

HABIBIA ISLAMICUS

(The International Journal of Arabic & Islamic Research (Quarterly) Trilingual (Arabic, English, Urdu) ISSN:2664-4916 (P) 2664-4924 (E) Home Page: <http://habibiaislamicus.com>

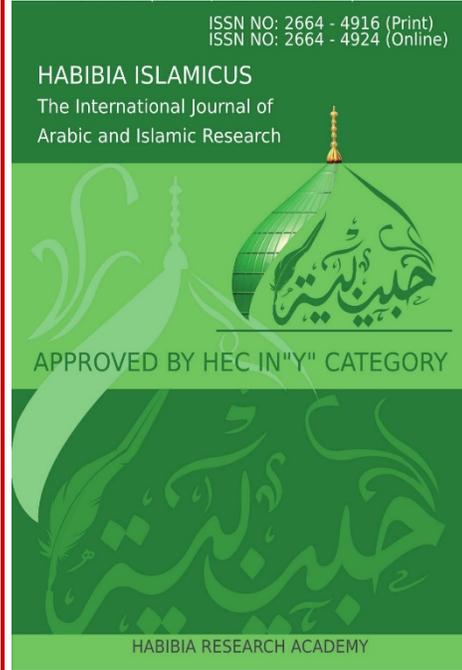
Approved by HEC in Y Category

Indexing: IRI (AIU), Australian Islamic Library, ARI, ISI, SIS, Euro pub.

PUBLISHER HABIBIA RESEARCH ACADEMY
Project of JAMIA HABIBIA INTERNATIONAL,
Reg. No: KAR No. 2287 Societies Registration
Act XXI of 1860 Govt. of Sindh, Pakistan.

Website: www.habibia.edu.pk,

This work is licensed under a [Creative Commons Attribution 4.0 International License](https://creativecommons.org/licenses/by/4.0/).



TOPIC:

DISTINCTIVE A DETAILED STUDY BASED ON THE SHARIAH LAW WITH FEATURES OF ADVERSARIAL SYSTEM AND INQUISITORIAL SYSTEM

AUTHORS:

1. *Zulfiqar Ali, civil servant Email ID: Alizulfiqarrind@gmail.com Orcid ID: <https://orcid.org/0000-0003-0702-3005>*

How to Cite: *Ali, Zulfiqar. 2021. "ENGLISH I A DETAILED STUDY BASED ON THE SHARIAH LAW WITH DISTINCTIVE FEATURES OF ADVERSARIAL SYSTEM AND INQUISITORIAL SYSTEM". Habibia Islamicus (The International Journal of Arabic and Islamic Research) 5 (4):1-8. <https://doi.org/10.47720/hi.2021.0504e01>.*

URL: <https://habibiaislamicus.com/index.php/hirj/workflow/index/258>

Vol. 1, No.4 || October –December2021 || P. 01-08

Published online: 2021-12-30

QR. Code



**A DETAILED STUDY BASED ON THE SHARIAH LAW WITH DISTINCTIVE
FEATURES OF ADVERSARIAL SYSTEM AND INQUISITORIAL SYSTEM**

Zulfiqar Ali,

ABSTRACT:

With the advance discourse over the adjudication that has taken place in contradiction of the key dominant of the western model of the adversarial trial in term of the common law and the inquisitorial trial in regards to the Civil Law. The primary characteristic of the inquisitorial system is regarded with the judge who is having the overarching part in the adjudicating process whereas the distinctive characteristic of the adversarial system is that is termed with the partisan-centric. In contrast to the models of the Islam and the adjudication mode that are fitted varies over the opinions. Various scholars comparatively integrate such with the adversarial models while some of the scholars perceive it similar to the inquisitorial models that are having the similar characteristics. In this article the qualitative approach is adopted by conducting critical research on some significant work of famous scholars moreover this article highlights the Shariah law with distinctive features of adversarial system and inquisitorial system.

Keywords: *Shariah Law, Fiqh, Adversarial System, Civil Law, Inquisitorial System, Common Law, Adjudication*

INTRODUCTION: Consequently, in oppose to the claim of various quarters, in Islam the law is having appropriate and satisfactory rules, principles; rules and the processes by which the lawsuit can be formed, fair rights been given, validities are ascertained, fair hearing accorded to contesting sides and the judgment against the defendant and the accused marked and implemented. The ruling that is based on the governing of the litigation (Shariah adjudication) is regarded as the “fiqh al-muhakmat”. The base of such is laid and positioned by the Holy Prophet (P.B.U.H) & the corpus of legalization was created via the ijthadin the Islamic fiqh classical period of the evolution. The proceedings of the court are based on the complaint nature (da`wa), criminal or civil, differently as affirmed by the IbnQayyim (1985), that the intensity and the nature of the terms depends on the kind of the claim that is tangled varies in the jurisprudence of the Islam. If it’s the (da`watumah), the cause of action and complain that are based on the accusation it needs additional severe regulations of the procedure, terms and the proof of standard. However in case of the (d`awaghayrtuhmah), in which the case is of non-accusation where the trial is in less complicated mode and low proof of standard are required (IbnQayyim, 1985). As per the Al-Mawardi (n.d) draws the attention towards the Shariah adjudication complexity of both the criminal and civil lines where he mentioned that if there are the appointment of the two judges in a city in which on of the judge receives the commission of the crime complaints and the second judge receives the complaint regarding the civil wrongs, such

as the claims of the child custody, it is allowed that the judge should be confined with the judgment that is under his jurisdiction. Moreover, in terms to the case complexity the jurist added that the cases that are filed in the court should be among the categories that are mentioned beneath, the claims that are related with the properties (“da’awa al-huquq al-maliyyah”), claims of accusatory (“da’awa al-ittiham”), the claims regarding the non-monetary (“da’awa al-huquqghayr al-maliyyah”) (Madhkur, 1966, p.336).

LITERATURE

In modern context the assessment among the Shariah mode, conventional and criminal adjudication trials more specifically in the case of criminal is under the argument on the partisan based trial mode or the mode that is judge centered in the criminal prosecution with the perspective of the Shariah. In order to discourse this method of customary comparison of the issues of Shariah with the law is the central approach between the comparativists. Such could be attained by seeking deep into the modern laws and then looking into the Shariah principles that is enshrined in the Holy Quran, justic laws and most significantly in the Sunnah, in terms to compare the differences and similarities among these. Such methodology is regarded as the functional methodology in the comparative law, in which the attention is given to the commonality instead of the doctrine framework and the divergent rules (Hoecke, 2015). The basic purpose of the adjudication via the judiciary and their institutions that are allied of (tahkim) arbitration, (municipal tribunal) hisbah & (ombudsmen) mazalim for instituting the justice within the society; the justice should be implemented with the equality and there aren’t any components of the prejudice in the stages of procedure. Due to this in the Quran (adl) juxtapose justice with (ihsan) fairness it orders the Muslims;

“Indeed, Allah orders justice and good conduct and giving to relatives and forbids immorality and bad conduct and oppression. He admonishes you that perhaps you will be reminded” (Al-Nahl: 90).

Apprehending such Shariah spirit Ibn Qayyim (1985) mentioned; *“Allah the Exalted has made clear in his law (sharia) that the objective is the establishment of justice between His servants and fairness among the people, so whichever path leads to justice and fairness is part of the religion and can never oppose it”* (p.13). Also in the hearing duration the judge cannot allow his personal perceptions spite and prejudice in terms to the litigants to sway them from the hearing conduction in a manner that is just and fair;

“O you who have believed, be persistently standing firm for Allah, witnesses in justice, and do not let the hatred of a people prevent you from being just. Be just; that is nearer to

righteousness. And fear Allah; indeed, Allah is Acquainted with what you do” (Al-Ma`idah: 8).

Furthermore, the adjudication isn't just a secular task but is also regarded as the (amanah) the divine trust that has to be completed by the judges

“Indeed, Allah commands you to render trusts to whom they are due and when you judge between people to judge with justice. Excellent is that which Allah instructs you. Indeed, Allah is ever Hearing and Seeing” (Al-Nisa: 58).

While the judicious administration of justice is the main element through which Prophet (P.B.U.H) and all the messengers are ordered to set and perform the shining precedents for the purpose to emulate the rulers of Muslim in future

“Indeed We sent Our Messengers with Clear Signs, and sent down with them the Book and the Balance that people may uphold justice....” (Al-Hadid: 25).

The criminal trial mode is basically determined based on the crime nature that is been conducted. Discussing about the crimes of hudud, on reading the charges that are against the accused he/she might either consider making a complete & free confession to the charges or he/she is having the right to deny the charges. Firstly in the situation that the confession is made the court will convey the verdict of guiltiness. Whereas in case of the silence or denial no interference that are adverse could be made to the accused instead the judge will demand for a prosecution officer or the Wakil depending on the case to present and prove the accused case (Haleemet., al, 2018). The kind of the evidence might be different based on the offence type and nature by which the accused is indicted. It might be in the kind of evidence that is orally from the eyewitness or by the accused confession or the evidence in the form of the material that is related to him/her such as the blood specimen etc. (`Awdah, 2008, Vol.2, p.34). In the case the judge meticulously evaluates evidence if it shows the satisfactory burden of proof then the case should be against the accused with the (yaqin) certainty that is a degree next and near to ghalbat al-zann), then will write the judgments. Few fundamental principles in terms of governing the entire procedure are such as;

None will be indicted for any crime until he/she(meaning therein the accused) having a prior notice based on the consequences and requirements. This principle indicates the Islamic representation that;

“No person can be accused of a crime or suffer punishment except as specified by law (LA JARIMATA WA LA `UQUBATA BILA NASS), (al-Nisa : 165;BaniIsra`il : 15,al-An`am : 19 al-Qasas : 59, & al-Fatir : 25; Awdah, Vol.1, p.25).

All the people are supposed to be innocent till proven otherwise (al-aslubara't al-dhimmah); all the people are having (karamah) dignity; fair trial should be given to the accused

With the system of the modern trial it is meant with the terms of the court room likewise the American-Euro system of the civil law and the common law. While the common law shadows the system of adversarial trial in which the contending people are having the right to argue and present their case to the court via the counsels. The judge should oversee the terms to combine and determine the facts and the law in regards to arrive at their ruling, which emerged in the legal Anglo-American system in the nineties. That shows the twin judicial objectives of the “right against self-incrimination” & the “the right to counsel” that was considered significant to meet the justice in the situation of the legal tradition (Tang, n.d.).

Civil Law adopts inquisitorial mode and contends that it's magistrates domain to mount an objective inquiry to discover the reality and thereby adjudicate in accordance with the fact and establish justice (Pakes, 2007). Common law, then again, argues that if the decider is on the center degree of fact locating, his probity to adjudicate objectively, dispassionately and justly may be compromised due to being acquainted with the information of the case during the pretrial stage. Hence, the thrust of opposed version is getting on the reality through partisan contest between opposing events (Rani, 2006). The supporters of each version hail the power of their respective structures via pointing the flaws of the alternative system. For instance, Inquisitorial proponents argue that judge's investigative role to dig for the fact, in a criminal case -prior to trial, not best helps the court docket to decide prima facie case for prosecution, but also has the benefit of fact locating while the reminiscences of witnesses are still clean. Moreover, it presents justice to parties who can't lease prolific attorneys (Ibid). Adversarial, on the opposite make the case for his or her version by maintaining that justice can most effective be disbursed when the litigants have the liberty to supply their statistics earlier than the courts in order that the choose can operate in a real vacuum to uphold the fact. Inquisitorial dismisses this via contending that, how can the information provided by the adversaries unveil the truth via such a contraption the thrust of which is the attorneys are the grasp of controlling and manipulating the information and prosecution is loose what witnesses to call (Ibid). The tussle over superiority of one over the other system is so intense that is described as “unfettered discourse” most of the jurists of procedural law within the Western criminal lifestyle (Pakes, 2007). Modern discourse, but subdues the warmth of the debate by conserving that the present state of the arts in trial methods in most jurisdictions do not represent a easy extraordinary clinging onto one of

the two but hybrid system combining a few capabilities from one into some other. For instance, the Malaysian method although a replicate of adverse machine includes functions from inquisitorial, which include judge's strength to invite questions from the accused, provide an explanation for the choice to the unrepresented accused and so forth (Rani, 2006).

CONCLUSION

In the light of the literature discussed above to sum up, the mode of adjudication in the Shariah is having few similarities with the elements of the Anglo-American and European models in regards to the technicalities, likewise the judges intervention, witness, investigating officers and the lawyers in the complex process, which diverges with the level of doctrinal that is based over the broad and unique concept of the judicial function, punishment of the crime, justice, proof of standard, quantum and the part that is played by the counsel legally. It is neither partisan-centric nor system of adjudication domineering but an incorporated version wherein the critical position of judge is regulated by means of the parameters of compartmentalization of burden of proof and religiously-controlled techniques of proof. It does no longer suffocate the voice of the accused while affording him felony counsel if he cannot talk for himself. The argument presented in this article is legitimate inside the local context due to the fact Shariah courts despite adopting some crucial capabilities of adversarial system keeps some non-secular capabilities of Shariah adjudications. For example, Kelantan Shari'ah Criminal Procedure Enactment ,1985, whilst recognizing positive functions of modern-day prison structures, inclusive of criminal engravings by means of attorneys, involvement of prosecution in the method of investigation, continues certain spiritual features like allowing non-public citizens to record instances to spiritual officials, administering oath to the accused if the prosecution cannot prove the case towards the accused, and related to kingdom Mufti within the appellate court docket to listen the appeal (Kelantan Shari'ah Criminal Procedure Enactment ,1985, Sections eight and 53; Nawawi, 1990). The epilogue consequently, is that the understanding of the doctrinal and structural features of shariah mode of adjudication is good sized for comparative studies in terms of sound methodological evaluation of reforming and updating the indoctrinated inadequacies by pulgging in hybrid structures to deal with the complexities of adjudication in any such manner so as not to lose its originality by utilizing the fiqh as a means of abridgment between the Adversarial –Inquisitorial divide within parameters of the substantive procedur

REFERENCES :

- Abu Daud.(n.d). Sunan Abu Daud, Kitab al-aqdiyah, Available At https://www.searchtruth.com/book_display.php?book=24&translator=3 (Date Accessed, 28 Nov 2021)
- Al Al-Tajkani,M. H.(n.d). al-Nazariyyat al-`ammah li al-qadawa al-ithbat fi al-shari`ah al-Islamiyyah.Baghdad: Dar al-Shu`unal-Thaqafah al-`Ammah.
- Al- Shirbini, M. K.(2009). Mughni al-muhtaj.Beirut: Dar al-Kutuab al-`Ilmiyyah.Vol.2.
- Al-Bukhari. M. (n.d).SahihBukhari, Kitab of ahkam, Vol,3, Available At <http://www.iupui.edu/~msaiupui/089.sbt.html> (Date Accessed, 28 Nov 2021)
- Al-Dar Qatni, A.(2001).Sunan al-darqutni.ed.AdilAhmad.Abd al-Mawjud. Dar al-Ma`rifah.vol.4.
- al-Mawardi, A.(n.d).al-Ahkam al-Sultaniyyah.Cairo: al-Maktabah al-Tawfiqiyyah
- Al-Saleh, O. A.M.(2018). “The Right of the individual to personal security in Islam”, The Islamic criminal justicesystem,ed.Haleem, et al. London ; New York : Oceana Publications.
- Al-Tabrizi, M.A.(2006).Miskat al-masabih.trasl. FazlulKarim. Islamic Book Services.vol.3.
- Al-Tirmidhi,A.I.(1966). Sunan al-Tirmidhi. Ed. Basshar `AwwadMa`ruf. Dar al-Gharb al-Islami.Vol.4.
- Awdah, A.Q.(2008). Al-Tashri` al-jina`i al-Islami.Dar al-Katib al-`Arabi.Vol.2.
- Bassiouni, C.M.(1982). Islamic criminal justice system.Oceana Publishing.
- Gans, G.(2009). “The Faces of islamic criminal justice,” Nottingham Law Journal, Vol.18, No.1
- Ghanem,I.(1982).Islamic medical jurisprudence .London:ArtharProbsthain.
- Haleem, M.A. et al.(2018). Criminal justice in Islam: Judicial procedure in the Shari`a. London: I.B. Tauris& Co. Ltd.
- Hodgson, J.(2006). Conceptions of the trial in inquisitorial and adversarial procedure, Available At <https://www.ssrn.com/abstract=1503969> (Date Accessed, 28 Nov 2021)
- IbnMajah.(n.d).SunanIbnMajah, Vol.3, Available At <https://sunnah.com/urn/1268640> (Date Accessed, 28 Nov 2021)
- IbnQayyim,J.(1985). al-Turuq al-hukmiyah fi al-siyasah al-shar`iyyah.Egypt : Matba`at al-Madani.
- Joe, B.(2017). Two in Hell, one in Heaven: Dispute resolution in Islamic Law, Available At <https://www.joebradford.net/two-in-hell-onein-heaven-dispute-resolution-in-islamic-law> (Date Accessed, 28 Nov 2021)
- Madhkur,M.S.(1966). ,Madkhalila al-fiqh al-islami.Kuwait : Dar al-Kitab al-Hadith.
- Maududi. A.A.(n.d). Towards understanding the Qur`an, Available At<http://www.islamicstudies.info/tafheem.php?sura=4&verse=105&to=112> (Date Accessed, 28 Nov 2021)

- Mir,M.(1994). Umar in judge and judgment.Available At <http://www.al-mawrid.org/index.php/articles/view/umar-on-judge-andjudgement> (Date Accessed, 28 Nov 2021)
- Mutawalli, M.`A.(2003). Damanat al-`adalah fi al-qada al-Islami.Beirut: Dar al-Kutub al-`Ilmiyyah.
- Nawawi,R.(1990). The Machinery of islamic justice in the Kingdom of Saudi Arabia and Malaysia.Petaling Jaya: IIUM.
- Pakes,F.(2007). “The Changing nature of adversarial, inquisitorial, and islamic trials,” in Applying psychology to criminaljustice, ed. David Carson et al.London: Jhon Wiley&Sons , Ltd.
- Rani,A B. K..(2006). Between the adversarial and inquisitorial trial(2006), Available at, irep.iium.edu.my (Date Accessed, 28 Nov 2021)
- Tang, A.(n.d). Comparative analysis of certain criminal procedure topics in Islamic , Asian and Common Law Systems, Available At <https://law.wm.edu/academics/intellectuallife/.../AnalysisofCertainCriminal.pdf> (Date Accessed, 28 Nov 2021)



This work is licensed under a [Creative Commons Attribution 4.0 International License](https://creativecommons.org/licenses/by/4.0/).