CHAPTER THREE
CHAPTER THREE
NATURAL GUARANTEES OF HUMAN RIGHTS

Introduction

The existence of real guarantees that enable people to practice and enjoy their rights and liberties was a necessity that has surged from the long lasting battle of peoples against the hegemony of their governors. Consequently, rights and liberties were recognized through constitutional citations. To put the constitutional citations into practice and clarify their implementation, legal tools were required.

Many jurists, like Berdeau, believed that "democracy" as a manifestation of freedom of opinion and speech is interactively connected with rights and liberties. Thus, what he claims that "a man could be free only within a free State", a proposal suggesting that political freedom is basic for individual rights and liberties. However, such a theory could be criticized on the ground that the practical effectiveness of minimum real rights with implementation guarantees is more important than wide range of constitutional liberties without any guarantee. Also, it appears that guarantees represent for the individuals a means to check and balance the different bodies of the government, so that governmental institutions, both legislative and executive, would be bound by the rules of rights.

The early Islamic era is considered as the golden age in respect of matters of individual rights. It was the age where individuals lived in liberty, justice and equity.
It was the first environment where all rights and duties were protected while the idea of discriminating people upon race, sex or color was repugnant in the eyes of the law.

The modern world has called for the protection of these rights only a few centuries after their implementation by early Muslims.

The present chapter will show the fundamental guarantees of rights and liberties in the contemporary jurisprudence, compared to the Islamic law and International Charters, with emphasis on the Algerian Charter of 1976 (*Mithāq al-Thawrah*).

3.1. The Mechanism of Human Rights Protection in the Constitutions and International Charters

All constitutions and international charters put different measures and legal mechanisms to protect human rights, prevent dictatorship, abuse of power and create a balance among different authorities in the state:

3.1.1. Separation of Powers

Separation of Powers is the doctrine which divides powers of government into three different branches in order to avoid tyranny. This separation therefore indicates the positing manner of managing the internal affairs of the state.¹
(1) In Western system

The West, in its quest of a more democratic system, has long been yearning to guarantee its citizen the rights that he deserves. That would require the development of a technical mechanism that aims at guaranteeing the smooth running of the State and the well being of the citizen, hence the creation of the doctrine of the separation of powers.

i. Democratic System

The western democratic system offers more liberty and set limits to the area of any power in order to prevent other powers from crossing its domains. Within such a system, separation of powers works as an obstacle between these powers and their eventual misuses.

Under the doctrine of separation of powers, three branches have been identified and put in practice; that is the legislative, executive and judicial. The legislative branch has the power to make laws. The executive branch has the authority to administer and enforce the law, primarily by bringing lawbreakers to trial, to appoint officials and review the administration of government responsibilities. The judicial branch has the power to try cases brought before the court and to interpret the meaning of laws under which the trials are conducted.

ii. In Socialist System

The Stalinist regime in the Soviet Union is probably the best example of
socialist system.

Though based on the monopolization of power, the socialist system recognizes the existence of different and separated powers. The Soviet Constitution considers the State’s power as a form of commission. The people delegates its power to the Supreme Soviet Assembly, which delegates its power to its President who, becomes answerable to it. It also considers the Assembly of Ministers merely as an attachment of the Supreme Soviet Assembly and an executor of its decisions. Thus, power is in theory the people’s property, but practically is in the hands of the Supreme Soviet Assembly.

The advocates of this system believe that the monopolization of power would prevent any conflict resulting from strata differences in society since the people hold the whole power.²

Nevertheless in practice it confiscated all rights and liberties of the soviet citizens although it was supposed to uphold them. Examples on this kind of regime can be seen nowadays in many countries where people are denied basic human rights and liberties.

(2) Algerian Constitution

Referring to the Algerian Constitution of 1996, we can realize the views of lawmakers in Algeria. They believe theoretically in the Constitution that administers the independence of government bodies from each other which will is clearly stated
in part two of the article titled "Arranging Powers". Each power was dealt with in a separated chapter, including the existence of power, its objectives and how to execute its functions.

The structure of the Executive Power was introduced by the first president of the republic who has put this executive organ in the introduction of the constitution on the basic that the president is the first man of the republic. In Chapter two the legislator made conditions for the creation of legislative powers. The third power is dealt with under a different chapter by explaining its functions and the way it interprets the law. The article 138 declares clearly the duty of the judiciary to separate the powers, as follow:

"The judicial power is independent. It is exercised within the framework of the law." (Article 138).

In the second part of the Algerian constitution 1996 with its three chapters, we do not find a single article assigning authorization for any body's member to interfere with the affairs of another power, except the president of the republic who has been given the power to look into the other power's domains. Some of these advantages are as such that the president is the first judge of the country with the ability to pardon offenders, reduce and change punishments which is basically the job of the judicial power. (article 78 paragraph 7).

The constitution gives him the power to override the legislative power by referring directly to the public through consultation or vote to strengthen his decisions and programs. As he has the power to look into the parliament works by
deciding upon exceptional meeting if requested from the Prime Minister. (article 118 paragraph 2).

There can be some relations between the three kinds of powers in the domain of legislation, as it appears between the executive and legislative power (article 119, Algerian Constitution 1996) or in the designation of the members of the judicial powers by the executive power.

We can remark that the juridical power cannot exercise its influence on the members of the parliament since they have a limited power over them.

(3) In the Islamic Political system

The Prophet (b.p.u.h) was the reference of the system, he was legislator and judge. The rules and judgments were based on the Divine Revelation. The Prophet was also the executive power who applied the laws at all levels. He was the Supreme Commander of the Muslim armies.4

He held all powers and had all prerogatives as a Prophet and none shared that with him since he was acting on dual capacity both as a Prophet and as a temporal leader. Later, independence of powers began to emerge in the era of the pious Caliphs.

The idea of delegation of power grew with the expansion of the geographical
area of the Islamic territory. Through the appointment of governors and judges autonomous authority was given to decide matters at hand. The idea of separation of power was still in infancy due to the rarity of disputes and the simplicity of the social and political life.\textsuperscript{5}

3.1.2. Parliament Commissioner

(1) The Western System

The Parliamentary system can afford a better execution of human rights and a wide guarantee for individual liberties by considering the principle of people's sovereignty. Through the elected deputies, the Assembly of People or Parliament can stress on the government to comply with the principles of law. As the parliament has many functions to attend to, it delegates its power to specialized committees, which come under the former total supervision. The committees present results of their deliberations through reports which will be discussed by the assembly.

The foundation of the parliamentary system first appeared in 1809 in the Swedish constitution under the domains of \textit{alampodsoman} pertaining to controlling the legal system and functions. Furthermore the latter system allows trials against offenders and those who fail to accomplish their duties properly during their mandates, exposing them as a procedure to prosecution.

This system appeared in Sweden due to the political and constitutional developments in that era. Both the administration and the law were controlled by the
king while the parliament was permanently not functional. Since there was no way to extend its control to all centers and machinery of administration and law, it has opposed (alampodesman) which means in Swedish, the delegate or agent. It settled the deficiency of the ministry control over the administration in the one hand and the lack of the tools of the traditional parliamentary control in the other. The Scandinavian countries followed the Swedish model although under different labels, as well as the other European countries. The final version of the alampodesman system has been adopted by Sweden in 1809, Finland in 1919, Britain in 1967, France in 1973 and the rest of the Scandinavian countries in 1950.

The above dates stand for the beginning of the application of the alampodesman system in terms of setting suitable mechanisms to control the government and to deal with any conflict occurring between law and system. Therefore, citizens will be protected and their general rights will be guaranteed democratically. In order to implement the protection and guarantee people’s rights, the parliament chooses a competent delegate who should be a jurist who is acquainted in administrative matters.

The alampodesman allows the inspection of any governmental service which is subject to any claim or complaint from a citizen. The inspection process also includes the implementation of the claims by the jurist. He can work in the unification of the administrative practicalities which will guarantee the citizens’ right and will give back the rights of the offended citizens by any illegal administrative functionary. In other words providing full protection to individuals’ right and
liberties under the light of the legislative principles and law sovereignty. The *alampodesman* provides the power to prosecute any offender from the executives who violate freedom of the parliament or any of its related commissions.

The French jurist, Andre Le grand, describes the *alampodesman* as an extraordinary organism to control the administration. In addition, it protects individuals from the administration abuses through the arbitration of conflicts rising between the administration and the individuals. It is noticeable that the *alampodesman* fully guarantees individual rights of the citizens. Therefore it has the power to prosecute any administrative organ of the government which fails to observe rules of law or breaches rules relating to human rights. Finally it has the power to investigate the conduct of the police or the armed forces.

In Britain the same system was applied under the name of the *Commission* but with less power compared to the *alampodesman*. It can only write a yearly report and prosecute any officer from the administration but it cannot address directly the parliament or pursue the case in court.

(2) Algerian System

Under the Republic intermediary, the President should be intellectually competent and able to deal the parliamentary lobbies so that he can control the administration, and solve the citizens' complaints. But it is only recently in 1995 that such a system has been adopted in Algeria. Previously, the citizens lodge their complaints as far as the administration is concerned directly to the administration. If
no answer is provided, the Wāli, who is the President of the executive authority in the Wilāyah (state) and supervisor of the general administration in its various levels, will take charge of the matter.

The Republic intermediary (the parliament commissioner) is independent, because the president of the Republic guarantees such quality. The President of the Republic is considered by the constitution as the president of the executive authority and the first in command. Therefore, it is clear that in the legal instance Algerian Parliament has never refused any law proposed by the President. This also can be considered as an indirect intrusion in the legislative authority indicating that the idea of independence of government organs is illusionary. Here are examples of some articles of the Constitution of 1996 which provides the powers of the President of the Republic. The Articles 77 and 78 from the Algerian Constitution 1996 be proof for that full power of the president. 7

(3) Islamic System

Indirectly, the alampodesman has existed in the Islamic Shari'ah. However the fundamental differences between the two systems left no room for comparison. Since fundamental aspect of Islamic Laws are not subject to revision, question or change the matter was much easier than the countries adopting man made laws, to change their situations in order to establish equality and justice. Laws are not immune from shortcomings and lapses. They are active only when offences are committed and damages done. 8
Divine quality of Islamic law (p.b.u.h) and its perfect revelation of rules and principles that serve humankind beyond any biases or favoritism is the only guarantees that preserves and maintains man's rights and liberties. Thus as the difference between the two systems is clearly seen in contracts and dealings of people. However in Islamic Shari'ah these agreements are limited by the principle of Islamic laws.\(^8\)

### 3.1.3 Control of the Constitutionality of Laws

The main objective of any constitution is to place every body under the law. Thus the state's authorities are compelled to submit to the rules of the constitution and execute their functions within the existing restrictions.\(^9\)

This means that the legal organs of the government, such as ordinary, administrative or any special organ such as constitutional court have the right to reexamine the constitutionality of any law. Enabling them to establish whether it is valid or not by issuing an order to stop its application in such a complaint where the allegation was proven. This is what is called legal control. Which means the submission of the state to the law.\(^10\)

Hence any clear action by any state authorities which disregards the supremacy rules of laws is considered inappropriate and will be cancelled. Furthermore any fees involved there in will be refunded.
(1) Political Supervision

The uncontrolled enactment of laws may undermine the constitution and cause it to serve purposes detrimental to the supremacy of the legal system in practice. This can be seen in the following:

i. In the International Bills

Its fundamental power is to reject all anti constitutional rules. This idea was created first during the French revolution, when the French jurist "Syez" attempts to create political body which would reject all laws which contradict the constitution. But he was unfortunate to find no acceptance among the writing of the constitution of year three of the Revolution because it seemed dangerous to allow the appearance of a high body onto the powers instead of his noble goal in protecting constitutional laws.\textsuperscript{11}

He has assigned such a mission to a temporary elected parliament which he assigned the duty of assessment instead of giving it to a judicial instance which will control the constitution and as a consequence of the bad reputation given by the judicial organism before the French Revolution. The constitution was made righteous by his proposition and thus created his organ which he named the Dignities Assembly by the constitution, on the eighth year of the revolution.

The constitution written in 1852, 1946, and 1958 have mentioned this principal and advised for the creation of a politicbody under the name of the constitutional assembly.\textsuperscript{12} The same principle has been cited in the constitutions of
the world, but under different names.

ii. The Algerian Constitution

After independence (1963) and through a well lengthy introduction titled judicial department and what follow in the article:

"The Constitution guarantees the independence of the judges, the Constitution council of the Supreme Court rules on the constitutionality of laws and ordnals when these are referred to them by the President or by the President of the National Assembly."

In articles 64, the constitution specifies the rule and function for the constitutional council.

Article. 64 "The Constitutional council shall rule in the constitutionality of laws and legislative ordinances when the President of the republic or the President of the National Assembly."

The Algerian Constitution of 1963 gave to the first President of the High Court, the two presidents of administration and civil chamber of assembly and the President of the Republic the right to name a President among them. But the French system is quite different especially when it comes to the constitutional assembly. It is led by a person appointed by the president of the republic from among the members of the assembly.

The head of the Constitutional assembly could be also appointed by the former President of the republic, as a permanent member and form nine members, three of them named by the President of the Republic, three of them, named by the President of the assembly and three by the President of the Senate and their members maximum duration of office is nine years and not renewable.
**Article: 63** "The constitutional council shall be composed of the first president of the supreme court, the presidents of the civil and administrative chambers of the supreme court, of three deputies appointed by the national Assembly and of one member appointed by the president of the republic."

The members of the constitutional council shall elect their president who shall not have a casting vote. The decisions taken by the constitutional assemblies have the character of obligation and are questionable. But this system in France or Algeria could be criticized for its control is limited to the Jurisdiction of the three powers that cannot be part in the complains of the citizens. In the United State of America the citizens have the rights to sue any part because of the non-constitutionality of the laws in the courts.

Article 38 of the Algerian Constitution of 1963 provided that the National Assembly controls the government by the following means:

- Hearing of the Ministers in a commission
- Demands from the Ministers to answer the written question
- Direct the question to them with or without discussion.

As it existed in the articles 149 to 160 of Algerian 1986 Constitution which are being repeated in the Constitution of 1996 from articles 159 to 170 to control the Constitutionality of laws as follows:

The article 159 from the Constitution 96 provides:

**Article 159.** "treats international Dumont ratified by the President of the Republic, under the conditions previous by the Constitution, have the force of law."

70
Article 161. "Each of the two chambers of the Parliament may, within the framework of its prerogatives, institute at any time committees investigating affairs of general interest."

Article 162. "The control institutions and bodies are in charge of checking the conformity of the legislative and executive action with the Constitution and to verify the conditions of use and management of material means and public funds."

Article 163. "A Constitutional Council is institute to see to the respect of the Constitution. The Constitutional Council sees also to the due form of referendum operations, the election of the President of the Republic and the legislative elections. It proclaims the results of these operations."

iii. Islamic law (Shari'ah)

In Shari'ah, both governmental organs and citizens have to obey the Islamic laws. The freedom of choice and legislation are limited to what al-Qur'an and the Sunnah prescribed and clearly stated in a way that cannot be opposed in its legality especially in practical side which exists between the powers and could be judged as true or false.¹⁴

Hence the peoples Assembly in the Islamic State has no power to the legislate laws that may oppose the principles of the Qur'an and Sunnah. However the assembly can propose laws and rules in order to be executed and can give advises to the executive organ when it fails to implement Islamic laws. The offender whatever position he occupies is subject to the implementations of Islamic law.

The public supervision function is strengthened by its independence and skilled members who are chosen from the scholars and trusted person of the people. Thus the opinion of Oday Zaid al-Kailani, who promotes the enlargement of this
system by considering it as the fourth department of powers. In spite this body’s independence in its organisation and management, it must he also financially independent in order to avoid any pressure and financial instability. This public control body prevents my deviation from the Islamic path including that of protecting the right and general liberties of the citizens.

(2) Judicial Supervision

Judicial rules refute penalties and laws which are opposed to provisions of the constitution. This concept first appeared in 1803 when, the High United Court of USA issued a decision in Marbury and Madison’s case. In this case the court decided not to implement the law which contradict the constitution. The judiciary control in this respect is two folds:

- **Control by abstention:** which means that the judge refutes the unconstitutional law and refuses to implement it in the cases under trial.

- **Control by rejection:** where the judges have the right to reject the unconstitutional law.

    To explain more this point I will give more details in this chapter when dealing with complaints

i. **Legal Mechanism in the Supervision of Constitutional Right**

    The court follows in general three ways of supervising constitutional rights of the people.
When examining civil, criminal, or administrative complaints presented the accused or the defendant may reject the demands or plaintiff of the accusation or claimed is contradiction to the constitution. The constitution is superior than any ordinary law, the court reexamines the truth of the accused or defendant and if found innocent the court releases him and reject the prosecutor's opinion.

Individuals have the right to complain to the court on the unconstitutionality of any law. The judge once received the complain should investigate and examine the truth of the complain. If it is found to be true, the court has to issues an order to stop the unconstitutionality of that law and the executive is obliged to comply with the court’s order.

This procedure appeared first in England, where an individual went to the King's Court, complaining about the unjust judgment. As a response the King's court issued an order or decree based on justice, which was considered as an exceptional source in the public law.¹⁵

Special court as provided in the constitution is empowered to hear complains against laws that may have contradicted the constitution. The defendant demands the rejection of the law, because it opposes the constitution in order to avoid conflict of opinions. The rights and general liberties of the individual are guaranteed through the above mechanism and serves as a warning to the legislative and executive powers not to transgress the constitution.

But the administrative supervising body has the power to review
administrative decisions in the countries like France, Algeria and Egypt, especially when the matter deals with rights and general liberties in order to harmonize with the situation.

ii. Judge qualification

The selection of a qualified Judge is a necessary condition to guarantee the individual’s rights and freedom. Because a trustworthy judge with a high knowledge, ethics and decency can assure these rights.

There are two way how a judge can be appointed:

First, through national voting. That is achieved by choosing a representative for the settlement of disputes between the parties. This method is less practical as it has defects that make the judiciary not impartial. Moreover, the selection could be for the less qualified. Moreover the selected judge will be biased towards those who opposes his selection.

The second way is through the appointment of the executive from among those who are upright, educated and in possession of ethical advantages according to the prescribed prerequisites. This method is easier and more assuring in preserving the judge’s righteousness in up-holding justice and the rights of people. That is why most countries appoint their judges by this way despite the criticism encountered in the practical aspects. The appointment procedures differ from countries to countries.
In Islamic law the judges who are being appointed to guarantee people’s rights most be trustworthy, most knowledgeable in Islamic law and respected both by the people and the government.

Evidence of this is the letter of ‘Ali (May Allah be pleased with him) to his governor in Egypt, which says:

"Appoint judges from the best of your people who is not pressured by situations, not controlled by disputes, does not get carried away in lapses, whose soul does not turn to greed, who is not satisfied with little knowledge rather than most of it, the most careful about doubts, the most considerate of pretests, haste in up holding the right of the oppressed, most patient in inquiring the matters, the most rigorous in pronouncing the sentence and who is not taken by praise nor drawn by temptation, etc."¹⁶

If the appointment of judge is verified, then his rulings are binding on all parties and can be enforced. Nevertheless, the caliph has the authority to remove a judge from office.¹⁷

The conditions of a judge in Islam are as the following:

- **No physical or mental disabilities:** A person must be physically and mentally competent. That means a judge must be in good mental and physical condition sound such as mind and body. Thus a child or a mentally unsound person is not qualified to be a judge in Islam.

- **A person must be a Muslim:** This is made a condition because Allah says: "...And never will God grant to the unbelievers a way (to triumph) over the Believers."
(Surah, al-Nisā': 141). A true Muslim fears Allah before anything else and for this reason will do justice. He obeys the commandments of Allah who says:

"God doth command you to render back your trusts to those to whom they are due." (Surah, Nisa': 58)
Also Allah says in another verse:

"O ye who believe! Stand out firmly for God, as witnesses to fair dealing, and let not the hatred of others to you make you swerve to do wrong and depart from justice. Be Just: that is next to piety: and fear God...." (Surah, al-Mā'ida: 7).

- A person must be conscientious: That the judge should not be corrupt, for Allah says:

"Oh ye who believe! If a wicked person comes to you with any news, ascertain the truth, lest ye harm people unwittingly, and afterwards become full of repentance for what ye have done." (Surah, Hudjurat: 6).

The word of a corrupt is unacceptable and his orders can not be executed. Since justice or 'adl is a condition for a witness to be qualified to give testimony in Islamic law, it is therefore considered as a priority and indispensable element in judgeship.

- A person must possess a good education: It is a condition necessary in all ancient and modern systems. A judge has to be knowledgeable on legislative injunctions, intellectually assiduous and not ignorant. What supports this is the fact that the Prophet (p.b.u.h.) sent Mu‘adh ibn Jabal as a judge to Yaman after he tested his intellectual assiduity and qualification. The prophet asks: “Which whay will you judge?” Mu‘adh answers: “with the book of Allah”. He asks: “And if you did not find? He answers “By the tradition of the Messenger of Allah.” He asks: “And if you did not find? He answers: “will try the best of my mind.” The Prophet (p.b.u.h)
agreed with the answers and says: “Praise be to Allah Who helped the Messenger of the Messenger of Allah succeed in what pleases Allah and His Messenger.”

Education is an important element that a judge must possess in order to pass judgment based on knowledge. The knowledge will assure that the rights and freedoms of the people are protected from the oppressors and usurpers who will manipulate a judge's weakness and ignorance of the law.

If the above conditions are fulfilled then a person qualified to be a judge in deciding dispute between parties. He is accountable before Allah and before the Caliph (the president of state), as well as before the nation of what he has decided. Except if it is appealed against by the defendant (one of the dispute parties), or by the attorney general in general cases like crimes for instance.

3. 2. The Guarantees of Human Rights in the International Charters

Several declarations have been made to stress the guarantees of Human Rights worldwide. In an attempt to shed light on the nature and credibility of these declarations, we shall select the following:

3.2.1. The International Declaration on Human Rights

The UDHR in 1948 did not specify clearly the provisions that prevent any infringement of human rights by any country in the international community which are signatories to the declaration. The declaration warns against any misinterpretation or misuse of the declaration without specifying any sanction against whoever infringes it in articles 28 and 30. However, it is clear that the declaration would not
be having any effect as long as it did not have any legal sanction which should be imposed on whoever infringes it. Otherwise it could be considered as a law and it would not be binding. Consequently rights of people and their freedom will be lost.

Thus, the criticisms against the declaration are numerous. The present study will try to highlight these shortcomings and propose some alternatives. The study will start with the articles 8, 20 and 23 of the Declaration which deal with the economic, social and cultural rights that every person deserve.... or to be a member of any group if he/she should abide by the regulation of that organization. However the article 8 states that this right should be in accordance with law. The Declaration also provides the right to strike for every worker. The legal analyst will be faced not only with ambiguity of these provisions but also with a contradiction of its different articles. The freedom of religion is legally protected, however, the religious manifestations which may have harmful impacts on the individual and the public, would not be accepted.

All the rights contained in the International Declaration on Human Rights whether they are economic social or cultural are just personal rights which could be waived or relinquished. This may lead to the loss of rights rather than to be protected. Moreover, by the course of time, it is possible that a law based on custom would include these rights, when facing contemporary challenges.

The declaration did not refer to the possible threat originated by scientific developments, which are not covered under any legal regulation that might be used
for destruction and the violation of human rights especially the economic, cultural and moral rights. However, in Tehran’s meeting in April 1968, it is stated in paragraph 18 from the declaration that:

"if the scientific discoveries and the artistic development have open the doors for economic social and cultural development which may affect the rights and freedom of the individual, this require a degree of alertness and vigilance."

However, it seems that this is not enough since it did not put forward practical steps whether concerning the kind of violation of these rights or the possible sanctions.¹⁹

Thus, with these theoretical limitations and the absence of practical guarantees the idea of human rights will remain just as a hope for the people and as an instrument of propaganda by the rulers and dictators in their international forums.

3.2.2. The United Nations Charter

When the General Assembly of the United Nations endorsed the international charter of civil and political rights in 1966, followed by a chapter concerning the complaints by individuals whose guaranteed rights are violated, a committee on human rights has been formed in accordance to articles 28 and 39.²⁰ The functions and the working regulations of this committee have been regulated by articles 40 and 42. It says in article 40:

"In order to prevent an aggravation of the situation, the Security Council may, before making the recommendations or deciding upon the measures provided for in Article 39, call upon the parties concerned to comply with such provisional measures as it deems necessary or desirable. Such provisional measures shall be without prejudice to the rights, claims, or position of the parties concerned."
The Security Council shall duly take account of failure to comply with such provisional measures."

- Where as article 42 provides:

"Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations."

The provisions and conditions contained in the International Charter the amended as in article 9 is considered to be applicable on the dawn of 12 June 1967. Any country member will take into load of the functions given to the International committee on human rights, especially in the issue of transmitting the complain related to human right abuse for the sake of a fair trial. Similarly every country should study this complain according to first article which states that "The Purposes of the United Nations are:

1. To maintain international peace and security, and to that end; to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;

2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;

3. To achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; and

4. To be a center for harmonizing the actions of nations in the attainment of these common ends."
Similarly, it is part of the duty of the committee according to article 4 part 5 to present its viewpoint to the state, organization or individual concerned. Besides that the committee will publish its annual report based on the complaints mentioned above in article 6. However this protocol did not prevent the countries and people under colonization to present their complain in accordance with the charter of the United Nations and other International treaties promulgated under the United Nations and its affiliated agency as stated in article 8. Thus, the international community has made one step in the right direction by providing guarantees and mechanism for the protection of human right and freedom of individual from any violation, despite the criticisms addressed to this move and the limitations and contradiction in its provisions.

3.2.3. In the European Declaration on Human Rights

The precedence of the European declaration on human right and freedom adopted by the European council in Rome in 1950 shares the same ground of the UN declaration of 1966. It contains very wide principles and more guarantees on human rights especially the civil and political rights. Thus, in the second chapter of the European charter on human rights and also the European Court of Justice, it is maintained that the door is open for any country whether to accept or to reject the function of the European committee of human rights.

All the complaints and protests from one country to another shall be
addressed to it and every country have the right to report about the transgression of another country member. Resort to the European committee of human rights represents the last possible step to be taken by an individual, organization or any other body in its administrative or legal actions. Similarly, the European charter give the European court of justice the advantage of interpreting the charter and the way of its implementation or whatever is reported by the country member or the European committee on human rights.

Furthermore, the court has the right to interfere in the internal affairs or court’ decision of the country member when it notices any violation of basic human rights.

The decisions of the European court are final and indisputable. All countries member will undertake to implement it. The decisions will be referred to the ministerial committee for its implementation.

On the other hand, in a further step to protect freedom and rights from any violation the charter in its article 60 prevents any interpretation, which may lead to such a violation. Thus, it could be said that the European charter on human right has contributed to a certain level in the preservation of guarantees for the protection of human rights. It should be noted here that the Muslim countries are the most required to implement this system due to the spirit of faith that unite them.

3.2.4. Rule of Law

The concept of rules in Islam differs from that of man-made law. It is general
than the legal rule or other rules given by other branches of the state. It includes all
rules emanating from the rulers, for the benefit of the population and without the
need for a legal action from one party against another such as the dismissal of a
judge or a provincial governor for one reason or another.\textsuperscript{21} In other words, it is the
different rules enacted by the ruler for the good of the population and this is what is
called in the civil law as the administrative regulations. On the other hand, \textit{qadār} in
Islamic law is a rule given by a judge in a specific dispute. For this reason the judge
(\textit{qādi}) is a called also in Islamic law as the ruler (\textit{al-hākim}) although the concept of
(\textit{hukm}) is much wider than that of \textit{qadār}.

A legal rule will not be binding unless it fulfils three conditions:

(1) It should be a decision emanating from a specialized court within the power given
to it. Therefore, a rule from an administrative entity would not have the same binding
effect of a juristic decision. Similarly the rules should be from a specialized court
otherwise it would be against the general rules. For instance, the criminal rule
emanating from a civil court would not have a binding effect.

(2) Similarly the decision should be based on the authority given to the court as a
juristic institution for the fact that its decisions as an administrative entity would not
have this force. The rule should be definitive. Therefore, the preliminary decisions
would not have this force. Thus, the preparatory decisions such as the transfer of the
case to a specialized court, the appointment of an expert or calling the witnesses are
only preparatory decisions. Similarly the introductory decisions would not have this
force although it may specify the kind of decision, which would be assigned to an expert who will value the damages which suggests that the decision will result in compensations.

(3) Furthermore, we have the temporary decisions such as the appointment of a person to secure the safety of the object in conflict until the final decision is given. The legally binding characteristic would be for the announced decision itself and not to its causes unless there is a close link between the decision and causes to the effect that the announced decision would not stand without these causes. These conditions represent protective elements against the violation of human rand freedom and the abuse of power by the court.

3.2.5. Appeal

It is a step initiated by the law as a kind of protection of the right and freedom of the individuals since mistake or error is possible in juristic decisions as well as in all human being’s deeds. Therefore, in order to protect the rights, life and dignity of the people this step represents a way to avert wrong implementation of the law. Law could not be repealed or appealed unless by due process of law delivered by the court of appeal. The process of appeal is different according to the system of laws as the following sub-topic will show:

(1) Judicial Review In the western law

There are two kinds of appeal in the Civil law system.
i. The Normal Way of Appeal

There are no specific conditions for the normal way of appeal. It is when one the party is not satisfied, then the case will be restarted in the same court by bringing up the new issues as basis for the appeal. (This is done by challenging (Muʿāraẓah) the decisions). However, the court of appeal will be the right court to review the case.

ii. Abnormal Mode of Appeal

Law must provide strong reasons, if any complain of unsatisfactions arises Regarding predetermined rules the abnormal appeal court does not review any conflict similarly to the normal court of appeal, yet it reviews the reason or reasons upon which the appeal is founded.23 The abnormal ways however are limited in the appeal by plea (al-İltimās), review and the Causation of the appeal.

(2) Judicial Review in Islamic Law

There is a general consensus among Muslim scholars that any rule proven to be wrong must be reviewed in order to comply with Islamic law principles. There is no normal and abnormal way of revising a ruling in Islamic law where the same judge or any other judge must reverse the wrong ruling. This is based on the instruction of 'Umar Ibn al-Khattāb to Abu Musā al-Ash'ārī when he has been appoint as a judge or qādhi.

"Do not hesitate to reverse a ruling which you have given yesterday if it appears to you today that it was wrong because the review in order to uphold what is right is better than to continue with what is wrong"
Therefore, there is only one way to revise judicial ruling which aim at rejecting or amending the first ruling. The ḍādi has to comply with Shari‘ah principles even without appeal or request from the parties as long as it realize a mistake in the first ruling. This is the core of truth and justice which Shari‘ah aims at implementing. The ḍādi is the responsible for his mistake whether it is intentional or otherwise.

If the deviance occur in public laws and the judge intentionally veered from the right path he would be liable for any pecuniary damage. Moreover, he should be removed from his job. However, if the deviance is the result of a mistake, the public treasury will pay the damage because the judge derives his legitimacy from the public. However, if he has to discover his mistake before the ruling has been executed he has to fix it.

On the other hand, if the case is about a private right and it has been realized that the judge has made a mistake, then the rule shall be reversed if it has not been implemented yet. However, if it has been implemented and the issue is about a property then the ownership of that shall be returned to his true owner. However, if the property is no longer existing then the owner has the right to damages. If the case is not a property case, but involving the killing of someone then the defendant would not be killed as a retaliation because the mistake of the judge casting doubts about the case and the defendant should pay the blood money. If the judge has made his own analysis and ijtihād and it has been realized that he was wrong. If the case is an
issue of *Ijtihād* then he should use his own *Ijtihād*. The basis for this is the case of *Umar ibn al-Khattāb* when used his own *Ijtihād* in the case known as *al-hajariyyah* in inheritance when *Umar* give the husband of the dead wife half of the property, one sixth to her mother and the third of it to the half brothers from the mother’s side and he prevented the full brothers from any inheritance. However, the full brothers requested *Umar* to review his verdict arguing that suppose that our father is (stone) *hajar* or a donkey (*himār*) we will be equal to our half brother. Therefore, there is no reason of giving them and preventing us. Then *Umar* reversed his first ruling and decided to let them share with their half brothers and said “... this is what we have decided now.”

A similar case is the act of *Abu Bakr* of giving the *muhājirun* and the *Ansār* equal amount from the public treasury without making any differentiation between them according their precedence in professing Islam. However, when Umar take the *khilāfah*, he takes the issue of precedence into consideration and distributed to people from the public treasury according to these criteria. However, when *Alī* takes the *khilāfah* he followed the steps of *Abu Bakr* rather than that of *Umar* and give people equally.

From the above it could be concluded that if the case is an *Ijtihād* one then the ruling would not be reversed and the coming judges should follow what they think to be right. This is because if the case is an *Ijtihād* case and the judge was right in his judgments he has two rewards while if he was wrong he has only one reward. However, if the first ruling based on *Ijtihād* was not executed it could be reversed. If
it is an *ijihād* issue and the text about it is explicit it would be reversed even after its execution. Unlike the situation in civil law there is no time frame for the reversal of the rule based on *ijihād*, which contradict clearly the text. *Shari‘ah* gives a paramount place to justice than any thing else.  

**3.2.6. Execution**

It is the main result of litigation and legal actions whether civil or criminal actions. In other words, it is the only process which provide restoration and protection of rights as well as freedom of individuals. In this context, execution is also defined as practical protection of rights. This means with the existence of the process of execution individuals will abide by their obligations and fulfill their promises.

Execution may be divided into two main categories, namely voluntary execution and coercive execution. The first one is when a debtor voluntarily chooses to honour his obligation without any coercion from the public authorities. This is a kind of execution of obligation which do as not involve official legal processes. However, if the debtor refuses to voluntarily honour his debt obligation and the lender brought legal action against him in respect to the subject matter of the debt then the law will not hesitate to compel the debtor to honour his debt obligation. In this respect, the courts will make sure that the right is fully recovered or compensation is duly awarded. This process is called compulsory performance and is done through legal procedures in an open court until the authorities are satisfied that the lender has fully recovered his or her debt.
It must be noted that compulsory execution is regarded the real legal means of protecting man's rights, material and immaterial properties as well as freedom of individuals. Law does not give the authorities unrestricted right to redress a situation of non-compliance with debt obligation. Under the law, the enforcement authorities are required to execute, within legal procedures, court decisions as it were rendered without any alteration whatsoever. Hence, if a debtor feels being harassed by the law enforcement such debtor may bring counter legal action against the authorities for any harm suffered in the process of recovering the debt.

The distinct feature of compulsory execution that it is costly and time consuming for debtor in the sense that he might be liable for the legal expenses, losses and damages in the course of recovering the debt.

It must be noted that as far as litigation and compulsory execution is concerned, there is a noticeable difference between Civil Law and Islamic law. In Civil Law, carrying out execution lengthy processes so much so that the purpose of execution is missed. In addition, the lender will suffer losses in terms of the time spent although he might be able to eventually recover his right. For this it is said, "a settlement which amount to loss is better than legal action which may be won."28

Unlike Civil law, Islamic law enjoys effective execution process which guarantees the recovery of right in a manner which save time and money simply because the law affiliates itself to religious connotations. In addition, the debtors do understand their responsibility, to honour their debt obligation due to religious
consciousness. Moreover, this is made possible by the fact that the decisions handed down are carried out without any obstacles. The Shari'ah thus is much interested to see that rights are returned to their real owners even if doing so will involve force against the will of the debtor who can voluntarily fulfil his obligation but chooses to delay. Therefore, Islamic law holds any delinquent debtor liable in this world and the hereafter. The law does not stand here but it has put in place all necessary legal means that can facilitate the recovery of rights of individuals. These execution means include the following:

(1) Forfeiting the right of debtor to use his property

Forfeiting the right of the debtor to use his property is a legal means which is aimed at restricting the debtor from disposing of or using his property in way that is detrimental to the lender and to put pressure on the debtor to fulfil a debt obligation. This is a process of facilitating selling the property of the debtor for settlement of debt. It is a legal means aims to protect the rights of the lenders from being debased or frustrated.

(2) Non-traveling order against the debtor

The civil law has granted the lender a right to seek legal injection to restrict the movement and travelling activities of the debtor when the due of the debt falls unless such debt is paid. Some Muslim jurists held the view that the debtor can be denied the right to travel even if the lender did not bring legal action against him. Notwithstanding that right of movement and travelling is one salient feature of human right, such right is forfeited here as a preventive remedy and legal procedure
to ensure that a debtor will not run away with the right of the lender without fulfillment.

It must be noted that injection against debtor’s right to travel is lawful in Islam. The fact is that since Islamic law allows imprisonment of the debtor until a debt is recovered, it thus follows that restricting debtor’s right of movement is also lawful. This process is but a fraction of imprisonment and who have a legal interest in imprisonment is also deemed to have a legal right in what is a fraction of imprisonment.29

(3) Imprisonment of default debtor

Islamic law allows imprisonment of a delinquent debtor. The imprisonment in this situation is a kind of punishment for injustice inflicted on the lender, and on the other hand, it is meant to redress such injustice. This is evidenced by the prophetic tradition that says, “a creditor has the upper hand and a say (legal sections)” and the other tradition which says, “procrastination of well-to-do person is injustice.”30

Therefore, some Muslim jurists concluded that it is lawful to temporarily imprison a solvent delinquent debtor due to procrastination and default as a punishment until he repays the debt. The idea of imprisonment stems from the fact that such defaulter might admit in due course that he has hiden some property from which a recovery of debt can be made.

Unlike Islamic law, civil law systems do not condone coercive procedures or
physical punishments or imprisonment as means of compulsory execution of debt obligation. The civil law systems see that forfeiting the right to use property and eventual sale of such property (movable or immovable) to fulfil debt is sufficient to compel the debtor to honour a debt obligation. On the basis of the principle that property of the debtor is a security for repayment and not his physical structure, the French law is able to do away with the coercive procedures,\textsuperscript{31} in debt recovery, civil cases and commercial matters. This is in accordance with the French law as introduced on 22/7/1867. However, the Algerian civil law had adopted coercive procedures in debt recovery such as forfeiting the right to dispose property and imprisonment because of moral hazards and cunning activities, especially in cases of significant importance such as maintenance, remuneration for suckling, custody and providing lodging.\textsuperscript{32}

(4) Discretionary punishment against debtor

\emph{Ta'\'zir} is a legally endorsed discretionary punishment on any crime or sin which bear no specific prescribed punishment. Therefore, it is legal for public authorities to discretionary punish a solvent debtor for his unwillingness to fulfil debt obligation. This can be done by way of beating or any coercive or punitive punishments that could put pressure on the solvent debtor to repay the debt. This is evidenced by the prophetic tradition that says, "\textit{Procrastination of a solvent debtor legalises him being punished and publicly exposed.}"\textsuperscript{33} In other words, this \textit{hadith} connotes that default in repayment of debt is injustice, which is committed against the lender. It is also reported that the Prophet (p.b.u.h) has on one occasion ordered his companions to severely punish a debtor who appears to hide his property until he
admits that he has property to repay a debt but chooses to delay.

Some jurists have declared as legal for the enforcement authorities to punish even a debtor whose financial situation is not known until a proof of insolvency is adduced by the debtor. They also agree as to investigate the house of a default debtor to see whether he had hidden property or had enough property to repay the debt. It must be noted that discretionary punishment is also similar to imprisonment. The liability of a debtor to repay stands until the debt obligation is fulfilled.

3.3. Human rights: the classical Islamic model

During the expansion of the Islamic State in the first century of Hijrah, time had called for the establishment of several systems that were deemed necessary to guarantee the rights of the citizens, be they Muslims or non-Muslims. The adequacy and the influential role these systems played in protecting Human rights make the classical Islamic theory on ‘guarantees’ worth studying.

3.3.1. In the Islamic State

The Islamic state is considered the only state where rights and freedom are complete and guaranteed to all who belong to it, Muslim or non-Muslim alike. Thus every one with the slightest relation to it is assured their fundamental rights. Individuals exercised their rights and freedom during its period to an extent never known to the world till recently by the distance of hundred years.
It is the creator of mankind who honoured man and made him a vicegerent on earth, designed this system and granted these rights and freedom. And it is He, the True Just, who guarantees them. He says:

"We have sent down to thee the book in truth, that thou mighth test judge Between men, as guided By God: so be not (used) As an advocate by those Who betray their trust." (Surah, Nisā': 105)

The Islamic State is distinct by the presence of the complete and equal judicial systems which are the following:
(1) The Judicial System

It is a system made up of qualified judges chosen from the most just and wise people who have the confidence from the public. This is an endeavor to establish justice, protect every one's right and to implement correctly the injunctions of Sharia'h law without preference of a ruler or a ruled.34

The basic condition required in a judge is the Knowledge of Shari'ah injunctions: that is having a great ability to distinguish between the lawful and unlawful, knowledge of Islamic verdicts, having a farsightedness, knowing the consequences of things and sound knowledge or the matter of the world and hereafter.

(2) The appeal system (Wilāyat Mazālim)

Another tool to guarantee individual’s rights and freedom, is this system, which is the judge's jurisdiction. That he should be of a high esteem, serious, prestigious, chaste, not greedy, pious and knowledgeable of the Qur'an and Sunnah (Prophet traditions), able to distinguish between the injunctions, the witness statements, jurists’ views and decision authority.

However, the jurisdiction of this system is not adequate the normal judicial system juris. Because it receives complains from people if any injustice is done to them by rulers or governors. Its jurisdiction during the era of the Islamic State did not go beyond these points:

- Injustice against workers for the shortage or delay of their wages.
- Executing the verdicts that ordinary judges fail to effectuate.
- Deliberating on disputes related to special *Waqf*.
- Deliberating on the issues of public interest that the *Muḥtasib* fails to deliberate on.
- Supervising the performance of main religious worships. That means he interferes in implementing the rights of Allah.

Moreover, the *Mazālim* System is considered as a quick executive authority for many issues that can be difficult for others to execute. As well as he assures the defendant’s right during investigation and grants him the right to defend and refute accusation doubts around him as if he is an investigation judge. This is because of the absoluteness of the texts and its clearness in all respects.

It is also differs from the normal judiciary that can exercise intellectual reasoning on the injunctions that have no texts. Its powers is much wider than the power of an ordinary judge in Islam.

(3) Accountability system (*Ḥisbah*)

It is system that guarantees individuals’ rights and freedom through its noble function represented in keeping public order with its basic elements; general security, general hygiene, tranquility and stability of citizens. It is to an extent similar to administrative control in the modern conception. Nevertheless, it is a type of special judicature with the functions of judiciary, *Mazālim* and police at the same time.

This system is made up of just, strong, prestigious people who are confided in
by others and have knowledge of Islamic legislation. They are appointed by the caliph directly or on the recommendation of judges or the Shurah (consultation) elite. They work in total independence in line with Shariah’s injunctions.

The judicial functions of Muhtasib who is in charge of settling people’s disputes that need no evidence. This is different from the ordinary judge. In addition, he has the power to punish any person who publicly commits crimes. He also has the right to check on markets and merchants transactions, takes care of public order and security, the hygiene and expiry of commodities, and also regulation of people’s practice of their religious affairs.\(^3\)\(^5\)

Fulfilling of accountability function is considered obligatory on the leader and on whosoever appointed therein. It is also a collective obligation on the rest starting by their scholars and intellectuals. The task of enjoying the right and forbidding the wrong is incumbent upon all individuals, groups and the state in Islam. This means the keeping and assuring of rights and freedom, is considered one of the noblest functions distinguishing the Muhtasib from other individuals.

The Muhtasib differs from the ordinary judge in several aspects. According to al-Mawardi, Some of them are:

- The Muhtasib has no right to listen to complaints in which there is no clear evidence contrary to a judge who verifies them and does not judge except by proof.

- He can personally call for the judgment without previous complaint. This is
contrary to a judge who does not call for the complaint except if it is filed by the claimant.

- He is considered more severe and rigorous concerning the truth than an ordinary judge who uses his political experience to investigate about the truth.

- The Muhtasib differs from the ordinary judge because he passes simple sentences in various daily dealings which are executed quickly contrary to judge who pass judgment on big cases that are complicated between citizens, the authority, or individuals.

So are several and various judicial institutions in Islam which have the responsibility of keeping people’s rights, guaranteeing of their limited basic freedom, and a guarantee to greater investigation for justice, equality and truth among people.36

(4) Arbitration

In addition to these organized and administrative institutions in the Islamic state, Islam encourages reconciliation. Allah says: “The believers are but A single brotherhood: So make peace and reconciliation between your Two (contending) brothers; And fear God, that ye May receive Mercy” (Surah, Ḥujurāt:9). Reconciliation between disputing parties be it individuals or groups, or even countries is clearly mentioned in the Holy Qur’ān. Among the Muslim countries it is of more priority. Allah says:

“If ye fear a breach Between them twain, Appoint (two) arbiters, One from his family, And the other from hers; If they which for peace, God will cause Their reconciliation...” (Surah, al-Nisā’: 35)
(5) Jihād (holy war)

Allah has decreed jihad to repel transgressors for the preservation of rights and freedom. It is also for the preservation of religion which is the noblest of necessities, and through it subjugation of man and aggression against his rights are prevented. Allah says:

"To those against whom War is made, permission Is given (to fight), because they are Wronged; -and verily, God is most powerful For their aid..." (Surah, Ḥajj: 39-40)

He said in other verse:

"And fight them on Until there is no more Tumult or oppression, and there prevail Justice and faith in God; But if they cease, Let there be no hostility Except to those Who practise oppression." (Surah, al-Baqara: 193)

Thus, Jihād is one of the means for change, limiting injustice and oppression from the part of unjust rules and groups that do not submit to Shari'ah Injunctions and rational matters. Allah says:

"If two parties among The believers fall into A quarrel, make ye peace between them: but if One of them transgresses Until it complies with the command of God; But if it complies, then make peace Between them With Justice, and be fair: For God loves those Who are fair (and just)." (Surah, Ḥujurāt: 9)

The Prophet (p.b.u.h) praised the Coalition of Virtue for the aid of the oppressed from which was formed during the days of ignorance, and he stated that if he was invited to it in the days of Islam he would respond. He said (p.b.u.h): "Fear the invocation of the oppressed, for there is no screen between it and Allah."
(6) The right to migrate and asylum

This truth stands clear in text and reality in the Islamic law. Allah says:

"...They say: Was not The earth of God Spacious enough for you To move yourselves away (From evil)? ..." (Surah, al-Nisā': 97)

Allah orders the Muslims to migrate in the beginning of the call, towards Madina as an escape with faith and as a fear of prosecution. Similarly, the Prophet (p.b.u.h) ordered his companions to seek asylum in Abyssinia as he said: "Go to Abyssinia for in it there is a King who allows no oppression..."

It is clear that Muslims' decision to migrate was due to lots of injustice and oppression on the part of Quraysh. They left for a place where basic rights and freedom are guaranteed and respected.

Hence, this might be considered as one of the legitimate means in Islam and man-made law for the protection of rights, guaranteeing of justice and fighting injustice. It is also necessary for the host country to protect and assure the refugees' rights, freedom, and religion rites whether this country is Muslim or non-Muslim under human rights principle.

Allah had sent His Messenger and sent His books so that people would do justice upon which heaven and earth was made. And if the reign of truth emerged, evidence of reason will be established.
3.4. **Public Supervision**

Public supervision or accountability means providing public the right to oversee and supervise activities of authorities and their representatives through constitutional means. The aim of public accountability is to facilitate participation of citizens in decision-making processes that concern the whole community. The participation of the public is exemplified in the rights to make inquiries and suggestions that could be put forward for consideration by the government through non-governmental organizations or in the case of an Islamic system, through *shurah* council and system of allegiance. The comay also grant the public the right to reject or oppose any law or activity that may be detrimental to their general well being or in the case of Islamic system, violates basic tenets of Islamic law.

However, to make public supervision more effective, a number of methods befitting this responsibility as explained by civil law legislation are needed. Chief among these methods is the following.

3.4.1. **Referendum**

In constitutional jurisprudence, referendum means presentation of pertinent issues to the public in order to get feedback on whether the public accepts or rejects proposals in relation to the issue raised. What is needed is seeking opinion of the public on a specific issue, which is in the interest of public and which the authorities want to reach a conclusion based on the view of the majority of the public. Therefore, public opinion may be defined as consulting citizens for their stance on
public affairs or issues which also involve authorities for taking decision.\textsuperscript{39} This definition shows that referendum for public opinion on certain matters gives the public a right to oversee and investigate basic things concerning certain laws and legal decisions and to make the authorities accountable for the mismanagement of justice.

Given the above concept of seeking public views, it may be said here that this process is classified in terms of being a liability on the part of the authorities to do so and in terms of being obligatory and non-obligatory. The question of whether or not seeking public for parliamentary debates is a liability can be looked at from two aspects. It may be a liability on the parliament and government to seek public opinion on some matters. Example of this is when a president of a country intended to introduce a law, which is rejected by both, the cabinet ministers and parliament, both the latter are liable to seek the opinion of the public by whatever means. The opinion of the public thus becomes binding upon both the government and the parliament because the power of public view outweighs regulations, decisions and laws. In addition, in this situation the president is under obligation to withdraw desert any proposal contrary to public opinion, which is reached by the majority vote.

The question of whether seeking public opinion is obligatory or not obligatory is also divisible into compulsory consultation and voluntary consultation.

It is compulsory when a provision in the constitution says so. An example of this is the Algerian constitution of 1963, which has given the public a right to be consulted in any move to amend the constitution. It reads:
Article 72: "the procedure for constitutional amendment shall include two...and two votes by an absolute majority of the members of the national assembly, separated by a period of two months."

It is therefore compulsory on the authorities to seek public opinion on matters to amend or repeal any provision of the constitution. In the same view, a referendum is also necessary in choosing representative of the people in the parliament after a vote of no confidence against the existing parliament or its dissolution by the president. However, the president would be re-elected through a compulsory referendum in a period not exceeding 45 days. During this period, the president of the constitutional council will assume the responsibility of the presidency. Similar rules apply after the death of the president, his resignation or removal from power due to a vote of no confidence.

The second kind of referendum for public opinion is called voluntary referendum. Voluntary referendum means that the authorities are not under obligation to initiate a referendum for public opinion in the first place because it may depend on the views of the members of parliament. An intriguing example of voluntary referendum is what has recently happened in Algeria on October, 1990 whereby the president of Algeria introduced a policy law for a peaceful settlement of the Algerian crisis. In the implementation of this law, it is sufficient for the president to follow the views of the members of parliament and cabinet ministers since they agree on it without conducting any referendum for public opinion. But in order to give the law a flavor of power, a referendum was conducted.

The culture of referendum for public opinion is seen in many matured
constitutions such Swiss Constitution, French Constitution of 1958, some constitutions of the states of America and the constitution of the majority of Communist countries\textsuperscript{40} headed by Soviet Union. Article 5 of the Constitution of Soviet Union provides that decisions on important matters concerning well being of the country will be first presented to the public for vote. This approach was also followed by Algeria, Germany, Cuba, etc.\textsuperscript{41}

It should be noted that freedom and basic rights are natural and fundamental for the citizens which should not in any way be altered. Therefore, any amendment or repeal as to these constitutional principles has to be done through referendums. This will give the public an impression that they are not isolated by the authorities when amending principles that are connected with their basic rights and freedom.

Unlike civil law systems, there is nothing as referendum in Islamic law. The possible principle that may be regarded as a kind of referendum is the system of \textit{shurah} (consultation), but in a very specific and limited meaning of the term referendum. The fact is that the system of \textit{shurāh} does not involve all folks of the society. In other words, its implementation is restricted to a certain group of elite and eminent scholars whose views on certain matters are sought in accordance with the principles of Islamic law.

Another Islamic system that is similar to referendum is \textit{al-bay'ah} (pledge of allegiance) system. This is more closely to the system of referendum, although more
general in some aspects. This was practiced by the Prophet (p.b.u.h) in a number of occasions, especially at the outset of his prophetic duty to introduce Islam. In the first pledge of allegiance, for example, the Prophet had ordered his followers to enter into allegiance to observe Islamic belief and adhere to its injunctions. In the second pledge of allegiance they took upon themselves to support him and defend him in all difficult times. Moreover, at the event of Hudaybiyyah, people took upon themselves to fight in the course of religion until the end of their lives.

One can therefore infer that *al-bay'ah* is introduced to deal with significant public matters, such as religion and independence of the 'Ummah. Hence, *al-Bay'ah* is far beyond a limited usage to appoint a political leader, the meaning of which was introduced by the 'Ummayads and Abbāsids after the death of the Prophet (p.b.u.h). It must be noted that although the system of pledge of allegiance enjoys a significant legal sanction, it cannot be put into use against basic principles or explicit texts of Islamic law. This is so simply because both the government and the public are under obligation to adhere to the laws of Islam.42

3.4.2. Right of Public Opposition

Right of opposition is that a group people will oppose a law which is introduced by the parliament in a particular period from the date of its introduction. This task may be carried out through an organization or political party in an well-organized manner. This kind of opposition may exist in an Islamic state for the reason that the leader himself may encounter opposition form either the elite or general public in one way or another simply because some of his decisions may be
based on personal endeavors without concrete textual source. This kind of opposition has occurred during the regime (tenure) of Umar Ibn al-Khattāb. For example, it is reported that a woman had opposed ‘Umar’s view in a mosque concerning the right of women to dower.

3.4.3. Right to be removed from public office

It is the right of any voted member in the government to adduce an application to remove their duties from office if such removal is warranted. For example, a removal from office is justified if the person concerned indulged in vile activities concerning the basic rights of individuals. The judges are not also exempted. It was provided for in the constitution of the United States of America. It is also the practice of a number of countries. It is noteworthy to say that provision for this kind of system can be found in Islamic law and the system of Ḥisbah is one of such provisions. The system of hisbah can secure the right and freedom of individuals if properly practiced.

3.4.4. Parliamentary Dissolution

This is a fraction of referendum for public opinion. Through this, a number of people in particular place may reached a particular number to demand the dissolution of the council of representatives by forwarding an application with the inclusion of the reasons of the request. If the reasons provided were reasonable, the issue will be put into referendum for public opinion and on that basis, a decision to dissolve the council of representatives will be taken based on the view of the majority of the public. However, this kind of referendum did not happen in any period of Islamic
regimes simply because the rights and freedoms were provided for by provisions of Islamic law as stated in the Qur'an and Sunnah. Hence, it is illegal for any public authority be it judges or otherwise to alter or go beyond the provisions as provided for by Islamic law and any alteration in this regard will amount to punishment.

3.4.5. Public Proposals

This is also a process, which can be regarded as a fraction of referendum for public opinion. This is practiced if the public or a fraction of it wants to point out some defects in a provision of law and suggests a better provision that can safeguard their freedom and basic rights. In this process, the public will present a number of proposals to the concerned authorities for consideration. The authorities will in turn resort to referendum for public opinion in order to reach at acceptable solution to all with regard to whether or not as such should be repealed or amended.

3.4.6. Right of Strike

This is a kind of demand to change. However, this kind of demand is restricted to the working community in company or public services departments. This is an effective method of sending message to the authorities of a private company or public entity because workers' complete refusal to attend their work is a stern move, which can compel the authorities concerned to consider their appeal with regard to their rights and freedom. However, this approach is usually superseded by a number of measures such as complaints against a specific administrative body. To make it effective, it is required that this approach must be carried out without any intention to harm the institution concerned otherwise it will be regarded as
transgression in demanding a right which is illegal.

3.4.7. Right to Demonstrate

This is a last resort means that the public use to protect their rights which are taken unjustly by despotic systems as it is said: “the last treatment for a disease is by cauterization.” In other words, it is incumbent upon the public to employ all peaceful and legal avenues to make their views considered. These avenues include a demand under an umbrella of a political party or non-political organizations and other political and peaceful solution such as resorting to international political bodies like United nations, the Organization of Human Rights and the like. However, if all peaceful and legal avenues of making public views considered are exhausted, it has become incumbent upon the public to bring about reforms and changes through force and violent, resisting all policies that go against their basic rights and freedom. This is what French government in its revolution against the Church employed. A number of systems have also employed demonstration against colonialism amounting to force departure of colonial masters from such countries. The best example is Algeria in which the revolution stays for about seven conservative years and the victims of this revolution were estimated to be around one and a half million. Other examples include Iran during the regime of Khomaini, the revolution in US against racism and recent resistance of the Lebanese, etc.

However, demonstration from an Islamic point of view, could not exist as a means simply because Islamic system goes in line with a ready-made laws and any violation of these laws by any authority will be automatically opposed through
system of *Hisbah* or individuals as a religious responsibility. In an Islamic system, the authority, if found astray, is required to remedy the situation by quickly return to true path or to face immediate legal punishment. It must be noted therefore, that the racial clashes and wars as witnessed in Muslim countries do not occur because of transgression and oppressions against basic rights of individuals. It is because of rational interpretations of governments and race for power.

In brief, public supervisions in all forms whether it is carried out by organizations, political parties or mass media or individuals in the form of complaints and legal actions, etc. on the constitutionality of the laws introduced is but one way of general accountability. These means also serve as a security against any despotic threat to the rights and freedom of the citizens when introducing laws and regulations and the manner of their execution. Since an ordinary citizen has general right to participate in decision-making processes and the right to reject or argue for amendment or removal of government, such individual is thus confident that his basic rights and freedom are secured. This individual security is very evident in an Islamic system. The citizen of an Islamic state whether Muslim or non-Muslim feels that he enjoys a high degree of security as far as rights and freedom are concerned. Because it is Almighty Allah who has prescribed that he enjoys such right and freedom. Therefore, in Islamic system the issue of racial differences and racism is totally unacceptable. There is no any human added value for an Arab upon a non-Arab and whites are not in the same vein better than blacks. In Islamic system, people are credited and classified by piety and nothing else. In this regard, the Qur’an says:

"Among his signs is the creation of heavens and the earth and the variations in your languages and your colors. Verily in that are signs"
for those who know.” (Surah, al-Roūm: 22)

This also can be seen under the banner of: “all of you were created from ʿAdam and ʿadam was created from clay.” In addition, the orders of Allah were meant for all human beings without any discrimination whatsoever. People were equally given their rights and freedoms. Therefore, complete obedience to Allah and His orders is sufficient to protect individuals’ rights and freedom as declared by Islamic law. Because any transgression on these rights are punishable in the hereafter. Therefore, Islamic system is the most flexible systems of the world that safeguards peoples’ rights and freedom. It is sufficient to quote the principle that says, whenever there is a public interest in the implementation of any law, then there lies the law of Allah.

In Conclusion, this chapter provides the teacher, the student and the practitioner with a wealth of materials which they can adapt to their particular needs or interests. It is up to then to pick and choose among the materials given in this chapter, it is my ardent hope that in their future work they will find them useful.
Endnote

1 The nature of the relationship between the three powers in the state mean, the appearance of a constitutional form of the political system, e.g., Presidential on Parliamentary systems.


5 Arsalan, op. cit. pp. 311, 312 and 313.


7 Article 77. In addition to the powers bestowed, explicitly, upon him by other provisions of the Constitution the President of the Republic has the following powers and prerogatives:

1. He is the Supreme Head of all the Armed Forces of the Republic;
2. He is responsible for the National Defense;
3. He decides and conducts the foreign policy of the Nation;
4. He presides the Cabinet;
5. He appoints the Head of Government and puts an end to his functions
6. He signs the presidential decrees;
7. He has the right of pardon, remission or commutation of punishment
8. He can refer to the People through a referendum on any issue of national importance;
9. He concludes and ratifies international treaties;
10. He awards State medals, decorations and honourific titles.

Article 78 - The President of the Republic appoints:
1. to posts and mandates provided by the Constitution:
2. To State civil and military posts;
3. To nominations decided in the Cabinet;
4. The President of the Council of State;
5. The Secretary General of the Government;
6. The Governor of the Bank of Algeria;
7. The Magistrates;
8. High officials of security bodies;
9. The "walis".

The President of the Republic appoints and recalls the ambassadors and the special envoys of the Republic abroad. He receives the credentials and the letters of recall of foreign diplomatic representatives.


9 'Uday Zayd al-Kilānī, *Mafāhim al-wa‘ al-Ḥurriyyah fi al-Islām wa al-Fiqh al-
Wadh‘i, Dirāsah Muqāranah, Amman: Dār al-Bashir Pr. 1, 1990, p. 259-262
14 Kilani, op. cit., p. 258.
15 Kilani, op. cit. p. 251.

Article 28

1. The Security Council shall be so organized as to be able to function continuously. Each member of the Security Council shall for this purpose be represented at all times at the seat of the Organization.

2. The Security Council shall hold periodic meetings at which each of its members may, if it so desires, be represented by a member of the government or by some other specially designated representative.

3. The Security Council may hold meetings at such places other than the seat of the Organization as in its judgment will best facilitate its work.

Article 39

The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.

25 Al-Dāraqutni, sunan al-Dāraqutni, op. cit. vol. 4, p. 88.
26 Al-Imam al-Sha‘fi‘y, Kitāb al-Umm, op. cit. vol. 4, p. 83.
28. Abd. `Aziz Khalil, al-Wajiz fi Qawā'id wa Ijra'āat al-Tanfidh al-jabari wa al-
tahafudh, Cairo: Dār al-Fiker al-'Arabi, p. 6.
32. Article 22 of The Algerian family law, Article 23 of the Algerian civil code
34. Ahmad Hafiz Najm, Huqūq al-Insān Bain al-Qurān wa al-I'lān, Dār al-Fikr al-
'Arabi, Kuwait, 1985.
35. Ibid.
39. Al-Qailani, 'Udayi Zaid, Mafāhīm al-haqq wa al-Hurriyyah fi al-Islām wa al-
40. Despite the noticeable provisions in the constitutions of Western countries
concerning referendum, one can note that in practice there is no such thing as
referendum.
41. Al-Kailānī, op. cit. p. 269.
42. Ibid. pp. 268-276.