

THE RIGHT TO FAIR TRIAL UNDER INTERNATIONAL HUMAN RIGHT LAW: A COMPARATIVE ANALYSIS FROM ISLAMIC LAW

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ABSTRACT

This article analyses one of the most important principles of the Islamic and international human right laws that is, the concept of the right to a fair trial. Also, in this article examine on both law which better for fair trial because, International human rights law is consist by treaties, agreements between sovereign states intended to have binding legal effect between the parties that have agreed to them; and customary international law. On the other hand, Islamic law consist by al-quran, sunna, ijma and qiyas (analogy with Quran and sunna drawn by jurists), or in the opinion of the Shi'is 'aql (reason), as its chief sources complemented by further supplementary sources. For this purpose, the secondary data from law books, law articles, law journal, newspaper etc. have been used. This article finds that the law related to fair trial in Islamic and international laws are relatively same. Both laws have suggested providing equal treatment in law.

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INTRODUCTION

Right to fair trial is one of the most importance parts of Islamic law and international human right law because human cannot make a peaceful society without fair judgment system in the world. Now, discourse about fair trial guarantees in criminal proceedings in Islamic law and international law is an attempt to compare two different matters . Such as, International human rights law is primarily consist by treaties, agreements between sovereign states intended to have binding legal effect between the parties that have agreed to them; and customary international law . Also, rules of law derived from the consistent practice of States. While international treaties and customary law form the mainstay of international human rights law, other instruments, such as declarations, guidelines and principles adopted at the international level contribute to its understanding, implementation and development . Finally, present international human rights law has established since the drafting of the United Nations Universal Declaration of Human Rights (UDHR), in December 1948. Drafted is common standard of achievement for all peoples and nations', the Declaration spells out civil, political, economic, social and cultural rights that all human beings are entitled to. It has been widely accepted as providing the fundamental norms of human rights that everyone should respect and protect.

The UDHR, together with the International Covenant on Civil and Political Rights (ICCPR) and its two Optional Protocols, and the International Covenant on Economic, Social and Cultural Rights (ICESCR), form the International Bill of Human Rights . Moreover “the Islamic criminal justice system recognizes all fundamental right guarantees that can be found in the most advanced criminal justice systems in the world today. The major difference though is that the basic principles of Islamic criminal justice system, stating the basic guarantees have been part and parcel of the Islamic legal system for over 1400 years” . Based on the Quran, the sunna, idjma'(consensus of the jurists), and qiyas (analogy with Quran and sunna drawn by jurists), or in the opinion of the Shi'is 'aql (reason), as its chief sources complemented by further supplementary sources. According to a word of the prophet, the diversity of opinions is a divine mercy and we must never forget that Islamic scholars may take different views on the same issue – all based on Islamic law, a fact that can be helpful in the development of law, e.g. by following the opinion that seems to be most appropriate to solve a particular problem . It is known that, Islamic criminal law involves of three categories of crimes. Such as hadd and qisas crimes of punishment were regarded and suggested by Allah. Also, ta'zir crimes, were left to the discretion to the ruler .

Definition of fair trial

“Fair Trial is a neutral trial conducted to accord each party to the proceeding their due process rights. The right to a fair trial applies to civil and criminal proceedings” . Similarly, it is related to the administration of justice in both civil and criminal contexts. At the outset, right to a fair trial

is vital to understand that the proper administration of justice has two aspects, the institutional and procedural. The principle of fair trial supports a series of individual rights ensuring the proper administration of justice from the moment of suspicion to the execution of the sentence .

Independence and Impartiality

One of the basic elements of an effective rule of law system is the part of independent and impartial courts in the Islamic and common law legal system. Also, the judicial power has to be completely separate from the legislative and executive powers because, the independence of judges is one of the most importance pillars of a free and fair judiciary system. If judges can be removed at any time by the government or other authorities, their institutional independence is not secured. Furthermore, if either the courts or the judges themselves are under the control or influence of non-judicial entities, no fair trial can be ensured .

Court judgments may not be changed by a non-judicial authority, except in the case of constitutionally recognized amnesties, usually granted by the Head of State. The fair trial norms do not require any specific structure for judicial benches, which may comprise professional judges only, combined panels of professional and lay judges, or other combinations of these. However, there are international standards on the independence of the judiciary which also include provisions for the appointment of judges. No international human rights implement requires a trial by a jury. But, where a country has instituted a jury system, the requirements of independence and impartiality apply to juries as well.

Concept of Independence of Judiciary in Islam law

The concept of judicial independence and impartiality has always been an essential part of Islamic law . Regarding the administration of justice, the Quran declares: “Surely, We have revealed the Book to you with truth so that you may judge between people by means of what Allah has taught you. And be not one pleading the cause of the dishonest.” (4:105)

“Independence of judiciary in Islam means independence of an individual judge or a collective judiciary to decide impartially according to the injunctions of Islam. It also means that the decision of a judge must not be influenced by any kind of pressure from any person and nothing or no one could deviates him from correct and impartial decision which is the basic objective of the administration of justice. Al Fudhailat views that judiciary is an independent and a separate constitutional organ of a state” .

Concept of Independence of Judiciary in international human right law

Every international and national human rights organization guarantee the right to a fair trial in civil and criminal proceedings before an independent and impartial court or tribunal, and the purpose of this section is to analyses the meaning of the terms “independent” and “impartial” in the light of the case-law of the competent international monitoring organs .

The principle of judicial independence is firmly enshrined in international law. The starting point for the gradual endorsement of this principle is Article 10 of the Universal Declaration of Human Rights which provides that “everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal”. It was followed by Article 14 (1) of the International Covenant on Civil and Political Rights which establishes that “everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law”. In addition, the major regional human rights conventions also promote the principles asserted by the UDHR, as does modern international humanitarian law. The Cairo Declaration on Human Rights adopted by the Organization of Islamic Conference in Cairo in 1990 provides in Article 19 (a) that “All individuals are equal before the law, without distinction between rulers and ruled”.

The formation of institutional mechanisms to monitor judicial independence and compliance with international law occurred comparatively late. It was only in 1985 that the United Nations General Assembly adopted the Basic Principles on the Independence of the Judiciary. These basic principles concretize what is meant by judicial independence *inter alia* providing that judges “must have tenure, and be free from direct or indirect pressure in the performance of their duties”. The Basic Principles also include a requirement that the independence of the judiciary be guaranteed by the state and enshrined in the Constitution or some other legislative instrument .

THE PRINCIPLE OF LEGALITY

The word ‘principle of legality’ is a ‘unifying concept’ in present world and one of the significant organs of human right law. It is taken in the Latin phrase “*nullum crimen sine lege, nulla poena sine lege,*” which roughly translated, means “no crime nor punishment without law.” In essence, the principle of legality means that nobody can be punished without the existence of a criminal law in force at the time when the act was committed. Law must foresee an exact description of the act that is to be punished and of the punishments that can be applied.

Mainly, this principle protects against the abuse of power of judges and guarantees the security of the individuals giving an exact idea of what is permitted or forbidden. In Western continental law, it was fully developed in the Age of Enlightenment when the rights of the individual became the basis of Western law. It may be true that common law countries follow the English traditions in which statutory law is not as important as in continental law but also here the judge is bound to the judicial precedents from which follows that the citizen knows what is forbidden. In the International Covenant on Civil and Political Rights the principle of legality is laid down in art.

In Islamic criminal law there is no word like “*nulla poena sine lege*”, that could be almost called a slogan, but there are many of the elements that are implied by the principle of legality. The Quran contains different

verses that are regarded as a basis for the principle of legality and the principle of non-retroactivity that is closely connected or almost a component of it: “We never punish until we have sent a messenger” (Surat Bani Israil XVII, 15). “And never did thy lord destroy the townships. He had raised up in their mother (town) a messenger reciting unto them our revelations” (Surat Al-Qasas XXVIII, 59). “Allah forgiveth whatever ... may have happened in the past, but whoso relapseth, Allah will take retribution from him” (Surat al-Ma’ida V, 95). The central meaning of all these verses is that there is no punishment without a preexisting law criminalizing such conduct.

EQUALITY BEFORE THE LAW AND COURT

The word of equality is one of the common principles of the rule of law because it prohibits discriminatory laws and includes the right to equal access to the courts and equal treatment by the courts. Such as “the first and most basic right emphasized by the Qur'an is the right to be regarded in a way that reflects the sanctity and absolute value of each human life. Each person has the right not only to life but also to respect, not by virtue of being a man or a woman, Muslim or unbeliever, white or black etc. but by virtue of being a human being. The Qur'an puts great emphasis on the right to seek justice and the duty to do justice. Justice encompasses both the concept that all are equal and recognition of the need to help equalize those suffering from a deficiency or loss”. Likewise, the Cairo Declaration on Human Rights in Islam (CDHRI), states, in its Article 1 that :“(a) all human beings form one family whose members are united by submission to God and descent from Adam. All men are equal in terms of basic human dignity and basic obligations and responsibilities, without any discrimination on the grounds of race, color, language, sex, religious belief, political affiliation, social status or other considerations. True faith is the guarantee for enhancing such dignity along the path to human perfection. (b) All human beings are God’s subjects, and the most loved by him are those who are most useful to the rest of His subjects, and no one has superiority over another except on the basis of piety and good deeds”. Meanwhile, on the same issue of equality, its Article 19 states, “(a) all individuals are equal before the law, without distinction between the ruler and the ruled’. Also, it’s Article 6(a) promotes gender equality by stating that: “woman is equal to man in human dignit”. The same article clearly imposes a duty on the husband to support and be responsible to the welfare of the family.

In Islam law ensure that, all persons are equal before the law and court. Everybody is required to be protected before the law regardless of race, religion, origin, sex and language. In this manner, individuals have to be treated equally before the law without any discrimination in the enforcement of the law. In another aspect, equality before the law includes the fact that individuals are equal in terms of rights and duties. As a result, every person is subject to Islamic law for every single act that he has done without any privilege. Thus, a judge is required to decide a case before

him based on the Sharia's principle as prescribed in Qur'an and Sunnah without exceptions. Also, "the process of human creation as revealed in the Qur'an and Sunnah shows that human beings are of equal standing. Human beings have the same source of creation. Therefore, they are equals having been created from the same source and single soul. Allah (s.w.t.) states the source of man's creation in a lot of verses of the Qur'an. He says: "Did We not create you out of mere water which We stored in a secular place in a secular place until a decreed time? We set the time and good was our setting." He also says: "So let man consider from what was he created? He was created from the dropping water, from water issuing between the lions and the ribs" (Qur'an, 86: ayah 5-7). In another verse, He says: "It was Allah who created you from dust, from the seed and who then set you in pairs. No female conceives or gives birth without His knowledge; none is given long life and none is given short life, unless it is in a Book. Verily that is easy for Allah" (Qur'an, ayah 35: 12)".

Similarly, Article 7 of the Universal Declaration of Human Rights states that "All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination". According to the United Nations, this principle is particularly important to the minorities and to the poor. Hence, the law and the judges must treat everybody by the same laws regardless of their gender, ethnicity, religion, socio-economic status etc, without privilege.

RIGHT TO BE PRESUMED INNOCENT

Presumed innocent means that everyone who has been charged with a criminal offence has the right to be presumed innocent and shall be treated as innocent until and unless he or she has been proven guilty according to the law in a fair trial. The presumption of innocence is one of the important principles in western and in Islamic criminal law in art. 14 (2) ICCPR it is defined in the following words: "Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law." In Islam man is regarded as originally innocent and pure. Therefore every person is presumed to act righteously and honestly until the contrary is proved. This conception is based on the so-called *istishab* that means the presumption in the law of evidence that a state of affairs known to have existed in the past continues to exist until a change is proved.

Also a man is born pure and innocent and he has to guard his innocence and purity. Unless a person is proved guilty by a competent court, in accordance with the strict rules of evidence and due process of Islamic criminal law, he is innocent. The concept of '*Istishab*', that is, presumption of continuity is a corollary of this maxim. Under '*istishab*' "a situation existing previously is presumed to be continuing at present until the contrary is proven." The Prophet (s.w) has laid the foundation of this maxim by his saying, "The onus of proof lies with the claimant and denial

shall be supported by oath.” The famous letter of ‘Umar b. al-khaib (R.A.) has referred to this hadith. It says, “The burden of proof is on the accuser, and he who negates should be asked to take the oath.” Similarly, “presumption of innocence is a legal right of the accused in a criminal trial, and it is an international human right under the UN’s Universal Declaration of Human Rights, Article 11. Under the presumption of innocence, the legal burden of proof is thus on the prosecution, which must collect and present compelling evidence to the trier of fact. The trier of fact (a judge or a jury) is thus restrained and ordered by law to consider only actual evidence and testimony presented in court. The prosecution must, in most cases prove that the accused is guilty beyond reasonable doubt. If reasonable doubt remains, the accused must be acquitted”.

THE RIGHT OF DEFEND OR RIGHT TO COUNSEL

One of the fundamental principles of fair trial is the guarantee of defense for the defendant that finds its expression in a number of detailed provisions. In Islamic law defense was not discussed as a theoretical question but there are different traditions about the behavior of the Prophet that let us understand that the defendant has to be informed about the charges against him. When the Prophet granted Ali governorship of Yemen, he said to him: “O Ali, people will appeal to you for justice. If two adversaries come to you for arbitration, do not rule for the one, before you have similarly heard from the other. It is more proper for justice to become evident to you and for you to know what is right.” And Calif Omar is told to have advised some judges by saying “If an adversary whose eye had been blinded by another comes to you, do not rule until the other party attends. For perhaps the latter had been blinded in both eyes. Moreover, international human right law declares that, everyone charged with a criminal offence has the right to defend himself or herself, in person or through legal assistance. The right to a counsel in the pre-trial stages of a criminal trial is clearly linked to the right to be defended during trial. The provisions generally state that in the determination of any criminal charge against any person, he/she is entitled “to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it” – Art. 14 (3d) ICCPR. When the counsel has to be assigned, it should be taken into consideration that the accused has a right to an experienced, competent and effective defense counsel. S/he also has the right to confidential communications with his/her counsel. Although there is a right to be tried in one’s presence, trials in absentia can be held, exceptionally and for justified reasons, but strict observance of the rights of the defense is all the more necessary.

RIGHT TO THE PUBLIC HEARING

In order to foster confidence in the administration of justice and ensure a fair hearing of the parties, proceedings should be open to the general public. According to the maxim that justice should not only be done, but should be seen to be done, the public has the right to know how justice is done and what decisions have been taken. A public hearing requires oral hearings on the merits of the case, which have to be held in public and where the members of the public and the press can attend. In this respect information about the time and the venue of the oral hearings has to be made publicly known by the courts. The principle of publicity must be fully respected, unless there is a reason which allows the exclusion of the public. Also, the reasons for restrictions are stated in the international instruments themselves, i.e. morals (e.g. the hearings involving sexual offences), public order (mainly in the court room), and national security in a democratic society or when the interests of the private lives of the parties so require, and in special circumstances where publicity may threaten the provision of a just and adequate sentence.

Article 14 of the International Covenant on Civil and Political Rights States: "All persons shall be equal before the courts and tribunals everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law." It states that everyone shall be entitled to minimum guarantees including "(a) to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him; (b) to have adequate time and facilities for the preparation of his defense and to communicate with counsel of his own choosing; (d) to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it; (g) not to be compelled to testify against himself or to confess guilt. Similarly, the conduct of criminal trials in Shari'a courts, as indicated in this report, has violated these provisions in many respects, particularly regarding the right to legal representation, the right to be heard by a competent court, and the right of the accused not to be compelled to confess.

RIGHT TO FREE ASSISTANCE OF AN INTERPRETER

If the person does not understand or speak the language used in the court, he or she has the right to have the free assistance of an interpreter, including the translation of documents. The right to an interpreter applies equally to nationals and aliens not sufficiently proficient in the language of the court. The right to an interpreter can be claimed by the suspect or by the accused at the moment of interrogation by the police, by an investigating judge or during the trial. During the proceedings an interpreter translates orally to the accused and to the court.

Right to Call and to Examine or Have the Witnesses Examined

This provision is designed to guarantee the accused the same legal powers of compelling the attendance of witnesses and of examining or cross-examining any witness who is available to the prosecution. It ensures that the defense has the opportunity to question witnesses who will give evidence and to challenge evidence against the accused. Such as, International human right law declared that, any accused has the right to examine or have examined the witnesses against him or her to obtain the attendance and examination of witnesses on his or her behalf under the same condition as witnesses against him or her. Furthermore, the right of the accused to examine or have examined witnesses on his or her behalf is expressed in article 14(3) (e) of the international convention on civil and political right, article 6(3) of the European convention for the protection of human right and fundamental freedoms and article 8(20) (f) of the americal convention on human rights. The right to examine witnesses an inherent element of the equality of arms principle discussed in the commentary to article 62 is according to the United Nations human right committee, designed to guarantee to the accused the same legal powers of compelling the attendance of witnesses and of examine or cross-examine any witnesses as are available to the prosecution. The right to examine witnesses is also related to the right to prepare a defense under article 61. Similarly, Islam law give permission that every man to adopt a particular method in proving a crime, it is absolutely certain that a crime stands proven in Islamic law just as it is in accordance with the universally acceptable methods of legal ethics endorsed by sense and reason. Consequently, if circumstantial evidence, medical check-ups, post mortem reports, finger prints, testimony of witnesses, confession of criminals, oaths and various other methods are employed to ascertain a crime, then this would be perfectly acceptable by Islamic law. It is to this fact that the following words of the Prophet (sws) allude to: The word bayyinah in the language of the Qur'an, the Prophet (sws) and his Companions is the name of everything by which the truth becomes evident. Hence contrary to its connotations in the terminology of the jurists, it has a wider meaning because they only use it for two witnesses or an oath and a witness.

If a person is accuses a chaste and righteous man or woman having a sound reputation of fornication. In this case, the Qur'an stresses that the accuser shall have to produce four eye-witnesses. Anything less than this will not prove his accusation. Circumstantial evidence or medical examination in this case is absolutely of no importance. If a person is of lewd character, such things have a very important role, but if he has a morally sound reputation, Islam wants that even if he has faltered, his crime should be concealed and he should not be disgraced in the society. Consequently, in this case, it wants four eye-witnesses to testify and if the accuser fails to produce them, it regards him as guilty of qadhif. The Qur'an says, upon those who accuse honorable women [of fornication] and bring not four witnesses as evidence [for their accusation], inflict eighty lashes, and never accept their testimony in future. They indeed are

transgressors. But those who repent and mend their ways, God is Most-Forgiving and Ever-Merciful. (24:4-5).

RIGHT OF APPEAL

A condemned person generally has the right to appeal against, or seek review of, conviction and sentence. And there is no reason to think that a person who has elected to defend charges will not exercise this right. Criminal appeals are thus a crucially important feature of the modern criminal process. The classical Islamic law allows the right of appeal to the accused against a decision. It is reported that Ali b.abi talib the fourth Caliph, had decided a complex case when he was the weli of Yemen and that the same case was appealed to the Prophet (s.w) who confirmed it and said, "It is decided (by Ali);" and according to another narration he said, I confirm his decision. It is reported that a woman who was accused of adultery was arrested and presented before Umar b. al-khattab– the second Caliph. It was alleged that since she had committed adultery because she had delivered a child after only a period of six months pregnancy. Umar (R.A) ordered that she be stoned to death. As people were taking her towards the location for punishment, she kept on pleading that she was innocent but no one would listen to her. It is reported that her sister came to 'ali b abi talib (R.A) – the fourth Caliph and told him that 'Umar (R.A) has sentenced her sister to be stoned to death but she is innocent. (R.A) Was asked by 'Umar (R.A) about it and he told him that she cannot be guilty of adultery because it is possible for a woman to give birth to a child after six months pregnancy. When 'Ali (R.A) was asked about evidence, he recited the Qur'enic verses: "If they (i.e. the fathers) wish that the period of suckling for their children be completed, mothers may suckle their children for two whole years." In another verse Allah says, "The carrying of the child to his weaning is a period of thirty months. argued that if the period of weaning which is two years (24 months) is subtracted from thirty months (which is the overall period of bearing and weaning), there remain only six months. This proves that pregnancy period can be of six months. 'Umar (R.A) changed his decision and set the woman free.⁶¹ Thus, a case that was decided in the face of evidence was overturned as the learned 'ali b abi talib (R.A) considered the earlier decision as wrong. A complete discussion of the right of appeal in Islam is beyond the scope of this work but what is deduced is that an accused may appeal if he or she so wishes and that such a right are in accordance with Islamic law.

Also all international human right law give right to appeal such as Article 14(5) of the ICCPR guarantees a right of appeal in broad and unequivocal terms: "Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law. This right was proposed relatively late in the gestation of the ICCPR. It was seen primarily as a mechanism for examining whether the right to a fair trial had been respected.

CONCLUSION

To sum up the above the main points are given below that, comparing the International human rights law and Islamic law of the fair trial proceedings are almost same such as an accused cannot be arbitrarily punished; his rights to life, honor, liberty, and property are protected by the Islamic and international human right law. He has frequent rights even during the investigation period, during the trial and after the trial. His trial must be fair and public before an impartial judge. He has the right to rebut the evidence against him with the help of a counsel. He cannot be arbitrarily arrested or detained or incriminated. His case shall be decided promptly and he has the right of appeal if he wishes. Thus, an accused cannot be charged under the Islamic law because of the principle of legality and if charged, he has many defenses under the doctrine of uncertainty in cases of hudud and homicide. He has the defense of qadhaf in the case of adultery or fornication. It means that the rights of the accused are fully guaranteed under the Islamic criminal law and that the Islamic criminal law has provided excellent procedural requirements to guarantee the rights of the accused. Unfortunately, the rights of the accused are scattered in treatises of the classical Islamic law and cannot be found together. The Islamic law has done its utmost to avoid any chance of a miscarriage of justice.

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