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ISLAMIC LAW, RELIGIOUS FREEDOM AND HUMAN RIGHTS IN NIGERIA

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ABSTRACT

This paper has critically examined the implementation of Islamic law in Nigeria today vis-à-vis the right to religious freedom of Muslims and non-Muslims. The study has considered in relatively greater details the Islamic law of apostasy and its implications on citizens' fundamental right to freedom of religion, thought and conscience. This inquiry found out that as Islam does not draw a caesura between religion and other aspects of human life, its practice in Nigeria affects the rights of individuals especially non-Muslims. The study recommended legal reform, de-politicization of Islam, adherence to state secularity principle, active awareness of religious pluralism, respect for the rule of law, and cultivation of patriotic sense, inter alia, as constituting the possible remedy. While structural-functionalism is the theoretical framework on which this investigation was built, the methodology employed was critical analysis.

Keywords: Religious Freedom, Human Rights, Islamic Law, Nigerian Constitution

1. INTRODUCTION

A cardinal issue that requires a special discussion in relation to Islamic sharia practice in Nigeria today is that of the right to freedom of religion. This right recognized as very fundamental and inalienable is arguably the oldest and most controversial right provided for at the traditional, national and international settings. This right, no doubt, protects theistic, non theistic and atheistic beliefs, as well as the right not to profess any religion or belief. In this case, the terms 'belief and 'religion' is to be broadly construed.[1] The right to freedom of religion, *inter alia*, is constitutionally guaranteed in Nigeria.

Our contextual discourse on the subject is particularly germane as religion has recently assumed an ever greater significance in the life of Nigerians and the country's body politic. Jamo (2009:5) suggests that this is due to the fact that religious organizations seem to constitute the only survivor of long years of military inclination to suppress, stifle and proscribe all meaningful and lawful window of dissents. The negative result is that religion came to the forefront of the political campaign and politicking. But the truth of Jamo's observation is only a partial one. What complements it is that African man is generally deeply religious (Mbiti, 1969:17). Be that as it may, religion in Nigeria today proves to be a sensitive and potentially explosive weapon which could help to make or mar the nation's democracy. Precisely how this characteristic of religion as it concerns Islam and the right to religious freedom affects the Nigerian democracy is what preoccupies the writer of this paper. However, before going into

[1] See General Comment No. 22 (on art. 18) of the ICCPR adopted 1993, UN Doc HR/GEN/1/Rev. I (19940 AT 35.

the discussions, it is apt to consider the place of sharia in the Nigerian legal system, and how the recent adoption of the Islamic criminal justice system had affected the religious and other rights of non-Muslims.

2. SHARIA LAW IN NIGERIAN LEGAL SYSTEM

Sharia was with Islam introduced into what is now Nigeria through the Kanem Bornu Empire in the 11th century (Trimingham, 1962:115; Abikan, 2003:164; Uthman, 2003:177). At this time, Islam thrived as a court religion together with its Sharia while the few commoners practiced it in their private lives. This was the situation of Islamic law until 1804 when Uthman Dan Fodio launched a jihad. Although his initial aim was to purify Islam of certain abuses, Fodio later succeeded in overthrowing the Hausa rulers and establishing a theocratic empire with its headquarters in Sokoto. This theocracy was what the Sokoto Caliphate became. With this, the stage was now set for a fuller application of Sharia.

Last (1967:56) holds that at this time, "the emirs were instructed to not only carry on the Jihad, study and teach the Quran and other Islamic sciences, command the good and prohibit the evil, but also to appoint judges (*Qadi*), tax collectors, army commanders and prayer leaders". According to Ubaka (2000:26), "with all these state machinery set in motion and the functionaries carrying out their duties to the best of their abilities the Islamic state came into full operation". "The Sharia became the law of the state insofar as the learned judges interpreted and administered it" (Ubaka, 2000:26). Sharia and other Islamic sciences were taught by the Mallams. Ozigbo (1988:141) notes that during this period, "all Islamic socio-political and judicial processes and institutions were emphasized". Surely, this enthronement of Islamic state involved the administration of Sharia criminal justice. Ahmed (2003:165) writes that the Jihad of Uthman dan Fodio "put in place a highly centralized system of criminal justice administration and a distinct legal system". In the same vein, Okonkwo (1980:4) observes that "in much of the North, there was the highly systematized and sophisticated Moslem law of crime…" Thus, after the Jihad and "prior to the British conquest of the northeastern part of present Nigeria in the Old Borno Empire, the Saifawa dynasty established Islam as a comprehensive legal system wherein Islamic law administered the life of the people and adjudicated their affairs" (Alkali cited in Zubair, 2003:230). Hence the socio-economic and political life of the people was re-organized on the basis of Sharia.

The scenario however became different with the advent of the British colonists in 1900. Although the initial intention of the colonists was to allow the continuance of the administration of Sharia law which in the words of Kenny (1986:2) "extended to all matters even crime and capital offences except for penalties such as mutilation, lapidation and crucifixion", yet it was soon discovered that Sharia application could not augur well with English law and the colonial programme in spite of the indirect rule policy. Hence, Allot (1984:56) observes that "during the six decades of the British rule, the colonial factor transformed the content and methodology of the Islamic criminal legal system", and indeed later abolished it. The beginning of this process was no doubt the recognition of Sharia as "native law and custom" (Native Courts Law, 1957, section. 22). The implication of this colonial classification of Sharia as part of the native ' law and custom' is that the law is now subject to the validity tests failing which the law would be enforced by the English-style courts. These tests include 'repugnancy test', 'incompatibility test' and 'public policy test'. For instance, the application of incompatibility test on any provision of Sharia would mean that once it is inconsistent with any written law for the time being in force, such a Sharia provision would be rendered unenforceable. Certainly, this colonial measure drastically curtailed the jurisdictional scope of Sharia. But it was in 1959 that full application of Sharia including Islamic criminal law was finally legislated out of existence. The supplanting Penal Code 1959 despite its Sharia bias was a fruit of the British colonial effort and not of the interpretation and codification of the injunctions of Allah. Although the code

retains most of the Sharia offences, the punishments thereof were drastically altered. In addition the gradual dying of the Sharia criminal justice system was quickened by the provision of section 3 (2) of Northern Nigeria Penal Code Law, which states that "no person is to be liable to punishment under any native law and custom". Ozigbo (1988:137) notes that at this time "only aspects of the Sharia relating to marriage and family life, divorce and inheritance were allowed to operate". It is precisely these aspects that are referred to as Islamic "personal law" which regime extended well into the post-colonial era.

Further restriction was also made with the constitutional abolition of unwritten customary law. Section 22 (10) of the Republican Constitution 1963 states that "no person shall be convicted of a criminal offence unless that offence is defined and the penalty prescribed in a written law except in contempt of court". This provision was retained in section 33 (12) and section 36 (12) of 1979 and 1999 constitutions respectively. The only difference is that the clause "except the contempt of court" in the 1963 Constitution was deleted in subsequent constitutions. But it was the latter two constitutions that specify that the "written law" for the purpose of the provision must have been enacted by the National Assembly or the State House of Assembly or in the form of subsidiary legislation or instrument under the provision of a law [Constitution of the Federal Republic of Nigeria, 1979, s. 33 (12); Constitution of the Federal Republic of Nigeria, 1999, s. 36 (12)]. Until recently, this provision has enormous implications for Sharia criminal justice. Firstly, some aspects of Sharia law were unwritten. For even though the Koran and the Sunna as compiled in the Hadith are written sources, ijma, qiyas and other sources of Islamic law are clearly unwritten. Secondly, even the written sources of Sharia were not enacted by the relevant legislative authority as provided for in the constitutions. Thirdly, it is quite debatable as to whether a source of law precisely as a source can amount to 'a law' within the constitutional understanding of law and legislation. Therefore, along these lines, the Sharia criminal law could not meet the constitutional demands.

Similarly, the constitutional delimitation of the application of Sharia to 'Sharia personal law' is yet another barrier to Sharia criminal justice administration in Nigeria. The Constitution of the Federal Republic of Nigeria 1979 states that "the Sharia Court of Appeal of a state shall… exercise such appellate and supervisory jurisdiction in civil proceedings involving questions of Islamic personal law…" [section 242 (1)]. Islamic personal law pertains to issues of marriage, family relationship, guardianship of an infant, gift, will, succession, and so on [section 242 (2)]. Notwithstanding the various attempts by the provisions of the Constitution of the Federal Republic of Nigeria (Amendment) Decree No 26 of 1986 and section 261 of the aborted Constitution of the Federal Republic of Nigeria 1989 to delete the word "personal" from their respective provisions on the jurisdiction of the Sharia Court of Appeal of a State, the 1999 Constitution still retains the word and reproduces verbatim the provisions of the aforementioned section 242 (1) & (2) of the 1979 Constitution [section 277 (1) & (2)]. It seems that the constitutional concern of the Sharia Court of Appeal's jurisdiction derives from the fact that it alone, among other possible Sharia Courts, is a constitutional and a superior court of record endowed with appeal and supervisory roles [Constitution 1999, section 6 (4)]. It appears that whatever jurisdiction is vested in the Sharia Court of Appeal determines the extent of the jurisdiction of courts of first instance that apply Islamic law. Hence, until 1999, Sharia personal law and that alone constituted the four walls within which the Sharia Court of Appeal and probably other relevant courts of original jurisdiction operated.

However, the period from 1999 till date witnesses a dramatic turn of events in the enforcement of Islamic law in Nigeria. Following a new interpretation of the 1999 Constitution, most northern states led by Zamfara made certain laws, repealed some, and amended some others. By these they established Sharia courts and vested them with not only the entirety of civil but also criminal jurisdictions. Zamfara State, for instance, arrived at these by way of five laws. They include:

- Sharia Court (Administration of Justice and Certain Consequential Changes) Law No. 5, 1999.
- Sharia Court of Appeal (Amendment) Law No. 6, 2000.
- Area Courts (Repeal) Law No. 13, 2000.
- Sharia Penal Code Law 1999.
- Sharia Criminal Procedure Code Law No. 18, 2000.

In that order, the first law provides for the establishment, composition and jurisdiction/ grades of Sharia courts, and makes general provision for the administration and implementation of Islamic law in the state. The second provides for the jurisdiction of the Sharia Court of Appeal of the state to hear and entertain appeals from the decisions of the Sharia courts in both civil and criminal matters decided on Islamic law. The third legislation repealed the Area Courts Law in the state and makes transitional provisions for the take off of Sharia courts. The fourth makes provision for the substantive Sharia Penal Law and the criminal law to be applied in the state. In other words, the law codifies the offences in their classifications along with the punishments stipulated therefor. The last one provides for the rules of practice and procedure to be followed and applied by the Sharia courts established in the state in their exercise of criminal jurisdictions and in the enforcement of Sharia Penal Code Law. It is also noteworthy that some other eleven northern states of Jigawa, Kaduna, Kano, Katsina, Sokoto, Kebbi, Niger, Bauchi, Bornu, Yobe, and Gombe have long since followed suit in imitation of Zamfara State, and many of which have copied almost word for word the Zamfara laws. Despite the controversies generated by this application of Islamic criminal law, the justice system has continued to operate in most of Northern Nigeria. Punishments such as amputation, lapidation, stoning to death, crucifixion and so on still attach to Sharia offences in the North.

3. RIGHT TO FREEDOM OF RELIGION IN THE 1999 CONSTITUTION

The right to freedom of religion is part and parcel of the bundle of fundamental rights guaranteed in section 38 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended). Thus, the right provided for in the said section extends from that of religion to those of conscience and thought. The reason for this conceptual association in relation to these rights may not be far-fetched. There is a conceptual *koinonia* among the three concepts of thought, conscience and religion. Surely, one would not fail to notice a thread of *Aryana* passing through the concepts when one immediately considers the fact that they are not only intangible and ultra personal, but also emanate from inner consciousness and disposition. As if this is not enough, they are, so to speak, divine sparks in man commanding the correlative duty of respect from other men. It is within this context that one speaks of moral freedom, intellectual freedom, and religious freedom. The subjects of these rights are not likely to forfeit any of them at the slightest attempt to infringe upon them. For a better appreciation of the provision of the right to freedom of thought, conscience and religion, it may be necessary to state the provision of section 38:

- Every person shall be entitled to freedom of thought, conscience and religion, including freedom to change his religion or belief, and freedom (either alone or in community with others, and in public or in private) to manifest and propagate his religion or belief in worship, teaching, practice and observance.

- No person attending any place of education shall be required to receive religious instruction or to take part in or attend any religious ceremony or observance of such instruction, ceremony or observance relates to a religion other than his own, or a religion not approved by his parent or guardian.

- No religious community or denomination shall be prevented from providing religious instruction for pupils of that community or denomination in any place of education maintained wholly by that community or denomination.

- Nothing in this section shall entitle any person to form, take part in the activity or be a member of a secret society.

A careful observation of the phraseology of the above provision would reveal the use of the term "shall" in positively guaranteeing the freedom of thought, conscience and religion upon every person. The word 'shall' when used in statutes more often imports obligation[2]. Hence, as a general rule the word 'shall' imports obligation even as, in some circumstances, the obligation is not intended[3].

With regard to the above provision, borrowing from the Christian theology of the Trinity, the Greek word *perichoresis* (Ott, 1974:70) which is rendered in Latin as *"circumincessio"* and in English as an "interpenetration" may go to the extent in explaining the reason for lumping the concepts together. Thought, conscience and religion may, if each is broadly defined, not exist in isolation from one another. While the thought may appear quite solitary, yet on a deeper consideration, thought may easily graduate into the level of religion and become a matter of conscience. After all one can decide to die for one's opinions emanating, as it were, from one's thinking. In the same way, conscience is like an inner divine instructor, guide, or master directing one on what to do or not to do (antecedent conscience) or a divine corrector or reproaches berating one for having done or not done an act (consequent conscience) (Fagothey, 1985:51-63). Hence, conscience almost always involves a form of thinking that may obey or disobey one's conscience. Understood as an external voice within, conscience is clearly of religious character. Yet in a very similar manner, religion is not unencumbered by thought and conscience. Certainly, religion without conscience is nothing but a misnomer, and religion without thinking is outright fanaticism (Chidili, 1988:82) or fundamentalism. That does not mean that everything about religion is thought for there is always the non-rational aspect of religion. Yet any religion that is irrational would not worth the salt (Tenant, 1927: 306-332) as that would be a contradiction to the very nature of the religious object (the author and epitome of rationality) and whom the religious person seeks to worship in conscience as the Wholly Other (Otto, 1972:25-30). All in all, thought, conscience and religion have to do with one form of belief and the world view which may be religious, economic, political, social, cultural, or otherwise.

In no section of the constitution is any of the key words, namely, thought, conscience, and religion, defined. Not even in its interpretative section 318 is an attempt made in defining the important words in spite of their socio-political and other implications in national life. One is therefore left with the lexical definitions of the terms for any relevant discourse. Oxford Advanced Learners Dictionary (2005:1334) defines 'thought' as "something you think or remember; a person's mind and all the ideas that they have in it when they are thinking or the powers or process of thinking". In the same manner, Chambers Twentieth Century Dictionary (1990: 1557) describes thought as "thinking, mind, consciousness, reasoning, deliberation; that which one thinks a notion, an idea or opinion". Similarly, the same dictionary identifies conscience as "inmost thought, consciousness, moral sense, scrupulousness on the part of your mind that tells you whether your actions are right or wrong" (1990:120). Religion is equally defined by these dictionaries. While the Oxford Dictionary (2005: 1250) sees religion as "the belief in the existence of god or gods and the activities that are connected with the worship of them", Chambers Dictionary (1990: 1357) describes religion as "a belief in, recognition of, or

[2] See the cases of *Katto v. Central Bank of Nigeria* (1991) 9 NWLR (pt. 214) 126 at 147; *Okpala v. Director General of National Museum and Monuments & Ors* (1996) 4 NWLR (pt 444) 587.
[3] See *Burknor- Macleans v. Inlaks* (1980) 8 – 11 SC 1 at 23.

an awakened sense of, a higher unseen controlling power or powers with the emotion and morality connected therewith". It regards religion as rites or system of worship, or any system of such belief or worship".

In spite of the difficulties involved in articulating the nuances in the concepts of religion, thought, and conscience, many an international human rights instrument still associate them together. Thus, Article 18 of the Universal Declaration of Human Rights (UDHR) provides.

> Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private to manifest his religion or belief in teaching, practice, worship and observance.

The UDHR provision has dictated the basic minimum content of international, regional, and constitutional guarantees for this right. Article 1 of the International Covenant on Civil and Political Rights (ICCPR) in a more elaborate form provides:

i. Everyone shall have the right to freedom of thought, conscience and religion. The right shall include freedom to have or adopt a religion or belief of his choice, and freedom either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
ii. No one shall be subject to coercion, which would impair his freedom to have or to adopt a religion or belief of his choice.
iii. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.
iv. The State Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure religious and moral education of their children in conformity with their own convictions.

Similarly, Article 1 of the United Nations Declaration on the Elimination of Discrimination Based on Religion 1981 provides:

i. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have a religion or whatever belief of his choice, and freedom either individually or in community with others and in public or private to manifest his religion or belief in worship, observance, practice and teaching.
ii. No one shall be subject to coercion, which would impair his freedom to have a religion or belief of his choice.
iii. Freedom to manifest one's religion or belief may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order health or morals or the fundamental rights and freedoms of others.

The Charter of Fundamental Rights of the European Union 2000 provides for this freedom in article 10 in a manner similar to that of the UDHR but adds in subsection 2 that "the right to conscientious objection is recognized, in accordance with the national law governing the exercise of this right". Article 12 of the American Convention of Human Rights 1969 also makes provisions for religion in a manner similar to that of the ICCPR quoted above. Interestingly too, article 10 of the Cairo Declaration on Human Rights in Islam in a cautions manner provides thus:

> Islam is the religion of unspoiled nature. It is prohibited to exercise any form of compulsion on man, or to exploit his poverty or ignorance to convert him to another religion or to atheism.

Thus, while acknowledging Islam as the major if not the only religion, the Cairo Declaration prohibits any form of coercion or exploitation based on poverty or ignorance, for purposes of conversion. Articles 26 and 27 of the Arab Charter on Human Rights in a bolder form provides:

> Everyone has a guaranteed right to freedom of belief, thought and opinion. Adherents of every religion have the right to practice their religious observances and to manifest their views through expression, practice or teaching, without what prejudice to the rights of others. No restrictions shall be imposed on the exercise of freedom of belief, thought and opinion except as provided by law.

This no doubt is wider than the Cairo Declaration. Similarly, Article 8 of the African Charter on Human and Peoples' Rights provides that "freedom of conscience, the profession and free practice of religion shall be guaranteed. No one may, subject to law and order, be subjected to measures restricting the exercise of these freedoms". It is noteworthy that the African Charter is now part of Nigerian laws. The provisions of the 1999 constitution is however more explicit and wider in scope than the charter, which must be seen as an addition to the provisions of the constitution.[4] This is because as has been decided by the courts in the case of *Fewehinmi* v. *Abacha*,[5] the provisions of the constitution are not inferior to that of international treaties.

The elements of the fundamental right to freedom of religion, thought and conscience as guaranteed in the Nigerian Constitution can be resolved as including freedom of thought and conscience, freedom of religion, freedom to change one's religion, freedom of irreligion, freedom to manifest and propagate one's religion, freedom from coercion to receive religious instruction or to take part in or attend any religions ceremony or observance, freedom of a religious community or denomination from being prevented from providing religious instruction for its pupils, and no freedom to belong to any secret society, form one or take part in it. The implication of the word "includes" used in the section is that the scope of these rights goes beyond what is stated and it is thus left to the courts to decide on a case to case basis. It may however be necessary to discuss briefly the individual stated rights as lumped together under the constitutional provision as in many other human rights instruments. Since there is not much Nigerian case law on the subject, recourse would be made to those of foreign jurisdictions. We take the aspects of the provision one after the other.

3.1 FREEDOM OF RELIGION

Throughout the history of man, this right has played a pivotal role in the affairs of men, especially during the period when the Roman Catholic Church exercised great influence on the world. In *Nikulnikoff v. Archbishop of Russian Orthodox Greek Catholic Church*[6] the court defined the term religion as meaning:

[4] It was re-enacted into Nigerian law in 1983 in accordance with the provisions of section 12 of the 1979 Constitution and became part of Cap 10 Laws of the Federation 1990. It is now Cap A9 Laws of the Federation of Nigeria 2004. See also section 12 of the 1999 Constitution, which is similar to that of 1979.
[5] (2001) 51 WRN 51.
[6] 142 Misc. 894, 225 NYS. 653, 663 (cited by Black's Law Dictionary 5th ed).

> … Man's relation to Divinity, to reverence, worship, obedience, and submission to [the] mandates and precepts of supernatural or superior beings. In its broadest sense it is a form of belief in the existence of superior beings exercising power over human beings by volition, imposing rules of conduct, with future rewards and punishments. Bond uniting man to God, and virtue whose purpose is to render God worship due to him as [the] source of all beings, and principles of all government.

The freedom to have a religion means that government does not prescribe orthodoxy or prohibit particular religion or belief. In fact, as a result of the highly subjective nature of religious belief, the courts have generally rejected the idea of an inquiry into the truth or falsity of beliefs claimed to be religious, stating that there is no heresy in law[7]. Stating the scope of this right, Ayoola JSC in *Medical and Dental Practitioners Disciplinary Tribunal v. Okonkwo*[8] stated:

> The right to freedom of thought, conscience and religion implies a right not to be prevented, without lawful justification, from choosing the course of one's life, fashioned on what one believes in, and a right not to be coerced into acting contrary to one's religious belief. The limits of these freedoms, as in all cases, are when they impinge on the rights of others or where they put the welfare of society or public health in jeopardy.

In this case, the deceased and her husband refused blood transfusion based on religious belief, as a result of which she eventually died. The court held that the right of an adult patient to refuse transfusion based on religious belief outweighs any duty that may be imposed on the medical practitioner to act to the contrary or discharge the patient after letting her know the consequences of her decision. The position is similar in the United State. Thus in *Re Osborne*[9], the court affirmed the lower court's order refusing to appoint a guardian to give consent for the administration of a blood transfusion to a patient who had refused it on religious grounds, and whom the physician feared would die without blood, upon evidence that the patient had validly and knowingly chosen this course, and there was no compelling state interest to override it. In the English case of *Sideway v. Board of Governor Bethlehem Royal Hospital*,[10] Lord Scarman stated that the courts should not allow medical opinion of what is best for the patient to override the patient's right to decide for himself whether he will submit to the treatment offered him. There is no doubt that if the situation is such as to put the health or interest of others such as a minor at risk, the courts may decide otherwise, that is, in such a way as to override the decision[11]. This is also a form of manifestation of religious belief.

3.2 FREEDOM TO CHANGE RELIGION OR BELIEF

This right is quite essential to the exercise of the right to freedom of thought, conscience and religion. It is recognition of the free will of man as an inherent aspect of his dignity. Thus any legislation, which prohibits the change of belief, would be a violation of this right. It entails the right to retain, choose or reject one's belief and accept another (Sullivan, 1988:487-488). This right is however not generally recognized in the Islamic world because 'according to sharia law any Muslim who repudiates his faith in Islam, directly or indirectly is

[7] *Church of the New Faith v. Commissioner of Pay Roll Tax (*1983) 57 ALJR 785.
[8] (2001) 10 WRN 1 SC at 41.
[9] (1972) Dist Col A2d 372.App. 294
[10] (1985) 1 ac 871.
[11] As per Ayoola JSC in *Medical Practitioners Disciplinary Tribunal v. Okonkwo*, supra., at 41.

guilty of a capital offence punishable by death' (An'Na'im, 1990). This obviously offends against this constitutional right. But the question is, can it be claimed as an integral manifestation of the basic tenets of the Islamic religion and thus worthy of protection? Such a conclusion would however mean the coercive imposition of a particular religious belief without the option of change, which would be contrary to the right to human dignity, personhood and self-development. This is surely obtainable in Nigeria today through several Islamic practices which we shall discuss below despite the fact that none of the states that recently adopted sharia criminal law expressly created apostasy as an offence.

3.3 FREEDOM TO MANIFEST AND PROPAGATE

Another aspect of this right, freedom to "manifest and propagate" religion or belief is one, which has generated a lot of discourse in the courts. According to the German court in *Rumpel Kammer case*.[12]

> In determining what is to be regarded as the free exercise of religion, we must first consider the self image of the relevant religion or ideological community. Indeed the state which strives to remain neutral in religious matters must interpret the basic concepts in terms of neutral generally applicable view points not on the basis of viewpoints associated with a particular confession or creed. However, in a pluralistic society where the legislative order considers the religion or ideological self image of those performing rituals associated with a particular belief, the state would violate the independence of ideological associations and their internal freedom to organize accorded by the Constitution if it did not consider the way these associations see themselves when interpreting religious activity resulting from a specific confession or creed.

In other words, the test must be subjective when determining the manifestation or propagation of a particular religion or belief. Thus in *Wisconsin v. Yoder*[13] children whose Amish parents objected, for religious reasons, to the education of their children in state schools beyond the eighth grade were held by the Supreme Court to have a valid exemption from state compulsory education. The court held that a high school education was not so vital to a child's well being that the state could require it over parental objective based on religion. In *Ojeigbu Ubani v. Federal Electoral Commission*[14] the appellants claimed that by fixing an election on Saturday, the Sabbath of the Seventh Day Adventists, the freedom of religion of some voters belonging to the faith was violated. The Supreme Court rejected this contention especially because it found that even if the entire Adventists in the constituency voted, the results recorded would not have been different.

The question is, would the decision have been different if, for example, the applicants were residing in an area mostly populated by members of the sect? In such a situation, the courts would have to decide on the degree of neutrality expected of the state in the exercise of its legislative and executive powers, in matters of religion especially when it involves the declaration of particular days held as work free days. In the Indian case of *Hami Quraishi v. The State*,[15] the question was whether the prohibition of cow slaughter affected the religious rights of Mohammedans, who claimed that the Koran enjoined cow slaughtering on certain

[12] B Verf G.E. 236 (1968).
[13] 406 U.S 205 (1972).
[14] (1960) 4 ENLR 72 CA.
[15] (1950) SCR 1045.

holidays. The Supreme Court held that they did not show enough evidence to prove this fact. This right also prohibits any form of coercion in relation to performance of custom or practices which are contrary to a person's religion or belief, as was stated in the Nigerian case of *Jenebu v. Ononje*.[16]

In its General Comments on article 18 of the International Covenant on Civil and Political Rights,[17] the United Nations Human Rights Commission described the scope of manifestation of religion or belief in practice, worship, teaching and observance as including:

> … not only ceremonial acts but also such customs as the observance of dietary rights, the wearing of distinctive clothing, head coverings, participation in rituals associated with certain stages of life, and the use of particular language customarily spoken by the group.

Does this then mean that a person can insist on the wearing or not wearing of particular clothing, for example, to the officer, based on religious beliefs, especially considering the provisions of the United Nation Declaration on Elimination of all Forms of Intolerance and Discrimination based on Religion or Belief? The German constitutional court has held in a case between Afghan-born Fereshta and City of Stuttgart[18] that a Muslim school teacher can wear a traditional head scarf in school and that this did not violate the neutrality principle with regards to the state. This decision within the context of a multi-ethnic or multi-religious state is however is undesirable, and it is better for the state to steer clear of such practices within its sphere of influence.

Emphasizing various aspects of the right to manifest and propagate ones religion or belief, article 7 of the United Nations Declaration on the Elimination or all Forms of Intolerance and Discrimination based on Religion or Belief provides that this right includes freedom:

(a) To worship or assemble in connection with a religion or belief, and to establish and maintain places for these purposes;
(b) To establish and maintain appropriate charitable or humanitarian institutions;
(c) To make, acquire and use to an adequate extent the necessary articles and materials related to the rites or customs of a religion or belief;
(d) To write issue and disseminate relevant publications in these areas;
(e) To teach a religion or belief in places suitable for these purposes;
(f) To solicit and receive voluntary financial and other contributions from individuals and institutions;
(g) To train appoint, elect or designate by succession appropriate leaders called for by the requirements and standards of any religion or belief.
(h) To observe days of rest and celebrate holidays and ceremonies in accordance with the precepts of ones religion or belief;
(i) To establish and maintain communications with the individuals and communities in matters of religion and belief at the national and international levels.

The right to manifest religion would also cover issues such as dressing, mode of worship, and so on as long as it is not coercive and does not affect the rights of others. The right to propagate here includes the right to proselytize, which is an integral aspect of the Christian religion and especially the Jehovah's Witness sect. in the case of *Kokkinakis v. Greece*[19] the applicant a Jehovah's Witness was convicted for criminal proselytisation and sentenced to a term of imprisonment. The trial court in Greece stated that he attempted to proselytize and directly or indirectly intrude on the religious beliefs of Orthodox Christians, "with the intention

[16] (1983) 4NCLR 492.
[17] C.C. PR/C/21/Rev: 1/Add 4 adopted July 20 1993, reprinted in HRIJ 15. (1994).
[18] Reported in *The Guardian*, October 4, 2003.
[19] European Court on Human Rights, 1993 Ser. A. No. 260 A, 17 EHRR 397.

of undermining those beliefs, by taking advantage of their inexperience…low intellect and naivety". The conviction was upheld on appeal upon which he applied to the European commission on human rights, which referred the case to the European court. The majority held, *inter alia*, that the conviction was contrary to the provisions of the European convention on human rights in relation to the right. The court stated further that non criminal proselytisation remains the main expression of freedom of religion, and that attempt to make converts is not itself an attack on the freedom and belief of others when not coercive. As was noted by the courts:

> … a distinction has to be made between Christian witness and improper proselytism. The former corresponds to true evangelism, which a report drawn up in 1956 under the auspices of the World Council of Churches describes as an essential mission and responsibility of every Christian and every Church. The latter represents a corruption or deformation of it. It may, according to the same report, take the form of activities offering material or social advantages with a view to gaining new members for a Church or exerting improper pressure on people in distress or in need; it may even entail the use of violence or brain washing; more generally, it is not compatible with respect for the freedom of thought, conscience and religion of others.

Thus the right to propagate here includes proper proselytisation, without coercion or inducement. Every rule of law to the contrary in any part of the country is therefore unconstitutional.

3.4 FREEDOM OF THOUGHT AND CONSCIENCE (CONSCIENTIOUS OBJECTION)

The freedom of thought rights include not only freedom of religion but also freedom to profess atheism. It equally includes right to conscientious objection, which is expressly provided for in article 10 of the European Charter of Fundamental Rights 2000, and by the United States Congress under the Selective Service Act[20]. This right can be read into the right to freedom of thought and conscience under section 38 of the 1999 constitution, because section 34(2)(b) recognizes alternative labour given to persons who object to compulsory military service on grounds of conscientious objection to military service. This limitation of permitted areas of objection to military service may however be discriminatory and unreasonable and the objection should be recognized in relation to other heads.

The right to conscientious objection came to the fore in the United States during the course of the Vietnam War, and was used mainly in relation to military service. In *Welsh v. United States*[21], the Supreme Court held that objection to participation in the armed forces based on non theistic, philosophical, sociological and historical grounds is legitimate here, the central consideration being whether such beliefs plays the role of, and functions as religion in the life of he objector. In *United State v. Seeger*,[22] the court stated that "a sincere and meaningful belief which occupies in the life of its possessor a place paralleled to that filled by God of those admittedly qualifying for exemption comes within the statutory definition". The courts have also held that this objection would be granted only to those who objected to all wars.[23] In *Sherbert v. Verner*,[24] the United States Supreme Court applied the right to

[20] 59 USCA S 356.
[21] 395 U.S 333 (1970)
[22] 380 U.S. 163 (1965) 185.
[23] See *Gillette v. United States and Neger v. Larsen 401 U.S. 437 (1971).*

conscientious objection to a case where an applicant who belonged to the Seventh Day Adventist refused employment which would require her to work on Saturday because of her religious belief. As a result, she did not qualify for unemployment benefit under a South Carolina statute, which denied such to those who refuse, without good cause, to accept employment. The court held that the statute imposed an indirect burden on her right to free exercise of her religion in that it constituted a compulsion upon her to forgo it. Also, there was no compelling state interest.

As earlier stated this right to conscientious objection could be applied to other issues outside conscription to military service. This the United Nations Human Rights Committee held in relation to a case from Zambia whereby a student was required to sing the national anthem and salute the flag as a condition for attending state schools despite conscientious objection, that this was unreasonable in the light of articles 18 and 24 of the international covenant on civil and political rights 1968 which guaranteed freedom of religion and its manifestation.[25] Amnesty International defining conscientious objection stated that such a person is someone:

> … liable to conscription for military service (even where there is no military service) who, for reasons of conscience or profound conviction arising from religious, ethical, moral, humanitarian, philosophical, political or similar motives, refuses to perform armed service or any other direct participation in wars of armed conflict.

This definition is limited to cases of military conscription but recognizes objection on basis other than religious. In 1987, the United Nations Human Rights Committee adopted a resolution urging universal recognition of the right of conscientious objection, which was again reaffirmed in 1998. Amnesty International has campaigned for many years for the recognition by governments of the right to conscientious objection to military service and for the protection of that right in national legislation. The right to conscientious objection is supported by many intergovernmental bodies concerned with human rights at both the international and European level, from which can be inferred that the right to conscientious objection extends not only to people who base their objection on profound convictions arising from religious beliefs but also to people who base their objection on profound conviction arising from ethical, moral, humanitarian, philosophical or similar motives.

In 1987, the United Nations Commission on Human Rights adopted Resolution 1987/46, which explicitly defines conscientious objection to military services as "a legitimate exercise of freedom of thought, conscience and religion". This definition has been reaffirmed in subsequent resolutions adopted by the commission in 1989, 1993, and 1995. The commission's 1995 Resolution (1995/83) appeals to all UN member states "…if they have not already done so, to enact legislation and to take measures aimed at exemption from military service on the basis of a genuinely held conscientious objection to armed service".[26]

There is no gainsaying that in a multi-religious country like Nigeria, the need to respect the respective elements the right to freedom of religion, thought and conscience cannot be over-emphasized. This is perhaps why the government machinery, organization, or institution is constitutionally made to be secular (Malemi, 2006:231). Hence, the constitution prohibits in its section 10 any government from adopting any religion as a state religion.

[24] 394 US 398.

[25] Concluding observation of the Human Rights Committee on Zambia 03/04 196 CCPRC 79/Add 62 para. 18.

[26] http//web.amnesty.org/library/index/ENGEUR520012000?open&of=ENG2U6 visted 20th March 2007.

4. ISLAMIC LAW AND HUMAN RIGHTS OF NON-MUSLIMS

The recent adoption of widescale sharia in Northern Nigeria has become an important index of human rights issues. No doubt, Sharia has affected negatively the economic life of the relevant states and that of the entire nation. For one thing, Sharia is not in sympathy with the modern economic revolution modeled, as it were, on capitalism and profit motive. The banking system is directly affected as its inner logic of interest accumulation is outlawed as usury by strict Sharia. Moreover, dealers in those commodities like alcohol and certain meats, for instance, the trade on which is criminalized by Sharia would be forced to relocate with the attendant economic hazards. This Sharia practice triggers off a debate on whether the value added tax (VAT) tagged on those commodities sold in non-Sharia states will ever be used on the development of the Sharia-implementing states. Will profits from alcohol and other beverages produced in other areas be used for the development of Zamfara, Kano, Sokoto or Katsina State? Certainly, the economic life of the Sharia states and its consequences for the nation as a whole will leave much to be desired. No wonder Sharia Islam has become the opium of the *"almajiris"* (Oraegbunam, 2006) who are subjected to perpetual poverty. Certainly, the application of Sharia criminal justice may not create the enabling environment that would attract foreign investment needed today for development in this era of globalization. The result is that the economic life of the Sharia states and its consequences for the nation would leave much to be desired.

It may be germane to say a word or two on the relation between Sharia law and educational development and rights in Nigeria. The Sharia Islam has indeed made some contributions to both formal and informal education. In Nigeria, the establishment of *Koranic* schools for the learning of Arabic language and Islamic studies is testimony to this fact. Too, other forms of school education structures have been put in place through the efforts of government. Nevertheless, some aspects of sharia regime need be reformed so as to maximize the profits of modern educational facilities.

The Islamic negative attitude to co-education is a case in point. In spite of what might be perceived as providing an occasion for sexual immorality among young boys and girls, the emotional and psychological development of the teenagers that is mostly derived from boy-girl association is thrown overboard by anti-co-education policy. We suggest that this stand need be re-examined especially as mixed-gender education is inevitable in tertiary institutions. Besides, the anti-co-education policy seems to infringe on the students' right to association that is well enshrined in section 40 of the 1999 Constitution. Equally needed to be checked is the anti-western education pathos that dots the Islamic attitude in Nigeria today. This is surely the gamut of the recent *Boko Haram* saga in which many lives and property were destroyed. Needless to say is that western education civilization constitutes to a great extent one of the indices of the development of the North. Establishment of modern Medicare, university education, electricity, good road network, pipe-borne water system, and mechanized agriculture are all fruits of western education. It therefore follows that anti-intellectualist tendencies inherent in Islam generally should be put in proper perspective.

The full application of sharia tramples on human rights and dignity. One of the main functions of religion is that it enhances human development. This is made manifest, for instance, in its importance in controlling stress. By that, it becomes a quality response to human problems and tries to alleviate them either physically through charity work, for instance, or psycho-spiritually through, for instance, its doctrines on the afterlife. But this is not clearly the case with the practice of Islam and its Sharia in Nigeria. As we have seen above, full application of Sharia derogates from some fundamental human rights and freedoms which include right to human dignity and befitting punishment, right to freedom of religion or irreligion, right to freedom from discrimination, and so on. More so, a system whereby Sharia

does not smile at some kinds of association between a man and a woman like in studying in one school, boarding one vehicle, or holding each other's hand, surely violates basic human rights of association and assembly (Constitution, 1999: section 40). Furthermore, a situation which ignites a mass exodus of non-Muslims from Sharia states due to the failure of Islamic ethos to accommodate them already tramples on their fundamental right to freedom of movement and residence in any part of Nigeria (Constitution, 1999: s. 41). But it is on the question of political participation that Sharia secretes its most lethal poison on Nigerian democratic state. Sharia enjoins every Muslim community not to submit to the rule of a non-Muslim (Koran 2:143). Many an international Conferences of the Islamic *Ummah* had always urged Muslims "to ensure the appointment of only Muslims into the strategic national and international political posts" (Islam in Africa Conference, 1989). It could also be reminisced that in 1997, Sheikh Abubakar Gumi, a renowned Muslim scholar said: "as a Muslim, you cannot accept a non-Muslim to be your leader" (Quality, October 1987). By virtue of this, Sharia certainly cultivates the attitude of socio-political stratification. Hence, full application of Sharia law in Nigeria falls short of promoting human dignity and respect for some fundamental rights which belong to man by virtue of his being human.

5. SHARIA PRAXIS AND FREEDOM OF RELIGION

There is no gainsaying that Islam professes a strong belief in the right to religious freedom. Replete are instances from both the primary and secondary sources of sharia which provide for the human rights to religious freedom. The Koran at Sura 2. 256 holds that "there is no compulsion in religion" and in Sura 109: 1-6 it stated: "say. O you who reject faith do not worship what you worship, nor do you worship what I worship….To you be your religion and to me the mine".

The Universal Islamic Declaration of Human Rights 1981 provides at its article 13 that "every person has the right to freedom of conscience and worship in accordance with his religious beliefs". In addition to these provisions, the Cairo Declaration of Human Rights in Islam, 1990 prohibits "the exercise of any form of compulsion on man or exploitation of his poverty or ignorance in order to convert him to another religion or to atheism". In fact Farooq (2007: n. p) claims that "freedom of faith is essential to Islam". The implication is that theoretically Islam is not bereft of the idea of religious freedom. Yet there are indications that the reverse can also paradoxically be true. Hence, according to Machowski (2010: n. p), "freedom of religion poses one of the thorniest issues in the relationship of Islam with human rights".

First and foremost, the Koranic guarantee of religious freedom as noted above is on the other hand withdrawn by the Islamic attitude to apostasy (*ridaa*) which offence is often visited with the death penalty. Oxford Advanced Learners Dictionary of current English (1994. 35) defines apostasy as "giving up one's beliefs or faith" or turning away from one's religion". Shafaat (2006: n. p) has adumbrated a number of acts that can amount to apostasy in Islam. According to him, a person commits apostasy (*irtidad)* or becomes an apostate (*murtadd*) if he describes himself a Muslim and then at a later time takes one of the following actions in a public way, namely, converting to another religion, rejecting a part of the Koran after recognizing it to be a part of holding an interpretation of some Koranic verses or hadith contrary to that of the whole Ummah. In relation to this third group one is declared an apostate by a decision of the Ummah. Shafaat (2006: n.p) distinguishes an apostate from a hypocrite. While a hypocrite is one who is outwardly willing to say or do what a Muslim says or does but in his heart has decided not to believe in Islam, an apostate in contrast is a person who openly and knowingly does or says something that makes him a non-Muslim after he had called himself a Muslim (Shafaat, 2006).

Aside the denial of religious freedom which matter shall in details be considered *anon*, one of the most burning issues in relation to Islamic attitude to apostasy is the capital punishment attached to it. In this regard, there is a polarity of views among Islamic scholars. There are some who reject the death penalty for apostasy out of a desire to "improve" the image of Islam among non-Muslims. Others, on the other hand insist on the death penalty rejection of which they think will encourage apostasy. Yet some others who hold on to the death penalty are influenced by a tendency to stick to traditional views no matter what (Shafaat, 2006). However, Shafaat (2006: n. p.) notes that "at some point the death penalty for apostasy was widely accepted among Muslims". No wonder Farooq (2007: n. p) observes that "undeniably the traditional position of Muslim scholars and jurists has been that apostasy is punishable by death". Quoting Maududi whose ardent argument in favour of capital punishment for apostasy is frequently referred, Farooq (2007: n. p) notes:

> To copy the consecutive writings of all the lawyers from the first to the fourteenth century A. H. would make our discussion very long. Yet we cannot avoid mentioning that however much the four schools of law may differ among themselves regarding the various aspects of this problem, in any case all four schools without doubt agree on the point that the punishment of the apostate is execution.

In the same vein, al – Qaradawi asserts that "the duty of the Muslim community, in order to preserve its identity, is to combat apostasy in all its forms and where from it comes, giving it no chance to pervade in the Muslim world". He holds that Muslim jurists are unanimous that apostasy being a criminal act is punishable (Farooq, 2007).

Yet, diligent study of the primary sources of Islamic law neither explicitly reveals that apostasy should be punished in this world nor does it stipulate death penalty for it. Arlandson (2010: n. p) observes that "automatic death for apostasy is not as prominent a theme in the Quran as one would expect". While granting that some verses such as 2: 217; 3: 72, 86-87, 90; 4: 137; 5: 54: 16: 106; 33: 14; 47: 25 – 27; 73: 11 and 74: 11 condemn apostasy, Arlandson (2010: n. p) notes that "its punishment is reserved for divine judgement in the last day or its punishment is not clear down here on earth". He further discovers that the historical context of Sura 5: 33 which commands mutilation and crucifixion for striving against Allah and Muhammad was not just for turning away from Islam by some Arab tribesmen. Arlandson (2010: n. p) observes that at each occasion, the tribesmen also mundered a shepherd and stole some lives flock. It is in relation to this context that some hadith reports and scholars justify the execution of apostates. Hence, Farooq (2007: n. p) maintains that there is no worldly punishment solely for apostasy (that is, changing one's religion) mentioned in the Quran".

Similarly, some scholars who favour the death penalty for apostasy do not fail to associate the offence with treason and treasonable acts which they claim often go with it. Hence, Farooq (2007: n. p) maintains that throughout history, the issue of apostasy has been clouded by mixing it with that of treason. Tellenbach (2008: 117) makes a report of this thought-form:

> According to the prevailing opinion in Islam, apostasy is a crime that merits death. There are attempts to interpret it so that only those deserve death who actually fight against an Islamic state, committing high treason in a manner of speaking, while those who merely change their faith do not as this merely concerns their private lives (also Machowski, 2010: n.p).

Zubair (2003: 52) agrees with this view when he claims that "apostasy is very much related to a conspiracy against Islamic community and hypocrisy than the issue of belief". He holds that Islamic legal system sees apostasy as a political conspiracy whose real goal was to destroy the Muslim community". Therefore, it does appear that the concept of apostasy is quite extended in Islam. Naeem (2008: 76) reports that it is claimed in Islam that the effect of apostasy on Muslims "is not restricted to explicit renunciations of the faith or religious conversions". Hence, he observes that "any Muslim may submit an application describing certain actions or attitudes that may then be interpreted by the authorities in general and the judiciary in particular as implying apostasy". No wonder Arlandson (2010: n. p) notes twenty different acts which entail leaving Islam. These acts traverse certain thoughts, actions and words against Allah, the Prophet, Islam, the Koran and Sharia. The effect is that what may constitute apostasy in Islam is by no means definite. In the same vein, International Humanist and Ethical Union (IHEU) (2003: n. p) holds that the Islamic position on apostasy has been described as "total disbelief that any sane person could possibly (sic) have a genuine reason for leaving 'the most perfect religion'. He or she must therefore be acting in bad faith". This implies that the Islamic notion of apostasy is based on religious triumphalism in which Islam is seen as the one and the only true religion. No surprise then that any turning away from Islam is interpreted as not only disembarking from Islam but also habouring an intention to fight against Islam and its tenets. So that "even when death penalty is not applied, those accused of apostasy can be subject to most violent treatment" (IHEU, 2003: n. p).

So much for the theory of apostasy in Islam! It may now be *apropos* to discuss this issue in relation to Nigeria. Surely, none of the Sharia Penal Codes of any of the relevant states in Nigeria criminalizes apostasy (Ahmed, 2003: 169). This legislative omission is perhaps due to the constitutional guarantee of religious freedom in Nigeria. Section 38 (1) of the 1999 constitution states that "every person shall be entitled to freedom of thought, conscience and religion, including freedom to change his religion or belief…" Hence, to explicitly create an offence of apostasy in the Sharia Penal Codes would be in direct collision with the clear constitutional provision. Yet, that does not mean that apostasy enjoys acceptability in Nigerian Islam. Implicitly, apostasy is still punished extra-judicially. First and foremost, it must be noted that the version of Islamic Jurisprudence, namely, the Maliki School, prevalent in Nigeria is a strict type. Hence, Ibn Malik, the founder of the school, lays the foundation that execution of apostates is legal. He relates that the Messenger of Allah said, "If someone changes his religion, then strike off his head" (Arlandson, 2010; n. p). This is also recorded in Bukhari: V4 B52 N260 wherein the Prophet Muhammad is cited to have said: "if a Muslim discards his religion, kill him" (Wikipedia, the free encyclopedia, 2009). Therefore, it is unlikely that Nigerian Islam would fold its hands and watch its adherents leave the fold. Secondly, it is doubtful that the omnibus provision enshrined in paragraph E (ii) of the Introduction to the Sharia Penal Code law 2000 of Zamfara state does not habour within itself the extra-codified sharia causes and offences such as apostasy. The paragraph states:

> Except as aforesaid, the provisions of this law shall not affect any right of action which any person would have had against another, if this law had not been passed: nor shall the omission from the Shariah Penal Code of any Penal provision in respect of any act or omission which before the time of the coming into operation of the Penal Code constituted any actionable wrong affect any right of action in respect thereof (emphasis mine).

This provision can thus be construed to mean that the Shariah Penal Code is not exhaustive with regard to the offences that can be prosecuted in Zamfara State and other sharia enclaves that copied *ipsissima verba* the Zamfara Code. One obvious implication of the extra-

territorial effect of the above provision is that offences such as apostasy though not created in the relevant codes, may be prosecuted by whatever means. Thus, the bid to do so may not be unconnected with the incessant religious crimes especially in the northern part of Nigeria, and in which mainly non-Muslims and their property are on the receiving end. For instance, in September 2004, a female Christian student at Ahmadu Bello University Zaria was accused of blasphemy which led to lethal classes between Muslims and Christian students. In 2002, two men were brought to trial in Zamfara State for converting from Islam to Christianity[27]

Other instances where the Islamic law on apostasy is indirectly enforced include the fact that public school students in many parts of northern Nigeria are subjected to mandatory Islamic religious instructions. This is carefully ensured by the executive refusal to employ teachers of Christian religious knowledge in many northern schools. As if these are not enough, there are reports by Christians in Zamfara State that the State government restricted the distribution of Christian religious literature (Harnischfeger, 2008). Furthermore, although it is claimed that sharia laws do not apply to non-Muslims, yet some non-Muslims have been affected by the implications of the social provisions of the laws. Separation of sexes on public transportation and institutions, the enforcement of the *hijab* rules (dress code), religious discrimination in matters of employment and admissions, the unnecessary harassment by state-sanctioned private and local vigilante sharia enforcement groups known as *Hisbah* who were vested with full powers of arrest and prosecution are some other evidences to the fact that one must be punished for not adhering to Islam[28].

Surprisingly however, the above measures are taken by Muslims in Nigeria who claim that by doing so, they are exercising their right to religious freedom. Arguing that Sharia is a total package guiding the life of a Muslim from cradle to grave, adherents hold that any attempt to deny them the enforcement of any of the above practices and more would tantamount to denying them their right to religious freedom. Ahmad (2002: 1) is a protagonist of this view:

> Few non-Muslims realize that shariah is not a matter of choice for believing Muslims. Islam is a total package; and a community cannot be Muslim by choosing between the three aspects of Islam: a monotheistic faith, practical rituals (prayer, fasting, charity, etc), and law or shariah (marriage, inheritance, contract, crime, etc). By accepting the Islamic faith, one is obliged to submit and let all the three categories apply to his entire life. Salvation, according to Islam, depends on the three jointly.

Yet this Islamic conviction and attitude does not augur well with both the constitutional guarantee of religious freedom that includes the right to change one's religion or to be irreligious, on the one hand, and the constitutional claw back or restriction to exercise of rights including right to exercise religious freedom, on the other hand. Hence, section 45 (1) of the Constitution of the Federal Republic of Nigeria 1999 states thus: "Nothing in section 37, 38, 39, 40 and 41 of this constitution shall invalidate any law that is reasonably justifiable in a democratic society in the interest of defence, public safety, public order, public morality or public health; an/or for the purpose of protecting the rights and freedom of other persons".

Therefore, according to this provision, the Muslims' enforcement of their so-called fundamental right to religious freedom which is claimed as founded on section 38 would readily be curtailed by the rights and freedoms of non-Muslims. Hence, it is a cardinal principle of common sense that one's exercise of right ends at the point another's begins. One must therefore endeavour not to infringe on the rights of another in the bid to enforce one's own. It goes without saying that the right to religious freedom is quite basic. Khan (2007: n. p) holds

[27] http://www.ncbuy.com/reference/ country/humanrights.html? Code = ni & sec – 2c.
[28] (http:www.ncbuy.com/referenc/country/humanright-html?codeni&seem2c)

that "freedom of faith and religion is meaningless without the freedom to charge one's faith". Thus, it is a pristine principle of religious freedom that it does not mean merely the freedom to have a faith but also the freedom to change one's religion or belief (International Humanist and Ethical Union (IHEU), 2003). While it is correct to observe with Shafaat (2006: n. p) that "a person cannot be compelled to enter Islam", this paper totally disagrees with him in maintaining that "a person who is a Muslim is subject to laws of Islam that include those that require death for leaving Islam" or any punishment whatsoever on account of that. This paper is equally not in sympathy with Ahmad's (2006: n. p) perception of freedom of worship according to which "once one accepts Islam or decides to become a Muslim, one is subject to all the rules prescribed by the religion" including those governing apostasy. It is ever valid to say that belief in any religion should be voluntary and a private matter. One may therefore ask the question of how strong a religion is if it has to force its adherents to stay under penalty of death (IHEU, 2003) or under any penalty for that matter. Again, the mitigated Islamic approach of "respecting' other monotheistic faith, Judaism and Christianity, and recognizing them as "protected minorities" that are not equal with Islam[29] is not even acceptable. Such a view that regards other religions as inferior is no doubt antithetical to religious pluralism which undergirds the principle of religious freedom.

To the best of the writer's knowledge, the phrase "freedom (either alone or in community with others) to manifest his religious belief in worship, practice and observance" in the above referred constitutional provision had not been a subject of many judicial interpretations in Nigeria. Recourse to foreign jurisdiction may be useful. The interpretation of the relevant provision of the European Convention for the Protection of Human Rights and Fundamental Freedoms vis-a-vis section 30 of the Education Act 1944 was the fulcrum of the case of *Ahmad v. Inner London Education Authority (ILEA)*[30] before the English Court of Appeal. In that case, Mr. Ahmad (the appellant) had been issued with a letter by respondent (his employer) giving him ultimatum to either change his employment status from full-time to part-time or resign his appointment. The implication of change of status is less pay and less valuable pension right. The letter was issued because the respondent could no longer cope with the disruption of lessons caused by the appellant's need to spend 45 minutes attending Friday *Juma'at* service every week outside the school. The appellant opted for resignation and brought an action for unfair dismissal on ground of religious discrimination. The Education Act 1944 also has provisions which carry the above freedom of religion provisions of the European Convention for the Protection of Human Right and Fundamental Freedom further. The Act prohibits, among other things, requiring a teacher to receive less pay or depriving him from promotion or other benefit of his religious opinion or for attending or refusing to attend religious worship. Also article 9 of the ILEA staff code allows a teacher who has objected to working on a particular day of the term, being 'a day of special obligation generally recognized in his religion as days when no work may be done', to go on leave with pay.

In *Ahmed v. Inner London Education Authority*[31], Lord Denning M.R held that there was nothing in article 9 of the European Convention on Human Rights which guarantees the right to religion that gives the applicant any right to manifest his religion on Friday afternoon in derogation of his contract of employment and not on full pay. Lord Denning position on the matter can however be understood based on the fact that England is a theocratic state. The majority of the court dismissed the appeal holding that the Authority was not unreasonable in issuing the letter and that it does not amount to unfair dismissal. Some of the *rationes decidendi* were that the right has to be interpreted as to be consistent with the appellant's duties under his contract of employment as it is being interpreted by the majority of Muslim teachers who do not take time off their prayers. Also, that giving the appellant, who is a member of a minority group

[29] http://www.nytimes.com/2005/09/16/opinion/16iht-edtibi.html?_r=I
[30] (1978) I Q. B. 38.
[31] (1978) QB 36.

– Islam, such privilege would amount to giving him preferential treatment over the great majority of the people (*Ahmad v. Inner London Education Authority*[32]). With all respect to the Lord Justices, introduction of the matter of majority and minority into an entitlement to fundamental human right is absurd; it is like saying that the minority are less human. In fact, we are not persuaded by this judicial reasoning as the issue of majority or minority should not attend to the question of human rights. Yet, we may want to ask whether the Muslim teacher did not have the real option of questioning the full time requirement of the job at the time of entering the contract of employment, Besides, the students may want not to be denied the right to be taught by their teacher at the appropriate time, just as the employer is entitled to demand the specific performance side of the contract from the employee.

However, Lord Scarman in a dissenting opinion recognized the fact that such rights must now be construed "in a multi-racial society which has accepted international obligations and enacted status designed to eliminate discrimination on grounds of race, religion, colour or sex". In other words, such manifestations of religion should be accommodated though not necessarily on full pay, especially in relation to a private employer. The opinion of Scarman L.J. allowed the appeal holding that the 1944 Education Act did not have the Muslims in contemplation because Islam was not a substantial religious grouping then. Yet, that does not remove the intention the Act was enacted to serve, that is, forbidding discrimination on the ground of religion. He held further that the statute should be interpreted in accordance with the societal reality which has recognized Islam as a substantial religious group. And that if the Act could take care of Sabbath and Sunday as days of special religious observance, apart from Good Friday and Easter Monday, it is implausible to interpret taking 45 minutes on Friday to go to mosque as constituting a breach of contract of employment[33]. In our considered view however, in spite of the strong persuasion presented by this dissenting opinion of the learned law Lord Scarman, the term of the contract of the appellant cannot be derogated from under the circumstances. This is similar to the decision in the *Hamilton's Case*[34] where the U.S Supreme Court held that the two Methodist students who refused to take courses in military science at a State University cannot claim freedom of religion and conscience because they were not compelled to go to the university.

In Nigeria, the very recent case of *Bashirat Saliu & 2 Ors v The Provost, Kwara State College of Education Ilorin & 2 Ors*[35] is also relevant to the interpretation of section 38 of the 1999 Constitution on the right to freedom of thought, conscience and religion. In that case, the applicants who are female Muslim students of the respondent institution filed an application for the enforcement of their fundamental human right to freedom of religion. The ground of their application is an objection they had to Article J of the Dress Code of the institution which prohibits the use of "dress/apparels that cover the entire face of an individual, thereby making the immediate identity of the person inside impossible" (Kwara State College of Education Ilorin, 28 September, 2005). Relying on the applicants' averment that their entire life is purely guided by the principles of Islamic tenets which regulate their dress and the literal dictionary meaning of the words 'manifest, observance and practice' as contained in section 38 of the Constitution, the court held that the provisions of the above article J are unconstitutional, null and void and of no effect whatsoever.

With respect, the above ruling of the Kwara State High Court of Justice is hardly the correct position of the law in Nigeria. The right to religious freedom generally is not an absolute or non-derogable right. It is a clear provision of section 45 of the 1999 Constitution that section 38 which provides for the right in question is among those provisions which can be detracted

[32](1978) I Q. B. 38, per Lord Denning MR., at pp. 40-41 and Orr LJ. at p. 45; Denning, 1982:283-284.
[33] Scarman L.J. in *Ahmad v. Inner London Education Authority (ILEA)* [(1978) I Q. B. 47, 48, 51.
[34] 231 US 112, 32 Sct 765 (1982).
[35]Unreported Suit No. KWS/28M/2006 of Kwara State High Court of Justice, Ilorin, ruling delivered on 8 May, 2006, p. 11.

from in the interest of public order. Use of apparels or dresses that can hide the identity of the user can surely disrupt public order especially in academic institutions like the Kwara State College of Education and other tertiary institutions in Nigeria where students are supposed to be identified at every moment probably for the purpose of disciplinary actions as a result of misbehaviours that may range from cultism, examination misconduct, sexual harassment, and the like.

6. CONCLUSION

So much has been debated on the constitutional justification for the legal enforcement of full Islamic legal code in Nigeria. On the one hand, proponents of the Sharia claim that the 1999 Constitution provides the legal foundation for its introduction. They aver that such inference complies with the wordings of Section 38 (1) & Section 275 (1) regarding the right and freedom to "manifest and propagate one's religious beliefs, teachings, practices, and observances." It is further argued that these sections of the constitution grant any state of the federation exclusive discretion to establish a Sharia Court of Appeal. Most of their critics strongly disagree with the positions. Section 6(5) (f) & (g) (replicated in section 260, 275, 262, and 277) of the Constitution states in clear and unambiguous terms the jurisdiction of the Sharia Court of Appeal, which by implication applies to all state Sharia Courts. A close study of Section 277(2) (a) – (e) reveals that Sharia courts shall be competent to decide only questions of Islamic personal law which cases were extensively enumerated in paragraphs (a) through (e) to include, among other things, marriage, guardianship of infants and persons of unsound mind, founding, *wakf*, gift, will, and succession. However, Section 277 (2) (e) requires that for that provision to apply, the parties must be Muslims and they must have requested the court at first instance to determine their case in accordance with Islamic personal law. The inference to be drawn from this is that the ultimate question of jurisdiction and application rests with the parties who must first determine whether or not they intend their trial to be by Sharia. Interestingly, nothing in the above section or the accompanying subsections suggests that members of other faiths are mandated to appear before a Sharia court (the only exception is when such a party, in spite of his religious beliefs, voluntarily opts to be tried under Sharia law). Nor is a Muslim so obligated if he or she indicated to the contrary.

Additionally, it has been argued that Section 38 (1) which provides for freedom of thought, conscience, and religion clearly justifies the enactment of the Sharia Penal Code. According to those supporting this claim, since the constitution gives some latitude to an individual to freely practice his religion, it is right for the same individual to elect to be guided by the Sharia code because true Islamic virtues can only be attained through the Sharia. This reasoning has led them to criticize neutrality or secularity provision of section 10 which they say contradicts section 38 (1). The present researcher humbly disagrees with this view. Section 10 which prohibits the establishment of state religion is designed to prevent the imposition of one religion or religious belief on the adherents of other religions. A breach of this section would necessarily deny the spirit and intent of Section 38 (1). Additionally, Section 38 (1) seeks to promote freedom of worship, and this includes the freedom to change one's religion or belief, either alone or in community with others. This is the true meaning of section 38 (1) and no contradiction should be read into section 10 as a result. Based on the inconsistencies with the Constitution, Sharia penal code is, by virtue of the consistency clause of section 1 (3) of the Constitution, null and void.

There is no doubt that freedom of religion is very fundamental and hence very sensitive issue in a multi-ethnic and multi-religious society like Nigeria. Respect for it is a recipe for individual and corporate harmony and peaceful co-existence. Reifeld (2008:132) is quite convinced that "humane existence comes only to those who recognize that every individual should have the right to practice his or her religion

freely". This is particularly so as freedom of this kind means that all men should be immune from coercion on the part of individuals, social groups and every human power so that within the confines of due limits, nobody is forced to act against his convictions nor is anyone to be restrained from acting in accordance with his conviction in religious matters in private or in public, alone or in association with others (Vatican II, Dignitatis Humane, 1965: n.2). This is engendered by the fact that the rights to religious freedom is founded on the very dignity of the human person. No doubt, religious freedom is inextricably interwoven with freedom of conscience through which man sees and recognized the demands of the divine law. Because human beings are bound to follow their consciences faithfully in all they do, they should not be forced to act contrary to them. The reason is quite obvious. The practice of religion of its very nature consists primarily of those voluntary and free internal acts by which humans direct themselves to the religious object.

A clawback to the exercise of the right to religious freedom would however be based on whether or not the public order is affected or whether or not another person's right is breached. Sharia as practiced today in Nigeria certainly violates the rights of especially non-Muslims, hence, the right of parents are violated if their children are compelled to attend classes which are not in agreement with the religious beliefs of the parents or if there is a single compulsory system of education from which all religious instruction is excluded. Economic rights of individuals are frontally assaulted if by a legislation or policy those individuals are prohibited from dealing on certain commodities or beverages which their own religion does not forbid. The human rights of persons are equally violated if they are subjected to economic and financial policies that promote the interest of particular religious tenets which the victims do not profess, nor are their rights not abused if they are met with punishments for offences created by religions other than theirs.

But exactly the above are the situations in Nigeria where presently, an Islamic sect, *Boko Haram*, is launching violent attacks on Christianity and other institutions perceived as Western-oriented. Infringements on people's right to religious freedom is also the order of the day in Nigeria where the adaptation of Islamic criminal law and other aspects of Sharia in most northern states has engendered practices that touch the right of non-Muslims especially in the areas of politics, commerce, punishment, employment, and religious observance and propagation.

For this reason and more, right to religious freedom is very much under siege in Nigeria. Therefore, there is a dire need for a concerted effort to protect religious freedom, and which effort much issue of the common responsibility of individual citizens, social group, human rights activists, civil authorities, and religious bodies and communities. Of all these stakeholders, the role of civil authorities is uniquely quite important. It must undertake to safeguard the religious freedom of all citizens in an effective manner by just legislation and other appropriate means. It must help to create conditions favourable to the exercise of a person's right to religious freedom. The question of the fact that the majority of the citizens belong to a particular religion does not detract from the recognition and respect for the religious freedom of the minority. Majority or minority issue does not arise in the consideration of the guarantee and exercise of human rights.

It therefore follows that it is wrong for a public authority in Islamic enclaves in Nigeria to compel its citizenry or any part thereof by force or fear or any other means to profess or repudiate any religion or to prevent anyone from joining or leaving a religious body. It is even more opprobrious to human right and dignity when force is applied to wipe out or repress a particular person's religious propensity insofar as due limits are observed. Islam in Nigeria needs to re-examine its praxis in relation to religious freedom of adherents of other religions. It is strongly suggested that the *Maliki* school of Islamic jurisprudence and the entirety of Muslims in Nigeria shall engage in Islamo-legal reform, socio-religious Renaissance, de-politicization of Islam, cultural rebirth, avoidance of fanaticism and fundamentalism, adherence

to state secularity principle. They should also be aware of the fact of religious pluralism and observe the rule of law. Equally, the need for national and inter-religious dialogue and cultivation of patriotic sense are also a desideratum. All these will lead to a national peaceful co-existence and individual development. Certainly, such a coexistence is congenial to the sustenance of constitutional democracy in Nigeria.

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