

The Nigerian police force and the enforcement of religious criminal law

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Summary

The argument of this article is that the Nigerian police force is responsible by the tenor of the provisions of the 1999 Constitution of the Federal Republic of Nigeria for the enforcement of criminal law in Nigeria, whether they are religiously inspired or not. Accordingly, the Nigerian police force has a constitutional responsibility to enforce the Islamic penal codes introduced in 12 Northern Nigerian states in the wake of Nigeria's fourth republic from 1999.

1 Introduction: The Constitution, the *hisbah* and the Nigerian police force

I shall argue in this article that the Nigerian police force (NPF) is responsible by the tenor of the provisions of the 1999 Constitution of the Federal Republic of Nigeria (Nigerian Constitution) for the enforcement of criminal law in Nigeria, whether they are religiously inspired or not. Accordingly, the NPF has a constitutional responsibility to enforce the Islamic penal codes¹ introduced in 12

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1 The states are Zamfara, Bauchi, Borno, Gombe, Jigawa, Kaduna, Kano, Katsina, Kebbi, Niger, Sokoto, and Yobe. The following are examples of the manner of introduction of Shari'a penal codes in Zamfara, Kano, Niger and Katsina States: In Zamfara State, the Shari'a Courts (Administration of Justice and Certain Consequential Changes) Law 1999 (Zamfara Law) came into effect on 27 January 2000, established Shari'a courts and endowed them with jurisdiction to determine civil and criminal proceedings. The applicable law in civil criminal proceedings of the Shari'a courts is declared to be the whole corpus of Islamic law, which is defined by sec 7(1)(a) of the Zamfara Law to include the Holy Qur'an, the Hadith and Sunnah of Prophet Muhammed, and other recognised components of Islamic law. Kano State enacted a comprehensive Shari'a Penal Code Law 2000. In Niger State, a slight amendment was made to the

Northern Nigerian states² in the wake of Nigeria's fourth republic from 1999. It will also be contended that it is the erroneous belief by the NPF that the Islamic penal codes are unconstitutional without the benefit of a judicial pronouncement that is at the heart of the organisation's refusal.

One of the significant consequences of the NPF's position is the establishment and operations of *hisbah* organisations³ by many northern states and the recent clamour for the amendment of the 1999 Constitution of the Federal Republic of Nigeria to either introduce a state police or to empower state governors to give final and lawful instructions to state police commissioners.⁴ It will be demonstrated that the reasonable accommodation and co-operation between the NPF and *hisbah* organisations in many Northern Nigerian states are indicative of the capacity of the NPF to enforce the Islamic penal codes alone or in co-operation with civil society organisations. Furthermore, it will emerge that the stance of the NPF and its co-operation with *hisbah* organisations is part of a systemic 'avoidance' of the legality of the introduction of Shari'a in Nigeria by civil society as well the political and judicial branches of the Nigerian government.

Writ large in the background is the incapacity of Nigeria's constitutional system to confront and resolve issues of significance such as the introduction of Shari'a by sweeping these issues under the carpet and hoping that they go away. This state of 'false reality' has resulted in considerable human rights abuses, which are also explored in the article. The second part of the article, following the introduction, reviews the assertion that the NPF is constitutionally responsible for the implementation of Islamic penal codes in 12 northern states of the Federation. The third part examines ongoing implementation of Islamic penal codes by *hisbah* organisations and

existing Penal Code through the Niger State Penal Code Amendment Law 2000. In Katsina State, Shari'a was introduced through the Katsina State Islamic Penal System (Adoption) Law 2000. For a fuller discussion of the introduction of the Islamic penal codes, see generally P Ostien (ed) *Shari'a implementation in Northern Nigeria 1999-2006: A source book* (2007) <http://www.Sharia-in-africa-.net/pages/publications/sharia-implementation-in-Northern-Nigeria.php> (accessed 14 March 2014).

- 2 The term 'Islamic penal code' is used to distinguish these codes from penal codes in existence that were based on the 1960 Penal Code.
- 3 *Hisbah*: enjoining what is good and forbidding what is wrong according to Shari'a; by extension, those who enjoin and forbid.
- 4 See Communiqué of Northern Governors Forum reproduced in J Bulus 'State police: The unending debate' *Vanguard* 25 August 2012. ('The Forum is not in support of the creation of state police. It, however, resolved to prevail on the FG to embark on police reforms that will assist the states in the control and management of police affairs on a sound philosophy of modern policing by amending the provision of section 215 of the Constitution to read as follows: "Subject to the provision of this section, the governor or such commissioner of the government of the state as he may authorise in that behalf may give to the commissioner of police of that state such lawful directions with respect to the maintenance and securing of public safety and public order within the state as he may consider necessary, and the commissioner of police shall comply with those directives or cause them to be complied with."')

their relationship with the NPF. In the fourth part, Nigeria's judicial review of constitutional compliance is examined with a view to understanding the obstacles to constitutional litigation that would have examined the legality of the introduction of Islamic criminal law, including the Islamic penal codes, which have greatly assisted the NPF in discharging its constitutional responsibility of enforcing the Islamic penal codes. Concluding remarks follow.

2 The Nigerian police force and the enforcement of Islamic penal codes

This section of the article examines the assertion that the NPF is under an obligation to enforce Islamic penal codes, just as it enforced the provisions of the Criminal Code⁵ and the penal codes⁶ which predate the Islamic penal codes. To provide a context for this assertion, it is important to draw attention to the fact that public order and public security are concurrent matters between the federal and state governments under the 1999 Constitution by virtue of the provisions of sections 11(1)⁷ and (2)⁸ thereof. The Criminal Code and the Penal Code, which are expressions of a legislative intent to secure public order and security through the creation of offences, is a federal and state enactment depending on how the offence relates to matters in the Exclusive,⁹ Concurrent¹⁰ or Residual list.¹¹ Thus, as rightly observed by Nwabueze, '[t]he Criminal Code operates both as a federal or state law under the provisions of the Constitution relating to existing law'.¹² The same remark applies to the Penal Code

5 Many Nigerian states have enacted an identical version of the Criminal Code Chapter 77 Laws of the Federation of Nigeria 1990. Eg, Rivers State has a Criminal Code Cap 37 Laws of Rivers State 1999.

6 Just like the Criminal Code, the northern states of Nigeria have reenacted the Penal Code 1960 as state laws. See eg Niger State Penal Code Law Cap 94 Laws of Niger State.

7 'The National Assembly may make laws for the Federation or any part therefore with respect to the maintenance and securing of public safety and public order and providing, maintaining and securing of such supplies and service as may be designed by the National Assembly as essential supplies and services.'

8 'Nothing in this section shall preclude a House of Assembly from making laws with respect to the matter referred to in this section, including the provision for maintenance and securing of such supplies and services as may be designated by the National Assembly as essential supplies and services.'

9 See part 1 of sch 2 to the 1999 Constitution which lists 66 items over which the federal government has exclusive competence.

10 See part 2 to sch 2 of the 1999 Constitution over which the federal and state governments have concurrent competence in the manner set out in the Constitution.

11 The residual list is a default list containing those matters which are neither in the Exclusive Legislative List nor in the Concurrent Legislative List.

12 See BO Nwabueze *The Presidential Constitution of Nigeria* (1982) 58.

promulgated in 1960, whose religious origin¹³ is far more acknowledged than the Criminal Code.¹⁴ Thus, the Penal Code contains many offences that reflect Islamic norms.¹⁵ Criminal law and prosecution in Northern Nigeria, even after the introduction of the Islamic penal codes for the 12 northern states, is partly constituted by the Penal Code and Criminal Procedure Code 1960, as enacted by each of these states. The NPF is constitutionally bound to enforce the Penal and Criminal Codes because they are existing laws under the 1999 Constitution. It is difficult to imagine why the introduction of Islamic penal codes in the 12 northern states should be any different. Until they are struck down by Nigeria's courts, the Islamic penal codes and other Islamic criminal legislation remain valid and enforceable by the NPF. As Ostien observes with respect to the pre-Islamic penal codes:¹⁶

Alongside the old Penal Codes we now have, also, in all the Shari'a states except for Niger, new Shari'a Penal Codes running in parallel. The Shari'a Penal Codes bring Islamic criminal law back into more or less full force within the Shari'a States as to persons tried for crimes in the new Shari'a Courts. They do so in the form of lengthy codes, in compliance with the constitutional requirement that all criminal law be enacted as written law in which all criminal offences are defined and the penalties therefor prescribed. At the same time, all the old Penal Codes, clones of the Penal Code of 1960, remain on the books – to be applied to persons tried in the Magistrate or High Courts. In short, as in colonial days, which penal law is applied to a person depends on which court he or she is tried in. The choice of court seems to a large extent to be the accused's. There is a presumption that non-Muslims will be charged and tried in the Magistrate and High Courts (and therefore be subject to the old Penal Codes); but they may *opt into* the Shari'a courts (and therefore be subject to the Shari'a Penal Codes) if they give their consent in writing.

The fact that the Islamic penal codes are more *Islamic* in no way diminishes the responsibility of the Nigerian police force to enforce them. At this stage, it is important to wonder whether the NPF is right to refuse to enforce Islamic penal codes. It is argued that the NPF is a secular organisation that is consistent with Nigeria's secular status, which is affirmed in section 10 of the 1999 Constitution and, accordingly, it would not enforce laws which are tantamount to the adoption of a state religion.

Closely related to the obligation of the NPF to enforce the Islamic penal codes is the operational design of the NPF in the 1999 Constitution, which endows the President of the Federal Republic of

13 See P Ostien & A Dekker 'Shari'a and national law in Nigeria' in JM Otto (ed) *Shari'a incorporated: A comparative overview of the legal systems of twelve Muslim countries: Past and present* (2007) 5 ('the contents of the Penal Code were negotiated at length with northern politicians and legal scholars of various schools, particularly the north's leading *Ulama*.')

14 See CO Okonkwo & ME Naish *Okonkwo and Naish on criminal law in Nigeria* (1980) 4-6.

15 See eg sec 389 of the Penal Code (Seduction and Enticement); sec 400 (Insulting the Modesty of any Woman); and sec 401-402 (Drunkenness).

16 Ostien (n 1 above) vol IV ch 4 6-7.

Nigeria with operational control over the NPF Force in terms of section 215(3) of the Nigerian Constitution.¹⁷ This position is reinforced by the provisions of section 215(4), providing that

[t]he governor of a state may give to the Commissioner of Police such lawful directions with respect to the maintenance and securing of public safety and public order within the state as he may consider necessary and the Commissioner of Police shall comply with those directions or cause them to be complied with: Provided that before carrying out any such directions under the foregoing provisions of this subsection, the Commissioner of Police may request that the matter be referred to the President or such Minister of the government of the Federation as may be authorised in that behalf by the President for his directions.

The proviso of a recourse to the President for his confirmation of instructions from a state governor has engendered considerable political problems, especially when the incumbent President is at political religious and personal loggerheads with state governors. Even though state governors have been judicially confirmed¹⁸ as the chief security officers of their states, the confirmatory powers of the President are still being exercised. Thus, a President would appear to be within his powers to lawfully instruct a police commissioner in any of the 12 northern states to ignore the request of a governor of one of these states to enforce provisions of an Islamic penal code.

It is therefore not surprising that an amendment of section 215(4) of the 1999 Constitution to empower state governors to give lawful and final commands to state police commissioners has become an attractive alternative. There is therefore merit in the contention that, were governors of a state to be recognised as capable of issuing lawful and final commands to state police commissioners, the enforcement of Islamic criminal law could be enhanced.

3 Nigerian police force and the enforcement of Islamic penal codes by *hisbah* organisations

This section reviews the operation of *hisbah* organisations to enforce the provisions of the Islamic criminal codes and other criminal legislations that promote Shari'a in the wake of the refusal of the NPF and the Federal Government of Nigeria to implement the Islamic penal codes. The establishment and operations of *hisbah* organisations has resulted in widespread allegations that they are a police force and unconstitutional in view of the emphatic cast of section 214 of the 1999 Constitution, that there shall be only one police force in

17 'The President or such other Minister of the Government of the Federation as he may authorise in that behalf may give to the Inspector-General of Police such lawful directions with respect to the maintenance and securing of public safety and public order as he may consider necessary, and the Inspector-General of Police shall comply with those direction or cause them to be complied with.'

18 See *Fawehinmi v Inspector-General of Police* (2002) 7 NWLR (Pt 767) 606.

Nigeria.¹⁹ Any other police force, it is argued, can only exist pursuant to a constitutional amendment. This perspective, however, ignores the constitutional challenges that arise from the powers granted to state governments by sections 4(6) and (7) of the Nigerian Constitution enabling state Houses of Assembly to make laws for the peace, order and good government of a state.²⁰ Supposing in accordance with their constitutional entitlements, a state government enacts criminal legislation, who would enforce such legislation? Faced with this challenge, the Kano State government took out an action against the Federal Government in *Attorney-General of Kano State v Attorney-General of the Federation*²¹ (*Hisbah* case), claiming that the Kano State *Hisbah* Board Law 4 of 2003 and the Kano State *Hisbah* Board (Amendment) Law 6 of 2005 were regularly made by the Kano State House of Assembly and duly assented to by the governor of Kano State in accordance with powers vested by sections 4(6) and (7) of the 1999 Constitution.²² It is clear that the Supreme Court sidestepped the merits of the case by holding that, by the facts of the case, the threshold of its original jurisdiction²³ had not been crossed since there was no dispute between the Federal and Kano State governments. Rather, the Court held that a dispute was evident between officials of Kano State and officials of the Federal Government that could have been brought before lower courts of record, such as the Federal High Court.²⁴ It is interesting to note that Kalgo JSC recognised the fact that, under section 7 of the *Hisbah*

19 In addition, para 45 of the Exclusive Legislative List found in the First Schedule to the Nigerian Constitution lists 'police and other government security services established by law', making the police a matter for the federal government.

20 See *Ojisua v Aiyebilehin* 2001 11 NWLR (Pt 723) 44.

21 2007 6 NWLR (Pt 1029) 164 (*Hisbah* case).

22 The trigger to this case appears to be a demonstration against the Kano State *Hisbah* Board in 2005 in the course of their attempts to enforce a ban on the carrying of female passengers by commercial motorcycle owners. In early 2006, the Inspector-General declared the Kano State *Hisbah* Board as unconstitutional, banned it and arrested its leaders. For an account of these events, see M Last 'The search for security in Moslem Northern Nigeria' (2008) 78 *Africa* 41 52; R Olaniyi '*Hisbah* and Shari'a law enforcement in metropolitan Kano' (2009) 57 *Africa Today* 71 87.

23 The original jurisdiction of the Supreme Court of Nigeria is stated in sec 213(1) of the 1999 Constitution: 'The Supreme Court shall, to the exclusion of any other court, have original jurisdiction in any dispute between the federation and a state or between states if and in so far as that dispute involves any question (whether of law or fact) on which the existence or extent of a legal right depends. (2) In addition to the jurisdiction conferred upon it by subsection (1) of this section, the Supreme Court shall have such original jurisdiction as may be conferred upon it by any Act of the National Assembly: Provided that no additional jurisdiction shall be conferred upon the Supreme Court with respect to any criminal matter.'

24 The jurisdiction of the Federal High Court as regards the case is found in secs 251(1)(p), (q) and (r): 'Notwithstanding anything to the contrary contained in this Constitution, and in addition to such other jurisdiction as may be conferred upon it by an Act of the National Assembly, the Federal High Court shall have and exercise jurisdiction to the exclusion of any other court in civil causes and matters – (p) the administration or the management and control of the Federal Government or any of its agencies; (q) subject to the provisions of this Constitution, the operation and interpretation of this Constitution in so far as it

Board Law of 2003, some of the duties and responsibilities of the *Hisbah* Board are similar in many respects to those of the NPF. Furthermore, it appeared from the papers filed by the plaintiffs in the *Hisbah* case that the then Inspector-General of Police was of the opinion that the *hisbah* corps in Kano State completely usurped the powers and duties of the NPF under the Police Act and the 1999 Constitution. The outcome of the *Hisbah* case was a successful civil suit for illegal detention instituted by the arrested officials of the Kano State *Hisbah* Board, and an acquittal of the criminal charges against them by the NPF could understandably be regarded by the Kano State government and the other 11 Northern Nigerian states as a victory and an affirmation of the constitutionality of the Kano *hisbah* operations.

While the Kano State *Hisbah* Board appears to be the most prominent, available evidence indicates that there are *hisbah* operations in seven of the 12 northern states which have introduced Islamic penal codes. With respect to law enforcement activities generally, it would appear that the unsettled status of the *hisbah* resulted in the designation of the *hisbah* as acting in an advisory and complementary role to law enforcement agencies, especially the NPF. For example, in Bauchi State, *hisbah* activities are carried out pursuant to section 8(g) of the Bauchi State Shari'a Commission Law 2001, which empowers the Commission to recruit and control members of the *hisbah*. The Bauchi State Guidelines on the Formation Functions and Operations of the *Hisbah* Committees in Bauchi State outline *hisbah* activities as including:²⁵

- 2.1.1 preaching, guidance and promotion of Islamic education;
- 2.1.2 resolution of conflicts and making peace between individuals, groups and communities without having to resort to courts;
- 2.1.3 uniting people of a particular community to solve their common problems related to moral issues, social welfare, youths unemployment, etc, so as to complement government activity;
- 2.1.4 assisting law enforcement agencies in preventing and combating crime and ensuring compliance with the Shari'a.

In Jigawa State, the *Hisbah* Advisory Committee (Establishment) Law 2004²⁶ established a Jigawa State *Hisbah* Advisory Committee. Section 5(d) of this Law provides that one of the functions of the Committee is 'assisting the law enforcement agents in the prevention and detection of crimes through locating and exposing criminals and places where criminal activities take place'. Available evidence

affects the Federal Government or any of its agencies; (r) any action or proceeding for a declaration or injunction affecting the validity of any executive or administrative action or decision by the Federal Government or any of its agencies.'

25 Text of Guidelines is found in Ostien (n 1 above) vol VI ch 10 5.

26 Law 2 of 2004. The text of the law is reproduced in Ostien (n 1 above) vol VI ch 10 22.

indicates that the Bauchi State *Hisbah* Corps has been involved in arresting prostitutes, homosexuals and a female singer, amongst other arrests.²⁷ In Kano State, the *Hisbah* Board Law of 2003 established the Kano State *Hisbah* Board. The functions of the Board are set out in section 7(4) and include 'rendering necessary assistance to the police and other security agencies, especially in the areas of prevention, detection and reporting of offences'. When it is seen that this function is one of the many endowed on the Kano State *Hisbah* Board,²⁸ it is tempting to conclude that the Kano State *Hisbah* Board, like other *hisbah* organisations, is not a police force mandated to enforce Islamic criminal law. Available evidence indicates otherwise, and there are many instances in which the Kano State *Hisbah* Board, like other *hisbah* organisations, has operated like a police force. In Kano State, the *Hisbah* Board has been involved in preventing women from riding commercial motorcycles pursuant to a 2005 amendment to the Kano State Road Traffic Ordinance, which inserted a section 45 that provides that any motorcyclist that carries any female as a paying passenger shall be guilty of an offence and on conviction shall be liable to a fine or suspension from riding a motorcycle. Other documented activities²⁹ of the *Hisbah* Board include the destruction of alcohol; the arrest of prostitutes; and the closure of brothels, rendering necessary assistance to the police and other security agencies, especially in the areas of prevention, detection and reporting of offences.

It is instructive that the activities of the *hisbah* in the northern states of the Federation have been conducted with the knowledge and in the presence of the NPF. Commenting on the relationship between the *hisbah* and the NPF in Bauchi State, an official of the Bauchi State Shari'a Commission stated:³⁰

Relations between the *hisbah* and the police vary from place to place, even within Bauchi State. In some places the police will balk at enforcing the Shari'a Penal Code: They feel they are a Federal force and not obligated to assist with Shari'a implementation. Sometimes there is a Christian DPO who doesn't want to enforce it. Sometimes the police seem to fear that the

27 Ostien (n 1 above) vol VI ch 10 11-13.

28 Sec 7 of the *Hisbah* Board Law 2003 lists other functions as follows: '... encourage Muslims to unite in their quest for justice, equality and enjoin one another to do good and to avoid evil; encourage kindness to one another; advise against acquiring of interest, usury, hoarding and speculations; encourage charitable deeds particularly the payment of *zakat*; advise on moral counselling in the society which is in conformity with Islamic injunctions; encourage orderliness at religious gathering eg in mosques during *salat* (prayer), *iftar*, breaking the fast during Ramadan, pilgrims during *hajj* operations and in any public functions; encourage general cleanliness and environmental sanitation; may handle non-firearms for self-defence like batons, and other non-lethal civil defence instruments; reconciliation of civil disputes between persons and or organisations where parties are willing; assisting in traffic control; emergency relief operations; and assisting in any other situation that will require the involvement of *Hisbah*, be it preventive or detective'.

29 See Ostien (n 1 above) vol VI ch 10 55-56.

30 Ostien (n 1 above) vol VI ch 10 10.

hisbah will usurp their function. Sometimes they refuse to treat a case when the *hisbah* bring a suspect; or sometimes they will deliberately bring the wrong charge so that the suspect gets off. However, the situation is beginning to change as the DPOs have been ordered to co-operate. Some Christian DPOs have given their full co-operation; one was given a letter of commendation in this regard and this has served as a morale booster to others that were hesitant.

Summarising the relationship between the *hisbah* and the police in Kano State, Ostien concludes that 'the *hisbah* and the police have sometimes co-operated. But often they have not, the *hisbah* acting in defiance of the police and even of court orders.'³¹ In Zamfara State, there also appears to be evidence of co-operation between the *hisbah*³² and the police. Co-operation and conflict would appear to represent the state of *hisbah*-police relations. It is therefore appropriate to conclude that there is a level of reasonable accommodation between the police and the *hisbah*. This could suggest that the two security agencies can exist side by side, but with the NPF as the enforcer of the Islamic penal codes and other criminal legislation. The *hisbah* organisations would bring valuable support in this regard. In this way, the excesses of the *hisbah* would be contained.

4 Human rights, constitutional litigation and the avoidance of the Shari'a question

This section of the article examines the contention that the judicial avoidance of the Shari'a question in Nigerian constitutional litigation has significant human rights implications for Nigerians of all faiths. It is important to reiterate that the Islamic penal codes are subject to constitutional scrutiny. It must be stated that the Shari'a penal codes declare that they are subject to the Constitution of the Federal Republic of Nigeria.³³ The Constitution is superior and this is a point that is the conventional understanding in the Nigerian legal system. Academic opinion is in support of this contention.³⁴

31 Ostien (n 1 above) vol IV ch 10 57.

32 The *hisbah* is established by the Zamfara State *Hisbah* Commission (Establishment) Law 2003. The text of the Law is reproduced in Ostien (n 1 above) vol IV ch 10 91.

33 These codes were introduced in the 12 northern states of Nigeria. In differing degrees, they codify principles of Islamic criminal law. See AH Yadudu 'Evaluating the implementation of Shari'a in Nigeria: Time for reflections on some challenges and limiting factors' Paper presented to the 2006 Annual General Conference and Delegates Conference of the Nigerian Bar Association held in Port Harcourt (Yadudu 2006) (on file with author).

34 See BY Ibrahim 'Application of the Shari'a penal law and the justice system in Northern Nigeria: Constitutional issues and implications' in J Ezeilo *et al* (eds) *Shari'a implementation in Nigeria: Issues and challenges in women's rights and access to justice* (2003) <http://www.boellnigeria.org/documents/Shari'a%20implementation%20in%20Nigeria.pdf> (accessed 31 January 2014) 128 132: 'Being a

The fact that the Nigerian Supreme Court missed a great opportunity to examine the constitutionality of the *Hisbah* Board of Kano State and, by implication, the legality of the introduction of Islamic penal codes in the 12 northern states of Nigeria would have resolved many lingering human rights issues. These issues stem in the main from the compatibility of the Islamic penal codes with Nigeria's Bill of Rights contained in chapter four of the Nigerian Constitution. The culture of judicial avoidance leaves a grey area in the enforcement of the Islamic penal codes by either the NPF or the *hisbah*. Any constitutional scrutiny of the legality of *hisbah* would significantly affect the rights of Nigerian Muslims to practise their religion as guaranteed by section 38 of the 1999 Constitution. If the *hisbah* were found to be without constitutional backing, the question of the enforcement of the Islamic penal codes would be left to the NPF which has indicated a resolve not to enforce these codes. Consequently, the Islamic penal codes would be left unenforced and the 12 northern states would revert to the penal codes which the NPF is content to enforce. As stated above, Muslims in these states would find their right to practise their religion severely constrained.

There is also the question of the challenge of a faith-based enforcement of Islamic criminal law. We noted that the structure of Islamic criminal law in states with the Islamic penal code is such that, while the Islamic penal codes will apply to Muslims, the penal codes will apply to non-Muslims who are exempted from the application of the Islamic penal codes. An appropriate question would be the constitutionality of such faith-based criminal jurisdiction. Many have argued that such faith-based jurisdiction is discriminatory on the grounds of religion which is recognised in section 42 of the Nigerian Constitution as a ground of discrimination. To provide a context that addresses such claims, it is important to examine the structure of the enforcement of fundamental human rights in the Nigerian Constitution, which recognises rights and the permissible grounds of their derogation. In this regard, section 45 of the 1999 Constitution is important and provides:

- (1) Nothing in sections 37, 38, 39, 40 and 41 of this Constitution shall invalidate any law that is reasonably justifiable in a democratic society –

supreme law, a constitution is endowed with a higher status in some degree over and above other legal rules in the system of government. It is in this light that the 1999 Constitution can be described as the supreme law in Nigeria ... This being so, the Shari'a legislated and practised in some northern states of Nigeria must comply with the provisions of the 1999 Constitution.' See also JM Nasir 'Women's human rights in a secular and religious legal system' 1 28, part of the two-day strategic conference on the Islamic legal system and women's rights in Northern Nigeria, organised by WARDC Lagos and WACOL Enugu (27-30 October 2002), <http://www.boellnigeria/documents/Shari'a%20%20women%27s%20human%20Rights%20in%20Nigeria%20%20strategies%20for%20Action> (accessed 31 January 2014).

- (a) in the interest of defence, public safety, public order, public morality or public health; or
- (b) for the purpose of protecting the rights and freedom or other persons ...

The derogation clause envisages that the right to privacy (section 37), the right to freedom of thought, conscience and religion (section 38), the right to freedom of expression (section 39), the right to freedom of association (section 40) and the right to freedom of movement (section 41) are not absolute. There is, however, some uncertainty as to what 'defence, public safety, public order, public morality or public health' means. While defence, public safety and public health are more specific, the same cannot be said of the other factors. Over two decades of human rights jurisprudence has not yielded definitive answers. For example, in *Osawe v Registrar of Trade Unions*,³⁵ the Supreme Court upheld the Trade Union Act as a law reasonably justifiable in Nigeria on the grounds of public order for giving the Registrar of Trade Unions the discretion to determine the number of trade unions to be registered in Nigeria. What seems evident in this regard is that an ordinary statute can override a fundamental human right in appropriate circumstances. It seems plausible that the Islamic penal codes qualify under the rubric of 'public order' or 'public morality' and justify such faith-based criminal enforcement and therefore trump the claims of discrimination. In this regard, the Court of Appeal in *Anzaku v Governor Nasarawa State*³⁶ adopted the views of Nwabueze on this point:³⁷

Fairness and justice demand that people who are similarly circumstanced should be treated equally by the state. Yet there is no discrimination where special restrictions imposed upon a class, or special advantages accorded to it are reasonable designed to reflect real and substantial differences between it and other classes and groups ... Protection is not unequal merely because real and substantial differences between classes or groups are recognised by law for purposes of special protection or treatment reasonably related to such differences. Provided therefore that such special protection or treatment is reasonable, and not arbitrary, oppressive or capricious, there is no denial of equal protection. A class, for eg a religious or political group, may be isolated for special treatment if it constitutes a danger to public order, public security, public health or public morality, or if it is so vulnerable by reason of its peculiar circumstances as to require special protection.

Such faith-based criminal enforcement is also implicated in the assertion by non-Muslims that Islamic penal codes³⁸ and other Islamic

35 (1985) 1 NWLR 755.

36 [2006] ALL FWLR (Pt 303) 308.

37 Nwabueze (n 12 above) 453-454.

38 See sec 401 of the Kano State Penal Code: 'The manufacture, distillation, distribution, disposal, haulage, consumption and possession of all brands of intoxicating liquors, trade spirits and any other intoxicating substance is hereby prohibited throughout the state.' In this regard, see the following reports in *Ostien* (n 1 above) vol VI ch 10 55 n 70 (citing 'Shekaru destroys 36 410 bottles of

criminal legislation³⁹ which criminalises alcohol sales and consumption and prostitution, infringe their rights, implying that their faith allows them to consume alcohol and engage in prostitution. It would appear that complaints of this nature arose because of the involvement of the *hisbah* and the summary action taken by them in the destruction of the alcohol rather than to commence the prosecution of the alleged offenders. In addition, it is well within the rights of the 12 northern states to criminalise prostitution as well as the sale and consumption of alcohol, since these states are within their constitutional remit to make criminal laws in accordance with their conception of the good of society, albeit religiously inspired. Whether these laws breach any provision of the Bill of Rights is one of the issues which constitutional litigation would clarify.

Constitutional litigation would also assist in the resolution of allegations that some provisions of the Islamic penal codes breach many provisions of the Bill of Rights. Even though these allegations directly affect individuals, they indirectly affect perceptions about the Islamic penal codes and ultimately the effectiveness of enforcement measures and the resolve of the NPF. It may well be that the reluctance to enforce the Islamic penal codes is attributable to the belief that the Islamic penal codes are unconstitutional, barbaric and uncivilised.⁴⁰ In this regard, punishments in the Islamic penal codes include hudud punishments, such as stoning to death for the offences of sodomy, rape and incest when committed by married persons; amputation for theft; cross-amputation for multiple thefts and robbery; and crucifixion for robberies in which murder has been committed and property seized; as well as retaliatory punishments. These punishments are alleged to be in contravention of the right to dignity of a person and the right to life. Whether the punishments contained in the Islamic penal codes are in contravention within the Bill of Rights is still unclear, almost a decade and half after the introduction of the Islamic penal codes. The situation is even more so since Nigerian human rights jurisprudence has no clear standards of what constitutes inhuman and degrading treatment. What seems to

beer' *Daily Trust* (Abuja) 26 October 2008; 'Shari'a Committee destroys N50 million drinks' *This Day* (Abuja) 13 January 2009.

39 See eg the Niger State Liquor Licensing Regulations 2000, reproduced in Ostien (n 1 above) vol III ch 3 pt IV 180; Borno State (Liquor Business (Prohibition) Law 2000 reproduced in Ostien (n 1 above) vol III ch 3 pt IV 187 and the Borno State Law on Prostitution Homosexuality Brothels and Other Sexual Immoralities reproduced in vol III ch 3 pt IV 199.

40 See ON Ogbu 'Punishments in Islamic criminal law as antithetical to human dignity: The Nigerian experience' (2005) 9 *International Journal of Human Rights* 165. See also Ostien & Dekker (n 13 above) 592: 'The Shari'a Penal and Criminal Procedure Codes have been in force for a number of years now. Many sentences shocking to modern sensibilities – of amputation of hands for theft, of other forms of mutilation as retaliation for injuries inflicted, of dire forms of execution, including stoning to death for *zina* and stabbing to death with the same knife the condemned man had used to kill his victims – have been imposed by the Shari'a courts.'

be an authoritative exposition of the standard of conduct deemed to be inhuman and degrading in *Uzoukwu v Ezeonu*⁴¹ and *Onwo v Oko*⁴² is as vague as the constitutional prescription. With respect to the right to life, it is difficult to appreciate the significant difference between the death penalty imposed by the Criminal Code and sanctioned by the Supreme Court of Nigeria in *Onuoha Kalu v State*,⁴³ and the manner of execution of the death penalty imposed by the Islamic penal codes, such as stoning to death.

A number of factors have contributed to the culture of avoidance. While the judgment of the Supreme Court in the *Hisbah* case appears to be deliberate and a good example of 'judicial avoidance', the absence of robust standing principles in Nigerian constitutional litigation has meant that only interested parties are likely to raise the question of the legality of Islamic penal codes. Even though there appears to be a watering down of the principles set forth in *Adesanya v President of the Federal Republic of Nigeria*⁴⁴ in a number of cases,⁴⁵ the point remains that the prospects of public interest litigation remains unlikely. One reason could be a type of 'religious avoidance' adopted by Muslims in seeking the constitutional review of the Shari'a legal system. Such review sought by a Muslim could be viewed as a betrayal of Islam and the Muslim an agent of 'Western countries' intent on destroying Shari'a.⁴⁶ Allied to this point is a strong belief that the Shari'a is a complete system of law, able to correct human errors in its implementation.⁴⁷ Yawuri, who was involved in the defence of the two *zina* (adultery) cases of *Safiyattu Hussaini*⁴⁸ and *Amina Lawal*,⁴⁹ said:⁵⁰

It is settled that the Shari'a had long ago evolved an appellate system to review cases with a view to rectifying these human errors, and the results of the appeals in these two cases show that the system is working in Nigeria.

If this represents the view of Muslims in Nigeria, it is not difficult to understand why there has not been a concerted constitutional challenge of the implementation of the Islamic penal codes. Is it any wonder then that there has been no such challenge by non-Muslims? Be that as it may, it is inevitable that such constitutional scrutiny will

41 [1991] 6 NWLR (Pt 200) 708.

42 [1996] 6 NWLR (Pt 456) 587.

43 [1998] 13 NWLR (Pt 583) 531.

44 (1981) 2 NCLR 358.

45 See *Owodunni v Registered Trustees of the Celestial Church* 2000 6 SC 60; *NNPC v Fawehinmi* (1998) 7 NWLR (Pt 559) 598; *Fawehinmi v Federal Republic of Nigeria* 2008 23 WRN 65.

46 See AM Yawuri 'On defending Safiyatu Hussaini and Amina Lawal' in Ostien (n 1 above) vol V ch 6, pt VII 139.

47 As above.

48 The English translation of the cases involving Safiyatu Hussaini are found in Ostien (n 1 above) vol V ch 6 pt II 17.

49 The English translation of the cases involving Amina Lawal are found in Ostien (n 1 above) vol V ch 6 pt III 52.

50 Yawuri (n 46 above) 139.

take place if the Shari'a legal system is agreed to be subject to the Nigerian Constitution. If the Shari'a legal system can correct human errors in its implementation, surely the Nigerian Constitution can also perform the same task. The successful constitutional scrutiny of the implementation of the Shari'a legal system – which is very likely – will be a huge boost for the legitimacy of the system across Nigeria's religious spectrum, just as the implementation of the Islamic penal codes by the NPF will contribute in no small measure to the legitimacy of the Shari'a legal system.

5 Conclusion: Shari'a and the Constitution

Our review of the relationship between the NPF and different *hisbah* organisations reveals that the former is sometimes engaged in the enforcement of Islamic penal codes and other criminal legislation of the Shari'a legal system of the 12 northern states of Nigeria. As stated above, this suggests that the NPF can successfully implement the Islamic penal codes, which this article has argued is the responsibility of the NPF. Significant issues will have to be addressed if the NPF were to take over the enforcement of Islamic penal codes, given the activities of the *hisbah* organisations. These issues are surmountable, it is submitted, because of the 'reasonable accommodation' between the two bodies identified in the article. The engagement of the NPF in enforcing the Islamic penal codes will strengthen the process of constitutional oversight of the Shari'a legal system in the 12 northern states that is inevitable if it is true – as it is – that the latter is built on the Nigerian Constitution. It is hoped that there will be constitutional scrutiny of many aspects of the Shari'a legal system, even when the NPF is involved in the implementation of its criminal aspects. The belief that the Shari'a legal system can run parallel to the Nigerian Constitution is not sustainable in the long run. So also is the belief that the present lukewarm implementation of the Islamic penal codes due to the international and local outcry over certain aspects of the Codes is acceptable. What is needed are measures, such as the enforcement of Islamic penal codes by the NPF, which will enhance the engagement of the Shari'a legal system in a long overdue dialogue with the Nigerian Constitution.