

# Iranian Judiciary Facing Human Rights Norms or Islamic Criteria

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**Abstract:** *The function of the courts in the Iranian post-Islamic revolution constitutional law may be analyzed by reference to a number of different considerations of procedural reforms: the abolition of pre-revolution courts; the establishment of new courts such as the clerical and the revolutionary one; the matter of radical changes due to procedural criminal law aiming to "Islamicize" the judicial system; and the classes of situations in which court's jurisdiction may be raised. On the other hand, the introduction of Islamic decisive factors as the basis for judgments resulting in the obvious challenges to the international norms, the nature characteristics and effects of the remedies and sanctions they may award, and many other matters can be listed in the substantive evolutions. A comprehensive analysis would be unbearably wordy and recurring. However, a brief preliminary survey may help to provide a clearer image of the judiciary in Iran. This article along with a constitutional overview of the judicial system in Iran and its preparedness for protection of human rights, attempts to illustrate, albeit briefly, the important aspects of the International human rights under the criminal codes of the post-Islamic revolution in Iran.*

**Key Words:** *Iran; Human Rights; Islam; Judiciary*

## I. Introduction

The Islamic Republic of Iran is a system based on belief in

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exclusive sovereignty of God, right to legislate, and the necessity of submission to His commands. It is believed that the regime is based on Divine revelation and its fundamental role in setting forth the law and the justice of God in creation and legislation (*Iranian Constitution*, 1998: §2). Divine law or in a comprehensive judgment Islamic "shari'ah" is a concept which should be narrated by official readings of governmental jurists fully qualified Faqihs on the basis of the "Koran" (*Iranian Constitution*, 1998: §2.6). Islamic law, as a sacred law, is the most classic expression of the Islamic way of life and is the most important part of political Islam. All laws and regulations including civil and criminal, financial, economic, administrative, cultural, military, political or otherwise, should be in accordance to Islamic principles (*Iranian Constitution*, 1998: §4). Under this comprehension, human rights and their universally accepted norms have no vast room within the process of legislation to bring about efforts to comply laws corresponding to international norms. On the other hand, the Constitution does not oblige itself to observe human rights norms, rather it is prepared to pursue "shari'ah" even if inconsistent with accepted norms of human rights by civilized nations, since the primary aim of the Constitution is to "islamicize" wholly entire governmental system including the Iranian judiciary whose features are different from other forms of modern judicial reforms in the west. In addition, preamble to the Constitution holds that peoples' rights should be in line of Islamic movement and the main task of the judiciary is to prevent the ideological deviations within the Islamic nation. It seems that restoring to international norms could be felt as into deviations of nation from true path of Allah.

After the Iranian Islamic Revolution in 1979, the Iranian judicial policies and rules, particularly in procedural criminal laws, were fundamentally changed. These changes in the provisions of Islamic Republic's Constitution resulted in substantial flaws in judicial institutions and the administration of justice to establish what has been claimed as the judicial system in Islam which according to officials

successfully experienced in Iran. <sup>①</sup>This is a fact that the Constitution of Iran, whether original or the amended one,<sup>②</sup> is the product of a political revolution under supervision of body of clergymen, who sought to consider improving Islamic criteria mixing<sup>③</sup>with some secular entities of western administrative systems. It was not a product of the research and deliberations of a body of eminent lawyers and experts acting on behalf of the people. Another aspect is that the Iranian constitution does not deal with the matters of human rights in details rather; it is abandoned to the future laws which need interpretation by Islamic jurists. The question of contradiction of the new establishments with the international standards is highly observed in course of scholars' debates. As expanding new courts and laws those took priority across the country can directly influence the international norms of human rights.

## II. Independence of Judiciary

The judiciary in Iran "should be an independent<sup>④</sup>power" (*Iranian*

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<sup>①</sup> Iran's Judiciary chief in a meeting with visiting Tanzanian counterpart expressed Iran's readiness to exchange experiences and judiciary, legal achievements in the meeting, Ayatollah Mahmud Hashemi Shahrudi said. He added, "One of the successes for Iran's judiciary system is expansion of using modern technology in management of the judicial system." See *Iran-daily*, Nov 5<sup>th</sup> 2008, available at <http://www.Iran-daily.com> (last visited on April 5, 2009).

<sup>②</sup> Original one goes back to 1979 and the amendment one to 1989, in a letter for establishing constitutional review council which was addressed by the late leader of Iran there were 20 politicians 18 out of them were clergymen. 'The Constitution of the Islamic Republic of Iran 1989'. Bureau of International Agreements 1999.

<sup>③</sup> This combination shows a structural dualism within the Iranian judicial system originating from the constitution. Hassan Rezai, *The Iranian Criminal Justice under the Islamization Project*. European Journal of Crime, Criminal Law and Criminal Justice. vol, 10/1. 54-69 (2002).

<sup>④</sup> The independence of the judiciary is guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and non-governmental institutions to respect and observe the independence of the judiciary. "Basic principles on the Independence of the judiciary" adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985". "See also": clause 1 of the report of committee 4 International Congress of jurists, New Delhi 1959.

Constitution, 1998: §57, 61, 156) to protect individual as well as social rights. Today, the independence of judiciary is recognized as "an indispensable requisite" of a free society under the rule of law. Such independence implies freedom from interference by the executive or legislature with the exercise of the judicial function" (*Report of Committee 4 International Congress of Jurists, 1959: §1*). Moreover, every one is entitled to an independent and impartial tribunal upon international human rights instruments (ICCPR § 14.1). Article 156 of the Constitution expressly stipulates that requirement as a precondition 'being in accordance with international standards which are demanded by the universal bodies and international law. To uphold the independence of judges from the executive interference, Article 170 stipulates that they are "bound to refrain from executing governmental decisions that are contrary to Islamic laws". The Constitution provides for the independence and moral authority of the judicial system. The non-binding preamble to the Constitution envisages the creation of a judiciary based on Islamic justice and comprised of just judges familiar with Islamic jurisprudence. The independence of the judiciary may be ensured in a number of ways. However, these argumentations are not guaranteed by procedural rules.

First, the head of the judiciary is appointed by the Leader and is not accountable to other branches of government (*Iranian Constitution, 1998: §157*). Therefore, the judiciary is independent from other powers of the state. Yet, it has no authority over possible offences of the Leader or related officials of his office unless with green signal of the leader, whereas in a modern constitutional law no body is regarded above law "ultra vires" (Smith, 1959: 57). In fact, according to Article 57, the judiciary should exercise under absolute authority of the leader.

Second, the administrative and employment affairs of the judiciary are independent of other powers (*Iranian Constitution, 1998: §158*). Therefore, executive power cannot interfere in the appointment and salary of judges which can influence the judicial decisions. Although it should be noted that the concentration of judiciary as like administrative units in the powerful hand of a single person 'head of the judiciary' may lead to corruption or using head's influence.

Independence does not require only impartial or independence of judges; rather, the control of finance and administration may provide any threat to judicial independence. According to some writers "the enforcement of the rule of law by the judges could be wholly frustrated by the refusal to appoint judges to provide courtrooms for them to sit in or staff to service those courts..."<sup>①</sup> In fact, he has judicial and ministerial power (*Iranian Constitution*, 1998: §160).

Third, the judiciary has control with respect to all judicial functions from investigation to adjudicating lawsuit and issuing verdicts. So all cases are adjudicated within the judicial power and judgments are made with total independence. Article 61 of the Constitution states that the judicial power shall be exercised by courts of justice which shall be established according to the Islamic principles and shall engage in settling disputes and complaints, safeguarding the public rights, promoting and carrying out justice and implementing divine law. Moreover, Article 159 of the Constitution stipulates that "the State authority to deal with litigation and complaints shall be the courts of law". Furthermore, Article 164 of the Constitution stipulates that a judge may not be suspended, temporarily or permanently, except by a trial proving his guilt and in consequence of an offence warranting his dismissal. <sup>②</sup>A judge may not be transferred or installed in a new position without his consent, unless warranted by the best interests of the society, pending the decision of the head of the judiciary and upon consultation with the head of the Supreme Court and the Attorney-General. Weak point of these articles is that no guarantee offered by procedural law particularly judicial bills should be prepared only by the head of judiciary. Therefore, these regulations can not decrease the dependence of the judges to the decisions made

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<sup>①</sup> Sir Nicolas Browne Wilkinson believes that 'A modern lawyer might say that the crown and its servants like all other public authorities must not act *'Ultra Vires'*'. "The independence of the judiciary in the 1980s" Public Law, The British Journal of Administrative Law. 44 (1988).

<sup>②</sup> International Congress of Jurists, the fourth committee, ¶3, 4. New Delhi, 1959. "See also" Articles 17-19 Basic Principles on the Independence of the Judiciary, General Assembly Resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

by head of judiciary. According to articles 161,164 in addition to absolute power of the head of judiciary to appoint the chief officials of the judiciary, he may provide laws and rules governing Supreme Court. This, in fact, might be misused for political interests. On the other hand, judges' position is not immune from political extra legal orders as no legal mechanism is foreseen to prevent presumptive arbitrary measures on behalf of the head of judiciary. Apart from independence of judiciary, the structure of judicial system and criminal codes can influence on the promotion of human rights.

### **III. Structure of the Judiciary**

According to the Article 157 of the Iranian constitution, the head of the Judiciary is appointed by the Supreme Leader as the most powerful authority of the state, who in turn nominates the Chief Public Prosecutor (*Iranian Constitution*, 1998: §157, 162, 110.6), head of state Chief Inspectorate (*Iranian Constitution*, 1998: §174), head of Administrative High court (*Iranian Constitution*, 1998: §173) and head of Military Courts (*Iranian Constitution*, 1998: §172)...(At the moment all of these officials are from among clergymen). The head of judiciary serves 'a period of five years' renewable terms.

The 1989 constitutional amendment of the Islamic republic of Iran charges the head of judiciary with "investigating and passing judgments on grievances;...supervising the proper enforcement of laws;...uncovering crimes; prosecuting, punishing criminals;" taking "suitable measures" to prevent crime and reform criminals (*Iranian Constitution*, 1998: §156, 158). He is responsible for the "establishment of the organizational structure" of the judicial system; "hiring, promoting and assigning judges" (*Iranian Constitution*, 1998: §156, 158).

Along with the head of judiciary, a Minister of Justice is to be chosen upon Article 160 by the President from among candidates who have been recommended by the Head of judiciary. This kind of selection process indicates the extent of the non elected judiciary does interfere into jurisdiction of the elected executive power. The Minister of Justice is responsible for all matters concerning the relationship

between the judiciary, on one hand, and the executive and legislative branches, on the other hand. The head of the judiciary may delegate full authority to the Minister of Justice in financial and administrative areas and for employment of personnel other than judges. In such cases the Minister of Justice shall have the same authorities and responsibilities which are laid down by law for other ministers as the highest executive authority of their respective ministries (*Iranian Constitution*, 1998: §160). Therefore, the minister of the respective office is responsible vis a vis the head of judiciary.

The head of judiciary has also legislative authority which is conferred to him upon article 161, providing that the composition of the Supreme Court is based upon laws and rules drafted by him. This process can be regarded as weak point of the article in which the legislative power has been granted to single person, challenging this basic internationally established rule of constitutionalism that "legislation should as far as possible be delegated only in respect of matters of economic and social character and that the exercise of such powers should not infringe upon fundamental human rights" (*Lagos Conference on the rule of Law*, first committee, 1961: 4). Whereas, he has responsibility to prepare judiciary bills which in practice can not be rejected by parliament.

In addition to the regular courts, which hear criminal and civil suits, the government established clerical tribunals, revolutionary tribunals, and the High Court of Administrative justice. The High Court of Administrative Justice (*Iranian Constitution*, 1998: §173) is under the supervision of the head of the judicial branch authorized to investigate any complaints or objections by people with respect to government officials, organs, and statutes. In this line, revolutionary and special clerical courts are the initial achievements of the Islamic Republic of Iran. The Special Courts for the Clergy are out of bounds of the judiciary and functions independently under the control of the Supreme leader, so they are accountable only to him. They are empowered to try any clerical dissident. The Special Clerical Court handles crimes allegedly committed by clerics "roohaniyat" whether

Shi'a or Sunni. <sup>①</sup>The judgments of these kinds of courts are final without appeal. Revolutionary courts also investigate and try any criminal activity against; 1) The domestic or foreign security of the Islamic Republic of Iran and decay on earth; 2) Any insulting attitude against the founder of the Islamic Republic and/or its leader; 3) Any conspiracy against the Regime or engaging in terrorism or demolition of public buildings or facilities with the aim of confronting the Islamic state; 4) Spying for foreigners; and 5) Drug trafficking or related crimes (*Procedural code of public and revolutionary courts 1994*) and in general "crimes against God".<sup>②</sup>

The rules of revolutionary courts usually have been issued in the form of condemnation and expropriate (Harris, 2004: 571, 577, 581, 630) against those religious minorities and political dissidents whom have been made to immigrate abroad mostly to the United States of America in the written verdict. The last point is that public courts are functionally classified according to their area of jurisdiction, civil or criminal, and according to the seriousness of the crime or the litigation, e.g., value of property under dispute or the level of punitive action involved.

#### **IV. Supreme Court**

The Constitution also requires the establishment of a Supreme Court with the task of supervising the implementation of laws by the courts and ensuring uniformity in judicial procedures (*Iranian Constitution, 1998: §161*). The nature of Supreme Court of Iranian legal system has much different character from one of its equivalent in the Indian Constitution with respect to human rights, since the Supreme Court in India has been assigned a special role as the protector and

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<sup>①</sup> The majority of Muslims of Iran are followers of Shi'a sect.

<sup>②</sup> God's rights, covers offences that are considered violations of God's commands as enunciated in the *Koran* and sound Tradition *Sunnah*. Any act or omission which is prohibited by religion is included under this category. There is no exact definition on the term but it depends on the judge to decide which act is to be treated on this base. Hassan Rezai "The Iranian Criminal Justice under the "Islamization" Project". *European Journal of crime, criminal law and criminal justice* vol,10/1,54-69,2002.

guarantor of fundamental rights. This fact can be understood by referring to Article 32(i) which according to Dr. Ambedkar it is the most important Article without which the constitution would be a nullity (Dwivedi, 1990: 14-15). As a matter of fact, this Article is provided to guarantee the fundamental human rights across the country. This keystone matter has been emphasized by Justice P.N. Bhagwati in *Bandhua Mukti Morcha* case (Morcha, 1984: 802). As a result, the judiciary in India has been conferred upon the power to issue the writs against any authority in the state to enforce fundamental rights of victims whose rights are infringed. The Supreme Court and High Courts (vide Art 226) are judicial institutions to strike at corruption, and abuse of power by officials protecting individual's rights vis a vis state. Through this legal policy one can sense that "Be you ever so high, the law is above you" (Iyer, 2001: 147), whereas this function is not expected from judiciary in Iranian constitution.

Appellate jurisdiction; Article 161 deals with appellate jurisdiction of Supreme Court. Appeals lie to the Supreme Court from any judgment, decree or final order of courts in the territory of Iran, whether in civil, criminal or other proceeding except revolutionary courts. It is an appellate court that also reviews decisions of the lower courts to ensure their conformity with the laws of the country. The Supreme Court is the ultimate judicial authority for establishing judicial practice and uniform practice. It has administrative control on lower courts across the state.

Judicial review: This jurisdiction is not recognized for Supreme Court by constitution. Rather, this task is conferred on the Guardian Council<sup>①</sup> of the constitution on the basis of Articles 91, 94 and 96. Only

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<sup>①</sup> This is the most influential body in Iranian political system and is usually controlled by conservatives. It consists of six theologians appointed by the Supreme Leader and six jurists nominated by the judiciary and may be approved by parliament. As the head of judiciary is appointed by supreme leader thus it is entirely under supervision of him. The council may approve all bills passed by parliament and has the power to veto them if it considers them inconsistent with the constitution and Islamic law without being in binding to explain its argument to the public opinion. The council can also bar candidates from standing in elections to parliament, the presidency and the Assembly of Experts. See Ir,Con.1998,§ 91, 94, 96,98and 99.

this Council can declare unconstitutional the laws enacted by the parliament. Moreover according to article 170 judges of courts are to refrain from implementing government decrees and regulations which are contrary to law or the rules of Islam or beyond the limits of authorities of the executive.

The head of the judiciary in consultation with the justices of the Supreme Court, nominates the Chief of the Supreme Court for a term of five years who, among other qualifications, must be specialist in Islamic Law (*Iranian Constitution*, 1998: §162). The composition and laws applicable on the Supreme Court is not mentioned by constitution rather the decisions of the head of judiciary is termination.

## **V. The Nature of Iranian Judiciary**

The entire judicial system "from the Supreme Court to regional courts, all the way down to local, revolutionary, military, administrative, clerical and press courts" are whether directly or indirectly, under the purview of the supreme leader of the state, implementing through his appointed head of judiciary who at the present believes that "Iran, by combining human achievements with religious ideals, has created a successful judicial system which could be a suitable model for Islamic countries." The model which is honored by political officials has derived its legitimacy from the Constitution that itself claimed has been rooted in Islamic foundations such as Koran and the Sunnah (*Iranian Constitution*, 1998: §2.2, 2.6). In addition to the preamble of the Constitution, many articles directly refer to the koranic verses justifying its legal legitimacy as an order or precept from God. So with an interesting initiative act, verses are unambiguously mentioned in their relevant Articles in the manner which is not even followed by radical Basic Law of Saudi Arabia. Using Koranic verses in the course of constitutional debates could influence on the hearts and minds of citizens effectively, particularly when they are used in Articles which are related to the matter of

powerful tools of state, not those related to human rights affairs. <sup>①</sup>

All of the chief officials of the judiciary namely; the chief Attorney General and the President of the Supreme Court and of course the head of judiciary power must be Shi'a "mujtahids" jurists. It unconditionally shows a non secular system that is not preferred in western hemisphere. The judges of all the courts must be familiar in Shi'a jurisprudence; they must meet other qualifications determined by rules established by the head of the judiciary.

### **1. Jurisdiction of the Judiciary Affecting Human Rights**

Generally speaking, the judicial power has an irrefutable effect on human rights in the governmental system of the Islamic Republic of Iran through preparing bills for the parliament and implementing regulations and laws on enjoyment of civil rights by individuals. The judiciary impacts on the exercise of human rights through the creation of judicial procedures by the Supreme Court, and the hearing of complaints and grievances by the courts of justice.

The Constitution in article 173 stipulates that to hear the complaints, grievances, and objections of people against government officials, organs and statutes and to administer justice in their case, a tribunal named the Administrative Justice Tribunal<sup>②</sup>, shall be formed under the supervision of the head of the judiciary. Article 21 of Administrative Justice Tribunal Act stipulates that all government units, whether ministry, organization, State-owned company or institution, municipality and affiliated entities or revolutionary organizations, shall implement the decisions and rulings of the Tribunal relating to their units, and in case of non-compliance, the delinquent shall be dismissed from government service.

### **2. Human Rights: Incorporation into Iranian Legal System**

It is clear that when a state has ratified an international convention it becomes a party to it. Without domestic legislature to incorporating into national legal system, national courts can not directly enforce observance of the international instruments (*ICCPR* §2.2). Accordingly,

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<sup>①</sup> For instance none of the articles of chapter 3 "Rights of nation" included "*Koranic Verse*"s whereas it is seen *verses* in other articles at least fifteen times.

<sup>②</sup> It should be counted among *Quasi judicial*.

Article 77 of the Constitution stipulates all international treaties, protocols, contracts and agreements shall be approved by the "Majlis"<sup>①</sup> have the force of law in the country. Article 9 of the Civil Code, takes into account treaties concluded between the Iranian Government and other Governments in accordance with the Constitution in level of enforceable laws (*Iran Civil Code, 1928: §9*). The term 'in accordance with the Constitution' generally means that international treaties including human rights instruments have to be ratified by the Islamic Consultative Assembly, approved by the Council of Guardians and signed by the President. Therefore, human rights instruments that have been approved through officials on the provided procedures become binding. Today, there is a tendency to implement these instruments although it has no binding force on the courts and simply is a matter of academician advisory debates on the matter.<sup>②</sup>

## **VI. Constitutional Principles Contained in International Human Rights Instruments**

In this section, some of the issues covered in the international human rights instruments will be explained and the corresponding legal provisions in the legislation of the Islamic Republic of Iran will be discussed.

### **1. Freedom**

According to Chapter three of the constitution all kinds of freedoms including freedom of thought, conscience, religion, expression and assembly are virtually recognized by Iranian constitution to be in accordance with international standards. These rights are guaranteed by other articles of the constitution For instance paragraph 7 of article 3 of the Constitution holds the Government responsible for ensuring political and social freedom within the

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<sup>①</sup> The Islamic Consultative Assembly.

<sup>②</sup> Advisory opinion No. 7/1669 dated 19 October 1992, issued by legal department of the judiciary, which comprises a number of highly qualified judges arguing that direct reference to provisions of international instruments may be made in domestic judicial proceedings.

framework of the law. In addition Article 9 of the Constitution stipulates that in the Islamic Republic of Iran, freedom, independence, unity and territorial integrity are inseparable. The latter part of this article stipulates that no authority shall have the right to deprive the people, under the pretext of safeguarding the independence and territorial integrity of the country, of their legitimate freedoms. Furthermore article 48 of the Islamic Punishment Act states that if a minister or a government official in violation of law deprives people of freedoms accorded to them by the Constitution, he shall be suspended for a period ranging from three to five years.

## **2. Equality**

Equality of opportunity in matters of public employment may be considered as a significant right of citizens. Article 3(14) of the Constitution holds the Government responsible for 'providing all embracing rights for men and women and equitable to create legal security for all and the equality of all the people before the law'. Moreover, Article 19 stipulates that the people of Iran of whatever tribe and clan shall enjoy equal rights and the color of skin, race, language and the like shall not be considered as a privilege. Article 20 states that all persons, men and women, shall be entitled to equal protection of the law and shall enjoy all human, political economic, social and cultural rights with due observance of the Islamic precepts. However, the judicial structure is manly and patriarchal. So equal opportunity for women to access judicial profession<sup>①</sup> like men is not allowed because of Islamic criteria. The equal opportunity of employment to public offices should be expressed in the Constitution as India's (*Indian Constitution*, §16.2). Whereas the Article 28 of the Constitution remained the matter of right to equal opportunity pending to Islamic criteria which causes grate vague on the case. This method of judicial selection is clearly a kind of applying sex discrimination against women not preventing improper motives which is emphasized by General Assembly resolutions 40/32 and 40/146.<sup>②</sup>In fact, the observance of the Islamic rules which would be

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<sup>①</sup> Obviously is in contrary to Art 15.2 of CEDAW which is not ratified by Iran.

<sup>②</sup> Basic Principles on the Independence of the Judiciary ;General Assembly

presented only by official jurists' interpretation creates great ambiguity in the fundamental rights of equality in the Islamic thought of Iranian constitution.

### **3. Remedies Available to Victims of Violations of Human Rights**

In general and from the legal point of view, compensation for losses resulting from an unlawful act is a legal responsibility. In modern, law every one whose rights are violated shall have an effectual remedy before a national authority notwithstanding that the infringement has been committed by personnel acting in an official capacity (*European Convention for the Protection of Human Rights and Fundamental Freedoms*, 1950: §13). Article 1 of Civil Liability law stipulates: "Any person who without legal authorization willfully or as a result of negligence causes harm to someone's life, health, property, freedom, good name, commercial reputation, or any other right he is entitled to according to the law, which leads to material or non-material losses, is accountable for redressing the damage resulting from that act". Article 11 of the same law stipulates: "Employees of government, municipalities and their affiliated institutions who as a consequence of performing their duties or willfully as a result of negligence cause losses to other persons, are personally responsible for the losses incurred. But if the losses incurred are not the result of their action and relate to defects of equipment and appliances used by the said organization, the responsible organization shall be held accountable for redressing the resulting damage". Article 171 of the Constitution states that if a judge fails to consider rightly the merits of a case or makes an error in his judgments or ruling in a particular case and thus causes someone to sustain material or non-material losses, he shall be responsible for such failure according to Islamic practice; otherwise, the Government shall pay for the losses incurred and in any case the accused shall be rehabilitated. This article may be considered in accordance to clause 3(a) of Article 2 of ICCPR which has a special stress on the violations that have been committed by persons acting in an official capacity. In line with this article, Article 58

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resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985". "See also" CEDAW Art 11(1) b,c.

of the Islamic Punishment Act states that in such cases the judge found to be responsible shall be held liable for material losses in accordance with Islamic practice; otherwise the Government shall pay for the losses incurred. For non-material losses, if any harm is caused to the good name of a person as a result of an error by a judge, action shall be taken to restore and rehabilitate the accused.

#### **4. Right to Free Legal Aid**

Without providing this legal right of accused person the state cannot secure the promotion of justice. It is believed that free legal service is an inalienable element of reasonable, fair and just procedure. ①Article 35 of the Constitution provides that in all courts, the parties to a case shall be entitled to appoint a lawyer and if they cannot afford one, they shall be provided with facilities to acquire legal assistance. Article 314 of the Code of Civil Procedure states that in all criminal cases the accused can have up to three lawyers of his own choosing. According to the Law concerning Criminal Courts and Decision of the Supreme Court on Uniformity of Procedure No. 1363.6.15-8, the presence of a lawyer is mandatory for accused persons charged with offences punishable by a death sentence or life imprisonment. If a judgment is issued without the presence of a lawyer, it shall be annulled by the Supreme Court.

Moreover, according to the Single Article Act on Choosing of Counsel by Litigants, the courts are obliged to accept lawyers, and refusal to accept them invalidates the decision of the court and makes the judge liable for disciplinary action.

#### **5. Non-retroactivity of Laws**

The principle of "Non-retroactivity" of laws as the other side of the coin of "Ex post facto laws" is a certain basic right of accused persons accepted by modern laws. In this regard, American Convention on

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① See article 13 of Arab Charter on Human Rights, drafted by League of Arab States and entered into force March 15, 2005. It declares: "Everyone has the right to a fair trial that affords adequate guarantees before a competent, independent and impartial court that has been constituted by law to hear any criminal charge against him or to decide on his rights or his obligations. Each State party shall guarantee to those without the requisite financial resources legal aid to enable them to defend their rights".

Human Rights reads freedom from Ex post facto laws.<sup>①</sup> According to article 169 of the Constitution, no act or omission of an act may be regarded as a crime retroactively by virtue of a law enacted thereafter. This is an integral part of a right to fair trial of person before the court (*European Convention for the Protection of Human Rights and Fundamental Freedoms*, 1950: §6). Article 11 of the Islamic Punishment Act also states that "all governmental regulations and punishment shall be based on the law enacted before the commission of an offence. No one shall be punished for any act or omission which is made a punishable offence by a law enacted after commission of that act". These articles are in harmony with international standards such as article 15(1) ICCPR.

### **6. Sufficient Proof**

One of the basic rules of practiced judiciary is that no one shall be condemned unheard "Audi alteram partem" nor without reason or ground of a judicial decision "Ratio decidendi". Therefore, Article 166 of the Constitution states that the judgments of courts shall be based on sufficient proof as to the merits of the case and also on the strength of laws and principles in due to guarantee this right by constitution it is not neglected since Article 171 holds the defaulting judge or government as guarantor to remedy the losses. Article 5 of the Civil Procedure Code states that the courts shall judge each case in accordance with the law and shall not base their judgments on general rules. It seems that these regulations are in harmony with international norms (*Basic principles on the independence of judiciary*, Article 2). Moreover, if rulings by the courts are not based on sufficient proof and laws or established principles, the Supreme Court (*Iranian Constitution*, 1998: §161) would overturn them. These organs ensure the enjoyment of the legitimate rights of individuals and raise awareness on the rights of citizens.

### **7. Locus Standi**

The basic leading rule in this regard is that a person who has a particular complaint of his own is entitled to certiorari "ex debito justitiae" (Peiris, 1983: 52), Everyone shall have the right to be tried by

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<sup>①</sup> Article 9. It came into force in 1978. See also article 7(1) of European convention for the protection of human rights and fundamental freedoms 1950.

ordinary courts or tribunals using established legal procedures (*Basic principles on the independence of judiciary*, Article 5). Therefore it is an established right in the Iranian system to plead for justice, Article 34 of the Constitution recognizes this right for all members of the nation accessing to competent courts to seek justice. According to the constitution no one can be stopped from referring to the court to which he has a right to refer.

### **8. Open Hearings**

Article 165 of the Constitution states that trials shall be held in open sessions, except when the court decides that this would be contrary to public decency or order. Article 168 states that investigation of political and press offences shall be held in open session of courts of justice in the presence of a jury. The need of defining concept of political crimes attracted attention of scholars and independent lawyers of the country but still the political crime is not recognized by the state and practical usage of the relevant Article remained among wishes of political activist. The closing part of article 165 explains that in private litigations the parties may request that the trial not be held in open court.

### **9. Presumption of Innocence**

One of the basic foundations in the process of just and fair trial is the principle of innocence of accused person. Therefore, a person who is charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law (*ICCPR*, § 14.2). This principle can in corollary, cause two consequences: the elimination of torture making accused person to confess, and the principle of sufficient proof which is to acquire by the given court. Therefore Article 37 of the Constitution states that 'innocence is to be assumed and no one is to be held guilty of a charge unless his guilt is proved by a competent court'. Article 356 of the Code of Civil Procedure states that presumption of innocence is a basic element and the burden of proof is on the claimant. Otherwise, according to this principle, the defendant shall be exonerated.

### **10. Prohibition of Arbitrary Arrest**

Freedom of humanity and his integrity is somewhat accepted

principle in Iranian constitutional law which is in accordance with international law. Arbitrary detention is prohibited and the victim of unlawful arrest shall have an enforceable right to compensation (ICCPR, § 9). Article 32 of the Constitution stipulates that no one shall be arrested unless ordered by law. If a person is arrested, the accused shall be notified in writing of the reasons for the accusation and within 24 hours the preliminary case shall be referred to a competent court which shall pursue the case at the earliest.

### **11. Prohibition of Torture**

Article 38 of the Constitution states that any torture whatsoever to make people confess or to obtain information shall be forbidden. To oblige a person to witness, confess or swear an oath shall not be allowed nor shall such witness, confession and oath be valid. The party violating this article shall be punished according to the law.

Article 58 of the Islamic Punishment Act also stipulates that an employee of the judicial power or others who use or order physical torture and corporal punishment to take out a confession shall be sentenced to jail from six months to three years and, if the accused dies as a result of torture, shall be accused of homicide; the person ordering the torture shall be punished for ordering an act of homicide. The Constitution also bans torture and insulting or degrading treatment of prisoners or detainees. Article 39 of the Constitution stipulates that "defamation or aspersions in any manner whatsoever of persons arrested, imprisoned or exiled according to law shall in no way be allowed and shall be liable to punishment". These Articles are in harmony with international human rights rules such as article 7, 14 clause 3(g) of ICCPR and rules of CAT<sup>①</sup> and Prior to all, and article 5 of UDHR.

### **12. Prohibition of Capital Punishment**

Despite of statement of international documents (ICCPR, § 6) to prevent death penalty and capital punishment against criminals by states, the Iranian legal system witnesses annually executing such

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<sup>①</sup> Some countries such as Iran and India have not ratified the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment of 1984.

severe punishments even against adolescents. The reason can be comprehended under Article 4 of the constitution which stipulates that "all laws and regulations including civil, criminal...or otherwise shall be based on Islamic principles. This article shall apply generally on all the Articles of the Constitution and other laws and regulations". As this Article shows, it is the Islamic rulings as determined by Islamic jurists to punish criminal children who are in age of maturity like ordinary people. Therefore, law prefers to obey Islamic rules instead of international law norms, whereas as a State party to the International Convention on Civil and Political Rights ICCPR and the Convention on the Rights of the Child CRC, Iran has undertaken not to execute anyone for an offence committed when they were under the age of 18, but continues to carry out such executions (Amnesty International, 2008: October 17).

### **13. Non Judicial Body for the Protection of Citizens' Rights**

In addition to mechanisms and arrangements within the judiciary, there is also special tribunal that monitors the exercise of citizens' rights. Article 90 of the Constitution affirms that anyone having a complaint with respect to the legislative, executive or judicial power can submit his complaint in writing to the Article 90 Commission of the "Majlis". If, however, such complaints relate to the executive or judicial power, the "Majlis" shall consider the case and call upon the executive or judicial power to give adequate clarification and shall announce the results within a reasonable period of time..<sup>1</sup> But truly there is no binding mechanism to implement the securing embodied provisions of the article against alleged violations of powerful judicial system. Practically it has been hard to present here any case in which the "Majlis" could reform or pose serious challenges to the Judiciary during last three decades.

## **VII. Conclusion**

Judiciary in Iran bore a lot of changes and challenges within the past three decades of Islamic revolution. The ruling cleric officials have tried to demonstrate a logic and stable system of judiciary but still

achievements are unsatisfactory. The main challenge can be illustrated between international norms of human rights on one side and the Islamic laws which is the base for legitimacy of regime in the modern world of secular systems on the other side. In spite of membership to some vital human rights conventions such as ICCPR, CRC and UDHR which generally were ratified by pre-revolution "Pahlavi" Dynasty, Iran avoids to eliminate discrimination against women and rough punishment. Meanwhile the government claims that the system is based on Islamic criteria and can be introduced to the world as a successful sample of Islamic judicial system. By examining the constitution which was amended by Islamic jurists the matter of challenge between international standards of human rights and principles of the constitution clearly appears. Since those articles recognize human rights standards are chiefly ill-defined on the base of the Islamic criteria.

## References

- Amnesty International. Retrieved April 5, 2009, from <http://www.amnesty.org/en/news-and-updates/news/iran-to-end-child-executions-20081017>.
- Basic principles on the independence of judiciary.*
- Dwivedi, K. C. (1990). *Right to equality and the supreme court.*
- European convention for the protection of human rights and fundamental freedoms* (1950).
- Harris, D.J. (2004). *Cases and materials on international law.*
- ICCPR (1966).
- Indian Constitution.*
- Iranian civil code* (1928).
- Iranian Constitution* (1998).
- Iyer, V. (2001). *A judge's extra judicial miscellany.*
- Lagos conference on the rule of law, first committee* (1961).
- Morcha, B.M.(1984). *Union of India.*
- Peiris, G. (1988: Spring). The doctrine of Locus Standi in common wealth administrative public Law. *The British Journal of Administrative Law.*
- Procedural code of public and revolutionary courts* (1994).
- Report of committee 4th international congress of jurists* (1959). New Delhi.
- Smith, S. (1959). *Judicial review of administration action.*