maclure and Taylor, *Secularism and Freedom of Conscience*, 29.

42 Temperman J. 2010. *State-Religion Relation and Human Rights Law: Towards a Right to Religiously Neutral Governance*. Leiden: Martinus Nijhoff, 1.

43 Ahdar R and Leigh I. 2013. *Religious Freedom in the Liberal State*. Oxford: Oxford University Press, 88.

44 *Adamu v Attorney General of Borno State* (1996) 8 NWLR (Pt.203) 1.

In a sense we can agree that such entanglements, like direct funding of religious activities or establishment of religious court system, are problematic, because even if the state equally funds or recognises all the different judicial systems, such state behaviour still amounts to unacceptable preference of religion over non-religion. It could be argued, in contrast, that where the Fundamental Objectives and Directive Principle of State Policy in Chapter 2 of the Nigerian Constitution recognises the need for facilities for social, religious and cultural life, it simply acknowledges the dimensions of human rights and well-being in the society. It does not in any way therefore entangle the state in religious matters in a such a manner as to betray the principle of neutrality.

In this context, it is important to note that every constitution is a product of its contexts and history. As Maclure and Taylor counsel, “The discussions of ‘models’ of secularism and their underlying principles should never lose sight of the fact that concrete experiences of secularism are always colored by history and context.” This is so because “attempts to reconcile citizens’ moral equality and their freedom of conscience will always vary with the specific context”.⁴⁵ One of the heritages of colonialism in Nigeria is legal pluralism, where two kinds of law apply at the same time: statutory law and customary law. So, the argument could be that the Nigerian Constitution merely recognises the existing reality of legal pluralism and provides for a Sharia Court of Appeal as well as a Customary Court of Appeal.⁴⁶ Because the *sharia* code is recognised as a form of customary law for Muslims, it is constitutionally recognised just as customary law is recognised for non-Muslims.

This brings us to the crux of the matter: if mere recognition of religion or religious matters in a court does not necessarily derogate from secularism or make the state a religious state, what is the threshold of state involvement with religion that shifts the pendulum towards establishment of state religion or makes the state a religious state? Many writers who focus on constitutional recognition of religious symbols or activities often miss out on the analytical distinction between a secular and religious state. I agree with Maclure and Taylor that unless we focus on the underlying values and principles behind these constitutional references to religion, we will not appreciate the underlying values that distinguish a secular state from a religious state. Maclure and Taylor provide an important analytic to make this important distinction. They distinguish between ends and modes of secularism. The “ends” of secularism are the principles which define secularism whereas the “modes” are the operations to achieve those principles. In this way, secularism is “based on two major principles – equality of respect and freedom of conscience – and on two operative modes-separation of church and state and the neutrality of the state towards religions and towards other secular philosophical movements”.⁴⁷ The importance of this distinction is that it enables us not to be distracted by the contextual representation of the state-religion relationship in terms of official

45 Maclure and Taylor, *Secularism and Freedom of Conscience*, 54.

46 Constitution of the Federal Republic of Nigeria, 1999, sec 6(5).

47 Maclure and Taylor, *Secularism and Freedom of Conscience*, 23.

1. Squaring the circle: Freedom of religion and secularism

establishment or legal institutionalisation and focus on how the institutionalised structure of social relations affects the principles underlying secularism.

If we admit that the nature of state-religion relationship depends on history and context, then this means that different patterns of state-religion relationship may achieve the six principles of equal respect and freedom of conscience. For example, Nigeria does not cease to be a secular state and become a religious state merely on account of recognition of the religious legal system in the Constitution. This does not mean that such recognition does not pose problem to the principles of secularism. It means that we have to look beyond this operative mode and inquire how it undermines or facilitates these principles. Maclure and Taylor's "end-mode" analytic rejects some of the definitions and explanations of secularist regimes by other notable scholars of religion. Philosopher Martha Nussbaum, for example, identifies six principles of secularism as equality, equal respect, freedom of conscience, accommodation, non-establishment and separation. Maclure and Taylor think that Nussbaum does not clearly distinguish between the ends and means of secularism in her six principles, as important as they are.⁴⁸

Bilikisu Yusuf, a Nigerian Muslim activist, continues in this pattern of confusing the ends and operative mode of secularism, when she outlines the essential features of secularism as first meaning that political authority is separated from religious authority. That is, the state is separated from religious matters. Second, it entails a prohibition of state funding of religious activities. Third, it entails that the state does not engage itself in promoting the growth or regulating the development of religious groups. And the state does not intervene in their activities.⁴⁹ Clearly, these are the operating modes for the principles of secularism. The principle of equal regard would require that the state does not favour any religion, or even religion against non-religion, by funding religious activities and that the state does not control religious activities.

The point is that we ought to first determine the moral principle (ends) of secularism before we determine its institutional principles (operative modes). It is not just the operative modes that determine whether the state is secular or not. We should consider whether the constitutional order is underlined by the moral principle of equality and freedom of conscience. Applying this conceptual clarity to the Nigerian constitutional order, the question would be whether Section 10 embodies the principles of equality and freedom of conscience? When the Nigerian Constitution prohibits the national and state governments from adopting a state in a multi-religious society what does it intend? What values are implicit in such prohibition?

48 Nussbaum M. 2008, *Liberty of Conscience: In Defense of American's Tradition of Religious Equality*. New York: Basic Books.

49 See Yusuf B. 1993. "Da'wa and Contemporary Challenges Facing Muslim Women in Secular States – A Nigerian Case Study", in Alkali N (eds). *Islam in Africa: Proceedings of Islam in Africa Conference*. Ibadan: Spectrum Books Ltd, 279. See also Wang AK and Varol OO. 2006. "Is Secularism Possible in a Majority-Muslim State? The Turkish Example", *Texas International Law Journal* 42:6.

If the Constitution guarantees the freedom to form opinion and religious beliefs and freedom to propagate such opinion and beliefs and equally restrains the state from privileging one religious opinion or belief over the other in any way, then it subscribes to the value of secularism. The fact that the Constitution does not expressly use the word “secular” does not detract from the secular character. The question whether Section 10 makes Nigeria a secular state should be answered in the affirmative.

TENSION BETWEEN SECULARITY AND RELIGIOUS FREEDOM IN NIGERIA

The interpretation of this historical moment in the Nigerian constitutional order depends partly on the facts. What is clear is that the 1979 Constitution broke with tradition by including a non-establishment clause. What is not clear is what ideas and conceptions informed the including of a non-establishment clause (some would prefer to call it a “non-adoption of state religion clause”).⁵⁰ Was it a deliberate decision to move away from the pattern of state entanglement with religion or was it a restatement of the extant position? Was it a principled change or a happenstance? Does it mean Nigeria becomes a secular state or remains a multi-religious state?

Nigerian legal scholar Ahmed Garba argues that the proper reading of Section 10 of the Nigerian Constitution is that “with regards to the such history of entanglement with religion, the legislature cannot be said to have intended making Nigeria a secular or a neutral state”.⁵¹ This interpretation of Section 10 is based on the history of state-religion relations before the constitutional entrenchment of a Bill of Rights. This history has disposed the interpretation of subsequent constitutional events in the country to error, the error that entrenching the freedom of religion in the constitution does not change the character of the Nigerian state. The fact that some regions were dominated by Islam and Christianity, to the point of being a state religion in the Islamic regions of the north, does not mean that Section 10, which arose at a disjunction in Nigerian constitutional history, should be interpreted to become merely declaratory of dominance of Islam and Christianity and fair treatment to other religions. Thus, I disagree with Garba and argue that the correct interpretation is that Section 10 is a declaration of the reconstitution of the pattern of state-religion relations in Nigeria. From the commencement of the 1979 Constitution, the old pattern of *cuius regio eius religio* (one religion for one kingdom),⁵² where it exists, has been replaced by a new pattern based on the principles of equality and freedom of conscience.

50 See Garba, “Nigeria’s Religion-State Relation”, 161.

51 Garba, “Nigeria’s Religion-State Relation”, 174.

52 Section 1 of the 1963 Northern Region Constitution makes Islam dominant in the region and makes the regional constitution superior. For the principle of territorial dominance of state religion, see The Treaty of Augsburg, 1555.

Disestablishment in the 1979 Constitution

Garba also argues that the origin of Section 10 prohibiting state religion lies in a sleight of hand by some of the members of the Constitution Drafting Committee. By Garba's account, the words that became Section 10 were formulated by the subcommittee on Fundamental Objectives and Directive Principles of State Policy, chaired by the constitutional lawyer, Ben Nwabueze. The original words were, "The state shall not adopt any religion as state religion but the freedom of every individual to preach, to teach and to practice the religion of his choice shall be protected."⁵³ It is alleged that the draft was moved, without consensus of members of the subcommittee, from the unenforceable Fundamental Objectives into Section 10, which is enforceable.⁵⁴ Another draft section that was favourable to Islam was removed from the final draft. It proposed that "All citizens, male and female, shall have equality of rights, obligations and opportunities before the law *but this provision shall not abrogate any rule of Moslem or customary law*" (emphasis is mine). This provision made it to the constitution without the proviso on Moslem and customary law.

Garba argues that Section 10 was smuggled into the constitution without the consent of some Muslim members of the drafting committee. From this history, he argues that, "The non-adoption of state religion provision in the Nigerian Constitution does not require any neutrality from the states. It is rather a pre-emptive attempt to ensure fairness and non-discrimination on the part of the state, in spite of the state's preferential treatment towards religion or some religions."⁵⁵

In other words, Section 10 does not make Nigeria a secular state, but a state that protects the dominance of two regional religions, while allowing other religious beliefs opportunities. I think that this reading is wrong and contradictory. A better reading of this history is that it marks a recognition of the radical fact of pluralism and a commitment to entrench the core values of liberal constitutionalism.⁵⁶ This position is evidenced by the rejection of the proposed exception for Islamic law

53 Federal Republic of Nigeria. 1976. *Report of the Drafting Committee Containing the Draft Constitution*, vol. 1. Lagos: Federal Ministry of Information, 253.

54 The rights in the Nigerian constitution are two types. Those included in Chapter Four of the 1999 Constitution, which are grouped as "Fundamental Human Rights", and those included in Chapter 2 and grouped as "Fundamental Objectives and Directive Principles of State Policy". Chapter 2 includes the so-called "second generation rights" – social, economic and cultural rights. The Nigerian Supreme Court has held such rights are not enforceable, although Section 13 commits every public official or institution to "observe and apply the provisions of this Chapter of the Constitution". An explanation for this is that these rights are greatly dependent on availability of resources and could unduly involve the court in making managerial decisions. See *A.G. Ondo State v A.G. Federation* (2002) 9 NWLR (Pt. 772) and *Okogie v A.G. Lagos State* (1981) NCLR 218.

55 Garba, "Nigeria's Religion-State Relation", 174.

56 Economist and political philosopher Friedrich Hayek argued that liberal constitutionalism involves "the recognized rules of conduct designed to define and protect the individual domain of each", in Hayek FA. 1979. *Law, Legislation and Liberty*, vol. 3. Chicago: University of Chicago Press, 109.

with regards to the provision on equality before the law.⁵⁷ Also, it is contradictory to talk about fairness and non-discrimination while protecting the dominance of one or two religions.

Rawlsian ordering and the “fact of pluralism”

This chapter started with the claim that Nigeria should be considered a well-ordered society in the Rawlsian perspective in terms of its constitutional ordering.⁵⁸ Therefore, freedom of thought, conscience and religion in Section 38 and the non-establishment clause in Section 10 are not conceptual framework, to protect the rights of the followers of the two major religions to engage in religious activities. Rather, they are a conceptual acknowledgment of the “fact of pluralism” and, therefore, a protection for everyone who holds any religious or moral belief to express and exercise it without fear of state interference.

Since Nigeria has multiple religious traditions and memberships across its regions – what Rawls calls “the fact of pluralism” – the only way it can offer equal treatment for its citizen in matter of religious expression is to affirm the values of a neutral state.⁵⁹ The members of the Constitution Drafting Committee recognised the fact of pluralism and inserted Section 10 as a guarantor of a neutral state. Garba and others argue against the idea of Nigeria as a secular state, because they rightly see a secular state as a neutral state and consider Nigeria, by virtue of its history, as a state that cannot be neutral in matter of religion, but which rather should intervene on behalf of religion, especially Islam in northern Nigeria. If Garba admits that the Nigerian constitutional order aims at non-discrimination and fairness to all religious and non-religious beliefs, then it is contradictory to reject neutrality.

This contradiction would be obvious to the proponents of “Nigeria is not a secular state” doctrine if they could accept the concept of radical pluralism or what Rosenfeld calls “comprehensive pluralism”.⁶⁰ Rosenfeld distinguishes between three types of pluralism. The first, *minimal pluralism*, relates to “division between self and others”.

57 Federal Republic of Nigeria, *Report of the Constitution Drafting Committee*, vii-viii.

58 For a fuller discussion by John Rawls of the concept of an ordered society and how it relates to the political conception of justice, see Rawls, *Political Liberalism*, 35-40.

59 In other words, we assume that, given the realities of modern Nigeria, the committee members will have to accept the fact of pluralism in this radical sense as reasonable persons who accept the fundamental principle of equality of citizens. This parallels John Rawls constructivist approach in his two principles of justice. It is about the principle that citizens who consider themselves equal and free would agree in an original position under a veil of ignorance, and not about an actual agreement. Rawls J. 1999. *A Theory of Justice*. Revised Edition. Cambridge, MA: Harvard University Press, 15-19; Rawls, *Political Liberalism*, 23; and Rawls J. 2001. *Justice as Fairness: A Restatement*. Cambridge, MA: Harvard University Press, 14-18.

60 Rosenfeld M. 1999. “Puralist Critique of the Constitutional Treatment of Religion”, in Andres Sajo A and Avineri S (ed). *The Law of Religious Identity: Models of Post-Communism*. The Hague: Kluwer International Law, 44 (cited in Ilesanmi, “Constitutional Treatment of Religion”, 546-548).

1. Squaring the circle: Freedom of religion and secularism

This sort of pluralism has little significance for constitutional governance as it exists even in the many totalitarian and undemocratic polities. The second, *limited pluralism*, prescribes “toleration of other (i.e. non-dominant) religions, but does not demand that all conceptions of the good be placed on equal footing”. According to religion scholar Simeon Ilesanmi, limited pluralism is the logic of “the approach shari’a states of northern Nigeria have adopted to deal with the question of the status of their non-Muslim citizens. In this logic, a state is bound to “defer to the religious sensibilities of the majorities in the formulation of public policy but is not required to coerce the minorities to change their religious affiliations”.⁶¹ The third form of pluralism is *comprehensive pluralism*, which aims at achieving “equalization of all conceptions of the good found in a polity”. The term “conceptions of the good” includes both religious and non-religious moral worldviews.

If Nigeria’s pluralism is limited to minimal and limited pluralisms, then the proposition by Garba and others that Nigeria is not a neutral state, but one that recognises two dominant religions and tolerates other religious beliefs, is not contradictory. But, clearly, the liberal nature of the Nigerian constitutional order, as defined by the entrenchment of a full Bill of Rights and the declaration of a rule of law and democratic state, puts the country beyond limited pluralism.⁶² Nigeria is constitutionally conceived to be a comprehensively pluralist state. If the Nigerian state is comprehensively plural, then the Nigerian constitutional order must be neutral in order to guarantee nondiscrimination to believers and unbelievers alike. So, the question is what concept of neutrality will be offensive to a constitutional order that promises nondiscrimination and fairness in a state of comprehensive pluralism.

NIGERIAN CONSTITUTIONAL CONFUSION ON RELIGION

Constitutional coherence requires that provisions in the other parts of the constitution on religious matters not detract from the underlying principles in Bill of Rights sections. But, expressly and impliedly, the Nigerian Constitution undercuts efforts to construct an overarching and guiding principles of state and religion relations in Nigeria. This incoherence and inconsistency have misdirected both scholarly reflection and policy formulation regarding the practice of religion in the public space in Nigeria.

Enyinna Nwauche is one of the legal scholars who thinks Section 10 does not make Nigeria a secular state. Nwauche argues,

Our religious demography in Section 2 shows that the dominant religions in Nigeria are Islam and Christianity. Their dominance is reinforced by the fact that governments in Nigeria actively promote, sponsor and

⁶¹ Ilesanmi, “Constitutional Treatment of Religion”, 547.

⁶² See Sections 33-44 for fundamental rights and Section 1 for supremacy of the constitution. These sections constitute what Brian Z Tamanaha calls legal and political liberty. See Tamanaha BZ. 2004. *On the Rule of Law: History, Politics, Theory*. Cambridge: Cambridge University Press, 33-35.

sustain both religions. If we accept ... with respect to Section 10, that “it is generally understood to mean that neither the legislative power nor the executive power may in any way be used to aid, advance, foster, promote and sponsor a religion”, then Nigeria has a state religion(s). Thus, it can be asserted that Nigeria has a *de facto* state religion, and for reason given below, it is constitutional.⁶³

Some of the facts Nwauche identifies in making this argument include the power of the legislature to make law for good governance, the establishment of religious court, appointment and funding of religious judges, the preferences given to Christian and Muslim marriages in the criminal and evidence laws in Nigeria and exemption of religious organisations from taxes. Some of Nwauche’s reasons for arguing that the Constitution makes Nigeria a religious state are unconvincing. For example, he argues that because Section 4 of the Constitution empowers state legislatures to make “laws for the peace and good government of the territories”, the leaders of the state will import their conception of the good. That is, they will repair to their religious beliefs to get to discern what is in the public good. This means that the Nigerian state is no longer secular because religious values will inform public policy. This is a thoroughly spurious argument, as making law for good government does not in any way suggest the importation of comprehensive religious doctrine of the sort that makes the state a religious state. But the larger point Nwauche makes that the Constitution makes Nigeria a *de facto* religious state does underline the incoherence of the constitutional proposition on freedom of religion and state and religion relations.

The problem with the Nigerian Constitution regarding conception of freedom of religion and state and religion relations is that it does not speak in one voice. The anti-secularist view is that Nigeria is a multi-religious state. Therefore, the neutrality which the Nigerian state can rightly practise is the neutrality of parity between Islam and Christianity. The Constitution sows this confusion. The constitution that proclaims the right of every Nigerian to freedom of religion (Section 38) and guarantees to all citizens equal protection of the law in respect of religious beliefs and practices (Section 10) and the right not to be discriminated on religious ground (Section 42) also provides for the establishment of Sharia Court of Appeal for adjudication of Islamic personal law for states that want it (Section 275). The Constitution also provides for the jurisdiction of the Sharia Court of Appeal (Section 277), and mandates that at least three judges of the Court of Appeal must be Islamic scholars (Section 237(1)(b)). The constitutional authorisation of *sharia* has been problematic in constructing a constitutional theory of state and religion relations.

Perhaps it can be argued in defence of the establishment of Sharia Court of Appeal in the Constitution that it is an accommodation of the reality of religious experience of a religious group. Since the pattern of state and religion relations is always responsive to the changing context of society, recognising *sharia* as an imperative of

63 Nwauche, “Law, Religion and Human Rights in Nigeria”, 577-578.

1. Squaring the circle: Freedom of religion and secularism

a Muslim does not erode the religious neutrality of the state. Permissible patterns of state and religion relations would be a range, with some patterns clearly outside the margin of the acceptability of state and religion relations, and therefore injurious to freedom of religion. Some patterns, though not ideal, fall into the range of acceptable state and religion relations. But the argument of context and historical legacy will not accommodate the Nigerian case. The constitutional establishment of *sharia* as a religious legal system is a direct provision for religion. It is a direct promotion of religion to mandate that experts in Islamic law should be part of judicial bench. Again, this is not a case of religious accommodation, because it is not about providing opportunity for minority groups to express their religion. This is a case of government direct intervention in favour of a religious group. Nwabueze argues that the drafters of the constitution counter-balanced this favour to Muslims by allowing for states that want to establish Customary Court of Appeal. There are two false or falsifiable parallels in this argument for recognition of *sharia* law in the Constitution. The first is that *sharia* is equivalent to customary law. This is obviously a false equivalence. Whereas *sharia* is religious, customary law is better conceived as the law of “local realm”. The other false equivalence is that religious groups are territorially defined and that the northern region is Islamic and southern region is Christian. Political reality followed this fancy to the extent that no Sharia Court was ever established in western Nigeria, in spite of large population of Muslims in state in the region.⁶⁴ The logic here is that Customary Court is equivalent to Sharia Court. When a constitution establishes a religious court, it is no longer a matter of historical legacy.

It is true that there is a history of state establishment of Islamic religion in northern Nigeria before and during colonial rule. But that pattern of state and religion relations have been disrupted by the emergence of liberal democracy and liberal constitutionalism. Ben Nwabueze justifies this establishment by arguing that a Sharia Court of Appeal in the constitution was a compromise to bestow “constitutional recognition on Sharia, counter-balanced by a like recognition of customary law, but only to the extent of establishing it for ‘any state that requires’, a Shari’a Court of Appeal or (as the case may be) a Customary Court of Appeal”.⁶⁵ Nwabueze argues that the constitutional provision was a halfway house between allowing for a full complement of *sharia* or just restricting it to personal matters of Muslims and voluntary on states that want it. At best, this was merely a pragmatic

64 There is a large population of Muslims in the southwest of Nigeria. Historically, there has been peaceful cohabitation of Muslims and Christians in those states. They have always had customary courts that adjudicated on personal and customary matters affecting both Muslims and Christians. In 2000, the Southern Council for Islamic Affairs furtively advocated for *sharia* for southern Muslims. *The Comet*, 30 July 2000 (cited in Ilesanmi, “Constitutional Treatment of Religion”, 344-345).

65 Nwabueze B. 2014. “Freedom of Religion, The Religious Neutrality of the State Under the Constitution and the Sharia Controversy”. Paper delivered at a symposium organised by the Spiritan International School of Theology, Enugu, 23 March 2001, 15 (cited in Ogbu, “Is Nigeria a Secular State?”, 15).

decision, a *modus vivendi* to keep the peace, rather than a principled decision in line with the aspiration of religious neutrality of the state in Section 10.⁶⁶

The liberal premise and character of the Nigerian Constitution point towards a concept of comprehensive pluralism and neutrality as non-involvement. But the Constitution fails to articulate a coherent framework of freedom of religion and state and religion relations. Whereas Section 10 speaks the language of non-establishment and Section 38 guarantees the freedom of religion in the philosophical language of equal regard and freedom of conscience, other sections speak in the language of religious state.

CONCLUSION

Section 10 of the Nigerian Constitution is a product of politics. These politics show that there is a lack of true consensus on the insertion of that section in the constitution. Leading Nigerian religious figures and political leaders have not deliberatively and comprehensively settled on character of the Nigerian state as it relates to state and religion relations. Just as it pertains to the 1959 settlement, the 1979 settlement still betrays a *modus vivendi*, rather than a principled decision. At the 1959 constitutional review conference, *sharia* advocates grudgingly accepted that *sharia* be made simply a matter of personal law and personal relations of a Muslim. But before the ink dried on the paper, they started advocacy for comprehensive *sharia*. The debate on the status of *sharia* that preceded the 1979 Constitution returned. The final outcome became another unprincipled settlement that kept *sharia* privatised as a personal matter and as personal law, but allowed public establishment of Islamic courts and designation of Islamic scholars as judges in the nation's appellate courts.

This settlement is now being challenged by advocates for comprehensive *sharia* who argue that it violates the religious freedom of Muslims to not to grant these Sharia Courts criminal jurisdiction. This pursuit of religious accommodation is based on the Section 38 guarantee of freedom of religion. Those who challenge the demand refer to the fact of pluralism and the fundamental guarantee of secularity and non-discrimination. The responses have been incoherent, because the constitution speaks in confused voices. The Nigerian Constitution speaks in the language of "freedom, equality and justice" in one breath and in the language of "promotion of dominant religions" in another. This incoherence has afflicted policy makers and legislators. It has resulted in policies and initiatives that trigger conflicting claims of religious manipulation and marginalisation. The recent controversies around curriculum review and proposals to amend the Nigerian Constitution to include criminal jurisdiction for Islamic courts have elicited outcries about plots to Islamise

66 In *Political Liberalism*, Rawls argues that the principle of justice in a liberal plural society must be a *modus operandi* rather than a *modus vivendi*. To be a viable principle of justice, it must not be a principle of convenience to just keep the peace, but one that people have reason to accept. See Rawls, *Political Liberalism*, ch 4 (The Idea of Overlapping Consensus) and xxxix-xlii.

1. Squaring the circle: Freedom of religion and secularism

the country. Christian leaders complain that these controversies suggest plot by the current Buhari presidency to Islamise Nigeria.⁶⁷ Of course, Muslim leaders counter such claims and accuse the Christian leaders of hate speech and condoning the Christianisation of Nigeria under the guise of Western education.⁶⁸

The incoherence in the practice of state and religion relations in Nigeria is difficult to resolve, because it is rooted in the constitutional substantiation of freedom of religion. Ordinarily, such conflicts in state practice are resolved by reference to the constitutional text. But, the deep-seated and incommensurable disagreement about the relations of the Nigerian state, to religious practices amongst Nigerian delegates, to the constitutional review conferences preceding the 1959 and 1979 Constitutions, suggests that constitutional bargains were mere stratagem for peacekeeping rather than settlements on moral principles. Nigeria's constitutional jurisprudence and state practices in relation to freedom of religion undermine the moral principle of equality and freedom of conscience which ought to define the proclamation of state neutrality in Section 10. The declaration of religious neutrality in Section 10 and the promotion of Islamic religion in other provisions create an irresolvable incoherence that will continue to plague management of religious difference under the Nigerian Constitution.

⁶⁷ Adepegba A. 2017. "ICYMI: Islamists plotting to impose Sharia ideology – Danjuma, Christian leaders", *Punch*, 14 July.

⁶⁸ Tukur A. 2018. "NSCIA attacks CAN, accuses Christian body of hate speech", *Premium Times*, 30 January.