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Senior Lecturer and Head
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Unimaid Journal of Public Law,
Department of Public Law,
Faculty of Law,
University of Maiduguri,
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Borno State-Nigeria.
garbaumarukwagyang@yahoo.com

EDITORIAL NOTE

The Journal is a Publication of the Department of Public Law, Faculty of Law University of Maiduguri-Nigeria. It covers a wide range of legal subjects as well as topical issues from multi-disciplinary backgrounds just like the previous special edition.

Dr. Garba Umaru Kwagyang

Senior Lecturer and Head

Department of Public Law, Faculty of Law,

University of Maiduguri, Borno State-Nigeria.

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RIGHT OF POLITICALLY EXPOSED PERSONS TO FAIR TRIAL IN NIGERIAN COURTS: PIECING THROUGH THE CONSTITUTIONAL AND ISLAMIC PERSPECTIVES

ABDULFATAI O. SAMBO*

ABSTRACT

The right to fair trial is a fundamental aspect in human rights discourse that has taken a centre stage. This is because the protection of this right necessitates the observance of other constitutionally ordained rights. Yet, its continued application to Politically Exposed Persons (PEPs) accused of grand corruption remains uncertain. Despite its safeguards by the Nigerian Constitution, there are inadequacies in the implementation of the right to fair trial by the law enforcement agencies in Nigeria. In view of this, the paper seeks to make a critical exposition into the perspectives of the right to fair trial as provided for under the Nigerian Constitution and Islamic law in juxtaposition with the PEPs entitlement to fair trial. The objective is to aid law reforms in areas of fair trial in Nigeria and other similar jurisdictions in the world. Also, the comparative analysis with Islamic positions will benefit some States in the Northern Nigeria that are implementing the Islamic law as part of their legal system and other similar jurisdictions. In this paper, various constitutional provisions in Nigeria and the authors' experience in the area of criminal trials are used. The paper found that the application of the guaranteed rights to fair trial to the PEPs accused of grand corruption have been abused as PEPs are being treated above common accused. Yet, every person is equal before the law in from constitutional and Islamic viewpoints. It is suggested that the PEPs should be denied certain right to fair trial such as right to bail, presumption of innocence and some other rights identified in this paper. This is due to the pervasive nature of corruption by the PEPs and the adverse impacts of their actions on the nation's integrity, resources and stability.

Key words: Fair Trial, Human Rights, Criminal Justice, PEPs, Nigerian Constitution, Islamic law.

* LL.B, BL, LL.M, PhD, Solicitor and Advocate of the supreme Court of Nigeria, Senior Lecturer, Department of Public Law, Faculty of Law, University of Ilorin, Nigeria. Email: fataisambo@yahoo.com.

INTRODUCTION

The right to fair trial has assumed a very significant aspect of human rights discourse. This is because of its importance in realizing efficient and well-organised administration of justice.¹ These rights are not only vital but also essential in the interest of public morality, public safety and in interest of preserving and safeguarding the fundamental rights guaranteed the most nations' constitutions.² The access to fair trial also ensures equity, equality and fairly in the administration of justice not only by the state but also in international community. The right cannot be denied or abridged so long as the courts still exist and perform their constitutional roles.³ This could be the reason why many human rights instruments and the constitutions of many states of the world have incorporated the right to fair trial.⁴ The term 'fair trial' is similar to 'fair hearing' and it is often used interchangeably.⁵ Fair trial is wider in scope than fair hearing. Fair hearing which has the two elements of not being a judge in one's cause and not condemning a person unheard is therefore an element of fair trial. It ensures equity and justice in the administration of justice especially where it has to do with criminal matters. It is an essential civil right that protects people against the arbitrary use of criminal justice system by the state or its agency because it embodies basic civil rights and important rule of law.

In line with the current Administration's 3 point agenda, since 3 ½ years, there has been series of arrests, detention and prosecution of Politically Exposed Persons (PEPs) on account of alleged grand corruption.⁶ There have been mind boggling revelations of endemic looting and criminal diversion of public funds.⁷ Yet, successful prosecution or conclusion of these cases has been a daunting task. In fact, the President expressed serious displeasure and frustration on the deleterious roles played by the courts in the trial of these

¹ Lemmens, P. 'The Right to a Fair Trial And its Multiple Manifestations.' In E. Brems & J. Gerards (Eds.), *Shaping Rights in the ECHR: The Role of the European Court of Human Rights in Determining the Scope of Human Rights* 2014, 294-314. Cambridge Books Online: Cambridge University Press; Doswald-Beck, Louise. *Fair Trial, Right to, International Protection, Max Planck Encyclopedia of Public International Law*.

² International Constitutional Law website: <http://www.servat.unibe.ch/icl/> accessed on the 24th day of May, 2012.

³ <http://www1.umn.edu/humanrts/demo/subcomm46detainees.html> for United Nations Doc,E/CN.4/Sub.2/1994/24 of 3 June, 1994, accessed on 14/01/2011.

⁴ See Articles 6-12,15,16,18 of the Arab Charter on Human Rights (1994),Article 19 of the Cairo Declaration on Human Rights In Islam (1990), Articles 3,6,and 7 of the African Charter on Human and Peoples' Rights (ACHPR) (1981), Articles 3, 7-10 of the American Convention on Human Rights(ACHR)(1969), Articles 5-7 European Convention for the Protection of Human Rights and Fundamental Freedoms(ECHR)(1950). See also International Constitutional Law website: <http://www.servat.unibe.ch/icl/> accessed on the 9th January 2010.

⁵ See *Isiyaku Mohammed v Kano Native Authority* (1968) 1 All NLR 424.

⁶ The Guardian Nigeria: Politically Exposed Persons - Issues and Matters Arising-11 may 2016, <https://allafrica.com/stories/201605110560.html> Accessed on 15 November, 2018

⁷ Eme O.I (2012), Politically Exposed Persons and April 2011. General Elections in Nigeria: Challenges before Anti-Corruption Agencies, paper read at the International Political Science Association Conference held at Madrid between 7 and 11 June, 2012.

PEPs. This is usually due to issues relating to the right to fair trials of these PEPs. Hence, the looters become more emboldened and fight back.

Much academic discourse seems to ignore approaching the right to fair trial from a comparative perspective of the constitutional and Islamic law. This is no doubt important because of the fact that the two legal jurisprudence needs to benefit one or two things from each other in dealing with the issue of fair trial. This is more so that every legal system of justice is always geared to the serving the interest of justice. The objective of the paper is therefore to make a critical exposition into the different perspectives to the protection of the right to fair trial in relation to Politically Exposed Persons (PEPs). The paper is therefore divided majorly into five parts apart from the introduction. The first part examines the PEPs and the issue of fair trial. The second part examines pre-trial rights in relation to fair trial while comparing the main features with the position of the law in Nigeria and under the Islamic law. The third part makes an exposition into the right to fair trial during the pendency of an action in relation to on fair trial and the position under the Nigerian Constitution and Islamic law. The fourth part examines the post-trial rights in relation to fair trial while comparing the main features with the position of the law in Nigeria and under the Islamic law. The last part concludes the paper. Although fair trial is applicable in both civil and criminal action, the paper emphasizes on criminal action for a proper exposition of the positions in relation to PEPs.

POLITICALLY EXPOSED PERSONS AND FAIR TRIAL

The mainstream and the social media together with the lawyers, especially the senior ones have attacked the war against corruption.⁸ The usual ground is that fair trial is not observed in the fight against corruption of the PEPs. The EFCC has taken a bold step of indicting some lawyers and judges in this respect.⁹ The government has been urged to fight corruption to an extent permitted by the rule of law and fair trial. Nevertheless, some lawyers have taken this advantage to frustrate the prosecution of the PEPs of corruption. The media and lawyers have advocated for the right of these PEPs to fair trials as if the right only applies to the PEPs.¹⁰ The bodies never bothered about the fact that 67.6% out of the 75,176, 000 prison inmates as at 1st October, 2018 are awaiting trial in violation of

⁸ Femi Falana, 'The Treatment of the Politically Exposed Persons in the Fight against Corruption'. May 8 2016 *Being* the keynote address delivered by Femi Falana SAN at the round-table convened by the Department of Jurisprudence and International law, Faculty of Law, University of Lagos at the Nigerian Institute of Advanced Legal Studies, Akoka Lagos on March 27, 2016. Available at: <https://www.thecable.ng/treatment-politically-exposed-persons-fight-corruption> .Accessed on 15 November, 2018.

⁹ Okpaga A., Ugwu S. C., Onyishi, A.O. & Eme, O.I. 'EFCC and Politically Exposed Politicians in Post 2011 Elections: An Analysis of Governors who lost Elections,' (2012), Oman Chapter of Arabian Journal of Business and Management Review (AJBMR) 1, (7), February Edition, Pp.74 -98.

¹⁰ Ibid.

the right to fair trial.¹¹ They were not concerned about the 70 soldiers who were sentenced to death on national TVs for demanding for weapons needed to fight *boko haram* before 2015.¹² However, as soon as looters are handcuffed or leg chained, the media and lawyers quickly raise the issue of fair trial as if the common criminals had not been hitherto treated in that manner. The usual language of the PEPs when arrested or tried for corruption is that they are being 'persecuted'.

A Politically Exposed Persons (PEPs), according to the Financial Action Task Force (FATF), are persons who have been entrusted with a prominent public function.¹³ These PEPs, due to their position and influence, are in positions which are subject to abuse of office, corruption or financial crimes. In Nigeria, PEPs are specially treated in terms of being given bail on light terms or sometimes on self-recognizance despite stealing billions of naira or dollars. In fact, there are currently 55 former public officers who are standing trial for alleged stealing of N1.3 trillion whose cases have been subjected to endless delay. Since 2007, the trials of these PEPs have not yet been concluded. As soon as bail is granted, the PEPs with the help of lawyers, the media and sometimes the judges, use their looted funds to frustrate the trial through delays, legal technicalities such as stay of proceedings and incessant adjournments and other corrupt acts. These delays occur at trial and appellate levels. In some cases, trials are successfully stalled.

Thus, the Supreme Court has condemned the act of frustrating cases of corruption by the PEPs all in the guise of fair trial. In *Joshua Dariye v FRN*¹⁴, the appellant who was charged with the stealing of N1.2 billion ecological fund while he was governor of Plateau state filed a preliminary objection against the jurisdiction of the Federal Capital Territory High Court to try the case. Although the application was dismissed by both the trial court and the Court of Appeal the trial was suspended for 8 years. In dismissing the appeal the Supreme Court (per Ngwuta JSC) condemned the delay tactics as "a sad commentary on our fight against corruption." In concurring with the judgment, Nweze JSC said: "I have noticed a worrisome trend in most recent time, particularly among politically exposed citizens of this great country, imagining that they are above the laws of the land, have perfected some dubious tactics of delaying their trial when they run into conflict with the law."¹⁵

Nonetheless, the negative impact of the wanton looting of the nation's resources by the PEPs has been seriously felt by the society. Thus, the stealing of money meant for job

¹¹ World Prison Brief Data: Institute for Criminal Policy Research. Available at: www.prisonstudies.org/country/nigeria. Accessed on 22 November, 2018.

¹² Ibid.

¹³ Ibid. see also World Bank (2007), Politically Exposed Persons – A Policy Paper on Strengthening Preventive Measures, Washington DC: World Bank.

¹⁴ (2015) 10 NWLR (1267).

¹⁵ Ibid.

creation, infrastructural development such as roads and hospitals, schools, ecology, have respectively led to armed robbery and kidnapping committed by youths that are unemployed youths, avoidable deaths and the blowout of dangerous diseases, illiteracy and ignorance in the society, flood that has caused tragic death of people and displacement of others as well as the destruction of the properties of the victims. Yet, these PEPs hide under fair trial prevent or frustrate prosecution.

PRE-TRIAL RIGHTS TO FAIR TRIAL

These are rights enjoyed by an accused person before an action is brought against him in court. One of the most important aspects of these rights is the right against unlawful arrest and Detention. In Nigeria, a person has a right against unlawful arrest and detention. Arrest is only made for the purpose of bringing the offender to a competent court for trial. The Constitution provides for instances where a person may be arrested.¹⁶ In a situation where an arrest is unlawful or arbitrary, a person has the right to apply to court for the purpose of quashing such arrest.¹⁷ Also, detention of a person must be in strict compliance with the provision on the law.¹⁸ In a situation where a person is unlawfully detained, such a person is entitled to compensation.¹⁹

The position under Islamic law is that most Muslim jurists opine that issue of unlawful arrest and detention should be condemned.²⁰ In fact, they opine that accused should be at large before the trial is commenced since mere accusation is not sufficient to justify the punishment of *Ta'azir* of incarceration.²¹ Judge Abu-Youssef, of Abu Hanifah School was

¹⁶ See 35(1) of the Constitution of the Federal Republic of Nigeria, 1999 for (hereinafter referred to as "the Constitution" the instances where a person's liberty may be deprived. This is in addition to other laws regulation the procedure of criminal trial in Nigeria such as the criminal procedure Act, criminal Procedure Code and the Police. Arrest may be warrant or without warrant depending on the provision of the law regulating the circumstances of each case.

¹⁷ However should be noted that illegality of arrest in Nigeria does not vitiate the criminal trial where the person has been successfully brought before the court.

¹⁸ Ibid. section 35(1) -g of the Constitution.

¹⁹ Ibid. See section 35 (6) of the Constitution where it provides that a person, who is unlawfully arrested or detained, shall be entitled to compensation and public apology from the appropriate authority or person specified by law. A person may also be detained in connection with the commission of a crime or to prevent the person from committing offences where there is a reasonable ground for such suspicion (preventive detention) and detention could be for the purpose of executing order of court in relation to conviction and sentence. See generally section 35(1) (a) (c) of the Constitution.

²⁰ See A.M. Awad, 'The Rights of Individual under Islamic Procedure', in M.C. bassiouni, (ed.), *The Islamic Criminal System*, 102-104. See also Article 8 of the Universal Islamic Declaration of Human Rights, 1981 which gives persons rights against groundless charges in court.

²¹ This prescription was founded on the assumption of a traditional extended family where collective obligation of the families, the lack of mobility, and an uneasy distrust of strangers flight would have been difficult or impossible for the accused where he is detained prior to trial. However, the social and economic realities do not make this practicable. See M. Lippman, S. McConville and M Yerushalmi, *Islamic Criminal law and Procedure: An Introduction* (New York WestPort, London, 1988) 62. Some scholars have advocated for the use of pre-trial detention in situations where the *Qadi* has reasonable

of the view that pre-trial detention is not recognised under Islamic law. He pointed out that the Prophet and his successor, Abu-Bakr, did not have any prison or imprison those guilty of criminal act and that Abu-Bakr warned that an isolated defendant if starved would not be secure and would incriminate himself the more if starved, frightened or imprisoned.²²

Thus, it is evident that the practice of this right was realized during the period of the Prophet (s.a.w.) and the caliphs, based on Islamic positions. The implementation of this right under the Nigerian legal system today appears to be a mirage.²³ This is because there are many situations where people are detained pending their trials. This has in no small measure infringed upon the rights to fair trial of the accused. This is usually not applicable to the PEPs in Nigeria compared to ordinary citizens who are detained for a long time without trial.

Another right that aids the fair trial of the accused is the right to information. In Nigeria, a person arrested has the right to be informed of the reason for his arrest at the time of arrest except he is caught committing the offence by the law enforcement agency, in the language he or she understand and must be transmitted in writing the facts and reasons for his arrest within twenty four hours.²⁴ An accused also has similar right under Islamic law to be informed of the offence he is alleged to have committed promptly. He is also to be shown the material if any, to be used as evidence against him and must be given an opportunity to refute the allegations.²⁵ This was well practiced during the period of the Prophet and the caliphs. However, practice shows that the law enforcement agents do not comply with these rights in many occasions. Many accused are being detained for a period of time without being informed of the nature of the offence they are alleged to have committed. This also does not usually apply to PEPs.

In the same vein, an accused has the right against delay charge and trial. The right here implies that an accused is entitled to be taken before a competent court of law as soon as he is arrested without being subjected to unnecessary awaiting trial or delay in the dispensation of justice. The Nigerian Constitution prohibits delay in being charged to court

ground to believe that the accused if released is likely to jump bail or run away or where the accused if released is likely to interfere with investigation. Others are of the view that detention should only be made in respect of an accused that lacks piety while others limit the detention period not to be more than one month. For more on this, see A.M. Awad.Ibid.

²² Ibid. detaining a person before trial also interferes with the freedom of movement prescribed in Islamic law. See Q67:15.

²³ See A. O. Sambo and K. Quadri 'Right to Fair Trial: An Expository Study of the Nigerian and Islamic Perspectives.' (2012) 7(1-2) *Indian Journal of Human Rights and Social Justice*, 37-56.

²⁴ See section 35(3) Constitution of the Federal Republic of Nigeria, 1999 which provides that any person arrested or detained shall be informed in writing within twenty four hours in the language he understands the facts and grounds of his arrest or detention.

²⁵ See A.O. Sherif, 'Generalities on Criminal Procedure Under Islamic Sharia' in M. AbdulHaleem (eds), *Criminal Justice in Islam* (I.B. Tauris, London, New York, 2003) 1-16.

and delay in criminal trial. A person arrested must be charged to court within reasonable time which is defined as not more than 24 hours or 48 hours as the case may be.²⁶ The position under Islamic law is that an accused has the right to speedy trial without any form of delay. Islamic law does not give room for delays in the administration of justice. The jurists opine that where evidence is unduly delayed in criminal trial, doubt is casted on it and may not be able to sustain *Hudud* (capital) offences.²⁷

Similarly, an accused has the right to be admitted to bail. In a situation where an accused is arrested, he is entitled to be released on bail; pending investigation or trial. He is not to be held for a long time by the law enforcement officers. He may be asked to produce some guarantee before he can be allowed to go on bail. This position applies to the Nigerian and the Islamic position. The right to bail is also constitutionally guaranteed in Nigeria. In a situation where a person is unnecessarily detained more than the specified number of days mentioned above, he may bring an action under fundamental human rights enforcement procedure seeking to enforce this right and the Court may issue habeas corpus order or such other orders as the court thinks just to release the accused from custody.²⁸ Islamic law also gives the accused the right to be admitted on bail so that the accused will not be in custody unnecessarily for a long period of time. Respect for individual is a cardinal principle in Islam and Qur'an warns against persecution in many verses.²⁹ This was well practiced during the early period of Islamic rule. Experience over the years reveal that the right to bail is not well practiced practised in Nigeria. Many accused persons await prosecution while they still lay in the custody of the Nigerian law enforcement agencies. Also, even though it is expressly written in many police stations that bail is free and that it is a right, the practices in many stations are not the same.

²⁶ See section 35 (5) of the Constitution which defines reasonable time to mean in the case of an arrest taking place within where there is court of competent jurisdiction within a radius of forty kilometer, a period of one day and in such other cases, a period of two days or such longer period as in the circumstances that the court may consider reasonable. See also section 36(4) of the Constitution which provides that a person who is arrested or detained shall be brought to Court within a reasonable time and if he is not tried within a period of two months from the date of his arrest in the case of somebody who is in custody but not entitled to bail or three month in the case of somebody who is on bail, he shall without prejudice to any further proceeding that may be brought against him, be released either unconditionally or upon conditions as are necessary to ensure that he appears for trial at a later date.

²⁷ See M.M. Salama, 'General Principles of Criminal Evidence in Islamic Jurisprudence,' In: Bassiouni (note 10).

²⁸ See generally section 35 of the Constitution. Bail in capital offences is rarely granted even though the court may grant it on cogent and compelling reasons such as on health ground and there is facility in the prison for the kind of ailment of the accused. Bail in respect of felonies other than misdemeanor is discretionary of the court and bail for misdemeanor or simple offences are mandatory except there is a good reason for the denial of bail. See generally sections 340-343 of the Criminal Procedure Code, sections 128-129 of the Criminal Procedure Act and section 4 and 123 of the Police Act.

²⁹ See Qur'an 9:28-29; Qur'an 45:14; 2:256. See also M.C. Bassiouni, Sources of Islamic Law and the Protection of Human Rights in Islamic Justice System

However, bail in relations to PEPs has been abused in Nigeria. It is submitted that PEPs who have cases of grand corruption should not be entitled to bail ordinarily. Bail should be rarely granted. This will give room for plea bargaining as experienced between 2003 and 2007. The reason for the broad-minded policy of refusing bail in cases of grand corruption was elaborated by the Court of Appeal in *Ekwenugo v. Federal Republic of Nigeria*³⁰ where Fabiyi J.C.A. (as he then was) noted that "Nigerian judges do not operate in utopia. We operate in Nigeria. And no Nigerian judge can rightly claim he has not heard that Transparency International rates our nation-state as the most corrupt in the whole universe in the year 2000. This is ear-aching." In the same vein, refusing bail to PEPs will contribute to speedy administration of justice in grand corruption cases. However, in *Ibori v. Federal Republic of Nigeria*,³¹ bail was readily granted to Ibori notwithstanding the unopposed affidavit evidence of the prosecution that the 1st respondent had been convicted for stealing twice in the United Kingdom the federal high court admitted him to bail but ordered him to deposit his passport in court. But the Court of Appeal varied the bail conditions by directing that the passport be released to him to enable him to travel to attend to his medical needs and other personal matters pending the conclusion of the trial. In justifying the decision, the Justices of the Court of Appeal buffed articulate in defending the fair trial of the suspect and thereby gave the impression that suspects charged with corruption were automatically entitled to bail and the release of their passports.

Thus, pursuant to the principle of stare decisis, many trial courts have religiously followed the Court of Appeal in the Ibori case. Consequently, PEPs charged with grand corruption cases have taken advantage of bail and the release of their passports to seriously delay or frustrate their trial. Some of them even jumped bail and have since fled the country. Courts rarely grant bail to PEPs accused of grand corruption. To reintroduce the judicial policy of denying bail to suspects in corruption cases. To ensure that such suspects are not unduly detained, corruption cases should be tried daily as envisioned by the Administration of Criminal Justice Act, 2015.

Akin to the above is the right against unlawful detention and right of action in court without delay in proceedings where an accused is detained. The right suggests that where an accused is to be detained, the detention must be recognised by law properly decided by the court and the court should not hesitate to release the accused where detention is unlawful. As earlier stated the Nigerian Constitution frowns at unlawful detention or delayed trial.³² There are, however, problems with the practice. Many accused are detained

³⁰ (2001) 6 NWLR (PT 708) 171

³¹ (2009) 3 N.W.L.R. (Pt 1127) 94.

³² This right is fundamental to fair trial because prolonged detention or delay impairs the ability of the accused to defend himself by getting witnesses who might have died in the interval and the trial judge may also lose the impression of demeanor of the witnesses after a long period of time. See *PerIdigbe JSC*

unlawfully for many years and courts proceedings always last for years before they are concluded. With respect to Islamic law, Maududi made an important observation in this regard by stating that the principle of *habeas corpus* is recognized in Islamic law and that Islamic law allows the right of a litigant to appeal to a higher authority for the purpose of seeking redress of any unlawful detention.³³

In the same token, the accused has the right to enforceable compensation where unlawfully detained. If an accused has been wrongfully detained, he should be entitled to adequate compensation. This right is also guaranteed under the Nigerian Constitution. The State, therefore, pays compensation to the accused unlawfully detained compensation for the injury suffered as a result of unlawful detention but this is rarely paid in practice.³⁴ This is therefore rarely practiced in Nigeria. Many are detained and eventually released. Nothing really happens in terms of compensation. In fact, even if damages in form of compensation are awarded against the police, enforcement against them becomes an issue. This is because they are the ones who ought to enforce the courts' decisions. So, they can decide not to enforce it against themselves. This is basically against the dictates of the rule of law but this represents the situations.

Under Islamic law, detention is seen as affecting the right to freedom of movement. Where a person is unlawfully detained, the person is protected as the State bears the responsibility of providing for him food, clothing, medical care and other facilities needed to ensure that the accused retains his right as human being.³⁵ Judges are responsible for any serious mistake leading to the detention of the accused wrongly or unlawfully and the accused will be entitled to compensation for the injury suffered by the accused. The reason is that judges in the Shari'a has full authority over criminal procedures and should not be seen as making unwarranted mistake. Also, if any person in charge of arrests and execution of sentences exceeds his authority and causes damage to the accused, that person is fully responsible and may be liable to pay compensation in addition to the fact that he has committed *qisas* crime.³⁶ However, as earlier argued, the PEPs accused of grand corruption should be lawfully detained by courts to encourage plea bargaining and save the precious time of the court from being wasted.

in *Apkor v Iguorigo* (1978) 1 LRN. See also for more discussion on this B.O. Nwabueze, *The Presidential Constitution of Nigeria* (C. Hurst and Company, London, 1982) 436.

³³ See A.A. Maududi, *The Islamic Law and the Constitution*, 12th edn (Lahore: Islamic publications, 1997), 338-40. See also M.A. Baderin, *International Human Rights and Islamic Law* (Oxford University Press, 2003) 89 -90.

³⁴ See section 35(6) of the Constitution. However, where it is the Complainant that intentionally sets the law in motion for the purpose of punishing the accused and thereby makes an allegation knowing fully well that it is untrue or without a reasonable belief in its truth, the accused may bring an action against the complainant where the charge has been struck out for one reason or the other.

³⁵ See G.M. Hussein, 'Basic Guarantees in the Islamic Criminal Justice System' in M. Abdel Haleem, (eds) *Criminal Justice in Islam: Judicial Procedure in Sharia*, (I.b. Tauris, London, U. k., 2003) 51.

³⁶ Ibid.

Another important right which also ensures the fair trial of an accused before his trial is the right of humanity and dignity of human person. The fact that a person is charged for a criminal offence does not make him lose his right to human dignity. He needs to be treated with respect and due regards. The Nigerian Constitution also makes similar provision in this regard by guaranteeing the right to dignity of human person and also prohibiting slavery, forced labour, torture and other inhuman and degrading treatment.³⁷ It also frowns at situations where an accused person is mixed together with the convicted inmates; it is a violation of the right to dignity and the presumption of innocence of the accused.³⁸ The practice in Nigeria also reveals that this right is still being violated. It is not uncommon for the law enforcement agents to resort to beating or other forms of torture in the art of investigating the accused. They try to get the accused confessed to the commission of alleged crimes through the art of torture. This is notwithstanding the fact that it violates the law of the land.

The position under Islamic law is that this right is not only recognized but highly promoted, and practiced. The creator mentions in a number of verses in the Qur'an that He has honoured and dignified man and that man has been created as pure and innocent. The Qur'an says: "Behold, the Lord said to the Angels: I am about to create man from clay: when I have fashioned him in due proportion and breathed into him my spirit, fall ye down in obeisance unto him. So the Angels prostrated themselves, all of them together. Not so Iblis: he was haughty, and became one of those who reject faith. (God) said: O Iblis! What prevents thee from prostrating thyself to the one whom I have created with My Hands? Art thou haughty? Or art thou one of the high ones."³⁹

Also, to show high honoured human beings are in the sight of Allah (s.w.t.), He says: "we have honoured the sons of Adam; provided them with support on land and sea; given them for sustenance things good and pure, and conferred on them special favours, above a great part of our creation"⁴⁰. Thus, unlawful arrest and detention is prohibited under the *Shari'a*. Also, all types of force, torture, duress are prohibited in Islam⁴¹ and have no legal

³⁷ See section 34 which provides that every individual is entitled to the respect of dignity of his person and to that extent, no person shall be subjected to torture or inhuman degrading treatment, slavery or servitude, or forced labour (except in respect of the execution of the Court sentence, labour required for training of members of the force, reasonable force during emergencies, communal or civic obligation or National Youth service). What is degrading and inhuman treatment may sometimes be subjective and not capable of precise meaning especially in terms of punishment. While punishments like beheading, electrocution, leather injection, stoning to death, hanging, firing squad etc may be considered as inhuman and degrading by a class of people, others may see it as necessary for the execution in relation to the crime committed. Also, in the case of searches of a person, it should be carried out by a person not of the opposite sex so as not to violate section 34 except where it is absolutely necessary in the particular circumstance.

³⁸ See sections 34 and 36(5) of the Constitution of the Federal Republic of Nigeria, 1999.

³⁹ Q38:71-75.

⁴⁰ Q17:70.

⁴¹ See Article 7 of Universal Islamic Declaration of Human Rights deduced from the *Hadith* narrated by Bukhari, Muslim, Abu Daud, Trimidhi, Nasai. See also the *Hadith* narrated by Ibn Majah.

backing.⁴² Criminal procedure which violate this right are of no legal value and those who did this act in fact commit crimes and are criminally liable.⁴³ Although the actions of the PEPs accused of grand corruption has affected the citizen's human dignity, he should be entitled to the right to dignity in his trial.

Also, the accused juvenile has rights. He has a right to speedy adjudication. In Nigeria, juvenile trials are enjoined to be done expeditiously in the interest of public safety and morality and it's not to be held in open court.⁴⁴ There are courts designated as Juvenile Courts meant for the adjudication of juvenile justice and there are rules relating to juvenile trials.⁴⁵ Accused juvenile also has the right to speedy trial in Islamic and is accorded some rights to ensure is fair trial. In fact, children at early ages are forbidden from working and no burden should be put on them which would arrest or harm their natural development.⁴⁶ Also, a child is not punished until he attains the age of ten.⁴⁷

Furthermore, the right adequate time and facilities in preparation for defence and right of communication to a counsel of his own choice exists in the Nigerian and Islamic legal system. This means that an accused person should not be denied a reasonable request for an adjournment in order for him to adequately prepare for his defence. In a situation where he is also in custody pending trial, he should not be denied the right to communicate with a counsel of his own choice. The right to adequate time and facilities to prepare for his defence is guaranteed under section 36(6) (b) of the Constitution. It therefore means that a court should not reject reasonable request for an adjournment of the accused. This will be a violation of his right but the court has the power to reject an unreasonable request for

⁴² See Taha Al wani, 'The Right of an Accused During the Investigation Stage,' in *The Accused and His Rights Under Islamic Shari'a* 15-50. See also Article 7 of the Universal Islamic Declaration of Human Rights, 1981 (UIDHR) which provides that no person shall be subjected to any torture in mind or body or degraded or threatened with injury to him or anyone related to him.

⁴³ Ibid.

⁴⁴ See Children and Young Persons Laws of various States of Nigeria.

⁴⁵ Although the regular courts are used, for the purpose of trying a juvenile, these courts are designated as juvenile courts and its proceedings are not open to the general members of the public. Juveniles are not to be tried along with adult accused except the offences are committed together of the offence relates to murder or homicide. The identity of the juvenile must not be published and the word "conviction" or "sentence" must not be used where a juvenile has been found guilty. A juvenile must not be sentenced to death where he has been found guilty of murder but may be ordered to be detained until the pleasure of the President or Governor as the case may be is known. Even where he is detained, he should not be mixed together with adults inmate. In determining the age of the juvenile, the relevant age is the age of commission of the offence and not the age of conviction. See generally sections 6 (5) (6), 8(2), 11 and 16 of the Children and Young Persons Laws of Lagos State of Nigerian and section 368 of the Criminal Procedure Act of Nigeria.

⁴⁶ See generally Article 19(d) (e) (f) of Universal Islamic Declaration of Human Rights and Q 17:24; 65:7; 30: 21.

⁴⁷ This can be deduced from the *hadith* of the Prophet where he said a child can only be punished for not observing *salat* upon attainment of ten year of age.

adjournment meant to purposely delay the trial and defeat the end of justice.⁴⁸ Also, an accused has a right to communicate with a counsel of his own choice especially where he is under detention to enable him prepare for his case.⁴⁹ The position is similar under Islamic law. An accused has the right to defend him and to debunk whatever evidence put forward against him which may be done either by himself or legal representative of his own choice.⁵⁰ The PEPs should also be accorded the rights but it should not be allowed to the extent that it will delay the trial. PEPs' trials should be on a daily basis.

Lastly, the accused is also entitled to the right to his private and family life. The law is that every person is entitled to a private life and should not be subjected to arbitrary or unlawful interference with his privacy. The Nigerian Constitution also guarantees the privacy of citizens, their homes, correspondence, telephone conversations and telegraphic communications.⁵¹ However, the illegally obtained evidence is still admissible in the Nigerian courts. This perhaps accounts for the reasons why the law enforcement agents violate peoples' rights to privacy all in the name of seeking for material evidence to nail the accused. This right is also highly recognized under Islamic law.⁵² Islam recognizes the sanctity and privacy of persons, correspondences, homes and properties and that is why the Qur'an order believers not to enter the houses of another until permission is granted to enter.⁵³ Search of a person or property can only be allowed to be done by the investigative officer in the interest of the public in the maintenance of public order and safety.⁵⁴ The search must be authorized based on sufficient evidence that the person has committed a criminal act which must be based on the trustworthy witness to a crime or upon cogent and compelling circumstantial evidence. Evidence of an unauthorized search may be regarded as inadmissible.⁵⁵ The right should not be fully accorded to the PEPs accused of grand corruption. His right to family and private life should not affect investigation in any way.

⁴⁸ See *Police v Okafor* (1964) 2 All NLR 166. Facilities which an accused is entitled to include the evidence in possession of the State to be used against him such as statements made by the prosecution witnesses, documents to be used against him etc. facilities also includes the assistance of legal representative provided by the State at the State's expense but this cannot be absolute except where the accused does not have the financial means of getting a Counsel.

⁴⁹ See section 36 (6) (c) of the Constitution. Such a Counsel must however not be subject to any disability under the law in relation to his right of representation.

⁵⁰ See G.M. Hussein, "Basic Guarantees in the Islamic Criminal Justice System," in M. Abdel Haleem, (eds), *Criminal Justice in Islam: Judicial Procedure in Sharia*, (I.b. Tauris, London, Uk, 2003) 50. See Q 17: 15; Q33:5; Q49:6; 53:8. See also Article 5(b) of Universal Islamic Declaration of Human Rights.

⁵¹ See section 37 of the Constitution.

⁵² See Article 22 of the UIDHR. See also article 18(b) of the Cairo Declaration of Human Rights in Islam, 1990.

⁵³ Q24:27. The prophet was reported to have said that if a person deliberately looks at you without your permission and you throw him a stone which put out his eyes, no guilt will be on you. See al-saleh, Right of Individual, cited in M. Lippman, S. McConville & M. Yerushalmi, *Islamic Criminal Law and Procedure* (New York Westport, Connecticut, London, 1988), 65.

⁵⁴ See also Q49:12 where instructs us not to spy on each other.

⁵⁵ See Q49:12. Also, the prophet was also reported to be furious at a man who peeped at him curiously. Sahl b. Sa'd said: A man looked into the Prophet's chamber while the Prophet was scratching his head withan

RIGHTS DURING TRIAL

The purpose of this right is to cater for the security and the liberty of the person during trial. These rights guarantee the fair hearing and fair trial of the accused. One important aspect of these rights is right to equality before the law. The concept of equality before the law is guaranteed in the Nigerian Constitution. This is contained in the preamble and the substantive part of the Constitution as this is proclaimed together with freedom and justice as an ideal of social order established by the Constitution.⁵⁶ There is also a problem with the practice of this right in Nigeria. This is because certain categories of office holders are immune from prosecution under the law.⁵⁷ This right is also well entrenched in Islamic law because Islam values the concept of equality as all men are born equal and subject to the equal protection of the law. The law applies to everybody equally without regard to social and economic status in the society.⁵⁸ Allah (s.w.t.) revealed in the Qur'an that: Indeed, the most noble of you in the sight of Allah is the most righteous of you."⁵⁹ Thus, as far as trial before the courts is concerned, everybody irrespective the status, age, race or religion is entitled to equal protection of the law.

During the trial, the accused also has the right to publicity of trial before an independent tribunal. It is important that the trial of the accused should be made in public before an impartial, independent and competent Court or tribunal established by the ordinary law of the land. This right is also well guaranteed in the Nigerian Constitution. The essence of publicity of trial is to ensure integrity in judicial proceedings so that justice will not only be done, it must manifestly be seen to be done so that the Court will not be used as an

implement. [The Prophet came out and scolded the man]: "Had I known you were looking, I would have stabbed you in the eyes with this (implement); for [the requirement to request] permission [before entering an abode] was established [first and foremost to regulate] looking."

⁵⁶ The preamble to the Constitution reads "we the people of the Federal Republic of Nigeria: Having firmly and solemnly resolved: To live in unity and harmony as one indivisible and indissoluble Sovereign Nation under God dedicated to the promotion of inter-African Solidarity, world peace, international cooperation and understanding; and to provide for a Constitution for the purpose of promoting the good government and welfare of all persons in our Country on the principles of Freedom, Equality and Justice and for the purpose of consolidating the unity of our people." The State is also enjoined in the furtherance of the notion of equality by stating that every citizens shall have equality of rights, obligations and opportunity before the law while discrimination on the grounds of sex, place of origin, circumstance of birth, status, ethnic, language is prohibited. See section 15 of the Constitution of the Federal Republic of Nigeria, 1999.

⁵⁷ See section 308 of the Nigerian constitution.

⁵⁸ See Article 19(a) of the Cairo Declaration of Human Rights in Islam, 1990; Article 3(a) of Universal Islamic Declaration of Human Rights.

⁵⁹ Q49:13. The Prophet was also reports to have said that Men are equal as the Teeth of Comb. No Arab individual is superior to non Arab except in piety and was also reported to have said that if Fatimah committed theft, she would be treated like any other criminal. See M.S. al- Awwa, "The Basis of Penal Legislation," cited in M. Lippman (note 9), 60. See also article 3(a) of the Universal Islamic Declaration of Human Rights 1981 which provides that all persons are equal before the Law and are entitled to equal protection of the law.

instrument to unfairly and unjustly deal with the accused.⁶⁰ It is well practiced in Nigeria as most criminal trials are usually conducted in the public except where the law permits certain exceptions. The right is also protected under Islamic law. This is because the practices of the Prophet (s.a.w.) and that of his caliphs reveal that most criminal trials were conducted in the public, usually in the mosque, where many people would have access to what goes on at a given point in time.

In the same vein, an accused has right to presumption of innocence until the contrary is proved. The significance of this right is that it ensures that nobody including the public authorities can predict the outcome of a trial. The guilt of the accused therefore should not be presumed until he is found guilty in a competent Court of law after following necessary procedure for the trial. Section 36(5) of the Nigerian Constitution guarantees this right. The essence of this is to make the guilt or innocence of the accused depend on the evidence put before the court. The prosecution is required to prove the guilt of the accused beyond reasonable doubt but not an iota of doubt as provided for under the Islamic law.⁶¹ This is a very significant provision even under the Islamic law. Generally, every human being is considered innocent until the contrary is proved.⁶² He is seen as innocent and pure until otherwise proven.⁶³ This is also shown in the consensus of Muslim scholars

⁶⁰ Section 36 (4) provides that a person charged with a criminal offence shall be entitled to a fair hearing in the Public by the Court or Tribunal but the Court may exclude the members of the public from the Court proceedings other than the parties or their legal practitioners in the interest of public safety, public morality, public order and the interest of the or welfare of persons who have not attained the age of majority. Publicity of trial is determined by whether the members of the public are allowed access or not and not whether it was conducted in the usual place.

⁶¹ See section 138(1) of the Evidence Act, Cap E14, Laws of the Federation of Nigeria, 2004. The accused is also not required to prove his innocence. The prosecution is required to prove the ingredients or elements constituting the offence beyond reasonable doubt.

⁶² This is based on the prophetic tradition that says everybody is born inherently pure. This is also based on the doctrine of *istishab* (presumption of continuity). The principle means that the continuation of an established state of affairs until the thing ceases to exist. See M.H. Kamali, *Principles of Islamic Jurisprudence*, 3rd Rev. edn (Cambridge: Islamic Texts Society, 2003), 384-396. Also, Q49v6 enjoins Muslims to always ascertain the true position of a state of affairs before jumping to conclusion so as not to hurt an innocent person. Q24:4 provides that "those who accused chaste women falsely and produce no four witnesses (to support their allegation), flog them with eighty stripes and reject their evidence ever after, for such men are wicked transgressors". The prophet was also reported to have said in one of his traditions that "the onus of proof lies upon the claimants while the oath is required on one who denies the claim. Reported by Bayhaqi. See Ibn Hajar Al Asqolani, *Bulugh al- Maram: attainment of the objectives according to evidence of the ordinances (with English translation)* (Riyadh: Dar-us- salam Publications, 1996) 498-499, *hadith* 1210.

⁶³ The presumption of innocence can be seen in Islamic law in the area of Hudud being averted by suspicion or doubt. This basic principle of Islamic law is based on a statement attributed to the Prophet to have said that *Hudud* Punishment should be averted by suspicion or doubt and if the accused has a way out, release him and that it is better for the Imam to pardon erroneously than to punish erroneously. Rules of procedure also need to be strictly followed under Islamic law. See generally for scholarship on presumption of innocence Ja'far al -Fadli, *The Original Principle Under Islamic Sharia'a is the Innocence of the Accused* In: *The Accused and His Right Under Islamic Sharia* (Arab Centre for Security Studies and Training, 1986), 189-199. See also article 5 (a) of the Universal Islamic Declaration of Human Rights, 1981 which provides that no person shall be adjudged guilty of an offence and made liable to punishment except after

opine that whatever doubt in the criminal proceeding shall be resolved in favour of the accused person. They based their opinion on the saying of the prophet that *hudud* punishment should be averted by a slightest iota of doubt.⁶⁴ However, the PEPs accused of grand corruption should be presumed guilty until the contrary is proved.

Similarly, while the trial goes on, the accused has the right to trial without undue delay. This right goes with the common saying that justice delayed is justice denied but care must also be taken because justice hurried could also lead to justice denied. As earlier stated, the Nigerian Constitution frowns at unlawful delayed trial.⁶⁵ However, the practice of this provision is always a problem because cases take longer period than required. Islamic law does not also permit delays in the administration of justice. The jurist opine that where evidence is unduly delayed in criminal trial, doubt is casted on it and may not be able to sustain *Hudud* offences.⁶⁶

Also, the accused has the right of defence in person and by counsel of his own choice when the case goes on. In a situation where a person has been charged with a criminal offence, he has the right to be tried in person and to defend himself in person or through a legal representative of his own choice. The accused counsel should not be denied the right of audience in court. However, such counsel must not be the one suffering from any disability as regards the right to appear in the jurisdiction as a Counsel. This gives the accused person the opportunity of putting forward before the court all available defences open to him.⁶⁷ It is submitted that counsel who waste the precious time of the court to frustrate trial should be sanctioned by the court.

proof of his guilt before an independent judicial tribunal. See also article 19 (e) of the Cairo Declaration of Human Rights in Islam, 1990. See also Q17:15 where Allah says "...and never would we punish until sent a messenger." See also 53:28 "And they have thereof no knowledge. They follow not except assumption, and indeed, assumption avails not against the truth at all."

⁶⁴ See M.S. al- Awwa, 'The Basis of Islamic Penal Legislation,' in M.C. Bassiouni (ed.), *The Islamic Criminal Justice*, (Ocean Publications, New York, 1982) 143-144. See also W. Al-Zuhayli, *al fiqh al Islami Wa Adillatuh* (The Islamic Jurisprudence and its Evidence) Arabic 11 Vols. (Dar al fiqr, Pittsburg, 1997), Vol. 4, 3144.

⁶⁵ See this right is fundamental to fair trial because prolonged detention or delay impairs the ability of the accused to defend himself by getting witnesses who might have died in the interval and the trial judge may also lose the impression of demeanor of the witnesses after a long period of time. See PerIdigbe JSC in *Akor v Iguorigo* (1978) 1 LRN. See also for more discussion on this B.O. Nwabueze, *The Presidential Constitution of Nigeria* (C. Hurst and Company, London, 1982) 436.

⁶⁶ See M.M. Salama, 'General Principles of Criminal Evidence in Islamic Jurisprudence,' in Bassiouni (note 50).

⁶⁷ The Counsel in this case is enjoined to act diligently and without any fear to enable him put across all defences available to the accused and has the right to challenge the conduct of the case if he notices that the accused is not likely to get justice in the case because there is no fair trial. See comment 13 (note 12). Also, a criminal case cannot go on in the absence of the accused, there are instances where the presence of the accused may be dispensed with especially where the accused has rendered his presence in that case practically impossible in the way and manner in which he conducts himself in a case. The international law places a duty on the governments in this regard that lawyers should be allowed to perform their

When the case comes to trial, the accused has the right to defend himself either in person or through legal Practitioner of his own choice.⁶⁸ The right to defend is equally recognized under Islamic law and much premium is placed on the right to be tried in the person's presence.⁶⁹ Islamic law appears not to favour the hearing of a case in the absence of the defendant and if the court wants to go ahead with this case under an exceptional condition, the representatives must be appointed for the defendant to protect his interest.⁷⁰ Imam Malik and Imam al Shafi'i are of the view that judgement may be given against a person who has been absent for a long time but Imam Abu Hanifah is of the view that judgement cannot be given against a person who is absent at all.⁷¹ A person also has the right to be assisted by a legal representative of his own choice under Islamic law.⁷²

A duty is therefore enjoined on the court to inform the accused to inform the accused of this right if the accused is unaware of this right or has not appointed one for himself. The perspective appears to be similar under Islamic law. This is demonstrated for instance by Al-Khushani where he wrote on the history of judges of Cordova, where he cited a case of two men who brought a matter in Islamic court before the judge Ahmad IbnBaqi. The judge observed in the presentation of the case one of the men was eloquent than the other (who had problems in presenting his case). The Judge advised the one who could not present his case as expected by saying it would be better if he was represented by somebody who also had verbal skills like the opponent. The man replied that but he was speaking the truth. The Judge replied that it did not matter because many men have perished because for lack of eloquence even though they are speaking the truth. This is to show that even classical Islamic jurists give recognition to this right.⁷³ Also, where the

professional duties without any form of intimidation, Harassment, hindrances or improper interference with the professional duties of lawyers. See Principle 16 of the United Nations Basic Principles on the role of Lawyers, 1990.

⁶⁸ See section 36(6) (c) of the Constitution. However, such legal practitioner must not be the one suffering from any legal disability. This may include the fact that the legal practitioner is not required or does not have the qualification to practice in that jurisdiction or he cannot appear by virtue of his position(Such as Senior Advocates of Nigeria who cannot appear before the Magistrate Court) cannot appear in the court in the case. The right to be heard will not be adequate if does not include the right of Counsel because even an intelligent and educated layman has little or no knowledge of the science of law. He is not familiar with the rules of evidence, he cannot determine for himself if charged with an offence whether indictment is good or bad and he is not familiar with the rules of the court, hence the importance of having legal representation.

⁶⁹ See article 5(b) of the Universal Islamic Declaration of Human Rights, 1981 (UIDHR) which provides no person shall be adjudged guilty except after a fair trial and after a reasonable opportunity for defence has been provided for him.

⁷⁰ See A.A. Qadri, *Islamic Jurisprudence in the Modern World* (New Delhi: Taj Company, 1986) 495.

⁷¹ See M. IbnRushd al-Qurtubi, *Bidayah al- MujtahidWaNihayah al- Muqtasid* (Arabic), 2 Vols (Beirut: Dar al-Kutub al-Ilmiyah,1988), Vol.2, 472, see also I.A.K. Niyazee (Trans) *The Distinguished Jurist's Premier*, 2 Vols (Reading: garnet Publishing Ltd,2000), Vol. 2, 567.

⁷² See Baderin M.A. *International Human Rights and Islamic Law* (Oxford University Press, 2003) 89 - 90.for an analysis of the right of audience of counsel under Islamic law.

⁷³ See Al- Khushani, *TarikhQudatQurtubah* (Arabic) cited in M.M. Baderin, 'A Comparative Analysis of the Right to Fair Trial and Due Process Under International Human Rights Law and the Saudi Arabian Domestic Law,' *International Journal of Human Rights*, 10 (3), 241 at 266.

accused person does not have the means of getting legal assistance and the interest of justice in that case so much requires that a legal representative be appointed for him, the accused has a right to be assigned a legal representative.

One other important right of the accused during trial is the right of calling witnesses and examination of prosecution witnesses. The accused has the rights to call witness(s) and must be allowed to examine the witnesses called by the prosecutor against him. This is just to strike the balance between the prosecutor and the accused person. It is meant to guarantee to the accused, the same legal powers of compelling the attendance of the witnesses and of cross examining the prosecution witnesses. The accused also has the right to call witnesses in support of his case and has the right to cross examine the witnesses called by the prosecution against him. This he may do either by himself or by his Counsel where represented.⁷⁴ The procedure of examining under Islamic law appears to be inquisitorial in nature rather than adversarial which therefore makes the judge to be the person who will examine the witnesses.⁷⁵ Revealing the truth and achieving the end of justice are what is paramount under Islamic law and to that end, examination and cross examination are allowed in Islamic law. Still, the judge plays the role of directing investigation as being done in the inquisitorial system.⁷⁶

Also, the right to free interpreter is guaranteed. The accused person is entitled to a free interpreter where he does not understand the language of the court. This right is highly significant because its denial will resort to manifest injustice against the accused who does not understand the charge preferred against him so that he will be given the opportunity to defend himself. The right is of basic importance in cases in which ignorance of the language used by the court or difficulty in understanding may constitute a major obstacle to the right of defence. An accused in Nigeria is also entitled to an interpreter where he does not understand the language of the court used at the trial of his case without being required to pay any sum of money.⁷⁷ This right is also fully guaranteed under Islamic law

⁷⁴ See section 36(6) (d) of the Constitution of the Federal Republic of Nigeria, 1999 which provides that every person charged with a criminal offence shall have the right to examine in person or by his Counsel the witness called by the prosecution before any Court or Tribunal and obtain the attendance and carryout the examination of witnesses to testify on his behalf before the Court or the tribunal on the same conditions applying to the witnesses called by the prosecution.

⁷⁵ The Judge under this inquisitorial system of trial needs to be careful because where he excessively descends into the arena of conflicts, he may be accused of being bias.

⁷⁶ This is different from the acquisitorial system where the judge acts as an on-looker not wanting to descend into the arena of conflict playing no persecutory role. The accused under Islamic law has the opportunity of reviewing all evidence in preparing for his defence so as to give credibility to the trial in the eyes of the public. The judge also has the power to grant the witnesses whatever protection he thinks appropriate. Oral testimony is required to give the accused the opportunity of confronting the witness even though affidavit evidence may be allowed in certain circumstances.

⁷⁷ See section 36(6) (e) of the Constitution of the Federal Republic of Nigeria, 1999.

because it is stated in the Qur'an that Allah does not send a messenger except in the language of His people in order to make things clear to them.⁷⁸

More still, the accused has the right not to be compelled to testify against himself or to confess guilt. In Nigeria, an accused has the right to remain silent either at the police station until his lawyer is around or at his trial in court throughout the proceeding and cannot be compelled to confess his guilt.⁷⁹ Under Islamic law, an accused can be convicted by making sure of his confessional statement or where he testifies against himself (voluntarily) (*iqrar*) but cannot be compelled to confess or implicate himself.⁸⁰ This is because Islamic law provides that a person cannot be punished for what is involuntarily done or what is done under coercion.⁸¹ However, Coulson noted quoting from the Maliki jurist Ibn Farhun's *Tabsirat al-Hukuk* that a suspect under Islamic law can be compelled to confess guilt true harsh treatment such as beating.⁸² He cited the instance of an alleged practice by Caliph Ali who ordered that the tongue of the plaintiff be pierced with a needle for the purpose of confirming the plaintiff's allegation that he had been rendered dumb as a result of the defendant's assault. Coulson's position is not correct because it is contrary to the general principle of Islamic law. Farrar has rightly opined based on further detailed evidence on this point that the leading authorities in the four schools of thought in Islamic jurisprudence held that a confession had to be voluntary and that according to Imam Malik (which Ibn Farhun belonged) and his companions generally opined that a confession obtained from an accused by any form of duress or deception was inadmissible and could not be relied on for *hudud* or non *hudud* cases.⁸³ He was therefore of the opinion that Coulson has quoted Ibn Farhun's Statement out of context thus

⁷⁸ See Q14:4. This verse recognizes the fact that human beings are to be communicated with in the language they understand especially where it has to do with the accused being called upon to defend himself.

⁷⁹ See section 35 (2) of the CFRN, 1999 which provides that any person who is arrested or detained cannot be shall have the right to remain silent or avoid answering any question until after consultation with a legal practitioner or any other person of his choice. Also, section 36 (11) provides that no person who is charged for a criminal offence shall at his trial be compelled to give evidence. This provision appears narrow when compared with the position in United States that states that no person shall be compelled in any criminal case to witness against himself. (see the fifth amendment.) While that of the United State can be conveniently extended to both oral and documentary evidence of the accused cannot be used against him in court even if made voluntarily. That of Nigeria only contemplates oral evidence given in court and does not include written statements such as confessional statements made by him. Also, refusal to give comments by the accused should not be subject of negative comments by the prosecutor because the accused is exercising his constitutional right. Where a confession has been obtained by coercion or force, or otherwise involuntary, then it is inadmissible in court.

⁸⁰ See Article 7 of the UIDHR which provides that a person shall not be forcibly made to confess to the commission of a crime or to consent to anything that will be injurious to his interest.

⁸¹ This is based on the *hadith* of the Prophet which says Pen has been lifted regarding three things. What a person does while sleeping, what was involuntarily done and what was done under coercion.

⁸² See N.J Coulson, "The State and the Individual in Islamic Law," (1957) Vol 6, *International and Comparative Law Quarterly*, 52.

⁸³ See S.A. Farrar, 'Islamic Jurisprudence and the Role of the Accused: A re-examination,' (2003) 23, (4), *Legal Studies*, 597.

misrepresenting Islamic criminal justice as a system without rules and necessarily oppressive. He also has the right to remain silent if he wishes.⁸⁴

Similarly, during trial, the right of an accused juvenile is not left out. This right suggests that the age and desirability of promoting the rehabilitation of the juvenile is to be preferred to the issue of punishment. This right is well guaranteed in Nigeria as earlier stated above, juvenile trials are enjoined to be done expeditiously in the interest of public safety and morality and it is not to be held in open Court.⁸⁵ There are courts designated as Juvenile Courts meant for the adjudication of juvenile justice and there are rules relating to juvenile trials⁸⁶ The position is similar under Islamic law.⁸⁷ This is because the Prophet exonerates children from liability by saying that three categories of persons are free from responsibility, the insane until he regains his senses, the sleeping until he wakes up and the child until he reaches majority.⁸⁸ The age of majority is primarily determined by biological means attained by the boys when attaining sexual puberty and attained by the girls when they start menstruation.⁸⁹ This right constitutes an exception to the general rule against retroactive legislation with regards to criminal proceedings. Here, the offender enjoys the benefit in the reduction of the punishment from heavier one to a lighter one. This is also guaranteed in the Nigerian Constitution.⁹⁰ The position is also similar under the Islamic law.⁹¹

⁸⁴ Ibid.

⁸⁵ See Children and Young Persons Laws of Various States of Nigeria.

⁸⁶ Although the regular courts are used, for the purpose of trying a juvenile, these courts are designated as juvenile courts and its proceedings are not open to the general members of the public. Juveniles are not to be tried along with adult accused except the offences are committed together of the offence relates to murder or homicide. The identity of the juvenile must not be published and the word "conviction" or "sentence" must not be used where a juvenile has been found guilty. A juvenile must not be sentenced to death where he has been found guilty of murder but may be ordered to be detained until the pleasure of the President or Governor as the case may be is known. Even where he is detained, he should not be mixed together with adult's inmate. In determining the age of the juvenile, the relevant age is the age of commission of the offence and not the age of conviction. See generally sections 6 (5) (6), 8 (2), 11 and 16 of the Children and Young Persons Laws of Lagos State of Nigerian and section 368 of the Criminal Procedure Act of Nigeria.

⁸⁷ See Baderin, (note 72).

⁸⁸ See M.S. al-Awwa, (note 59). See also W. Al- Zuhayli , al Fiqh Al-Islami Wa Adillatuh (The Islamic Jurisprudence and Its Evidence) Arabic 11 Vols. (Pittsburg Dar al -Fiqra, 1997) Vol. 4, 3144.

⁸⁹ With respect to age, the opinion of Islamic jurists range from 15 years based on the tradition that the Prophet (s.a.w.) does not permit Ibn Umar to join the battle of Uhud at the age of 14 but was allowed to join the battle of Khandaq at the age of fifteen years old to a maximum year of 18 in the opinion of Maliki and Hanafi School. The age of puberty (*bulugh*) according to jurist also differ from majority (*rushd*). See Zuhayli, *ibid*.

⁹⁰ Section 36(8) provides that no person shall be held guilty of any criminal offence on account of an act or omission that did not at the time it took place constitute an offence and no penalty shall be imposed for any criminal offence heavier than the penalty in force at the time the offence was committed

⁹¹ See O.A. al-Saleh, 'The Rights of Individual to Personal Security in Islam,' in M.C. Bassiouni (ed), *The Islamic Criminal Justice System* (New York: Oceana Publications, 1982) 62-65.

Finally, an accused has the right against retroactive criminal law or heavier punishment. This promotes the principle of legality and places duty on the state to define offences and penalty as clearly as possible and not subject to retrospective enactment. This is very significant to ensure fair trial. This is also guaranteed under the Nigerian Constitution because the Constitution even prohibits the legislature from making any law especially with regards to criminal matters having retrospective effects.⁹² This principle is also recognized under Islamic law.⁹³ No act under Islamic law is considered as an offence except it stated in the clear wording of the law.⁹⁴

POST-TRIAL RIGHTS

This aspects aims at securing and protecting the individual liberty after the trial has been concluded. This issue encompasses the right of appeal, their rights available to the prisoners, enforcement of judgement and rights against double jeopardy.

One significant aspect of this right is the right to humane treatment after conviction where detained. The right to humane treatment, and dignity of human person also extends to prisoners in certain respects. Islamic law also recognizes this right of the prisoner and the scholars of Islam agree that it is the responsibility of the State to ensure the feeding, clothing, medical care and the basic need of the prisoner since he is under the custody of the State.⁹⁵

Akin to the above is the accused's right of appeal. The Right of Appeal to a higher Court must be given to the accused after trial whether it is a capital offence or minor offence. This affords opportunity to the convict to challenge the decision of the lower Court before the court. This is also an essential right to fair trial so that the accused exercises his right of appeal from the decision of the lower court to the highest court of the land. It also ensures that an innocent person is not wrongfully convicted for an offence. The accused in Nigeria always has a right of appeal from a lower up to the Supreme Court. The right of appeal is also recognized under Islamic law. Islamic jurisprudence provides for appeals and revision of decisions under the legal principle of *Mura'fa'ah* which exists in the Islamic legal system in some Muslim states.⁹⁶

⁹² See section 4(9) and section 36(8) CFRN, 1999.

⁹³ See Q4 :22-23, Q28:59, Q5:95, Q8: 38 &Q17:15. See also Baderin, (note 72) at 112-113.

⁹⁴ See Q 17:15; Article 5(d) of the UIDHR. See also Article 19(d) of the Cairo Declaration on Human Rights, 1990.

⁹⁵ See A.A. Ali (Trans), *KitabuKharaj*, Istedn (Lahore: Islamic Book Centre, 1979), 301-303 for a discourse of the fact that prisoner should be given humane treatment while serving their sentence.

⁹⁶ See M.H. Kamali, *Freedom, Equality and Justice in Islam* (Cambridge, Islamic Text Society, 2002) 120, A.A. Qadri, *Justice in Historical Islam* (Lahore:sh. Muhammad Ashraf, 1968). Abu Yusuf was the first Qadi al- Qudat (Chief Justice) in the administration of Islamic Justice appointed during the rule of the Abasid Caliph, Harun al-Rashid Baghdad in the 8th Century and was hearing appeals and reviewing other Judges' decisions throughout the Islamic empire. See also IbnSa'd Al Darib al-Tandhim al Qadai fi al-

Similarly, an accused has the right to compensation where wrongfully convicted. As earlier states, this right exists in Nigerian Constitution. The State therefore pays compensation to the accused unlawfully detained compensation for the injury suffered as a result of unlawful detention but this is rarely paid in practice.⁹⁷ Under Islamic law, Under Islamic law, conviction is seen as affecting the right to freedom of movement. Where a person is unlawfully convicted, the State bears the responsibility of providing for him food, clothing, medical care and other facilities needed to ensure that the accused retains his right as human being.⁹⁸

CONCLUSION

From the foregoing discussion of the various perspectives to the right to fair trial, it is submitted that Islamic law, which has been in existence for a very long period of time, presents a better protection to the right to fair trial. Islamic law presents the most adequate and effective legal frame work on the promotion and protection of the right to fair trial. This is not to say that the Nigerian Constitution has not made provisions for the protection of the right to fair trial as it has been examined. The paper, therefore, submits that the right to fair trial under Islamic law as found in the Quran and the *Sunnah* shows the unique and international character of Islam.⁹⁹ It also shows the contribution made by Islam to the development of the concepts of human rights and fundamental freedoms in international spheres.

Also, there are many cases of similarities between position of the Nigerian Constitution and Islamic law and are so examined. The paper also examines some few areas of difference. Although most of the rights discussed are similar in both legal systems, the approach, however, differs. For instance, while both legal systems under review frowns at unlawful detention of an accused; Islamic law goes further as it does not favour the

Mamlakah al Arabiyyah al-Saudiyyah fi Daw 'al- Shariyyah al- Islamiyyah, 2 vols. (Arabic), 2ndedn (Riyadh: Matabi Dar al Hilal, 1984), Vol.1, 250.

⁹⁷ See section 35(6) of the Constitution of the Federal Republic of Nigeria, 1999. However, where it is the Complainant that intentionally sets the law in motion for the purpose of punishing the accused and thereby makes an allegation knowing fully well that it is untrue or without a reasonable belief in its truth, the accused may bring an action against the complainant where the charge has been struck out for one reason or the other.

⁹⁸ Judges are responsible for any serious mistake leading to the detention of the accused wrongly or unlawfully and the accused will be entitled to compensation for the injury suffered by the accused. The reason is that judges in Shari'a has full authority over criminal procedures and should not be seen as making unwarranted mistake. Also, if any person in charge of arrests and execution of sentences exceeds his authority and causes damage to the accused, that person is fully responsible and may be liable to pay compensation in addition to the fact that he has committed qisas crime. See G.M. Hussein, "Basic Guarantees in the Islamic Criminal Justice System," in M. Abdel Haleem, (eds), *Criminal Justice in Islam: Judicial Procedure in Shar'ia*, (I.b. Tauris, London, Uk, 2003) 51.

⁹⁹ M.I. Patwari, 'Human rights in Islamic law and international law: A Comparison' (1990-91) 10&11, *Islamic and Comparative Law Quarterly*, 17-28.

detention of the accused prior to his trial. It is expected that the accused is not detained before trial commences against him. The paper is thus a critical exposition into the perspectives of the right to fair trial as provided for under the Nigerian Constitution and Islamic law. Similarly, both systems do not allow delay in preferring a charge against the accused. However, while the Nigerian criminal justice system still accepts evidence that has been unduly delayed, Islamic law frowns at this and even render inadmissible evidence that has suffered from prolonged delays in court. Doubt is casted on such evidence and is therefore rendered inadmissible. This is especially the case with respect to *Hudud* offences. Also, judges under Islamic law are responsible for any serious mistake leading to the detention of the accused wrongly or unlawfully and the accused will be entitled to compensation for the injury suffered by the accused. The reason is that judges in the *Shari'ah* has full authority over criminal procedures and should not be seen as making unwarranted mistake. This is unlike the Nigerian system where judges' carelessness or unwarranted mistakes does not come with any remedy to the accused.

It is also observed that while the right to fair trial was well practiced during the periods of the Prophet (s.a.w.) and his caliphs, the implementation of many components of the rights to fair trial appears to be a mirage in Nigeria. This is due to the inadequacies of the law in safeguarding the proper implementation of the rights. Also, poor attitudes of the law enforcement agencies make the implementation of the right to fair trial a difficult task. In view of this, there is the need for an adequate legal framework in Nigeria that would assist in the implementation of the right to fair trial in Nigeria. There should also re-orientation of the law enforcement agencies on the issues relating to fair trial of an accused in order to have a change in attitude in matters relating to fair trial. This is because as earlier mentioned; the protection of the right to fair trial necessitates the protection of other guaranteed rights in the Constitution. All hands must be on deck to make this happen. However, while it is important to accord some guaranteed rights to fair trial to the PEPs accused of grand corruption, they should not be treated above common accused. In fact, they should be denied certain right to fair trial such as right to bail, presumption of innocence and some other rights identified in this paper. This is due to the endemic nature of corruption by the PEPs and the negative impacts their actions have had to the nation's integrity, resources and economy. Also, to avoid delay, anti-corruption court will be necessary.