

RELIGIOUS FREEDOM AND ITS LIMITATIONS UNDER THE 1999 CONSTITUTION OF NIGERIA¹

Abstract

This paper critically reviewed the provisions of the 1999 Constitution of Nigeria on freedom of religion and its limitations as a result of the long history of religious tensions Nigeria has witnessed particularly between the two major religious groups, Christians and Muslims and as a result of the violence created constantly by the Boko Haram which desires to Islamize the country. It has caused many deaths, created internally displaced people and a pall of anxiety all over the country. 250 Chibok girls still remain missing. The review was done with a view to finding the adequacy of the provision of the Constitution in guaranteeing freedom of religion. Insight was drawn from international legal instrument on the subject. The finding is that the constitutional provisions are adequate in themselves for arresting religious extremism as they are in tandem with the provisions of many international legal instruments. However, the repudiation of the supremacy of the Constitution by Islamic law withdraws the commitment of many Muslims to the provisions of the Constitution on freedom of religion. Internal reform is recommended for Muslims to bring Islamic law to accept the supremacy of the Constitution.

Key words: *Freedom of religion, limitations, 1999 Nigerian Constitution, Supremacy of Constitution*

1. Introduction

This papers critically explores the constitutional guarantee of and limitations to freedom of religion in Nigeria. Religious tensions and evident proofs of religious extremism are presented in various ways as major problems challenging Nigeria's stability and development. Nigeria's population estimated to be about 170 million has Christians and Muslims represented numerically at par with African traditional religion coming a distant third. Religion is regarded as the fault line in the structure of the country. Many explanatory theories are proffered for it. Jamo believes that this is so because religious organizations appear to be the only survivors of long years of military penchant to suppress, stifle and proscribe all meaningful and lawful windows of dissents.² This has negatively led to religion taking the front burner in political campaign and politicking.³ Oraegbunam thinks the veracity of Jamo's assessment to be partial and feels that it is rather complemented by Mbiti's perception of the reality.⁴ Mbiti holds that an African man is generally deeply religious.⁵ All the same, Mbiti's thesis cannot go far in explaining religious extremism because the supreme being worship in religion is generally conceived as benevolent. Be that as it may, religion remains a sensitive issue that challenges the stability and development of the country. Falola observes that: "The links between religious violence and the Nigerian economy and state are so firmly established that many answers have to be sought in those connections. That religious violence and aggression will slow down the pace of economic progress is already clear".⁶ Sampson asserted: "religious violence has remained a critical security challenge to the

¹By **Jude O. EZEANOKWASA, PhD (Law), JCD (Canon Law), LL.M., JCL, LL.B., B.L, B.Phil., B.D.**, Dept. of International Law and Jurisprudence, Faculty of Law, Nnamdi Azikiwe University, Awka. jo.ezeanokwasa@unizik.edu.ng, +234-705-267-7705; **Boniface E. EWULUM, PhD (Law), LL.M, LLB, B.L**, Dept of Public and Private Law, Faculty of Law, Nnamdi Azikiwe University, Awka. emefie@yahoo.com, +234-703-813-7153; and **Obinna Onyebuchi MBANUGO, LL.M, LLB, BL**, Dept of International Law and Jurisprudence, Faculty of Law, Nnamdi Azikiwe University, Awka. obinnambanugo@ymail.com, +234-803-774-9145

² N M Jamo, 'The Nature and Scope of the Freedom of Thought, Conscience and Religion under Section 38 of 1999 Nigerian Constitution' (2009) *Ahmadu Bello University Zaria Journal of Private and Comparative Law*, Vols. 2 & 3, 5. Cited in I K E Oraegbunam, 'Islamic Law, Religious Freedom and Human Rights in Nigeria' (2012) *African Journal of Law and Criminology*, vol 2. No. 1, 1.

³ I K E Oraegbunam, 'Islamic Law, Religious Freedom and Human Rights in Nigeria' (2012) *African Journal of Law and Criminology*, vol 2. No. 1, 1.

⁴ Ibid.

⁵ J S Mbiti, *African Religions & Philosophy*, (London: Heinemann, 1969) p.17.

⁶ T Falola, *Violence in Nigeria: The Crisis of Religious Politics and Secular Ideologies*, (New York: University of Rochester Pres, 1998) p. 298.

Nigerian state.”⁷ This dire situation with religious tensions sets the background of this paper and it motivates the inquiry into the constitutional guarantee of freedom of religion and limitations to it as safeguards against extremism which generates tensions. In addressing these questions, the paper first looks at the meaning of religion and recognizes the difficulty of having a definition of religion that cuts across all the cultural milieus. All the same it takes cognizance of certain features that enjoy a consensus of appreciation across the world cultures. The paper moves forward to consider freedom of religion under the 1999 Constitution particularly highlight the similarity of the constitutional provisions with those of many international legal instruments. The next part of the paper reviews the limitations set around freedom of religion in order to make it responsible and responsive to other social needs including the right of others to enjoy the same freedom. The paper concludes with the finding that the constitutional provisions are generally sufficient to forestall religious extremism. It finds lack of dedication to the written words of the Constitution a problem dogging the actualization of the letters of the constitution on freedom of religion and its limitation. The general repudiation of the supremacy of constitution by Islamic law evidenced in twelve states in northern Nigeria declaring Sharia to be the ultimate source of their laws plays an active role in this regard.

2. Religion Defined

Religion refers to the attribute of the human being to go beyond himself into relationship with the divine or the supreme being. Tylor sees religion as ‘belief in spiritual beings’.⁸ This perception of religion is very minimal. If religion were to be simply a belief in spiritual beings, there is no way there could be extreme actions in the name of religion. Mere belief cannot be violent or aggressive. After all, belief is locked up in the mind of the believer. Durkheim added more flesh to this rudimentary understanding of religion by saying that it is “a unified system of belief and practices (rite) relative to sacred things, that is to say, things set apart and surrounded by prohibitions –beliefs and practices that unite its adherents in a single moral ecommunity called a Church”.⁹ His definition complements that of Tylor as he underscores the fact of belief issuing out in practices. Religious extremism are destructive and loathed because they are actions that go beyond the lines of reasonability. But a problem with this definition is that it contemplates religion in the context of christianity. This comes out from its description of the moral community built around religion as a Church. Evidently, Christianity is not the only religion. Many other religions exist: Islam, African traditional religion, Judaism, Sikhism, Shintoism, Budhism, Hinduism, etc.

Goetz noted that finding a definition of religion that covers the distinctive features of the religions in the world is the first difficulty in discussing religion.¹⁰ The difficulty, according to him, comes primarily from what he considered as a fundamental and radical divide in the understanding of religion. There is the Western conception on one hand; and on the other, there is the conception of religion found amongst societies termed primitive society by religion scholars. The Western notion is theistic in nature and is influenced greatly by the Western speculative, intellectualist and scientific approach to knowledge. This Western approach is equally a product of the dominant Western religious pattern which has been characterized by Judaism, Christianity and Islam. Theism as a pattern of religious belief involves belief in a transcendent deity that is distinct from all else, thereby involving the notion of two worlds – the world of the deity and the world of humans.¹¹ On the other hand, in the so-called primitive societies, the Western concept of religion cannot fit in as there are no such two worlds. These societies do not consider the deity to be anywhere outside the world. The deity is immanent in the world. The conclusion

⁷ I T Sampson, ‘Religious violence in Nigeria: Causal diagnoses and strategic recommendations to the state and religious communities’ (2012) Afr. J. on Conflict Resolution - Vol 12, No 1. ><http://www.ajol.info/index.php/ajcr/article/view/78703>< accessed on 19 February 2016.

⁸ E B Tylor, ‘Animism’ in WA Lessa & EZ Vogt (eds), *Reader in Comparative Religion: An Anthropological Approach* (2nd Ed, New York: Harper & Row Publishers, 1965) p.10.

⁹ E Durkheim, *The Elementary Forms of Religious life*, (New York: Oxford University Press, 2001) p.46.

¹⁰ J. Goetz., “Religion” in B L Marthaler (ed), *New Catholic Encyclopedia*, (2nd Ed, Michigan: Thomson Gale, vol. 12, 2002) p.56.

¹¹ J O Ezeanokwasa, *The Legal Inequality of Muslim and Christian Marriage in Nigeria: Constitutionally Established Judicial Discrimination*, (New York: Edwin Mellen Press, 2011) p.14.

from this is that regardless of the problem of finding an all embracing definition of religion, the phenomenon of religion is found in all cultures and societies. Corroborating this point, Arinze described religion as the transcendent dimension of culture.¹² Religion, therefore, involves a relationship with a spiritual being whether in the theistic sense or in the immanent sense. This lends credence to the description of man as a *homo religiosus*, meaning that religion is part and parcel of human nature. Consequently, allowing him to practice religion, as freedom of religion connotes, is allowing him to be truly human. Man is not fully alive if he is not allowed the freedom to reach out of himself into relationship with the divine. In doing this, the human person defines himself in a most spectacular way as the only creature capable of reaching out of himself to establish a relationship with the divine. Political communities, to cater well for their citizens and individuals within their territories, have therefore to juridically allow them freedom of religion.

3. Freedom of Religion in the 1999 Nigerian Constitution

Appreciating the fact of man being a *homo religiosus*, Nigeria guarantees the right to freedom of religion as one of the fundamental rights in the Constitution. Section 38 of the 1999 Constitution (as amended) 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 a 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.”

The language of section 38 brings out the fact that religion is an attribute of a human being as an individual and not as a citizen. The right is guaranteed for ‘every person’. This is different from other fundamental rights guaranteed by the Constitution for people as citizens, such as the right to private and family life (section 37), the right to freedom of movement (section 41), and right to freedom from discrimination (section 42). The Oxford Advanced Learners’ Dictionary defines ‘person’ as “a human as an individual”.¹³ The same dictionary defines ‘citizen’ as ‘a person who has the legal right to belong to a particular country’.¹⁴ A citizen is a party to the social contract on which a country is established. In a democracy like Nigeria, he is part of the people that constitute the *demos* on which the democracy is built. He is a subject of rights and obligations under the democratic contract fundamentally articulated in the constitution. This is different with the status of a person. A person is a human being in his status as an individual without necessarily being a citizen of a country. That the right to freedom of religion is granted to every person in Nigeria means that it is not only for Nigerian citizens but all human beings in the country including non-citizens. The only justification for this is that religion is an attribute of a human person in his nature as such. It is not created by the state. From the language of the Constitution respecting this right of a person is a legal duty on all others. The section uses the operative word *shall*

¹² F. Cardinal Arinze, *Religions for Peace: A call for Solidarity to the religions of the World*, (New York: Doubleday, 2002) p.41.

¹³ *Oxford Advanced Learners’ Dictionary*, (New York: Oxford University Press, 2010) p.1092.

¹⁴ *Ibid.*, p.253.

which when used in the second and third persons means obligation.¹⁵ Every other person, physical or legal, has the duty to accord this right to a person.

It is not only the Nigerian Constitution that understands religion as an inherent attribute of the human person. Many international legal instruments do. They include the Universal Declaration of Human Rights (UDHR),¹⁶ the International Covenant on Civil and Political Rights (ICCPR), the African (Banjul) Charter on Human and Peoples' Rights,¹⁷ the European Convention on Human Rights (ECHR),¹⁸ the Arab Charter on Human rights (ACHR) 2004,¹⁹ and the American Convention on Human Rights.²⁰ The only difference amongst them is in the words used to convey the idea. Rather than use the words *every person* most of these legal instruments use the word *everyone*. For instance, the ICCPR provides in article 18(1): "Everyone shall have the right to freedom of thought, conscience and religion...." The African (Banjul) Charter on Human and Peoples' Rights uses neither 'every person' nor 'everyone'. It simply makes an impersonal guarantee of the freedom thus: "freedom of conscience, the profession and free practice of religion shall be guaranteed."²¹ All the same *everyone* can be read into it from the other provision of the article 8 relative to the derogation of freedom of religion where it uses *everyone* in the negative sense: "No one may, subject to law and order, be subjected to measures restricting the exercise of these freedoms."

The freedom of religion guaranteed by the 1999 constitution is not a solitary right to hold a religion but rather is a compound right embracing other freedoms that define religion as involving rational process, and a social reality, which thrives in interpersonal dynamics and concrete civil presence. It is guaranteed alongside freedom of thought and conscience. This is not an anomaly because religion ordinarily involves thought and conscience even though thought and conscience can exist without necessarily leading up to having a religious belief. By ringing these three concepts together, the Constitution recognizes this internal bond which Oraegbunam refers to as the "conceptual *koinonia* among the three concepts of thought, conscience and religion."²² The Oxford Advanced Learner's Dictionary defines 'thought' as "something that you think of or remember; a person's mind and all the ideas that they have in it when they are thinking; the power or process of thinking; the act of thinking seriously and carefully about something, power or process of thinking; a feeling of care or worry; an intention or a hope of doing something". One idea central to these nuances of thought is that it deals with the mind and its operations. The same dictionary defines 'conscience' as "the part of your mind that tells you whether your actions are right or wrong".²³ Conscience also is connected with the mind but it is that part that performs the role of a judge. It is in this context that we find expressions like 'I leave you to your conscience' or 'let your conscience be your judge'. We thus find a link between 'thought' and 'conscience'. At the thought level, the mind critically examines an experience from the point of view of its being beneficial to him or proper to be done. After a decision is reached at this level, the decision taken becomes a standard that guides future actions. This is the conscience level of the mind. Actions are judged right or wrong depending on whether or not they agree with the standard already set by the mind. As noted shortly, 'thought' and 'conscience' are not religion in themselves but they lead up to it. They are actually the antecedents to religion. Relationship with the divine begins from 'thought' and 'conscience'.

Adults are in relationship with God because they are deemed to have analysed and considered the relationship to be beneficial to them. Infants and children who have not acquired mature analytical faculties relate with the object of religion on the authority of their parents or guardians. Thus, Chidili

¹⁵ See S O Imhanobe, *Legal Drafting & Conveyancing*, (Abuja: Temple Legal Consult, 2002) p.44.

¹⁶ The Universal Declaration of Human Rights 1948, art. 18.

¹⁷ The African (Banjul) Charter on Human and Peoples' Rights 1981 (Entry into force in 1986), art. 8.

¹⁸ The European Convention on Human Rights 2010, art. 9(1).

¹⁹ The Arab Charter on Human rights 2004 (Entry into force in 2008), art. 30(1)

²⁰ The American Convention on Human Rights 1969 (Entry into force in 1978), art. 12(1).

²¹ The African (Banjul) Charter on Human and Peoples' Rights, art. 8.

²² I K E Oraegbunam, (n.3) p.5.

²³ Oxford Advanced Learners' Dictionary (n. 13) p.307.

believes that religion without conscience is nothing but a misnomer, and religion without thinking is outright fanaticism.²⁴ This however, does not mean that everything about religion is thought because there are always some non-rational aspects of religion.²⁵ At the same time, a religion that is majorly irrational would not be worth the name²⁶ since that would be contrary to the nature of the religious object, understood as the “author and epitome of rationality”, and whom the religious individual worships in conscience as the Wholly Other.²⁷ In spite of religion embracing thought and conscience, they have independent existence outside of religion. This explains why the Constitution, like other legal instruments, lists them separately. By so doing the Constitution guarantees their being enjoyed outside of religion. This is the basis of the right to not have a religion. To give fuller effects to the right to freedom of religion, the Constitution guarantees ancillary rights. These are: freedom to change religion or belief, freedom to manifest religion, freedom to propagate religion, and freedom to not have a religion. Given that the Constitution introduces these ancillary freedoms with ‘include’, it means that the list is not exhaustive. Court can, on case by case basis, determine other freedoms that can be added to the list. These freedoms will next be considered individually.

Before this is done, it is apposite to note that section 38(2) and (3) are particular applications of freedom of religion or belief to the context of education. And section 38(4) disclaims any attempt at extending freedom of religion to cover membership of a secret society. Unfortunately, just like religion, the Constitution does not define ‘secret society’. The Merriam-Webster Dictionary online defines ‘secret society’ as “any of various oath-bound societies often devoted to brotherhood, moral discipline, and mutual assistance”.²⁸ For the Cambridge English dictionary online, it is “an organization that does not allow people who are not members to find out about its activities and customs”.²⁹ The center-point of these definitions is that a secret society is oath-bound and that some measure of its activities are unknown to the outside world. But many religions have information about some aspects of their activities reserved to members. The difference between the secrecy in these religions and that of a secret society might be a matter of degree.

3.1 Freedom of Thought and Conscience

Freedom of thought and conscience protects an individual from every coercion or restriction in holding a thought. It could be religious, atheistic or merely philosophical. The right protects the most fundamental aspect of the human person, which has to do with his rational faculty--man’s crowning attribute. Any inhibition or force to his mental processes and belief would gravely undermine his dignity. After doubting the existence of everything, the only thing, the French Philosopher, Rene Descartes, could not doubt was that he was doubting. He concluded that he was alive because he was thinking and *a fortiori* doubting; hence his conclusion: *cogito ergo sum* – I think, therefore, I am. Freedom of thought and conscience also embraces the right to conscientious objection. Article 10(2) of the Charter of Fundamental Rights of the European Union 2000 expressly incorporates it into the concept of freedom of thought, conscience, and religion. Section 34(2)(c) of the 1999 Constitution recognizes conscientious objection by providing for alternative labour to be given to those who have conscientious objection in serving in the armed forces of the Federation. Thus it can be comfortably read into section 38 of the 1999 Constitution.³⁰

²⁴ B Chidili, “Religious Fanaticism” (1998) *West Africa Journal of Ecclesial Studies* (Wajes), Vol. 4, 82. Cited in I K E Oraegbunam, (n.3) p. 5.

²⁵ See I K E Oraegbunam, (n.3) p. 5.

²⁶ F R Tenant, *Philosophical Theology*, (London: Cambridge University press, Vol. 1, 1927) pp. 306-332. See *Ibid.*

²⁷ R Otto, *The Idea of the Holy*, (London: Oxford University Press, 1972) pp. 25-30. Cited in I K E Oraegbunam, (n.3) p. 5.

²⁸> <http://www.merriam-webster.com/dictionary/secret%20society>< accessed 29 January 2016.

²⁹> <http://dictionary.cambridge.org/dictionary/english/secret-society>< accessed 29 January 2016.

³⁰ See I.K.E. Oraegbunam, (n.3).

3.2 Freedom of Religion

Freedom of religion embraces freedom of belief. The second and third mentions of ‘religion’ in section 38(1) come with ‘belief’ connected to it with ‘or’ signifying alternation. Thus ‘belief’ can be similarly joined to the first mention of ‘religion’ in section 38(1) and in all the sections. Freedom of religion issues have bothered man from the earliest of human history traversing the Old Testament times of the people of Israel and their neighbours through the Greek and Roman civilizations to our times under the international order being moderated by the United Nation. Article 18 of the ICCPR is similar to section 38(1) of the 1999 Constitution. On the interpretation of ‘religion’ and ‘belief’ in article 18 of the ICCPR, the Human Right Committee of the UN directs that the terms ‘belief’ and ‘religion’ are to be broadly construed to embrace theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief.³¹ Accordingly, in *Campbell and Cosans v. UK* the court held that “beliefs... denotes views that attain a certain level of cogency, seriousness, cohesion and importance”.³² The onus of proving these characteristics lie on the applicant. However, the burden of proof is not very high.³³ This liberal attitude to the proof of religion or belief has led the court to restrain from trying to attempt an objective definition of religion because it is principally subjective. In *Watson v. Jones* the U.S. Supreme Court stated that “The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect”.³⁴ The same mindset is seen in the Nigerian judiciary. In *Medical and Dental Practitioners Disciplinary tribunal v. Okonkwo, Ayoola JSC* stated:

The right to freedom of thought, conscience and religion implies a right not to be prevented, without lawful justification, from choosing the course of one’s life, fashioned on what one believes in, and a right not be coerced into acting contrary to one’s religious belief. The limits of these freedoms, as in all cases, are when they impinge on the rights of others or where they put the welfare of society or public health in jeopardy.”³⁵

In other words, the state cannot prescribe any religion or proscribe any.³⁶

3.3 Freedom to Change Religion

This freedom has been a subject of controversy particularly in the modern times in the history of the drafting of article 18 of the Universal Declaration of Human Rights as some opinions believed that it was not necessary for it to be expressly stated.³⁷ It is an essential part of the freedom of religion, which needs to be expressly guaranteed in order not to be denied or suffocated.³⁸ Thought and conscience are parts and parcels of religion and they are dynamic in nature as they could change from time to time. The result of this change is change in religious belief. The Freedom to change one’s religion is recognition of the dignity of a person to follow his thought, conscience, feelings, and above all, his will. This freedom is denied in the Islamic society.³⁹ According to sharia law any Muslim who repudiates his faith in Islam, directly or indirectly is guilty of a capital offence punishable by death.⁴⁰

³¹ Australian Human Rights Commission, > <https://www.humanrights.gov.au/freedom-thought-conscience-and-religion-or-belief> accessed 20 January 2016. See *The Church of the New Faith v. The Commissioner of Pay-Roll Tax*, 154 CLR 120, 57 ALJR 785, 14 ATR 769, 49 ALR 65, 83 ATC 4652, where it was held *per curiam* that “The test of religion should not be confined to theistic religions.”

³² *Campbell and Cosans v. UK*, Ser. A, no. 48 (1982), para. 36.

³³ M D Evans, *Religious Liberty and International Law in Europe*, (Cambridge-U.K.: Cambridge University Press, 1997) p. 291.

³⁴ (1872) 80 U.S. (13 Wall) 679, at p. 728 [20 Law. Ed. 666, at p. 676].

³⁵ (2001) 10 WRN 1 SC at 41.

³⁶ See 1999 Constitution of Nigeria, s. 10.

³⁷ M D Evans, (n.33) pp. 187-192.

³⁸ *Ibid.*, p 188.

³⁹ *Ibid.*, pp. 187-192.

⁴⁰ See A.A. An-Na’im, *Islam and the Secular State: Negotiating the Future of Shari’a*, (Massachusetts: Harvard University Press, 2008)p.119.

3.4 Freedom to Manifest and Propagate Religion or Belief

The Oxford Advanced Learner's dictionary defines 'to manifest' as 'to show something clearly, especially a feeling, an attitude or a quality; to appear or become noticeable'.⁴¹ The same dictionary defines 'to propagate' as 'to spread an idea, a belief or a piece of information among many people'.⁴² To manifest concerns itself with displaying something that is somewhat not clearly seen. It involves the demonstration of the existence of something in such a manner that it becomes clearly known and understood. On the other hand, to propagate means spreading an idea or belief with the purpose of having the audience buy into it. In matters of faith, it involves proselytising or winning converts. A relationship, nonetheless, exists between them in that 'to propagate' entails some measure of manifestation of religion or belief even though 'to manifest' does not necessarily connote to propagate. A person can wear a religious symbol without meaning to convert people with that. All the same, one does not necessarily need to intend to propagate a religion by wearing a religious symbol. A symbol speaks by itself. But it cannot speak anything new to people who already know what it symbolizes. The right to manifest and propagate is actualized in worship, and through teaching, practice and observance. This right can be exercised either alone or in community with others, and in public or in private. The express provision of this freedom strikes a death-nail on the old jurisprudence that put a steel sieve between the freedom of religion or belief on the one hand, and the freedom to take actions motivated by religion or belief. The U.S. Supreme Court in *Reynolds v. United States*,⁴³ held that, though the constitution protected religious belief and opinions, actions inspired by religion were not all that protected.⁴⁴ The effect of the distinction was that actions inspired by religion could very easily be sacrificed if it conflicted with the least state interest. The belief-action dichotomy was impliedly abolished in *Sherbert v. Verner*⁴⁵ where the U.S. Supreme Court held that belief and actions inspired by belief were indivisible. In other words, freedom of religion and the freedom to manifest religion in visible social actions form a composite whole. This jurisprudence is reflected in section 38(1) of the 1999 Constitution which includes in freedom of religion the right to manifest and propagate religion in worship, teaching, practice and observance.

Section 7 of the United Nations Declaration on the Elimination of all Forms of Intolerance and Discrimination based on Religion or Belief takes further the extent of the freedom to manifest and propagate one's religion to include freedom:

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

⁴¹ *Oxford Advanced Learner's Dictionary*, (n.12) p. 904.

⁴² *Ibid.*, p.1176.

⁴³ 98 U.S. 145 (1879).

⁴⁴ *Ibid.*, at 166.

⁴⁵ *Sherbert v. Verner*, 374 U.S. 398(1963).

The United Nations Human Rights Commission commenting on article 18(1) of the ICCPR which has provisions similar to section 38(1) of the 1999 Constitution indicated that the range of manifestation of religion or belief includes:

... not only ceremonial acts but also such custom as the observance of dietary rights, the wearing of distinctive clothing, head coverings, participation in rituals associated with certain stages of life, and the use of particular language customarily spoken by the group.⁴⁶

In spite of the wide latitude given to freedom of religion by law, it is not non-derogable. It is not an absolute right that can be exercised anyhow. Its exercise is limited by a number of factors.

4. Limitations to Right to Freedom of Religion

In spite of religion being an inherent feature of the human person, right to freedom of religion is not a licence for one's religion to be manifested however, wherever and whenever a person desires. It's manifestation in the society has to be balanced out with other social values and interests. In this way the legal right to freedom of religion is interfaced with the legal duty to respect other key social interests. This fact is incorporated in section 45(1) of the 1999 Constitution which provides:

- Nothing in sections 37, 38, 39, 40 and 41 of this Constitution shall invalidate any law that is reasonable justifiable in 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 of other persons.

Apart from the freedom of thought, conscience and religion contained in section 38(1), section 45(1) limits the exercise of the rights in sections 37, 39, 40 and 41 of the Constitution. By including section 38 amongst the sections of the Constitution to be limited under section 45(1), it means that every right granted under section 38 is liable for restriction including freedom of thought and conscience. But most international legal instruments restrict only the manifestation of religion or belief in social actions without including thought and conscience. Such instruments include the UDHR,⁴⁷ ICCPR,⁴⁸ UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination based on Religion or Belief,⁴⁹ the African (Banjul) Charter on Human and Peoples' Rights,⁵⁰ and the European Convention on Human Rights, 2010.⁵¹ Others are the American Convention on Human Rights⁵² and the Arab Charter on Human Rights 2004.⁵³ The couching of the provision differs but the same idea runs through them. The UDHR for instance provides in article 29(2):

In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

The ICCPR in article 18(3) states that "freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others". Notwithstanding the foregoing, article

⁴⁶ C.C. PR/C/21/Rev: 1/Add 4 adopted July 20, 1993, reprinted.

⁴⁷ Art. 29(2).

⁴⁸ Art. 18(3).

⁴⁹ Art. 1(2 & 3).

⁵⁰ Art. 8.

⁵¹ Art 9(2).

⁵² Art. 12(3).

⁵³ Art. 30(2).

15(1) of the European Convention on Human Rights appears to authorize during war a sweeping limitation of freedom of religion similar to the provision of section 45(1) of the Nigerian Constitution. It provides in article 15(1): “In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law”. This is a general legal authority for government to do whatever is possible for defending the country during war or in an emergency situation, which does not particularly mean restricting people’s right to think, have a conscience, religion or a belief *simpliciter*.

Derogation from freedom of religion is limited to the external manifestation of it for the obvious reason that it is hardly possible to regulate what is locked up in a person’s mind. There is hardly any police for thoughts, conscience, beliefs or ideas that are not put into actions. In the English case of *Williamson v Secretary of State for Education and Skills* the House of Lord stated that while “[e]veryone is entitled to hold whatever beliefs he wishes, when questions of “manifestation” arise ... a belief must satisfy some modest, objective minimum requirements. The belief must be consistent with basic standards of human dignity or integrity. ...”⁵⁴ In other words, a person can hold whatever belief he wants in so far as it is not manifested. But if it is to be manifested, then it has to be subject to social requirements. In effect, though section 45(1) provides for the restriction of freedom of thought, conscience and religion or belief in all ramifications, what is possible is the limitation of the manifestation of religion.

4.1 Conditions for Restricting Freedom of Religion

4.1.1 Limitation to be backed by law

The first condition for validly restricting freedom of religion is that the restriction must be imposed by law. Law in this context refers to the domestic legal system,⁵⁵ thereby excluding international law. Section 318 of the Constitution, i.e., the interpretation section of the Constitution, defines ‘law’ to mean “a law enacted by the House of Assembly of a State.” By this definition it means that only state legislation could limit freedom of religion. A federal statute can therefore not impose a restriction on the exercise of religion. This definition appears to be at odds with the intentions of section 45(1).⁵⁶ Paragraph (a) of the section includes ‘defence’ as one of the justifications for limiting the manifestation of religion. Given that the legislative power on ‘defence’⁵⁷ is reserved exclusively for the National Assembly, any legislation limiting freedom of religion on the ground of ‘defence’ has to come from the National Assembly. Such an act therefore has to be included in the law contemplated by section 45(1). Moreover, issues of public interest such as public order, public security, public health, public morality, and the rights of others contained in paragraphs (a) and (b) are issues of peace and order which the Constitution in section 4(2) empowers the National Assembly to make laws for. Therefore, the law in question has to be construed to include federal statutes. The law also includes subsidiary legislations made under duly delegated powers. It is believed that customary law should come within the purview of law contemplated by section 45(1). The law contemplated by section 45(1) is a law reasonably justifiable in a democratic society, which condition customary law meets by being a source of law in Nigeria. Interpreting article 9(2) of the European Convention on Human Rights, which has a provision “...such limitations as are prescribed by law....” similar to that of section 45(1), the court in the English case *Sunday Times v. UK*⁵⁸, interpreted ‘law’ to include unwritten law, e.g., the common law.⁵⁹ Common law is the customary law of the English legal system.

⁵⁴ [2005] 2 AC 246, at para. 23

⁵⁵ M D Evans, (n.33) p.319.

⁵⁶ A definition given by the Interpretation Act applies unless a contrary meaning is indicated in an Act or enactment in question. Interpretation Act. This should analogously apply to interpretation sections of legislations.

⁵⁷ ‘Defence’ is serial number 17 in the Exclusive Legislative List, Second Schedule, Part I, 1999 Constitution.

⁵⁸ Ser. A, no. 30(1979), para. 47

⁵⁹ *Ibid*.

4.1.2 Law must be reasonably justifiable in a democratic society

That the law must be justifiable in a democratic society points to the quality of the law. Notwithstanding the lack of uniformity in the characters of democracy in different countries, certain principles are central in genuine democracies. They include majority rule, respect for minority rights, due process and rule of law. That the law must be justifiable in a democratic society implies that the laws are not arbitrary or dictatorial. Interpreting a similar phrase, ‘necessary in a democratic society’ in article 9(2) of the European Convention on Human Rights, Evans holds that the phrase is associated with the requirement that the restriction be justified by ‘a pressing social need’.⁶⁰ In other words, the restriction must be to achieve a pressing social need. In *Sherbert v. Verner*⁶¹ the U.S. Supreme Court held that the right to the free exercise of religion can only be restricted legitimately for *compelling state interest*.

4.1.3 Other Specific Ground for Limiting Freedom of Religion

The section lists the following grounds for limiting freedom of religion: interest of defence, public safety, public order, public morality, public health, and rights and freedom of other person. Since the section does not introduce these conditions with ‘include’, it means that the list is exhaustive; freedom of religion cannot be limited on any other ground. These grounds can be grouped into three: interest of defence, public interest, and rights and freedom of others.

Restricting Freedom of Religion for Interest of Defence

In a sense this belongs to the same class of public interest justifications for limiting freedom of religion because all of them seek to protect the general interest of the populace. But in another sense, it is unique because it protects perhaps the highest public interest, the security of the country as a whole whereas the other public interests protect specific public values. Defence issues are serious issues in the life of a country in that they relate to “national security, encompassing both territorial sovereignty and political independence”⁶² The U.S. National Security law defines ‘national security’ to refer to the protection of a nation from attack or other dangers by maintaining adequate armed forces and guarding state secrets.⁶³ It embraces equally economic security, monetary security, energy security, environmental security, military security, political security and security of energy and natural resources.⁶⁴ Notwithstanding this broad understanding of the importance of national security for a country, when considered as ground for restraining people’s right or freedom, it is interpreted narrowly to refer to direct threats to a nation’s safety. In *Cole v. Young*,⁶⁵ the U.S. Supreme Court held that for ‘national security to be a justification to summarily dismiss somebody under the Summary Suspension Act (64 Stat 476), it has to be used in a definite and limited sense to refer to only those activities which directly concern the nation’s safety, as distinguished from the general welfare. Analogously for interest of defence to be a justification for restricting freedom of religion, it has to be construed narrowly to refer to direct threats to Nigeria’s safety.

Restricting Freedom of Religion for Public Interests

This head of exception embraces public safety, public order, public health and public morality. They are specific aspect of the overall public interest and the constitution recognizes them as important for the stability and development of the country. Thus they are to be safeguarded even to the point of restricting freedom of religion. Since section 45(1) is restrictive, these grounds are to be construed narrowly and strictly to refer to those issues of safety, order, health and morality that are of compelling interest to the state.⁶⁶ The concepts of public safety, public order, public health and public morality are wide and imprecise. ‘Public’ according to the Oxford Advanced Learner’s Dictionary, means “connected with ordinary people in society in general; something provided by the government, for the

⁶⁰ M D Evans, (n.33) p.320. See *Handyside v. UK*, Ser. A. no. 24 (1976), para. 48.

⁶¹ 374 U.S. 398(1963)

⁶²David Johnston, “Minister’s Forward” in *Defence Issues Paper 2014*, ><http://www.defence.gov.au/whitepaper/docs/defenceissuespaper2014.pdf>< accessed 9 February 2016.

⁶³ Ibid.

⁶⁴ ><http://definitions.uslegal.com/n/national-security/>< accessed 9 February 2016.

⁶⁵ 351 U.S. 536 (1956).

⁶⁶ See *Sherbert v Verner*, (n.45).

use of people in general; connected with the government and the services it provides”.⁶⁷ The same dictionary defines ‘safety’ as “the state of being safe and protected from danger or harm; state of not being dangerous; and a place where you ate safe”.⁶⁸ The same Oxford Advanced Learner’s Dictionary defines ‘order’ as “the way in which people or things are placed or arranged in relation to each other; state of being carefully and neatly arranged; the state that exist when people obey laws, rules or authority”.⁶⁹ It defines health as “the condition of a person’s body or mind; the state of being physically and mentally healthy; the work of providing medical services”. The dictionary further defines ‘morality’ as “principles concerning right and wrong or good and bad behaviour; the degree to which something is right or wrong, good or bad, etc. according to moral principles; as system of moral principles followed by a particular group of people”. From the definitions, these public interests refer to the duty of government in seeing that there is safety, order, good health and proper morality in the society. The problem is that each of these terms predicated to ‘public’ has different nuances. If freedom of religion is abridged for every slight conflict with any of these nuances, it would lose every practical significance. Thus it is only issues of public safety, order, health or morality that are of compelling state interest that can justify limiting freedom of religion.⁷⁰ The same principle of strict and narrow construction of a restrictive law applies to mean that the religious manifestation that can be restricted is that that directly and strictly impinges on any of these public interests. This is the import of the ruling in *Cole v. Young*, supra. The Human Right Commission (HRC) of the UN stressed on the principle of strict construction when it stated in relation to article 18(3) of the ICCPR that the religious action or behaviour being restricted must be directly related and proportional to the public interest being safeguarded.⁷¹ In *Singh v. Canada*⁷² the HRC of the UN considered article 18(3) of the ICCPR which contains public safety, public order, public morality, and public health as conditions for restricting freedom of religion just like section 45(1) of the 1999 Constitution. In this communication, the author claimed that his right under article 18 of the ICCPR was violated in that as a Sikh, his religion demanded that he should wear a turban and for this he refused to wear protective headgear at work as demanded by Canadian law. This refusal resulted in the termination of his contract of employment. The HRC held the view that , “If the requirement that a hard hat be worn is regarded as raising issues under article 18, then it is a limitation that is justified by reference to the grounds laid down in article 18, paragraph 3.”⁷³ Commenting on the view of the HRC Evans said that: “It is clear that the State is entitled to enforce paternalistic legislation aimed at ensuring health and safety.”⁷⁴ In *Coeriel and Aurik v. the Netherlands*, the issue was whether regulation of surnames and the change thereof was a matter under public order as contemplated by article 18 (3) of the ICCPR. The HRC expressed the view that “With regard to the author’s claim under article 18 of the Covenant the Committee considered that the regulation of surnames and the change thereof was eminently a matter of public order and restrictions were therefore permissible under paragraph 3 of article 18”.

To ensure fair and legitimate restriction of freedom of religion for public interests, Carrillo de Albornoz identified four principles: (a) every limitation must be prescribed and regulated by law and never be left to an arbitrary administrative decision, (b) such provisions or limitations must be equally applicable to all citizens and to all religious institutions, (c) limitations should never be imposed on particular confessional grounds, and (d) limitations based on emergency situations must be proportionate to the emergency itself and disappear as soon as the crisis is over.⁷⁵ The banning of the public celebration of Christmas in Somalia, Brunei, and Tajikistan for the interests of public safety, or public are instances

⁶⁷ *Oxford Advanced Learner’s Dictionary* (n.13) p.1184.

⁶⁸ *Ibid.*, p.1303.

⁶⁹ *Ibid.*, p. 035.

⁷⁰ *See Sherbert v. Verner*, (n.45).

⁷¹ *General Comment*, No. 22(48) of the HRC on article 18 of the ICCPR, para. 8.

⁷² Comm. No. 208/1986 (View adopted on 9 November 1989). *See* 14 Annual Report of the HRC, A/45/50, 1990, vol. II Annex E; Yb. HRC 1989/90 II, p.398.

⁷³ *Ibid.* para. 6.2

⁷⁴ M D Evans, (n.33) pp.224-225.

⁷⁵ A. F. Carrillo De Albornoz, *The Basis of Religious Liberty*, (London: SCM Press, 1963) pp.142-144

of limitations being imposed on particular confessional grounds. They were dictated merely from Islamic sentiments.⁷⁶

Freedom of Religion Restricted for Rights and Freedom of Other Persons

In principle this ground underscores the fact that freedom of religion shares the social, civil and political space with the legal rights and freedoms of other persons. This means that all these freedoms and rights, including freedom of religion, are equal and mutually limiting. Thus, none is ordinarily superior and so should not unjustifiably displace any other. This idea is represented in the dictum - one's freedom or right begins where those of others end. Thus, to ensure that freedom of religion of one person does not inhibit others from exercising their other rights and freedoms, government can make a law limiting the exercise of freedom of religion. Section 45(1) (b) takes the 'rights and freedom of others' as ground for restricting the freedom of religion of any person. Being in the plural, 'rights' refers to all the legal rights of the other person, such as his property, intellectual, civil, economic and political rights. "Freedom" being in the singular could be taken to refer, in the context of section 38, to freedom of religion or belief of the other person. To mention 'freedom' in the singular, the Constitution draws attention to the fact that the other person is also entitled to freedom of thought, conscience, religion or belief. As with public interests, the restriction of a person's freedom of religion in order to protect the rights and freedoms of others must be strictly construed. This ground seeks to establish a balance in the exercise of all rights and freedoms including freedom of religion.

5. Conclusion

This paper took off from the background of religious tensions and extremism in Nigeria as the motivation for the inquiry into the constitutional guarantee of freedom of religion and safeguards against extremism. The provisions of the Constitution on freedom of thought, conscience, religion or belief as well as on the limitations to its manifestation are in tandem with what is provided in many international legal instruments such as the UDHR and the ICCPR. To show good faith and commitment to the highest level of freedom of religion, the Constitution aligns more to the provisions of these two key international legal instruments than to the African regional charter on human rights, the African (Banjul) Charter on Human and People's Right, which is rather minimal in its provisions on freedom of religion and its limitation.⁷⁷ This means ultimately that in themselves the constitutional provisions on freedom of religion and its limitations, can forestall the scourge of religious tensions and extremism. The keywords here are *in themselves*. In other words, if religious tensions and extremism are to be arrested only by the fairness of the Constitution in regulating freedom of religion and its limitations, the provisions of the 1999 Constitution could. But the truth is that the mere letters of the Constitution cannot achieve anything without constitutionalism, which is the disposition and commitment across the citizenry to actualize the letters of a constitution. It is like the spiritual constitution while letters of the constitution constitute the physical constitution. The intimate relationship between these two concepts - constitution and constitutionalism - is like that in philosophical anthropology by which in a living person the soul animates the body and makes it accomplish things. Constitutionalism is the commitment of all the parties to the social contract embodied in the constitution to bringing into fruition the desires and rights guaranteed in the documentary constitution. Without this, every word in the documentary constitution would be sterile. This commitment can come if the values enshrined in the constitution are shared values. Otherwise, the commitment to the constitution as the supreme law of the land would be wanting.

This is the problem with freedom of religion and its limitations as guaranteed in the 1999 Constitution. It is not only that freedom of religion guaranteed in the constitution is not a shared value but also the idea of the constitution as the supreme law of the land is not shared by many Muslims. They take the Sharia, the Islamic legal system as the supreme law, being that according to them it is revealed by Allah.

⁷⁶ "Christmas celebrations banned in Somalia, Tajikistan and Brunei", *The Guardian*, 23 December 2015, ><http://www.theguardian.com/world/2015/dec/23/christmas-banned-somalia-tajikistan-brunei>< accessed 8 February 2016.

⁷⁷ Article 8 of African (Banjul) Charter on Human and People's Right provides: "Freedom of conscience, the profession and free practice of religion shall be guaranteed. No one may, subject to law and order, be submitted to measures restricting the exercise of these freedoms."

And since the constitution is a secular document deriving from human reason rooted in natural law and from the sovereignty of the people of Nigeria, it does not bind them supremely. Lemu wrote that “since the Shari’ah is Allah’s way and Allah’s law, as revealed in the Qur’an and demonstrated by the Prophet, ... the Shari’ah is the law for all Muslims to follow, not man-made laws that change with the fashions of the time”.⁷⁸ Oba put the situation very flatly: “Islamic law, having accepted the sovereignty of Allah and His Laws, cannot accept the ‘supremacy’ of the Constitution and the sovereignty of the ‘people’. Islam does not countenance any law as superior to its laws”.⁷⁹

To assure that they live under the Sharia as the supreme law instead of the Constitution, twelve states in the northern part of the country with Muslim majority adopted from 1999 the Sharia as the ultimate source of their laws, meaning that is their grundnorm. But studies indicate that rather than being a divine code like the ten commandments in Judeo-Christian religion, the sharia developed over time through human initiative and ingenuity.⁸⁰ It “is not a code since it was never codified in the strict sense”.⁸¹ To substantiate further the deep involvement of human beings in the making of Sharia, Ozigbo noted that “the Quranic law and other injunctions laid down by the prophet were in no way comprehensive. With time, it became necessary that a full system of law be evolved to supplement the rudimentary guidelines of the Quran and the hadith for the daily needs of the faithful... Muslim laws at the time were being formulated by judges eager to fit the legal system into the precepts and spirits of Islam”.⁸² It is held that it was not until the 11th century that the framework of the law was fully set and formalized.⁸³ Fadl concluded that “although it is claimed that Shariah comprised a set of objectively determinable divine commands the fact is that the divine law was the by-product of a thoroughly human and fallible interpretative process”.⁸⁴ He affirmed further that “whatever qualified as a part of Shariah law, even if inspired by exhortations found in religious texts, was the product of human efforts and determinations that reflected subjective socio-historical circumstances”.⁸⁵ Olayiwola draws out the full implications of having sharia as the fundamental law of a state. He wrote:

In its precise meaning, Islam is not only a religion; it is also a way of life that regulates all the aspects of life on the scale of the individual and the nation. Islam is a social order, philosophy of life, a system of economic rules and government. Islam clearly establishes man’s duties and rights in all relationships – a clear system of worship, civil rights, laws of marriage and divorce, inheritance, code of behaviour, laws of economy, laws of governance, laws of war and peace, of buying and selling and laws of relations and co-existence with one another, parents, children, relatives, neighbours, guests, Muslims, non-Muslims and brethren.⁸⁶

That Islam establishes a Muslim’s duties and rights in all relationships means that it is Islamic law that primarily regulates a Muslim’s relationship with others and not the constitution. In other words, in the

⁷⁸ B A Lemu, *Tawhid and Figh (Belief and Jurisprudence)*, *Junior Islamic Studies*, (Minna: Islamic Education Trust, Vol. 1, 1988) p.183.

⁷⁹ A. A. Oba, ‘The Shariah Court of Appeal in Northern Nigeria: The Continuing Crises of Jurisdiction’ (2004) *The American J. of Comp. Law*, Vol. 52, No. 4, 895.

⁸⁰ I R A. Ozigbo, *An Introduction to the Religion and History of Islam*. (Enugu: Fourth Dimension Publishers, 1988) p.47.

⁸¹ *Ibid.*

⁸² *Ibid.*, p. 48.

⁸³ I.K.E. Oraegbunam, ‘Islamic Criminal Law and Constitutionalism in Nigeria: Any Lessons from Turkey?’ (2015) *J. of Law, Policy and Globalization*, <<http://iiste.org/Journals/index.php/JLPG/article/viewFile/19335/19643>> accessed 19 February 2016.

⁸⁴ K.A.E. Fadl, ‘The Human Rights Commitment in Modern Islam’, <http://www.musawah.org/sites/default/files/Wanted-KAEF-EN.pdf>, accessed 11 February 2016.

⁸⁵ *Ibid.*

⁸⁶ A. Olayiwola, ‘Nationalism and nation building in Islam’ in Momoh, Campbell S. (ed) *Religion and nation building: Nigerian studies in religious tolerance*. Vol. 1. (Lagos: Centre for Black and African Arts and Civilization, and National Association for Religious Tolerance, 1988) p.227.

area of freedom of religion, a Muslim's treatment of others is governed by the Sharia rather than by the Constitution. In northern parts of the country where Sharia rules, the records show that the right to freedom of non-Muslims is not respected. They are denied permits to build places of worship. Their religious institutions are closed down arbitrarily by government. Non-Muslims are discriminated against in employment and other socio-economic benefits. In the final analysis, the words of the Constitution on freedom of religion and its limitation will remain largely ineffective when the constitution is not wholeheartedly accepted as the supreme law of the land across the board. Muslims need internal reformation in order to bring their religion to terms with the constitutional provisions for freedom of religion and its limitations, which are ingredients for a harmonious co-existence in a multi-religious Nigeria.