

INTERROGATING CONSTITUTIONALISM AND ISLAM IN NIGERIA

Aborisade Olasunkanmi

Senior Lecturer, Department of General Studies, Ladoke Akintola University of Technology,
Ogbomoso, Nigeria

ABSTRACT

This work interrogates constitutionalism as a modern secular doctrine of governance and rights in Nigeria and Islam, as a religious tradition. Nigeria at independence chose secularism based on the multi religious nature of the society. But the coming in of fourth republic in 1999 brought in the issue of religious law. Some state in the northern part of Nigeria with Muslim majority decided to implement Shari'a'h within the state. This work looks at constitutionalism and the Shar'i'ah, secularism and Islam, Nigeria as a secular state, constitutionalism and Islam in Nigeria and Nigerian experience with Shari'a'h. The work concludes that to afford the adherent of the three known religions in Nigeria the opportunity of the best form of government for Muslims, Christian, Traditional African Religion and for the flourishing of their faith, secularism should remain Nigeria's policy.

Key words: Africa, Constitutionalism, Christian, Government, Religion, Secularism, Shari 'a'h, Traditional, Muslim

Introduction

Constitutionalism can be defined as limited government, a system in which the state power is divided and limited by separation of powers and other effective mechanisms of checks-and-balances, with the ultimate aim of affording a strong protection for individual rights and liberties. De Smith conceptualized the idea of constitutionalism in this way:

...involves the proposition that the exercise of governmental power shall be bounded by rules, rules prescribing the procedure according to which legislative and executive acts are to be performed and delimiting their

permissible content—Constitutionalism becomes a living reality to the extent that these rules curb arbitrariness of discretion and are in fact observed by the wielders of political power, and to the extent that within the forbidden zones upon which authority may not trespass. There is significant room for the enjoyment of individual liberty. (De Smith SA 1964)

De Smith conceives constitutionalism as a “living reality” that deters arbitrariness of the wielders of power in the state. Ihonvbere on his own part argues that “in liberal political discourse, constitutionalism revolves around the twin issues of individual rights and limited powers of government. These encompass the rule of law, separation of powers, periodic elections, independence of the judiciary and the right to private property among other critical issues” (Ihonvbere 1991). Ihonvbere made us understand that his concept of constitutionalism “goes beyond a legalistic interpretation” (Ihonvbere 1991). And as a result he refers to constitutionalism “as a process for developing, presenting, adopting, and utilizing a political compact that defines not only the power relations between political communities and constituencies, but also defines the rights, duties, and obligations of citizens in any society” (Ihonvbere 1991). For the right we are discussing to be meaningful, it must be crystal clear to the citizens. It must be treasured by the citizens and the implementation must be transparent and effective.

This meaning of constitutionalism was emphatically declared by Article 16 of 1789 of the French Revolution: “Any society where rights are not secured nor separation of powers is established has no constitution at all.” The same declaration also adds a democratic element in its Article 6: “The law is the expression of the general will. All citizens have the right to participate in its making either personally or through their representatives.” What we are saying is that the people themselves participate in the process of constructing the constitution and their active participation in giving it meaning in the process of social production such that their social aspirations are not alienated by the power that be in that given society.

However, in the contemporary society, almost all countries of the world, from highly institutionalized liberal democracies to totalitarian regimes, have both written and unwritten constitution that they declare as the supreme law of the country. A constitution is a charter of government deriving its whole authority from the governed and sets out the form of government. It specifies the purpose of the government, the power of each department of the government, the

state-society relationship, the relationship between various governmental institutions, and the limits of the government. A written constitution is the one that is contained in a single document, which is the single source of law in a state. An unwritten constitution, on the other hand, is the one that is not contained in a single document but consists of several different sources, such as the acts of parliament and, unwritten sources, such as constitutional conventions, observation of precedents, royal prerogatives, custom and tradition (Aristotle, 1977). But many of these so-called constitutions may be devoid of constitutionalism. More importantly, though some of them could be claimed to be legal documents, they were certainly not legitimate. In fact, the so-called constitutions were instruments for terrorizing the poor and the weak, legitimating corruption and privatization of the state, and rationalizing the suffocating of civil society and subservient relationships with imperialism.

However today, almost all the Islamic countries, with the single exception of Saudi Arabia, have written constitutions. Very few of them, however, fit the constitutionalist model, either in the way they are made, or in terms of their substance. As Nathan Brown observes, in Arab countries “constitutions have generally been written to augment political authority; liberal constitutionalism (aimed at restraining political authority) has generally been at most a secondary goal” (Nathan J. Brown, 2002). He thus argues that Arab constitutions were not aimed at limiting the authority of the state, but they “have been designed primarily to render the political authority of the state more effective and secondarily to underscore state sovereignty and establish general ideological orientations” (Nathan J. Brown, 2002). These situations rule out the ideal of constitutionalism in Arab world, because Islam has been accepted as the state religion in those countries and the Shar‘i’ah as the law. According to M.A Ambali (1998) quoting the Holy Quran thereafter, *Shariah is the straight path or the path that leads to the spring where drinking water is fetched*. As God Almighty Allah put it;

Finally, we sent thee (Mohammed) on a way Shariah by which, the purpose of faith may be fulfilled. So follow this way and follow not the likes and dislikes of those who do not know the truth (Quran45v18).

The Shariah is divine and absolute concept of law. Islam does not allow for any change in legal concepts and institutions because it is believed that it was handed down by Allah himself.

Therefore, the Shar‘i`ah cannot be identified as law in the proper sense, rather it is an ethical or moral system of rules. The Shar‘i`ah is immutable, regardless of history, time, culture, and location, as it does not develop an adequate methodology of legal change. The rulings pronounced by the Shar‘i`ah are static, final, eternal, absolute and unalterable. Invariably, its idealistic, religious, rigidity and casuistic nature leads to the immutability of the Shar‘i`ah. This position is not compatible with the nature of constitutionalism which limits the power of government. Shar‘i`ah and constitutionalism are not compatible; it is not possible to have a shar‘i`ah and constitutionalism in a state because almost all the attributes of constitutionalism are against the rule of Shar‘i`ah.

Secularism and Islam

An-Na`im(2008) “defined secularism to mean only the separation of religion and state”. According to An-Na`im; secularism is the most compelling ground for separation of religion and state with efforts to safeguard Islam from abuse at the hands of the powerful. According to Kamali(2012), “secularism in the Arabic terminology (*alaminiyyah*, or *dunyawiyyah*) refers to the worldly and the temporal, and it is usually taken to imply the liberation of politics from religion.

Secularism is the principle of the separation of government institutions and persons mandated to represent the state from religious institutions and religious dignitaries. This refer to reducing ties between a government and a state religion, replacing laws based on scriptures (such as the Torah and Shariah law) with civil laws, and eliminating discrimination on the basis of religion. This is said to add to democracy by protecting the rights of religious minorities (Feldman, Noah 2005). To Omotola Jeremiah Shola(2012) “Secularism is commonly regarded as ‘an ideology that holds that religious issues should not be the basis of Politics, or (in the extreme) that religion has no place in public life’. Essentially, secularism seeks to preserve the religious neutrality of government and cultures”. The issue of religion is a private one in a secular state. A secular state does not mean a state where religions are not recognized but where the choice to believe in a religion or not to believe is entirely an individual’s prerogative. One of the most common misconceptions about secularism is that it is viewed as anti-religious when it really is ‘religion neutral’. It protects the rights of Muslims in a non-Muslim society and it protects rights of non-

Muslims in a Muslim society. It is quite conducive to the growth of personal religion where the relationship of morality is between the individual and God, not the individual and the state.

One manifestation of secularism is asserting the right to be free from religious rule and teachings, or, in a state declared to be neutral on matters of belief, from the imposition by government of religion or religious practices upon its people. Another manifestation of secularism is the view that public activities and decisions, especially political ones, should be uninfluenced by religious beliefs and practices. Ahmet Kuru (2009) distinguishes between “passive” and “assertive” types of secularism. In his words, “assertive secularism requires the state to play an ‘assertive role to exclude religion from the public sphere and confine it to the private domain. Passive secularism demands that the state plays a ‘passive’ role by allowing the public visibility of religion. Assertive secularism is a ‘comprehensive doctrine,’ whereas passive secularism mainly prioritizes state neutrality toward such doctrines” (Ahmet Kuru 2009).

Ira M. Lapidus (1975), analyses the separation of religion and state in early Islamic history. Lapidus points out the unity that exists between religious and political authorities when Prophet Muhammad was the leader of Ummah. According to him:

The prevailing view among Islamists is that classical Islamic society does not distinguish between the religious and the political aspects of communal life. The Caliphate was both the religious and the political leadership of the community of Muslims, whose individual believers and subjects belonged to a polity defined by religious allegiance. [...] Since Muhammad was the Prophet who revealed God's will in all of life's concerns, belief in Islam entailed both loyalty to a chief whose authority derived from his religious position, and membership in the ummah- the community he led. In this sense, religious and political values and religious and political offices were inseparable (Ira M. Lapidus 1975).

However, by the middle of 10th century, the secular governments had existed in the Muslim world and the effective separation of religion and politics had been established between 'Ulama, political and military leaders under the authority of the Caliph. Then religion and political life had developed a distinct sphere of experience to the extent that there were independent values and organizational leaders. “From the middle of the tenth century effective control of the Arab-

Muslim Empire had passed into the hands of generals, administrators, governors, and local provincial lords; the Caliphs had lost all effective political power” (Ira M. Lapidus 1975).

However, with the loss of effective political power by the Caliphs, government in Islamic lands then became secular and the Muslim states were fully differentiated political bodies without any intrinsic religious character, though they were officially loyal to Islam and committed to its defense (Ira M. Lapidus 1975), but religious organizations, institutions, personnel and activities were clearly separate from the ruling regimes. This claim was substantiated by Ibn Taymiyya who held that, apart from the Caliphate, the *ulama* constituted the true *umma* of Islam, and that ruling regimes were 'Muslim' regimes not by any intrinsic quality but by virtue of the support they lent the Muslim religion and religious communities (Ira M. Lapidus 1975). The religious and political life of the Muslim was finally separated through a historical process that involved three developments: Arab rebellions against the Caliphate, the emergence of religious activity independent of the actual authority of the Caliphs, and the emergence of the Hanbali School of law (Ira M. Lapidus 1975).

However from the review of Ira M. Lapidus literature we discovered that the changes were brought about by the need for a radical step forward in the communal life of the time. There is no doubt that one thing that is constant in life is change, it is inevitable in the society of human. Although there were other claims by other scholars on the relationship between Islam and secularism by some contemporary writers like Kamail(2012), who claimed that; secularism came to the Muslim world together with related concepts such as modernity and westernization in the context of colonialism. And he further claimed that; secularism led to the “marginalization of Islam and its exclusion from law and governance, or else of confining it to the sphere of personal law” (Kamali, 2012). Fadl (2012) also argues similarly that “in the Muslim world, secularism is normally associated with what is described as the Western intellectual invasion, both in the period of colonialism and post-colonialism”.

The scholars in the clash of Kamail and El Fadi and others should be made to understand that; the society of early Muslim was communal with low population. Lapidus(1975) even made us to understand that, before the coming of the Prophet, the community affairs were been directed by the tribal chiefs. One should not forget that these tribal chiefs also have their own religion before the coming of the prophet. His coming to the communal life brought about Islam which produced the Shariah. Though Shariah encompasses everything the community needed then, because during the Prophet's time the

governance was limited to almost a city. He did not live long after the conquest of Mecca. But after his death the jurisdiction of the state expanded much beyond the frontiers of Arabia. With the expansion, development came in among the adherent of the same religion and they revolted against the authority of the Caliphs. Note that there was nothing like colonization, post-colonization and westernization then, in fact colonization started from the Arab world, the whole of Europe was colonized by Ottoman Empire, the Jihad was fought far and far because he wanted to conquer the whole world but the Empire was too large for him to rule and was latter tagged the sick man of Europe.

Constitutionalism and Islam in Nigeria

The attempt to make Nigeria a secular state was done to pave way for constitutional government, but many Muslims in Nigeria sees constitutionalism as a Western product and part of hegemony. They claimed that constitutionalism is outside Islamic discourse; it was introduced into Muslim society in order to maintain Western power. Since secularism which was associated with constitutionalism brought about separation of religion from politics, Jihad in Islam would be meaningless because in the Islamic world, where Shariah is being practiced, it is not possible to bring in the idea of constitutionalism, since many of the tenets of constitutionalism are against the tenets of Islam. Constitutionalism works well in a secular society and that has been the reason why it works well in the developed world which is largely secular. Thus, any Islamic country that wishes to be constitutional would have to drop Shar ‘i’ah and become secular.

Furthermore, Muslim hostility to liberal constitutionalism is well exposed when it comes to the issue of popular sovereignty. Popular sovereignty is the principle that the authority of the government is created and sustained by the consent of its people, through their elected representatives, who are the source of all political power. The Muslim sees this as infringing upon or contradicting the sovereignty that properly belongs to God, not the people. To Muslim it is only Allah that is absolute and sovereign over and above every other existing thing on earth. In any case, the doctrine of sovereignty as such has never had the “absolutist” implications accorded to it and if at all the sovereignty of men can never be compared with sovereignty of God.

More so, Qur'ān, says that; Shar'ī'ah is perfect and it covers broad topics such as ritual, social interaction, criminal law, and political law. Every single problem can be answered by the Shar'ī'ah. It was designed for all times, places and for universal application to all the people. Meanwhile, constitutionalism will not (and cannot) provide answers to all human problems. Despite the fact that constitutionalism possess the following attributes: effective restraints upon the powers of those who govern, the guarantee of the individual fundamental rights, the existence of an independent judiciary to enforce these rights, genuine periodic elections by universal suffrage, and the enthronement of the rule of law as reflected in the absence of arbitrariness and equality of all before law (Adewoye O 2005). We still find out that constitutionalism cannot provide answer to all human problems even in the advanced countries with the self acclaimed constitutional government things are still not all right.

Islam is declared to be incompatible with constitutionalism because constitutionalist states are almost secular. There is no place for divine laws in constitutionalism, and at the same time secular laws are unacceptable to Islam. Also it is believed that in Islam religion and politics cannot be separated while it is not possible to combine religion with politics in constitutionalism. On these grounds secularism is totally rejected by Muslims. They also think that secularism is atheistic, and atheism has no place whatsoever in Islam. Islam strongly emphasizes faith in Allah. These are some of the grounds which make Muslims uneasy with the very word secularism. Islam emphasizes life hereafter and secularism means only those matters which pertain to this world. There is no place for the world hereafter as far as secular philosophy is concerned. In the Shar'ī'ah, there is no distinction and separation between religion and state. Islam is a religion and a state (dīnwadawlah). Politics of the state is a part of Islamic teachings, in that Islam is a religion as much as it is a legal system. The view that religion cannot be separated from politics in Islam is due to Islamic value which includes: an upright conduct, justice, truth, benevolence, compassion and human dignity that are basic to the Holy Scripture. It was thought by early Islamic `Ulama and jurists that if religion was separated from politics, the rulers would totally neglect these fundamental Islamic values and would behave in a manner which would only satisfy their greed for power. In constitutionalism, there is a distinction

between the state and religion. The government here is secular, every member of the state has right to practice their own religion or believes without fear of intimidation from anywhere.

The Shar'ī'ah is based on the revelation of God. The source of Islamic law is the will of God, which is absolute and unchangeable. The Islamic laws must operate within the boundaries of the Shar'ī'ah. This condition is in contradiction with the nature of constitutionalism, which is based on the will of the people. The source of the law is the people; the people in government were placed there in trust and may be removed whenever they fail the people that placed them in office. So the existing law must operate according to the laid down rules and regulations not according to any religious caprices. While the Shar'ī'ah combines religion, law, politics and state together. Constitutional state must separate the functions of the state into different segments i.e Executive, Legislative and Judiciary.

Nigerian Experience with Shari'ah

The practice of Shari'ah in Nigeria may be difficult to be realized because of multi-religious nature of the society. That has been the reason why the founding fathers have chosen to remain secular so that every individual can have free worship based on their faith. However, some states chose to adopt Shari'ah and after 1999 election most states especially in the northern part of the country. This raised many questions because this is about to happen in a secular state. But in our literature review, we discovered that this practice raised a lot of dust, and that is exactly what we intend to examine here.

Christians and civil libertarians regardless of religious affiliation, contend that Shari'ah mandates punishments for criminal offenses that are incompatible with “fundamental rights” protected by the constitution. Examples include these: flogging in a public place for the new offence of drinking an alcoholic beverage in public; amputation of a hand for the crime of theft; compulsory prayer at regular daily intervals; behavioral restrictions on women, including a prohibition against travel in public conveyances with men, other than family members. There were reports that it was difficult for Christian organizations to receive land allocations for churches, or to place their advertisements on state-owned television and radio stations, Christian began trickling

out of Shariah states immediately. Greater still was the fear that general insecurity, often punctuated by run-ins with *hisbah* (Shariah police) groups, negative market interactions, or even simple misunderstandings, could turn into violence. So, implementing this strict way of lives seems to be very difficult in a society that has been enjoying freedom for years.

In Nigeria, with different religions i.e. Christianity, Islam, and African Traditional Religion it would be difficult to apply Shari'ah. The proponents of Shari'a argue that it would not be applied to the Christian residents of those states; but a person's religious identity may not be obvious to the enforcers and officials who apprehend suspects. Beside this many of the enforcers are overzealous who may not care to know which religion their victim belongs. We should not forget that the Northern part of Nigeria where the issues of Shariah implementation had taken place had remained volatile for long in the history of Nigeria. Religious riot has remained a recurring decimal in the life of the people there and each time the violence occurs the other religious believers were often the target. So it will be unrealized dream for anybody to claim that the enforcer will not apply Shariah to the Christian and other religion in the state.

More so, the introduction of Shari'ah for Muslims in Nigeria means that there would be two laws for those categories of citizens to obey in the state concerned i.e. the law of the Federal republic of Nigeria must be obeyed and at the same time religious law. Each law with its own set of rights and penalties. What will then happen will be a bifurcated legal order, the potential menace of a proverbial "house divided against itself, is one that cannot stand" (Richard L. Sklar 2012)". It may not be possible for many citizens to obey the two laws, in fact what may likely happen is not obeying any of the two laws or one law dies out quietly.

Conclusion

Various arguments here and there tend to ascertain whether Nigeria is a secular state or not. Some argued that Nigeria is not a secular state but a multi religious state while some claimed that Nigeria is a member of OIC (Organization of Islamic Conference) and the membership is permanent. But Nigeria is a constitutional state. At independence she chose secularism so as to allow both the majority and minority to practice their religious believes without hindrances. The

endorsement of secularism in Nigeria was premised on constitutional governance and universal human rights. This will afford the three known religions in Nigeria the opportunity of the best form of government for Muslims, Christians, and Traditional African Religion and for the flourishing of their faith.

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