

The Role of the Judiciary in Upholding Constitutional Law and Human Rights: An Islamic Perspective

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Abstract

This research explores the judiciary role in recognition of fundamental human rights, preservation of their civility and protection of laws. Government goals will better achieve by the standards developed by the judiciary in making people life easier, specifically in a context of Islamic teachings. Interpretation upon the comprehensive literature review, this study explores the relationship between the Government and the people and the international community through developing standards and laws in perception of Islam. Addressing the research question, “What role judiciary play in betterment of human’s life and as a guardian of the Constitution through embryonic standards and laws in Islamic perspective?” the study approaches the qualitative and analytical methodology. Data is collected through research, observations and studies conducted in Islamic communities and by the other scholars. The findings underscore the duties of the State and the rights of human by drafting limitation, preventions and equitable decisions. It delves into Islamic teachings influencing equitable enforcement of law and



solidification of Human rights. It is further concluded that the State is obliged to constitute equal rights of freedom, democracy, social justice, tolerance equality of status as enunciated by Islam to ensure peace and protection in the country. It is recommended further to foster Islamic norms and values in judicial constitutions and policy makers for optimal protection of human rights and stability of political system.

Keywords Judicial, rights, Islam, law, justice, society

Introduction

Human beings are inter-reliant, they cannot live without others, and they are socially dependent on others by nature. When they interact with each other's in their personal or others matters conflicts arises between them. Everyone has his own interests and rights that's why clashes breakout unavoidably. When matters get more ambiguous and intricate, it is needed to avert human beings from intimidating one another and to determine between right and wrong. Here the term justice arises and a person who has power to settle the disputes according to Islamic principles is Judge. He can give legitimate judgments in case of quarrels. A judiciary system recognized individuals with their rights and responsibilities. Because life of human beings without natural rights and security measures is unendurable. It is compulsory for an Islamic State to draft judicial laws for the protection of human rights and elude legal pitfall. But it has been seen that judiciary of an Islamic state not playing much role to safeguard human lives and rights. So, his article will investigate the true values of an Islamic judicial system that a state must need to practically implement through laws and regulations for a civilized nation. Before this research the studies held for the investigation of human rights or the judicial system. But research has a significant feature that it based on Islamic rules and features. The research will be taken for investigation of judiciary performance for the protection of human rights according to Islamic laws and values.

Aims of the Research

- I. What are the foundations of Islamic judicial system?

2. How judiciary play role in protection of human rights?
3. What are the principles of Islamic judiciary for establishing a civilized society?

Methodology

For this research qualitative methodology is adopted. For attaining the purpose of research data is analyzed by relating textual and critical approaches. The Quranic text based on central theme of judicial system is also analyzed.

Literature review

I.I Concept of Judiciary in Islam

For a peace social environment and settlement of disputes among people, judiciary system is the necessity of human's life. Islamic law and legal constitutions can practically prevail in a man's social and personal affairs through a transparent judicial system. The word "jurisprudence" according to Islamic point of view is defined as:

*"Knowledge of the rules of God which concerns the actions of persons who own themselves bound to obey the law"*¹

Islam is a doctrine of equality, mercy and justice. It brings freedom and justice for human beings and eliminates iniquity and oppression from their lives. Allah Almighty said in Quran:

لَقَدْ أَرْسَلْنَا رُسُلَنَا بِالْبَيِّنَاتِ وَأَنْزَلْنَا مَعَهُمُ الْكِتَابَ وَالْمِيزَانَ لِيَقُومَ النَّاسُ بِالْقِسْطِ²

"Indeed, we sent Our messengers with clear proofs, and with them We sent down the Scriptures and the balance of justice so that people may administer justice."

The term "justice" used in Quran is about **14 times** and both "justice and equality" **16 times** appear in Quran.³ Holy Prophet (PBUH) was greatest of Judges, the First Islamic state established was Madina, where a judiciary system was properly institute under the supervision of Holy Prophet (PBUH). To govern political and social affairs in other cities, He (PBUH) sent people as a judges, authorizing responsibilities and obligations such as Muaz bin Jabal and Ali bin Abu Talib were directed to Yemen⁴, Utba bin Asyad was

sent as judge to Mecca. Similarly in the time period of Caliphs, judges were appointed by the Caliphs (head of state) to govern the affairs. Hazrat Umar bin Khattab was the first one who makes the judge as a distinct entity from governor and Caliph. Moreover, in time period of Umayyad and Abbasid, the judiciary system widespread, the post of chief justice was coming in to being, who was obliges to supervise and monitor the performance of judges. He has authority to appoint and eradicate judges. In this way the judicial system established in Muslims era to now a days with their own circumstances and ways. But the purpose of all judicial systems from beginning given by Islam is the only one to establish justice and equality. Islamic laws and principles remain same throughout the different time periods.⁵

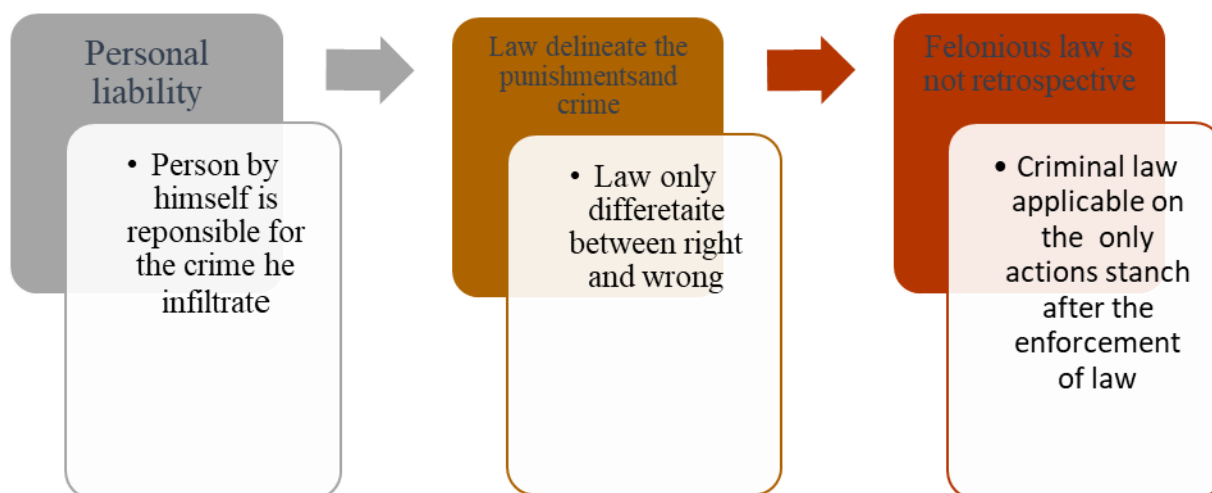
I.2 Principles of Judicial system in Islam:

Islam is the very first religion establishing an Islamic state on sovereignty of law and legitimacy. The mission of Holy Prophet (PBUH) is implementation of divine guidance of timely human necessities. "In other words, the nature of Islamic law always remains in advance of the social change coming into society and by reason of its identity with the nature of the man; the rules formed under the sacred principles remain valid for all time".⁶ Islamic laws applicable to new circumstances with provision of fundamental edicts.

Islamic principles are derived from its sources; *Quran*, *Sunnah (Prophet's reigning)*, *Ijma'a* (consensus of views), *Qiyas* (analogy) and *Ijtihad* (personal stab), *Isthishsan* (Equity), *Malah al Mursalah* (Civic Concerns). This is the unique feature of Shariah legislations that it gives diversity of sources so that the problems encountered by mankind can easily find solution in legal texts.⁷

In contemporary Islamic teachings and practices with true principles are not to be affirm in many aspects of human life. While Islamic principles encompassing all affairs of life based on individual's own and social responsibilities guaranteeing peace, freedom and rights. Islamic jurisprudence gives inclusive principles to safeguard human life, assert security measures and balancing prosperity of society. These principles summarized as⁸:

Figure (I)



Codes of Islamic judicial system

These principles based on the concept of submission and surrender to Allah Almighty. Believe on Allah is the only one who is Lord and superior to every creature. Allah said in Quran:

فَأَصْبِرُوا حَتَّىٰ يَحْكُمَ اللَّهُ بَيْنَنَا وَهُوَ خَيْرُ الْحَاكِمِينَ⁹

“Have patience till Allah shall judge between us. He is the best of those who judge”

He makes laws and regulations for harmonizing and balancing human life. A man has to surrender in front of Allah’s will and laws because He alone is the measure of everything¹⁰. The *Shariah* system of Islam establishes on rubrics 1400 back when Quran was revealed. These laws always give protection to human rights, religious liberty, security and peace. In contrast, a man who violates the rights Allah, rights of other persons or rights of state is committing crime. A man is declared as criminal if his act is against the law and he is under age of 18 years(adult)¹¹.The factor of Majority (*physical*

The Role of the Judiciary in Upholding Constitutional Law and Human Rights...

capability) with maturity (*soundness of person*) is also compulsory for proclaiming a man as a criminal then he would responsible for his illicit acts. On bases of violations of privileges crimes are categorized according to Islamic principles as:

Figure (2)

Categorization of Crimes in Islam

| No | Islamic categorization of Criminal Acts | | |
|----|---|--|--|
| | Types of Punishments | Explanation | Examples |
| I. | <i>Hadd</i> (prescribed punishments/Rights of God) | Hadd means prevention or boundaries. Crimes precisely defined in Quran and their penalties are also directly indicated in Quran. ¹² Hadud commended as privilege of Allah Almighty so the judge has no right to alter, increase or decrease these punishments but to impose it the way it revealed. | Drinking, Theft, Apostasy, Adultery and Fornication False Accusation and Homicide ¹³ etc. |
| 2. | <i>Tazir</i> (Retributory Punishments/not | <i>Tazir</i> means reform or correction. | Unsupported allegation of adultery, |

| | | | |
|----|---|--|---|
| | demarcated by Quran or sunnah but left on the verdict of judge) | Tazir occurs when the injury or assassination is done eagerly, then the perpetrator is chastised with the same hurt that he triggered to the victim. On the other hand, Islam preferred to the pardon rather than punishment that is the right of victim. Pardon can be done in the form of blood money or without it. | corruption of Orphan's wealth, perjury, usury, house violation, abuse, fraud, spying, bribery etc ¹⁴ |
| 3. | <i>Qisas</i> (Discretionary Punishments/law of equality) | Qisas means making the penalties appropriate to the crime. ¹⁵ Except the specified crimes punishment defined in Quran some of the crimes based on the social changes or | Premeditated and Erroneous murder, intended or unintended felonies other than homicides etc... |

| | | | |
|--|--|---|--|
| | | consequences not prefixed in Islamic penology known as discretionary punishments. ¹⁶ | |
|--|--|---|--|

Note: This figure describes the types of penalties in Islam according to the commands of God Almighty.

Islam is a legal system aim the social stability and saving the community from peril of several offenses by determining all these punishments. Islam preserves the life, religion, property, intellect and lineage of human beings. Islamic penology centered on humanitarian features and they rely on reforming the convicts. As Allah said in Quran:

وَلَكُمْ فِي الْقِصَاصِ حَيَاةٌ يَا أُولِي الْأَلْبَابِ لَعَلَّكُمْ تَتَّقُونَ¹⁷

“There is (preservation of) life for you in retribution people of understanding, that you may become pious.”

It is the principle of Islam to publicly announce about the execution of punishment to the criminal. This results that the evicted will ashamed and will not do again in future and the others who watched will safe their selves from crimes felonies. So, the objective of Islamic principles is to raise a peaceful society.¹⁸

I.3 Islamic Judiciary and protection of Human rights

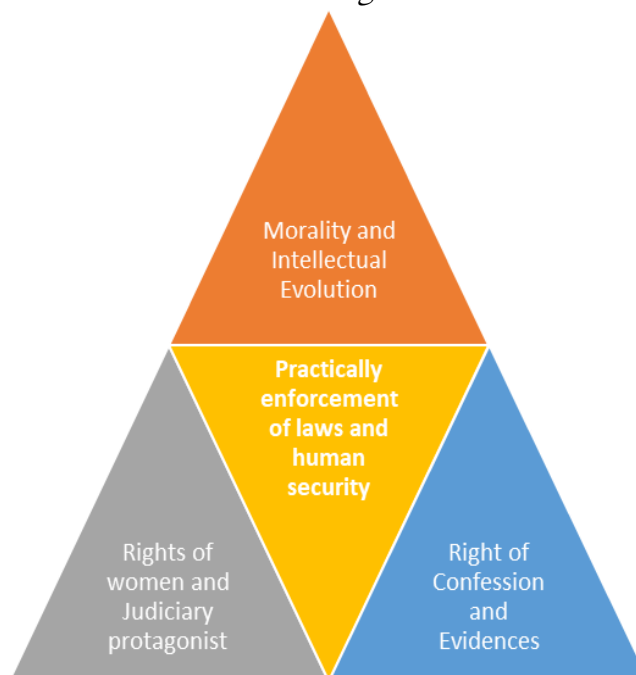
In religion of Islam Allah almighty a supreme power, holding momentous worth, who unifies the rights of humans. The main target of message of God to all human beings is contentment of equality and justice. Islam gives a balanced demonstration of human rights based on tolerance, sensitivity flexibility, crew, value and managing human privileges¹⁹. Islamic judiciary system give importance to the liberties and rights of all human beings rather the rudiments of individual lives. As compare to global human rights Islamic judiciary system upraise self-sufficiency, moral legitimate, and adherence to

the nation except the ordinary sanction. Vision of Islam is to develop rights of all humanity as the rights of individuals which results in social peace and fairness among people²⁰.

Islam judiciary system gives protection of humanitarian rights in the following ways:

Figure (3)

Islamic judiciary and protection of humanitarian rights



Morality and intellectual evolution

- 1) Morality regulates life of human beings on ethical manners while living in a community system. Religious laws provide sanctions for the practical enforcement of morality. Islamic judicial laws of human evolution based on the *moral edicts*. One who acts against the ethical law's interim against the religious manners. The moral progress of a man depends on the rational

development. Both intellectual and moral development coincides with each other.

- 2) Morality demonstrates *difference between right and wrong* and by laws it can be practically enforce in a community. For this purpose, religious judicial laws other than the secular law can take count of deleterious consequences of the acts in the life here and hereafter. A man binding with Haqooqullah (Rights of Allah) and Haqooqunnas (Rights of people) addressed as Khalifah of Allah on earth, will be accountable by himself for his acts to Allah. Allah said in Quran:

أَقْرَأْ كِتَابَكَ كَفَىٰ بِنَفْسِكَ الْيَوْمَ عَلَيْكَ حَسِيبًا²¹

“And it will be said “Read your Record. You alone are sufficient this Day to take account of yourself.”

This foundation of sovereignty leads a man to live his life by obeying Divine laws and ethical norms. On the Day of Judgment man will be punished due to merciless severity and wrong doings. This sense of accountability in turns gives human rights and morality.

- 3) The function of morality is *promotion of justice* by prohibition of cruelty, abuse, despotic oppression and violence. Islamic laws emphasize on morality of all human beings as a whole, it not only means by individual one’s own moral attitudes.
- 4) Islamic laws make judicial system for the purpose of redemption, relief and *security of man*. For this purpose, it emphasizes on explosion of evil deeds and injustice so that it can be fought and its victims reimbursed. By this thing people tried to get rid of evils deeds and endure good actions.²²

Practically enforcement of laws and human security:

The appropriate judiciary emphasize on the law enforcement for the protection of human rights. Law enforcement has great impact on an individual or society welfare. The codes have been conducted for the authorities responsible for implementation of laws to protect human dignity

and respect. These edicts forbid acts of cruelty or torture to the people in custody and emphasized to keep personal information confidential.

In reference to the article 3 of the code of conduct for law Enforcement Officials principles are formulated for the use of firearms and force against the people in detention or custody.²³ This results in effective reporting and reviewing procedure within domain of ethical attitudes towards unlawful criminals. Use of force can only be apply at some specific circumstances where necessary such as the arrest of suspected offenders and prevention of crimes.

Right of confession and Evidences:

The judiciary system of Islam gives right to the accused person to keep quiet or to confess for the act he was accused for. But no one has right to do hypnotism or give him drugs for obtain information. It is right of accused to respondent or non-respondent to the questions. The accused has right to retract the assertions, if he answers the questions and later found these are wrong then he has right to withdraw and annul the earlier statement. By threats, blows or imprisonment subjecting someone to tribulation is unlawful²⁴. This *freedom of choice* results in appropriateness of the obtained confession. On the other hand, the probability of the false confession will be greater, if it is obtained by coercion and duress.

Actions and claims are bound to advance evidences. Evidences should be unbiased even if it is against a person's interests, or his family and friends.

Allah said in Quran:

يَا أَيُّهَا الَّذِينَ ءَامَنُوا كُونُوا قَوِّمِينَ بَآلْفِسْطِ شُهَدَاءَ لِلّٰهِ وَلَوْ عَلَىٰ أَنفُسِكُمْ أَوِ الْوَالِدِينَ وَالْأَقْرَبِينَ²⁵

“O you who believe! Be persistently standing firm in justice, witness for Allah, even it be against yourselves or parents and relatives”.

If the defendant is failing to provide evidences, then he is obliging to refute the assertion under oath in the name of God otherwise the plaintiff's

statement would be void. The oath is applicable only in civil matters and not accepted in penal cases for example defilement of public rights.²⁶ It shows that there are different types of evidences such as *Bayyinah, Shahadah, Iqrar, Qarinah* and *forensic evidences*. In all these types evidence from an adult Muslim recognized as *adil* can be accepted. An evidence of non-Muslim, unbeliever or *fasiq* can also be heard and accepted based on the judge judgments and verifications. A child of 10 year (age of discretion) can also give substantiation²⁷.

Women rights and Judiciary protagonist

Allah has created both man and woman from a single soul (nafs) and without any inferiority with equal rights. In Quran Allah has ordered both of them with same duties and responsibilities in spiritual and religious matters.

Allah Almighty said:

يَا أَيُّهَا النَّاسُ اتَّقُوا رَبَّكُمُ الَّذِي خَلَقَكُمْ مِنْ نَفْسٍ وَاحِدَةٍ وَخَلَقَ مِنْهَا زَوْجَهَا وَبَثَّ مِنْهُمَا رِجَالًا كَثِيرًا
وَنِسَاءً²⁸

“O humanity! Be mindful of your Lord who creates you from a single soul, and from it He created its mate, and through both He spread countless men and women.”

Man is obliged to be maintainer and protector of women and women is considered as the Queen of home and holding duties of her family inside home. Islam has revolutionized status of women in a society by assembling such rules and regulation raise the prestige of women. Some of these judicial laws according to Islam for women are as following:

- I. Islam held a marital relation between men and women, that is a mutual contract having religious overtones, for a strong bonding of family. Women entitled with *mahr* that is a gift of man for women and will be remain with her after marriage. It's her property that a groom gives to a bride and nobody is allowed even a husband or father or brother to take from her after

marriage. Moreover, a Muslim can marry to women from Christian or Jewish community but not to a polytheist²⁹.

2. Before Islam, it was considered as a pride to have more than ten women but Islam limited to get marry not more than *four wives* with condition of justice to be held in all of them.
3. Women in early days of Islam worked outside for their livelihoods, fought in the battles with their menfolk and participated in official business and political matters as well.³⁰
4. Women has given right of share in *inheritance*, that is her own property to be use by her own will.
5. If a marital relation is not possible to continue and irretrievably broken down and there is no chance of reconciliation it is better to get a part by law of *Divorce* or *Khula*.
6. Women has right to *contribute in judicial matters*. There are different opinion regarding the extent where women can legitimately participate. According to some Muslim scholars, women can be appointed in judicial or court official services. While the other said, they can be act as a judge except *Hudud* cases. However, these rules change with the circumstances by the Muslim Scholars. Moreover, evidences of women are also acceptable but with a ratio that evidences of two women are satisfactory where evidence of one man. Excluding in some cases where evidence of men cannot express such as in child birth and in some other situations then evidence of one woman is also accepted³¹.

In current era, International Conventions CEDAW³² holding tradition view of Islam but according to some Muslim scholars CEDAW is an attempt to impose inappropriate western culture in Muslim countries. In actually CEDAW and true Islamic view point has not much division emphasizing on justice, equality, rational and egalitarian ideals. But practically complete implementation of CEDAW is unlikely presently in Muslim countries. While Muslims have to indorse it with some reservations about the provisions contradicts to Shariah laws and regulations.³³



CEDAW

I.4 Application of Islamic judiciary laws in contemporary world:

In contemporary world many countries are against the Islamic criminal laws and punishments are considered unacceptable and cruel in the modern era. According to their opinion these punishments not succor in the rehabilitation of the delinquent. Due to inappropriate application of these laws result in injustice. These laws lead to conservative attitude towards women and against their freedom. These outdated laws are not taking account of changing attitude of communities.

Besides all these accusation on Islamic judicial legislations, the legitimacy of these laws is remaining same. Many countries like Indonesia, Iraq, Libya, Saudi Arabia, Sudan, Malaysia and Pakistan retained Shariah as the foundations of their illegitimate decrees. The existence of Shariah criminal rules with strict evidences in these countries results in free of criminality, law breaking, people's security and justice³⁴.

I.5 Conclusion and Recommendations:

This theoretical study analyzed that Islamic Judicial System plays a vital role in providing human rights by preservation of moral ethical manners, equity, justice, and prohibition of violation of rights and inflict of punishments on criminal acts. Islamic criminal laws based on unique categorization of *Hadd*, *Tazir* and *Qisas* for proscription of delinquencies. Islamic principles for the protection of rights, confession, evidences, practically enforcement of *Shariah*, protection of dignity and respect of all human being specially women result in welfare and peace of a society.

Islam provides such judicial system that is equitable and circumstantial to the nature. Islamic Judiciary laws based on a proper knowledge of all rules and regulations regarding social, political and criminal matters. It is necessary to give proper education and learning regarding this in our educational institutes. From secondary level of education, it can be teaching as specified subject. So that people get awareness of the worth, objectivity and integrity of these laws and application of these laws in a proper form can be possible in a community.

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