

## **The Rights of the Accused in Islam (Part Two)**

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Under the law of Islam, the accused enjoys many rights. These will be summarized below.

### **The Right to a Defense**

The accused has the right to defend himself/herself against any accusation. This may be accomplished by proving that the evidence cited is invalid or by presenting other evidence that contradicts it. In any case, the accused must be allowed to exercise this right so that the accusation does not turn into a conviction. An accusation means that there is the possibility of doubt, and just how much doubt there is will determine the amount and parameters of defense. By comparing the evidence presented by the defense with that of the party making the accusation, the truth will become clear—which is, after all, the objective of the investigation.

Therefore, self-defense is not only the right of the accused to use or disregard as he/she pleases, but is also the right and the duty of society as a whole. If it is in the best interests of an individual not to be convicted when he/she is in fact innocent, the interests of society are no less important. It is the society's concern that the innocent are not convicted and that the guilty do not escape punishment. It is for this reason that the Shari'ah guarantees the right to a defense, and prohibits its denial under any circumstances and for any reason.

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In a well-known hadith, the Prophet is reported to have told 'Alī, who he had just appointed as governor of Yemen: "O 'Alī! People will come to you asking for judgments. When the two parties to a dispute come to you, do not decide in favor of either party until you have heard all that both parties have to say. Only in this manner will you come to a proper decision, and only in this way will you come to know the truth." It is related that 'Umar ibn 'Abd al 'Azīz said to one of his judges: "When a disputant comes to you with an eye put out, do not be quick to rule in his favor. Who knows, maybe the other party to the dispute will come to you with both eyes put out!"

The basic rule in regard to defense is that it should be undertaken by the accused, as it is his/her right, if he/she is capable of doing so. If not, he/she may not be convicted. This is why some jurists have opined that a dumb mute cannot be punished for *ḥadd* crimes, even when all of the conditions regarding evidence have been satisfied. Because if the mute were capable of speaking, he might be able to raise the sort of doubts that negate the *ḥadd* punishment (for a lesser, *ta'zīr* punishment or amercement), and by means of sign language only, he may not be able to express all that he may want to. So, under such circumstances, if the *ḥadd* punishment is administered, justice will not have been served, because the *ḥadd* will have been administered in the presence of doubt.

### **The Accused's Seeking Legal Defense from a Lawyer**

I know of no opinions from the early jurists that permit the accused to seek the help of a lawyer. Books dealing with Islamic procedural law (*aḥkām al qaḍā'*) and the behavior of judges (*adab al qaḍī*) do not mention this issue. This apparent omission might be due to the fact that, historically, court sessions were public. As these sessions were widely attended by legal scholars and experts, whose presence represented a true and responsible legal advisory board that actively assisted the judge in dispensing justice, there was never any need for professional counsel.

Nonetheless, it was the opinion of Abū Ḥanīfah that one who appoints another to represent him/her before the court is responsible for whatever ruling is passed, even though the one represented may not be present when the ruling is made. Other jurists have given similar opinions. In an authentic hadith, it was related that the Messenger said: "I am only human, and some of you are more eloquent than others. So sometimes a disputant will come to me, and I will



consider him truthful and judge in his favor. But if ever I have (mistakenly) ruled that a Muslim's right be given to another, then know that it is as flames from the hellfire. Hold on to it or (if you know it belongs to another) abandon it."

There are many Shari'ah texts that stress the need to settle disputes by whatever means necessary. When we consider the great disparities in talent and ability (particularly the ability to argue and debate effectively) that exist between the disputants, even those brought before the Prophet, we realize that any method that will lead to a just settlement may be considered legally valid. Therefore, the accused's decision to ask for help in defending himself/herself may also be considered valid, provided that the help comes from an impartial and independent counsel. With the help of such counsel, the accused may acquire a proper understanding of the charges against him/her, of what the law says, of the weight of the evidence presented, and of what may be used (and how it may be used) to rebut that evidence. When taking all of this into consideration, we may assume safely that the accused has the right to defend himself/herself and also to seek the help of someone else.

Some people might object to this on the grounds that while such a counsel might be a more capable defender than the individual being defended, it is also true that he/she might be more capable than the other party to the dispute. As a result, a just settlement might never be reached. But, one could counter this view by saying that what is being sought is a settlement that is as just as possible, and that it is better to allow one the choice of counsel than to deprive him/her of help in articulating his/her case and refuting the other party's arguments. It is also better than leaving any doubt in the judge's mind about what kind of punishment should be given. As mentioned above, there should be no room left for doubt about the final verdict's validity.

In his *History of the Qadis of Qurtuba*, al Khashinī reports that two men brought their dispute before Aḥmad ibn Bāqī. Believing that one of the disputants seemed to know what he was talking about while the other (who appeared to be honest and truthful) did not, he advised the latter to find someone to speak on his behalf. When the man replied that he spoke only the truth regardless of the consequences, the judge replied: "It couldn't be worse than (your opponent's) murdering the truth." According to al Marīdī, however, if the judge tells the disputant to seek the help of someone else, the individual chosen to serve as counsel may only assist in establishing (not refuting) a claim. The judge may not appoint an individual to represent someone else.

So here we have two judges: one who advises a disputant to seek defense counsel and another who considers such advice improper. Obviously, then, this is a question of *ijtihad*. In such a case, it is quite possible that the best opinion and the one closer to the spirit of the Shari'ah is the one that allows a disputant to seek legal counsel. It is even more likely that the right to legal counsel is indicated in cases of penal law, whether in *hudūd* cases (where only the rights of Allah are involved) or in cases where the alleged crime involves the rights of both Allah and His subjects.

Under the procedures in contemporary courts of law, the accused is certain to encounter an opponent, usually an attorney or a public prosecutor, who is far more eloquent and capable of making legal points than himself/herself. Under such circumstances, it is obvious that the accused will need the services of someone who can present his/her case and rebut the arguments put forth by the accuser. The question that arises here, however, is whether the accused is entitled to counsel while the case is under investigation or only when it actually comes to court? If the question is subjected to *ijtihad* and it is determined that the accused is allowed to seek legal counsel, then it may be best for the accused to have legal counsel at both stages. This also would help to establish the facts of the case. In addition, if one is to prepare an effective defense, it is necessary to acquire a complete understanding of the alleged crime and the evidence so that the charges can be refuted. In addition, information proving the accused's innocence must also be gathered and then presented effectively. This would indicate that the accused should be allowed to seek legal counsel from the time that charges are filed.

### **The Accused's Right to Remain Silent and to be Heard**

The accused has the right of free expression without the fear of reprisal or the use of truth serum, drugs, or hypnotism to obtain information that he/she would otherwise not give.<sup>1</sup> The accused may choose not to respond to questions. If he/she does respond and it is later determined that the answers were false, he/she may not be charged with, or punished for, bearing false witness. If the accused acknowledges liability or confesses to a *ḥadd* crime, he/she may retract his/her statement and thereby nullify the earlier confession.

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<sup>1</sup> Samīr al Janzūrī, research in *al Majallah al 'Arabiyyah*, no. 7 (March 1978): 119.



## Statements Made under Duress

The accused may not be pressured to confess. Ibn Ḥazm writes:

Therefore it is unlawful to subject someone to tribulation, either by blows, imprisonment, or threats. There is nothing to legitimize such treatment in the Qur'an, or the established Sunnah, or *ijmā'*, and nothing may be said to be of the religion unless it comes from one of these three sources. On the contrary, Allah Most High has prohibited this and caused His Messenger to say: "Verily, your blood, your wealth, your reputations, and your skins are sacred to you." So when Allah made both the body and the reputation sacred, He prohibited the physical and verbal abuse of Muslims, except when required by law as prescribed in the Qur'an and the Sunnah.<sup>2</sup>

Among the most important conditions to be satisfied before a confession may be accepted is freedom of choice. A confession submitted of one's own volition will be considered valid, as its veracity is more probable than its prevarication. This assumption is based on the fact that it is inconceivable that a rational person would admit to something harmful unless there was a good reason to do so. If the confession or admission of guilt or liability is obtained through coercion, the probability of its being false will be considered greater than its veracity owing to the factor of duress. As it was given in the hopes of avoiding a greater (or more certain or immediate) evil, it cannot be considered as having been given freely, and therefore the majority of *fuqahā'* have ruled that any admission of guilt or liability obtained under duress is invalid and legally inadmissible.

In the Qur'an, we read: "save he who is compelled, though his heart be content with faith (16:156)." Here, Allah has said that compulsion is grounds for cancelling the sin of disbelief and the prescribed punishment for apostasy. Therefore, it may be considered grounds for cancelling other matters. A hadith says that the Prophet said: "The responsibility for mistakes, forgetfulness, and duress has been lifted from my ummah."<sup>3</sup> Abū Dāwūd related that:

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<sup>2</sup> Ibn Ḥazm, *al Muḥallā*, vol. 11, p. 141.

<sup>3</sup> There are several versions of this hadith, some of which are authentic. For details on the occurrence and authenticity of the hadith, see my edition of al Rāzī's *al Maḥṣūl*, vol. 1 (Beirut: al Risālah, 1992), 233.

Goods were stolen from the Kalā'ī tribe, who accused certain weavers [of the crime]. When they brought the matter to Nu'mān ibn Bashīr, the Prophet's Companion, he imprisoned the weavers for a few days and then let them go. The tribesmen went to Nu'mān and said: "How could you let them go without beating them or otherwise subjecting them to tribulation?" Nu'mān replied: "What did you want? Did you want me to harm them? If your goods appeared [after they had been forced to confess their whereabouts], that would have been that [and you would have your goods back]. Otherwise, I would have had to take [as much skin] off of your backs [in lashing them to get a confession] as much as I had taken from theirs." The tribesmen said: "So that is your ruling?" Nu'mān said: "That is the ruling of Allah and His Messenger."<sup>4</sup>

'Umar said: "A man is not responsible for himself if he is starved, fettered, or beaten."<sup>5</sup> Shurayḥ said: "Confinement is duress, a threat is duress, prison is duress, and beating is duress."<sup>6</sup> Sha'bī said: "[Subjecting people to] tribulation is [blameworthy] innovation."

It should be clear from the foregoing that the scholars never considered the authorities' use of force against the accused to be justified by the Shari'ah. On the contrary, such behavior was clearly prohibited by Allah, who had His Messenger say: "Verily, every part of a Muslim is sacred to a Muslim; his blood, his wealth, and his reputation."

It is related on the authority of 'Urāk ibn Mālik that he said:

Two men from the tribe of Ghaffār approached an oasis fed by the waters of Madīnah at which a number of the Ghaṭfān tribe were grazing their camels. When the Ghaṭfān tribesmen awoke the next morning, they discovered that two of their camels were missing and accused the two Ghaffārīs. When they took the two to the Prophet and told him what had happened, he detained one of them and said to the other: "Go and look." The man in custody was treated as a prisoner until his companion returned with the two camels. The Prophet said to

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<sup>4</sup> Abū Dāwūd, *Sunan*, hadith no. 4382. The same was related by al Nasā'ī, hadith no. 4878.

<sup>5</sup> 'Abd al Razzāq, *al Muṣannaf*, vol. 10, p. 193.

<sup>6</sup> *Ibid.*



one of them, or to the one he had kept with him: "Ask Allah to forgive me!" So the Ghaffārī tribesman said: "May Allah forgive you, O Messenger of Allah!" And then the Prophet said: "And you! And may He grant you martyrdom in His way!" Later, at the Battle of Uhud, the man died a martyr.<sup>7</sup>

It is related on the authority of 'Abd Allāh ibn Abī 'Āmir that he said:

I set out with some riders and, when we arrived at Dhū al Marwah, one of my garment bags was stolen. There was one man among us whom we thought suspicious. So my companions said to him: "Hey, you, give him back his bag." But the man answered: "I didn't take it." When I returned, I went to 'Umar ibn al Khaṭṭāb and told him what had happened. He asked me how many we had been, so I told him [who had been there]. I also said to him: "O Amīr al Mu'minīn, I wanted to bring the man back in chains." 'Umar replied: "You would bring him here in chains, and yet there was no witness? I will not recompense you for your loss, nor will I make inquiries about it." 'Umar became very upset. He never recompensed me nor did he make any inquiries.<sup>8</sup>

In this instance, the Prophet sought forgiveness from one he had detained on the basis of no more than an accusation. The rights of one whose property had been stolen were considered invalid by 'Umar when the man told him he wanted the accused arrested even though there was no evidence to indicate his guilt. In consideration of the invalidity of something said under pressure, the majority of scholars have opined that a confession obtained under duress is similarly invalid and that nothing may legally result from it.<sup>9</sup>

Even so, certain scholars did consider a confession obtained under duress as valid if the accused was known for corruption and

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<sup>7</sup> Ibid., p. 216.

<sup>8</sup> Ibid.

<sup>9</sup> See *al Mughnī*, vol. 15, p. 12; *Kashshāf al Qinā'*, vol. 6, p. 454; *al Inṣāf*, vol. 12, p. 133; *Mughnī al Muhtāj*, vol. 2, p. 240; *al Muhadhhab*, vol. 2, p. 362; *Badā'i' al Ṣanā'i'*, vol. 7, p. 189; *al Hidāyah*, vol. 3, p. 275; *al Mabsūt*, vol. 9, pp. 184-85; *al Dasūqī 'alā al Sharḥ al Kabīr*, vol. 3, p. 348; *al Kharashī*, vol. 6, p. 87; *al Muḥallā*, vol. 2, p. 288; and *al Baḥr al Zakhkhār*, vol. 5, p. 3.

evil doing, such as theft and the like. They cited the hadith of Ibn 'Umar, in which he reported that the Prophet fought the inhabitants of Khaybar until they were forced to take refuge in their fortress. Seeing that their land, crops, and orchards had fallen into Muslim hands, they signed a treaty that their lives would be spared and that they could take with them all that they could carry. All of their gold and silver, however, would be left to the Prophet. All of this was dependent on the condition that they hide nothing. If they ignored this understanding, they would have no treaty and no protection. Nonetheless, they hid some musk with the money and jewelry belonging to Ḥuyayy ibn Akḥṭab which he had brought with him when he was banished with the Naḍīr tribe. The Prophet asked Ḥuyayy's uncle: "What happened to the musk that your nephew brought with him from the Naḍīr?" He replied: "The wars and other expenses took it." The Prophet replied: "But he arrived very recently, and there was more money than that..." So the Prophet turned the man over to Zubayr, who subjected him to some punishment.<sup>10</sup> Ḥuyayy, in the meantime, was spotted hiding in the midst of some ruins. So they went there and searched, and found the musk hidden in the ruins.<sup>11</sup>

This hadith, however, concerns Jews in a state of war who had broken one agreement (by fighting) only to seek refuge in another one, which they also broke. How does this compare with inflicting pain on an innocent Muslim whose guilt has not been established?

Some later Ḥanafī scholars upheld the validity of a confession obtained under duress. Sarkhasī wrote, in his *al Mabsūṭ*: "Some of the later scholars from among our shaykhs gave *fatwās* upholding the validity of confessions obtained under duress in cases of theft, for the reason that thieves, in our times, do not willingly admit their crimes."

It is related that 'Iṣām ibn Yūsuf, an associate of Abū Ḥanīfah's two companions,<sup>12</sup> was asked about a thief who denied (having com-

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<sup>10</sup> For example, in order to force information or a confession. This part of the hadith, however, is mentioned in only one of the several versions related. See the following footnote.

<sup>11</sup> This version of the hadith was related by a sound chain of narrators in Bayhaqī's *Sunan al Aḥkām*, vol. 9, p. 137. Abū Dāwūd related the hadith (3006), but without mention of the uncle being turned over to Zubayr. This is how it was related by Ibn Ḥajr in his *Fath al Bārī*, vol. 7, pp. 366-67. See also Ibn 'Ābidīn's *Ḥāshīyah*, vol. 3, p. 270; and Ibn al Qayyim's, *al Ṭuruq al Ḥukmīyah*, pp. 7-8.

<sup>12</sup> These were Abū Yūsuf and Muḥammad ibn al Ḥasan al Shaybānī, the two of his companions most responsible for ensuring the preservation and dissemination of his legal thought and opinions. Otherwise, it is well known that Abū Ḥanīfah was



mitted a theft). 'Iṣām replied: "Let him take an oath to that effect."<sup>13</sup> But the amīr objected: "A thief and an oath? Get the whip!" Before ten lashes had been administered the man confessed, and the stolen goods were recovered. 'Iṣām said: "Praise Allah! Never have I seen injustice appear so similar to justice than in this case."

In Bazāzīyah's collection of *fatāwā*, the validity of confessions obtained under duress is also upheld. When Ḥasan ibn al Ziyād was asked if it was permitted to beat a (suspected) thief until he/she confesses, he replied: "Unless the flesh is opened, the bone will never show through."<sup>14</sup>

Ibn 'Ābidīn wrote: "Beating one accused of theft is a matter of politics. So opined al Zayla'ī. A *qāḍī* may do what is politic, as politics are not the exclusive domain of the imam."<sup>15</sup> Yet there is nothing to support the opinions offered by these scholars. It should suffice (by way of refutation) that a Ḥanafī, 'Iṣām ibn Yūsuf, described it as an injustice.

Moreover, none of these reasons refutes or even weakens the evidence gathered by the majority of jurists that it is illegal to obtain a confession through the use (or threat) of force. Their opinions would be valid only if there were contributing circumstances that indicated clearly that the accused was guilty, that he/she had hidden the stolen item(s), and if the evidence stipulated (for prosecution as a *ḥadd* case) was not available. In such a case, a judge could use force to recover what had been stolen.

But even then, there is no evidence to support their opinion. In fact, the Ḥanafī scholars agreed with the majority that a confession made under duress was always invalid, except in a case of theft. Even in cases of theft, they held that duress might be resorted to only in order to recover stolen goods. Otherwise, the *ḥadd* penalty of

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surrounded by companions who jointly participated in the process of ijtihad. See Zāhid al Kawtharī, *Fiqh Ahl al 'Irāq wa Ḥadīthuhum*. Trans.

<sup>13</sup> The general rule in cases involving a claim is that the case may be decided, if the claimant cannot produce evidence, by an oath taken by the party denying the claim. This accords with the juristic principle that "evidence is for those who affirm, and the oath for those who deny." This was not used often in cases involving a *ḥadd* punishment, such as theft, and explains why the amīr objected to the ruling. [Trans.]

<sup>14</sup> See *Tanwīr al Abṣār* and Ibn 'Ābidīn's commentary on it, vol. 3, p. 270.

<sup>15</sup> See Ibn 'Ābidīn's *Hāshīyah*, vol. 3, p. 259.

severing one's hand may not be carried out even when there is suspicion that force had been used.<sup>16</sup>

Ibn al Qayyim, following the opinion of his shaykh, Ibn Taymīyah, upheld the beating of those who were accused of theft if they already had a notorious record of evil deeds. But this was only done in order to recover the stolen goods. In his opinion, this admission under duress was not the reason for carrying out the *ḥadd* penalty, as the thief's possession of the stolen goods was sufficient reason to punish him. He wrote: "If the accused is beaten in order to obtain his confession, and he does confess, and then the stolen goods are found where he said they would be, his hand may be severed. The sentence will not be carried out as a *ḥadd* penalty on the basis of the confession obtained under duress, but because the stolen goods were found where he, in his confession, had indicated they would be."<sup>17</sup>

Ibn Ḥazm wrote:

In a case, if there is no more [evidence] than a confession obtained under duress, then this will amount to nothing, for such a confession is condoned by nothing in the Qur'an, the Sunnah, or *ijmā'*. Moreover, the sacredness of a person's flesh and blood is an established certainty. Thus, nothing of that may be made lawful save by virtue of a text or *ijmā'*. If, however, in addition to the confession there is evidence that proves what the accused had confessed to, and that he had undoubtedly been the perpetrator, it then becomes obligatory to carry out the *ḥadd* penalty against him.<sup>18</sup>

I do not suppose that Ibn al Qayyim intended anything other than what Ibn Ḥazm intended when he mentioned conclusive evidence obtained by other means, so that the case may be decided by that rather than on the basis of the confession alone. As mentioned previously, the majority of jurists held that a confession obtained under duress was invalid. Moreover, they maintained this to be so even when circumstantial evidence indicated the contrary, as in the presence of the stolen goods in the home of the accused, owing to the

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<sup>16</sup> Ibid, vol. 4, p. 651. [The general rule in regard to *ḥadd* penalties is that they may not be administered if there is the least doubt about the case. Trans.]

<sup>17</sup> See Ibn al Qayyim, *al Ṭuruq al Ḥukmīyah*, p. 104.

<sup>18</sup> Ibn Ḥazm, *al Muḥallā*, vol. 11, p. 142.



possibility that the goods may have been placed there by someone hoping to implicate the accused in the crime.<sup>19</sup>

Undoubtedly, the opinion of the majority must be considered preponderant in terms of prohibiting duress and nullifying the legal effect of whatever is obtained under duress. This opinion is consistent with the teachings of the Qur'an and the Sunnah in relation to the need to uphold truth and justice. A confession obtained under duress cannot be considered truth, and punishment awarded because of it cannot be considered justice. Moreover, the only true deterrent to the dangers that threaten society is the guarantee that truth and justice will prevail. It is for this reason that duress must be considered a source of innumerable evils.

### Confessions Obtained by Deceit

The use of deceit to obtain an admission of guilt from the accused was preferred by Ibn Ḥazm, who cited a hadith<sup>20</sup> in which the Prophet was reported to have used deceit to ensnare a Jew who had crushed the head of a girl with a stone. In that instance, the Prophet interrogated the man (after determining from the girl before she died that the man had attacked her) and continued to question him until he ultimately relented and admitted his guilt.<sup>21</sup>

Ibn Ḥazm likewise mentioned that the Companions used deceit to obtain admissions of guilt. As there is no coercion or torture involved, Ibn Ḥazm considered it a good method. Earlier, Imām Mālik had opined that deceit was reprehensible, but Ibn Ḥazm disagreed and refuted his arguments. However, it is more likely that Imām Mālik's position is closer to the principles of Islamic law, for deceit, after all, invalidates one's choice and the voluntary nature of the confession, even if it does not involve harm or the threat of harm to the accused. In fact, the prohibition against duress owes less to the factor of harm than it does to the matter of free will, a matter upon which Islam is adamant.

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<sup>19</sup> See al Zarqānī, *Sharḥ al Muwaṭṭā*.

<sup>20</sup> This hadith was related by Anas ibn Mālik and was included in the collections of Bukhārī, Muslim, Abū Dāwūd, Ibn Mājah, Imām Aḥmad, and others. [Trans.]

<sup>21</sup> Ibn Ḥazm, *al Muḥallā*, vol. 11, p. 142.

## The Accused's Free Admission of Guilt and Right to Retract

In terms of the validity of the accused's retracting an admission of responsibility, rights are of two varieties:

First: There are rights for which the retraction of an admission is valid. These are the *ḥudūd*, which are the rights of Allah and may be waived whenever doubts arise in relation to them. Thus if a person accused of a *ḥadd* crime retracts, there is the chance that the original admission was false and that the retraction is true. As *ḥadd* penalties must be waived whenever doubts arise, one who has confessed adultery, for example, can have this punishment waived if he/she retracts his/her confession. All of the classical jurists agreed with this, with the exceptions of Ibn Abū Laylā, 'Uthmān al Batī, Ibn Abī Thawr, and the *ahl al zāhir* (the literalists).<sup>22</sup> Imām Mālik, however, is reported to have said that a retraction is acceptable only if it leads to doubt. Actually, there are two versions of Mālik's opinion on when a retraction does not lead to doubt. The best known version is that it will be accepted, while the lesser known is that it will not.<sup>23</sup>

This difference of legal opinion occurred in regard to the *ḥadd* penalties for theft and intoxication. The jurists agreed generally that a retraction may not be accepted in the case of false accusation (*qadhf*). They also differed on highway (armed) robbery. One opinion held that any retraction in such a crime may not be accepted, because the rights involved were those of people in need of protection, as in the case of false accusation (where the rights of the innocent are to be protected). The second opinion is that retraction should be accepted just as a retraction in the case of adultery may be accepted.<sup>24</sup>

The evidence for accepting a retraction of a confession to a *ḥadd* crime comes from the hadith in which Mā'iz is prompted by the Prophet to retract his confession to adultery: "Maybe you simply kissed, or felt, or looked...." Had retraction not been an option, the Prophet would not have prompted him in the manner reported. Retraction of a confession to a *ḥadd* penalty may be made by dec-

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<sup>22</sup> See *al Ifṣāḥ*, vol. 2, p. 406; *Kashf al Qina'* vol. 6, p. 99; *al Qawānīn al Fiqhīyah*, p. 344; *Bidāyat al Mujtahid*, vol. 2, p. 477; *Mughnī al Muḥtāj*, vol. 4, p. 150; *Badā'ī' al Ṣanā'ī'*, vol. 7, p. 61; *al Mabsūt*, vol. 9, p. 94.

<sup>23</sup> See Ibn Rushd, *op. cit.*, vol. 2, p. 477.

<sup>24</sup> See al Nawwawī, *al Muhadhdhab*, vol. 2, p. 364.



laration, as in stating: "I retract my confession," or by indication, as when one flees from the place where the penalty is to be applied. Likewise, a retraction may be made before or after the judge rules.

Second: There are rights, financial or otherwise, for which the retraction of a confession is not valid. These are the rights of people. Clearly, the one confessing has no rights of disposal over another's property. However, since the confession has the effect of establishing such a right for someone else, it follows that its retraction invalidates someone else's right. For this reason, such a retraction, either by declaration or indication, may not be accepted.

### **The Accused's Right to Compensation for Mistakes in Adjudication**

Certain scholars hold the opinion that the Shari'ah gives compensation to the accused who is placed under detention as a precaution but whose innocence is later established. As proof, they cite the ruling of 'Alī for compensation (*ghurrah*) to be paid to the mother when miscarriage resulted from an official's mishandling of her case.

It was reported to 'Umar ibn al Khaṭṭāb that a woman whose husband was away had been entertaining male visitors. Finding this reprehensible, 'Umar sent someone to question her. When she was told that 'Umar had summoned her to explain her behavior, she exclaimed: "Woe unto me! What chance do I have with someone like 'Umar!" On her way, she was overcome with fear and began to have pains. Unable to continue, she stopped at a house and immediately gave birth to a baby who, after delivery, screamed twice and died. 'Umar sought the counsel of several Companions. They told him that he was not responsible for what had happened. Then he turned to 'Alī, who had remained silent, and asked his opinion. 'Alī replied: "If they have spoken on the basis of their opinions, then their opinions are mistaken. If they have spoken to please you, their advice will not benefit you. My opinion is that you are responsible and must pay blood money (*diyyah*). After all, you were the one who frightened her. If you had not frightened her so, she would not have given birth prematurely." So 'Umar instructed that the money be paid.<sup>25</sup>

The position taken by the Ḥanbalī school is that the responsibility for paying the blood money is the ruler's. If the mother dies for the

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<sup>25</sup> This incident was narrated in the following works: 'Abd al Razzāq, *al Musnaf*, vol.9, p. 454, vol. 10, p.18, vol. 11, p. 18; Ibn Qudāmah, *al Mughnī*, vol. 9, p. 579; Ibn Ḥazm, *al Muḥallā*, vol. 11, p. 24; al Nawwawī, *al Muḥadhdhab*, vol. 2, p. 192.

same reason, her blood money will also have to be paid by the ruler.<sup>26</sup> On this point the Shāfi'ī jurists agreed with the Ḥanbalīs, arguing that the child died through no sin of its own and pointing out that the ruler is responsible for blood money in case a pregnant woman miscarries as a result of a *ḥadd* punishment.<sup>27</sup>

Imposing a *ḥadd* punishment is the ruler's duty. If he is remiss in carrying out this duty, he will have sinned against Allah and His prophet. As visits by strange men to the home of a woman whose husband is away is a questionable matter, it should be looked into by the authorities so that it will not lead to any social evils. In the case described, it is possible that 'Alī took the position he did because he felt the matter should have been dealt with in a different manner. For example, the woman could have been counselled in her home and in a nonthreatening manner. So perhaps what 'Alī meant to say was that if a ruler needs to talk to someone, he should summon the individual in a polite and dignified manner, not harshly. Otherwise, a ruler's summoning the accused in an appropriate manner should never subject the ruler to such a responsibility, unless he oversteps his right and transgresses the rights of the accused.<sup>28</sup>

It should also be noted that the woman gave birth before she had been accused of anything and before knowing why 'Umar had summoned her. It is therefore difficult to use her case as a precedent for saying that a ruler is responsible for paying blood money when an individual dies while in custody. Still, the principles of the Shari'ah are certainly not averse to the government's doing a good turn for those who suffer as a result of its mistakes while it undertakes to protect the rights of society and its subjects. This could take the form of an apology or material or juristic recompense. In fact, it is likely that these principles encourage such acts. The Prophet apologized to the Ghafārī tribesman he had detained and then asked the tribesman to pray and ask Allah's forgiveness for him. When he did so, the Pro-

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<sup>26</sup> Ibn Qudāmah, *al Mughnī*, vol. 9, p. 579.

<sup>27</sup> Of course, a pregnant woman is not to be given a *ḥadd* punishment until after she has given birth and weaned her child. However, if a mistake is made and she is punished, then the imam is responsible for whatever results. [Trans.]

<sup>28</sup> The opinion of the Zāhirī jurists was that the ruler or his representative cannot be held responsible in such cases. See Ibn Ḥazm, *al Muḥallā*, vol. 11, pp. 24-25. Both al Māwardī and Abū Ya'lā differed between *ḥadd* and *ta'zīr* punishments, holding the ruler responsible only when the latter led to the death of the prisoner. See al Māwardī, *al Ahkām al Sulṭānīyah* (238) and Abū Ya'lā, *al Ahkām* (282).



phet immediately prayed for the man and asked Allah to grant him martyrdom. That was certainly more than a simple apology on the part of the Prophet, and it indicates the correctness of the opinion that the accused should be recompensed for whatever suffering he/she undergoes due to an unproven accusation.

As regards the tyrannical and despotic procedures used by certain rulers who transgress rights and privileges granted to humanity by Allah, the entire ummah agrees that such rulers and their officials are responsible for both the harm they intend and that which they do not, and that they must be held accountable for it as would anybody else. After all, the Prophet took himself to task.

Finally, the opinions of the jurists were divided on whether payment for the ruler's mistakes or transgressions should be made from his personal funds, from those of his *'āqilah* (family and neighbors), or from public funds (*bayt al māl*). Each option had supporters.<sup>29</sup>

## Conclusion

It was not my intention to enumerate each right of the accused in Islam, but rather to point to some of the more important ones. Otherwise, it would have been necessary to review all of the legal procedures, conditions, and etiquette designed to protect the accused's person and dignity. It is indeed shameful for us today to see that certain Muslim majority states are not at all concerned with human dignity and rights and that they willfully ignore the guarantees designed to protect those rights. The fact is that many of those associated with Islam, in certain Muslim countries, have become a curse on Islam and Muslims. Their tyranny serves only to distort the truth of Islam and the ways in which it upholds justice, as well as to turn the lives of their subjects into a living hell. If the rest of the world views Muslims as generally cruel and despotic, it is because of the barbarism of these rulers and their disregard for human decency. For these reasons, the world community is always ready to join with the enemies of Islam for whatever cause, simply because they believe that the Muslims must be the aggressors. After all, how can those who transgress the rights of their own citizens and violate their sanctity not be expected to be the aggressors against their enemies and opponents?

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<sup>29</sup> See the sources listed at the end of the previous footnote.