

Law, religion and human rights in Nigeria

Enyinna S Nwauche

Associate Professor of Law; Director, Centre for African Legal Studies, Port Harcourt, Nigeria

Summary

This paper explores the relationship between law, religion and human rights in Nigeria. The level and intensity of religious strife in Nigeria justify this inquiry, whose aim should be the design of a framework that enables individuals to enjoy the freedom of religion and ensures that religious conflicts are managed in Nigeria's multi-ethnic and multi-religious context. Almost a decade to the introduction of Islamic criminal law in the 12 northern states of Nigeria, there is no longer any doubt that religion is fundamental to the survival of Nigeria. The basic thesis of this paper is that the key to understanding the relationship between law, religion and human rights in Nigeria lies in the unacknowledged dominance of Islam and Christianity, which I characterise as de facto state religions, and the resulting neglect of other religions. It is this reality, its denial and misunderstanding of attendant constitutional obligations that define the relationship between the Nigerian state and religion.

1 Introduction

This paper explores the relationship between law, religion and human rights in Nigeria. The level and intensity of religious strife in Nigeria justify this inquiry, whose aim should be the design of a framework that enables individuals to enjoy freedom of religion and ensures that religious conflicts are managed in Nigeria's multi-ethnic and multi-religious context. Almost a decade since the introduction of Islamic criminal law in the 12 northern states of Nigeria, there is no longer any doubt that religion is fundamental to the survival of Nigeria.

* LLB, LLM (Ife), BL (Lagos); esnwauche@frilegudies.com

The basic thesis of this paper is that the key to understanding the relationship between law, religion and human rights in Nigeria lies in the unacknowledged dominance of Islam and Christianity, which I characterise as *de facto* state religions, and the resulting neglect of other religions. It is this reality, its denial and misunderstanding of attendant constitutional obligations that define the relationship between the Nigerian state and religion.

I have organised this paper as follows: In the next section I chart the religious demography of Nigeria. In the third section I sketch a broad overview of the right to freedom of thought, conscience and religion, while in section four I examine the question of a state religion and consider the introduction of Islamic criminal law in the 12 northern states. In the fifth section, I consider the framework within which religious communities can practise and spread their religion. In section six I determine whether there is state interference in the internal affairs of religious organisations. Section seven examines how the Nigerian state treats indigenous religions. I discuss the resolution of religious conflict in section eight and finally make concluding remarks in section nine.

2 The religious demography of Nigeria

The deletion of religion as one of the parameters in the 2006 national census denied the possibility of accurately stating the relative proportion of religious groups in Nigeria. What we are left with are conjectures¹ and projections.² Nigeria's 36 states are made up of 19 states in Northern Nigeria and 17 states in Southern Nigeria. What is generally accepted is that Muslims dominate the northern states of Nigeria and Christians dominate the rest of the country, with the margin being closer in the Middle Belt and southwestern part of the country where there is a significant Muslim population. There seems to be broad agreement that Muslims constitute a slightly larger, if not equal, section of the population than that constituted by Christians,³ and that there are a substantial number of persons who practise traditional indigenous religions as well

¹ Eg, see H Agberemi 'Nigeria beyond secularism and Islamism: Fashioning a reconsidered rights paradigm for a democratic multicultural society' (2005) 2 *Muslim World Journal of Human Rights* <http://www.bepress.com/mwjhr/vol2/iss1/art10> (accessed 30 September 2008).

² The Pew Forum on Religion and Public Life states in its Religious Demographic Profile of Nigeria that according to the most recent Demographic and Health Survey held in 2003, which presents statistics of a nationally representative sample of women between the ages of 15 and 49 and men between 15 and 59, '50,5% of the population is Muslim and 48,2% is Christian. Only 1,4% is associated with other religions' <http://www.pewforum.org/world-affairs/countries/?CountryID=150> (accessed 24 April 2008).

³ The *International Religious Freedom Report 2007* for Nigeria issued by the US Department of States, speaking of the proportion of Christians and Moslems, states that it is 'generally assumed that the numbers are equal'. <http://www.state.gov/g/drl/rls/irf/2007/90114.htm> (accessed 24 April 2008).

as a good number of non-religious believers. It is fair to conclude that Islam and Christianity are the dominant religions in Nigeria.

The predominant form of Islam is Sunni, even though there are Shia adherents. The Christian faith includes the Roman Catholic Church, the Anglican Communion, the Baptist Convention, Seventh Day Adventists, the Methodist Church of Nigeria, the Presbyterian Church of Nigeria, Jehovah's Witnesses and a large number of Evangelical and Pentecostal churches, many of whom are indigenous with no links to the West.

3 An overview of the right to freedom of thought, conscience and religion

In this section I undertake an overview of the right to freedom of thought, conscience and religion as provided for in section 38(1) of the Constitution of the Federal Republic of Nigeria 1999 (1999 Constitution).⁴ The structure of section 38 follows the general pattern of recognised rights in chapter IV of the 1999 Constitution. This is the grant of individual entitlement and permissible derogations based on individual and group considerations. Section 38(1) contains the primary right protecting the freedom of religion. There are a number of secondary rights which reinforce the enjoyment of the freedom of religion. They are freedom of association protected by section 40, the right to private and family life protected by section 37, the right to freedom of expression protected by section 39, and the right to freedom of movement protected by section 41. To reinforce and ensure that the entitlement to this right is meaningful, section 42 of the 1999 Constitution⁵ provides that no person shall be discriminated against on the

⁴ Sec 38 provides: '(1) 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. (2) 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 if such instruction ceremony or observance relates to a religion other than his own, or religion not approved by his parent or guardian. (3) 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. (4) Nothing in this section shall entitle any person to form, take part in the activity or be a member of a secret society.'

⁵ Sec 42(1) of the 1999 Constitution provides *inter alia*: 'A citizen of Nigeria of a particular community, ethnic group, place of origin, sex, religion or political opinion shall not, by reason only that he is such a person:- (a) be subjected either expressly by, or in the practical application of, any law in force in Nigeria or any executive or administrative action of the government, to disabilities or restrictions to which citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religions or political opinions are not made subject; or (b) be accorded either expressly by, or in the practical application of, any law in force in Nigeria or any such executive or administrative action, any privilege or advantage that is not accorded to citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religions or political opinions.'

basis of his or her religion. While on one hand this ensures that people freely embrace any religion of their choice, it further underscores the equality of all religions. The right to freedom of religion is also to be enjoyed in a context in which no religion is to be preferred. Thus, section 10 of the 1999 Constitution provides that '[t]he government of the federation or of a state shall not adopt any religion as state religion'.

The right to freedom of religion contained in section 38 is not absolute. Section 45(1) of the 1999 Constitution⁶ provides for derogations for individual and group considerations. The scope of the right can be understood by first determining what the individual entitlement is in the context of the circumstances of each case and then proceeding to inquire if factors that are the basis of derogation are present. This framework for understanding the scope of the right to freedom of thought, conscience and religion was set out by the Nigerian Supreme Court in *Medical and Dental Practitioners Disciplinary Tribunal v Okonkwo*.⁷ Ayoola JSC, who read the unanimous judgment of the Court, stated:⁸

The right to freedom of thought, conscience or religion implies a right not to be prevented without lawful justification from choosing the course of one's life, fashioned on what one believes, and the right not to be coerced into acting contrary to one's belief. The limits of these freedoms, as in all cases, are where they impinge on the rights of others or where they put the welfare of society or public health in jeopardy ... Law's role is to ensure the fullness of liberty when there is no danger to public interest. Ensuring liberty of conscience and freedom of religion is an important component. The courts are the institutions society has agreed to invest with the responsibility of balancing conflicting interests in a way to ensure the fullness of liberty without destroying the existence and stability of society.

In *Okonkwo*, the Court upheld the right of a Jehovah's Witness to object to a blood transfusion and held that a medical doctor had no right to overrule the patient's refusal of a blood transfusion on public interest grounds. Even though the Court did not allude to section 45(1), there is no doubt that reference to public interest may be taken to refer to all or any of the grounds mentioned therein. What is also interesting is the Court's interpretation of 'public interest'. The Court agreed that, while an epidemic will qualify as public interest, it is absent when the direct consequence of the right is limited to the competent individual. In the case at hand, the Court held that the refusal of a blood transfusion affected

⁶ Sec 45(1) of the 1999 Constitution provides: 'Nothing in sections 37, 38, 39, 40 and 41 of this Constitution shall invalidate any law that is reasonably justifiable in a democratic society (a) in the interest of defence, public safety, public order, public morality or public health; or (b) for the purpose of protecting the rights and freedom or other persons.'

⁷ [2001] FWLR (Pt 44) 542 (*Okonkwo*). For commentary on this case, see N Tijani 'Physicians, patients and blood: Informed consent to medical treatment and fundamental human rights' in E Chianu (ed) *Legal principles and policies: Essays In honour of Justice Chukunweike Idigbe* (2006) 359.

⁸ *Okonkwo* (n 7 above) 588.

only the patient involved and no injustice could be occasioned in giving an individual's right primacy. The interpretation of 'public interest' is questionable, given the statutory obligation of a doctor to protect lives.

It is important to draw attention to the words 'any law' in section 45(1) and what this means. It refers to the standards mentioned in section 45 including 'public interest' to be expressed in a law. While 'any law' will include legislation and the common law, for long the question has been whether 'any law' includes customary law and internal institutional directives.⁹ Recently, the Court of Appeal answered in the affirmative in *Anzaku v Governor of Nassarawa State*¹⁰ that '[a]ny law is so encompassing an expression, not limiting the type of law. It applies to any system, whether statute law, customary law, Islamic Law or common law applicable in Nigeria.'¹¹ We are thus left to wonder whether the principles of Islamic law can be the basis for the derogation of the section 38 right.

4 Nigeria and the question of a state religion

The provisions of section 10 of the 1999 Constitution prohibit any state or federal government from adopting a state religion. It may thus be asserted that no government can explicitly or impliedly take steps or by conduct declare a religion as a state religion in Nigeria. What the implied steps are or the conduct that will not pass constitutional muster is not very clear. For example, it is not very clear what Nigeria's observer status at the Organisation of Islamic Countries (OIC) means. While non-Muslims assert that such membership makes Islam a state religion, Muslims seem to stress that the economic benefits of joining the OIC should be the goal.¹²

Section 10 of the 1999 Constitution has led to two broad opposing conclusions of Nigeria's status as a secular state.¹³ On one hand, it is asserted that Nigeria is a secular state.¹⁴ The other strand of opinion is

⁹ See eg the case of *Onyinyeka M Enoch v Akobi* (1994) 9 ANSLR 338, where the Anambra State High Court relied on a school directive to justify the refusal of the school to register a student on her objection to a directive to cut her hair on religious grounds. See CO Okonkwo 'Religious freedom — *Onyinyeka M Enoch v Mary U Akobi* — A comment' (1994-1997) 6 *The Nigerian Juridical Review* 214.

¹⁰ [2006] All FWLR (Pt 303) 308.

¹¹ n 10 above, 340-341. See also Nasir P in *Uzoukwu v Ezeonu* [1991] 6 NWLR 708.

¹² This seems to be the Islamic response that has caused controversy regarding the allegation that President Yar'Adua led a delegation to the just concluded meeting of the OIC and that Nigeria is now a full member of the OIC because it had paid up all relevant dues during the tenure of President Olusegun Obasanjo. See *Punch* 3 April 2007 8.

¹³ See J Tyus 'Going too far: Extending Shari'a law in Nigeria from personal to public law' (2004) 3 *Washington University Global Studies Law Review* 199.

¹⁴ See BO Nwabueze *Military rule and constitutionalism* (1992) 282; AU Iwobi 'Tiptoeing through a constitutional minefield: The great Shari'a controversy in Nigeria' (2004) 48 *Journal of African Law* 133-135.

that, in spite of section 10, Nigeria is not a secular state and religion has a place in Nigerian public life.¹⁵ The latter opinion seems a better description of the reality in Nigeria. 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 sustain both religions. If we accept, as Peters urges with respect to section 10, that 'it is generally understood to mean that neither the legislative power nor the executive may in any way be used to aid, advance, foster, promote or sponsor a religion',¹⁶ then Nigeria has a state religion(s). Thus, it can be asserted that Nigeria has *de facto* state religions and that, for reasons given below, this is constitutional. This fact is buttressed by a composite interpretation of the relevant provisions of the 1999 Constitution which leave no doubt that a significant role is contemplated for religion in Nigerian public life.

First is section 4(7) of the 1999 Constitution,¹⁷ which permits states to make laws for the peace and good government of their territories. States are asked to legislate their conceptions of the public good. Religion supplies these conceptions of the public good. It is therefore a contradiction of sorts for the argument that the Constitution, on one hand, requires that no state adopts a religion and, on the other hand, provides an enabling framework by which the states can functionally infuse the public good with religious values. It may well be argued that states are not allowed by the tenor of section 10 to use religious values as the basis of the common good. In other words, irreligious values will be welcome as the basis of a common good. There is no such indication in section 4(7), and certainly not in section 10. If the meaning of section 10 is that only irreligious values should undergird the Nigerian conception of good, it is certainly discriminatory of religions. Non-religious values have as much claim to influence public policy as religious values.¹⁸ Secondly, the fact that the Constitution

¹⁵ See eg M Tabiu 'Shari'a federalism and Nigerian Constitution' paper presented at an International Conference on Shari'a, London, 2001, reproduced in Tyus (n 13 above) 205: 'We can see that the section does not establish ... [the] claim that the Constitution describes Nigeria as a secular state. In fact the Constitution does not use the word secularism or any of its derivatives at all. How then can they build an argument, alleging violation of the Constitution, merely on their personal interpretation of such a word of varied and controversial meaning, which is not even in the Constitution?'

¹⁶ See R Peters *Islamic criminal law in Nigeria* (2003) 33.

¹⁷ Sec 4(7) of the 1999 Constitution provides: 'The House of Assembly of a state shall have power to make laws for the peace, order and good government of the state or any part thereof with respect to the following matters, that is to say: (a) any matter not included in the Exclusive Legislative List set out in Part I of the Second Schedule to this Constitution; (b) any matter included in the Concurrent Legislative List set out in the first column of Part II of the Second Schedule to this Constitution to the extent prescribed in the second column opposite thereto; and (c) any other matter with respect to which it is empowered to make laws in accordance with the provisions of this Constitution.'

¹⁸ See IT Benson 'Notes towards a (re)definition of the "secular"' (2000) 33 *UBC Law Review* 519.

recognises religious communities permits them to urge their views on the state. When these religious communities are dominant in any particular state, it would be naïve to imagine that their conception of the public good does not influence public policy. The third example lies in the fact, alluded to above, that the human rights framework in Nigeria is a balance between individual entitlements and communitarian values. In particular, any reference to public morality points inexorably to religious values in a religious society such as Nigeria. Even if there is no consensus on the relevant religious values, the fact remains that the conception of public morality can be influenced heavily by these values.

A combination of sections 10, 38 and 42 of the 1999 Constitution imposes positive obligations on Nigerian governments to ensure that they treat all other religions equally to the way they treat the *de facto* religions. It is in this context that the introduction of Islamic criminal law by the northern states of Nigeria should be understood. It is to this controversial issue that I now turn.

4.1 Islamic criminal law in Nigeria

In 2000, Zamfara State enacted the first Shari'a Penal Code in Northern Nigeria.¹⁹ In due course, 11 other northern states followed this example and at present Islamic criminal law²⁰ is enforced in 12 northern states of Nigeria²¹ by the enactment of new Penal Codes or the amendment of the existing Penal Code. The Shari'a Penal Codes contain provisions on (i) Qur'anic offences (*hudûd*), such as unlawful sexual intercourse (that is, between persons who are not married) (*zinâ*); theft (*sariqa*); robbery (*hirâba*); drinking of alcohol (*shrub al-khamr*); false accusation of unlawful sexual intercourse (*qadhf*); (ii) provisions on homicide and hurt; and (iii) corporal punishment (caning or flogging) as penalty for many offences. The punishments contained in the Shari'a Penal Codes include death, forfeiture and destruction of property, imprisonment, detention in a reformatory, fine, restitution, reprimand, public disclosure, boycott, exhortation, compensation, closure of premises, retaliation, death by stoning, amputation, caning, a blood price, the closure of premises and a warning. The Penal Code also contains a provision to the effect that any act or omission that is not specifically mentioned in the Code, but is otherwise declared to be an offence under the Qur'an, Sunnah and Ijtihad of the Maliki School of Islamic Thought, shall be an offence under the Code and shall be punishable with a term of imprisonment or caning or with a fine or any combi-

¹⁹ See the Shari'a Establishment Law (27 October 1999).

²⁰ Of the four Sunni schools of jurisprudence (Maliki, Hanafi, Shafi'i and Hanbali) the Maliki school prevails in Northern Nigeria. See Peters (n 16 above) 1.

²¹ These are the states of Bauchi, Borno, Gombe, Jigawa, Kaduna, Kano, Katsina, Kebbu, Niger, Sokoto, Yobe and Zamfara. The other seven states in Northern Nigeria have no such laws.

nation of any two punishments.²² Non-Muslims are exempt from the enforcement of Islamic criminal law unless they voluntarily accept this jurisdiction in a specific proceeding. One important provision of the Shari'a Penal Codes that affects other religions is the prohibition of the worship and invocation of any *juju*, which is defined to include the worship and invocation of any subject being other than Allah.²³ In addition, there are offences relating to witchcraft and *juju*.²⁴

In the wake of the introduction of Islamic criminal law, there has been controversy regarding the constitutionality of Islamic criminal law in view of the prohibition in section 10 of the 1999 Constitution. It is asserted that the 12 northern states have adopted Islam as a state religion²⁵ and that this is unconstitutional. I am convinced that the introduction is constitutional and that these states have only reaffirmed Islam as a *de facto* state religion for three reasons. First, the criminal law in the northern states of Nigeria before 1999 was largely religiously based.²⁶ Few people seemed willing to argue then that this fact caused these laws to amount to the adoption of a state religion. Secondly, the validity and operation of these laws are within a constitutional scheme. These laws are subject to overriding provisions of the Constitution, including the fundamental human rights found in chapter four. The courts applying Islamic criminal law have recognised that the tenor of the Islamic Penal Codes must be examined with respect to their compliance with constitutionally-recognised human rights.²⁷

²² See sec 92 of the Zamfara Penal Code.

²³ See sec 405 of the Zamfara Penal Code.

²⁴ See secs 406-407 of the Zamfara Penal Code.

²⁵ See the discussion in sec 4.1 above.

²⁶ See eg Peters (n 16 above) ch 1, 12: 'The direct but controlled and restricted application of Islamic criminal law came to an end in 1960 when the new Penal Code Law for Northern Region 1959 was brought into effect. The code remained in force until the recent enactment of Shari'a Penal Codes. The Penal Code of 1959 was based on the Indian (1860) and Sudanese (1999) Penal Codes, and was essentially an English code. However, here and there special provisions were included based on Shari'a criminal law.'

²⁷ See *Safiyatu v Attorney-General of Sokoto State*, unreported judgment of the Sokoto State Shari'a Court of Appeal dated 25 March 2002. In this case, the appellant appealed against a judgment of the Upper Area Court in Gwadabawa which sentenced her to death by stoning for the offence of *zina* (adultery) punishable under sec 129(b) of the Sokoto State Shari'a Penal Code 2000. One of her grounds of appeal was that the penal code law was not in existence at the time of the offence. The Court held that the Shari'a Penal Code itself prohibited retrospective criminal legislation in accordance with sec 36(9) of the 1999 Constitution. The Court further held that the Penal Code was in consonance with sec 36(12) of the 1999 Constitution which provides that 'a person shall not be convicted of a criminal offence unless that offence is defined and the penalty therefor 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 provisions of a law'.

This fact²⁸ raises serious doubt about whether the Islamic Penal Codes have turned Islam into a state religion. In this regard, other potential conflicts with human rights provisions in the 1999 Constitution include provisions of the Shari'a Penal Codes which criminalise conduct that is not explicitly set out in the Codes, but is a crime under Shari'a, and provisions which discriminate against women.²⁹ The need for the operation of Islamic criminal law within a constitutional context applies to other religions. Thus, if a state in Southern Nigeria decides that section 4(7) of the 1999 Constitution inspires them to enact canon-inspired criminal law, the fact remains that these laws become part of the Nigerian legal system, mediated by the tenets of the 1999 Constitution. The same goes for customary criminal laws which in many instances are religiously based.³⁰ Thirdly, the fact that Islamic criminal law applies only to Muslims reinforces the equality principle contained in section 42 of the Constitution. Whether this is a concession³¹ or the recognition and compliance with Nigeria's constitutional framework, there is no doubt that it has gone a long way in entrenching the fact that the 1999 Constitution recognises the role of religion in the public life of the country mediated by equality guarantees. Fourthly, the recognition by a constitution of certain forms of religious values renders largely meaningless a distinction between what is personal and what is public on the basis, for example, of the deployment of coercive machinery of

²⁸ See also A Yadudu 'Evaluating the implementation of Shari'a in Nigeria: Time for reflection on some challenges and limiting factors' paper presented to the 2006 Nigerian Bar Association General and Delegates Conference (on file with author); BY Ibrahim 'Application of the Shari'a penal law and the justice system in Northern Nigeria: Constitutional issues and implications' in J Ezeilo *et al* (eds) *Shari'a implementation in Nigeria: Issues and challenges in women's rights and access to justice* (2003) <http://www.boellnigeria.org/documents/sharia%20implementation%20in%20Nigeria.pdf> 128 132 (accessed 30 September 2008): 'Being a supreme law, a constitution is endowed with a higher status in some degree over and above other legal rules in the system of government. It is in this light that the 1999 Constitution can be described as the supreme law in Nigeria ... This being so, the Shari'a legislated and practised in some northern states of Nigeria must comply with the provisions of the 1999 Constitution.' See also JM Nasir 'Women's human rights in a secular and religious legal system' 1 28, being part of the a two-day strategic conference on Islamic legal system and women's rights in Northern Nigeria organized by WARDL Lagos and WACOL Enugu (27-30 October 2002) <http://www.boellnigeria.org/documents/sharia%20%20women%27s%20human%20Rights%20in%20Nigeria%20%20strategies%20for%20Action> (accessed 30 September 2008).

²⁹ See eg sec 68(A)(3)(b) of the Niger State Penal Code which provides that, in the requirement for proving the offence of unlawful sexual intercourse, the testimony of men is of greater value than that of women.

³⁰ See eg FU Okafor *Igbo philosophy of law* (1992); O Adewoye *The judicial system in Southern Nigeria 1854-1954* (1977).

³¹ A Ahmad 'Extension of Shari'a in Northern Nigeria: Human rights implications for non-Muslim minorities' (2005) 2 *Muslim World Journal of Human Rights* <http://www.bepress.com/mwjhr/vol2/iss1/art6> (accessed 30 September 2008).

the state.³² Even though criminal law is a good example of public law that relies on the coercive machinery of the state, all law ultimately does so. Even judgments in civil cases are liable to be enforced by the state. The 1999 Constitution, like its predecessors, recognises Islamic personal law and provides for a judicial structure to protect these laws that are clearly religiously based.³³ It is difficult to urge that these are in the personal realm and that, since criminal law is in the public realm, it should not be subject of legislation. This would be discriminatory to Muslims who view religion as permeating all aspects of their lives.

The recognition of Islam as a *de facto* religion in the 12 northern states of Nigeria enables us to understand, recognise and implement the commensurable constitutional obligations incumbent on state governments.³⁴ These obligations require governments to treat other religions in the same way that they would support and sustain Islam. Thus, non-Muslims must be allowed to practise and spread their religion within the context of the structure of the section 38 right. Accordingly, regulations such as gender segregation in public transport, the ban on the sale of alcohol, and the refusal to grant or the revocation of building permits for non-Muslim places of worship are unconstitutional. It is the pretence that there is no state religion that fuels the nonchalant attitude of all governments in Nigeria towards minority religions, when in reality these governments are actively promoting the *de facto* religions.

4.2 The dominance of Islam and Christianity in the Nigerian legal system: *De facto* state religions?

A combination of the colonial legal legacy of Nigeria and geographic dominance of their adherents in Nigeria ensure that Islam and Christianity dominate the Nigerian legal system. Ultimately, the indigenous religions are in the minority, even though it ought to be noted that the two major religions are also minorities depending on the part of Nigeria in which they are found. A third feature of the dominance of certain religions in Nigeria is the fact that Christianity is dominant to the extent that it is the foundation of English common law which is superior to Islamic law and customary law in Nigeria.

³² See Iwobi (n 14 above) 5. See also Peters (n 16 above) 34: ‘... (t)he recognition of Muslim civil and personal law is sufficient for Muslims to be able to practise their religion. The introduction of criminal law necessitates an intensive involvement of the state and could be regarded as the adoption of Islam as state religion.’

³³ See sec 277 of the 1999 Constitution.

³⁴ See Ahmad (n 31 above) 17, who identifies the inability of the 12 northern state governments to enforce the constitutional obligations to other religions largely to the lack of articulation or justification of the difference between the principles of classical Shari’a and the Islamic Penal Codes with respect to the status of non-Muslims in an Islamic state.

Let us first consider the dominance of English common law in the Nigerian legal system. The first example of this dominance is the preference given to Christianity in the marriage laws of Nigeria. The three types of marriages — under the Marriage Act,³⁵ under customary law and under Islamic law — are not of the same parity. First, section 35 of the Marriage Act prohibits the possibility of any person married under the Act from contracting a subsequent customary law marriage. Indeed, to do this may amount to an offence punishable with a five-year term of imprisonment as stipulated by section 48 of the Marriage Act. Because the prohibition is restricted to customary law, it is thought that a Muslim marriage is exempt from this prohibition. Secondly, according to the provisions of section 33 of the Marriage Act, parties who are married under customary law can subsequently marry under the Act. Because the reverse is not possible, it becomes clear that the customary marriage is of a lesser status than marriage according to the Act, since the latter precludes any subsequent customary marriage. Indeed, there is recognition that the later marriage in terms of the Act is sought for enhanced security because marriage under the Act imports monogamy into the union.³⁶ As a matter of routine, therefore, parties first contract a customary marriage and then enter into marriage according to the Act. Thirdly, the preference given to Christian marriages is evident in the advantages conferred on such spouses as against their customary and Islamic counterparts by the Criminal Code³⁷ and the Evidence Act.³⁸ This is because of the definition of a 'husband' and 'wife' by section 10 of the Criminal Code as meaning respectively the husband and wife of a Christian marriage, while section 1(2) of the Evidence Act defines husband and wife as meaning husband and wife of a monogamous marriage.

Other advantages include the point that the Criminal Code in a number of provisions exculpates the wife of a Christian marriage from liability in certain circumstances. These include section 10, which exculpates a wife for becoming an accessory after the fact for assisting or helping the husband escape punishment, section 33 which provides that a wife of a Christian marriage is not criminally responsible for doing or omitting to do an act which she is actually compelled by her husband to do or omit to do, and section 34 which provides that a wife and husband of a Christian marriage are not criminally responsible for a conspiracy between themselves alone. In addition, section 162 of the Evidence Act provides that a husband and wife of a monogamous marriage, including an Islamic marriage, cannot be compelled to disclose any communication made between them in the course of the marriage.

³⁵ Cap M6 Laws of the Federal Republic of Nigeria 2004.

³⁶ See *Jadesinmi v Okoitie--Eboh* [1996] 2 NWLR (Pt 429) 128 147-148.

³⁷ Cap C38 Laws of the Federal Republic of Nigeria 2004.

³⁸ Cap E14 Laws of the Federal Republic of Nigeria 2004.

In effect, the spouses of customary marriages may be so compelled, clearly illustrating the inferior status of customary law marriages.

Other manifestations of Islamic and Christian religious bias in public life include the fact that, at public ceremonies, it is likely that either a Christian or Islamic prayer or both are said, depending on the geographical context of the ceremony. Furthermore, the 1999 Constitution in its Preamble refers to 'God', as do oaths of office in the Seventh Schedule to the 1999 Constitution. This seems to refer to a Christian God, because Muslims are given an alternative of swearing on the Koran. Yet another example is that Islam and Christianity, the two dominant religions in Nigeria, along with Judaism, are favoured in the taking of oaths by section 5 of the Oaths Act.³⁹ Yet another manifestation of the dominance of the two religions is evident in the fact that only Christian and Islamic holidays are mentioned by the Public Holidays Act.⁴⁰

Even more worrisome seems to be a marked judicial bias in favour of Nigeria's *de facto* religions. The bias for the Christian faith is evident in *Registered Trustees of the Rosicrucian Order, AMORC (Nigeria) v Awoniyi*,⁴¹ where Iguh JSC declared as follows:⁴²

It cannot be seriously suggested that there was anything secret in the teachings of Jesus Christ which in my view is entirely public and properly documented in the scriptures. Clearly to assert, as the plaintiff unequivocally did, that Jesus Christ was a member of secret societies and that he was an advocate of occult teaching is speaking for myself satanic, blasphemous and entirely unacceptable.

There is also the hint of the superiority of Islam to customary law evident in the consistent denial that Islamic law is not customary law.⁴³

5 Regulation and interference by the state in the internal affairs of religious organisations in Nigeria

The adoption of *de facto* state religions in Nigeria has not generally led to state interference in the internal affairs of religious organisations beyond the threshold of protecting society. To illustrate this point, I shall consider the formation and registration of religious organisations; the judicial review of internal affairs of religious organisations; and the exemption of religious organisations from the payment of taxes.

³⁹ Ch O1 Laws of the Federation of Nigeria 2004. Sec 8 of the Oaths Act allows persons to affirm rather than swear to an oath.

⁴⁰ Ch P40 Laws of the Federation of Nigeria 2004.

⁴¹ (1994) 7 NWLR (Pt 353) 154.

⁴² n 41 above, 192-193.

⁴³ See generally AA Oba 'Islamic law as customary law: The changing perspective' (2002) 51 *International and Comparative Law Quarterly* 817.

5.1 The formation and registration of religious organisations in Nigeria

In Nigeria, there is an unfettered freedom to form associations, including religious organisations, in accordance with section 40 of the 1999 Constitution. There are no registration requirements,⁴⁴ except in situations where the religious organisation is desirous of adopting a form as prescribed by the Companies and Allied Matters Act.⁴⁵ That form is either that of an incorporated trustee or a company limited by guarantee. A religious organisation is allowed by law to operate and exist in an unincorporated form. To allow or permit the registration of religious organisation *qua* religious organisation will most likely be unconstitutional. This may explain the repeated refusal by the Corporate Affairs Association to allow the Christian Association of Nigeria (CAN) to exercise the power of consenting to the registration of churches. Commenting on the refusal of the Corporate Affairs Commission, Emeka Chianu submits that:⁴⁶

Perhaps CAC perceives that if CAN is obliged, it would introduce biased esoteric conditions precedent to the incorporation of Christendom religious groups to the chagrin of the disfavoured. This may create more problems for government and the society at large than the ones CAN intends to prevent or to solve. To surrender to a religious association the right to determine which religious group to register and which application to reject would involve it in making a judgment as to which religious beliefs deserve protection. Such a judgment would greatly interfere with the religious freedom entrenched in the Constitution and would be dangerous.

It needs to be pointed out, however, that the right to freedom of association and the right to freedom of thought, conscience and religion can be derogated from in the light of section 45 of the 1999 Constitution, as discussed above. The appropriate question is whether any law requiring registration will fit the bill of public safety or public morality, and such. There is already an example in *Osawe v Registrar of Trade Unions*,⁴⁷ where the Trade Unions Act 1986, which sets out conditions for the registration of trade unions in Nigeria, was held as constitutionally justified by the provisions of the 1979 Constitution similar to section 45 of the 1999 Constitution. This was because of the history of the proliferation of trade unions and the havoc this wrought on the movement. It may well be argued that the derogation clause is enough justification for the Companies and Allied Matters Act (CAMA) and its power to register religious organisations. This is even more the

⁴⁴ The assertion in *IE Ekwo Incorporated trustees law for churches and religious associations* (2003) 35 that '[a]pplication for registration by the church is an exhibition of an intention to have its formation and establishment legalised' is therefore wrong.

⁴⁵ Ch C20 Laws of the Federation of Nigeria 2004.

⁴⁶ E Chianu 'Registration of churches in Nigeria — Keeping religious freedom and societal interests on equipoise' (2000) 1 *Nigerian Contemporary Law Journal* 60.

⁴⁷ (1985) 1 *NWLR* 755.

case when it is clear that, unlike trade unions which are denied the right to operate without registration, religious organisations can operate without registration under part C of CAMA. However, if there is a propensity to register under CAMA, as I argue below, it is well worth observing that the nature of the powers exercised by CAC is important, lest indirectly it is used to choose which religious belief to be registered under or otherwise. Before undertaking an overview of the powers of CAC to register associations and companies, I shall dwell briefly on the forms of incorporation open to religious organisations.

As stated above, a religious organisation can either register as a company limited by guarantee under section 26 of CAMA⁴⁸ or incorporate a number of trustees under part C of CAMA. A company limited by guarantee is one that the liability of its members is limited to the amount, if any, that members undertake at incorporation or joining that they will bear in the event of the company being wound up. In reality, companies limited by guarantee are not profit-oriented. The advantages of incorporation are found in section 37 of CAMA, which provides that the incorporated company becomes a juristic person, capable of suing and being sued and able to hold property in its registered name. The second form a religious organisation may choose is an association with incorporated trustees. Section 673(1) of CAMA provides that one or more trustees appointed by a community of persons bound together by religion or by any body or association of persons established for any religious purpose may, if so authorised by that community body or association, apply to the Corporate Affairs Association to be registered as a corporate body. Upon being so registered, section 679 provides that the trustees shall become a body corporate with perpetual succession, a common seal and power to sue and be sued in its corporate name,⁴⁹ and power to hold and transfer property. Accordingly, an unregistered body of trustees will not enjoy these advantages.⁵⁰ The trustees can enter into legal relations for the religious organisation in their personal status on behalf of the association.⁵¹ The advantages of choosing the form of incorporated trustees are similar to that of a company limited by guarantee.

Most religious organisations seek to register with the CAC to ensure the perpetuity of their association and also the corporate form of the

⁴⁸ Sec 26(1) of CAMA provides that '[w]here a company is to be formed for promoting commerce, art, science, religion, sports, culture, education, research, charity or other similar objects, and the income and property of the company are to be applied solely towards the promotion of its objects and no portion thereof is to be paid or transferred directly or indirectly to the members of the company except as permitted by this Act, the company shall not be registered as a company limited by shares, but may be registered as a company limited by guarantee'.

⁴⁹ See also *Registered Trustees, Apostolic Church, Ilesha Area, Nigeria v The Attorney-General of the Mid-Western State of Nigeria* (1972) 1 All NLR 359.

⁵⁰ See eg *Anyabunam v Osoka (No 2)* (2000) 5 NWLR (Pt 657) 380.

⁵¹ n 50 above, 389.

association, as distinct from its members. CAC is therefore an important arbiter in the existence of religious bodies. As soon as CAC registers a religious organisation, it is conferred with the power to also annul the organisation. The powers granted to CAC to register and dissolve an association incorporated with trustees are broadly similar. Section 674(b) of CAMA requires that CAC shall register an association whose aims and objectives must be for the advancement of any religious, educational, literary, scientific, social, development, cultural, sporting or charitable purpose and must be lawful. In the same vein, section 691(2) of CAMA permits the dissolution of an association incorporated with trustees on grounds which include that 'all the aims and objects of the association have become illegal or otherwise contrary to public policy' and that 'it is just and equitable in all circumstances that the corporate body be dissolved'. Similarly, a company limited by guarantee may also be wound up if the court is of the opinion that 'it is just and equitable that the company be wound up'.⁵² Ultimately, what is worrisome about the power of CAC in this regard is the seemingly wide latitude given to the Commission to register or annul a religious organisation. This is largely because there is no definition of the term 'religious' in CAMA in the 1999 Constitution or any other statute. The same comment relates to the concept of 'public policy' and 'just and equitable', even though the term 'just and equitable' has acquired a technical meaning in corporate law. Consequently, the CAC is endowed with wide powers with little guidance. Even though there is scant evidence of a disagreement between her and a prospective applicant, the possibility of abuse looms large in the background. This is more so with a disturbing judicial trend that seems to ascribe to the CAC an absolute discretion in its determination of compliance with registration requirements. Even though decided with respect to disagreements over the choice of names, the cases of *Amasike v Registrar General Corporate Affairs Commission*⁵³ and *Corporate Affairs Commission v Ayedun*,⁵⁴ affirming the absolute discretion of the CAC, are a departure from the detailed scrutiny of the powers of the Commission and its predecessors in the past.⁵⁵ This is clearly dangerous in view of the *de facto* religions in Nigeria and the possibility that they may become the paradigm of what is religious or otherwise. Even at that, it must be remembered that religious organisations do not need to register, so ultimately the power of the CAC may not be as far-reaching as they seem.

⁵² Sec 408(e) of CAMA.

⁵³ [2006] 3 NWLR (Pt 968) 463.

⁵⁴ [2005] 18 NWLR (Pt 957) 391.

⁵⁵ See the cases of *Lasisi v Registrar of Companies* (1976) 7 SC 73 and *Kehinde v Registrar of Companies* (1979) 3 LRN 213.

5.2 Judicial review of the internal affairs of religious organisations

To a large extent, religious organisations enjoy a measure of autonomy in their internal affairs to the extent that political authorities, including the judiciary, do not interfere to ensure favoured outcomes. Where, however, the members of a religious organisation disagree even about matters of faith, doctrine, discipline, and so on, Nigerian courts,⁵⁶ when approached, have consistently assumed jurisdiction, even if reluctantly, over these matters. It is to be remembered that the 1999 Constitution, in section 6(6)(b), extends judicial power to ‘all matters’.⁵⁷ Thus, in *Shodeinde v Registered Trustees of the Ahmadiyya Movement in Islam*,⁵⁸ Kayode Eso JSC said:⁵⁹

Now it appears to me that matters of faith are hardly matters for a court of law, but once there the court should deal with them without passion, but only with justice according to the law being a guide.

Recently, the Nigerian Supreme Court engaged in determining whether the Rosicrucian Order is a secret society in the case of *Registered Trustees of the Rosicrucian Order, AMORC (Nigeria) v Awoniyi*.⁶⁰ In assessing the defence of justification in a libel suit brought by the Rosicrucian Order against a publication that it was a secret and satanic society, the Supreme Court and the lower courts engaged in doctrinal assessments of the teachings and practices of the Rosicrucian Order. Even at that, Nigerian courts are most likely to abide by the constitutions of religious associations, especially the ones filed pursuant to applications for incorporation.⁶¹ However, the courts will protect the fundamental rights of members and officers of a religious organisation in the event that there is an allegation of breach.

5.3 Exemption from payment of tax

Sections 19(1)(c) and (d) of the Companies Income Tax Act⁶² exempt the profits of any organisation engaged in ecclesiastical, charitable or

⁵⁶ The original jurisdiction over the CAMA vests in the Federal High Court in Nigeria by virtue of sec 251(e) of the 1999 Constitution.

⁵⁷ See Tobi JCA in *Registered Trustees of the Ifelaju Friendly Union v Kuku* (1991) 5 NWLR (Pt 189) 65: ‘In our democracy where the rule of law both in its conservative and contemporary constitutional meaning operates, the doors of the courts should be left wide open and I mean really wide open throughout the day for aggrieved persons and the generality of litigants to enter and seek any form of judicial redress or remedy.’

⁵⁸ (1983) NSCC 523.

⁵⁹ See also *The Registered Trustees of the Apostolic Church v Olowoloni* (1990) 6 NWLR (Pt 158) 514 538: ‘[A] church organisation ... [is] subject to the rule of law and expected to obey the law.’

⁶⁰ n 41 above.

⁶¹ See the case of *The Registered Trustees of Faith Tabernacle Congregation Church Nigeria v Ikwechegh* (2000) 13 NWLR (Pt 683) 1.

⁶² Cap C21 Laws of the Federation of Nigeria 2004.

educational activities of a public character in so far as such profits are not derived from a trade or business.

6 The right of religious communities to uphold, practise and spread their religion in Nigeria

In this section we explore different ways in which religious communities can practise and spread their religion. In this regard, sections 38(1), (2) and (3) of the 1999 Constitution are critical. Section 38(1) of the 1999 Constitution recognises the right of an individual, either alone or in community with others, in private and public, 'to manifest and propagate his religion or belief in worship, teaching, practice and observance'.⁶³ This may be regarded as a general right that entitles the outward manifestations of the right to religion. More specific entitlements are found in subsections (2) and (3), but are limited to religious education and the establishment of religious educational institutions. The subsections provide as follows:

- (2) 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 if such instruction ceremony or observance relates to a religion other than his own, or religion not approved by his parent or guardian.
- (3) 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.

As argued above, Nigeria's *de facto* state religions impose constitutional obligations on the relevant governments to ensure that other religions are treated equally. Treating other religions equally is especially important in the manner that the state ensures that all religious communities are able to practise and spread their religion without constraints. It would entail positive action to ensure that minority religious practices are recognised and promoted. In fulfilling these constitutional obligations, the state may be obliged in certain cases to curb the manifestations of a *de facto* religion(s). To appreciate how the Nigerian state has acted in this regard, I shall examine the issue of religious schools, religion in schools, religious proselytism and the balance established by Nigerian courts in the clash between religious beliefs and practices, on the one hand, and communal and statutory duties, on the other.

6.1 Religious schools

As we noted above, section 38(3) of the 1999 Constitution permits the establishment of religious schools in Nigeria, and generally it may

⁶³ See the 1981 UN Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion and Belief.

be stated that religious organisations are free to establish religious schools. A distinction seems appropriate between schools owned by religious organisations, where normal curricula are taught, albeit from a religious perspective, and doctrinal schools, where clergy and *imams* are prepared. A further distinction rests on the level of education. While primary and post-primary schools are within the competence of state governments, post-primary education, including at universities, is concurrently shared between state and federal governments. Item 27 of the Second Schedule to the 1999 Constitution endows the federal government with the power to regulate university and technological education. Pursuant to this power, the establishment and standards of universities are controlled by the National Universities Commission. In *Ukaegbu v Attorney-General Imo State*,⁶⁴ the Supreme Court recognised the right of individuals to establish private universities by virtue of the right to freedom of expression within the context of any law made to regulate such establishment. Consequently, private universities require the consent of the National Universities Commission to establish universities. Since there is no restriction apparently targeted at religious bodies, many of them have established universities. For a long time public universities have held sway in Nigeria and a cardinal feature of these universities is that they profess no religion, even though they are likely to observe Islam and Christianity on most campuses.⁶⁵ At the lower levels of primary and secondary education, there is also no peculiar restriction in the establishment of religious schools. However, one of the areas of controversy is whether a student in any such religious school or university is entitled to object to any form of religious instruction and practice. Recently, a number of Christian⁶⁶ and Islamic⁶⁷ universities have come under attack for their moral rules. While these universities stress that their moral rules and a certain level of autonomy underlie their origin and context,⁶⁸ other commentators stress the rights of students in the schools, implying that these rights ought to trump the moral rules.

⁶⁴ [1984] 5 NCLR 78.

⁶⁵ See E Obadare 'From students to disciples: Fundamentalism and the structural transformation of university campuses' in A Agbaje *et al Nigeria's struggle for democracy and good governance* (2004) 375.

⁶⁶ One of such universities, the Covenant University, prescribed a virginity test for its graduating students. See 'Religious universities: Campuses of strange happenings' *Newswatch* 24 September 2007 18: 'Not a few Nigerians were shocked at the revelation that Covenant University conducts medical tests which includes HIV and pregnancy tests and that the result of the tests would stand between the students and their educational pursuits.'

⁶⁷ *Newswatch* (n 66 above) 17 alleges that in the Crescent University, Abeokuta Jumat service is compulsory for every student whether you are a Christian or a Muslim.

⁶⁸ As above.

6.2 Religion in schools

As hinted above, there is considerable state involvement in the running of schools in Nigeria. One direct consequence of the end of civil war in Nigeria in 1970 was the take-over of primary and post-primary schools and universities in all parts of Nigeria by state and federal governments. Even with the take-over of schools, *de facto* state religions are taught and promoted in these schools to the detriment of other beliefs and religions.⁶⁹ Thus, in the northern part of the country, Islamic religious knowledge is taught and promoted as opposed to Christian religious knowledge. The reverse is the case in Southern Nigeria. One key issue is whether there is an obligation by state governments to provide and promote all religious knowledge in their schools. This question was raised, but unfortunately sidestepped, in the case of *Adamu v Attorney-General of Borno State*,⁷⁰ where the appellants as plaintiffs instituted an action in the High Court of Borno State, claiming a declaration that the practice whereby they paid for the teaching of Christian religious knowledge to their children in the same school where their local government (the Gwoza Local Government Council) paid teachers of Islamic Religious Knowledge was unconstitutional as such a practice is discriminatory. They also sought an order directing the Gwoza Local Government Council to pay the salaries of teachers of Christian Religious Knowledge. The trial judge dismissed the action on a preliminary motion that the subject matter of the suit is not justiciable, because it fell within chapter two of the 1979 Constitution. The Court decided that the matter was justiciable and that, had the trial judge gone to trial and the facts established, it would have amounted to the appellant's fundamental right of freedom from discrimination based on religion. Consequently the Court of Appeal remitted the case to another High Court judge for trial. Adamu hints at the possibility of the equality provisions being deployed to ensure that all religions are treated equally. In that context, a finding of discrimination against the teaching of Christian Religious Knowledge would also be applicable to the teaching of Traditional Religious Knowledge, so long as the teachers can be found.

6.3 Religious proselytism in Nigeria

It may be stated that religious organisations in Nigeria generally have a right to proselytise in furtherance of their right to religion found in section 38(1), subject, of course, to the maintenance of public order. In this regard, there is a Public Order Act⁷¹ that is potentially directed

⁶⁹ See generally RIJ Hackett 'Conflict in the classroom: Educational institutions as sites of religious tolerance/intolerance in Nigeria' (1999) *Brigham Young University Law Review* 537.

⁷⁰ (1996) 8 NWLR (Pt 465) 248.

⁷¹ Ch P42 Laws of the Federal Republic of Nigeria 2004.

at religious organisations. Furthermore, there are regulations made by media regulators in Nigeria that affect the ability of religious organisations to proselytise. First, section 1 of the Public Order Act enables the governor of each state to regulate public assembly meetings⁷² and processions on public roads and places of public resort in the state by issuing licences in this regard. Subsection (2) of the Act provides that any person desirous of convening an assembly, meeting or procession must apply to the governor of the state not less than 48 hours before the event. Section 2 of the Public Order Act empowers a police officer to stop any assembly, meeting or procession for which no licence has been issued or which violates any condition in an issued licence. Section 4 permits police officers to issue proclamations banning any public assembly meeting or procession for up to a period of 14 days. The constitutionality of the Act was recently challenged with respect to political rallies. In *Inspector-General of Police v All Nigeria Peoples Party*,⁷³ the Court of Appeal considered whether the Public Order Act, requiring a licence to hold assemblies, permits and processions, was constitutional and justifiable under section 45 of the 1999 Constitution. The issue was whether such a law is reasonably justifiable in a democratic society, or an unwarranted substantial conditionality for the exercise of the freedom of assembly and association. The Court held that the requirement of a licence by the Public Order Act was unconstitutional, as it stifles the right of citizens to assemble freely and associate with others. The Court recognised the right of the government to safeguard law and order in a society, but held that the means of doing this should not stifle fundamental personal liberties. Accordingly, religious organisations do not need a police permit to hold proselytising meetings.

As stated earlier, media regulatory bodies in Nigeria are capable of affecting the proselytising the mission of religious organisations. Of note here is the National Broadcasting Commission (NBC), a federal government agency statutorily⁷⁴ charged with the regulation of the broadcasting industry. The Commission is charged with a number of functions which include responsibility for (i) upholding the principles of equity and fairness in broadcasting; (ii) establishing and

⁷² It is to be noted that the Public Order Act defines in sec 12 a 'public meeting' as including any assembly in a place of public resort and any assembly which the public or any section thereof is permitted to attend, whether on payment or otherwise, including any assembly in a place of public resort for the propagation of any religion or belief whatsoever of a religious or anti-religious nature but, notwithstanding any other provision of this Act, does not include (a) any regular religious service conducted in a mosque, church or any building or other structure customarily used for lawful worship of any description; (b) any charitable, social or sporting gatherings; (c) any meeting convened by a department of any government in the Federation or any other body established by law for its own purposes; or (d) any lawful public entertainment.

⁷³ (2007) 18 NWLR (Pt 1066) 457. This decision can be taken to have overruled *Chukwuma v Commissioner of Police* (2005) 7 NWLR (Pt 927) 278.

⁷⁴ Ch N11 Laws of the Federation of Nigeria 2004.

disseminating a national broadcasting code and setting standards with regard to the content and quality of materials for broadcast; and (iii) promoting Nigerian indigenous cultures, moral and community life through broadcasting. Pursuant to the enabling law, the NBC enacted a Broadcasting Code which affects religious organisations. Section 3.4, articles 1 and 3 of the National Broadcasting Code mandate the provision of equitable air-time and appropriate opportunity for all religious groups. The advent of Pentecostal evangelism and its real and perceived benefits has led to a proactive use of the broadcasting institutions to proselytise.⁷⁵ It appears that broadcasting stations routinely flout the above-mentioned article, preferring to air the programmes of paying (rich) religious organisations.⁷⁶ This, of course, is discriminatory with respect to poor religious bodies of the same faith and also privileges Christianity over Islam.⁷⁷ Another section of the Broadcasting Code affecting religious organisations is the allocation of not more than 10% of the air-time of the broadcasting station. Another relevant aspect of the Code is section 3.4, article 6, which prohibits religious broadcasts promoting unverifiable claims. In 2004, the NBC banned miracles on television as they are not provable or believable.⁷⁸ The NBC is a good example of a government agency unable to successfully mediate the spread of religion. Its practice, the designating of religious broadcasts as private and commercial is an example of the folly of pretending that the body is neutral. What the NBC needs to do is to actively support all religions to have equal access by providing facilities for all religions to

⁷⁵ See RII Hackett 'Charismatic/Pentecostal appropriation of media technologies in Nigeria and Ghana' (1998) 28 *Journal of Religion in Africa* 258.

⁷⁶ See W Ihejirika 'Media and fundamentalism in Nigeria' 2005 (2) *Media Development* http://www.wacc.org.uk/wacc/publications/media_development/2005_2/media_fundamentalism_in_Nigeria: 'Before the advent of Pentecostal media, religious broadcasting has been provided as a form of public services by the various media houses. Today, because of the money accruing from the televangelists, none of the stations allocates space for public service religious programmes.'

⁷⁷ See Hackett (n 75 above) 270: 'It is precisely the appeal of these Western Christian programmes that Muslim leaders fear, and their powerful images of health and wealth- directly offered and electronically mediated by the persuasive evangelist in the privacy of one's own home.' See also Ahmed (n 31 above) 3: 'The unprecedented proselytisation, televangelism and deployment of foreign religious personnel and fund into Nigeria is a manifestation of the power of Nigerian Christians, which spawns a siege mentality amongst Muslims, who then perceive the institutionalisation of Shari'a in Muslim states as a kind of safety net.'

⁷⁸ See Ihejirika (n 76 above): 'For instance, on a number of occasions, attempts have been made by the Commission to stop the airing of the programmes of Pastor Chris Oyakilome, the most visible and flamboyant Pentecostal preacher. The allegation is that his programmes carry unsubstantiated claims of miracles and healings ... These attempts have ended in failure because of stiff resistance especially from the private electronic media owners in the country who know how much income they will be losing if the programme is stopped. Despite all the threats and warnings, Oyakilome still appears on both national, state and private radios and televisions with his programme "Atmosphere for Miracle".'

produce broadcast materials. What is observed of the NBC applies to state electronic media bodies in the 12 northern states.

6.4 Upholding religious beliefs and practices in conflict with communal and statutory duties

In this section, I explore the tension between religious beliefs and practices in conflict with statutory and communal duties. One appropriate question is whether the Nigerian legal system accords religious practices and beliefs a unique standing that recognises the objections of adherents. It does appear, however, that the courts are far more likely to hold that the right to religion supersedes communal obligations than statutory duties. In *Nkpa v Nkume*,⁷⁹ members of the Jehovah's Witness sect objected to the paying of levies for development projects and for not participating in the sanitation exercises of a community. The Court of Appeal upheld their objection and overturned the judgment of the lower court, which had held:⁸⁰

[a]ll the levies which the plaintiff objects to are definitely for the well being of his community. Will it be right to allow individuals to ruin development projects in their communities because of religious tenets? My answer is clearly in the negative. The plaintiff is allowed to practice whatever religion he professes but there must be something fundamentally wrong with a tenet which renders its adherents odious before the people.

In overturning the levies, the Court alluded to the freedom of religion of the objector and also dwelt on the power of the community to impose levies and the manner of recovery thereof. The Supreme Court, in the earlier case of *Agbai v Okagbue*,⁸¹ upheld the objection of a Jehovah's Witness to joining an age grade because his religion forbade such an activity. In both cases, the courts stressed the self-help resorted to by the community, implying that, had the community applied to the courts, the levies may have been enforced.⁸² In both cases, the courts drew attention to provisions similar to section 34(2)(e) of the 1999 Constitution which makes an exception to the right of dignity of the human person by excluding normal communal and other civic obligations for the well-being of the community. The import of the cases is that there is a constitutional sanction of communal labour which may override objections based on the right to freedom of thought, conscience and religion. Sadly, this point was not fully considered in the cases discussed above.

⁷⁹ [2001] 6 NWLR (Pt 710) 543.

⁸⁰ Judgment reproduced at 557-8.

⁸¹ (1991) 7 NWLR (Pt 204) 391.

⁸² See ES Nwauche 'A note on the burdens of association and limits of legality in Nigeria' (1994-1997) 6 *The Nigerian Juridical Review* 235.

Another case of objection to communal rites on grounds of religious belief is *Ojonye v Adegbudu*,⁸³ where a widow's religious objection to the custom of an animal sacrifice as part of her late husband's burial rites was upheld by the Benue State High Court. Worried about the 'possibility of people escaping their civic responsibility or civil obligations to other people on the pretext of ... freedom of religion',⁸⁴ the High Court erected a threshold that what is required is not merely the belief of the objector, but what is generally known as permitted by the religion in question. In fact, the Grade II Area Court from where the appeal came from had ruled that the widow could not rely on her religion, because she was not a true Christian, since she had not been baptised and had not taken holy communion in church.⁸⁵ While the threshold erected by the Court seems untenable since the belief of the widow is enough to sustain the section 38(1) right, it underlies a persistent worry about the use of fundamental human rights to undermine customary law.

The extent to which people may object to statutory or public duties on religious grounds is yet to be fully explored by Nigerian courts. An opportunity was missed by the Federal Supreme Court in the case of *Ojueye v Ubani*,⁸⁶ where Seventh Day Adventists complained that their right to religious freedom was violated, because an election held on a Saturday resulted in about 7 000 of them not voting because of their fear of being excommunicated. The Court held that fixing the election on a Saturday did not violate their right. It seems the Court decided the matter on the ground that the margin of loss by the candidate by over 20 000 votes made the loss of the Seventh Day Adventist votes irrelevant.

7 Indigenous spiritual beliefs, values and practices in Nigeria

In this section, I examine four ways through which the Nigerian legal system treats indigenous spiritual beliefs, values and practices. The first way is by criminalising some of these beliefs, values and practices. The second way is by refusing to recognise these beliefs, values and practices and consequently refusing to accord them any legal significance. The third way is to classify these beliefs, values and principles as customary law and to apply them if they pass the validity tests. The fourth way recognises these beliefs, values and principles and applies them. It can be stated that these four ways indicate a legal system that has not been able to properly understand the application of section

⁸³ [1983] 4 NCLR 492.

⁸⁴ n 83 above, 494.

⁸⁵ n 83 above, 493.

⁸⁶ [1961] 1 ALL NLR 277.

38 to indigenous beliefs, values and practices within the context of the colonial hangover of the dominance of Islam and Christianity.

A good example of the first way is the prohibition of the practice of the occult and paranormal, such as witchcraft. Chapter 20 of the Criminal Code is titled 'Ordeal, witchcraft, *juju* and criminal charms' and prohibits all activities related to witchcraft, criminal charms and *juju*.⁸⁷ Secondly, the Nigerian legal system treats indigenous spiritual beliefs, values and practices as unreasonable, superstitious and of no legal consequence.⁸⁸ Consequently, such beliefs do not generally avail defendants of the defences of insanity; self-defence; provocation and the defence of mistake of fact.⁸⁹

Thirdly, the Nigerian legal system treats indigenous beliefs, values and practices as forming part of customary law. It is the definition of customary law as including Islamic law that is particularly relevant here. At the turn of the twentieth century, Islam had become the dominant religion in Northern Nigeria through the *jihads* of the eighteenth and nineteenth century, while indigenous African religions thrived in the south of Nigeria. The English colonial masters introduced English law in Nigeria with the effect that, while it transformed⁹⁰ Islam in the northern part of Nigeria, it supplanted and led to the disappearance of many of the traditional religions in the Southern Nigeria. By the time Nigeria became independent, Islamic criminal law was reduced into

⁸⁷ The said section provides that any person who (a) by his statements or actions represents himself to be a witch or to have the power of witchcraft; or (b) accuses or threatens to accuse any person with being a witch or with having the power of witchcraft; or (c) makes or sells or uses, or assists or takes part in making or selling or using, or has in his possession or represents himself to be in possession of any *juju*, drug or charm which is intended to be used or reported to possess the power to prevent or delay any person from doing an act which such person has a legal right to do, or to compel any person to do an act which such person has a legal right to refrain from doing, or which is alleged or reported to possess the power of causing any natural phenomenon or any disease or epidemic; or (d) directs or controls or presides at or is present at or takes part in the worship or invocation of any *juju* which is prohibited by an order of the state commissioner; or (e) is in possession of or has control over any human remains which are used or are intended to be used in connection with the worship or invocation of any *juju*; or (f) makes or uses or assists in making or using, or has in his possession anything whatsoever the making, use or possession of which has been prohibited by an order as being or believed to be associated with human sacrifice or other unlawful practice; is guilty of a misdemeanour, and is liable to imprisonment for two years.

⁸⁸ See *Gadam v R* (1954) 14 WACA 442. See also Oputa JSC in *Goodluck Oviefus v State* (1984) 10 SC 207 262.

⁸⁹ See LO Aremu 'Criminal responsibility for homicide in Nigeria and supernatural beliefs' (1980) 29 *International and Comparative Law Quarterly* 113.

⁹⁰ See A Yadudu 'Colonialism and the transformation of the substance and form of Islamic law in the northern states of Nigeria' (1992) 32 *Journal of Legal Pluralism and Unofficial Law* 103.

a penal code⁹¹ within the context of an English common law,⁹² while Islamic personal law was recognised as customary law. The recognition of Islamic personal law as customary law began in the colonial period⁹³ and was adopted after independence,⁹⁴ and is achieved essentially by defining 'native law and custom' as including Muslim law, a classification which has been stoutly and strongly resisted by a broad spectrum of the Muslim society,⁹⁵ including the Nigerian judiciary.⁹⁶ The customs of the people of Southern Nigeria, including the religiously-based ones, potentially fall under the rubric of customary law.⁹⁷

As a matter of law, customary law must pass a number of tests before it can be applied in a Nigerian court. These tests are statutorily⁹⁸ and constitutionally based. The statutory test provides that a customary law can be enforced, so long as it is not repugnant to natural justice, equity and good conscience. The repugnancy test, which has been applied in many cases,⁹⁹ is a term without definite contours, making it subjective and open to the understanding and values of different courts. In most cases, the fact that the test is applied by judges trained in English common law often leads to the application of a different value system to customary law.¹⁰⁰ Secondly, customary law must not

⁹¹ See AG Karibi-Whyte *The history and sources of Nigerian criminal law* (1993) 124.

⁹² See C Okonkwo & M Naish *Criminal law in Nigeria* (1980) 9-10; MA Owoade 'Some aspects of criminal law reform in Nigeria' (1980) 16 *Nigerian Bar Journal* 25.

⁹³ See sec 2 Native Courts Ordinance, Cap 142 Revised Edition of Laws of Nigeria 1948.

⁹⁴ See sec 2 of the High Court Law, Cap 42, Laws of Northern Nigeria, 1963 (applicable to the northern states of Nigeria).

⁹⁵ For the views of scholars, see AA Oba (n 43 above); YK Saadu 'Islamic law is NOT customary law' (1997) 6 *Kwara Law Review* 136; M Tilley-Gyado 'A case for the inclusion of African customary law in the curriculum of law faculties in Nigerian universities' (1993-1995) 2 & 3 *Nigerian Current Legal Problems* 246 256-7.

⁹⁶ See the cases of *Umaru v Umaru* (1992) 7 NWLR (Pt 254) 377: '[T]he definition of "customary law" ... is incapable of including "Moslem law".' In *Alkamawa v Bello* [1998] 6 SCNJ 127 136 Wali JSC stated *obiter* that 'Islamic law is not the same as customary law as it does not belong to a particular tribe. It is a complete system of universal law, more certain and permanent and more universal than English common law.'

⁹⁷ See sec 20(1) of the High Court Law of Cross River State which defines customary law as 'a rule or body of rules, regulating rights and improving correlative duties, being a rule or a body of rules which obtains and is fortified by established usage'.

⁹⁸ See eg sec 16(1) of the High Court Law Bayelsa State which provides that '[t]he Court shall observe and enforce the observance of customary law and shall not deprive any person of the benefits thereto except where such customary law is repugnant to natural justice equity and good conscience or incompatible either directly or by its implication with any written law from time to time in force in the state'.

⁹⁹ See eg the cases of *Okonkwo v Okagbue* [1994] 9 NWLR (Pt 368) 301; *Yinusa v Adesubokan* (1968) NNLR 97; *Zaidan v Mohsen* (1971) 1 UILR (Pt.II) 283.

¹⁰⁰ Academic commentary on the repugnancy test is overwhelming. A representative sample is as follows: A Ojo 'Judicial approach to customary law' (1969) 3 *Journal of Islamic and Comparative Law* 44; Y Aboki 'Are some Nigerian customary laws really repugnant' (1991-1992) 9-10 *ABU Law Journal* 1; BO Achimu 'Wanted — A valid criterion of validity for customary law' (1976) 10 *Nigerian Law Journal* 35.

be incompatible either directly or by implication with any law in force. In simple terms it means that any inconsistency between customary law and legislation will be resolved in favour of the latter. The third test is that customary law must not be contrary to public policy.¹⁰¹ There is no definition of public policy in the Evidence Act, even though it is again a matter of value judgment. The Nigerian Supreme Court in *Okonkwo v Okagbue*¹⁰² stated that public policy 'must objectively relate to contemporary mores, aspirations and sensitivities of the people of this country and to the consensus values in the civilised international community, which we share'.¹⁰³ The test is as difficult as it is vague in its application. In this way, it is a potent weapon in the hands of a judicial system whose value system is not rooted in the customary law which is being applied. The effect of the combination of the statutory tests leads to the inescapable conclusion that customary law, including Islamic law, is subordinated to the English common law and ensures that the growth of customary law is stunted. The constitutional test is perhaps the most important validity test. Every law, including customary law, must pass constitutional muster. While the constitutional test encompasses the whole Constitution, there is no doubt that the provisions of chapter four of the Constitution are most appropriate in addressing the validity of customary law.¹⁰⁴

The fourth sense in which the Nigerian legal system treats indigenous beliefs, values and practices is by a wholesale adoption of procedures underpinned by the indigenous phenomena. Thus, Nigerian courts have accepted the validity of customary arbitration conducted through oath-taking and have upheld decisions applicable to persons who have survived oaths.¹⁰⁵ Customary oath-taking rests principally on the belief that surviving an oath is evidence of the truth of an assertion.¹⁰⁶ As I have argued elsewhere, this is a welcome instance of the enforcement of the section 38 right.¹⁰⁷

¹⁰¹ This test is provided for in sec 14(3) of the Evidence Act.

¹⁰² (1994) 9 NWLR (Pt 368) 301 (SC).

¹⁰³ n 102 above, 341.

¹⁰⁴ See *Uke v Iro* [2001] 11 NWLR 196 where a Nnewi custom, by which a woman is precluded from giving evidence, was held unconstitutional as it offended the right to freedom from discrimination. See also *Ukeje v Ukeje* [2001] 27 WRN 142, where the Court of Appeal held that an Igbo custom that disentitles daughters from participating in the sharing of the estate of their deceased father was unconstitutional.

¹⁰⁵ See eg the case of *Onyenge v Ebere* [2004] All FWLR (Pt 219) 981.

¹⁰⁶ See generally AA Oba 'Juju oaths in customary law arbitration and their legal validity in Nigerian courts' (2008) 52 *Journal of African Law* 139.

¹⁰⁷ See ES Nwauche 'The right to freedom of religion and the search for justice through the occult and paranormal in Nigeria' (2008) 16 *African Journal of International and Comparative Law* 35 53.

8 Resolving religious conflicts in Nigeria

Nigeria has been the victim of considerable religious strife. It seems fair to assert that the persistence of religious conflict in Nigeria hints at either a lack of understanding of the causes of the conflict or the failure of a resolution strategy. Understanding and implementing the constitutional obligations to minority religions, as argued above, by different levels of government, will assist in the reduction of religious conflict. Another method is the institutionalisation of the interaction of leaders of all religious groups. Already the federal government is empowered to do this by the Advisory Council on Religious Affairs Act,¹⁰⁸ which establishes an Advisory Council on Religious Affairs and charges the Council in section 3 with serving as an avenue for articulating cordial relationships amongst the various religious groups and between them and the federal government; assisting the federal and state governments and the populace by stressing and accentuating the position and roles religion should play in national development; serving as a forum for harnessing religion to serve national goals towards economic recovery, consolidation of national unity and the promotion of political cohesion and stability; considering and making recommendations to the federal government on matters that may assist in fostering the spiritual development of Nigeria in a manner acceptable to all religious groups. The Council is designated as an autonomous body even though its secretariat is to be located and provisioned by the Federal Ministry of Internal Affairs. The Council is made up of an equal number (12) of Muslims and Christians with the chairmanship and secretarial position rotating between the two religions. It is to be noted that the Council is an advisory body with no enforcement powers. Furthermore, there is the question of the recognition of Islam and Christianity as the basis of its constitution. There is little public evidence of its functions over the years in the area of religious tolerance. All the same, it is easy to identify the body as a possible fulcrum of resolving religious strife in Nigeria and as an example to be emulated at all levels of government in Nigeria.

9 Concluding remarks

A credible path to religious harmony in Nigeria lies in the recognition of Nigeria's *de facto* religions and the attendant constitutional obligations of equality and non-discrimination which entail respect, recognition and promotion of the belief, values and practices of other religions. Many cases of religious intolerance in all parts of Nigeria stem from a lack of understanding of the practical consequences of the constitutional

¹⁰⁸ Ch A8 Laws of the Federation of Nigeria 2008.

obligations. All governments in Nigeria and their organs must understand and implement these obligations. Furthermore, administrative bodies, such as the Advisory Council for Religious Affairs, must be effectively engaged. The role of the judiciary in the balancing of interests in section 38 cannot be overestimated, as is the infusion of religious tolerance into the curricula of schools and universities. Ultimately it is the nuanced determination of inter- and intra-religious disputes that will make the difference. Even though the path seems long and tortuous, there are signs of an understanding of the tasks ahead.