"When you judge among the people, judge with justice" **[*The Holy Quran, 4:58*].**

Adjudication in Modern Islamic Countries:
Emphasis on Principles of Fair Trial

Mostafa Elsan[*]

Assistant Professor, Department of Law, Faculty of Theology
Tarbiat Moalem University of Azarbijan, Tabriz, Iran

Principles of fair trial are, under Islamic law, to be inferred from Islamic sources (*fiqh*) and opinions of scholars (*Fatawa*). No modern method for classifying principles of fair trial has been proposed so far in Islamic law. I am proposing two main criteria of classification. Based on a substantial-formal dichotomy, the principle of "rule of law" and the "principle of procedural predictability" should be considered as substantial, whereas the "principle of formality", the "principle of transparency" and the "principle of safety" are formal. Principles of fair trial can also be divided into the three categories of pre-trial, trial and post-trial principles. Many crucial questions arise from the contact between Islamic law and fair trial principles, such as the position of statutes

[*] Ph.D. (2008 Private Law), University of Shahid Beheshti. Member of Scientific Board, Tarbiat Moalem University of Azarbijan, Iran, Fax: +98 4124327563;
e-mail: mostafaelsan@yahoo.com
This paper has been written while I had a scholarship in *Institut Suisse de Droit Comparé* (*ISDC*). I would like to thank A.E. Peters (legal advisor, *ISDC*) for her insightful comments on the first draft of the paper and *ISDC* which awarded me scholarship for researching about fair trial and procedural justice. The views expressed herein are those of the author only, and do not reflect, in whole or in part, the official views of the *ISDC*.

in Islamic law, the role of procedural law in the Iranian judicial system and the conflict between statutes and religious sources.

Part I. Fair Trial: Its Concepts and History in Islam

After the prevalence of Islam firstly in Arabic areas and then to the other areas, nearly in the century of 2 H., Islamic scholars were trying to collect the Islamic rules and provisions about proceedings and other aspects of social life as a chapter in their books. These rules were named as "*Al Feq*". A section of these rules allocated to adjudication i.e. "*Al Qaza*". *Al Qaza* is the rules and provisions governing the administration of justice in Islamic society.

Thus, the main form and concept of Islamic law which traditionally equated with the "*Shari'a*" arose during the first three and half centuries after the death of Islamic prophet in A.D 632.[1]

Differences can be seen between the Islamic approach, which introduces itself as a comprehensive system for all aspects of human life, and other approaches. The first of all is about the roots of rights. Under Islamic law, the rights have been granted by the god and the duties determined so therefore we can see a constant and continuous regime of rules and commandments in Islamic society. The advantages of this regime, as A'la Mawdudi said, are that "*since in Islam human rights have been conferred by god, no legislative assembly in the world or any government on earth has the right or authority to make any amendment or change in the rights conferred by god. No one has the right to abrogate them or withdraw them*".[2]

Some criticisms, however, are arising about such rigid system: a regime having some pre-determined rights, probably having such duties. About the latter, someone may think that Islam is not a flexible religion that designed for different circumstances. The second criticism is that the provisions of holy Quran, as fundamental source of Islamic jurisprudence, are general and sometime ambiguous.[3] Based on the above, different interpretations may be stated about these provisions.

---

[1] Comparative Criminal Law and Enforcement: Islam - Hadd Offenses,, False Accusation Of Unlawful Intercourse (kadhf), Drinking Of Wine (shurb), Theft (sariqa), American Law and Legal Information, Crime and Justice Vol. 1;
At: law.jrank.org/collection/1/Crime-Punishment-in-America-Reference-Library.html

[2] Maududi, Sayyid Abul A'la (1976), Human Rights in Islam, Leicester: The Islamic Foundation.

[3] The holy Quran has confirmed this fact in Sura 3 (Al-i-Imran), verse Number 7: "He sent down to you this scripture, containing straightforward verses - which constitute the

Many aspects of both criticisms are not answerable, so some of Islamic scholars have attempted to justify above matters. Since the main subject of these matters are not relating to the subject of this paper, we continue only about the concept of fair trial and its background in Islam.

1. The Concept of Fair Trial

In an institutional view, the right to fair trial "is a norm of international human rights law designed to protect individuals from the unlawful and arbitrary curtailment or deprivation of other basic rights and freedoms".[4] From this point of view, a fair trial has been guaranteed by international instruments. In the classic legal literature, fair trial is a new subject that opened to the life of human being by endeavors of many persons and after many struggles.

From a religious viewpoint, fair trial has been concomitant with human beings. International provisions, therefore, have not established a new or unique regime in this field. They only confirmed what was already created by religions.

In any way, fair trial has a clear meaning. It may be discussed by focusing on the meaning of "fair" or on the processes needed for fair proceeding. From the first point of view, fair trial is relating to philosophy of law and in the second prospect, it has relation with procedural fairness and the law of procedure.

2. Procedural and Substantial fairness

In the structure of judicial system, the phrase "fair trial" refers to both procedural and substantial law. From the procedural view, we can see the concept of "Due Process" as a principle in common law, especially in the law of U.S.A. In general, due process is refers to "the conduct of legal proceeding according to established rules and principles for the protection and enforcement of private rights, including notice and the right to fair hearing before a tribunal with the power to decide the case".[5]

General substantive law defines how the facts in the case will be handled. In fact, it deals with the "substance" of the subject,

essence of the scripture - as well as multiple-meaning or allegorical verses" (Translated by Dr. Rashad Khalifa; At: www.quran-islam.org).

[4] **What is Fair trial: A Basic Guide to Legal Standards and Practice**, Lawyers Committee for Human Rights, March 2000, p. 1.

[5] Black's Law Dictionary, Bryan A. Garner (Ed.), Eighth Edition, Thomson 2004, pp. 538-539.

especially when it is brought before the court of law. But, procedural law provides the "process" that the case will go through. The procedural law concerning the process and formalities necessary to enforcement of substantive law (rights) when they have ignored, disputed or declined.[6]

Irrespective of distinction between procedural and substantive law, it is understood from Islamic resources that the main purpose of proceedings between peoples is "justice". In fact, "the very aim and object of existence of the Islamic state is establishment of justice".[7] God is commissioning the prophets in the world to establishment of justice in human community. This goal has laid down in Quran (Sura. 57, Verse. 25) as follows:

"*We sent our messengers supported by clear proofs, and we sent down to them the scripture and the law, that the people may uphold justice*".

3. History of Islamic Fair Trial

Prophet Muhammad, while survived, was making judgment between Muslims and between other tribes in Arab territory. When the prophet immigrated to the "*Yathrub*" after his meeting some tribesmen of *Yathrub*, (which in the years to come was renamed "*Madinat Al Nabi*" -- the City of the Prophet, later to be abbreviated to Medina) and he has appointed as arbitrator in long struggles between *Aus* and *khazraj* tribes. He ultimately resolved the fight by absorbing both fictions in to his Muslim community and forbidding bloodshed among Muslims.

After some time, because of the expansion in geographical territory of Islam, men who called "*Qazi*" were appointed by the prophet or *Khalifa* (Islamic Leader) after him to making adjudication between peoples.

At the time of drafting Islamic jurisprudence in the form of books, a chapter was allocated to "*Ketab o Al Qaza*" (chapter on adjudication). In that chapter there was no difference between civil and criminal procedure. Both of these fields are governed by the same rules. Many of *feq* books, in the chapter of *al-qaza*, are remarking that "it is up to a judge to consider the equality between parties even in

[6] See: Mullan, David J, Natural Justice and Fairness--Substantive as Well as Procedural Standards for the Review of Administrative Decision-Making?, **McGill Law Journal**, Vol. 27, 1981-1982.

[7] Syed, M. H, Human Rights in Islam, the Modern Perspective, Vol. 1, First Ed, Anmol Publications PVT Ltd, New Delhi, 2003, p. 256.

looking at them or responding to their questions or the degree of respecting them in the course of proceedings”. [8]

In recent decades, Islamic countries confirmed that a modern judicial system is necessary for prosperity and development of nations. It is needed to protect the right of the oppressed and restrain the oppressor. It is also a way for resolving disputes and ensuring the protection of human rights.

Therefore, many of Islamic countries were adopting the structure of the judicial system from civil law countries. Now many of them have a separate mode of public prosecutor and courts. In Iran this separation is applying. Albeit, this does not mean that Islamic judicial system is totally dependent of other systems of law. Especially in substantial law, Islam has its own rules and principles.

4. Sources of Adjudication in Islam

According to Principle 166 of Iranian Constitution “*The verdicts of courts must be well reasoned out and documented with reference to the articles and principles of the law in accordance with which they are delivered*”. Following this principle, the courts should be having sources for reasoning according to it.

The sources of adjudication are nearly similar to the sources of law, as a science. We must, of course, make a distinction between the Islamic sources of adjudication as a “religion” and the sources of law and adjudication in Islamic countries. Because these countries ordinarily are members of one of the main systems of law i.e. Common Law or Civil Law.

The primary source accepted by all Muslims is Quran. Besides this source, the second one is *Sunna*. In spite of Quran, Muslim's branches have divided into two different branches i.e. *Shi'a* and *Sunni* after the death of the prophet. Generally, the *Sunna* consists of the religious actions and quotations of the prophet (this is consensus point between Muslims) and certain persons after him known as Imam (this is only accepted by *Shi'a* religion).

After these two important sources, the consensus of Islamic scholars (*Ijma*) and the intellect (*Aql*) have been accepted as sources of law. Thus, Muslims could use consensus (*Ijma*) under special conditions

[8] Shahid Sani, Vol. 3, p. 72.

and rely on their intellect to find general principles based on Quran and *Sunna*.[9]

Upon a time, sciences became appear around interpretation of primary sources of Islam. One of them was “Principle of Islamic Jurisprudence” (*Usool al-fiqh*). *Usool al-fiqh* is the science of principles used in inference, rationalization and interpretation of Islamic sources.[10] We are using some of these principles in the following chapter for finding Islamic rules of fair trial.

Part II. Substantial Principles of Fair Trial in Islam

The principle of rule of law (legality) and the principle of predictability of procedure should be considered as substantial principles of fair trial. In the frame of these two principles, it is possible to speak about rules and provisions of adjudication in Islam which are relating to mentioned principles.

5. Legality (Rule of Law) in Adjudication

“Not long ago, Islamic jurists wanted the judge to be free to establish his own rules and principles in areas where a legislative vacuum persisted and to apply them in the case brought in front of him. His opinion would not bind other judges or even bind him in a future case. This system is different from what followed in the Anglo-Saxon system based on the authority of precedents”.[11] Nowadays something has changed in the Islamic courtroom scene and changed profoundly.

“The original meaning of the Rule of Law phrase in English law was that no individual should be "above" the law-meaning that governmental actions should be accountable to some set of predetermined standards”.[12] The sovereignty of law is not only a guarantee for the freedom of individual alone, but also at the same time the sole basis for the legality of authority. Thus “the formation of courts and their jurisdiction is to be determined by law”.[13]

---

[9] Souaiaia, Ahmed, On the Sources of Islamic Law and Practices', Journal of Law and Religion, Journal of Law and Religion, Vol. 20 (1), 2004–5, pp.123–47.

[10] See: Kamali, Mohammad Hashim, Principle of Islamic Jurisprudence, third edition, The Islamic Texts Society, September 2003.

[11] Attia, Gamal, The Right to a Fair Trial in Islamic Countries, In: David Weissbrodt and Rüdiger Wolfrum (Eds.), **The right to Fair Trial**, Springer, Berlin and New York 1997. p. 361.

[12] Whitford, William C, The Rule of Law, Wisconsin Law Review, 2000, p. 724.

[13] Principle 159 of the Constitution of Iran.

Additionally, in Islamic countries, "The functions of the judiciary are to be performed by courts of justice, which are to be formed in accordance with the criteria of Islam, and are vested with the authority to examine and settle lawsuits, protect the rights of the public, dispense and enact justice, and implement the Divine limits".[14]

In Islamic countries, sovereignty of law shall be the basis of the rule in the state.[15] With accepting this principle, a problem arises: where is the position of Islamic sources in courts while we are speaking about "rule of law in the Constitution of Islamic countries"?

One of the Constitutions (belong to an Islamic country) has a good answer to this argument: "All civil, penal financial, economic, administrative, cultural, military, political, and other laws and regulations must be based on Islamic criteria. This principle applies absolutely and generally to all articles of the Constitution as well as to all other laws and regulations".[16]

Thus, the assumption is that none of the statutes in Islamic countries are opposite with Islamic criteria. By accepting this proposition, we could tell that the statutes and certain types of precedents (previous legal decision serving as an authoritative rule) are admissible in Islamic courts and their gravity of importance is not comparable with primary sources of *Sharià* (Quran, Sunna, Aql and Ejma). This thought is exactly compatible with the concept of "the rule of law" in modern philosophy. As a result of this argument, the law (as statutes) became separated from its sources (including *Sharià*) and whenever a statute available, the judge does not have any permission for reasoning to *Sharià* or anything like this.

From the view of philosophy, the Constitution and other statutes of Islamic countries have been affected directly from the doctrine of "Legal Positivism" in the West, where one of the positivists said: "law is valid only as positive law, that is, statute (Constituted) law".[17] The result of approving any statute as "law" in the parliament is that "the material of the law [became] wholly free from ideology".[18]

---

[14] Principle 61 of the Constitution of Iran.

[15] Article 64 of the Constitution of the Arab Republic of Egypt.

[16] Principle 4 of the Constitution of Iran.

[17] Kelsen, Hans, The Pure Theory of Law Part II, **Law Quarterly Review**, Vol. 51, 1935, p. 518.

[18] Kelsen, Hans, The Pure Theory of Law, Its Method and Fundamental Concepts, **Law Quarterly Review**, Vol. 50, 1934, p. 488.

Therefore, the court is obliged to apply the law and make a rational decision according to the law (statute). Because the law, irrespective of the idea of religion (Islam) about the fact of the case, requires it.
This is wholly true about procedural law. Since Islam originally has not had modern procedures for securing rights with the path of courts. From the substantial law aspect, at least in the law of Iran, we have a principle of preference of statutes to all sources of law. The principle 167 of Iranian Constitution reads as follows: "*The judge is bound to endeavor to judge each case on the basis of the codified law. In case of the absence of any such law, he has to deliver his judgment on the basis of authoritative Islamic sources and authentic fatawa. He, on the pretext of the silence of or deficiency of law in the matter, or its brevity or contradictory nature, cannot refrain from admitting and examining cases and delivering his judgment*". This principle is restated in the Article 3 of Iranian Civil Procedure Act (1379 H/2000).
If a judge says that he does not believe in the law or states that in his thought the special statute considered opposite with religious believes of Muslims, another problem is arising.
From this sense, we may speak about "bad law", since it has conflicted with the religious beliefs of people. But the law, while has not abolished by the competent authority, still is a "law" and will been preferred to any other sources of law.
With accepting this, "You can see very plainly that a bad man has as much reason as a good one for wishing to avoid an encounter with the public force, and therefore you can see the practical importance of the distinction between morality and law".[19]
In confirming preference of "bad law" to its "good sources" the Note of Art 3 of Iranian Civil Procedure Act says that if the judge is *Mujtahid*[20] and in a certain case, in his opinion, the applicable Act on that case being contrary to the *Sharià* (Islam) then the case will be referred to another judge for judgment". Therefore, the opinion of Mojtahid (as a judge) only will be honorable for him and not give priority to the applicable Act in the case.

6. Predictability of Proceedings

[19] Holmes, Oliver Wendell, The Path of the Law, Harvard Law Review, Vol. 10, 1896-97, p. 488.
[20] "*Mujtahid* (Arabic) is a Muslim jurist who is qualified to interpret the law and thus to generate *Ijtihad*"; See: Encyclopedia of the Middle East, At: www.mideastweb.org .

Another substantial principle that may be conformed to fair trial in Islam is "principle of predictability of the process and results of proceedings". According to this principle, all formalities and sustentative rules necessary for judgment should be arranged in so way that enables a reasonable person to predict integrity of the process of proceeding and its result. In other words, the process of adjudication should be predictable to a reasonable person.

There are three factors for securing the predictability of proceedings:

i. Institutional: the structure of judiciary system must be designed and administrated according to the law.

ii. Constitutional: All of the process of adjudication, from the beginning to the end, should be according to the relative statutes which approved by competent authority (Parliament).

iii. Personal: all of the judges and staffs of the judiciary system should be independent from other powers, impartial and neutral.

For obtaining this purpose in Islamic judicial system, we should refer again to the principle of legality. Accordingly, a primary source of Islam may be a useful tool by which lawyers and others became able to attempt to predict how a case, relating to religious facts, will be resolved, but it hardly constitutes a legitimate tool for a judge to use in resolving the case.

Therefore, Holmes' statement that the law consists of nothing more than predictions of what the court will do in fact,[21] encapsulates the strand of legal realism that provide the philosophical underpinnings for a predictive jurisprudence.[22]

The principle of predictability is a distinguishing point between law and religious notions of what the law should be or must be like. This principle is rooted in realism and there is a real sight to the structure of law courts: how a judge can learn many different books and ideas written about Islam, its philosophy, Islamic jurisprudence et cetera and why he is obliged to do this? Do our judges have enough time to review all or many of Hadith books searching for a consensus that probably exists about the fact brought before the court of law? If so, can anybody predict the results of adjudication in such a complex regime of jurisprudence?

---

[21] Holmes, op. cit, p. 458.

[22] Dorf, Michael C, Prediction and the Rule of Law, **UCLA Law Review**, Vol. 42 (3), 1995, p. 656.

Instead of the foregoing, we can use a predictable system of statutes by approving the consensus of Islamic jurists in the frame of "Act". In order to achieve predictability of adjudication we may use three categories of fair trial rights: pre-trial rights, the rights at the hearing (during the process of hearing the case in the court) and post-trial rights. Of course, the violation of rights during one stage may affect other stages and consequently the predictability of proceedings.

The judge must have appropriate reasoning for his discretion in applying special formalities or rules in the process of his judgment or decision. For reasoning, according to Constitution of many of Islamic countries, jural sources and valid religious injunction should be the base and foundation of law for the legislator not for the judgment by the judges.[23]

Part III. Procedural Principles of Fair Trial in Islam

Proceeding is a shape of public discipline, even there is no rule for determining its formalities. Because, typically, recoursing to an authority resulting to creation of certain types of formalities at that place which may be continued upon a time.

In this part, I am discussing the concept of the principle of formality of procedure, principle of transparency and the principle of safety in a comparative perspective.

7. The Principle of Formality

This concept means that the process of adjudication is as a path governed by different rules, procedures and formalities. When any or some of these aspects have been ignored in the process, the judgment became null and the Appeal court should revoke it.[24]

When the court applies the formalities correctly, the affected party is to participate in the decision by presenting proofs and reasonable arguments for a decision in his/her favor.[25]

The result of applying formalities and considering all principles is the "decision" of the court. Obviously, when the court issues a final decision after its adjudication, it is legally binding to both parties,

---

[23] Habibzadeh, Mohammad Ja'far, Legality Principle of Crimes and Punishments in Iranian Legal System, Educational Research and Review Vol. 1 (3), June 2006, p. 111.

[24] Art 371 (3) of Iranian Civil Procedure Act.

[25] Fuller, Lon. L, The Forms and Limits of Adjudication, **Harvard Law Review**, Vol. 92, 1978, p. 364.

irrespective of justness in its formalities and substantive aspects.[26] This is called *Res Judicata*[27] and accepted by Islamic countries as one of the post-trial principles.

The principle of formality can be analyzed in the frame of the theory of "pragmatic instrumentalism". According to this theory, the law and its procedures are not the goal but the law is only considered as a body of practical tools for serving specific substantial goals.[28]

This theory has many similarities with the Islamic thought about the spiritual goal of human. Upon the Quran the spiritual goal of Islam is to attain the state of peace in the soul.[29] In this world, if the "welfare" is an ultimate goal of human being, the law and its formalities should be planned in the direction of welfare of society.

Intelligibility, rationality, participation of the parties in the adjudication, timeliness, peacefulness and consequentialism are also rules derived from the principle of formality and have been approved by Islamic jurisprudence.

Principle of Intelligibility. According to the principle of intelligibility, the process of adjudication should be intelligible to the parties. In general, rationality increases intelligibility. "Accordingly, humans generally prefer to order their affairs through reason than through random or arbitrary action".[30]

Principle of Participation. Under the principle of participation of the parties in adjudication "parties should be able to participate meaningfully in the legal resolution of disputes".[31] In Islamic jurisprudence, the parties of a claim have all their rights and duties for suing against each other, brought evidences, defense and so on. Albeit the burden of proof had imposed to the plaintiff in both civil

---

26 Zain-al-Din ben Ali Ameli, (Dhahid Sani), Sharhe-el Loma, Vol. 3, Najaf Publ., Iraq 1418 H.G (Arabic), p. 81.

27 Res Judicata: "(Latin: "a thing adjudged"), a thing or matter that has been finally juridically decided on its merits and cannot be litigated again between the same parties. The term is often used in reference to the maxim that repeated reexamination of adjudicated disputes is not in any society's interest", See: Britannica Online Encyclopedia, At: www.britannica.com.

28 Summers, Robert S, Pragmatic Instrumentalism in Twentieth Century American Legal Thought—A Synthesis and Critique of Our Dominant General Theory About Law and Its Use, **Cornell Law Review**, Vol. 66, June 1981, p. 863.

29 Quran, 89-27.

30 Summers, Robert S, Evaluating and Improving Legal Processes A Plea for "Process Values", **Cornell Law Review**, Vol. 60, 1974-75, p. 26.

31 Bayles, Michael, "Principles for Legal Procedure", **Law and Philosophy**, Vol. 5, No. 1, April 1986, p. 54.

and criminal proceedings.[32] This also can be considered as restatement of presumption of innocence in Islam.

Principle of Timeliness. The subject of principle of timeliness is that people do not want to wait longer than necessary for a resolution of their disputes.[33] In determination of any charge against any person, everyone shall be entitled to be tried in a competent court without undue delay.[34]

Principle of Peacefulness. The sphere of proceedings should be peaceful and finally all of proceedings should be done in order to achieve a fairness result.

Principle of Consequentialism. According to the principle of consequentialism, a morally right action is one that produces a good outcome or consequence. The principle hold that "whether an act is morally right depends only on the consequences of that act or of something related to that act, such as the motive behind the act or a general rule requiring acts of the same kind".[35]

Although the principle of consequentialism has some inconsistency with the principle of formality, it refers to people`s belief about the administration of justice (since in the view of laymen, the consequence of a case is very important). The principle of consequentialism would, thus, be confirmed as one of the requirements of fair trial in Islamic countries.

8. Principle of Transparency

"Many ordinary citizens do not exhibit rational apathy about criminal justice, but rather show passionate interest in how insiders handle it".[36] The principle of transparency of adjudications is one of requirements of the principle of accountability. The latter has emphasized in the Islamic sources as one of the duties of Islamic government. Additionally, as mentioned in Islamic thoughts, all

---

32 In fact, in a Hadith, prophet remarked that: "proof lies on the plaintiff and the oath is to be sworn by the defendant"; See: Al-Fawzan, Salih, A Summary of Islamic Jurisprudence, Vol. 2, Al-Maiman Publishing, Saudi Arabia 2005, p. 726..

33 Bayles, op. cit, p. 56.

34 Art 14 of the International Covenant on Civil and Political Rights, GA res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 52, UN Doc. A/6316 (1966).

35 Consequentialism, Stanford Encyclopedia of Philosophy, First published Tue May 20, 2003; substantive revision Thu Feb 9, 2006;
At: http://plato.stanford.edu/entries/consequentialism/

36 Bibas, Stephanos, Transparency and Participation in Criminal Procedure, New York University Law Review, Vol. 81 (3), 2006, p. 915.

humans who have lived on earth are accountable and answerable on that day for their beliefs and willful actions.[37]

A court system is "transparent" when all relevant aspects of its operation are revealed to policy maker, litigants, and the public in forms that they can readily comprehend.[38] The publicity of court may be helpful in the process of administration of justice. In Islamic thoughts there should be no ban between the judge and person.[39]

In the shadow of the principle of transparency, "if people can understand the process and the reasons for a decision, they are more likely to accept it as settling their disputes".[40]

9. Principle of Safety

The independence of judiciary and neutrality of judges are two important elements of the principle of safety in Islamic system of fair trial. In fact "the independence and immunity of the judiciary are two basic guarantees to safeguard rights and liberties".[41] In all of Islamic countries, "the judiciary is an independent authority. There is no control over the judges in the dispensation of their judgment except in the case of Islamic *sharià*".[42]

The doctrine of separation of powers, as a modern doctrine, is the heart of Constitutions of Islamic countries. Actually the principles of separation of powers and judicial independence become universally accepted. "Many countries, regardless of their political, social or religious beliefs and identities, have constitutional provisions recognizing judicial independence".[43] For instance in the 1952 Jordanian Constitution (Art. 28), the 1962 Kuwaiti Constitution (Arts. 50 and 163), the 1991 Tunisian Constitution (Art. 65), the 1973 Bahraini Constitution (Arts. 32 (a) and 101 (b)), and the 1979 Iranian Constitution (Art. 57), the principle of independence of judicial power is recognized.[44]

---

[37] Quran, *Al-e-Imran* (3)- 30, *Al-Ghashiyah* (88)/25-26.

[38] LoPucki, Lynn M, Court-System Transparency, Iowa Law Review, Vol. 94, 2008-2009, p. 483.

[39] Najafi, Shaykh Muhammad Hassan, Jawahir al-Kalam, Vol. 40, Tehran: Dar al-Kotob al-Islamiya, Third Publication, 1398 H. (1988), p. 79.

[40] Bayles, op. cit, p. 55.

[41] Article 65 of the Constitution of the Arab Republic of Egypt.

[42] Constitution of Saudi Arabia (Adopted on: March 1992), Art. 46.

[43] Al-Jarbou, Ayoub M, Judicial Independence: Case Study of Saudi Arabia, Arab Law Quarterly, Volume 19, Numbers 1-4, 2004, p. 5.

[44] Ibid, pp. 5-6.

Obviously, as a historical fact, if the judicial system does not neutral the influence of high-ranking officials will clearly be felt by anyone who has a case against the government.[45]

Although there is no uniform scheme for selection of judges between Islamic countries, the method of "merit" system has prevalence in many of mentioned countries. In fact, for the safety of adjudication and securing impartiality of judges, Islamic law requires certain qualifications from judges such as knowing the law. There is no place in Islamic judiciary for a judge who does not know the law.[46] As I mentioned earlier, the "law" which the judges should know is "statutes" not Islamic jurisprudence (*Fiqh*).

10. Remarks and Conclusion

Upon a time the philosophers have argued about the importance of justice and fairness in society. Likewise, the judiciary systems in all nations have attempted to justify their administration and judgments according to justice or in the system of common law in accordance with fairness. Studying the historical experiences indicate that the procedures which required to achievement to justice are critical important like the result and decision which issued following to application of procedure.

It is obligatory to Islamic judiciary systems to consider this fact that in the structure of "Fair Trial" the "way" has a high rank of significance, like the "outcomes" resulting from judgments. As an inevitable fact, courts in Islamic countries should interpret the due process guarantees as not only securing reasonable procedures, but also as substantial rights that are included in the concept of freedom, equality, welfare, presumption of innocence and so on in the holy Quran and their Constitutions.

The final remark is that if the process of adjudication in a certain case was not according to "justice", then we cannot describe the result of that process as "judgment of a competent and independent court". It is only considered as an illegal collusion upon indisputable rights of an injured party from this arbitrary process. In such case, the reputation and good standing of the injured party should be restored.

[45] Harry M. Scoble (Editor) Laurie S. Wiseberg (Editor), Access to Justice Struggle for Human Rights in South East Asia, Zed Books, London 1985, p. 81.

[46] Attia, op. cit, pp. 357-358.