

AIRLINE PASSENGERS' SCREENING: AN APPRAISAL FROM THE ISLAMIC LAW PERSPECTIVE

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ABSTRACT

The alarming rate of aviation offences such as the offence of aircraft hijacking in the 21st century warrants the need to adopt various preventive and suppressive measures to prevent these offences. The current method to prevent and suppress these offences is to subject every passenger to screening of their body and baggage through the imaging technologies and physical searching called “pat down”, the purpose of which is to detect the presence of weapons, explosives and other dangerous materials that will aid the commission of any of these offences. As a sequel to the adoption of these methods, many queries have been raised especially from the human rights activists who argue that the so-called imaging technologies intrude on the fundamental human rights of passengers. While some passengers support the argument of the activists, others are in support of the aviation security practitioners. The question therefore is: what is the position of Islamic law on the screening of airline passengers using imaging technology? The present article intends to answer this question.

Keywords: Airline passengers, passengers' screening, imaging technologies, pat down, Islamic law

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PENAPISAN PENUMPANG PENERBANGAN: SATU PENILAIAN DARI PERSPEKTIF UNDANG-UNDANG ISLAM

ABSTRAK

Kadar kesalahan penerbangan yang membimbangkan seperti kesalahan rampasan pesawat dalam kurun ke 21 memerlukan penerima pakaian pelbagai langkah-langkah pencegahan bagi mencegah kesalahan-kesalahan ini. Kaedah terbaru untuk mencegah dan mengurangkan kesalahan-kesalahan ini ialah penapisan setiap penumpang dan bagasi melalui teknologi imbasan dan pencarian fizikal yang dipanggil “pat down” (pemeriksaan badan) yang bertujuan mengesan kewujudan senjata, bahan letupan dan bahan bahaya yang lain yang akan membantu dalam melakukan kesalahan-kesalahan ini. Dengan penerima pakaian kaedah-kaedah ini, banyak persoalan diajukan terutama dari kalangan aktivis hak kemanusiaan yang berhujah bahawa teknologi imbasan mengganggu hak asasi kemanusiaan para penumpang. Walaupun ada penumpang yang menyokong hujah para aktivis ini, penumpang yang lain menyokong para pengamal keselamatan penerbangan. Persoalannya ialah: apakah pandangan undang-undang Islam terhadap penapisan penumpang penerbangan melalui teknologi imbasan? Artikel ini bertujuan menjawab persoalan tersebut.

Kata kunci: penumpang-penumpang penerbangan, penapisan penumpang-penumpang, teknologi imbasan, pemeriksaan badan, undang-undang Islam

INTRODUCTION

The need for airline passengers’ security screening has arisen since a long time ago, precisely in the 1960s when there were a series of hijacking of the US aircraft to Cuba.¹ Even though the first hijacking of aircraft could be traced back to 1930, the international community began to see its consequences in 1970.² These prompted the international community

¹ Price Jeffrey, and Jeffrey Forrest, *Practical Aviation Security: Predicting and Preventing Future Threats* (USA: Elsevier Inc.2009), 46-47; Ruwantissa A., *Aviation Security* (Aldershort: Ashgate Publishing Co. Ltd., 1998) 103.

² Jenkins Brian Michael, ‘The Terrorist Threat to Commercial Aviation’, (paper presented at the International Seminar on aviation security, Herzerllyyyah, Israel, February 5-9, 1989), 11; Wallis Roodney, *How Safe Are Our Skies? Assessing the Airlines’ Response to Terrorism*, (USA: Praeger Publisher, 2003), 1; Balvanyos Tunde,

to respond to the consequences and to find solutions to the heinous act. The responses are twofold: legally and technically. The legal response includes the adoption of international conventions such as the Tokyo Convention on Offences and Certain other Acts Committed On Board Aircraft 1963,³ the Hague Convention on the Suppression of Unlawful Seizure of Aircraft 1970,⁴ the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation⁵ and the most recent 2010 Convention on the Suppression of Unlawful Interference Relating to International Civil Aviation.⁶ The technical response can be found in Annex 17 to the Chicago Convention on International Civil Aviation 1944.⁷ The primary objective of this Annex is to secure, through the screening of passengers and baggage, international civil aviation from unlawful interference.

The screening of passengers and baggage can be conducted by the use of electronic devices or by the 'pat-down' physical searching technique. This passenger screening procedure has generated serious arguments between the human rights activists on the one hand and the aviation security practitioners on the other, the former arguing that it is against fundamental human rights. The present paper is an attempt to appraise the legality or acceptability, from the Islamic law perspective, of passengers' security screening using imaging technologies.

and Lester B. Lave, *The Economic implications of terrorist attack on commercial Aviation in the USA*, (Report to the Center for Risk and Economic Analysis of Terrorism - CREATE, University of Southern California, Los Angeles, 4, (2005).

³ The Tokyo Convention on Offences and Certain other Acts Committed On Board Aircraft adopted on 14 September 1963 and entered into force on 4 December 1963, 704 UNTS 219, 20 U.S.T 2941 [Herein after referred to as The Tokyo Convention 1963].

⁴ The Hague Convention on the Suppression of Unlawful Seizure of Aircraft 1970, adopted on 16 December 1970 and entered into force on 14 October 1970, 80 UNTS 105, 22 U.S.T 1641, T.I.A.S No. 7192 [Herein after referred to as The Hague Convention 1970].

⁵ The Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, adopted on 23 September 1971 and entered into force on 26 January 1971, 974, UNTS 177, 24 U.S.T 564, T.I.A.S. No 7570 [Herein after referred to as The Montreal Convention 1971].

⁶ Convention on Suppression of Unlawful Interference Relating to International Civil Aviation, done at Beijing on 10 September 2010.

⁷ Convention on International Civil Aviation signed at Chicago on 7 December 1944.

THE NATURE OF AIRLINE PASSENGERS' SECURITY SCREENING

Annex 17 to the Chicago Convention defines “screening” to mean “the application of technical or other means which are intended to detect weapons, explosives or other dangerous devices which may be used to commit an act of unlawful interference”.⁸ According to this definition, passenger screening could be conducted by: (1) technical means, or (2) other means, that is, physical searching.

It should be noted that Annex 17 to the Chicago Convention is silent in relation to the meaning of “technical”. However, according to the Oxford Advanced Learner’s Dictionary the term “technical” is defined as “connected with the practical use of machinery or the skills needed for a particular job”.⁹ It can therefore be stated that the word “technical” in Annex 17 to the Chicago Convention is referring to the use of “machinery” or reliance on the skill and experience of the screener. This submission is supported by Appendix B to the International Civil Aviation Organization (ICAO) Resolution A17-10 that obliges the contracting states to adopt the use of detection devices or physical searching to conduct the screening of passengers and baggage.¹⁰

The main objectives of detection devices, according to aviation security practitioners, are:

- a. To detect the presence of weapons, explosives or other dangerous devices that are hidden in the body, clothing, or baggage of a passenger;¹¹
- b. To enable the aviation security practitioners to obtain information as to the type and location of the weapon hidden in the body, cloth, or baggage;
- c. To increase the efficiency and effectiveness of the detection of

⁸ See Annex 17 to the Chicago Convention 1944, Chapter 1.

⁹ Hornby Albert Sydney, and Joanna Turnbull. *Oxford Advanced Learner’s Dictionary of Current English: International Students’s Edition*. 8th ed., (Oxford: Oxford University Press, 2010), 526.

¹⁰ Appendix B to ICAO Resolution A 17-10, 1970, entitled “processing and protection of passengers, crew and baggage” paragraph 9, cited as 9 ILM 1278, 1970.

¹¹ Auxiliary police (AVSEC Officer), interviewed by Ismail Adua, one of the researchers at Kuala Lumpur International Airport, Malaysia on, 31 October 2013. General Manager Aviation Security Murtala Muhammed International Airport, Ikeja, Lagos, interviewed by the same on 30 November 2013. See also Appendix B to ICAO Resolution A 17-10, 1970, entitled “processing and protection of passengers, crew and baggage” paragraph 9, cited as 9 ILM 1278, 1970.

- weapons or other harmful devices;¹² and
- d. To reduce the time of conducting security screening.

The other aspect of passenger security screening is physical searching of passengers called “pat down” or “frisk”. “Frisk” is interpreted to mean “to search a person, particularly for a weapon, running one’s hand over his clothing”.¹³ The purpose of this method is to detect and trace the location of weapons on the body of a passenger. However, at some airports this procedure is usually adopted on a passenger who has triggered the alarm of the detection equipment,¹⁴ while other airports adopt the 100% frisking of passengers whether the alarm is triggered or not.¹⁵ The discrepancy in this respect is due to the national aviation security policy of the country concerned.

The detection equipment

As a general rule, electronic machines are used for the screening of passengers and their baggage for the purpose of securing the airport and the aircraft against any unlawful interferences. The detection equipment are classified into two: non-imaging and imaging.

There is no controversy as to the use of non-imaging equipment such as Walk Through Metal Detector and Hand Wand. They are only used to detect metallic objects concealed in the clothing or inside the baggage of a passenger. They do not reveal the body image of a passenger. The advantage of these equipment is that it reduces public concern about the health of a passenger. However, their disadvantage is that they are not capable of detecting non-metallic objects such as liquid explosives or plastic materials.

However, it is controversial to use imaging equipment. The imaging equipment such as Trace Detection Technologies and Active

¹² Committee on Commercial Aviation Security, Panel on Passenger Screening, Commission on Engineering and Technical Systems, National Research Council, *Airline Passenger Security: New Technology and Implementation Issues*, (Washington D.C.: National Academies Press, 1996), 1.

¹³ Garner Bryan A., *Black's Law Dictionary*, 8th. Ed., (USA: Thomson West, 2004), 692.

¹⁴ This procedure was observed at the KLIA International Airport, Malaysia, field study conducted by Ismail Adua, one of the researchers, on 29th June 2013.

¹⁵ Garner, Bryan A., *Black's Law Dictionary*, 8th. Ed., (USA: Thomson West, 2004), 692. See also Cambridge Advance Learner's Dictionary, (New Ed.), (Cambridge: Cambridge University Press, 4th. ed., 2013) 500

and Passive Millimetre Wave Technologies generate serious problems. The Trace Detection equipment is used to trace the presence of weapons in the carryon baggage of a passenger,¹⁶ while the Active and Passive Millimetre Wave Technologies are used to detect both metallic and non-metallic objects hidden in the body of a passenger. The difference between the latter is that while the former produces radiation into the body of a passenger to detect and analyse a weapon or other unauthorised material, the Passive Millimetre Wave relies solely on the radiation emitted by the passenger to it.¹⁷ It is submitted that the advantage of using these equipment is to detect the weapons, explosives and other unauthorised materials, whether metallic or non-metallic, that are hidden in the clothing and private parts of the passenger before boarding the aircraft. Non-detection of the dangerous weapons or explosives can make the aircraft and its passengers vulnerable to hijackers and terrorists. For instance, failure of the aviation security practitioners to detect weapons and explosives resulted in the hijacking of four United States of America aircraft on 11 September 2001,¹⁸ the hijacking of a Malaysia Airlines aircraft in 1977,¹⁹ and the hijacking of a Nigerian aircraft in 1993.²⁰ It may also cause the destruction of aircraft such as the explosion of the Pan American Airlines Flight 103 over Lockerbie, Scotland, on December 21, 1988.²¹

Why controversial?

The controversy emanates from the function of imaging technologies. The Panel on Passenger Screening set up by the National Research Council (NRC) of the United States of America²² describes the function of imaging technologies as follows:

¹⁶ *Ibid*, 4.

¹⁷ *Ibid*, 3, 4, 15 and 16.

¹⁸ Elias Bartholomew, *Airport and Aviation Ssecurity: US Policy and Strategy in the Age of Global Terrorism*, (USA: Auerbach Publications Taylor & Francis Group, 2010), 49-50; Price, Jeffrey, and Jeffrey Forrest, *Practical Aviation Security: Predicting and Preventing Future Threats* (USA: Elsevier Inc.2009),72-76.

¹⁹ "Aviation Safety Network: ANS Aircraft accident Boeing 737-2H6 9M" accessed on November 15, 2013 <http://aviation-safety.net/database/record.php?id=19771204-0>.

²⁰ U.S Department of State: Pattern of global terrorism, 1992, Department of State Publication 10136, 1994.

²¹ Committee on Commercial Aviation Security, 6.

²² The panel was set up to prepare a report assessing issues concerning the implementation of new, automated passenger screening methods and barriers to their implementation. See *Ibid*., 7.

“These screening systems generate television-like digital images that can be evaluated by image processing and analysis methods. Images are viewed by an operator trained to identify potential threat objects in these images, sometimes with the assistance of image enhancing software that highlights unusual features”.²³

The above description generated arguments and counter arguments from human rights activists and aviation security practitioners. The human rights activists contended that the use of the imaging equipments intrude into the privacy of passengers²⁴ and constitute a health hazard to the passenger.²⁵ The American Civil Liberties Union put its objection thus:

“In addition, these machines are capable of projecting an image of a passenger’s naked body. We oppose using this as part of a routine screening procedure. Passengers expect privacy underneath their clothing and should not be required to display highly personal details of their bodies such as evidence of mastectomies, colostomy appliances, penile implants, catheter tubes and the size of their breasts or genital as a prerequisite to boarding a plane”.²⁶

The thrust of the above concern is the intrusive nature of the imaging machine adopted to screen the passengers before boarding the aircraft. This truly infringes a fundamental human right, namely, the right to privacy.

The health concern was raised by the Medical Doctors and Professors of the University of California, San Francisco, through a letter written to Dr. John P. Holdren, Assistant to the United States President for Science and Technology, on April 6, 2010, contents of which are as follows:

“We are writing to call your attention to serious concerns about the

²³ *Ibid*, 14.

²⁴ Shokoofeh Mosaferi, Nazura Abdul Manap, Maryam Rafiei, Pardis Moslemzadeh Tehrani, “The impact of biometric issues on human privacy: A perspective on the body scanning technique Under US and EU Regulations,” accessed November 13, 2013, <http://download.fromdoctopdf.com/index.jhtml?partner=Y6xdm007&gclid=CIXM-pSL4boCFe2n4godvQgAfg>.

²⁵ *Ibid*.

²⁶ American Civil Liberties Union, “Airport Security: Increased Safety Need Not Come at the Expense of Civil Liberties,” accessed June 12, 2013, <http://www.aclu.org/national-security/facts-airport-security>

potential health risks of the recently adopted whole body backscatter X-ray airport security scanners. This is an urgent situation as these X-ray scanners are rapidly being implemented as a primary screening step for all air travel passengers. Our overriding concern is the extent to which the safety of this scanning device has been adequately demonstrated. This can only be determined by a meeting of an impartial panel of experts that would include medical physicist and radiation biologist at which all available relevant data is reviewed.... There are good reasons to believe that these scanners will increase the risk of cancer to children and other vulnerable populations. We are unanimous in believing that the potential health consequence needs to be rigorously studied before these scanners are adopted".²⁷

The above quotation vividly reveals the exposure of the passengers to the radiation emission by the imaging machines. Even the medical doctors and the scientists testify to the health risk of the imaging machine.

However, aviation security practitioners and some governments posit that the radiation emitted by the imaging machine is minute compared to that emitted by the X-ray or other radioactive use in the hospital. They further state that a passenger needs to be scanned over 1000 times before it will have effect on such a passenger.²⁸ In another perspective, Dr David Brenner was of the opinion that "what actually constitutes public health is the millions of people travelling by air who are made to pass through the machine and whose health is jeopardized. The multiplier effect has not been put into the equation. If this were done the number of fatalities could become devastating"²⁹ The positions of the proponents of imaging machines was further countered by David Argard, a biochemist and biophysicist, at the University of California, when he opined that "There is no threshold of low dose being OK. Any

²⁷ Policy Report, Whole Body Imaging at airport checkpoints: the ethical and policy context, *Hide & Rise Projects*, Policy Report No 2010/01, February 2010; Shapiro, Daniel L., "The Nature of Humiliation," (paper presented at the 2005 *Workshop on Humiliation and Violent Conflict*, Columbia University, New York, December 2005), 1-5; Smith K.J., "Regulatory Control of X-ray Equipment Used in the Mining Industry in South Africa to Screen Workers for Security Purposes", *Proceedings of 35th National Conference on Radiation Control 2003*, South Africa Department of Health, Bellville, South Africa; Klitou Demetrius, "Backscatter body scanners – A strip search by other means," *Computer Law & Security Report* 24 (2008) : 316-325.

²⁸ *Ibid*.

²⁹ Bello-Salau, H., Salami, A.F., Hussaini, M., "Ethical Analysis of the Full-Body Scanner (FBS) for Airport Security," *Advances in Natural and Applied Sciences*, Vol.6, No.5 (2012): 664-672, at 667.

dose of X-ray produces some potential risk”.³⁰

It is amazing that till today there are ongoing arguments and counter arguments on the issue of fundamental human rights versus privacy and health as a result of the adoption of the imaging machine to screen passengers before boarding an aircraft. Furthermore, apart from the scientific discussions on the issue, some are relying on cultural and religious arguments to raise concern over the procedure. In this connection, what then is the position under Islamic law in regard to the security screening of airline passengers' using imaging machines and the pat-down technique?

THE ISLAMIC LAW VIEW ON THE SCREENING OF AIRLINE PASSENGERS USING IMAGING TECHNOLOGIES

The position of Islamic law on the subject is extracted from the primary³¹ and secondary³² sources of Islamic law. The Holy Qur'an says:

“Nothing have We omitted from the Book,...”³³

The above verse of the Holy Qur'an supports the view that there is nothing that the Islamic law does not touch upon and it is only that human beings do not know or refuse to follow the directives from the Holy Qur'an. This verse therefore serves as a starting point to understand the Islamic law point of view on the airline passengers' security screening using imaging technologies.

As far as screening of passengers and baggage is concerned, questions are raised as to the nature of the screening machine and the image the machine produces to the screener - that is projection of private parts of the passengers to the screener (a stranger) through a

³⁰ Policy Report, Whole Body Imaging, *Supra*, n. 29; Shapiro, *Supra*, n. 29, 1-5; Smith K. J., Regulatory Control of Xray Equipment Used in the Mining Industry in South Africa to Screen Workers for Security Purposes. (proceedings of 35th National Conference on Radiation Control, South Africa Department of Health, Bellville, 2003 South Africa); Klitou Demetrius. “Backscatter body scanners—A strip search by other means.” *Computer Law & Security Review* 24, no. 4 (2008): 316-325. See also Bello-Salau, H., *Supra*, n. 31, 667.

³¹ The primary source in this context refers to the Holy Qur'an and the Hadith of the Prophet (SAW).

³² This is referring to the Ijma', Qiyas and other Ijtihad principles of Islamic law.

³³ Al-Qur'an, Surah al-An'am, 6:38 (Abdullah Yusuf 'Ali Translation, Islamic Book Trust, Kuala Lumpur, 2007).

digital like-television screen. What then is the position of Islamic law on the exposure of private parts to another person (stranger)? And who is a stranger under Islamic law?

The meaning of a stranger has been indirectly explained in the Holy Qur'an when Allah says:

“Prohibited to you (for marriage) are - your mothers, daughters, sisters; father's sisters, mother's sisters; brother's daughters, sister's daughters; foster-mothers (who gave you suck), foster-sisters; your wives' mothers; your step-daughters under your guardianship, born of your wives to whom you have gone in - no prohibition if you have not gone in - (those who have been) wives of your sons proceeding from your loins; and two sisters in wedlock at one and the same time, except for what is past; for Allah is Oft-Forgiving, Most Merciful”.³⁴

The above Qur'anic verse refers to those with whom a Muslim man cannot marry because there is a close relationship (by blood, affinity, or fosterage). Therefore anybody outside the scope of those listed in the above quoted verse could be regarded as a stranger. This position is supported by Alli Ibn 'Itiyyah's explanation of the above verse: “these categories of people are those that are permitted to see and be in closed confine with them. Anybody outside this listing falls into the categories of strangers”.³⁵ Alli Ibn Itiyyah further cited the *Hadith* of the Prophet (SAW) narrated by Uqbah bin Aamir in these terms: “Beware, and do not be in close confines with women. One man from the Ansar asked, “What if it is the *Amwu* (brother of the husband) that is in close confine with the woman? The prophet replied, “*Al Hamu* indeed, is death.”³⁶

It should be noted that despite the fact that those that are mentioned in the Qur'an in Chapter 4 verse 23 appear to be related to one another and they can move closely among each other, the Islamic law still puts a limit to the part of the body these categories of people can see, depending on their relationship. Thus, it is only the husband and wife(s) that are allowed to see the nakedness including each other's private parts, while others are limited to certain parts. This position is supported by an Islamic scholar, Sheikh Ahmad Ismail Yahaya in his

³⁴ Al-Qur'an, Surah-al- Nisa, 4: 23.

³⁵ Layth A.”In Defense of the Obligation of Covering the Awrah” Seeking Ilm Research Publications accessed November 14, 2013. <http://www.seekingilm.com/archives/44>

³⁶ Siddiqui, “A Translation of Sahih Muslim”, University of Southern Carolina Centre for Muslim-Jewish Engagement, accessed November 14, 2013 <http://www.usc.edu/schools/college/crcc/engagement/resources/texts/muslim/hadith/muslim>.

book, *Al-Deen Mu'amalah*.³⁷ Supporting the view of Sheikh Ahmad Ismail is Mustapha Abdul Gayt in his book *Al-Fiqh Nashri* when he explains the Qur'an Chapter 23 verses 5-7 which reads:

“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”.³⁸

Mustapha is of the view that by virtue of the above verse of the Holy *Qur'an*, it is legal and permissible for a person who is married to look at the private part of his wife(s). The point is that it is forbidden for any other person except husband and wife to look at the private parts of the opposite sex.³⁹ To further buttress the point that only married couples are allowed to see each other's private parts, Aisha (RA) is reported to have said that she used to bath with the Prophet Muhammad (SAW) in the same bathroom using the same bowl.⁴⁰

Islamic scholars further argue that males are not allowed to look at the private parts of other males let alone a male looking at a female's private parts and vice versa. Ibn Taymiyyah affirms this by quoting the Prophetic *hadith* to the effect 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.”⁴¹ He also said: “Conceal your private parts except from your wives and from whom your right hand possesses.”⁴² He concluded by saying: “looking as well as touching the private parts of others is forbidden on account of obscenity and indecency.”⁴³ Imam Ahmad, Abu Dawud, Tirmidhi, Ibn Majah and Hakim reported from Muawiyah bin Hida that Prophet Muhammad (SAW) said to her: “Do not show your private parts to anybody other than your husband and female slave.”⁴⁴

³⁷ Murray Thomas H., “On the Human Body as Property: the Meaning of Embodiment, Markets, and the Need of Strangers,” *Michigan University Journal of Law Reform* Vol.20, No.4 (1987): 1055-1089; Layth A.”In Defense of the Obligation of Covering the Awrah” Seeking Ilm Research Publications, accessed November 14, 2013, <http://www.seekingilm.com/archives/44>.

³⁸ See Al-Quran, Surah al- Mu'minun, 23:5-7.

³⁹ Murray, “On the Human Body as Property”; Layth A., *Supra*, n 39.

⁴⁰ Bello-Salau, “Ethical Analysis of the Full-Body Scanner”, 669.

⁴¹ Murray, “On the Human Body as Property”.

⁴² *Ibid*.

⁴³ *Ibid*.; Bello-Salau, “Ethical Analysis of the Full-Body Scanner”, 669.

⁴⁴ Huwayni, *Al-fatawal-hadisiya*, vol.1, 44-45: see also the opinion of Imam

From the foregoing, it can be concluded that the aviation security screener who views the private parts of others violates clear prohibitions of the Holy *Qur'an* and the Prophetic traditions so cited. That is why scholars like Layt, Shapiro, Klitou and Murray conclude that using imaging technology to screen a passenger is illegal. This view is also supported by Bello-Salau, Salami and Hussaini.⁴⁵ These are regarded as opponents to imaging screening technology.

The obligatory rule and the exceptions: *Maqasid al-Shari'ah*

It is submitted that the opponents to imaging screening technology fail to consider the exception to the general rule. In Islamic law, the legal obligation or obligatory rule is called *Al-Azimah*, while the exception to the obligatory rule is called *Ar-rukhsah*, meaning exception to the obligatory rule.⁴⁶ According to Hanafi jurists, *Ar-rukhsah* is said to be synonymous to *Daruri* (necessity).⁴⁷ Thus, it is an obligatory rule for a stranger not to look at the private parts of another person. However, in an exceptional circumstance, it is temporarily permitted to look at the private parts of another person such as where any of the *Muqasid al-Shari'ah* is highly threatened or is likely to be threatened.⁴⁸

Maqasid al-Shari'ah is defined as the fundamental objectives (or goals) of the Islamic law. There are “five fundamental elements of human existence”, namely: (1) religion, (2) life, (3) reason, (4) family, and (5) property.⁴⁹ Thus, as a matter of “necessity”, it is permissible to do away with an obligatory rule where any of these fundamental objectives of *Shari'ah* is threatened or likely to be threatened.⁵⁰ The authority to support this submission can be found in the Holy *Qur'an* and the traditions of the Prophet Muhammad (SAW).

Nawawi, *al-majmu*, vol.16, 134-135.

⁴⁵ Bello-Salau, “Ethical Analysis of the Full-Body Scanner”, 670-671.

⁴⁶ Yasmin Hanani Moh'd Safian, “Necessity (*darura*) in Islamic Law: A study with special reference to the Harm Reduction Programme in Malaysia” (Ph.D. diss, University Exeter, 2010) 32-33.

⁴⁷ *Ibid*, 62.

⁴⁸ Bello-Salau, “Ethical Analysis of the Full-Body Scanner”, 670.

⁴⁹ See al-Shatibi, *Al-muwafaqaht fi Usul al-Ahkam*, Vol. II, 4; Jasser Auda, . *Maqasid al-Shari'ah as Philosophy of Islamic Law: A System Approach*, (Washington: The International Institute of Islamic Thought, 2008), 2; Imran Ahsan Khan Nyazee, *Theories of Islamic Law: The Methodology of Ijtihad*, (Advanced Legal Studies Institute, Kazi Publications Inc.1995), 213.

⁵⁰ Yasmin Hanani, “Necessity (*darura*) in Islamic Law”, 33.

The provisions of the Holy Qur'an

The underlined parts of the verses below provide for the obligatory rules and the exceptions.

He hath only forbidden you dead meat, and blood, and the flesh of swine, and that on which any other name hath been invoked besides that of Allah. 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.⁵¹

Forbidden to you (for food)... are...But if any is forced by hunger, with no inclination to transgression, Allah is indeed Oft-Forgiving Most Merciful".⁵²

"Why should you not eat of (meat) on which Allah's name has been pronounced, when He has explained to you in detail what is forbidden to you - except under compulsion of necessity?..."⁵³

Anyone who, after accepting Faith in Allah, utters Unbelief - except under compulsion....⁵⁴

The exceptions relate to unintentional situations such as compulsion (force) and necessity. Compulsion and necessity are therefore valid excuses from the punishment of Allah. All these verses support the fact that in an extreme situation, a Muslim is allowed to do away with the obligatory rule temporarily for the purpose of safeguarding and securing any of the five fundamental objectives of Islamic law.

The provisions of the Prophetic Hadith

The *hadith* below supports the provisions of the Holy *Qur'an* cited earlier.

It was narrated from Jābir bin Samurah that a man stayed in Al-Harrah, and he had his wife and children with him. A man said: "A she-camel of mine is lost; if you find it, then keep it (for me)." He found it, but he could not find its owner. It fell sick and his wife

⁵¹ Al Qur'an, Surah Al Baqarah 2: 173. See also Al Qur'an, Surah Al Nahl, 16: 115. [Emphasis added].

⁵² Al Qur'an, Surah Al Ma'idah, 5: 3. [Emphasis added].

⁵³ Al Qur'an, Surah Al An'am, 6: 119; see also 6: 145. [Emphasis added].

⁵⁴ Al Qur'an, Surah Al Nahl, 16: 106. [Emphasis added].

said, "Slaughter it," but he refused, then it died. She said: "Skin it so that we can dry its fat and flesh and eat it." He said: "Not until I ask the Messenger of Allah." He came to him, and asked him, and he said: "Do you have anything else that is sufficient for you?" He said: "No." (The Messenger of Allah replied): "Then eat it." Then its owner came and he told him the story. He said: "Why didn't you slaughter it?" He said: "Because I felt shy of you."⁵⁵

It was narrated from Al-Fuji' Al-`Àmiri that he came to the Messenger of Allah and said: "Is it permissible for us to eat dead meat?" He said: "What food do you have?" We said: "One in the evening and one in the morning." - Abu Nu'aim (one of the narrators) said: "Uqbah explained it to me: 'only a cup (of milk) in the morning and a cup in the evening'." - (The Messenger of Allah replied): "That - by my father - does not ward off hunger." And he made it permissible for him to eat dead meat in this situation.⁵⁶

It was narrated from Al-Hasan, from Samurah bin Jundab that the Prophet of Allah said: "If one of you comes by grazing animal, and the owner happens to be there, you should seek his permission, and if he permits then you can milk it and drink it. If he is not there, then you should call him three times, and if he answers then you should take his permission, and if he does not, then you may milk it and drink from it, and you should not carry any of it."⁵⁷

Both the *Qur'an* and the *Sunna* suggest that in an extreme situation, the obligatory rules should be relaxed as a matter of necessity. All the Islamic Jurists agree to this submission.⁵⁸

There is no argument that the issue of airline passengers security screening was unknown, and even air transport was unknown, at the time the verses were revealed and during the life time of the Prophet (SAW) and His companions. However, by analogical deduction, it is clear that since the protection of life and property are among the *Maqasid al Shari'ah*, the adoption of the imaging screening machine

⁵⁵ Hadith number 3816 in Chapter 36 "Regarding One Who Is Compelled By Necessity To Eat Dead Meat" in Iman Hafiz Abu Dawud Sulaiman bin Ash'ath, English translation of *Sunan Abu Dawud*, Vol. 4, 288; See also Yasmin Hanani, "Necessity (darura) in Islamic Law", 42-43.

⁵⁶ Hadith number 3817, *ibid.*, 289.

⁵⁷ Hadith number 2619, in Chapter 85, "Regarding A Wayfarer Eating Dates And Drinking Milk He Passes By", in Iman Hafiz Abu Dawud Sulaiman bin Ash'ath, English translation of *Sunan Abu Dawud*, Vol. 3, 266.

⁵⁸ Yasmin Hanani, "Necessity (darura) in Islamic Law", 42.

could fit into the extensive interpretation of the above verses and the Prophetic traditions.

The consequences of unlawful interference with civil aviation such as hijacking of an aircraft would include loss of lives, properties, economic loss, distortion of international peace and market, as well as psychological effects. These would serve as a catalyst to the international community to find mean(s) such as the adoption of imaging technologies to screen the body of passengers, for the purpose of detecting hidden weapons and other dangerous devices and explosives that are used to commit any of these offences.

In addition, viewing the private parts of another person is a compulsory procedure for airliners, otherwise the principle of "No screening no fly" will apply. This therefore necessitates, as a matter of compulsion, allowing the aviation security screener to screen a passenger through whatever means the airliner adopts. Furthermore, the intention of both the screener and the passengers are very important in this circumstance. Once it is intended to provide security of civil aviation against unlawful interference and not to transgress the limits of Allah, Allah is Most Forgiving and Most Merciful. This submission, by analogy, is derived from the provisions of the Holy *Qur'an* cited earlier. It can therefore be concluded that the intent to secure civil aviation against unlawful interference necessitates the screening of passengers with imaging technologies to see what is hidden in the human body.

In addition, the principle of Islamic governance makes it obligatory for the state to protect public interest (*al-Masalih al-Mursalah*) on any matter relating to *Maqasid al-Shari'ah* as a matter of necessity.⁵⁹ It is therefore necessary for the ruler to verify a situation before he could declare a solution to be a necessity.

It is submitted that unlawful interference with civil aviation is a situation that needs an urgent solution which could be considered necessary to adopt imaging screening technology. The adoption of imaging technology imposed on the passengers could be categorised as *daruri* because the imposition is as a result of an extreme situation of breakdown of law and order in the aviation industries that requires such a treatment.

⁵⁹ Yasmin Hanani, "Necessity (darura) in Islamic Law", 76; Felicitas Opwis, "Islamic Law and Legal Change: The Concept of Maslaha in Classical and Contemporary Islamic Theory", in Abbas Amanat and Frank Griffel, *Shariah-Islamic Law in the Contemporary Context*, (Stanford: Stanford University Press, 2007), 62; Muhammad al-ayubi, "Maqasid al-Shari'ah al-Islamiyyah wa 'Alaqtuha bi al-'Adillat al-shariyyah", (Riyadh, Dar al Hijrah, 1418/1998) 37.

CONCLUSION

The use of imaging screening technologies to screen airline passengers has generated heated arguments among the human right activists and the aviation security practitioners across the world. The basis of the argument is the projection of nakedness of a passenger to the screener as being a violation of a fundamental human right - right to privacy, and according to some Islamic writers as against the provisions of the Holy Qur'an and the traditions of the Prophet Muhammad (SAW). After appraising the views of the anti-imaging screening technologies on the basis of Islamic law principles of *Daruri* (Necessity) and *al-Masalih al-Mursalah* (considerations of public interest), it is our finding that the verses and the *ahadith* quoted by the opponents of imaging technologies are applicable only where the screener uses these technologies to engage in corrupt practices or commit adultery or fornication. They are not applicable in a situation where any of the *Maqasid al-Shariah* is to be protected or safeguarded. In fact, the protection of *Maqasid al-Shari'ah* (protection of religion, life, intellect, family, property) constitutes an exception to the applicability of the verses and the traditions cited by the opponents imaging screening technologies. An analogical reasoning can be drawn to support this view from the Holy Qur'an and the *ahadith* of the Prophet (SAW). It can therefore be safely concluded that the adoption of imaging screening technologies to screen airline passengers could be legalised as a necessary means for the protection of life and property which are among the basis of human existence. Therefore, the commission of the offences such as aircraft hijacking, the sabotage of an aircraft, and hostage-taking necessitate the adoption of imaging screening technologies to detect weapons, explosives and other dangerous devices that are hidden in the private parts of passengers. Necessity, in extreme exceptional circumstances, legalises illegality.