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Aviation Security Provisions Versus Basic Fundamental Human Rights: The Islamic Law Perspective

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Abstract

One of the cardinal principles of Islamic law is the protection and safeguard of human life and property. In Islamic aviation security parlance, therefore, passengers, aircrews and other aviation workers lives as well as properties comprising aircrafts, passengers' luggage, airport and its equipment's must be protected against any of the unlawful interference with civil aviation. In recent times particularly, in the 21st centuries, the protection that needs to be given to these important aspect of human existence tends to be shaking and derogating because of the conflicting interests between the providers of Aviation security services and human rights activists. The purport of the conflict between the Aviation security providers and the activists is not personal but generated in the performance of the application of the law toward human beings for the purpose of protecting civil aviation in general. While the Aviation security providers' device technological means to detect aviation criminals, the activists rejected such device on the ground that it intrudes and reveals human private parts as well as its negative health effect and sudden breach of right to freedom from discrimination. The paper therefore raises a query: What is the position of the Islamic Aviation Security Law on this issue as argued by the Aviation Security Providers and counter argument from the Human Rights Activists? On what circumstance(s) will fundamental human right be derogated to protect civil aviation?

Key terms: Islamic Aviation Security Law, Fundamental Human rights, Unlawful interference, *Maqasid al-shari'ah,* Annex 17 to the Chicago Convention 1944, Derogatory, *Maslaha*

Introduction

Islamic Aviation Security law is a branch of Islamic legal system different from Common and French legal systems. It is an embodiment of rules and regulations guiding all spheres of aviation security one can think of. Allah said: "Nothing have

we omitted from the Book..."[1] While other legal systems are only promulgated to guide worldly affairs between human beings, the purport of Islamic law is beyond human imagination, as it is design to educate the people on worldly affairs including security of civil aviation, and the life in the hereafter.

Aviation security and basic fundamental human rights, whether under Islamic or conventional law are two rights that must be guided and protected rigorously by whatever means within the reach of an individual and, where pertinent, any Islamic state. They involve life, religion, and property which can best be described as parts of an important aspect of human existence (*Maqasid al-shari'ah or maqasid al-ummah)*. In recent times particularly, in the 21st centuries, the protection that needs to be given to these important aspect of human existence tend to be shaking and derogating because of conflicting interests between the providers of Aviation security services and human rights activists. Security services providers, it is argued, elect to dispense with basic fundamental human rights in the interest of aviation security. In defence, the providers cited several instances of unlawful interference with civil aviation the consequence of which results in loss of lives, and property of aviation providers and passengers. The activists vehemently opposed this proposition and contended that under no circumstances should these rights be derogated. The purport of the conflict between the Aviation security providers and the activists is not personal but generated in the performance of the application of the law toward human beings.

For the purpose of this paper, the basic fundamental human rights are restricted to right to privacy, health and freedom from discrimination. By analogical deduction, these rights are derived from the principle of Islamic law known as *Maqasid shari'ah.* Thousands of western scholars have written and commented on the conventional analysis of basic fundamental human rights vis-a-vis aviation security, yet no literature have been found on pure Islamic law approach in this area. It is from this perspective that this article will examine, from the Islamic law perspective, the basic fundamental human rights and appraise the aviation security procedures that are considered to impinge upon these rights with a view to

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[1] Al-Qur'an, Surah al-An'am, 6:3 (Abdullah Yusuf Ali Translation, Islamic Book Trust, Kuala Lumpur, 2007).

balancing the conflicting interests of the security services providers and human rights activists.

2. Basic Fundamental Human Rights under the Islamic Law Right to Privacy

In the word of western scholars, the term "Privacy" is incapable of giving a specific connotation.[2] However, Warren and Branders gave the first definition of privacy in 1890 as "right to be let alone".[3] It seems Warren's definition is similar to the earlier connotation of the term as contained in Surat Al-Hujurat (Quran 49 v. 12) where Allah SWT said:

> And do not spy or backbite each other.[4]

Ibn Kathir while commenting on the above Surah underscores the importance of privacy in Islam and posits that *Tajassus,* means "to spy somebody or to search for something, harbours ill intentions."[5] It is submitted that "right to let alone" and "do not spy" mean the same. In fact they are intended to serve the same purpose-that is privacy right. The right to privacy shall be discussed under two sub-heading:

Aviation Security versus Right to dignity of passengers

Pursuant to article 13 of the Convention on International Civil Aviation, 1944[6], the contracting states adopt various security screening methods including the use of Advance Screening Technology, physical search and pat-down to detect contraband concealed in the body or clothing of passengers. Consequently, the religious

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[2] See Michael Foutouchos, (2005) "The European Workplace: the right to privacy and Data protection", , *Accounting Business and public interest,* Vol. 4 (1), 36.

[3] See Warren and Branders L.D, (1890) "The Right to Privacy", *HARV. LAW REV.* Vol. 4, 193; See also Velu,J, (1973) "European Convention on Human Rights and the Rights for Private life, the Home and Communication", in A.H Robertson(ed), , *privacy and human right*, MUP, Manchester, 27-31; See also D. Banisar, (2011), *The Right to Information: Balancing Rights and Managing Conflicts,* (The world Bank Institute Working Paper Series), 6 ; See also D. Calcutt QC, (1990) Report of the committee on privacy and related matters, Commd. 1102, HMSO, London, 7 See also See per La Forest .J. (2003), in *R v Broadcasting, standards commission* exparte BBC , 3 WLR 1327, 1332.

[4] Surat Al-Hujurat, Quran 49 v. 12.

[5] Tafsir Ibn Kathir,vol. 9, pp201-202.

[6] Convention on International Civil Aviation 1944, done at Chicago on 7 December 1944 and entered into force on 4 April 1947, 15 UNTS 295, 61 Stat. 1180. T.I.A.S No. 1591. [Herein after referred to as the Chicago Convention, 1944].

groups[7], the American Civil Liberties Union (ACLU)[8], and the Electronic Privacy and Information Center (EPIC) rejected the adoption and use of these methods on the ground that they intrude into passengers' privacy. Their oppositions to the methods stemmed from the fact that the imaging technology displays highly personal details of a passenger's body such as evidence of "mastectomies", "colostomy appliances", "buttocks", "piercing", "penile implant", "catheter tube" and the size of breast or genital, and therefore violates the Fourth Amendment, the Privacy act, The Religious Freedom Restoration Act and the Video Voyeurism Prevention Act.[9]

In response to the above protests, the Aviation Security Providers including the American TSA and the Director Aviation Security, Muritala Muhammed International Airport, (MMIA) Lagos, Nigeria maintain that the adoption of the methods was to further strengthen the safety and security of civil aviation against unlawful seizure and sabotage of aircraft among other civil aviation offences, particularly after the Christmas day event of 2009 where a passenger smuggled plastic explosives onto a Detroit-bound airliner, and that of 9/11 events.[10]

It is submitted that the issue of aviation security versus right to privacy is an unending discussion up to this moment, what therefore is the position of Islamic law in this regard?

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[7] Bahrampour Tara. Washington Post. Dec. 23, 2010. TSA Scanners, Pat-downs Particularly Vexing for Muslims, Other Religious Groups.

[8] ACLU Backgrounder on Body Scanners and 'Virtual Strip Searches" < http://www.aclu.org/technology-and-liberty/aclu-backgrounder-body-scanners-and-virtual-strip-searches. > (accessed 29 March, 2018). See also ACLU, Airport Security: increased safety need not come at the expense of civil liberties <http://www.adu.org/nationalsecurityfacts-airport-securityaccssedon > (accessed 29 March, 2018).

[9] See the EPIC Organized meeting, The Striping of Freedom: A Careful Scan of TSA Security Procedures, set at the Carnegie Institute for Science in Washington, DC. < http://epic.org/events/tsa/ > (accessed on 29 March, 2018). See also EPIC v. DHS (Suspension of Body Scanner Program) < http://epic.org/privacy/body_scanners/epic_v_dhs_suspension_of_body.html. <(accessed on 29 March, 2018). See also Patrick Mehta and Rebecca Smith-Bindman, Airport Full body screening: What is the Risk? Arch. Intern Med. Vol. 171 (12) (2011), p. 1112.

[10] Director of AVSEC MMIA, Lagos, Nigeria, interviewed by the author at Lagos state, Nigeria on 25 October, 2013. The same view was expressed by the Director AVSEC Ilorin International Airport, Ilorin on the same date. See also Patrick Mehta and Rebecca Smith-Bindman, Airport Full body screening: What is the Risk? Arch. Intern Med. Vol. 171 (12) (2011), p. 1112.

To start with, there is no direct authority either from the Holy Quran or Hadith of the Prophet Muhammad (SAW) that discussed the adoption of security screen methods and the controversies surrounding their applications. However, by analogical deduction, the Islamic law position on the issue of exposure of private parts of the passengers (display of highly personal details of a passenger's body) to the screener through the use of imaging machine, or touching of the private parts through the adoption of pat-down shall be considered.

Islam totally forbids unnecessarily exposure of human private part to another person, except husband and wife.[11] This position has found support in the Holy Quran and Ahadith of the Prophet (SWA). Allah (SWT) proclaimed:

> Who abstain from sex, except with those joined to them in marriage bond, or (the captives) whom their right hands possess- for (in their case) they are free from blame. But those who desires exceed those limits are transgressor.[12]

Aisha reported to have said that she used to bath with the Prophet Muhammad in the same bathroom using the same bowl.[13] Further Imam Ahmad, Abu Dawud, Tirmidhi, Ibn Majah and Hakim reported from Muhawiyyah bin Hida that Prophet Muhammad (SAW) said: "Do not show your private parts to anybody other than your husband and female slaves".[14] Ibn Taymiyyah contributed to knowledge when he said the Prophet is reported to have said that "a man should not look at the private parts of another man and a woman should not look at the private parts of another woman"[15] All these are clear provisions from the primary sources of Islamic law. Thus, acting in contradiction of these authorities without legal justification amounts indecency and obscenity.

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[11] Murray, T.H., (1987) "On the Human Body as property: The meaning of Embodiment, Markets, and the Need of strangers", *Michigan University Journal of Law Reform,* (20) 4, 1055, 1089; *See Layth, A.,* In defense of obligation of covering the Awrah, Seeking IIm Research Publications http://www.seekingilm.com/archives/44 accessed 15 September 2015. See also Ismail Mustapha Adua, AbdulGhafur Hamid, and Mohammed Iqbal, (2015) "Airline Passengers' Screening: An Appraisal from the Islamic Law Perspective", *IIUM Law Journal*, Vol. 23(1), 143-144.

[12] Qur'an, Surah al-Mu'minun, 23: 5-7.

[13] Bello-Salau, H., Salami, A.F., Hussaini, M., (2012) "Ethical Analysis of the Full-Body Scanner (FBS) for Airport Security", *Advances in Natural and Applied Sciences*, Vol. 6 (5), .664 at 669.

[14] Huwayni, *Al-fatawal-hadisiya,* Vol. 1, 44-45; See also Al-Nawawi, *Al-majmu,* Vol. 16, 134-135.

[15] Murray, at 1089.

Further analogy can be drawn from the above authorities to the effect that it is forbidden for a stranger[16] to look at another person's private part. It is therefore submitted that if mere looking is prohibited, touching of the sensitive parts of human being by the screener is also prohibited. It can be safely concluded that it is only the husband and wife that are allowed to see and touch the private parts of each other. In this respect, the adoption of Backscatter and Millimeter wave machines, and pat-down or physical search could be detested under Islamic law. This is the general rule in which exception shall be provided through the analogical deduction in the later part of this paper.

Aviation security versus Information privacy of passengers

According to Golumbic, each passenger has the right to control the information about himself and the use of information so collected. In addition, each passenger is entitled to determine the circumstance in which the information about him will be published, or accessible to the public. This right is known as right to information privacy.[17] To achieve the maximum security of the passenger's information, the ICAO has approved the use of a Machine Readable Travel Documents (MRTDs)[18] to store the specific biometric information of the holder in addition to some personal information on the document. The purpose of the biometric information is to identify and verify the in-coming and out-going passengers at the border control, and as well to prevent the high quality of passport forgery.[19] In furtherance to the secrecy and privacy issues in these forms of MRTDs,[20] the ICAO warned that information stored in these machines should be secured against "skimming" or "eavesdropping" so that the passenger's data would not be read from the vicinity of the airport.[21] The challenges of skimming and eavesdropping in the MRTDs

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[16] For the meaning of Stranger under Islamic Law, see Ismail Mustapha Adua, AbdulGhafur Hamid, and Mohammed Iqbal, Airline Passengers' Screening: An Appraisal from the Islamic Law Perspective, 23 (1), (2015) IIUM Law Journal, pp. 141-143.

[17] Golumbic, M.C, (2008), *The Balance between security and civil rights, in fighting terror,* Springer Berlin, 38.

[18] ICAO, Machine Readable Travel Documents, Annex 9, Chapter 5, paragraphs 3- 47, ICAO Doc. 9303; See also Conte A, (2010) *Human Rights on the prevention and punishment of terrorism,* Springer Verlag Berlin, Heidelberg,, 655.

[19] S.K. Gaurav and P.A Karger, (2005), *security and privacy issues in Machine Readable Travel Documents (MRTDs),* IBM Research report, 2005, n.p.

[20] The MRTDs includes biometric passports and visas, and in some states, National security cards. See Conte, supra, 655.

[21] *ICAO, Guideline on Machine Readable Travel Documents and passengers and facilitation,* 17th April 2008, 18.

raised privacy issue in the collection of passenger's data information. What therefore is the Position of Islamic law on these challenges?

Prophet Muhammad (SAW) has extended the form of right to privacy to include *Tahassus*. *Al-Awza'I* has interpreted *Tahassus* to mean "listening to people when they are talking without their permission, or eavesdropping at their doors..."[22] Islamic law forbids eavesdropping as being contrary to the right to privacy of information. It was narrated in the Saheehayn from Abu Hurayrah that the Prophet Muhammad SAW is reported to have said:

> Beware of suspicion, for suspicion is the falsest of speech. Do not eavesdrop; do not spy on one another; do not envy one another; do not forsake one another; do not hate one another. Be, O slaves of Allah, brothers.[23]

The punishment of eavesdropping is categorically stated in one of the Ahadith of the prophet as reported by Ibn Abbas thus:

> ...Whoever listens in on another people's conversations when they do not like that will have molten lead poured into his ears on the Day of Resurrection.[24]

It is submitted that the above authorities testify to the effect that each person has the right to control the information about himself and the use of information so collected. In addition, he is entitled to determine the circumstance in which the information about him will be published, or accessible to the public. Otherwise, the act is punishable in the sight of Allah.

In addition, Islamic law has deep respect for human dignity as a form of right to privacy. Dignity literarily connotes "decency, non-degradation, and self-esteem".[25] It is "the autonomy of an individual in addition to their having the right to make a

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[22] Ibn Abi Hatim recorded this statement. See Tafsir Ibn Kathir, supra.

[23] Al-Bukhari, 5144; Muslim 2563.

[24] Al-Bukhar 7042, narrated from Ibn Abass.

[25] Sayyid Mohammad H.L and Seyed Mohammad Kalantarkousheh, (2013) "The roots of Human Dignity according to Quranic Verses", *Australian Journal of Basic and Applied Science*, Vol. 7 (10), 393.

decision".[26] A categorical statement on human right to dignity has been provided in the Holy Quran thus:

> Certainly we gave dignity the Children of Adam, and carried them over land and sea, and provided them with all good things, and given them an advantage over many those We have created with a complete preference.[27]

While underscore the importance of this verse, Sayyid Mohammad H.L and Seyed Mohammad Kalantarkousheh posit that the verse clearly shows that dignity is explicitly given to human being without allocating it to Adam, Prophet, or any special group of people.[28] The kind of dignity Allah has given to children of Adam is unquantifiable. This submission found support from Surah Anbiya verse 26 where Allah said: "...rather they are [His] honoured servants". To further underscore the importance of human dignity, Islam has totally forbids Muslims from disgracing or mutilating the corpses of non-Muslims. That is why, according to Bukhari "The Prophet has prohibited us from mutilating the corpses of the enemies".[29]

As a respect to human dignity, Qur'an warned the Muslims about entering another Muslim's apartment without necessary consent and express permission been sought and obtained. Allah states in Surah An-Nur thus:

> O you who have attained to faith! Do not enter houses other than your own unless you have obtained permission and greeted their inmates. This is [enjoyed by you] for your own good, so that you might bear [your mutual rights] in mind.[30]

Even though the above verse specifically mentioned the believers, it is submitted that the entire human race, whether a Muslim or not, could learn a lesson of how and when to enter the house of one another. This is a clear demonstration of human dignity which Islam has accorded to human being.

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[26] McCrudden , C., (2008) "Human Dignity and Judicial interpretation of human rights", (2008), European Journal of international Law, Vol. 19 (4), 655-724. See also Sayyid Mohammad H.L , note 25 at 393.

[27] Quran 17 verse 70.

[28] Sayyid Mohammad H.L and Seyed Mohammad Kalantarkousheh note 25 at 394.

[29] Maududi, S.A.A., (2012), Human right in Islam cited in Sayyid Mohammad H.L and Seyed Mohammad Kalantarkousheh, note 25 at 394.

[30] Surat An-Nur, Quran 24 verse 27.

Aviation security versus Right to Health

The concern of the opposition to the use of Backscatter device, in relation to the health of the scanned passenger, is its radiation emission saga.[31] All the scientists agreed that the Backscatter technology generates low radiation into the body of scanned passenger(s). What is controversial and generating debate is whether the dose of radiation so generated is risky to the health of the scanned passenger(s).[32]

The American Civil Liberty Union, David Argard among others argued that the low dose of radiation produced by the Backscatter device is hazardous to the health of passenger. The health effect includes cancer, negative effect on reproductive organ and teratogenic, and cardiac arrest.[33] However, the proponent consisting of Aviation Security Providers, the Food and Drug Administration's Center for Devices and Radiological Health (CDRH), Rapiscan's Third-Party Radiation Testing Group, the National Institute of Standards and Technology's (NIST) Office of Law Enforcement Standards, and Johns Hopkins University Independent Assessment Group state that the radiation so produced by the Backscatter machine is negligible that it can't constitute a source of risk to human health.[34] This has

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[31] See Policy Report, Whole Body Imaging at airport checkpoints: the ethical and policy context, Hide & Rise Projects, Policy Report No. 2010/01, February 2010; See also Shapiro, Daniel L.,(2005) "The Nature of Humiliation" (Paper presented at the 2005 Workshop on Humiliation and Violent Conflict, Columbia University, New York, December 2005)p 1-5; See also Klitou Demetrius, (2008) "Backscatter Body Scanners-A strip search by other means" *Computer Law & Security Report*, Vol. 24 , p. 316-325.

[32] See Elif Hindie, M.D, David J. Brenner & Colin G. Orton, (2012), Backscatter X-ray machines at airports are safe, *Med. Phys. Point/Counterpoint,* Vol. 39 (8), 4649; See also Julie Accardo, & Ahmad Chaudhry M. (2014), Radiation exposure and privacy concerns surrounding full-body scanners in airports, *Journal of Radiation Research and Applied Sciences,* Vol. 7, 198; See also Patrick Mehta and Rebecca Smith-Bindman, (2011), Airport Full body screening: What is the Risk? *Arch. Intern Med.* Vol. 171 (12), 1113; see also National Research Council, Airline Passenger security screening: New technologies and Implementation Issues, National Academies Press, Washington, D.C, 1996, Chapter 6, p. 28. < http://doi.org/10.17226/5116 .

[33] See Policy Report, Whole Body Imaging at airport checkpoints: the ethical and policy context, Hide & Rise Projects, Policy Report No. 2010/01, February 2010; See also Shapiro, Daniel L.,(2005), "The Nature of Humiliation" (Paper presented at the 2005 Workshop on Humiliation and Violent Conflict, Columbia University, New York, December 2005)p 1-5; See also Klitou Demetrius, (2008) "Backscatter Body Scanners-A strip search by other means" *Computer Law & Security Report,* Vol. 24, 316-325.

[34] See Julie Accardo, & Ahmad Chaudhry M. (2014), "Radiation exposure and privacy concerns surrounding full-body scanners in airports", *Journal of Radiation Research and Applied Sciences,* Vol. 7, 199; See also Brenner D.J. (2011) " Are X-ray Backscatter Scanners Safe for Airport

been a source of worry as the argument and counter argument continued. Therefore, what is the position of Islamic law to the health of human being (Passengers)?

Islam clearly recognizes the importance of health to the individual and to the society at large to the extent that the Islamic government must protect this right without fear and discrimination on the basis of religion. In fact, this Islamic principle is followed by the World Health Organization when it advocates the slogan "Health For All" in the fourteenth century campaign in favour of right to health.[35]

The importance of right to health in Islam underscores the need to properly guide and protect the fundamental objective principles of Shari'ah (Maqasid al-shari'ah) which is the back bone for the existence of humanity in this world. Individual and Islamic government are under a divine duty to protect this right. Ali reported that the Prophet Muhammad is reported to have said:

> The Pen has been raised for three person (meaning they are not held accountable for what they do): one who is sleeping until he gets up, a child until he reaches the ages of puberty, and an insane person until he becomes sane.[36]

The importance of health has been clearly demonstrated in the above *hadith.* It therefore means that for someone to be bound and accountable for his action, he must be of good health. Health is therefore a necessity for an individual to be able to protect the principle of *maqasid shari'ah.* Imam Ghazli has this to say:

> A proper understanding and implementation of religion, from standpoint of both knowledge and worship, can only be arrived at through physical health and life preservation.[37]

It is submitted that religion as one of the *maqasid shari'ah* can only be protected and preserved through good health.

Passenger Screening? For Most Individuals, Probably Yes, but a Billion Scans per Year Raises Long-Term Public Health Concern" Radiology Vol. 259 (1), 6-9.

[35] Al-Khayat, M.H.,(2004), *Health As a Human Right in Islam*, World Health Organization, Regional Office For Eastern Mediterranean, Cairo, Egypt, 32.

[36] See Musnad Ahmad (1/154) No. 1327; Sunan Abu Dawud (4/140) No. 4402; Sunan Tirmidhi (4/32) No. 1423; Sunan Ibn Majah (3/198) No. 2041; Al-sunan al-kubra al- Nasa'I (5/265) No. 5596; Mustadak al-Haakim (2/67) No. 2350.

[37] Al-Khayat, M.H., *Health As a Human Right in Islam,p.32.*

Aviation security versus Right to Freedom from Discrimination

The application of rule(s), principle(s), practice(s) or law(s) and convention(s) in any where or event or circumstance which is subject to race, colour or religion among others, contravenes the principles of non-discriminatory envisaged in the Human right laws. Thus, it would amount to discrimination. Discrimination is interpreted to mean 'differential treatment, especially a failure to treat persons equally when no reasonable distinction can be found between those favoured and those not favoured. It is effect of a law or established practice that confers privileges on a certain class or that denies privilege to a certain class of race, age, sex, nationality, religion, or handicap'[38] The Human Right Committee defines it as ' any distinction, exclusion, restriction or preference which is based on any ground such as, colour, sex, language, religion, political or other opinion, natural or social origin, property, birth or other status and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms'.[39]

Accordingly, there were arguments and counter-arguments as to the discriminatory tendencies in the application of profiling as a measure to secure civil aviation; and the issue of travel ban. Profiling has been defined as 'a rapid risk analysis based on suspicious signs in a passenger's documentation, itinerary, appearance, or behavior'.[40] It is an ability to assess comprehensive amount of information about a person's personality.[41] In Aviation Security parlance, the term has been adopted as a method to search and identify enough information about individual's intent for the purpose of determining if such individual is a threat or is likely to be a threat to aviation security.[42] While it is clear that the main purpose of profiling is to fix out the would-be aviation offenders, its application based on religion, or race or colour amongst others as mentioned in the Human Rights Laws was out rightly condemned

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[38] See Black's Law Dictionary, 8th ed., p. 1286.

[39] See HRC General Comment No. 8, paragraph 7.

[40] See Martin Aggar, (2005), Passenger Profiling: dispelling the myths surrounding the controversy, *Aviation Security International*, Vol. 11, 20.

[41] See Dan Korem, (1997) *The art of profiling: reading people's right the first time*, Rechardson, TX: International Focus Press, np.

[42] See Jefferey Price and Jefferey Forest, (2009) *Practical Aviation Security: Predicting and Preventing the Future Threats*, Butterworth Elsavier; Oxford, 209.

by the American Civil Liberty Union (ACLU).[43] The reason been that the American Law Enforcement Officers adopted it to target an individual for suspicion of crime based on race, colour, ethnicity, religion or nationality.[44] The Union states further that the method would not only be unfair, unconstitutional but constitutes an ineffective mode of detecting who may be a criminal.[45] On the other hand, Bernard is of the view that the adoption of racial discrimination is permissible on the ground of compelling governmental interests[46] including but not limited to aviation security. Cont is of the view that profiling based discrimination is permissible if for example race is one of the factors considered to carry out the act.[47]

The question readily comes to mind regarding the adoption of profiling as a tool in determining and detecting would-be aviation criminals are: are all the passengers treated equally? What then is the position of Islamic law on the equality of man?

Islamically, the Holy Qur'an emphatically admonished equality of man and that no man is above another man. Thus, men are created from the same source (parent). This statement finds support from the Qur'an itself when Allah said:

> O mankind! We created you from a single (pair) of a male and a female, and made you into nations and tribes, that you may know each other (Not that you may despise (each other). Verily the most

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[43] See Ismail Adua Mustapha and N.O.A Ijaiya, (2017) "Racial Profiling versus Right to freedom from discrimination: An Analysis from the Aviation Security Domain", *Port Harcourt Law Journal*, Vol. 6 (1), 155.

[44] See American Civil Liberty Union, Racial Profiling: Definition https://www.aclu.org/racial-profiling-definition assessed on 20/5/18.

[45] See Ibid. See also The Committee on the Elimination of Racial Discrimination, Statement on Racial Discrimination, UN. Doc. A/57/18 of 4-22, March, 2002. See also David Harris,(2018) Ending Racial profiling: Necessity for public safety and the protection of civil rights (Being a testimony before the Sub-Committee of the Constitution, Civil Rights, and Civil Liberties of the United States House of Representatives on Judiciary Committee, on 7th June, 2010 <http://judiciary.house.gov/hearings/pdf assessed on 20/5/18.

[46] Bernard E.H, (2006), Muslims profiles Post 9/11: Is Racial Profiling an Effective Counter terrorist measure and does it violate the right to be free from discrimination?.*Ghicago, John M Oline Law & Economic working* paper No. 288 (2D Series) (Being a paper presented at the Oxford Colloqum on Security and Human Rights, Oxford University, 17th March, 2006).

[47] See Alex Conte and Boazganor, Legal and Policy issues in Establishing an International Framework for Human Rights Compliance when countering terrorism, ICT Paper < http://www.ict.org.il/pdf/Ganor_Conte_Nov05.pdf. assessed 20/5/2018. See also *Whren v. United States* 517 US 806 (1996).

> honoured of you in the sight of Allah is (he who is) the most righteous of you.[48]

Indeed, Islam is demonstrating equality of man in all aspect of human life. For example, Islam did not say a person is exempted from performing five daily prayers because he is an Arab or white or black man. In the same vein, An Arab man is not exempted from performing Hajj even though Mecca is located in his home town or he is from Saudi Arabia. Whatever applies to an Arab man equally applies to non-Arab. This is a clear provision of the Qur'an to His servant irrespective of race, colour, affinity or religion. The importance of this submission in relation to non-discrimination under the Islamic law follows the commentary as provided by the Ministry of Hajj and Endowment of the Saudi Arabia while interpreting the above verse of the Holy Qur'an thus::

> ...As it is, mankind is descended from one pair of parents. Their tribes, races, and nations are convenient labels by which we may know certain differing characteristics. Before Allah they are all one, and he gets most honour who is most righteous.[49]

It is submitted that the purport of the above provision of the Holy Qur'an is to completely ward off discrimination against fellow human being irrespective of his religion, race, colour or nationality. Men are created with different colour in order to appreciate the signs of Allah, to appreciate the wisdom of Allah and to glorify Allah for His mercies on us. Allah further said:

> And among His signs is the creation of the heavens and the earth, and the variations in your languages and your colours, verily in that are signs for those who know.[50]

Prophet Muhammad in his farewell sermon during his last Hajj in the year 632 A.C at Mountain Arafat warned the Muslim *ummah* on the need to shun act of discrimination in whatever form. The prophet is reported to have said:

> O people! Your Lord is One. Your father is one. There is no superiority for an Arab over a non-Arab nor for a white person over

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[48] Qur'an 49 verse 13.

[49] Ministry of Hajj and Endowment of the Saudi Arabia, *The Holy Qur'an: English Translation and Commentary,* Custodian of the Two Holy Mosques, King Fahd Complex, al-Madinah Al-Munawarah, 1413, p. 1593.

[50] Qur'an 30 verse 22.

> a black person except by piety. You belong to Adam and Adam is from dust. Your individual wealth, blood, and honour are as sacred to you as this day of yours in this land of yours in this month of yours.[51]

It is submitted that the importance of the above textual authorities are multi-dimensional. First, human beings are created from the same source that is the same parents- Adam and Hawau; Second, no human being is superior to other by reason of his colour, race, nation, religion or affinity; Third, the discrepancies in colour and race are pointing to the power of Allah that He creates the way He likes; and four, the favoured and the friends of Allah are those who fully submit and follow the command of Allah in entirety.

Discrimination makes one full of arrogance and feels on top of the world. That is why the Prophet has showed disgust and warned the faithful Muslims against discrimination. Prophet is reported to have said:

> O people, Allah has elevated from you the arrogance of the era of arrogance and taking pride in family and clan…Humans are the children of Adam and Adam is from dust.[52]

In another *hadith*, Prophet Muhammad is reported to have said: "Allah does not look at your appearances or your financial status, but He looks at your hearts and your action."[53] Therefore, no matter how highly placed human being is, Allah will not look at his appearances but whatever he does in this world. This further shows

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[51] Prophet Muhammad Last Sermon delivered 632 A.C, 9th day of Dhul al-Hijjah 10 A.H in the Uranah Valley of Mountain Arafat http://www.themodernreligion.com/prophet_lastsermon.htm accessed on 10 August 2015. See also Poonawala, Ismail. K., (1990) *The History of Tabari: The Last years of the Prophet,* Albany: State University of New York Press, 112-114; See also Guillaume. A., (1955) *The Life of Muhammad: A Translation of Isaq's Sirat Rasul Allah,* Karachi, Oxford University Press, 650-652; See also Abd as-Salam Muammad Harum, al-jai, al-Bayan wa-al-tabyin, *Taqiq and Shar*, 7th edition, al-Qahirah, maktabah al-khariji, pp.31-33; See also Nuh Hamim Keller, *Adab of Islam,* http://www.masud.co.uk/ISLAM/nuh/adab_of_islam.htm accessed on 10 August, 2015.

[52] Reported by Abu Dawud no. 5116; See also AbdulRahman al-Sheha, Human Rights in Islam and Common Misconceptions. In Abu Ayoub Jerome Boulter & Abdurrahman Murad (ed.), p.12 < www1.umm.edu/humanrts/research/Egypt/HumanRightsinI-slam.pdf > accessed on 15 September 2015.

[53] Reported by Muslim, Hadith no. 2564.

that AlMighty God hates discrimination and the Prophet had several times warned Muslim *Ummah* to shun any act of discrimination in all ramifications.

It is further submitted that the wisdom from the Islamic law principles relating to freedom from discrimination were copied and modified into western human rights freedom from discrimination as contained in the United Nations Universal Declaration of Human Rights 1948. As a matter of fact, the basic fundamental human rights must be well guided and protected under the Islamic and western human rights laws.

Aviation Security Provisions: Annex 17 to the Chicago Convention 1944

Annex 17 is an important security document to prevent and suppress the offence of aircraft hijacking and other related offences. It contains aviation security provisions and directives to secure the airport and aircraft and passengers from any of the unlawful interference with civil aviation.

The practical effect of articles 37 and 54(l) of the Chicago Convention 1944[54] brought about Resolutions A17-10 and A18-10 1970.[55] Pursuant to these two resolutions, Annex 17 to the Chicago Convention[56] was adopted as a template for the ICAO civil aviation security programmes. The aims and objectives of the Annex are to serve as a security document to prevent civil aviation against unlawful interference; and to coordinate the aviation security practitioners on their primary responsibilities on the prevention of all aviation offences.[57]

In the interest of national security, the Annex obliges the ICAO members to establish National Civil Aviation Security Committee to implement, and coordinate National Civil Aviation Security Programmes in their respective states.[58] It is submitted that aviation security experts should form the nucleus of the Security

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[54] Chicago Convention on International Civil Aviation 1944 adopted on 7 December 1944 and entered into force on 4 April 1947, ICAO Doc. 7300/9, Ninth Edition, 2006, articles 37 and 54 (l).

[55] See ICAO Res. A17-10 and A18-10, Annex 17 to Chicago Convention First Edition, 1974.

[56] Standard and Recommended Practices-Security-Safeguarding international civil aviation against acts of unlawful interference-Annex 17 to the Chicago Convention, six edition, 1997.; cited as 9 *ILM* 1278.

[57] See Annex 17, Chapter 2; see also Abeytrane, (1998) *Aviation Security Law,* Ashgate, Aldershot, 79; See also See Security-Safeguarding International Civil Aviation against Acts of Unlawful Interference < http://freedownloadb.com > (accessed 7 December, 2012).

[58] Annex 17, Chapter 3.

Committee, so that it would achieve its main aim and objective of securing the civil aviation in its entirety.

Very important in the provisions of Annex is a provision directing and obliging member states to conduct the screening of passengers and their baggage via electronic devices or by hand before boarding the aircraft.[59] This is done to detect explosives, weapons, and other dangerous devices that may be used to commit any of the offences against civil aviation.[60] However, challenges envisaged in the application of this directive are the cost of purchasing screening devices and prerequisite knowledge required in operation of the devices and the human rights challenge as it has been contended that the adoption of electronic devices intrude into the privacy of passengers.[61]

In addition, Member states are under obligation to render assistance to one another in the event of any unlawful interference by providing Navigational aids, Air Traffic services and permission to land. Furthermore, state that provides air traffic service should disseminate information to other Air traffic providers in order to put in place appropriate measure(s) for the security of aircraft and passengers therein.[62] This directive is in line with the provision of article 25 of the Chicago Convention that calls for the assistance of an aircraft in distress.[63]

It is submitted that a proper implementation of Annex 17 to the Chicago Convention will prevent and suppress any of the unlawful interference. That is why the international community has from 1974-2011, edited Annex 17 twelve times to meet aviation security challenges of a specified period.[64] Security challenges such

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[59] See Amendment 12 to the Annex 17 particularly Chapter 4, standards 4.2.6 and 4.2.7. See Assembly Resolution A37-17, Declaration on Aviation Security, C-DEC 191/2.

[60] Annex 17, Chapter 4.

[61] American Civil Liberties Union, Airport security: increased safety need not come at the expense of civil liberties. Retrieved 20 January 2015. http://www.adu.org/nationalsecurityfacts-airport-securityaccssedon; See also Ismail Mustapha Adua, *International Law On Aircraft Hijacking: The Practice in Malaysia and Nigeria,* Ph.d Thesis, International Islamic University, Malaysia, 2014, p. 181.

[62] Ibid., Chapter 5.

[63] See Chicago Convention, 1944, article 25.

[64] See Annex 17 to Chicago Convention, 1974, 9th edition, 2011 made pursuant to ICAO resolution A37-17, C-DEC 191/2; see also Paul S and Eugene S, (1990) "Setting International Aviation Security Standards". In Yonah A and Eugene S, *Aerial Piracy and Aviation Security*, Martinus Nijhoff publishers, Netherland, 7-8. See also Annex 17 to Chicago Convention, 1974, 9th edition,

as hijacking of aircraft to sabotage of aircraft to airport and its facilities destruction and in recent time modern day terrorism on civil aviation have been adequately taken care during the last amendment-Amendment 12 to Annex adopted on November 2010 and became effective on March 2011 but not applicable until 1st July 2011.[65] And to further embrace the uniform application of the Annex so that whatever the procedures that are applicable in one state would equally apply in another state.

It is further submitted that one of the cardinal principles of human existence (*Maqasid Shari'ah*) is the security of life and property. The purpose of Annex 17 on Aviation security is basically to protect and secure lives of passengers and their properties in all ramifications. It can be safely stated that Annex 17 to the Chicago Convention 1944 is in line with the principle of Shari'ah. In fact, Annex 17 could be described as a document to protect basic fundamental human rights of an individual or community as a whole.

It is further submitted that the grave consequences of unlawful interference with civil aviation such as unlawful seizure of aircraft, sabotage of aircraft, hostage of passengers, and airport and its facilities destruction, to mention a view, include loss of lives, destruction of properties, distortion of international peace, and psychological disorder of the family's victim. All these are forbidden under the Islamic and conventional concept of aviation security law.

Be that as it may, the adoption of screening devices, whether electronic or physical, to screen passengers for the purpose of detecting the presence of unlawful items such as explosive, knife, even blade and other dangerous weapons are permitted to secure the lives and properties, even that of entire human race which are the basis of human existence.

2011, Table A at vii; See also Roland I.C.B,(2012) *International Aviation Law: A Practical Guide,* Ashgate Publishing Limited.

[65] See ICAO Resolution A37-7: Declaration on Aviation Security, C-DEC 191/2.See also Izabela K, Modalena P, (2011) "New Counter Terrorism Legal Instruments Under The Auspices of International Civil Aviation Organization". In Emil P. W, *Biatostockie Studia Zeszyl 10,* 134; See also Alen K. J, (2005) Recent Development Relating To Terrorism and Aviation. In Victor V.R, Michael H and Kent R (eds.), *Global Anti-Terrorism Law and Policy,* Cambridge University Press, London, 227-228. See ICAO Resolution A22-17, Annex 17 to Chicago Convention, 9th edition, 2011..

The pertinent questions therefore are: Are these rights derogable under the Islamic law? If the answer is in affirmative, under what circumstance(s) would these rights be derogated?

4. When May Basic Fundamental Human Rights be Derogated under the Islamic Law?

There is no doubt that Islam protects basic fundamental human rights. This statement found support in all the aforementioned verses of the Holy Qur'an and the *ahadith* of the Prophet Muhammad so cited. Consideration as to whether these rights may, under certain circumstances, be derogated or otherwise can be addressed in the light of two basic principles of Islamic law, namely: Principle of *Al-Azimah wa-Rukhsah* and *Masalih al-Mursalah.*

Al-Azimah wa-Rukhsah

The Arabic word *Al-Azimah* has been interpreted to ordinarily mean "legal obligation or legal rule", while *Al-Rukhsah* is an "exception to the obligatory rule".[66] While *Al-Azimah,* on one hand; could be defined as an obligatory rules and regulations promulgated by Allah to all His creatures adherence of which attract reward and failure of which is punishable by Allah. On the otherhand, *Ar-Rukhsah* is an exception to the rules and regulations that guide human dealing in his worldly affairs. Simply put, *Al-Azimah wa-Rukhsah* connotes legal rule(s) and its exception(s). According to Hanafi School of Islamic Jurisprudence, the term *Ar-Rukhsah* can be interchangeably used with *al-darur*, meaning Necessity.[67]

It is submitted that the application of this principle in the light of basic fundamental human rights, therefore reveals that, it is an obligatory rule of law to respect, guide and protect the principle of human rights in accordance with the provisions of the textual authorities cited earlier. However, in exceptional and extreme circumstance(s), the obligatory rules relating to fundamental human rights shall be relaxed. It is further submitted that an instance of where such rule may be jettisoned

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[66] Yasmin Hanani Mohammad Safian, (2010) *Necessity (darura) in Islamic Law: A study with special reference to the Harm Reduction Programme in Malaysia,* Ph.D Thesis, University Exeter,.32-33.

[67] Ibid., at 62.

is where any of the element of human existence, *Maqasid Shari'ah* is being or likely to be affected.[68]

Therefore, a minor threat to the elements of objective of *shari'ah* will, as a matter of urgency and necessity, accommodate temporary suspension of the application of legal rules relating to basic fundamental human rights. This submission is inferred from the provision of the Holy Qur'an where Allah states: "...But if one is forced by necessity without wilful disobedience, nor transgressing due limits-then is he guiltless. For Allah is Oft-Forgiving Most Merciful".[69]

Unwitting disobedience is a complete defence to the suspension of application of obligatory rules. Assuming this is the case, the paper will therefore proceed to examine whether aviation security qualifies to be regarded as protection of *maqasid shari'ah* and therefore necessitate the suspension of basic fundamental human rights.

Aviation security provisions as a measure to protect Maqasid shari'ah

Longman dictionary of contemporary English interprets "Aviation" to mean "the science or practice of flying in aircraft".[70] Security is defined as "protection of person, building, organization or country against threat such as crime or attacks by foreign countries."[71] It has also been defined as "things that are done in order to keep someone or something safe".[72] Therefore, aviation security entails the act of protecting someone or person who engaged in the act of flying in aircraft. In Aviation Security Law parlance, the term is used to describe the "measures to safeguard civil aviation against acts of unlawful interference".[73]

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[68] See Bello-Salau.H., Salami. A.F., Hussaini. M.,(2012) Ethical Analysis of the Full-Body Scanner (FBS) For Airport Security, *Advances in Natural and Applied Science,* vol.65 (5), 670-671.

[69] Al-Qur'an, Surah Al-Baqarah 2 Verse 173.

[70] Longman Dictionary of Contemporary English, 3rd edition, London, Pearson Education Limited, 2000, p. 74; See also Cambridge Advance Learner's Dictionary, Cambridge, Cambridge University Press, 2003, p. 74.

[71] Cambridge Advance Learner's Dictionary, Cambridge, Cambridge University Press, 2003, p.1128.

[72] Longman Dictionary of Contemporary English, 3rd edition, London, Pearson Education Limited, 2000, p.1286.

[73] Jief Haung,(2009) *Aviation Safety and ICAO,* Netherlands, Kluwer Law International, 5.

Pilot (a person who engages in the act of flying the aircraft), passenger, aircraft, and airport are what constitute civil aviation. For the purpose of emphasis, Islamic law enjoins protection to life, property, family, religion and..... In this circumstance, it is the duty of government (Islamic or any other government) to adequately protect the lives of pilot and passenger in an aircraft against any of the civil aviation crimes. In addition, *shari'ah* obliges human being to protect and safeguard his property and that of another (movable or immovable). Thus, a movable property such as aircraft, and an immovable property including the airport are classes of property that is subject to the principle of Maqasid shari'ah. They therefore need to be protected in the interest of security of an Islamic state. It is submitted that protection and safeguard can only be given to the pilot, passenger, aircraft and airport through aviation security provisions as contained in the Annex 17 to the Convention on International Civil Aviation, 1944.

The screening methods, irrespective of whether or not intrude into the basic fundamental human rights of passenger(s) are justified from their aim and objective of protecting *Maqasid Shari'ah*. This position therefore necessitates the adoption of aviation security provisions as measures to secure and protect the principles of Maqasid Shari'ah. Thus, aviation security provisions will derogate the provision of basic fundamental human rights in an extreme circumstance such as unlawful interference with civil aviation, which will warrant temporary suspension of basic rights.

I. Application of Maslaha in the light of Aviation Security versus Basic Fundamental Human Rights

The Arabic world *"Masalih Al-Mursalah"* has literally interpreted to mean "public welfare or benefit", was originated from the Maliki School of Islamic Jurisprudence.[74] According to Baderin, the term may also be referred to as *"Maslaha al-Ummah"* meaning the "benefit or welfare of the muslim community as a whole".[75] Thus, the two terms may be interchangeably used. *Masalih al-mursalah* may therefore be defined as any legally thing, action, practice and procedure that will benefit Muslim community as a whole.

The importance of the doctrine as a vehicle to convey basic objectives of Islam to the mankind has been recognized by the later Islamic scholars such as Imam al-

[74] Baderin, at pp.42-43.
[75] Ibid, at 43.

Ghazali and al-Tufi of the Shafii; and Hambali school of Islamic jurisprudence. In fact, a 14th century jurist Abu Ishaq al-shatibi further extended the principle to "accommodate and use as a basis of rationality and extendibility principle for the universality and certainty of Islamic Law".[76]

Kamali while concurring with the exposition of Al-shatibi stated thus:

> The doctrine of maslaha is broad enough to encompass within its fold a variety of objectives, both idealist and pragmatic, to nurture the standards of good government, and to help develop the much needed public confidence in the authority of salutary legislation in Muslim societies. The doctrine of Maslaha can strike a balance between the highly idealistic levels of expectation from the government on the part of the public and the efforts of the latter to identify more meaningfully with Islam.[77]

The doctrine may be adopted to strike a balance between individual benefit that will cause untold hardship to the community and the societal benefit that will make life meaningful to the community at large. Beliefeldt observed as follows:

> What seemed to be useful to society could just be justified as being in accordance with; and indeed part, of the Shari'ah. At the sametime, those elements of the Shari'ah whose implementation could lead to undesired consequences were suspended pragmatically.[78]

It is conceded that basic fundamental human rights are divinely proclaimed in the primary and secondary sources of Islamic law. However, a strict application of human rights provisions when the national security including aviation security is being threatened or likely to be threatened will amount to misunderstanding of the principle of shari'ah. They are not revealed to cause hardship to the community. Al-Izz rightly observed:

> The divine law has been set in this form in order to secure what brings benefit to people and to prevent what is detrimental to them.[79]

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[76] See Masud, M.K; (1995) *Al-Shatibi Philosophy of Islamic Law, p.viii.*

[77] Kamali, M.H. (1998), *Have We Neglected the Shariah-Law Doctrine of Maslaha?, Islamic Studies,* Vol. 27 (4), 287-288.

[78] Heiner Beliefeldt, (2000) "Western" Versus "Islamic" Human Rights Conceptions: A critique of Cultural Essentialism in the Discussion on Human Right, *Political Theory*, Vol. 28 (1) , 90 at 106.

[79] Al-Izz Ibn Abdal-Salam, "Qwaid al-ahkam fi massalih al-anam".

Thus, where the application of the fundamental human right to privacy of a passenger will cause hardship to other passengers, the provision of the law should certainly be suspended. For example, an intending hijacker, who is a passenger, would hardly known unless and until the aviation security screening is been conducted on him. In this respect, fundamental human right to dignity and information privacy need be temporarily suspended. This is so to protect the community against insecurity.

In addition, the application of Neighbourhood principle in relation to doctrine *Masalaha* could justify temporary suspension of basic fundamental human rights to privacy, health and freedom from discrimination. Allah SWT states thus: ...and do good to your parents, kinsfolk, orphans, those in need, Neighbours who are kin, Neighbour who are strangers...[80] (emphasis added)

It is submitted that the underline portion of the above verse could be extensively interprets to include immediate or distance neighbours. In aviation parlance, a Neighbour may be immediate when he boarded the same aircraft with another passenger. Although they are strangers but became close by virtue of circumstance that unites them together-that is boarding the same aircraft. It may be distance when intending passengers met at the airport awaiting aviation security screening. These neighbours need protection from the government. Protection can only be afforded through the application of aviation security provisions on the screening of passengers. It can safely be concluded that protection of one's neighbour while on board aircraft is an onerous duty of passengers that must be performed for the safety and security of *Ummah.*

Conclusion

A careful reading of the Islamic principles to the ongoing conflict between the Aviation security and Human rights activists is a mere argument which has no basis from the Islamic point of view. Because, the so called conflict has been settled under Islamic law having regard to the provision of Al-Qur'an 6 verse 38 unless we don't know or refuse to follow same.

While it is conceded that human rights must be respected and protected on one hand, security of civil aviation must equally be protected in order to secure and protect fundamental objectives of human existence called *Maqasid Shari'ah*. This therefore suggests that whenever there is general principle of law, exception usually

[80] Surat An-Nisa, Qur'an 4 verse 36.

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follows immediately. In this circumstance, giving respect to fundamental human rights to privacy, health and freedom from discrimination is obligatory on mankind, this obligation can temporarily be suspended in an emergency situation wherein mankind has no power of choice rather than to act in another way. This falls under the principle of *Al-Azimah Ar-Rukhsah*. It is this principle that makes the aviation security provisions as one of the instances where these rights may be derogable considering the fact that civil aviation is being threatened with avalanche of offences.

In addition, it is the duty of government to secure its national against security threat of any kind from anywhere. This therefore calls for the application of the doctrine of *Masalaha* to accommodate aviation security provisions as a necessity to temporarily derogate fundamental human rights of passengers. The application of this doctrine will benefit the community by way of absolute security of civil aviation within their domain. However, it need be stressed that suspension of fundamental human rights to privacy, health and freedom from discrimination can and should only be allowed when there is perceived threat to civil aviation, but not to score a political or ideological point.

It is finally concluded that it is arguable from the paper that Islam has provided essential necessities of life that ensure and protect personal rights without damage to *maqasid shari'ah* which must be protected in accordance with the principles of Islamic law.