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JUDICIAL IDIOSYNCRACIES AND THE PLACE OF RELIGION IN JUDICIAL LAW MAKING

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ABSTRACT

Law and religion are like two inseparable siamese twins. Every law has a religious undertone. That accounts to a great extent why most laws are flavoured with religious colouration. The duty of a judge, primarily, is to adjudicate on disputes brought before him. In so doing, the judge is influenced by a number of factors before arriving at a decision. This underscores the point that it is not only pure legal issues or consideration that could influence a judge's decision. Religion is one potent weapon that has continued to shape how laws are made. It follows that in settling disputes between rival parties, religion has a place in a judge's minds eye. This is helped by the fact that a particular case has to be treated on its merit. A judge of a particular religious faith would be more favouarably disposed in upholding the tenets of that faith. When this happens, there is a deliberate 'interference' with the judge's adjudicatory function. Whether or not such interference is needed is a subject of our inquiry in this paper.

Keywords: Law, Religion, Judicial Powers, Nigeria.

1. INTRODUCTION

Modern law and religion are essential socio-political phenomena that have in common some veiled elements. Both aspire to constitute, or at least to frame, human consciousness and behaviour in all spheres of private and public life. Accordingly, modern law and religion are complementary, contradictory and simultaneous sources of rule-making, adjudication and execution[1]. Both embed obedience and obligations, leadership, institutions and legal ideology as foundations of their maintenance and prevalence, based on a strict structure of command. Modern law and religion are engendered through written and oral intergenerational- sometimes transnational- texts that are enforceable through authorities, and are subjected to authoritative, corresponding and alternative hermeneutics[2]. Since modern law and religion are intimately dynamic bound spaces of institutions, professionalism and social mobilization, they are carriers and subjects of political power.

Modern democratic reality is exemplified by the growing role of courts in politics, as social activists regularly utilize the judicial process in a spirited attempt to secure their values and interests in law. Observers of constitutional politics generally explain this trend in the recent constitutional transformations worldwide, manifested principally in the enactment of bills of

[1] P Radan, *Law and Religion* (Taylor and Francis 2004) 130
[2] R Sandberg, *Law and Religion* (Cambridge University Press 2011) 15

rights accompanied by judicial review powers. These constitutional transformations enabled and simplified the ability of those with limited access to government to challenge governmental policies through the courts. As a result, law has come to be perceived as a compelling mechanism to effectuate progressive change and facilitate authoritative resolutions to conflicts. In societies divided along religious lines, the appeal of litigation has been particularly strong, with secular and religious groups increasingly viewing it as a principal opportunity to mould the public sphere in accordance with their political and moral preferences.

From antiquity to current modernity amid various historical transformations, some of which have been revolutionary, law and religion have never been completely separated[3]. They have never been so independent as to achieve complete autonomy from each other. Religion has essentially been embodied in modern legal systems, even in those that have aspired to privatize religion. Religions are embedded in daily practices in various regions, from the Middle East through Africa to Europe, from Latin America to North America and Asia, western regimes and post-communist regimes alike[4].

The compound interactions and multifaceted mutuality between law and religion, as excavated in this paper, deserve a distinctive scholarly attention on account of their immense socio-political significance. Religion and law should be redeemed from their imagined setting as metaphysical mythological entities and be conceptualized as relative socio-political phenomena. This paper examines the intricacies surrounding the relationship between law and religion and how they fit into a jigsaw.

2. CONCEPTUAL FRAMEWORK

2.1 Meaning of religion

A number of modern scholars of jurisprudence and religion have commented on the difficulty of defining what religion is. Over the centuries, influential thinkers have offered their own definitions, with greater or lesser degrees of assurance, but virtually all of these definitions have been found wanting by the majority of scholars. In some cases, the definitions are too narrow, defining religion in terms of the speaker's religious beliefs or those of his/her culture and tending to exclude the religious beliefs of other cultures[5]. The learned author, Chris Wigwe[6], defined religion as a system of faith and worship usually involving belief in a supreme being and usually containing a moral or ethical code; especially such a system recognized and practiced by a particular church, sect or denomination. Religion can also be a belief in or worship of a supernatural power or powers considered to be divine or to have control of human destiny[7]. According to *Puja Model*[8], religion is a belief in God. In other words, religion is the human response to the apprehension of something of power, which is supernatural and supersensory. It is the expression of the manner and type of adjustment effected by the people with their conception of the supernatural. From the above therefore, it seems as if these meanings have something in common. They all seem to be saying that religion is a belief[9].

[3] PW Edge, *Religion and Law: An Introduction* (Ashgate Publishing Ltd 2006)
[4] MW Janis and CM Evans, *Religion and International Law* (Martins Nijhoff Publishers 1999) 17
[5] P Connelly, 'understanding Religion and Related Terms' <http://www.darc.org/connelly/religion1.html> accessed 14 August 2015.
[6] CC Wigwe, *Jurisprudence and Legal Theory* (Accra: Readwide Publishers 2011)
[7] at 109
[8] P Mondal, 'Religion: Meaning, Definitions and Components' <http://www.yourarticlelibrary.com/religion/religion-meaning-definitions-and-components-of-religion/6151/> accessed 14 August 2015
[9] CC Wigwe (n 6)

3. RELIGION, LAW AND THE SECULAR STATE

The laws of any given society should reflect moral ideas which, at least in principle, can be defended without invoking religiously revealed doctrines. However problems may arise when laws which may have been enacted for purely secular reasons and that, in the view of the legislator or even of the great majority of the population are unobjectionable from a moral point of view are vigorously objected to on religious grounds by the members of some religious group[10]. We live in a country that should never, if it hopes to exist as a country, permit any religion to enter into its body politic, economic activity, social fabric and most importantly, but most delicately a disturbance of the educational equilibrium of the youths.[11] One would begin to question the rationale behind the recent call by President MuhammaduBuhari for the inclusion of Islamic books in the curriculum of all federal colleges.[12] The 1999 Constitution of the Federal Republic of Nigeria clearly prohibits Federal or state Governments from adopting any religion as state religion[13]. This section should be read together with section 38 of the Constitution which provides for right to freedom of thought, conscience and religion. By the purport and import of section 10, it means Nigeria is a secular state[14].

The massive protests that trailed the Senate's passage of a resolution to retain the provision of section 29(4)(b) of the 1999 Constitution is an indication that where religious belief influences the law in a manner that is considered unacceptable, the citizens will express their resentment towards such a law. Under the amended section, a married underage girl is deemed to be an adult. It can be argued that religion had a strong influence on the voting pattern on the floor of the Senate for the passage of the said section. What it means therefore is that a 13 year old who is married automatically becomes an adult but cannot exercise her franchise in an election. Wherein lies the logic? In Marx's[15] words, "religion is the sigh of the oppressed creature, the sentiment of a heartless world and the soul of soulless conditions. It is opium of the people".

The governance of this country, indeed the Executive and definitely the Judiciary with their law-making and law-interpreting functions, respectively, have a most delicate though enviable duty in having to take extra-ordinary care and setting out positively to promote laws which must be acceptable and non-suspicious from the religious aspect of the nation in its entirety.

It is therefore a matter of great concern to the State, when promulgating its laws in areas of religion to watch out for serious and negative breakers. For instance, as soon as laws were promulgated for the promotion of the Moslem Hajj, the Christians demanded the same for a pilgrimage to the Holy land. And whereas there exist arguments put up by the Moslems that their performance of the Hajj stems from a religious compulsion, while the Christian pilgrimage is not that essential as a tenet of their faith, a non-careful handling of the situation might generate such religious sentiments as might lead to religious disaster[16].

The law in deserving cases takes the religious values of a particular group into cognizance. For instance the American constitutional experience is replete with situations where there has been a balance between law and religion. In *Wisconsin v Yoder*[17], the Court held that the

[10] JM Elegido, *Jurisprudence* (Spectrum Books Ltd 2007) 370
[11] K Eso, *Thoughts on Law and Jurisprudence* (MIJ Professional Publishers Ltd 1990) 301
[12] C Ejiofor, 'Buhari orders inclusion of two Islamic Books in Curriculum' <http://www.naij.com/506580-buhari-directs-inclusion-islamicbooks-curriculum-fuels-concerns-among-nigerians.html> accessed 15 August 2015
[13] Section 10 Constitution of the Federal Republic of Nigeria (CFRN)
[14] C Wigwe, 'Sharia and the 1999 Nigerian Constitution (2009) JJCI RSUST 51 109-121
[15] K Marx, 'The Economic and Philosophical Manuscripts' (1964) in M Haralambos and M Holborn, *Sociology: Themes and Perspectives* (HarperCollins Publisher 2000)
[16] K Eso (n 11)
[17] 406 US 205 (1975)

people of Amish[18] are relieved of the compulsory public education after the eighth grade education so that they can learn a skill which is a requirement of their religious obligation. This can be contrasted with the situation in Nigeria, Lagos State precisely, where the state government banned the use of Hijab on the argument that it was not part of the approved school uniform for pupils. Following the ban, two 12 years-old girls under the aegis of the Moslem Students of Nigeria, Lagos State Area Unit, brought an action in court challenging the ban. In upholding the ban, the court ruled that the prohibition of the Hijab over school uniforms within and outside the premises of public schools was not discriminatory and does not violate sections 38 and 42 of the 1999 Constitution as claimed by the Plaintiffs. This is how law and religion indeed mix. The relationship between law and religion, following our illustration above, can be best described as a "give and take" situation. It begs the question *inter alia*: Would the judgment of the Lagos State High Court be the same if the matter were to come before a Moslem judge? We submit that religion has a very strong influence on lawmakers and judges and argue that a different decision would have been reached if the Judge were a Moslem.

4. RELIGION AND JUDGE'S DECISION MAKING

In the preceding section, we argued that religion has a very strong influence on judges. A judge who is of the Catholic persuasion would find it difficult to dissolve a marriage if same is brought before him. His strong religious convictions would prevent him from doing so. Like many other Americans, judges can have deep seated religious convictions. Although their religious beliefs certainly do not interfere with their job performance most of the time, judge's religion can occasionally become problematic. For example, an Alabama Supreme Court Chief Justice, Roy Moore, was removed from office in 2003 after he placed a 5,300- pound monument of Ten Commandments in the rotunda of the state judiciary building and refused to remove it despite being ordered to do so[19]. He installed the monument "in order to remind all Alabama citizens of, among other things, his belief in the state and the church"[20]. Religion and its relationship to judges' attitudes, also comes up in the judicial nomination and confirmation process. This is especially true in the qualification requirement for a Justice of the Court of Appeal in Nigeria. The 1999 Constitution requires that not less than three of the total number of Justices of the Court of Appeal shall be learned in Islamic personal law and not less than three shall be learned in customary law[21]. It is also true with regard to the United States Supreme Court, which for many years had purported Catholic and Jewish seats[22].

Societies deeply rooted in religion-based divisions experience a perennial struggle over the public sphere. The classic liberalist antidote for these conflicts has been to set apart the spheres of political and religious affairs[23]. According to the liberalist, separation best maintains neutrality among competing ideas. If we separate the spheres of religion and politics, "engaged citizens, religious and secular, [will] be prevented in *exactly the same way* from achieving anything like total victory" of their views[24].On the other hand, accommodationists advocate the inclusion of religious interests in the public realm, emphasizing the resentment felt by religious

[18] The Amish are a group of people who follow simple customs and refuse to take oaths, vote, or perform military service. They shun modern technology and conveniences.
[19] BH Bornstein and K Monica, 'Does a Judge's Religion influence Decision Making?' (2009) Court Review: The Journal of the American Judges Association 300 <http://www.digitalcommons.un/edu/ajacourtreview/300> accessed 16 August 2015.
[20]Glassroth v Moore, 335 F. 3d 1282, 1284 (11th cir. 2003)
[21] Section 237 (2)(b) Constitution of the Federal Republic of Nigeria 1999 Cap C 23 LFN 2004
[22] BA Perry, *A 'Representative' Supreme Court? The impact of Race Religion, and Gender on Appointments* (Greenwood Press 1991)
[23] J Locke, *A Letter Concerning Toleration*(Merchant Books 2011)
[24]MWalzer, "Drawing the Line: Religion and Politics", (1999) Utah L. REV. 613, 633.

people over their silencing[25]. A third group, most notably represented by Fish, attempts to expose the alleged fallacy of this debate[26]. Fish describes the separationists' call for neutrality as a disguised political attempt to control the public sphere, and declares the accommodationists' claim for fair inclusion futile. Accomodationists, he argues, ignore the fact that boundaries between religion and state are routinely shaped by the strongest view in a social system resulting in legal arrangements that only appear to manifest a common ground[27].

Politically-motivateddisputes over religion-state relationships have increasingly been played out in the judicial sphere, with social activists attempting to effectuate a change in unfavourable governmental policies through the courts[28]. Judicial recourse seems to be sought for two main reasons. First, law is viewed as a mechanism of social reform. The legal process is perceived as enabling thepossibility for progressive change, to which society will defer[29]. Second, the legal process is perceived as capable of resolving social conflicts authoritatively in a way that advances social peace. A decision by a professional and supposedly impartial judiciary asserting constitutional principles should be more persuasive than a similar advancement by partial politicians[30]. These perceptions are ever more prevalent in societies with deep religion-based divisions, which typically involve passionate, clashing moral disagreements. With political compromise often a distant possibility, the litigation process becomes particularly attractive, since it entails the prospects of achieving the desired reform as well as ensuring the compliance of those who do not necessarily share the same values. In all of these, the task of a judge becomes even more difficult, as he is bound to decide a case one way or the other. In so doing, his religious inclinations could play a part on who he so decides.

An emphasis on religion in choosing judges naturally pre-supposes the existence of a relationship between the particular religion that a judge practices and the judge's decisions[31]. For example, will Jewish Judges be more lenient toward criminal defendants than protestant judges? Will a Pentecostal judge be more lenient toward a petitioner in a divorce case than a Catholic judge? Will evangelical judges favour the death penalty? One might expect judges, as professionals deciding a large number of cases, to be able to ignore extralegal factors such as their religious beliefs, yet two aspects of judges religion suggest that it is a significant concern and at least as likely to influence their decisions as jurors' decisions[32]. First, judges are solitary decision makers, so any influence of a judge's religion would not be diluted by countervailing religious (or non-religious) influences as it would be for one juror among many[33]. Second, judges rule on matters. This opens up a new arena for possible religious influence as the legal questions might themselves contain explicit or implicit religious elements (for example, separation of church and state).

In the United States, most of the research that has been conducted on the relationship between judges, religion and their decisions focuses on appellate Judges[34]. There is a growing consensus that appellate judges' attitudes and beliefs are important predictors of their decisions. This attitudinal model holds that an appellate court, such as the United States Supreme Court,

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[25]SL Carter, "The Culture of Disbelief: How American Law and Politics Trivialize Religious Devotion" (1993)25

[26]S Fish, "Mission Impossible: Settling the Just Bounds between Church and State", (1997) 97 COLUM. L. REV. 2255

[27]V Bader, "Religious Pluralism: Secularism or Priority for Democracy", (1999) 27 POL. THEORY 597, 603, 607.

[28]CHarlow& R Rawlings, *PressureThroughLaw*(Routledge 1992)

[29]Y Dror, "Law and Social Change" (1959) 33 TUL. L. REV. 787

[30]GC Christie*, Law, Norms, and Authority* (Gerald Duckworth & Co. Ltd. 1982) 176

[31] B Bornstein and M Miller, *God in the Courtroom: Religion's Role at Trial* (OUP USA 2009)

[32] On religion's role in juror decision making, see Bornstein & Miller (n 23)

[33]This is obviously less true for appellate judges, who decide cases as a group. Although judicial conferences might resemble jury deliberations in some respects, individual judges are nonetheless considerably autonomous than individual jurors

[34] BA Perry (n 22)

"decides disputes in light of the facts of the case vis-à-vis the ideological attitudes and the values of the justices".[35] The attitudinal model is closely related to the social background and extralegal models of judicial decisions making, which encompass a wide variety of demographic and experiential variables, such as religion. Religion is undoubtedly one important factor-albeit only one of many social background characteristics-influencing judges' attitudes, values, personalities and ideologies. The most obvious examples are probably the Catholic Church's stance on abortion and the death penalty, but religion doubtlessly influences case-relevant attitude in more subtle ways as well.

5. CONCLUSION

While it is only fitting that the community make an effort to try and accommodate the religious beliefs of its members, there is always a point at which the freedom to practice and manifest one's religion would be subject to some limitations. As rightly observed by Justice Roberts[36] , the free exercise of religion embraces two concepts-freedom to believe and freedom to act. The first is absolute, but in the nature of things the second cannot be[37]. Limitations to the "freedom to act" are required in order to perfect public safety, order, health or morals or the fundamental rights and freedom of others. This paper examined the relationship between law and religion and the influence the later has over the former. We clearly brought to the fore how religion influences both legislative law making and judicial decision-making.

[35]MW Janis & Evans (n 4)
[36] Cantwell v Connecticut 310 U.S 296 (1940)
[37]at 303-4