



Lead City University Law Journal (LCULJ)

A Publication of the Faculty of Law, Lead City University, Ibadan, Nigeria
Vol. 2, No. 1 January – June, 2016 ISSN 2504-9747

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- The Role of the United Nations Environmental Programme (UNEP) to the Development of International Environmental Law



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Human Rights and the Judiciary: Islamic Law Perspective

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&

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Abstract

The concept of human rights has over the years been canvassed by the west with exclusivity that almost eroded the reasoning that any other culture (Islam inclusive) is having anything to do with rights of individuals and its protection. This research, therefore, debunks that notion by giving general insight to the concept of human rights and how the judicial system in Islam is structured to protect it. It compares the scope and components of rights under the two systems. It summarily analysed the Islamic human rights instruments relying on affirmative evidence from Quran and Sunna and practices of the companions in the area of Human rights protection. The research is concluded by noting that human rights and its protection through the judiciary are as old as Islam itself and even surpasses the western notion of human rights especially in the area of equality before the law and right against discrimination on the basis of status.

Introduction

Human right is a global phenomenon, protection of which is of great concern to every civil society world over. Judiciary is a mechanism put in place by the law, under which courts are vested with judicial power to interpret the provisions of the laws that guaranteed rights in order to adjudicate on matters bordering on violation of those rights, with a view to protecting and redressing such violation and infringement. Considering the voluminous literatures available on the subject of human rights from the western direction, the enlightenment campaign through the western media, the legal machineries put in place to guarantee human rights³ and the judicial mechanisms established to ensure its protection.⁴ One will ordinarily feel that the field is exhaustive much to create the impression that the concepts of human rights and judiciary originated and exist only in the western parlance. The above assertion leaves some imperative questions to be answered. For example; does the concept of human rights exist under any other culture apart from the western culture? Can human rights concept be viewed from the perspective of any other culture such as Islam? What are human rights from the Islamic point of view? Is there any other viable judicial system aside the conventional courts system under which human right could be adequately protected? In reaction to the above fundamental questions, this research work, gives a general insight to the concept of human rights from the Islamic perspective. In order to appreciate the concept under reference which cannot stand in isolation, a brief analysis of its components such as right, duties and freedom is proffered. Furthermore, nature and scope of human rights in Islam is part of the discussion in this work with a view to observing the sharp distinctions between the scope

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³ See for example The International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic Social and Cultural Rights (ICESCR), The African Charter on Human and Peoples' Rights (ACHPR) and other International and local instruments on Human Rights, such as Constitutions of various Countries e.g The Constitution of the Federal Republic of Nigeria etc.

⁴ See sections 6 and 233(2) of the Nigerian constitution, more particularly the jurisdiction of the Federal High Court as contained in the Fundamental rights (Enforcement Procedure) Rules 1979 which came into force on the 1st of January, 1980.

and the nature of the human rights under Islam and in the western perspective. The research also enumerates some selected rights as provided for under the Islamic Law, such as right to life; justice and equality; and right to freedom of speech and expression. It makes an overview on the modernisation of human rights in Islam by summarily analysing the main two Islamic human rights instruments, (Universal Islamic Declaration of Human Rights and Cairo Declaration on Human Rights in Islam). There is what could be referred to as the second leg of discussion in this work. That is, the Judicial System in Islam. This research work considers the Islamic Judicial System from the historical purview especially during the period of the Prophet (S.A.W), the four rightly guided Khaliphs as laid down for the later generation. It briefly looks into the qualifications and basic functions of a Muslim judge and instances of how the judiciary protected human rights.

Affirmative evidence from the primary sources of Islamic Law on the issues discoursed are outlined, verses from the Holy Qur'ān and authorities from the Sunnah of the Holy Prophet are explained to buttress the discussion on the issues. In addition to the textual authorities provided, references are made to the practices of the early companions of the prophet especially the rightly guided Khaliphs. This work is concluded by suggesting solutions from the Islamic judicial practices to the problems of human rights protection been encountered by the conventional judiciary.

Conceptual Framework

The concepts of right and freedom have a slightly different connotation under the Islamic law from their understanding within the framework of western discourse. There is therefore the need to put the different understanding in proper perspectives.

Right (HAQQ)

Right in Islam ordinarily means *ḥaqq*. *Ḥaqq* under the Islamic law has a comprehensive connotation as it encompasses both rights and duties or obligations. These are two twin concepts that cannot be severed from one another and the origin of which is the Qur'ān and Sunnah. In many occasions rights are crystallized to duties, this simply indicates that where there is right there is corresponding duty and obligation. In Islam *Ḥaqq* or rights are divided into two main divisions namely; (1) *Ḥuqūq Allah*: Rights of Allah (2) *Ḥuqūq al-insān*: Rights of man otherwise called human rights. In Islam this is right of individual which accrued to every person on the basis of being a human being.

Human rights in Islam therefore are divine in nature; they are not based on human thought like in the western connotation. They are those right granted to mankind by Allah the creator of man Himself and cannot be curtailed by any authority or any man-made laws. The scope of human rights in Islam is wider, certain and specific than in the western parlance, also the western concept of human rights is subject to changes and expansion based on human reasoning. Human right in Islam, the authority of which is derived from the Qur'ān and Sunnah of the Prophet, is however as said earlier divine and thus it is immutable. Islam makes no formal distinction between other right and fundamental rights as every right granted by Allah the Law-giver is fundamental, hence in the Islamic perspective all rights are fundamental.

Freedom (Ḥuriyyah)

While discussing human rights, apart from the concept of rights, duties and obligations, freedom in Arabic called (*Ḥuriyyah*) otherwise referred to as personal liberty is another important concept. Muslim jurists have rigorously engaged themselves intellectually with a view to defining the concept, based on their understanding of the concept of rights from the Islamic perspective. For example Hashim Kamali defined it as:

the ability of a person to manage his own affairs free from oppression and interference of others, while enjoying the safety of his person, honour, property,

home and all rights that belong to him, provided that the manner of his management does not amount to hostility and prejudice against others⁵

Similar to what is obtainable in the western categorization of rights,⁶ Muslim jurists have compressed the basic rights and liberties, then brought them under three broad categories namely: (1) personal rights and liberties (*al-ḥuqūq wa al-ḥurīyyah al-shakhṣiyyah*); (2) intellectual rights and liberties (*al-ḥuqūq wa al-ḥurīyyah al-ma'naviyyah*); and (3) social-economic rights and liberties (*al-ḥuqūq wa al-ḥurīyyah al-iqtisādiyyah wa al-ijtimā'īyyah*). Since the objective of human rights in Islam is to preserve human dignity, the first division has been considered the most essential and the foundation upon which all other rights are built. This implies that without the protection of the first category, that of others is uncertain, unobtainable and even unnecessary.⁷ The above mentioned rights and liberties containing other segments and sub-divisions of freedom and liberties must not be interfered with in order to uphold the aim of preserving human dignity.

Notwithstanding the importance of the protection of these rights and liberties under the Islamic law, there is no absolute right, freedom and or liberty. Consequently there is certainly limitation to every right and liberty. This is because where one's rights end is where another man's rights begin. Limitation to rights is a common feature in both the Islamic and western human right discuss; the latter through the instruments conferring rights on people usually make proviso as to the circumstances under which rights could be curtailed though in accordance with the law.⁸ In the former, the law giver, Allah, provides limitation for every right which He divinely granted to mankind. Taking example from the mother of all rights (right to life); He has placed automatic limitation on life by emphatically assuring every soul of the taste of death⁹ and by the creation of death as twin concept of life¹⁰. Under the Islamic law although it is believed that every human being is granted the right to life but the right is limited under certain circumstances such as when the owner of the right kills another without a just cause. In a similar vein law of *Qadhf* (defamation) is put in place to limit and checkmate the commission of defamation against other in the name of exercising right to freedom of expression. Likewise, right to personal liberty and security of an individual can be restricted when he has been formally found guilty and convicted of a crime through the due process of law¹¹.

⁵ Muhammad Hashim Kamali, "Freedom, Equality and Justice in Islam", (Malaysia and UK: Ilmiah Publishers and The Islamic Foundation, 1999), at 11. Kamali, after scrutinizing various definitions of different scholars like Ibn 'Ashur, Mahmassani, Abdal Karim Zaydan, Kamil Laylah and Abu Zahrah to mention but a few; he therefore considered in his personal opinion to choose the definition of Abdal-Wahab Khallaf as more comprehensive, all encompassing and preferable approach to personal liberty

⁶ See the International Covenant on Civil and Political Rights (ICCPR) adopted by the UN General Assembly on December 16th 1966, and put into force on March 23rd, 1976. Also the International Covenant on Economic, Social and Cultural Rights (ICESCR) adopted by the UN General Assembly on the 16th of December 1966 and came to force on 3rd January 1976. The former document commits its parties to respect the civil and political rights of individuals, including right to life, freedom of religion, speech, assembly, electoral rights and right to due process and fair trial. The latter document on adoption commits its parties to work toward granting economic, social and cultural rights to individuals, such as labour right, right to health, education and adequate standard of living.

⁷ Kamali, *Freedom...*, 15, where he made particular reference the above classification as laid down by Abdal-Mun'im Ahmad and to complement the importance of the first category as the bedrock of others, he quoted Ahmad saying "For what good it will do to an individual to enjoy the freedom of ownership and work if he is in the meantime denied his freedom and right of movement"

⁸ See section 45 (1,2 and 3) under chapter IV of the Constitution of the Federal Republic of Nigeria 1999

⁹ Qur' ān, Al-Ankabūt (29):57

¹⁰ Qur' ān, Al-Mulk (67): 2

¹¹ See Qur' ān, Al-An'Em (6): 151; Al-Isr'Êi (17): 33; and Al-Furq'En (25): 68.

Development of Human Rights

Generally the domination of the concept of human rights discourse by the west is consequential to the use of the western value has being the yardstick in human Rights standard. Although the impetus for the standardization of international human rights has been credited to the west, and notwithstanding the western propaganda on the negative image of Islam and Islamic Law in the west,¹² Islam has been described as an all-encompassing religion (*ad-dīn*).¹³ It has practically granted man various rights by virtue of being human over a thousand and four hundred years ago. That was Hundreds of years before the issuance of Magna Carta of 1215, not to talk of the various cultural revolutions which influenced the birth of what is today known in the west as the first and mother of all international human rights instruments, the Universal Declaration of Human Right (UDHR) 1948. Recognition, preservation and adequate protection of human dignity and human welfare have been the concern of Islam through the divine law main sources of which are the Qur'ān and Sunnah¹⁴.

The cornerstone of human rights therefore is the manifestation and protection of human dignity which the constitutional provisions and content of other human rights instruments have been designed to uphold¹⁵.

Historically, the concept of human rights in Islam is as aged as Islam itself. The commencement of the revelation of the Holy Qur'ān over a thousand years ago¹⁶ which lasted for a remarkable period of thirteen years marked the emergence of the recognition of rights of human person and dignity and also the needs for its protection and preservation. In addition, the formation of the state of Madinah around the year 622 C.E by the Holy Prophet (S.A.W)¹⁷ was the basis for the issuance of the Madinah Charter (*Ṣaḥīfah* of Madinah)¹⁸ which is no doubt the first ever world written constitution. These are evidence of the pioneering status of Islam on the subject of human rights and freedom. It was a state under which rights, duties, interests and obligations of all the inhabitants including those of Non-Muslims and Jews within the Islamic state were spelt out based on mutual agreement of all the concerned parties. The protection of those rights and interests were adequately guaranteed in the Charter¹⁹ and this became possible through the guidance of the Holy Qur'ān, because Qur'ān had been substantially revealed at that time. This is the channel through which the Islamic civic rule was first introduced by the Holy Prophet (S.A.W) to the Arabian Peninsula. The system has been described thus:

The state of Madinah was marked by high moral standard. It was the standard-bearer of Muslim behaviour and a model for the implementation of human rights under Muslim religious state authorities. The Muslim statehood established by the Prophet

¹² Mashood A. Baderin, "International Human Rights and Islamic law", (Oxford: oxford University Press, 2003), at 11

¹³ See Qur'ān, 3 :19, also see Shamrahayu A. Aziz, "Muslims' Right to Religious Freedom in Malaysia: Piercing through the Confusion and Contradictions" (2007) 7 MLJ at cxxxi

¹⁴ See Qur'ān 17 :70

¹⁵ Muhammad Hashim Kamali, "*The Dignity of Man: The Islamic Perspective*", (Malaysia: Ilmiah Publishers, 1999), at 1

¹⁶ Here we mean the emergence of the mission of Islam as a religion when the revelation began in Makkah specifically at the cave of Hira, it was a continuous process in Makkah for a period of ten years before the prophet and his companions migrated to the then Yathrib today known as (Madinah) where the revelation of the Holy Qur'ān continued for another thirteen years

¹⁷ Maimul Ahsan Khan, "Human Rights in the Muslim World: Fundamentalism, Constitutionalism and International Politics" (Dorham, North Carolina: Carolina Academic Press 2003) at 146

¹⁸ Ibid., 149. The Madinah Charter is regarded as the constitution of the city-state of Madinah. This is due to its feature of been the Grand Norm and the supreme law of the state with binding effect on the people of the state. This is a document in which rights, duties and responsibilities were set out, more so it stipulates the structure of government in the state. It is been called treaty due to the fact that it is an outcome of the agreement between different clans of Madinah and the Muslims. It is thus regarded as the legal philosophy of the socio-political and economic system introduced by the Muslims in the city-state of Madinah.

¹⁹ Ibid., 150

in Madinah was the symbolic representation of the Islamic civilisation and Muslim brotherhood²⁰

One of the main objectives of the Madinah Charter was to maintain peace and ensure security of life and properties within the state and among the people of different cultures, ideologies and beliefs. The Charter was complemented by the *Hudabiyyah* treaty which has been translated to be the extension of the Madinah Charter.²¹

Some Selected Rights in Islam

History has made it clear that human right is not a new concept under the Islamic law, the primary sources of Islamic law (Qur' ān and Sunnah) have substantial authorities and affirmative evidences supporting the grant and protection of various basic rights. In the light of the above, therefore, some selected rights like right to life; justice and equality and right to freedom of speech and expression shall be looked into with a view to analysing how these rights were rooted in Islamic law. Also the affirmative evidence in respect of these rights shall be outlined. The selection of the aforementioned few rights among others is premised on the scope of this work. Thus, it does not accommodate or permits the discussion and enumeration of every available right in Islam. Other peculiar reason is that right to life is the foremost and mother of all other rights both in Islam and in the western view, justice is also a general phenomenon across the globe while equality is a specific area of attack on Islam by the west. And freedom of expression is crucial in a civic rule for participation and representation in the decision making process about the welfare of the people.

Right to Life (*Ḥaqq al-Ḥayāh*)

Life is sacred,²² its creation goes beyond human perception hence its protection becomes uncompromised under the Islamic Law. Allah is the sole life-giver,²³ sanctity of life therefore is one of the major tenets of Islamic teachings and this is the manifestation of Islam's claim of preservation of human dignity.²⁴ Right to life is the most essential of all other rights, in fact it is the *sine qua non* of all other rights. Provisions of the Holy Qur' ān are numerous and unambiguous on the sanctity and sacredness of life, for instance Allah says:

We have ordained the children of Israel that if anyone slew a person, unless it be for murder or for spreading mischief in the land, it would be as if he slew the whole mankind. And if anyone saved a life, it would be as if he saved the life of a whole people.²⁵

The last part of the above verse shows how great it is to protect just one life, thus it is the duty of everyone to save others life without sentiment or discrimination of any kind.²⁶ Human beings are considered equal when it comes to the issue of sanctity, security and protection of life religious differences notwithstanding.²⁷ Allah further ordered:

²⁰ Ibid., 167

²¹ Ibid., 170

²² Qur' ān, 17 : 33

²³ Qur' ān, 67 :1 & 2

²⁴ Syed Ahmad S.A. Alsagoff, "Al-diyah as Compensation for Homicide Wounding in Malaysia", (Malaysia: IIUM, 2006) at 9

²⁵ Qur' ān, 5 :32

²⁶ Alsagoff, n. 23 at 15

²⁷ Kamali, *The Dignity*..., 32. Kamali made particular reference to Al-Ghazzālī to have quoted the above verse from *Ḥuqūq al-Insān*, p 54, to maintain his position that attack on the personal safety of non-Muslim attracts the same punishment in this world and the hereafter

Do not kill a soul which Allah has made sacred except through the due process of law.²⁸

The due process of law mentioned in the above verse corroborates the limitations stipulated in the earlier verse to the right in question, which are situations where life is authorised to be taken for instance in cases of *Qatl Nāmd* (wilful killing), *Qisās* (retribution), *Zinā* (adultery) married persons, apostasy and high-way robbery (*Hirāba*). Each of these cases is to be decided by the government through established legal mechanism and not individual responsibility or duty.²⁹

Islamic law protection of life is a strict provision of law. It is not only about protection of other people's life,³⁰ but also prohibition of taking one's own life³¹. Aside from the worldly punishment for wilful killing, there is consequential punishment awaiting such person in the hereafter unless he repents before his death³².

There are good number of Hadith supporting the position of Qur'ān on right to life, its sanctity and protection³³. Islam is not particular about Muslims on the protection of life, for instance, the Prophet was reported to have prohibited the killing of certain categories of people even during war such as *Dhimmi* and children polytheists.³⁴ The Prophet was equally reported to have regarded homicide as the greatest next sin to *Kufr* (polytheism).³⁵ It is noteworthy that right to life and its protection in Islam does not begin after birth but from pregnancy, this has been determined to be from 120 days after conception³⁶. Even after death, human dignity is still preserved in Islam and that is why mutilation of human body is not allowed including that of enemies at war. This is why Islam made adequate provision for the burial right for a dead Muslim within a specified limited period of time.

Right to Justice and Equality

Justice ordinarily means even distribution of things among people with fairness and impartiality. It is a prerequisite for the attainment of peace and harmony in the society, hence it is the ultimate yearning of every human being.³⁷ Justice has been said to connote giving every person his due unhindered while equality is the practice of possessing the same right, privilege, immunity and being liable to the same duties and obligations³⁸ without discrimination on the basis of race, colour,

²⁸ Qur'ān, 5 :32

²⁹ Maulana Muhammad Razi Khan Afridi, "Hadith on Human Rights" (India: Anmol Publications PVT LTD, 2008) at 141

³⁰ Alsagoff, n. 23 at 5

³¹ See Qur'ān 2 : 195 and Q 4:29

³² See Qur'ān, 4 :93

³³ Afridi, n. 28 at 7 where the author specifically quoted part of the Prophet's sermon during his last Hajj as follows "O men, listen to my words, I do not know whether I shall ever meet you in this place again after this year. Your blood and your property are sacrosanct until you meet your Lord, as this day and this month are Holy....All bloodshed in the pagan period is to be left unavenged. The first claim on blood is that of b. Rabī' ah b. Hārith. Abdul Muṭṭalib (who was fostered among the b Layth and whom Hudhay killed). It is the first bloodshed in the pagan period which I deal with....Know that every Muslim is a Muslim's brother, and that the Muslims are brethren. It is only lawful to take from a brother what he gives you willingly, so wrong not yourselves"

³⁴ Ibid., 143

³⁵ Ibid., 112, also see Alsagoff, n. 23 at 28-29

³⁶ Ibid., 145, the author here referred to the hadith of the Prophet where he delayed the sentence and execution of a woman (*Ghāmidīyyah*) who confessed to have committed *Zinā* after it was discovered that she was pregnant. The rationale behind this practice of the Prophet is to the effect that life begins from the womb thus must be protected right from that moment. Otherwise if the punishment was passed immediately, the life of the innocent child in the womb would have been terminated for no offence

³⁷ Michael Freeman, "Universalism, Particularism and Cosmopolitan Justice" in *International Justice*, Tony Coates (ed.), (Burlington USA: Ashgate Publishing Company, 2002) at 74

³⁸ Francis J. Ludes (ed.), et al. *Corpus Juris Secundum*. St. Paul, Minnesota: West Publishing Co., 1965. Vol. 30. at 752

language, age or sex. Equality and justice are synonymous,³⁹ however what constitute just and equal treatment varies from person to person and from society to society.

Justice and equality in Islam are unambiguous twin concepts. Justice known as '*adl*', as placing things in their appropriate positions; equal treatment of people and act of maintaining equilibrium in the treatment of issues among people.⁴⁰ Allah commands justice, it therefore becomes an obligatory and a sacred duty of every Muslim to do justice⁴¹ and under no circumstances must the door of justice be closed in Islam while for no reason must injustice be allowed as it is a driving wheel to anarchy, unrest and above all destruction. Doing justice is *farq* *kifāyah* on the whole community and *farq* *'aim* on individual member of the community depending on the circumstances of each case.

Equality, on the other hand, is called *Musāwāh*, meaning evenness and equivalence of human nature. Allah made it clearly known that human beings are equally created from one and the same source but one can excel over the other only on ground of piety and devotion.⁴² In Islam other exception to this general rule is found under natural differences unavoidably present in human beings. This simply means there is no absolute equality in Islam as there are some differences or inequality in human beings such as talents and skills which are natural endowments from Allah. These differences do not interfere with the ideals of justice and equality and if properly observed, acknowledged, and upheld, would serve the course of justice better.

In addition and in corroboration to various provisions of the Holy Qur'ān, Islam has established the fraternity of man and general equality of all through various practices of the Holy Prophet (SAW). Islam emancipated women from the barbaric culture of been buried alive. It changed their status from been property to be inherited to heirs with allotment of portions in the properties of their deceased parents and relatives. Although the allotment is not on equal ratio, the differences are due to the gravity of some other socio-economic factor and different responsibilities placed on man and woman respectively especially in the family relationship.⁴³

Another important area is the position of Islam on slavery; categorical condemnation of slavery by Islam through the wordings of the Prophet buttressed the Islamic protection of human dignity and freedom. People were made to understand and appreciate the fact that both the slave and their hitherto masters are created by one God (Allah) and are on the same footing as servants of Allah. The prophet was reported to have said:

There are three categories of people against whom I shall myself be a plaintiff on the day of Judgement. Of these three, one is he who enslaves a free man, then sells him and eats his money⁴⁴

It was against this background and the then prevailing practice among the Arabs that people were advised to set free their slaves in different ways.⁴⁵ The Prophet did not only instruct but practiced the act of setting free some slaves given to him as gifts after his first marriage. Eventually it is in history that some of the close associate of the Prophet were of slave origin.⁴⁶ The overall

³⁹ Dennis Davis, "Equality and Equal Protection" in *Rights and Constitutionalism the New South African Legal Order*, David Van Wyk (ed.), (Kenwyn: Juta & Co. Ltd, 1994), at 197

⁴⁰ Kamali, *Freedom*...., 140

⁴¹ See Qur'ān, 16 :90, Qur'ān, 57 :25, Qur'ān, 5 :8

⁴² See Qur'ān, 49 :13 and Qur'an, 33 :35

⁴³ See Qur'ān, 4 :34

⁴⁴ Sahih Bukhari and Ibn Majah

⁴⁵ Afridi, n. 28 at 115

⁴⁶ Ahsan Khan, n.10 at 219

implication and result of this practice is that within the period of thirty to forty years, the problem of slavery in Arabia has been solved.⁴⁷

Freedom of Speech and Expression

Freedom of expression means the ability of individual or a group of people to express or refuse to express their feelings and ideas without restraint or fear of oppression in so far as the exercise of this right does not invade on other people's right or violate the limit set by the law. This freedom, as recognised and protected under the Islamic law is a tool towards the attainment of justice and respect for human dignity. It is one of the important features of democracy as and means of participating in the decision making by way of representation. Freedom of expression can be exercised through various dimensions such as it encompasses freedom of press, academic freedom, freedom of communicating ideas in order to inform, persuade and convince other people righteously and liberty to reveal the truth in order to discard doubt.

People normally form groups and association to enable them achieve some vital goals in the society and for the society, with the aim to making the collective and individual feeling of the people known through the forum of association. Thus freedom of expression is closely related to freedom of association, assembly and thoughts. Islamic law grants individual the freedom to express himself but with limitation that the expression does not incur blasphemy, insult or incitement to sin.⁴⁸ It is on this note that it was observed that the objectives of right to freedom of speech are basically two namely; discovery of truth and upholding human dignity.⁴⁹

Islam as a religion of truth does not compromise in any way the manifestation of truth, same must be upheld by whatever means. Although the Qur' ān placed serious restriction on free speech when it becomes evil, immoral or disgusting, this restriction is relaxed if it enables injustice to be detected through the voice of the victims.⁵⁰ The importance and finality of truth is also emphasised in the Qur' ān.⁵¹ Furthermore, a good number of Ḥadīth are relied upon in Islam on discovery of the truth where the Prophet (SAW) has emphatically ordered truth to be said even if it becomes unpleasant and if it be to confront a tyrant ruler.⁵² This principle of discovery of the truth was the attitude inculcated in the companions of the prophet and eventually became their notable practices after the passing away of the Prophet so much that the reign of the rightly guided Khaliphs had this doctrine as its bedrock.

Dignity is natural right of every human being according to the Holy Qur' ān:

We have bestowed dignity on the progeny of Adam...and conferred on them special favours, above a great part of Our creation.⁵³

Man therefore feels highly dignified when he is free and autonomous to have entitlement to his conscience and feelings including the decision about faith.⁵⁴

The right to freedom of expression can be exercised in a number of ways which has been translated to mean mechanisms for the manifestation of the freedom. This includes *ḥisbah* (*al-amr bi al-ma'rūf wa al-nahy 'an al-munkar*) promotion of good and prevention of evil. This is a practice

⁴⁷ Afridi, n. 28 at 115 where the author made reference to the estimated number of slaves liberated in Islam as at the period of the Rightly-Guided Khaliphs to the effect that; the Prophet (SAW) alone was reported to have liberated as many as 63 slaves; Aisha freed 67; 'Abbas liberated 70; 'Abdullah bin 'Umar freed 1000; 'Abdur-Rahmān personally purchased up to thirty thousand slave and set them free and so was other companions did liberated good numbers of slave most of whom and their descendant became prominent rulers of Muslim states and outstanding scholars in the Islamic history

⁴⁸ See Kamali, *The Dignity...*, 48

⁴⁹ Ibid., 47

⁵⁰ See Qur' ān, 4 :148

⁵¹ See Qur' ān, 103 :3 and Qur' ān, 10 :32

⁵² See Kamali, *Freedom...*, 38

⁵³ See Qur' ān, 17 :70

⁵⁴ See Kamali, *The Dignity...*, 47

under Islam which entitled individuals to either speak or act in pursuit of righteousness and discourage evil according to Qur' ān⁵⁵ and Sunnah;⁵⁶ *Shūrā* conduct of affairs by consultation has been the foundation upon which the Islamic system of administration was built. This ensures the citizen's right of participation in the selection of their leaders. Prophet Muhammad (SAW) the founder of the Islamic state was commanded by Allah to consult his companions⁵⁷ who were eventually described with this virtue.⁵⁸ Consultation yields the expected fruit only if people are free to participate, this practice was exemplified by the Khaliphs as was manifested in the inaugural speeches of the first and second Khaliphs⁵⁹. *Al-naṣiḥah* known as sincere advise,⁶⁰ *ijtihād* personal reasoning and *ḥurriyah al-mu'aradah* freedom to criticise are other relevant mechanisms through which right to freedom of expression could be exercised in Islam. Human dignity is better preserved if the above institutional instrument are utilised with tolerance open-mindedness and sincerity while participating in the state affairs for the protection of human rights and preservation of human dignity.

An Overview of Modern Islamic Human Rights Documents

For the realisation of the campaign for the universality of human right at the international level and in order to ensure its protection internationally, in addition to the duty upon states for the accomplishment of these objective, regional mechanisms were established. These include the European, Inter-American and African regional human rights institutions.⁶¹ Furtherance to this and complementary to the UN effort in this regard, the Muslim states comprising, mostly, the North African and Middle East Arab states formed a regional community under the umbrella of the Organization of Islamic Conference (OIC).⁶² In its effort as a body and in line with its Charter on commitment of the Muslim communities and Islam to human right protection, it came out with the Cairo Declaration on Human Right⁶³ in addition to the earlier issued Universal Islamic Declaration of Human Rights.

Universal Islamic Declaration of Human Rights

This Declaration came earlier than the Cairo Declaration. It was made in Paris on the 21st Dhūl al-Qa' dah 1401 (19th September, 1981). This Declaration was the second fundamental right document proclaimed by the Islamic Council, the first one was the Universal Islamic Declaration announced in 1980, at the International Conference on the Prophet Muhammad (S.A.W) and his Message held in

⁵⁵ See Qur' ān, 3 :110, 104 and Qur' ān, 22 :41

⁵⁶ See Kamali, *Freedom...*, 42 where he quoted the Hadīth of the Prophet in support of *ḥisbah* as follows: "If any of you sees something evil, he should set it right with his hand; if he is unable to do so, then with his tongue, and if he is unable to do even that, then (let him denounce it) in his heart. But this is the weakest form of faith"

⁵⁷ See Qur' ān, 3 :159

⁵⁸ See Qur' ān, 42 :38

⁵⁹ See Kamali, *Freedom...*, 40 where reference was made to parts of the inaugural speeches of the two Khaliphs. Abubakar was partly quoted to have said: "O people, I have been entrusted with authority over you, but I am not the best of you. Help me if I am right, and rectify me when I am wrong." While 'Umar was reported to have said; "rectify my aberration" a statement which prompted a man to rise and said: "if we see deviation on your part, we shall rectify it by our swords". This is a great instance of right to freedom of expression through consultation as the Khalīfah did not reprimand this fellow for his comment rather he was said to have graciously praised God for having such courageous person among his people who could stop him from going astray. Also see Afridi n 20 at 162

⁶⁰ See Kamali, *The Dignity...*, 50

⁶¹ See Baderin, n. 5 at 225

⁶² Ibid., OIC is a body founded in 1969 by the joint efforts of the Muslims Heads of State and Government vested with the responsibility of consolidating co-operation in the economic, social, cultural, scientific and other essential activities among the Muslim states, more so to foster the regional goal of putting in place the appropriate framework at the regional level for the practical realization of international human rights law across the Muslim world. This body as at 2003 has membership of 57 Muslim states who also doubled as members of the UN

⁶³ Ibid., 227

London. Just like the Cairo Declaration, this Declaration is based on Qur'ān and Sunnah and it is aimed at ensuring and upholding the dignity already conferred on mankind some fourteen centuries ago. It is focused on the same objectives like the Cairo Declaration, especially in the area of protecting men against injustice and oppression, and to serve as a guide to Muslim countries in preserving and ensuring the rights of citizen in all aspects of life.

This document is made up of twenty-three articles under which various rights are guaranteed for the citizens of member states strictly in accordance with Shari'ah Law.⁶⁴ The rights contained therein includes, right to life, right to freedom, right to equality and prohibition against discrimination, right to justice, right to fair trial, right to protection against abuse of power and torture. Others are right to asylum, right to freedom of speech, freedom of religion, right to education, social security and protection of property. Also the document provides for rights of minority, right to family life and some basic rights of married women among others.⁶⁵

The Cairo Declaration on Human Rights in Islam

Between the 9th to 14th of Muharram 1411H (31st July to 5th August, 1990),⁶⁶ the Nineteenth Islamic Conference of Foreign Ministers was held in the Arab Republic of Cairo, Egypt, where it was agreed upon by the member states in attendance to issue the Cairo Declaration on Human Right in Islam that will serve as a general guide for member states on issues of human rights. The objective of the document is among others to serve as a guide for member states in all aspect of human life. This effort is also seen as a great contribution to the effort of mankind in the agitation for human rights, in order to protect man from exploitation, oppression, persecution and injustice, and to ensure man's freedom and right to a dignified life in accordance with the Islamic Law. This is because in Islam, fundamental rights and freedoms are integral part of the religion. These rights are naturally given by Allah, the Creator of man and the law giver of Shari'ah. As such, they can neither be abolished in any form nor violated by anyone, in as much as they conform to the divine law. The instrument holds that safeguarding those fundamental rights is an act of 'Ibādah (worship) and it is the responsibility of both individuals and the Ummah collectively. The above effort can also be regarded as modernization and codification of human rights laws in Islam in order to meet the international demand of human right protection in the Muslim world.

Cairo Declaration on Human Rights in Islam is a document consisting of twenty-five Articles, providing for various rights guaranteed for the citizens of member states.⁶⁷ Among those rights provided for in the document under reference are, equality of human race, right to life, preservation of human dignity up till after death, right to family life, right to fair hearing. Others are right of education, right of equality before the law, right of access to justice, right to freedom of expression, right to protection against exploitation and oppression. Also contained therein are some basic rights for women and children etcetera⁶⁸.

The Judiciary in Islam

Similar to what operates in the western culture, Islam as a unique culture has a universal legal system known as the Islamic law.⁶⁹ For the purpose of interpretation and application of this divine law therefore, Islam has put in place from inception and across its developmental ages, a dignified judicial system, under which the law is practically put in motion. Administration of justice in Islam is sensitive so much that it is considered as a devotional act and next to belief in God⁷⁰. The concept

⁶⁴ See Universal Islamic Declaration of Human Rights

⁶⁵ See Articles I to XXXIII of the Universal Islamic Declaration of Human Rights

⁶⁶ Baderin, n. 5 at 227

⁶⁷ See The Cairo Declaration on Human Rights in Islam

⁶⁸ See specifically Articles 1 to 25 of the Cairo Declaration on Human rights in Islam

⁶⁹ See *Alkamama V. Alhaji Bello* (1998) 6 SCNJ 17 at p. 136

⁷⁰ See Anwar Ahmad Qadri, "Justice in Historical Islam" (Lahore Pakistan: SH Muhammad Ashraf, 1980) at 3

of justice itself is sacred in nature as it is a commandment of Allah that justice must be done at all times⁷¹.

General Principles in Administration of Justice in Islam

Administration of justice is another area where Islamic law as a legal system and Islam as a religion and culture have excelled in the area of human right protection, particularly as it relates to equality before the law and access to justice. This position has numerous authorities both in the Qur'ān and Sunnah. It is further corroborated by the practices of the *Ṣaḥābah* after the demise of the Holy Prophet (SAW). It negates the doctrine of immunity from proceedings as enshrined in most modern constitutions⁷², where it is the common feature to immune certain calibre of people from legal proceeding,⁷³ based on political status and other ground. Islamic law did not provide immunity of any kind for anyone no matter how highly placed such person is. Both the rulers and the ruled are subjected to legal challenges and proceeding at any time.

Administration of justice through the judicial system during the period of the Prophet (SAW) was straight forward. This was because all matters were referred to him and he adjudicated and decided them upon the content of the divine revelation and his decisions were final. Stressing the importance of justice, the Prophet (SAW) was reported to have described a just ruler as a shadow of God on earth.⁷⁴ When Islam was becoming popular in the Arabian Peninsula, in addition to the appointment of governors and military commanders to various part of the land, the Prophet (SAW) normally appoints a judge who is independent of the other functionaries and has autonomous power to discharge his duty, more so that other functionaries were subjected to his jurisdiction.

The Prophet (SAW) laid down both the system of civil and criminal jurisdictions as well as procedural principles.⁷⁵ The famous rule of *ijtihād* was also laid down by the Prophet (SAW) through his interaction with Mu'adh bn Jabal when the latter was being sent to Yemen as a judge.⁷⁶ Also a special department known as *milāyah al-mazālīm* was conferred with a special jurisdiction.⁷⁷ Judicial proceeding during the time of the Prophet (SAW) was simple as most of the procedural techniques of doing substantial justice for the protection of people's rights was laid down by him, such as the presence of the disputing parties, fair hearing, proof of evidence and the like.

Furthermore, immediately after the demise of the Prophet (SAW), Abūbakar became the first Khalifah; he was the head of government and the judge although he appointed judicial officers for other Islamic states and vested 'Umar with similar power. Abūbakar handled most of judicial issues. Abūbakar ruled strictly in line with Qur'ān and Sunnah. He ensured that people have access to justice in order to protect their rights as done by the Prophet (SAW) during his time.⁷⁸

⁷¹ See Qur'an, 4:58

⁷² See Jadesola (O. Akande, "The Constitution of the Federal Republic of Nigeria: with Annotations", (Lagos Nigeria: MIJ Publishers, 2000) at 430, where the author quoted the Attorney-General in *Mississippi v. Johnson* 71(1867 U.S. 475,484) "It is not upon any peculiar sanctity belonging to him as an individual, as is the case with one who has royal blood in his veins; but it is on account of the office that he holds that I say the President of the United State is above the process of any court or jurisdiction of any court to bring him to account as President..."

⁷³ See Section 308 of the Constitution of the Federal Republic of Nigeria 1999 for instance immunes President or Vice President, Governor or Deputy Governor from civil or criminal proceedings, arrest or imprisonment while holding the office; see also Article 32 of the Malaysian Federal Constitution for similar provisions.

⁷⁴ See Muslim bn al-ḥajjāj, "*Ṣaḥīḥ Muslim*", (Beirut: Dār al fikr, 2003/1424), Hadīth no. 1829/4617 at 930.

⁷⁵ See Almawardi, Ali bn Muhammad, "*Al-aḥkām al-Ṣulṭāniyyah*", (Dār al-fikr, 1960/1380), at 77. Also see Qadri, n. 69 at 11, reference was made by the author to various Ahadith narrated by different companions on the rules of administration of justice adopted by the Prophet (SAW). For example when 'Ali was sent to Yemen as a judge when he was thought the rule of fair hearing upon warning not to decide a case on one sided argument until he hears from the other side before arriving at his decisions.

⁷⁶ See Almawardi, n. 74 at 67

⁷⁷ See Qadri, n. 69 at 10

⁷⁸ Ibid., 18

When 'Umar took over the baton as the second Khalifa, his reign experienced a tremendous development in the area of expansion of the Islamic territory and administration of justice. He was the first to directly charge people with judges function by specifically appointing Abū Dardā as a judge with him in Madīna; Shurayḥ as a judge in Baṣrah and Abū Mūsā al-Ash'arī as a judge in Kufah with the introduction of salary for judges. During this period, the role of judiciary was strengthened in areas of interpretation of the divine law and dispute resolution for the protection of people's rights. Khalifa 'Umar laid down many important principles in the administration of justice to enable judiciary perform its functions with ease and reasonable level of accuracy. Among his initiatives are the code of conduct for Muslim Judges, the rules of evidence and procedural rules as contained in his letter to Abū Mūsā al-Ash'arī.⁷⁹ It could be deduced from the content of the letter that, protection of peoples' right of access to justice and equality before the law are, among others things, major functions of the judiciary. Khalifa 'Umar established what could be called the Police department, Public jail, separation of the judicial power from the executive power and constitution of the first Jurist Committee to produce what is akin to rules of practice and procedure for the judges.⁸⁰

In a similar manner, Khalifa 'Uthmān and 'Ali faithfully followed the righteous precedence laid by their predecessors in the area of law and administration of justice. In addition to what was on ground, Khalifa 'Ali was a supporter of law or legal regime, he was said to have propounded during his reign, the doctrine of *Am* in the field of inheritance;⁸¹ individual or personal liability of accused in crime investigation procedure in criminal cases.⁸²

The above is the premise upon which the judicial system in Islam was built which was followed in the later Islamic administration starting from the period of *Umayyad* with substantial development and improvement on the system especially during the unequalled reign of 'Umar bn. 'Abdul 'Azīz. It was in view of softening the burden of enormous duties and responsibilities upon the Khalifa that brought about the development in the appointment of offices of the Imām, Mufti and the like as we have in the recent time.⁸³

Right from the time of the prophet, the general principle for the appointment of a Muslim judge is that he must be a Muslim, free person, male⁸⁴ and *mukallaf* (legally responsible), sane, have sound sense of sight, hearing and speech, in addition he must be an upright person of unquestionable character, literate in Qur'ān and sunnah and intelligent to make independent research (*mujtahid*). Basically during the early period of Islam, the function of a judge was narrowed down to settlement of dispute between litigating parties. It was however expounded later during the Khaliphate period to cover some other vital areas of concern of the Muslims.⁸⁵ From the totality of the above therefore, the major function of a judge and judiciary in Islam is to see justice done, that the people have full access to justice and protected same and other rights as their fundamental right without prejudice.

⁷⁹ See Al-mawardi, n.74 at 71; see also M.A Ambali, "The Practice of Family Law in Nigeria" (Zaria, Nigeria: Tamaza Publishing Company Limited, 2003), at 93.

⁸⁰ See Qadri, n. 69 at 21.

⁸¹ Ibid., 26 where references were made to various remarks of the early companions describing him as great jurist and the most learned in law of inheritance. For instance the author quoted Khalifa 'Umar to have remarked thus, "Ali is the best of us in judicial decision" and that whenever a trustworthy person disclosed to him a judgment of 'Ali, he will not deviate from it. In a similar development, 'Aisha was reported to have said about him, "Verily he is the most learned in the Sunnah."

⁸² Ibid., 27.

⁸³ Ibid., 33.

⁸⁴ Although some jurists opined as an exception to the general rule that a woman could be appointed as a judge under certain circumstances, see M.A Ambali, "The Practice of Family Law in Nigeria" (Zaria, Nigeria: Tamaza Publishing Company Limited, 2003) at 82.

⁸⁵ Ibid., 93. See also Prof. Dr. Anwarullah "Principles of Evidence in Islam" (Kuala Lumpur, A.S. Noordeen, 1999), at 144 s.

Judiciary and Human Rights in Islam

Protection of human rights is an essential function of judiciary in Islam. Access to justice is no doubt a fundamental right in Islam. On this note therefore, judiciary as an institution in Islam does not compromise its role in this regard, and there are numerous instances of judicial protection of human rights in Islam, right from the period of the Prophet (SAW).

Equality before the law as a right was often protected by the Prophet (SAW) as a judge. The judiciary, like other sectors under the Holy Prophet (SAW) treated everyone equally when it comes to legal proceedings. Noble people appeared in court to answer claims from those regarded as ordinary people and judgements were given among them impartially by the Prophet (SAW). The Hadith of the Holy Prophet (SAW) that exemplified the position of Islam on justice and equality is the popular Hadith of a lady belonging to a noble family who was arrested in connection with the offence of theft. Pleadings were made for her to be spared and or exonerated of the punishment on account of the nobility of her family, but the Prophet (SAW) in protecting people's right of equality before the law, was reported to have reacted thus:

The nations that lived before you were destroyed by God because they punished the common man for their offences and let their dignitaries go unpunished for their crimes: I swear by Him (God) who holds my life in His hand that even if Fatima, the daughter of Muhammad, had committed this crime, then I would have amputated her hand⁸⁶.

Instances of judicial protection of human rights were found during the reign of the Khaliphs, for instance 'Umar bn al-Khaṭṭāb was sued before Khalipha Abūbakar in a case of custody of a child and judgement was given against him despite his status and reputation. Also during the period of 'Umar as Khalipha, in protecting right to dignity of human person, the Khalipha was reported to have ordered an Egyptian to take vengeance by telling him to beat the son of the noble who eventually was Muhammad the son of 'Amr bin al-Āṣ, the then Governor of Egypt and afterward said to the governor:

O Amr when did you start to enslave the people, though they were born free of their mother?⁸⁷

In a similar development, Abū Mūsā Ash'arī as a Governor also offered himself to be avenged against in the public as ordered by Khalipha 'Umar before the wronged person pronounced wholehearted forgiveness to him.⁸⁸

One of the unique features of the Islamic judicial system from inception is equality before the law, as the Prophet himself never claim to be above the law and that any of the Muslim leaders can be brought to court in both his private and official capacities. This principle confirms the independence of judiciary in Islam and its autonomy as well and boost the impression that protection of the people's right is ensured under such system where justice is obtainable without any influence.

Furthermore, the practicability of the above principle was exemplified by the judiciary in the following instances. Khalipha 'Umar was said to have purchased a horse and during the testing course it got injured, he offered to return same while the seller rejected it, dispute arose and the case was referred to a judge who gave impartial judgment against the Khalipha for which the Khalipha was commended and promoted him. The same Khalipha was said to have caused his drunken son flogged publicly. A similar instance is the dispute between Khalipha 'Ali the then ruler of the

⁸⁶ Sahih Muslim, Book 17, Hadith 4187 - 4190.

See Afridi, n. 28 at 135

Ibid., 149

Ummah and a Jew over a war gown. The judge, in person of Shurayh⁸⁹ gave judgment against the Khalipha not because he doubted his truthfulness but because he was unable to satisfy the procedural requirement in respect of his evidence. In fact it was a landmark judgment to which the Jew confessed 'Ali's ownership of the gown and consequently embraced Islam.

Conclusion

A just society is the one in which human rights can be best protected. Justice in Islam is an essential instrument for the procurement and maintenance of peace and tranquillity in the society. The perspective through which Islam sees administration of justice makes it more different and unique; it is *farq kifāyah* on the whole community and *farq 'ain* on individual member of the community depending on the circumstances of each case.

Protection of individual rights has been in the culture of Islam right from the time of the Holy Prophet, the Khulafau (*sing.* Khalipha) and the Sahabah. Instances of Human Rights protection as enumerated above depicts the protection of peoples right particularly right to justice and right to equal treatment before the law. It is clearly evident that before the conventional human right advocacy, Islam has taken proper care of the right of individuals by way of protecting same through the judiciary.

More important is the dispensation of justice being seen as devotional act in which the judge is not only answerable to the public but also to his God. This assures commitment on the part of a judge to ensure that justice is done at all times. A rider to this is the position of Islam on equality before the law and judicial independence. Where a judge is rest assured that he is free of influence and intimidation in the discharge of his duty, even if he gives right and appropriate judgment against the president and head of government, his life and job are protected. Unlike the case under the Conventional human right system, no personality is immune from equal justice under the Islamic Law. If this and other exemplary features of the Islamic judicial system can be incorporated into the conventional judicial system, the judiciary and the judges will have less or no fear in discharging their functions for the maintenance of justice and protection of people's rights.

⁸⁹ This was the same judge who gave judgment against Umar as Khalipha.