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ARAŞTIRMA MAKALESİ / RESEARCH ARTICLE

UNCONSTITUTIONALITY OF CONSTITUTIONAL SHARIA AND CADI COURTS IN NIGERIA AND THE GAMBIA: DISCRIMINATORY TOOLS IN THE LEGAL PROFESSION

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ABSTRACT

The dichotomy of justiciability and non-justiciability of Preamble of a Constitution is resolved in Carl Schmitt's constitutional theory of absolute, relative and positive concepts of Constitution. These concepts established the constitutional theory: constitutional laws are valid first on the basis of the constitution and presuppose a constitution. This research synthesised the theory to realise the twin factors for validity of constitutional laws (constitutional provisions): peoples' participation and the Preamble – fundamental political decisions of the people. In addition, the juxtaposition of the twin factors vis-à-vis the constitutional provisions of Sharia and Cadi Courts in Nigeria and The Gambia revealed the following findings, that – constitutional provisions of Nigeria Sharia Courts of Appeal lack validity; The Gambia 1996 referendum exercised for Cadi Court establishment was in futility; constitutional provisions on expansion of Cadi Court's jurisdiction and establishment of Cadi Appeals Panel in 2001 lack validity; Nigeria is a secular state by virtue of her Preamble while The Gambia is a secular state on the basis of the constitutional theory; and, all legal practitioners in Nigeria and The Gambia are not equal before constitutional laws for qualifications for employment as Qadi or Cadi and Grand Qadi in the Sharia and Cadi Courts of both jurisdictions.

Keywords Constitution, Constitutional laws, Shari and Cadi Courts, Secularism, Equality

NİJERYA VE GAMBİA'DAKİ ANAYASAL ŞERİAT VE KADI MAHKEMELERİNİN ANAYASAYA AYKIRILIĞI: HUKUK MESLEĞİNDE AYRIMCI ARAÇLAR

Gloria Akpore**

ÖZET

Bir Anayasanın Önsözü'nün yargılanabilirlik ve yargılanamazlık ikiliği, Carl Schmitt'in anayasal teorisinde mutlak, göreceli ve pozitif Anayasa kavramlarıyla çözülür. Bu kavramlar anayasa teorisini oluşturmuştur: anayasaya dayanan kanunlar öncelikle anayasa temelinde geçerlidir ve bir anayasayı varsayarlar. Bu araştırma, anayasa yasalarının (anayasal hükümlerin) geçerliliği için iki faktörlülüğün yerine getirilmesi gereği teorisini sentezlemiştir: Halkın katılımı ve Önsöz – halkın temel siyasi kararı. Ek olarak, Nijerya ve Gambiya'daki Şeriat ve Kadı Mahkemelerinin anayasal hükümleri iki faktörlülük ilkesinin sentezlenmesi sonucunda şu bulgular ortaya çıkmıştır: Nijerya Şeriat Temyiz Mahkemelerinin anayasal hükümleri geçersizdir; 1996 yılında Kadı Mahkemeleri'nin kurulması için yapılan Gambiya referandumu amaçsızca yapılmıştır; 2001 yılında Kadı Mahkemelerinin yargı yetkisinin genişletilmesine ve Kadı Temyiz Heyetlerinin kurulmasına ilişkin anayasal hükümler geçersizdir; Nijerya, anayasasının Önsözünden dolayı laik bir devlettir, Gambiya ise anayasal teori temelinde laik bir devlettir; ve Nijerya ve Gambiya'daki tüm hukukçular, her iki yargı alanının Şeriat ve Kadı Mahkemelerinde Kadı veya Kadı ve Büyük Kadı olarak istihdam edilme nitelikleri bakımından anayasa ve kanunları önünde eşit değildir.

Anahtar Kelimeler Anayasa, Anayasa Hukuku, Şeriat ve Kadı Mahkemeleri, Laiklik, Eşitlik

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INTRODUCTION

Most famous of constitutional declarations are supremacy of Constitution[1], any law inconsistent with provisions of Constitution is void to the extent of inconsistency[2]. Moreover, a declaration that Constitution is in conflict with constitution or that Constitution has violated constitution will present a case of ambiguity. However, it is not ambiguity but a practical case where codified Constitution is in breach of its constitutions[3].

Act No.6 of 2001 amending Constitution of the Republic of The Gambia 1997, herein after referred to as 1997 Constitution, seeks to simultaneously insert the word 'secular' in section 1 (1) and establish a Cadi Appeals Panel as section 137A of the 1997 Constitution[4]. Also, in Nigeria, during drafting of 1979 Constitution, the inserting of constitutional provisions for establishment of Sharia Courts of Appeal were on the orders of Head of State, General Olusegun Obasanjo[5]. These contrasting acts of governments raise question of validity of constitutional laws that established Cadi Appeals Panel and Sharia Courts of Appeal in Nigeria and The Gambia.

In Carl Schmitt's constitutional theory[6], appendage of 'Constitution' after a proper noun to create a compound noun such as United States Constitution relates 3 (three) intertwined facets of 'constitutions'. These facets: absolute concept of Constitution, relative concept of Constitution and positive concept of Constitution are crafted into the singular word with the capital 'C', Constitution. Thus, mention of United States Constitution or Nigeria Constitution or The Gambia Constitution, they are embodiment of absolute, relative and positive concepts with small 'c',constitution. Absolute concept of Constitution signifies an existing condition before the codified Constitution. Thus, absolute concept of Constitution means, first, political unity and social

[1] Constitution of the Federal Republic of Nigeria 1999, s.1; *United Democratic Party & Ors v The Attorney General & Anor* [2008] 4 CS 322, 325 ratio 6 (SC) <https://static1.squarespace.com/static/5a7c2ca18a02c7a46149331c/t/5a7c76529140b7d749eafed2/1518106227310/The+Gambia+Law+Reports+2002+-+2008+Volume+1.pdf> accessed 06 June 2021; Constitution of the Republic of The Gambia 1997, 4.
[2] ibid 4.
[3] Carl Schmitt, *Constitutional Theory* (Trans/Ed Jeffrey Seitzer Duke University Press 2008) 59.
[4] *Jammeh v Attorney General* [2001] 4 CS 839, 842-843 (SC).
[5] Abdulmajeed Hassan-Bello, 'Sharia in the Nigeria Constitutions: Examining the Constitutional Conferences and Sharia Debates in the Drafts' (2019) vol 29 Al-Ahkam 1,10 <DOI:http://dx.doi.org/10.21580/ahkam.2019.29.1.3158> accessed 06 September 2021.
[6] Schmitt (n 3).

order of a given nation[7]. The existing condition of political unity and social order of a state, such as The Gambia and Nigeria, before their codified Constitutions, is a constitution: a constitution of a people. Consequently, a nation is a constitution owing to her twin status of unity and order that allowed for its existence. The non-existence of this twin status (constitution) results in non-existence of a nation. Second, a distinct style of leadership such as monarchy, aristocracy or democracy that depicts supremacy and subordination is a constitution[8]. Apparently, this meaning of constitution is nation form. Thus, nation form – monarchy, aristocracy or democracy – is a constitution. Third, dynamic emergence of political unity is constitution. Here, nation is not seen as already existing but as something emerging, always arising anew[9]. This concept of constitution is in opposition to earlier two definitions of absolute concept of Constitution[10].

Relative concept of Constitution means individual constitutional laws or constitutional details in constitutional text[11]. Also, it is written constitution[12], a written contract, alterable by legislation and stands in opposition to customary law[13]. These constitutional laws, including amendment provisions, owe their validity to absolute concept of Constitution[14]. Positive concept of Constitution refers to decisions of constitution-making power[15]. The decisions are of political unity that doubles as bearer of constitution-making power[16]. Thus, positive concept of Constitution is prior to establishment of written formal Constitution, and it is 'the fundamental political decision by bearer of constitution-making power'[17]. These fundamental political decisions, such as 'German Reich is a republic' are not constitutional laws[18]. Being substance of written Constitution, they are situated at Preamble (or with titles such as Preface or Forward) of Constitution[19].

[7] Schmitt (n 3) 59.
[8] ibid 60.
[9] ibid 61.
[10] ibid.
[11] ibid 67-68.
[12] ibid 68.
[13] ibid 69.
[14] ibid 74.
[15] ibid 75.
[16] ibid 76.
[17] ibid 77.
[18] ibid 78.
[19] ibid 78-79.

Hence, one will disagree with Shucheng Wang who claims that mention of Communist Party of China in Preamble of Constitution of People's Republic of China 1982 does not give legitimacy to Communist Party of China in the Constitution[20]. In addition, in France, during her Third Republic of 1870 – 1940 where sovereignty of people was officially abandoned[21], French National Assembly in her making of constitutional laws of 1875 was bereft of fundamental political decisions – decision by the people[22]. Furthermore, Liav Orgad, highlighted legal and social functions of Preamble amongst which are that Preamble specify reasons for a Constitution's enactment, and it is a 'national calling card'[23]. Thus, contrasting acts of Nigeria and The Gambia governments that necessitate an enquiry into validity of constitutional Sharia and Cadi Courts in the jurisdictions signal the aim of this research: the absence of peoples' participation and their fundamental political decisions in formulation of constitutional laws of Sharia and Cadi Courts in Nigeria and The Gambia. Consequently, constitutional laws of Nigeria Sharia Courts of Appeal lack validity; The Gambia 1996 referendum exercised for Cadi Court establishment was in futility; constitutional laws on expansion of Cadi Court's jurisdiction and establishment of Cadi Appeals Panel in 2001 lack validity; Nigeria is a secular state by virtue of her Preamble while The Gambia is a secular state on the basis of the constitutional theory; and, all legal practitioners in Nigeria and The Gambia are not equal before constitutional laws for qualifications for employment as Qadi or Cadi and Grand Qadi in the Sharia and Cadi Courts of both jurisdictions.

The article is divided into six parts. Part I introduced the subject matter by explaining the 3 (three) components of a Constitution and essence of this research. Part II discussed criteria for validity of constitutional law based on constitutional theory. Part III delved on application of the constitutional theory to determine validity of Sharia and Cadi Courts provisions in Nigeria and The Gambia. Part IV considered secularity of Nigeria and The Gambia on basis of the constitutional theory. Part V explained discriminatory consequence of Sharia and Cadi Courts employment provisions to legal practitioners in both countries. Part VI is conclusion that revealed

[20] Shucheng Wang, 'Emergence of a Dual Constitution in Transitional China' (2015) vol 45 Hong Kong Law Journal 1,17 <https://ssrn.com/abstract=2712042> accessed 18 September 2021.
[21] Karl Loewenstein, 'The Demise of the French Constitution of 1875' (1940) vol 34 The American Political Science Review 867,875 <https://www.jstor.org/stable/1949213> accessed 18 September 2021.
[22] Schmitt (n 3) 82.
[23] Liav Orgad, 'The Preamble in Constitutional Interpretation' (2010) vol 8 International Journal of Constitutional Law 714,722 <https://doi.org/10.1093/icon/mor010> accessed 02 April 2021.

the connection between the Preambles and international laws when discrimination on basis of religion occurs.

1. VALIDITY OF CONSTITUTIONAL LAW: CONSTITUTIONAL THEORY

The interrelationship and interconnectedness of absolute, relative and positive concepts of Constitution by Carl Schmitt's constitutional theory established that 'constitutional laws are valid first on the basis of the constitution and presuppose a constitution'[24]. While constitutional laws are the relative concept, the first 'constitution' is absolute concept and the second 'constitution' is positive concept. Thus, constitutional laws (such as Sharia and Cadi provisions in Nigeria and The Gambia Constitutions) require the simultaneous presence of absolute and positive concepts to attain validity[25]. Invariably, peoples' participation and prior political decisions of the people are factors for validity of constitutional laws.

The peoples' participation for determination of validity of constitutional laws was enunciated in the words of Ringera J of Kenya's High Court,

> '…the Constitution is not supreme because it says so: its supremacy is a tribute to its having been made by a higher power, a power higher than the Constitution itself or any of its creatures. The Constitution is supreme because it is made by they in whom the constituent power is reposed, the people themselves ….'[26]

Thus, the constituent power inherent in the people is a source of the Constitution's validity and supremacy[27]. Consequently, a Constitution cannot be made or remade without the exercise of constituent power[28]. The people is the existing political unity and social order that make the nation in the absolute concept of Constitution.

[24] Schmitt (n 3) 76.
[25] ibid.
[26] Njoya & Others v Attorney General & Others [2004] LLR 4788 (HCK) Nairobi 15 cited in Richard Stacy, 'Constituent Power and Carl Schmitt's Theory of Constitution in Kenya's Constitution-Making Process' (2011) vol 9 International Journal of Constitutional Law 587,587-588 <doi:10.1093/icon/mor050> accessed 14 July 2021.
[27] Stacy (n 26) 606.
[28] ibid.

The second criteria for determinant of constitutional law's validity is a prior political decision of an existing political unity – political decision of the people who are bearers of the constitution-making power[29]. Wherein, such prior political decision of the people, that is fundamental and created by unity, is found in Preamble or Forward or Preface of a Constitution – positive concept of the Constitution. At times, some Constitutions do lack a formal Preamble or Forward or Preface. In its place, substantive Preamble in body of constitutional text suffices[30].

James Monroe described the Preamble in these words 'the key of the Constitution'[31]; Sanford Levinson brands it 'the single most important part of the Constitution'[32]. Moreover, like other judges, Yacoob of Constitutional Court of South Africa employed Preamble in constitutional interpretation[33]. The Preamble is regarded as an integral part of Irish fundamental constitutional legal framework[34]. In Irish judicial process, from 1940 – 1993, the Preamble has been consulted in twenty-five legal suits[35]. In addition, Indian Supreme Court held that Indian Constitution was framed in the auspices of the Preamble. Thus, the Preamble was realised by the Constitution[36]. Furthermore, Nigeria Supreme Court states that the Preamble of a Constitution is applicable when there is ambiguity in the constitutional laws[37]. The Gambia Supreme Court declared the status of Preamble in a Constitution to be the context in which constitutional laws are to be utilised[38]. Hence, Preamble gives validity to constitutional laws.

The fundamental political decisions of the people, found in Preambles or its likes is inviolable. While constitutional laws can be suspended in times of emergency or amended by state,

[29] Schmitt (n 24).
[30] Constitution of Saudi Arabia, Article 1.
[31] *The Writings of James Monroe* (vol III 1969) 356 cited in Orgad (n 23) 720.
[32] *Our Undemocratic Constitution* (2006) 13 cited in Orgad (n 23) 721.
[33] *Government of the Republic of South Africa & Ors v Irene Grootboom & Ors* [2000] CCT 11/00 1 (CCSA) <https://www.escr-net.org/sites/default/files/Grootboom_Judgment_Full_Text_%28CC%29_0.pdf> accessed 02 September 2021.
[34] Teresa Iglesias, 'The Dignity of the Individual in the Irish Constitution: The Importance of the Preamble' (2000) vol 89 An Irish Quarterly Review 19,20 <https://www.jstor.org/stable/30095321> accessed 02 September 2021.
[35] ibid.
[36] *Kesavanada Baharati v State of Kerala* [1973] 4 SCC ratio 95 (SCI) <https://indiankanoon.org/doc/257876/> accessed 02 September 2021.
[37] *Chief Emmanuel Ogbonna v The Attorney General of Imo State & 3 Ors* [1992] 2 SC Pt III 1,10 (SC) < https://www.lawbreed.com/site/search-for-case/?case_ref=3531> accessed 02 September 2021.
[38] *The State v Yankuba Touray* [2020] CR/001/ 1,24 (SC).

fundamental political decisions are immune to these[39]. The essence of the immutablility is to preserve constitutional law. Hence, in The Gambia, amendment provisions of 1997 Constitution do not include the Preamble[40]. Apparently, only the Gambian people, bearers of the constitution-making power, can alter the Preamble[41]. Australia is an example where a referendum was held to adopt a new Preamble[42]. In addition, United States court's rejection of Preamble as a source of constitutional right or limitation[43] is an exception to the constitutional theory[44]. Furthermore, Preambles of Constitutions of Australia states of New South Wales and Queensland are non-justiciable[45]. Thus failure to accord legal recognition to Preamble is a violation of a fundamental principle of constitutional law.

Amongst content of a Preamble is mention of God or religion. Essence of this provision in a Preamble, being fundamental political decisions, is to delineate a nation as secular or religious. This is one of main functions of a Constitution[46]. Consequently, if it is the fundamental political decision of the people that the nation be secular or religious, it can be deduced from Preamble of the Constitution. Also, on the basis that constitutional laws owe their validity to these fundamental political decisions, the constitutional laws on God or religion in the constitutional text are subject to the Preamble. However, some countries, such as Greece, 'prevailing religion in Greece is that of the Eastern Orthodox Church of Christ'[47], Thailand, 'The State shall patronize and protect Buddhism and other religions'[48], Argentina, 'Federal Government supports the Roman Catholic Apostolic Faith'[49], have precise religions in their Preambles or operative part of their Constitution without adopting a State religion or established church[50]. This does not stop the Preamble or

[39] Schmitt (n 3) 80.
[40] Constitution of the Republic of The Gambia 1997, s.226.
[41] ibid s.102(d); Orgad (n 23) 729.
[42] ibid 735.
[43] *Jacobson v Massachusetts* [1905] 197 11,11 (US) <https://tile.loc.gov/storage-services/service/ll/usrep/usrep197/usrep197011/usrep197011.pdf> accessed 16 October 2021.
[44] Orgad (n 23) 715.
[45] Anne Twomey, 'The Application of Constitutional Preambles and the Constitutional Recognition of Indigenous Australians' (2013) vol 62 The International and Comparative Law Quarterly 317,324 <https://www.jstor.org/stable/43301564> accessed 10 October 2021.
[46] Dawood Ahmed, *Religion – State Relations* (International IDEA Constitution-Building Primer 8 2017) 3,4.
[47] Constitution of Greece 1975, art.3(1).
[48] Constitution of the Kingdom of Thailand 2007, 79.
[49] Constitution of the Argentina Nation 1994, art.2.
[50] United States Commission on International Religious Freedom, 'The Religion-State Relationship and the Right to Freedom of Religion or Belief: A Comparative Textual Analysis of the Constitutions of Majority Muslim Countries and Other OIC Members' (2012) Special Report 3,9 <

substantive Preamble from being 'the national calling card'[51], 'the most important part of the Constitution'[52], 'the substance of the written Constitution'[53], when the need for a Constitution's enactment arises. Hence, the varieties of constitutional practices with respect to religion contribute to infringement of the right to freedom of thought, conscience and religion or belief, and other human rights[54].

2. UNCONSTITUTIONALITY OF CONSTITUTIONAL SHARIA AND CADI COURTS IN NIGERIA AND THE GAMBIA

a. ABSOLUTE CONCEPT OF CONSTITUTIONS OF NIGERIA AND THE GAMBIA

On meanings of absolute concept of Constitution[55], the existing conditions of unity and order of the people, and their aspiration for representative democracy before their codified Constitutions spur absolute concept of Constitutions of Nigeria and The Gambia. This political unity and social order of absolute concept underscores government institutions' simultaneous respect for diversity and promotion of equality in the state[56]. Their failure of this necessitates judicial review[57]. Simultaneous respect for diversity and promotion of equality can be seen in Islamic Republic of Pakistan where, 342 seats for Pakistan's National Assembly members include seats reserved for women and non-Muslims[58]. Thus, the pre-existing unity and order of Pakistan is reflected at her National Assembly, a creation of her codified Islamic Constitution.

https://www.uscirf.gov/sites/default/files/resources/USCIRF%20Constitution%20Study%202012%20(full%20Text(2)).pdf > accessed10 October 2021.

[51] Orgad (n 23).
[52] Orgad (n 32).
[53] Schmitt (n 19).
[54] United States Commission on International Religious Freedom (n 50) 9-10.
[55] Schmitt (n 7, 8).
[56] Nora Hedling, *A Practical Guide to Constitution Building: Principles and Cross-cutting Themes* (International IDEA 2011) 1,20.
[57] ibid.
[58] The Constitution of the Islamic Republic of Pakistan 2012, s.51(1).

i.NIGERIA

Likewise, after 1914 amalgamation of Southern and Northern Protectorates of Nigeria[59], the existing political unity and social order of Nigeria was obvious in the midst of hostilities against the unity. Nigeria is made up of an actively increasing population[60] that occupies a landmass of 923,773 km square[61]. Aside English as official language, there are 250 indigenous languages and ethnic groups in Nigeria[62]. This is unlike England where dialect variations of English divided the people[63]. North and South geopolitical diversity of people of Nigeria reflects Muslim and Christian religious stratification[64]. Thus, ethno-religious crisis and ethnic militias are recorded in Nigeria[65]. In midst of these diverse elements reflecting Nigerian people, willingness to sit together as one people and draft a Constitution for the wellbeing of all in the state called Nigeria is the existing political unity and social order. Carl Schmitt called this willingness for a common purpose the absolute concept of Constitution. The absence of this willingness as one people for a common purpose erodes the nation called Nigeria. Hence, the state is the constitution. Without the people, there cannot be a constitution[66]. Nigeria civil war of 1967 – 1970 for creation of Biafra state could not break this existing political unity and social order[67]. Moreover, translation of 1960 Independence 3 regions of Nigeria[68], with the addition of one region in 1963[69], into twelve states in 1967, then, nineteen in 1976, twenty-one in 1987, thirty in 1991, and thirty-six states in 1996[70] did not alter the existing political unity and social order that remains within the confines of the

[59] Ojong Echum Tangban, 'History and the Quest for Unity in Nigeria' (2014) vol 4 International Journal of Social Science and Humanity 378,378 < http://www.ijssh.org/papers/382-C10008.pdf> accessed 28 October 2021.
[60] Based on the 2006 census, Nigeria's population was 140 million.
[61] Aregbeshola R Adewale, 'The Political Economic and Social Dynamics of Nigeria: A Synopsis' (2011) No.39 African Institute of South Africa Policybrief 1,1 <https://media.africaportal.org/documents/No-39.-The-Political-Economic-and-Social-.pdf> accessed 28 October 2021.
[62] ibid 3.
[63] Frederick Pilkington, 'The Problem of Unity in Nigeria' (1956) vol 55 Oxford University Press 219,219 < https://www.jstor.org/stable/718750> accessed 28 October 2021.
[64] Adewale (n 61) 3.
[65] Tangban (n 59) 378-79.
[66] Schmitt (n 7, 8).
[67] Chuka Enuka and Ikenna Odife, 'The Nigerian Civil War as a Domestic Determinant of Nigeria's Foreign Policy 1967 – 1975' (2009) vol 10 Unizik Journal of Arts and Humanities 240,243 <https://www.ajol.info/index.php/ujah/article/view/67018/55133 > accessed 29 October 2021.
[68] Gerald McLoughlin and Clarence J Bouchat, *Nigeria Unity: In the Balance* (Strategic Studies Institute and U.S. Army War College Press 2013) 1,5.
[69] Henry E Alapiki, 'State Creation in Nigeria: Failed Approaches to National Integration and Local Autonomy' (2005) vol 48 Cambridge University Press 49,50 <https://www.jstor.org/stable/20065139> accessed 15 October 2021.
[70] ibid.

landmass of 923,773 km square. They remain the Nigerian people. Furthermore, annulment of 12 June, 1993 presidential election results, that aborted a third republic after more than 23years of military rule, by Head of State, General Ibrahim Babangida and numerous religious uprisings in North and Middle Belt did not demolish the existing political unity and social order that made the Nigeria state. Thus, constitution of Nigeria as a collection of her millions of people of Nigeria-decent remains intact.

However, constitution of Nigeria people who are bearers of the constitution-making power is absent in the symbolic and evidentiary political unity and social order of series of constitution-making bodies in Nigeria: Constituent Assemblies of 1977 and 1989, Constituent Conference of 1994 and Constitution Debate Committee of 1998. The essence of the people as bearers of the constitution-making power, constituent power, is reiterated in the words of Ringera J of Kenya's High Court of Kenya,

'…the Constitution is not supreme because it says so: its supremacy is a tribute to its having been made by a higher power, a power higher than the Constitution itself or any of its creatures. The Constitution is supreme because it is made by they in whom the constituent power is reposed, the people themselves ….'[71]

Thus, the constituent power inherent in the people is a source of the Constitution's validity and supremacy. Consequently, a Constitution cannot be made or remade without the exercise of constituent power. Hence, Kenya's High Court granted application of Timothy Njoya that 2004 draft Constitution produced by Constitution of Kenya Review Commission and National Constitutional Conference lack validity because where a new Constitution was to be made, it can only be made by exercise of constituent power through a referendum[72]. Also, Colon-Rios, amongst his enumeration for the making of a new Constitution was popular participation that is not hindered by law or influenced externally[73].

[71] Stacy (n 26).
[72] ibid 606.
[73] Joel I Colon-Rios, 'Notes on Democracy and Constitution-Making' (2011) vol 9 New Zealand Journal of Public and International Law 17,19 < https://www.wgtn.ac.nz/public-law/publications/nz-journal-of-public-and-international-law/previous-issues/volume-9-issue-1-june-2011/Colon-Rios.pdf> accessed 09 September 2021.

Four Nigeria constituent assemblies and their two Constitutions (1979 and 1999 Constitutions) created during military regimes in Nigeria cannot be seen to have fulfilled these standards of Kenya High Court and democratic components of Colon-Rios. First, Constituent Assembly of 1977, even though it originated from democratic practice of election on basic principles of general and equal right to vote[74], the Constituent Assembly was not sovereign. After her debate on the draft Constitution, she submitted it to Head of State, General Olusegun Obasanjo, Chairman of Supreme Military Council (SMC)[75]. The SMC enacted the 1979 Constitution into law, after her insertion of additional provisions, by virtue of Constitution of the Federal Republic of Nigeria (Enactment) Decree 1978[76]. The SMC exercised sovereignty over the decisions of the Constituent Assembly[77]. Sharia provisions in 1979 Constitution were creations of SMC[78]. Debate on Sharia impeded a cordial and an even deliberation process in the evidentiary political unity and social order of Nigeria in 1977[79], and it occasioned an impasse that was resolved by SMC[80]. Second, the existing political unity and social order was further rocked during making of 1989 Constitution of Nigeria[81]. The non-operation of this Constitution was due to the nullification of the 12 June, 1993 presidential election by military Head of State, General Ibrahim Babangida[82]. This Constituent Assembly was equally rocked by debate on Sharia and Federal Military Government issued an order debarring Constituent Assembly from further debate and discussion on clauses pertaining to Sharia[83]. Third, Constitutional Conference of 1994 was established by Decree No.3 of 1994[84]. It was not bedeviled by serious acrimonious debate on agenda of Sharia[85]. This Conference produced the 1995 draft Constitution which was never promulgated into law due

[74] Schmitt (n 3) 132.
[75] FT Abioye, 'Constitution-Making, Legitimacy and Rule of law: A Comparative Analysis' (2011) vol 44 The Comparative and International Law Journal of Southern Africa 59,71 <https://www.jstor.org/stable/23253114> accessed 01 October 2021.
[76] ibid.
[77] Hassan-Bello (n 5) 8.
[78] ibid.
[79] Abdulmumini Adebayo Oba, 'The Sharia Court of Appeal in Northern Nigeria: The Continuing Crises of Jurisdiction' (2004) vol 52 The American Journal of Comparative Law 859, 865 <https://www.jstor.org/stable/4144468> accessed 01 October 2021.
[80] Hassan-Bello (n 5) 10.
[81] Constitution of the Federal Republic of Nigeria (Promulgation) Decree, 1989 (Decree No.12 of 1989).
[82] Ignatius Akaayar Ayua and Dakas CJ Dakas, *Federal Republic of Nigeria* (International Association of Centers for Federal Studies) <http://www.forumfed.org/libdocs/Global_Dialogue/Book_1/BK1-C08-ng-AyuaDakas-en.pdf> accessed 13 October 2021.
[83] Oba (n 79) 866.
[84] Hassan-Bello (n 5) 16.
[85] ibid.

to sudden death of Military Head of State, General Sani Abacha in 1998[86]. Fourth, while members of 1998 Constituent Debate Committee (CDC) were handpicked by military Head of State, General Abubakar Abdulsalami[87], CDC executed her mandate of organising a public debate and recommend a new Constitution based on 1995 draft Constitution of General Sani Abacha in few cities of Nigeria[88], CDC had less than 2 months to submit report[89]. This military government through her Provisional Ruling Council, PRC, inserted new provisions into draft Constitution submitted by CDC before promulgating it as the Constitution of the Federal Republic of Nigeria, 1999[90]. It is most likely that express order of Federal Military Government to 1989 Constituent Assembly to desist from further debate and discussion on Sharia was manifest in 1998 CDC. These acts of military governments abolished exercise of constituent power inherent in Nigeria people to validate Sharia provisions in 1979 and 1999 Constitutions.

This research establishes that absence of Nigerian people in determination or otherwise of Sharia provisions in Constitutions are a violation of first leg of constitutional theory: 'constitutional laws are valid first on the basis of the constitution and presuppose a constitution'[91]. Therefore, Sharia provisions in subsisting Constitution of Federal Republic of Nigeria, 1999 lack validity; they are in conflict with political unity of Nigeria (absolute concept of Constitution) when military government unilaterally (not Nigerian people) dictated *modus operandi* of Sharia in Nigeria to Constituent Assembly of 1977 thereby ending impasse created by Sharia in Assembly[92]. Sharia provisions have violated the political unity of Nigeria by not being creations of Nigerian people[93]. The import of this is evident in Kenya's High Court judgement that held that 2004 Boma draft Constitution cannot become new Kenya Constitution without a referendum[94]. Apparently,

[86] Chinelo Okekeocha, 'Questioning the Constitutionality of Sharia Law in some Nigerian States' (2014) vol 6 African Social Science Review 15,17 <https://digitalscholarship.tsu.edu/cgi/viewcontent.cgi?article=1001&context=assr> accessed 13 October 2021.
[87] Jacob O Arowosegbe, 'Revisiting the Legitimacy Question of the Nigerian 1999Constitution' (2021) Cambridge University Press 1,7 < doi:10.1017/S2045381721000162 > accessed 12 November 2021.
[88] ibid.
[89] The text of a speech delivered by the Chairman of the CDCC, Justice Niki Tobi, while presenting the CDCC's report to the Head of State, General Abdulsalami Abubakar 2 < http://constitutionnet.org/sites/default/files/presentation_of_the_report_of_cdcc_nigeria.pdf > accessed 10 October 2021.
[90] Abioye (n 75) 72-73.
[91] Schmitt (n 24).
[92] See n 77-80, 83.
[93] See n 90.
[94] Stacy (n 26) 597.

Kenya High Court advocated subjection of constitutional laws (relative concept) to the making of the people (absolute concept) for necessary validation. Thus, subsisting 1999 Constitution does not create a contract between Nigerian people and the constitutional provisions of Sharia on basis of their invalidity since they are unconstitutional.

ii.THE GAMBIA

The Gambia, a mini trading settlement and an independent colony in 1885, became independent from Britain on 18 February, 1965[95]. Unlike Nigeria that has 250 ethnic groups[96], The Gambia has 10 ethnic groups based on 1993 census[97]. Muslim adherents account for 85 percent of the 2,507,681[98] population while Christians and traditional believers are 15 percent[99].

Also, The Gambia is a nation almost immersed into Senegal. She shares her Northern, Eastern and Southern borders with Senegal while occupying a total area of 11,000 square kilometers[100]. The people of the two nations are identical in appearance and ethnic composition[101]. Senegal is an ancestral home to all Gambian families[102]. Extensive sharing of borders with Senegal, a large nation compared to The Gambia that is one of smallest nations in Africa[103], has assisted preservation of the political unity and social order of The Gambia. This is evident in intervention of Senegal to quell Kukoi Samba Sanyang coup of 1981[104]. Necessity for security from this gesture resulted in formation of the 1981 Senegambia Confederation: a confederation that did not demolish the existing political unity and social order of The Gambia[105]. Moreover, the successful coup of 22 July, 1994 did not destroy the existing political unity. The existing political

[95] Arnold Hughes and David Perfect, *A Political History of The Gambia 1816-1994* (University of Rochester Press 2006) 6,53.
[96] See n 62.
[97] Hughes and Perfect (n 95) 10.
[98] <https://worldpopulationreview.com/countries/gambia-population> accessed 17/10/2021.
[99] Akpojevbe Omasanjuwa and Modu Lamin Tarro, 'A Week of Mayhem: The July 30 Insurgency in The Gambia' (2021) Journal of Universal History Studies 1,3 <DOI:10.38000/juhis.752635> accessed 22 October 2021.
[100] Hughes and Perfect (n 95) 6.
[101] Omasanjuwa and Tarro (n 99) 20.
[102] ibid.
[103] Hughes and Perfect (n 100).
[104] Omasanjuwa and Tarro (n 99) 22.
[105] Agreement Between the Republic of The Gambia and the Republic of Senegal Concerning the Establishment of a Senegambia Confederation (1982) vol 1261 United Nations Treaty Series 332,332 < https://treaties.un.org/doc/Publication/UNTS/Volume%201261/volume-1261-I-20735-English.pdf > accessed 28 September 2021.

unity and social order is evidentiary in April, 1970 referendum for a republican Gambia[106]. In addition, it functioned via a referendum on 8 August, 1996 for promulgation of 1997 Constitution into law[107]. In 2017, during Constitution (Amendment) Bill 2017 for change of retirement age and removal of age limit for presidential aspirants, the political unity was denied expression but for the timely intervention of the Attorney - General that made it possible for the participation of the people of The Gambia via a referendum[108].

With Gambians popular participation, through referendum, in issues of national concern since the 70s, it is a pointer to the fact that the political unity (Gambians) are perpetually conscious of their mandate on governance that sovereignty lies with the Gambian people. However, with regards to the subject matter of this research which seeks to establish the absence of Gambians' prior decision for establishment of Cadi Courts in the 1997 Constitution through the constitutional theory[109], it is apparent that exercise of constituent power, constitution-making power of Gambians on 8 August, 1996 towards the establishment of Cadi Court[110] amongst other constitutional provisions, was exercised in vacuum. This is because there is no prior political decision of the Gambian people on Cadi Court in Preamble of 1997 Constitution. The interrelationship and interconnectedness of absolute, relative and positive concepts that established the constitutional theory is inseparable to justify Cadi constitutional provisions that lack prior decision of the Gambian people simply because there is exercise of constituent power through a referendum. Hence, on declaration of the Kenya's High Court that established exercise of constituent power through a referendum to hold that the Bomas draft, being a new Constitution, lacks popular participation[111], the referendum did not automatically justify the constitutional provisions to transform them into constitutional laws. Consequently, 2004 Kenya's draft Constitution was rejected at referendum[112]. Precisely, it was constitutional laws (relative concept) that were rejected by constituent power (absolute concept). Thus, in 2004, in Kenya, the validity of the constitutional

[106] Ousman A S Jammeh, *The Constitutional Law of The Gambia: 1965 – 2010* (AuthorHouse Publishing 2011) 1,41.
[107] ibid 39.
[108] Gaye Sowe and Satang Nabaneh, 'The State of Liberal Democracy' Richard Albert and others (eds), *2017 Global Review of Constitutional Law* (I.CONnect and the Clough Center 2018) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3215613 > accessed 18 October 2021.
[109] See Schmitt (n 24).
[110] Constitution of the Republic of The Gambia 1997, s.137.
[111] Constitution of Kenya Review Act 13 of 1997 (as amended) cited in Stacey (n 26) 597.
[112] ibid.

laws failed on the first leg, first constitution in the constitutional theory. Likewise, the evaluation for validity of Cadi Court provisions in the 1997 Gambian Constitution has failed on the first leg owing to the fact that the referendum was not exercised on Cadi provisions that lack prior political decision. Thus, the Gambian people exercised their constituent power on section 137 in 1997 Constitution in futility owing to lack of fundamental political decision (prior decision for such Court) in the Preamble.

On the other hand, in 2001, Constitution of the Republic of The Gambia 1997 (Amendment) Act, 2001 was before The Gambia Supreme Court on the basis that the Act did not comply with amendment section of 1997 Constitution. The Amendment Act is concerned with a long range of issues which falls under entrenched and unentrenched sections of 1997 Constitution[113]. For this essay, attention will be limited to amendment of section 1(1) – inserting the word 'secular', section 137 – new provisions on Cadi Court and 137A – establishment of Cadi Appeals Panel. At the end of counsels' address, The Gambia Supreme Court held that,

> 'The purported amendment to section 1(1) of the 1997 Constitution contained in the Schedule to the Constitution of the Republic of The Gambia, 1997 (Amendment) Act, 2001 (No.6 of 2001), and purporting to substitute for that section a new one declaring that: "The Gambia is a sovereign secular Republic", is null and void and of no effect, by reason of non-compliance with the provisions of section 226(4) of the Constitution, which, required inter alia, the holding of a referendum on the Bill before it was passed by the National Assembly and presented to and assented by the President'[114].

In addition, The Gambia Supreme Court applied the severability test to grant appeals from decisions of the Cadi Court to the Cadi Appeals Panel and for the establishment of the Cadi Appeals Panel being constitutional that does not require referendum[115].

[113] *Jammeh* (n 4) 852.
[114] ibid 842.
[115] ibid 852.

When on the absence of referendum, The Gambia Supreme Court declared the insertion of the word 'secular' null and void and applied the severability test to deny referendum for the expansion of Cadi Court's jurisdiction and establishment of Cadi Appeals Panel, the Supreme Court unequivocally established The Gambia an Islamic state. Thus, The Gambia Supreme Court unilaterally declared the state to be an Islamic state contrary to meaning and implication of severability test; even though, Amendment Act is bereft of a severability clause. This unilateral declaration weighed heavily on members of the 2017 Constitutional Review Commission (CRC) that inserted provisions establishing Sharia High Court and Sharia Court without a prior political decision of the people[116]. However, amid several discrepancies in content of 2020 Draft Constitution by 2017 CRC, its bill, Constitution of The Gambia Promulgation Bill 2020, was rejected in its second reading at the National Assembly[117].

On severability test, John Nagle stated its aim as a measure to determine 'whether the legislature would have enacted the statutory provisions that survive after another part of the statute is held unconstitutional'[118]. The contradiction in the use of the word 'secular' and the expansion of jurisdiction of Cadi Court and establishment of Cadi Appeals Panel render the severability test inapplicable. This is because the principle of secularism spelt by the Preamble is antithetical to state's religious mandate. Consequently, The Gambia Supreme Court was in error when she applied the severability test to claim that section 1(1) on inserting the word 'secular' is not 'inextricably bound up with and had no linkage whatsoever' with the Cadi provisions[119]. The provisions on expansion of Cadi Court's jurisdiction and establishment of Cadi Appeals Panel being constitutional laws (relative concept) are subject to the making of the people (absolute concept). Thus, in the absence of referendum by virtue of section 102(d) of 1997 Constitution and an amendment of the 1997 Constitution's Preamble by referendum, constitutional provisions on expansion of Cadi Court's jurisdiction and establishment of Cadi Appeals Panel have failed the

[116] 2020 Draft Constitution, s.187.
[117] Sankulleh Gibril Janko, 'Draft Constitution Rejected, Over D116m Wasted' *The Point* (Kanifing, 23 September 2020) <https://thepoint.gm/africa/gambia/headlines/draft-constitution-rejected-over-d116m-wasted> accessed 23 September 2021.
[118] John C Nagle, 'Severability' (1993) vol 72 North Carolina Law Review 203,206 < https://scholarship.law.unc.edu/cgi/viewcontent.cgi?article=3522&context=nclr> accessed 03 October 2021.
[119] *Jammeh* (n 4) 843.

validity test of the first leg of the constitutional theory (absolute concept). Consequently, they did not create any contract with the Gambian people owing to their invalidity.

b.POSITIVE CONCEPT OF CONSTITUTIONS OF NIGERIA AND THE GAMBIA

In 2014, Osita Ogbu asked, whether Nigeria is a secular state[120]? The question can be asked of The Gambia on basis that while both countries are multi-ethnic and multi-religious[121], both have similar constitutional provisions for secularity[122], for establishment of Sharia and Cadi Courts[123] and are members of Organisation of Islamic Cooperation[124]. Thus, are both countries secular states where secular means not spiritual; not ecclesiastical; relating to affairs of the present world[125]? This segment looks at second leg of the theory where constitutional law (relative concept) is valid on basis of the presupposed constitution (positive concept): fundamental political decision of the people found in preamble, preface, forward or substantive part/s of Constitution.

In case of both countries, their fundamental political decisions are situated in their Preambles.

Both nations' highest courts, Supreme Courts, have supported this principle of constitutional laws receiving their validity from fundamental political decisions of the people encapsulated in their Preambles: when there is ambiguity in the constitutional laws[126]; the context in which constitutional laws are utilised[127].

[120] Osita Nnamani Ogbu, 'Is Nigeria a Secular State? Law, Human Rights and Religion in Context' (2014) vol 1 Transnational Human Rights Review 1,10 < https://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1003&context=thr> accessed 28 September 2021.
[121] See n 62 64 97-99.
[122] Constitution of the Federal Republic of Nigeria 1999, s.10 'The Government of the Federation or of a state shall not adopt any religion as state religion; Constitution of the Republic of The Gambia 1997, s.100(2)(b) 'The National Assembly shall not pass a Bill to establish any religion as state religion'.
[123] Constitution of the Federal Republic of Nigeria 1999, ss. 262, 237(2)(b), 277; Constitution of the Republic of The Gambia 1997, ss. 137, 137A.
[124] United States Commission on International Religious Freedom (n 50) 2-4.
[125] Henry Campbell Black, *Black's Law Dictionary* (4th edn West Publishing Co 1968) 1,1521.
[126] *Ogbonna* (n 37).
[127] *The State* (n 38).

Comparatively, applying content of Preambles to Sharia and Cadi Courts constitutional provisions, in accordance with constitutional theory and same approved by Supreme Courts, to establish their validity, it is obvious that –

There exist a contradiction in secularity sections and Sharia and Cadi sections. While, secularity sections provide that, 'The Government of the Federation or of a state shall not adopt any religion as State Religion'[128]; 'The National Assembly shall not pass a Bill to establish any religion as state religion'[129], the same Constitutions provided for establishment of Sharia and Cadi Courts whose financial implications towards material and human resources are exclusive responsibilities of governments. The obvious ambiguity ushered the context in which the ambiguity can be resolved, the Preamble: 'national calling card'[130], 'the most important part of the Constitution'[131], 'the substance of the written Constitution'[132].

Apparently, on grounds that the two nations are multi-ethnic and multi-religious, their Preambles did not make recognition of a particular religion to necessitate establishment of state religion as seen in Preambles of nations establishing state religion – 'The kingdom of Saudi Arabia is a sovereign Arab Islamic State whose religion is Islam ….'[133]; 'Trusting in the omnipotence of Allah, the Mauritanian people …'[134]; 'the Comorian people solemnly affirm their will to cultivate …, a sole religion (Sunni Islam) ….'[135]; 'In the Name of the Most Holy Trinity, …. We, the people of Eire, humbly acknowledging all our obligations to our Divine Lord, Jesus Christ, ….'[136].

Mention of God in the two Preambles: '…to live in unity and harmony as one indivisible and indissoluble sovereign nation under God,…'[137] and 'In the name of God, the Almighty'[138], are due recognition of theists nature of the political unity. Before advent of colonialism that ushered

[128] Constitution of the Federal Republic of Nigeria 1999, s.10.
[129] Constitution of the Republic of The Gambia 1997, s.100(2)(b).
[130] Orgad (n 23).
[131] Orgad (n 32).
[132] Schmitt (n 19).
[133] Saudi Arabia's Constitution 1992, art.1.
[134] Preamble, Mauritania's Constitution 1991, Preamble.
[135] Comoros Constitution 2018, Preamble.
[136] Ireland Constitution 1937, Preamble.
[137] Constitution of the Federal Republic of Nigeria 1999, Preamble.
[138] Constitution of the Republic of The Gambia 1997, Preamble.

in independence and propagation of democracy as a state form, peoples of Nigeria and The Gambia have actively been engaged in religious practices. Borno region of Northern Nigeria encountered Islam as early as eleventh century. In addition, Islam further gained much ground in Kano and Katsina in fifteenth century. During last quarter of eighteenth century, Islam had widely spread all over Northern Nigeria. At Southern Nigeria, Christian missionaries had contacts during nineteenth century before colonisation[139]. For The Gambia, through Cassamance region of Senegal, spread of Islam coincided with European colonisation of Africa[140]. Christianity got to The Gambia in 1456 through Portuguese sailors[141]. From these brief histories, it is certain that religious practices, amongst residents that translated into political unity of Nigeria and The Gambia, were an import. Meanwhile, before the import, residents had their customary practices peculiar to them in their respective domains. Subsequently, with much migration, other religious practices have been imported into the political unity of both countries. Thus, religious nature of the people of the states cannot be denied. They have always acknowledged existence of a supreme being in their lives. Apparently, when the word 'God' was used in their Preambles, it was used in the common noun sense where God does not mean a specific supreme being with specific name. It was used to refer to the Supreme Being that all religions have, to avoid discrimination. Thus in Australia, Constitutional Conventions of 1890s inserted an express provision prohibiting government from making any religion state religion and religious status as qualification for government appointments[142] to restrain public petitions quest for the reference to God in the Preamble[143]. Invariably, simultaneous preference for the word 'God' in their Preambles and charge of severing state from religion indicate the submission of the theist political unity to a Supreme Being, whoever they regard the Supreme Being to be, in their private capacity, while governance is divorced from religious ties in the state's administration to prevent discrimination on basis of religion.

[139] Philip Osteien and Albert Dekker, 'Sharia and National Law in Nigeria', Jan Michiel Otto (ed), 2010 *Sharia Incorporated: A Comparative Overview of the Legal Systems of Twelve Muslim Countries in Past and Present*, (Leiden University Press 2010) 17, 556.

[140] Bala S.K. Saho, 'Appropriation of Islam in a Gambian Village: Life and Times of Shaykh Mass Kah, 1827 – 1936' (2011) vol 12 African Studies Quarterly 1,2 < https://asq.africa.ufl.edu/files/Saho-Vol12Is4.pdf> accessed 06 September 2021.

[141] Christians in Gambia <http://www.accessgambia.com/information/christians-gambia.html> accessed 20 October 2021.

[142] Section 116, Australia Constitution 1901, s.116.

[143] Twomey (n 45) 319.

Consequently, by virtue of Preambles of both countries, Sharia and Cadi Courts constitutional provisions lack validity on the grounds that the Preambles, being the fundamental political decisions of the Nigerian and Gambian people, did not recognise a specific religion above other religions in the multi-ethnic and multi-religious countries. Also, the Preambles did not recognise Muslim religion above all other religions prevalent in both countries. However, the Preambles of both countries acknowledged the theist nature of citizens in their private capacity.

3.SECULARISM IN NIGERIA AND THE GAMBIA

Constitutional provisions on Sharia Courts made some Nigerians to regard her as a religious state[144]. Also, scholars have branded Nigeria as Muslim country due to exclusive incorporation of Sharia into state law by some Northern states[145]. Other scholars have, on basis of high population of Nigerian Muslims, grouped Nigeria Majority Muslim country[146]. Other Nigerians, on absence of the word 'secular' in Constitutions of Nigeria, denied Nigeria to be secular[147]. In addition, others have regarded Nigeria to be a Muslim state on basis that a Bill for removal of Sharia provisions in the Constitution will fail due to high number of National Assembly Muslim members[148].

Also, The Gambia is faced with fate of not being secular. In 2001, The Gambia Supreme Court rejected section of the Act that included the word 'secular' into section 1(1) of 1997 Constitution[149]. In addition, the Chairperson of 2017 CRC, Justice Cherno Jallow, said 'secularism has never been included in any of Gambia's previous Constitutions'[150]. This stands contrary to the CRC establishing Act which enjoins members of CRC to employ 'The Gambia's continued existence as a secular State (in which all faiths are treated equally and encouraged to foster national cohesion and unity)'[151].

[144] *Jama'atu Nasril Islam*, 'Text of Press Conference by the *Jama'atu Nasril Islam* (JNI) On The Nigerian Constitution and The Nigerian Muslim Ummah, February 13, 1999', *The Guardian* (March, 15 1999) 16 cited in Ogbu (n 120) 11.
[145] Jan Michiel Otto ed, *'Sharia Incorporated: A Comparative Overview of the Legal Systems of Twelve Muslim Countries in Past and Present'* (n 139) 12.
[146] United States Commission on International Religious Freedom (n 50) 3-4.
[147] Justice Bashir Sambo, Secretary-General of the *Jama'atu Nasril Islam* cited in Ogbu (n 120) 20.
[148] Prof. Mashood Baderin, SOAS University of London, Thirteenth SOAS Law PhD Colloquium 8 June 2021.
[149] See n 114.
[150] Omar Bah, 'CRC Explains Controversial Absence of Secularism in Draft' *The Standard* (Kanifing, 20 November 2019) <https://standard.gm/crc-explains-controversial-absence-of-secularism-in-draft/ > accessed 22 October 2021.
[151] The Constitutional Review Commission Act 2017, s.6(2)(d)(vi).

The constitutional provisions of, 'The Government of the Federation or of a state shall not adopt any religion as State Religion'[152]; and 'The National Assembly shall not pass a Bill to establish any religion as state religion'[153], being constitutional laws (relative concept) are subject to constituent power, the people who are bearers of the constitution-making power (absolute concept) and the fundamental political decisions of the people contained in the Preamble (positive concept). Thus, are the secular provisions valid to grant Nigerians and Gambians secular contracts? The constitutional theory is used to resolve the quagmire on the secularity of both countries.

a.NIGERIA

The making of 1999 Constitution witnessed a defective democratic process: members of 1998 Constituent Debate Committee (CDC) were handpicked by military Head of State, General Abubakar Abdulsalami[154], CDC acted restrictedly to the neglect of active public participation[155], time frame for CDC to execute her mandate was short[156], military government under PRC inserted new sections into draft Constitution from CDC before promulgating it as Constitution of the Federal Republic of Nigeria, 1999[157]. Consequently, the political unity, the Nigerian people who are the constituent power, the constitution-making power, never had input of their united purpose in 1999 Constitution of the Federal Republic of Nigeria. Ringera J of Kenya's High Court, reiterated the essence of the people as the bearers of the constitution-making power, constituent power in these words,

> '…the Constitution is not supreme because it says so: its supremacy is a tribute to its having been made by a higher power, a power higher than the Constitution itself or any of its creatures. The Constitution is supreme because it is made by they in whom the constituent power is reposed, the people themselves ….'[158]

[152] Constitution of Federal Republic of Nigeria 1999, s.10.
[153] Constitution of the Republic of The Gambia 1997, s.100(2)(b).
[154] See n 87.
[155] See n 88.
[156] See n 89.
[157] See n 90.
[158] See n 26.

Apparently, when section 10: 'The Government of the Federation or of a state shall not adopt any religion as State Religion', lacked a higher power (they in whom the constituent power is reposed – the people themselves) it lost its validity. Section 10 cannot be made or remade without the exercise of constituent power – the Nigerian people. Thus, section 10 not being the creation of Nigerians lacks validity with respect to the first leg of the constitutional theory.

Next, presuppose a constitution (positive concept) – Preamble. The Preamble of 1999 Constitution is apt with section 10 on basis that religious matters are in private and not public domain. This is a reflection of Australia's Constitutional Conventions of 1890s that recognised theist Australians in the Preamble and simultaneously inserted a provision to restrain religious practices in state affairs[159]. Thus, when some Nigerians state that the word 'secular' had not featured in any Nigerian Constitution, they seem to be uninformed about the content and implication of Preamble in Constitution. Also, they seem to be unaware that the word 'secular' is an adjective which describes what is in existence: 'The Republic of Turkey is a democratic, secular and social state governed by rule of law,….'[160]; 'The Gambia is a sovereign secular republic'[161]. Therefore being an adjective, it must be followed with a substantive provision in the text. A simple 'secular' in the Constitution will be vague without a substantive provision to explicate the nature of secularism in operation in the state. Hence, the adjective secular can be omitted as in Nigeria.

Consequently, section 10 has validity with respect to second leg of the constitutional theory. However, for the fact that absolute, relative and positive concepts are interrelated and inseparable to realise the validity of constitutional laws, section 10 being constitutional law must attain the simultaneous validity of absolute and positive concepts. Thus, with the absence of simultaneous validity, section 10 lacks validity to ascribe a secular state to Nigerians. Invariably, section 10 does not create a contract between it and Nigerians.

[159] See n 143.
[160] Constitution of the Republic of Turkey, art.2.
[161] Constitution of the Republic of The Gambia 1997, s.1(1).

i. INTROSPECTION OF NIGERIA BEING A SECULAR STATE

The Preamble of 1999 Constitution is not constitutional law[162]. The interconnectedness, interrelationship and inseparability of absolute, relative and positive concepts in the constitutional theory are strictly for validity of constitutional laws. Thus, lack of validity of section 10 (a constitutional law) on basis of the constitutional theory does not erode the secular status of Nigeria. The Preamble: the national calling card[163], the most important document[164], the substance of the Constitution[165], the key of the Constitution[166] is the sole document that establishes the secular nature of the political unity called Nigeria with these words, 'to live in unity and harmony as one indivisible and indissoluble sovereign nation … on the principles of freedom, equality and justice, and for the purpose of consolidating the unity of our people'[167]. Being multi-ethnic and multi-religious who is proud of her theist nature, Nigeria did not specify any religion to be prominent over others to ensure equality, unity, freedom and justice. By implication, governance should not be saddled with religious affairs that breed inequality, disunity, lack of freedom and injustice for sustenance of 'one indivisible and indissoluble sovereign nation'.

Consequently, Nigeria's secularity is by virtue of the Preamble which is not constitutional law[168] and inviolable[169].

b.THE GAMBIA

The Gambia remains an example of popular participation of constituent power in making of her indigenous Constitutions – 1970 and 1997 – by virtue of referendums. Thus, her secular provision of section 100(2)(b): 'The National Assembly shall not pass a Bill to establish any religion as a State religion' received the peoples input on 8 August, 1996. Consequently, The Gambia's secular provision is valid on basis of first leg of the constitutional theory.

[162] Schmitt (n 18).
[163] Orgad (n 23).
[164] Orgad (n 32).
[165] Schmitt (n 19).
[166] Orgad (n 31).
[167] Preamble, Constitution of the Federal Republic of Nigeria 1999, Preamble.
[168] Schmitt (n 18).
[169] Schmitt (n 39).

For second leg, presuppose a constitution (positive concept). The constitutional law, section 100(2)(b) is apt with Constitution. Being a people of multi-ethnic and multi-religious disposition, they ceased to make any religion dominant above others with these words,

'The fundamental rights and freedoms enshrined in this Constitution, will ensure for all time respect for and observance of human rights and fundamental freedoms for all, without distinction as to ethnic considerations, gender, language or religion'[170].

Consequently, section 100(2)(b) has validity with respect to second leg of the theory. Thus, with simultaneous validity of absolute and positive concepts, there exists a secularity contract between the Gambian people and section 100(2)(b). Hence, it was an error of The Gambia Supreme Court[171] to have applied severability test to nullify insertion of the word 'secular' in section 1(1) and justify expansion of jurisdiction of Cadi Court and establishment of Cadi Appeals Panel. The Court should have turned to the Preamble when faced with contradiction because she is alive to essence of the Preamble of a Constitution: the context in which constitutional laws are utilised[172]. Another slip was 2017 CRC's establishment of new Sharia Courts[173] while relying on the errors of The Gambia Supreme Court.

Despite professions of Godliness, corruption and degrading human acts perpetrated by members of the theist societies are rampant in both countries. Here comes the questions whether the religiousity of Nigerians and Gambians are superficial or intended to make them better persons?

In 1998, as a mark of allegiance to the republic state form of Turkey, Turkish Constitutional Court upheld secularism law to dissolve a political party that seeks to establish a theocratic regime in Turkey[174]. In 2003, European Court of Human Rights as a Grand Chamber unanimously upheld

[170] Constitution of the Republic of The Gambia 1997, Preamble.
[171] *Jammeh* (n 115).
[172] *The State* (n 38).
[173] See n 116.
[174] *Refah Partisi (the Welfare Party) and Others v Turkey*, Applications nos. 41340/98, 41342/98, 41343/98 and 41344/98, European Court of Human Rights sitting as Grand Chamber, Strasbourg, 2003

this democratic principles in a republic state canvased by Turkish Constitutional Court[175]. Consequently, a peoples' constitutional declaration for democracy through republic state form implies a representation of popular sovereignty where this representation is a promise of obedience to civil authorities[176], and civil authorities respect for general will for equality and not for particular will for preferences[177].

4. SHARIA AND CADI COURTS: DISCRIMINATORY TOOLS IN THE LEGAL PROFESSION

Secularism in Nigeria and The Gambia, establishes general will of the sovereign people that religion must not be enmeshed in processes of government. Thus, law must have a secular purpose; its principle must be one that neither advances nor inhibits religion; it must not foster an excessive government entanglement with religion[178].

First, juxtaposing constitutional provisions for appointments of Cadis in Nigeria[179], and The Gambia[180], with the first criteria: law must have a secular purpose[181], they reveal that provisions for appointments of Cadis in both countries are not for secular purpose but for religious purpose. Constitutional requirements of a recognised qualification in Islamic law and considerable experience in practice of Islamic law or a distinguished scholar of Islamic law are established religious requirements which is that they must be a *Mujtahid* (individual legal scholar)[182], and a *faqih* (well versed in law)[183]. They must be eligible for being an acceptable witness[184]. Also, they must not be a non-Muslim because a non-Muslim is not *Kamal al-a hkam* (the conditions of being eligible to perform general religious duties, and these conditions are being an adult, sane, free and

[175] ibid.
[176] Luc Foisneau, 'Governing a Republic: Rousseau's General Will and the Problem of Government' (2010) vol 2 A Journal for the Study of Knowledge, Politics, and the Arts 93,99 < https://arcade.stanford.edu/sites/default/files/article_pdfs/roflv02i01_Foisneau_121510_0.pdf> accessed 19 September 2021.
[177] ibid.
[178] *Lemon et al v Kurtzman et al* [1971] US 403 (AP) 602,612-613.
[179] Constitution of the Federal Republic of Nigeria 1999, ss.260-264.
[180] Constitution of the Republic of The Gambia 1997, ss.137-137A.
[181] *Lemon* (n 178) 612.
[182] Ghulam Murtaza Azad, 'Qualifications of a Qadi' (1984) vol 23 Islamic Research Institute 249,249 < https://www.jstor.org/stable/20847272> accessed 11 October 2021.
[183] ibid 251.
[184] ibid 249.

a male[185]. In addition, each Cadi functions within accepted Sharia law of his school (*Madhhab*) to perform independent reasoning (*ijtihad*) of content of Quran and Sunna to obtain God's will[186]. Hence, duty of a Cadi is to his school of religious law that lacks a central authority and not to the republic state[187]. This is because Sharia law is not man made law but from God[188]. However, Professor Mashood Baderin is of the view that Nigeria Constitution did not expressly state that a Cadi should be a Muslim[189]. Practically in Nigeria and The Gambia, Cadis are strictly Muslims.

Second, its principle must be one that neither advances nor inhibits religion[190]. Owing to established facts that Sharia and Cadi Courts are for religious purpose, it is *res ipsa locitur* that creation and functioning of all Sharia and Cadi Courts in both countries are advancing Islamic religion above other religions while the States remain constitutionally secular and a republic.

Third, the law must not foster an excessive government entanglement with religion[191]. Infrastructure, human and financial resources of all Sharia and Cadi Courts of both countries are exclusively funded by governments.

Consequently, preferential will for Sharia against general will for secular courts and judges violates secularism which is an indispensable condition of democracy in a republic state. Thus, qualifications listed to be entitled for employment at Sharia and Cadi Courts are not objective on basis that they exhibit and promote inequality and discriminate amongst members of the legal profession in both countries where all are called to a single Bar – Nigeria Bar or The Gambia Bar not on basis of religion.

Apparently, where International Covenant on Civil and Political Rights (ICCPR) and African Charter on Human and Peoples' Rights (ACHPR) declare all persons equal before the law

[185] ibid 250.
[186] Tamir Moustafa, 'Islamic Law, Women's Rights and Popular Legal Consciousness in Malaysia' (2013) vol 38 Wiley 168,172 <https://www.jstor.org/stable/23357742> accessed 11 October 2021.
[187] Martin Shapiro, 'Islam and Appeal' (1980) vol 68 California Law Review 350,370 < https://www.jstor.org/stable/3479990> accessed 11 October 2021.
[188] Jan Michiel Otto, *Sharia and National Law in Muslim Countries* (Leiden University Press 2008) 5,7.
[189] SOAS University of London, Thirteenth SOAS Law PhD Colloquium 2021, 8 June, 2021.
[190] *Lemon* (n 178) 612.
[191] ibid 613.

and entitled to equal protection by the law without discrimination on the basis of religion[192], constitutional employment qualifications for Cadi at Sharia and Cadi Courts in both countries have declared all legal practitioners in both countries unequal and some without economic protection on being called to Bar. Consequently, non-Muslim legal practitioners are not given equal opportunity with Muslim legal practitioners. The constitutional provisions advance discrimination and guaranteed to Muslim legal practitioners effective protection for employment on ground of religion.

Thus, a Cadi employment accords a constitutional flavoured job where pension and other benefits are guaranteed to sustain social class and unequal earnings. This is unlike the private legal practice where a legal practitioner is his or her own pensioner. Thus, with this rare opportunity reserved for Muslim legal practitioners in both countries, there exist a wide and widening gap between socio-economic status of Muslim and non-Muslim legal practitioners and their families.

The constitutional employment provisions violate social right to work with equal pay for equal work[193], work for cohesion and respect for family[194], to pay taxes in the interest of society[195], of non-Muslim legal practitioners on basis of religion. While it is the law that religion shall not justify domination of a people by another[196].

CONCLUSION

On the basis of Carl Schmitt's constitutional theory where it is the people's participation and their prior political decisions, stipulated in the Preamble or substantive Preamble, that determine the validity of constitutional laws (constitutional provisions). This research revealed that the constitutional provisions of the Nigeria Sharia Courts of Appeal lack validity; The Gambia 1996 referendum exercised for Cadi Court establishment was in futility; the constitutional laws on expansion of Cadi Court's jurisdiction and establishment of Cadi Appeals Panel in 2001 lack validity; Nigeria is a secular state by virtue of her Preamble while The Gambia is a secular state

[192] ICCPR, art.26; ACHPR, art.3.
[193] ACHPR, art.15.
[194] ibid art.29(1).
[195] ibid art.29(6).
[196] ibid art.19.

on basis of the constitutional theory; and, all legal practitioners in Nigeria and The Gambia are not equal before constitutional laws for qualifications for employment as Qadi or Cadi and Grand Qadi in the Sharia and Cadi Courts of both jurisdictions.

These findings justify the distinction between a formal Constitution and legislation. While a Constitution is the making of the people based on their prior political decisions, legislation is the making of the peoples' representatives. Hence, international law, such as the African Charter on Human and Peoples' Rights, are domesticated through legislation and not Constitutions. The Constitution remains the dictate of the people on how they should be governed. Consequently, where international law requires the consent of the peoples' representatives to be enforceable within a jurisdiction, the Preamble or substantive Preamble reflected in the Constitution and the constitutional laws which are details of the peoples' fundamental political decisions (Preamble), guide and regulate the peoples' representatives in accepting or refusing an international law.

Apparently, where international laws are found to be violated by Sharia and Cadi constitutional laws, in a multi-ethnic and multi-religious state, it erodes the need for domestication of international law for such international law to be enforceable in the state. This is because the international law is a true reflection of the people's fundamental political decision evidenced in their Preamble. Consequently, violation of the Preamble is *mutatis mutandis* violation of international laws of discrimination on basis of religion.

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