

Law, Religion and Reconciliation in Africa



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13 RELIGIOUS COURTS AND TRIBUNALS IN NIGERIA

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INTRODUCTION

This article evaluates the operations and workings of religious courts and tribunals in Nigeria.⁴ A similar meaning is attributed to “religious court” and “religious tribunal” in this article; however, for convenience, the term “religious court” is adopted. A religious court in this context refers to a formal or informal adjudicatory structure, established either by a government or a religious body, empowered to adopt religious laws and doctrines to settle disputes and to enforce laws and discipline.

Very recently in Nigeria, prominent religious groups and individuals have repeatedly called upon the government, both at the federal and state levels, to fully integrate religious courts as part of the country’s official adjudicatory system. For instance, the Christian Association of Nigeria demanded the establishment of ecclesiastical courts,⁵ similar to the sharia courts that are operating in northern Nigeria.⁶ Similarly, some Islamic groups were demanding that sharia courts be established in Lagos and Oyo States of southwestern Nigeria, as they currently operate in most of the Northern states.⁷ Anthony Idigbe,⁸ a lawyer and senior advocate of Nigeria, and Idowu Akinloye,⁹ an Anglican priest and a scholar of

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4 See other companion chapters in this volume on other African countries as well as the overview chapter on religious courts and tribunals in Africa generally.

5 The Christian Association of Nigeria was founded in 1976. It is the largest Christian ecumenical body established to be the powerful Christian voice in Nigeria.

6 Mgboh D. 2021. “Christian Association Seeks Establishment of Ecclesiastical Courts in Nigeria”, *The Sun*, 3 June 2021; Olatunji K. 2021. “Christian Lawyers Advocate Ecclesiastical Court in Lagos State”, *The Guardian Nigeria*, 18 August.

7 Adunola S. 2021. “NACOMYO Demands Establishment of Shari’a Court of Appeal in Lagos”, *The Guardian* 18 June; Salawu S. “FORUM seeks establishment of Shariah court in Oyo”, *Nigerian Tribune*, 27 January.

8 Onyekwere J. 2021. “Idigbe Endorses Call for Creation of Ecclesiastical Courts”, *The Guardian Nigeria*, 21 September.

9 Akinloye IA. .2019 ‘Human Flourishing, Church Leadership and Legal Disputes in Nigerian Churches’ in Green MC (ed). *Law, Religion and Human Flourishing in Africa*.

law and religion, also canvassed for the introduction of ecclesiastical courts in the Nigerian legal system.¹⁰

Implicit in the above are two assumptions. First, sharia courts, which enforce Islamic law, are recognised by the state and operated in some parts of the country. Thus, the above demands are primarily for their establishment and state recognition in other parts of the country. Second, Christians have requested the official recognition and establishment of ecclesiastical courts in the country. These demands are not misplaced given that Nigeria is a religiously pluralistic country. In fact, the calls by the aforementioned religious groups are premised on the ground that Nigerians are very religious and that their modes of dispute resolution should therefore reflect their religious beliefs and practices. Furthermore, Section 38 of the Constitution of the Federal Republic of Nigeria, 1999 (hereafter, CFRN, 1999), guarantees freedom of religion in the country. This right protects both the individual and institutional freedom of religion. Within the scope of the institutional right of freedom of religions is the right of *religious autonomy*¹¹ – that is, the right of religious organisations to manifest their religious practices without interference of the state or state actors. Arguably, the conception of religious autonomy further presupposes that religious organisations will be able to manage their internal religious activities, including establishing mechanisms for settling disputes among members.

However, it may be argued that the degree of the scope of powers, jurisdiction and legal recognition afforded to religious courts in a country may form the parameter to measure the degree of state and religion relation in that country – in this context, Nigeria. As we shall soon observe, most religious organisations in Nigeria have religious courts. However, some questions arise: To what extent are religious courts used for resolution of disputes in Nigeria? What are the procedures of these courts? What, if any, funding is provided by the state for them? What is the subject matter or jurisdictional scope of these courts? Do the civil (state) courts recognise and enforce decisions of religious courts? Are religious courts subject to governmental oversight or judicial review? Are some religious courts or tribunals afforded greater privileges or status than others? This chapter explores possible answers to these questions within the context of Nigerian legal and constitutional jurisprudence.

Stellenbosch: African Sun Media Publishers, 25-41.

10 Akinloye IA. 2020. "Legal Disputes Involving Clergy Discipline: Perspectives from Nigeria and South Africa", *Ecclesiastical Law Journal* 22(2):192.

11 Religious autonomy refers to the principle that protects the institutional independence of religious bodies to self-regulation and from interference on the part of the state and other external actors. It is also described variously as "ecclesiastical abstention, hands-off approach, freedom of the religion, and ministerial exception, among others." See generally, Garnett R. 2009. "A Hands-off Approach to Religious Doctrine: What Are We Talking About?" *Notre Dame Law Review* 837; Horwitz P. 2012. "Act III of the Ministerial Exception" 106 *Northwestern University Law Review* 106(2):973. There are three important components involved in religious autonomy, namely, regulation of own affairs and doctrines, state's non-interference, and court's non-interference. See also, Van Der Schyff G. 2003. "Freedom of Religious Autonomy as an Element of the Right to Freedom of Religion", *Journal of South African Law* 3:531-538.

The remainder of the chapter is divided into two main sections. The first section below provides a brief examination of the religious demography of Nigeria, followed by assessment of the deployment and operations of religious courts within the context of the three dominant religions, namely, Christianity, Islam and African traditional regions. The next section explores the nature of religion and state relation in Nigeria in terms of the state involvement in religious courts. These main sections are followed by a concluding section summarizing the evaluation of these religious court systems. Overall, the observation is that there is discrimination in the degree of legal recognition of the religious courts operating in Nigeria, with sharia and customary courts being afforded more governmental recognition.

NIGERIA'S RELIGIONS AND RELIGIOUS COURTS

Three popular religions are practised in Nigeria: Christianity, Islam and African traditional religions. Although no authentic estimate of the numbers of the adherents of each of the religions is publicly available, there is a consensus that Christianity and Islam are the dominant religions.¹² Regarding Islam, the United States Department of State, quoting the 2010 report of the Pew Forum on Religion and Public Life, found 38 per cent of the Nigerian Muslim population self-identified as Sunni and 12 per cent as Shia, with the remainder declining to answer or identifying as "something else" or "just a Muslim".¹³ Included among the Sunnis are several groups, such as the Tijaniyah, Salafist, Qadiriyyah and Ahmadi Muslims. The Christian groups, on the other hand, include the Anglicans, Evangelicals, Roman Catholics, Presbyterians, Pentecostals, The Church of Jesus Christ of Latter-day Saints and the Jehovah's Witnesses, among several others.¹⁴ There are also several African traditional religions (ATR) practised in the country. ATR have been described as religions "developed in Africa by Africans for Africans".¹⁵ Examples include the worshippers of Sango (the god of thunder) and Ogun (god of Iron) that are prominent among the Yorubas in Nigeria. Also, some Ibo people of Eastern Nigeria worship Ota Miri (the deity who owns all the waters). This chapter evaluates religious courts in the context of the three dominant religions.

12 See Stonawski M, Potancokova M, Cantele M and Skirbekk V. 2016. "The Changing Religious Composition of Nigeria: Causes and Implications of Demographic Divergence", *Journal of Modern African Studies* 53(3):1-27; Pew Forum on Religion and Public Life. 2010. "Tolerance and Tension Islam and Christianity in Sub-Saharan Africa". Washington DC: Pew Research Center.

13 United States Department of State. Office of International Religious Freedom 2019. "Nigeria 2018 International Religious Freedom Report" Washington, DC: U.S. State Department.

14 U.S. State Department, "Nigeria 2018 International Religious Freedom Report"; see also Nwauche E. 2008. "Law, Religion and Human Rights in Nigeria", *African Human Rights Law Journal* 8:568-595.

15 Akinloye IA. 2020. "Freedom of Religion: African Perspectives" in Ferrari S, Hill M, Jamal A and Rossella Bottoni (eds). *Routledge Handbook of Freedom of Religion or Belief*. London: Routledge, 187-200.

Christian religious courts

There are several Christian denominations in Nigeria, each of them has its canons, charters, constitutions and manual of laws or similar internal governing mechanisms.¹⁶ These governing mechanisms commonly provide structures for dispute resolution and enforcement of religious laws among the members of the church. These structures take different nomenclatures and exist under a variety of titles, such as “church court”, “church tribunal”, “ecclesiastical court” and “dispute resolution committee”. This chapter adopts the term “ecclesiastical court” to cover all these variants.

The exercise of jurisdiction by ecclesiastical courts is predicated on scriptural principles and constitutional foundation of freedom of religion and association.¹⁷ In the Catholic tradition, Pope John Paul II argued that the church has “its own and exclusive right to judge in spiritual and disciplinary matters and this belongs to the church by divine institution.”¹⁸ The procedure usually adopted by an ecclesiastical court is peculiar to each court in terms of the church’s canons and laws. However, it is commonly short of a formal judicial process, but some ecclesiastical courts are characterised by original and appellate jurisdictions and exist in tiered structures, such as national, regional and local levels. For example, the Anglican and Baptist churches use the hierarchical court system.¹⁹ Except in a few instances, the disputants in most ecclesiastical courts are not represented by lawyers.²⁰ Members of clergy and laity, particularly those that have the knowledge of the secular laws, often constitute the membership of the court.

An ecclesiastical court exercises jurisdiction and settles disputes among those who show allegiance to the church as members or who voluntarily submit to the jurisdiction of the court on issues that involve religious law. What flows from this

16 See, for example, the Church of Nigeria (Anglican Communion) Constitution and Canons 2020; Roman Catholic Church Code of Canon Law (1983); The Mandate Operational Manual of the Living Faith Church Worldwide (2012).

17 For example, the Bible instructs the church not to let evil be present within it in order to remain pure from the unrighteous (1 Corinthians 5:9, 11; Ephesians 5:1-3). Further, church leaders are to warn the sinful and admonish them to change their evil ways (2 Thessalonians 3:14-15) because the church leaders have the duty of the care of souls and, thus, are to be obeyed (Hebrews 13:17a). The Biblical procedure for discipline is found in Matthew 18:15-17.

18 Pope John Paul II. 1994. “The Church and Protection of Fundamental Human Rights (First Address to the Roman Rota)”, in WH Woestman (ed) *Papal Allocutions to the Roman Rota 1939-1994*. Ottawa: Faculty of Canon Law, Saint Paul University, 156. See also Doe N. 2013. *Christian Law: Contemporary Principles*. Cambridge: Cambridge University Press: Cambridge, 187.

19 See Chapter XVII of the Church of Nigeria (Anglican Communion) Constitution and Canons 2020; Article VIII (Settling Disputes) of the Constitution and Regulations of the Nigerian Baptist Convention.

20 Canon XVI (11) of the Church of Nigeria (Anglican Communion) Constitution and Canons 2020 allows legal representation; Article VIII (Settling Disputes) of the Constitution and Regulations of the Nigerian Baptist Convention do not allow for legal representation,

is that an ecclesiastical court has the authority to preside over conflicts between church members. The court's decision does not bind a non-member. In terms of subject matter jurisdiction, ecclesiastical courts adjudicate on issues affecting doctrinal issues of the church and personal law, such as the law of marriage, divorce, child custody, guardianship and inheritance, among others, that govern church members. Ecclesiastical courts also exercise jurisdiction over ecclesiastical misconduct and offences to enforce discipline in the church. The basis for enforcing discipline in the context of church governance is not simply to punish, but more importantly, to ensure restoration, reconciliation and relationship building, and this appears to have an effect on the procedure of the court. As legal scholar Mark Hill has asserted, church discipline "is not considered to be punitive."²¹ The church rules would commonly give a framework for identifying and interpreting ecclesiastical misconducts and offences. Since the rules of each church often reveal the church's theological and doctrinal self-understanding, acts of misconduct for which a member or cleric can be sanctioned vary among churches, and so also does the procedure for their enforcement.

Common examples of ecclesiastical misconduct and offences include inappropriate sexual behaviours, such as rape, fornication, sexual harassment and abuse and extramarital sexual relations, including not being celibate in singleness. Practices declared by some African Christian churches to be incompatible with Christian teachings, such as being a self-avowed practising homosexual, performing same-sex wedding ceremonies, drunkenness, polygamy, divorce and remarrying, embezzlement and mismanagement of church property and funds, confiscation of church property, simony, heresy, apostasy, schisms, blasphemy, perjury, falsehood, sacrilege, a conspiracy against canonical authorities, gross disobedience to lawful authority, neglect of duty and so forth.²² Where a church member is found guilty of any prohibited conduct, an appropriate sanction or penalty is imposed. The sanctions vary depending on the act of misconduct committed. Examples of such penalties include warning, admonition and rebuke, penances, defrocking or deposition, degradation or demotion, suspension, dismissal, state prosecution, expulsion or excommunication and so on.²³

Ecclesiastical courts do not receive official recognition from the state as official adjudicatory bodies; accordingly, the civil courts do not enforce their decisions

21 Hill M. 2016. "The Regulation of Christian Churches: Ecclesiology, Law and Polity", *HTS Teologiese Studies/Theological Studies* 72(1):6. See also, *Mackonochie v Penzance* (1881) 6 AC 424, 433 (Lord Selbourne LC observing that the Church "has for its objects, not punishment of individual offenders, but the correction of manners and the discipline of the Church."

22 See, for example, Church of Nigeria (Anglican Communion) Constitution and Canons 2020, Canons XVI (1) and XVII (1).

23 Ekwo IE. 2007. *Incorporated Trustees: Law and Practice in Nigeria*. Durban: LexisNexis, 158-159. Ekwo says excommunication is of two kinds, the lesser and the greater. The former deprives the offender of the use of the Sacraments and divine office. The latter deprives the offender not only of the Sacraments and the benefits of the divine office, but of the society and conversation with the faithful.

and rulings. The enforcement of their decisions is carried out within the apparatus provided in the church regulations. Also, the state does not provide any funding for them, neither does the state regulate their procedure nor get involved in the constitution of their memberships. Each church funds its court. There is no evidence available that the state or civil court favours one church denomination against another in terms of their adjudicatory procedures.

Where an ecclesiastical court gives a decision that touches on doctrinal, religious or internal affairs of the church, the civil (state) courts will not interfere or review the decision. The civil courts often claim to adopt a restrained deference approach and are careful not to get entangled in religious issues.²⁴ Thus, in *Owodunni v Registered Trustees of Celestial Church of Christ*,²⁵ the court was confronted with a leadership succession crisis in the defendant church. The trial court identified the vacuum in the church's constitution in not providing effective processes for the emergence of a new leader for the church. The court did not engage in the issue of who is the rightful person to occupy the office of the leader of the church. Rather, it advised the church to amend its mechanisms to fill in the vacuum. Whilst addressing this issue on appeal at the Supreme Court, Ogundare JSC, delivering the lead judgment, stated: "The question then arises: What is the way out? The learned trial Judge provided an answer to this question. He advised: 'It is the duty of the C.C.C. to fill the 'gap' by amending the Constitution accordingly.'" ²⁶ Eso JSC gave similar advice in *Thomas v Olufosoye*,²⁷ which also involved a leadership dispute in the Anglican Church in Nigeria. Eso held: "Perhaps, religionists would assist themselves more, by devising a forum for settlement of their disputes and come to court only when that fails."²⁸ Thus, where it is pleaded and validly proved that parties voluntarily submit to an ecclesiastical court, the outcome thereof is binding on the parties and is capable of constituting estoppel. Arguably, the civil court deference approach is a form of state recognition of the capacity of the ecclesiastical courts to adjudicate on some disputes involving the internal affairs of churches.

However, where an ecclesiastical court refuses to follow its own rules or procedure, where the rules of natural justice are not followed and lead to a miscarriage of justice or where the ecclesiastical court adjudicates on crimes within the jurisdiction of the state courts, then its decision and ruling may be subjected to judicial review in the secular court. In *Egubson v Joseph Ikechiuku*,²⁹ the Supreme Court upheld the ruling of the trial court that declared the suspension and excommunication of the defendant, a pastor of his church, by the claimants as null and void for failing to comply with the procedure and the sanction prescribed in the church rules. Also, in *Anyanwu*

24 *Eternal Sacred Order of Cherubim and Seraphim v Adewunmi* (1969) 2 ALR 273. See also, Nwauche, "Law, Religion and Human Rights in Nigeria", 583.

25 *Owodunni v Registered Trustees of Celestial Church of Christ* (2000) LPELR-2852(SC) 1.

26 *Owodunni v Registered Trustees of Celestial Church of Christ*, 49.

27 *Thomas v Olufosoye* (1986) 1 NWLR (PT 18) 669.

28 *Thomas v Olufosoye*, 701.

29 *Egubson v Joseph Ikechiuku* (1977) LPELR-1050 (SC) 1.

v Okoroafor,³⁰ the applicant, a church cleric, was suspended by the Assemblies of God Church on allegations of mismanagement, stealing and conversion of 300 million Nigerian naira belonging to the church.³¹ The applicant challenged his suspension before the Federal High Court, Bwari, on the grounds that the panel that investigated him was illegal and unlawful, as its constitution did not follow the church's bylaws. The applicant contended further that the panel was not a court or tribunal established by law and thus lacked the competence to investigate and to try him for the criminal offences of which he was accused. In addition, he was not given the opportunity of presenting his defence or of being heard by the panel before he was purportedly suspended and dismissed.³² The court upheld the case of the applicant and declared that the allegations of mismanagement, stealing or conversion of 300 million naira church funds with which the applicant was charged were criminal offences under the state legislation. Furthermore, that by virtue of Section 36 of the Constitution of the Federal Republic of Nigeria, 1999, the applicant ought to be arraigned and tried before a court of competent jurisdiction established under the state law, not the investigative panel set up by the respondents to try the applicant. The court further held that by virtue of Section 36(5) of the Constitution of the Federal Republic of Nigeria, 1999, the applicant was presumed innocent of all the allegations made against him by the respondents, on which he had yet to be tried and found guilty by a competent court.³³ The court accordingly declared the investigative panel constituted by the respondents to investigate and try the applicant to be illegal, unlawful and unconstitutional. It also declared unlawful, unconstitutional and of no legal effect whatsoever, the entire proceedings of the panel declaring the applicant guilty and leading to his suspension for not affording the applicant a fair hearing.³⁴ In the words of the presiding judge, Musa J, "the constitution of a committee to handle the allegations was a total breach of the rule of law and procedure".³⁵

Islamic religious courts

There are Islamic religious courts that adopt *sharia* for the resolution of disputes in Nigeria.³⁶ Sharia courts have jurisdictions over Muslims only, except for non-Muslims who voluntarily submit to its jurisdiction. Two forms of sharia courts exist in Nigeria. The first are those that do not receive official recognition from the

30 *Anyanwu v Okoroafor* (Unreported, Suit No. FCT/HC/CV/1889/2014).

31 This is an equivalent of about two million US Dollars as at the time the suit was instituted.

32 *Anyanwu v Okoroafor*, 6.

33 Constitution of the Federal Republic of Nigeria, 1999, s 36(5) ("Every person who is charged with a criminal offence shall be presumed to be innocent until he is proved guilty.")

34 *Anyanwu v Okoroafor*, 19-22.

35 *Anyanwu v Okoroafor*, 11.

36 Ostien P and Dekker AJ. 2010. "Sharia and National Law in Nigeria", in Jan M Otto (ed) *Sharia Incorporated: A Comparative Overview of the Legal Systems of Twelve Muslim Countries*. Leiden: Leiden University Press, 553-612.

government and the second are those that have official recognition and operate as part of the state's adjudicatory system.

The sharia courts that do not receive official recognition are organised locally or take the form of a local imam acting as a judge or arbiter. These sharia courts resemble ecclesiastical courts in the sense that they do not receive funding from the government, their rulings are unenforceable in the civil courts and the government does not involve in the constitution of their membership or in developing the courts' procedure. Litigants before the courts are not commonly required to be represented by lawyers. This category of sharia courts is commonly found in the western, southern and eastern parts of the country. The promoters of this category of sharia courts are those calling for official recognition by the government.

The second category of sharia courts not only receive recognition from the state government and form part of the state judiciary, but they also have constitutional support. Section 6 of the CFRN, 1999 deals with the national judiciary. It specifically provides for the creation of superior courts of record in Nigeria.³⁷ Section 6(5)(f) and (g) specifically establish the Sharia Court of Appeal of the Federal Capital Territory Abuja and the Sharia Court of Appeal of a state (both courts are hereinafter referred to as the Sharia Courts of Appeal) respectively as part of the superior courts of record. Besides, Sections 6(4) and 6(5) (j) and (k) of the Constitution further empower the national and state legislature to establish courts other than those listed as the superior courts of record. Pursuant to these latter provisions, twelve federating states in northern Nigeria, where Muslims are predominant, have implemented *sharia* and established sharia courts as part of the state official adjudicatory structure.³⁸ These sharia courts are trial courts. Appeals lie from them to Sharia Courts of Appeal created in terms of Section 6(5)(f) & (g) of the Constitution.

The territorial jurisdiction of each sharia court is limited to the geography of each state. In term of subject matter, sharia courts have wide civil and criminal jurisdictions on issues touching *sharia*. The twelve states of the northern Nigeria that have adopted sharia law have enacted and are enforcing Islamic Penal Codes to compliment the Penal Code enacted by the national legislature. The sharia courts in the northern Nigeria exercise jurisdiction over all Muslims. They do not exercise jurisdiction over non-Muslims, except where the non-Muslim voluntarily submits to the jurisdiction of the court. However, a Muslim who is sued in these courts cannot refuse to appear before the courts, which is different from sharia courts that do not receive official recognition of the government, such as those in the western and

37 CFRN, s 6(5) provides for the superior court of record to include, the Supreme Court of Nigeria; the Court of Appeal; the Federal High Court; the National Industrial Court; the High Court of the Federal Capital Territory; High Court of a State; Sharia Court of Appeal of the Federal Capital Territory Abuja; Sharia Court of Appeal of a State; the Customary Court of Appeal of the Federal Capital Territory, Abuja; and Customary Court of Appeal of a State.

38 This covers Zamfara, Jigawa, Kaduna, Kano, Katsina, Sokoto, Kebbi, Niger, Bauchi, Bornu, Yobe and Gombe states.

southern states of Nigeria. Sharia courts in northern Nigeria follow formal judicial procedure and allow legal representation. Appeals lie from the sharia courts to the Sharia Courts of Appeal on issues that touch on Islamic personal law.³⁹ However, an appeal will lie to the High Court on issues not involving Islamic personal law. Accordingly, Sharia Courts of Appeal exercise supervisory and oversight jurisdiction on sharia courts. Appeals also lie from the Sharia Courts of Appeal to the Court of Appeal and then to the Supreme Court, the Nigerian apex court. The CFRN, 1999, further protects the interest of disputes involving Islamic personal law that come to the Court of Appeal by ensuring that in appointing judges to the Court of Appeal, at least three appointed members are learned in Islamic personal law.⁴⁰

Unlike the ecclesiastical courts and the sharia courts in the southern Nigeria that do not receive governmental recognition and financial support, sharia courts in the twelve states of the northern Nigeria that have adopted *sharia*, and the Sharia Courts of Appeal are fully funded by the government. The government provides the facilities of the courts including the building and it also recruits and pays members of staff of the court, including the judges. Expectedly, since the government funds the courts, it wields political influence in the appointment of their members of staff and judges of the courts, as well as their discipline. Arguably, if not well managed, political influence on the courts may influence the quality of their justice delivery.

Generally, sharia courts and Sharia Courts of Appeal, being religious courts (albeit established by the secular state government), get entangled in Islamic religious and doctrinal affairs that come before them. The question that begs for an answer is how a High Court, being a secular court, exercises oversight jurisdiction on Islamic religious issues (not issues of personal Islamic law which go to the Sharia Court of Appeal⁴¹) without getting entangled in doctrinal and religious affairs? This will be a herculean task for the High Court to do. Furthermore, the fact that the state establishes sharia courts and gets involved in religious issues implicates the doctrine of religious entanglement.

Customary and traditional religious courts

The third popular religion in Nigeria is African traditional religion. Nigeria is a multi-ethnic nation and each ethnic group has “customary laws” developed from the custom of the people. These customary laws are closely merged with the traditional beliefs and religions. In fact, there is a thin difference between tradition or custom and religion. Danoye Oguntola-Laguda, a Nigerian professor of African religions, notes that religions in African context are “often expressed daily in

39 The basis is because the Constitution limited the jurisdiction of the Sharia Court of Appeal of the state and that of the Federal Capital Territory Abuja to Islamic personal law. See Section 277 of the Constitution.

40 CFRN, ss 237(2)(b) and 247(1)(a).

41 Examples of such issues may include disputes involving cleric discipline, leadership tenure of a religious institution or financial misappropriation of funds of a religious institution, and so on.

practices and activities".⁴² Jacob Olupona, also a professor of indigenous African religions, has similarly commented: "African spirituality simply acknowledges that beliefs and practices touch on and inform every facet of human life, and therefore African religion cannot be separated from the everyday or mundane."⁴³ Thus, Akinloye concluded that it may be logical to describe African religious practices as "religio-cultural practices".⁴⁴ It must be emphasised that not all customary laws are religiously influenced. Three categories of traditional customary courts exist in Nigeria: religious oath-taking, customary arbitration, and customary courts.

Religious oath-taking

Strictly speaking, there are no recognised or formalised traditional religions courts in Nigeria such as the Sango court or Ogun court. However, practitioners of traditional religion may resort to oath-taking to resolve disputes or to ascertain or confirm who is right or wrong or who has violated a particular religious rule or injunction. Oath-taking is often used to determine issues arising from marriage sanctity, ownership of property and criminal wrongs such as stealing, among others. Although there is no official recognition of religious oath-taking as forming part of Nigeria judicature, where oath-taking is pleaded and validly proved to have been taken voluntarily, the outcome thereof is binding on the parties and is capable of constituting estoppel. In other words, a civil court will not interfere in the decision. The Nigeria apex court's decision in *Umeadi v. Chibunze*⁴⁵ is very apt on this when it states: "Where parties who believe in the efficacy of a juju resort to oath-taking to settle a dispute, they are bound by the result and so the common law principles in respect of proof of title to land no longer applies since the proof of ownership of title to land will be based on the rules set out by the traditional arbitration resulting to oath-taking."⁴⁶

Customary arbitration

Customary arbitration is a common way of resolving conflicts virtually in all indigenous Nigeria society. It is often organised locally or takes the form of leaders or heads of community acting as arbiters. It is also known as "customary judicial process", which according to Augie JSC in *Ordu v. Elewa*⁴⁷ is a "mode of referring a

42 Oguntola-Laguda D. 2005. *Divinities in West African religion*. Lagos: Free Enterprise Publishers, 18. See also Akinloye, "Freedom of Religion: African Perspectives", 187-200.

43 Olupona states further, "For starters, the word 'religion' is problematic for many Africans, because it suggests that religion is separate from the other aspects of one's culture, society, or environment. But for many Africans, religion can never be separated from all these. It is a way of life, and it can never be separated from the public sphere. Religion informs everything in traditional African society, including political art, marriage, health, diet, dress, economics, and death." See the interview with Professor Jacob Olupona in Chiorazzi A. 2015. "The spirituality of Africa", *The Harvard Gazette*, 6 October.

44 Akinloye, "Freedom of Religion: African Perspectives", 190.

45 *Umeadi v. Chibunze* (2020) 10 NWLR (Pt. 1733) 405 SC.

46 *Umeadi v. Chibunze*, 445. See also, *Onyenge v. Ebere* (2004) 13 NWLR (Pt. 889) 20.

47 *Ordu v. Elewa* (2018) 17 NWLR (Pt. 1649) 515 (SC).

dispute to the family head or an elder of the community for a compromise solution based upon subsequent acceptance by both parties of the suggested awards, which becomes binding only after such signification of its acceptance and from which either party is free to resile at any stage of the proceedings up to that point".⁴⁸

Customary arbitrations resemble ecclesiastical courts in the sense that they do not receive official recognition and funding from the government; that is, government does not involve in the constitution of their membership or in developing the arbitration procedure. Litigants before the courts are not commonly required to be represented by lawyers. However, unlike the ecclesiastical courts, their rulings are binding and enforceable in the civil courts. Ordinarily, a party to a customary arbitration may withdraw from the arbitration at any stage of the proceedings up to the point of judgment. However, once decision is reached, a party will be estopped by a civil court from resiling. In *Iwu v. Ogu*, the court held: "Where two parties to a dispute voluntarily submit their matter in controversy to expressly or by implication that the decision of the arbitration according to customary law and agree expressly or by implication that the decision of the arbitration would be accepted as final and binding, then once the arbitrators reach a decision, it is no longer open to either party to subsequently back out of such decision."⁴⁹ It must be emphasised that for a customary arbitration to be binding and enforceable, it must show with credible evidence that the party sought to be bound by the customary arbitration. Although customary arbitration is not an exercise of the judicial power of the constitution, however, customary law is by Section 274(3) of the CFRN, 1999, an "existing law", being a body of rules in force immediately before the coming into force of the constitution.⁵⁰

Customary court

Customary courts, on the other hand, receive recognition from the state government and also form part of the state judiciary. Within the window created by virtue of Sections 6(4) and 6(5)(j) and (k) of the CFRN, 1999, which empowers the federating states to establish more courts, a number of federating states in Nigeria, particularly in most of the southern part of the country, have established customary courts.⁵¹ These courts are commonly in a hierarchy. Oyo State of Nigeria, for instance, has Grade C and Grade A customary courts. Grade C is lower in the hierarchy and in jurisdictional capacity to Grade A. Also, Section 6(5)(h) and (i) specifically establish the Customary Court of Appeal of the Federal Capital Territory Abuja and the Customary Court of Appeal of a State (both courts are hereinafter referred to as the Customary Courts of Appeal) respectively as part of the superior courts of record.

⁴⁸ *Ordu v. Elewa*, 530.

⁴⁹ *Iwu v. Ogu* (2020) 9 NWLR (Pt. 1730) 621.

⁵⁰ *Ordu v. Elewa*, 529. See also *Agu v. Ikewibe* (1991) 3 NWLR (Pt. 180) 385.

⁵¹ See for example, Oyo State Customary Court Law, 2018, s 3 (establishing two grades of customary courts, namely: Grades A and C).

Customary courts adopt the customs and traditions of the people in their area of location to resolve disputes among the members who are subject to the custom. Accordingly, the territorial jurisdiction of each customary court is limited to the geography of each state. Section 16(4)(c) of the Oyo State Customary Courts Law, 2018, provides that “in civil causes and matters the appropriate customary law shall be the customary laws in the area of jurisdiction of the court.

In term of subject matter, customary courts have civil and criminal jurisdictions on issues touching customary laws, including personal and non-personal laws.⁵² Customary courts follow formal judicial procedure and allow legal representation. Appeals lie from the customary courts to the Customary Courts of Appeal on civil proceedings involving the question of customary law.⁵³ However, an appeal will lie to the High Court on issues involving criminal proceedings. Accordingly, Customary Courts of Appeal exercise supervisory and oversight jurisdiction on customary courts.⁵⁴ Appeals also lie from the Customary Courts of Appeal to the Court of Appeal and to the Supreme Court. The CFRN, 1999 further protects the interest of disputes involving customary law that come to the Court of Appeal by ensuring that in appointing judges to the Court of Appeal, at least three customary law experts are appointed.⁵⁵

Like the sharia courts in the twelve states of the northern Nigeria that have adopted *sharia* and the Sharia Courts of Appeal that are fully funded by the government, so also the customary courts and Customary Courts of Appeal. The government provides the facilities for the courts, including the building, recruitment and payment of the members of court staff, including the judges. In the same vein, since the government funds the courts, it wields political influence in the appointment of their members of staff and judges of the court as well as their discipline.

STATE AND RELIGION RELATIONS AND IMPLICATION ON RELIGIOUS COURTS IN NIGERIA

Similar to what is contained in the constitutions of the United States and some European nations,⁵⁶ Section 10 of the CRFN, 1999, *prima facie* adopts the approach of an absolute separation of the state from religion. The provision states: “The Government of the Federation or of a State shall not adopt any religion as State

52 Customary courts have limited criminal jurisdiction. They cannot try capital or other serious offences like homicide, treason, sedition, rape, procurement, defilement of minor, among others. See Oyo State Customary Court Law, 2018, s 19.

53 The basis is because the Constitution limited the jurisdiction of the Customary Court of Appeal of the state and that of the Federal Capital Territory to only civil actions. See CFRN, s 282.

54 On the jurisdiction of Customary Court of Appeal, see generally *Customary Court of Appeal Edo State v. Aguele* (2018) 2 NWLR (Pt. 1607) 369.

55 CRFN, ss 237(2)(b) 247(1)(a).

56 For example, Constitution of the Republic of Poland, 1997, art 25.3 and Constitution of Greece, 2001, art 3.1.

Religion.”⁵⁷ This provision has led to two opposing views of Nigeria’s status as a secular state. Generally, secularism presupposes a state of neutrality between religion and the state.⁵⁸ Some scholars and public commentators argue that Section 10 makes Nigeria a secular state in which there is no interference from the state in any religious affairs. Commenting on this view, legal scholar Jennifer Tyus posits that “In the absence of the adoption of a state religion, a nation is most accurately described as secular. Thus, Nigeria’s prohibition of a national or state religion automatically qualifies the country as a secular nation.”⁵⁹

In contradistinction to the position above, other scholars argue that the prohibition of a national or state religion is not a clear indication that Nigeria is a secular state. Enyinna Nwauche, one such proponent, argues that:

Section 10 of the 1999 Constitution prohibits the adoption, by the federal or a state government, of any religion as a state religion. It is often said that because of this provision, Nigeria is a secular state. This would be a wrong conclusion if it were to mean that religion does not play a role in public policy. Nigeria is a *de facto* religious state where Islam and Christianity are integrated into public policy – in the recognition of marriages, the observance of public holidays, and the resolution of conflicts.⁶⁰

However, from the activities of the successive governments in relation to how the state gets involved in the affairs of religious courts (particularly with reference to sharia courts, Sharia Courts of Appeal, customary courts, Customary Courts of Appeal), one can argue that the country is acting contrary to the express provisions of Section 10. The state’s relationship with religions encourages interference with the right of religious autonomy of some religions, and ultimately it constitutes an infraction of the right to freedom of religion. Thus, in the light of the discussion above, it can be concluded that, strictly speaking, Nigeria practises a “religiously mutual neutral state”, whereby the state does not adopt a specific religion, but gives

⁵⁷ CFRN, s 10.

⁵⁸ For different perspectives to secularism, see Ben-Yunusa M. 1995. “Secularism and Religion”, in Mitri T (ed). *Religion, Law and Society: A Christian-Muslim Discussion* Geneva: World Council of Churches Publications, 81-82; Ansari AM. 2000. *Iran, Islam and Democracy: The Politics of Managing Change*. London: Chatham House, 15; Pimor A. 2010. “A Collection of States or a State of Mind: The Religious and Spiritual Dimensions of European Citizenship”, in Doe N and Sandberg R (eds). *Law and Religion: New Horizons*. Leuven: Peeters, 212.

⁵⁹ Tyus J. 2004. “Going too far: Extending Shari’a Law in Nigeria from Personal to Public Law”, *Washington University Global Studies Law Review* 3:205; See also, Nwabueze BO. 1992. *Military Rule and Constitutionalism*. Ibadan: Spectrum Books, 282; Iwobi AU. 2004. “Tiptoeing through a Constitutional Minefield: The Great Shari’a Controversy in Nigeria”, *Journal of African Law* 48:133-135.

⁶⁰ Nwauche E. “Nigeria: Introductory Notes”. Pretoria: Institute for International and Comparative Law in Africa, University of Pretoria, 5. Online at: <https://www.up.ac.za/media/shared/Legacy/sitefiles/file/47/15338/nigeria.pdf> [Accessed 24 February 2024]. See further, Olagunju GA. 2008. “The Sharia Legal System and Democracy: An Unfinished Debate”, *LASU Law Journal* 6(1):167-168.

support to some religious institutions as preferred religions. This aligns with the very recent decision of the Nigerian Court of Appeal in *The Registered Trustees of Atheist Society of Nigeria v. AG Akwa Ibom State & Ors*,⁶¹ holding that the purport of Section 10 is geared towards equality of religions as opposed to separation between state and religion.

CONCLUSION

This chapter has examined the functioning of religious courts within the context of Nigeria. Strictly speaking, ecclesiastical courts of the Christian churches and sharia courts (including Sharia Courts of Appeal) are the core religious courts in Nigeria. The status of customary courts as religious courts is debatable, since not all customs are religiously influenced. Sharia courts and customary courts are integrated as part of the adjudicatory system in some states of the federation. Whilst sharia courts are integrated in the northern states' judicature, customary courts are part of the southern states' judicature. Ecclesiastical courts do not receive any governmental recognition and the civil courts do not have oversight jurisdiction over them, except in a few instances.

Among the religious courts operated in Nigeria, customary courts and the Customary Courts of Appeal in the Southern Nigeria and sharia courts and Sharia Courts of Appeal in the northern Nigeria are afforded more recognition by the state in terms of funding. However, this has its implications for the courts. Notably, it exposes the courts to governmental and civil court oversight and interference. Against this backdrop, it needs to be emphasised that those calling for ecclesiastical courts and sharia courts to be fully engrafted into the state adjudicatory system need to take cognisance that if the government yields to such calls, the autonomy of the religious bodies to control their religious courts may be lost. In other words, the concern is that the government's financial support of religious organisations may erode the religious autonomy. Religious organisations may be dictated to by the agenda of their funding source – the government. As legal scholar Helena van Coller has warned, "The more they [religious organisations] operate in the public sphere and are dependent on public funds, the greater the need for accountability and the potential loss of independence and vitality. If this is not taken seriously, it can lead to the erosion of the separation of church and state and to interference by the state in the internal organisation of religious organisations to pursue their own public policy agendas."⁶²

61 *The Registered Trustees of Atheist Society of Nigeria v. AG Akwa Ibom State & Ors* (2022) LPELR-58700(CA).

62 Van Coller H. 2014. "Church Polity and 'Constitutionalism'", in Koffeman LJ and Smith J(eds) *Protestant Church Polity in Changing Contexts II*. Zurich: Lit Verlag: Zurich, 162. See also, Quashigah K. 2014. "Religion and the Republican State in Africa: The Need for a Distanced Relationship", *African Human Rights Law Journal* 14:80. Quashigah argues, "If the relationship between religions and the political authority is left unchecked, politically hungry individuals or groups can manipulate religion to serve their political ends."

In conclusion, the analyses of the workings and operations of the religious courts in Nigeria have shown that Nigeria does not operate a clear secular system whereby the State is clearly separated from religious doctrinal affairs. State and state actors get entangled in religious activities including dispute regulation involving religious matters.