The Rights of the Accused in Islam

Taha J. al- ʻAlwani

Introduction

As a faith and a way of life, Islam includes among its most important objectives the realization of justice and the eradication of injustice. Justice is an Islamic ideal under all circumstances and at all times. It is not to be affected by one's preferences or dislikes or by the existence (or absence) of ties of blood. Rather, it is a goal to be achieved and an ideal to be sought: "Surely, Allah commands justice and the doing of good" (Qur'an ١٦:٩٠); "And I was commanded to deal justly between you" (٤٢:١٥); and "Allow not your rancor for a people to cause you to deal unjustly. Be just, for that is closer to heeding" (٥:٨). There are also many hadiths in the Sunnah that command justice and prohibit wrong. Moreover, the achievement of justice is one of the objectives towards which human nature inclines, while its opposite—injustice—is something that humans naturally abhor.

Allah has ordained measures by which justice may be known and by which it may be distinguished from its opposite. He has clarified the means by which all people might achieve this objective, facilitated the ways by which it may be accomplished, and made those ways (the most important of which is the institution of judgment, *gada*) manifest to them.

Allah prescribed the institution of legal judgment "that men may stand forth in justice" (٥٧:٢٥). This institution ensures that everything will be measured by the same criteria, which would make it impossible for one to be unjust to another's person or wealth. As a result, all people will live in the shade of peace and justice, where their rights are protected and where contentment envelops their hearts, souls, persons, honor, and wealth.

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Translator's Note: In view of the recent interest shown by scholars on the subject of human rights and the ways they are neglected at different places in the world, the journal presents the following study. Of all the rights accorded to individual human beings, perhaps the rights of the accused are the ones most often transgressed. Owing to the length of the study, it will be published in two installments.

Historical Development of the Judiciary

The judiciary has been a firm religious responsibility and a form of worship from the time the Prophet initiated it by establishing the first Islamic state in Madinah. This is clear from the treaty between the Muslims, both the *Muhajirun* and *Ansar*, and their Jewish and polytheistic neighbors. In the treaty, it is written that "Whatever occurrence or outbreak is feared will result in corruption shall be referred for judgment to Allah and to Muhammad, His Prophet."[١]

During the Prophet's reign Madinah was small, and the community's legal problems were few and uncomplicated. And so there was a need for only one judge (*qadi*)—the Prophet. But when the territories ruled by Muslims began to expand, the Prophet began to entrust some of his governors with judiciary responsibilities and permitted some of his Companions to judge cases. He sent them to different lands and advised them to seek justice for the people and to oppose inequity. 'Ali was sent as a judge to Yemen, and others, such as Abu Musa and Mu'adh, became judges.[٢] The judgments passed by the Prophet were always based on what Allah had revealed to him.

In most cases, the two disputing parties would agree to present their case to the Prophet. After listening to both sides, he would tell them that he was deciding their case solely on the basis of the externals (i.e., evidence and testimony).[٣] He was careful to explain that his decisions should not be cited in order to permit what was prohibited or to prohibit what was permitted. He explained the proof and evidence and the means of defence and denial:[٤] "Proof is the responsibility of the claimant; whereas, for the claimed against, an oath is sufficient."[٥] Confession, with all of its conditions, is proof against the confessor. No judgment is to be passed between two disputing parties until both have been heard. The Prophet had no apparatus to collect and verify evidence to the advantage or detriment of either party.

When Abu Bakr became the (political) ruler (*khalifah*) upon the Prophet's death, he entrusted the judiciary to 'Umar ibn al Khattab. Owing perhaps to 'Umar's reputation for severity, two years passed without his having to judge a single case. When 'Umar became the ruler, however, the situation changed. During his reign, the major conquests of Islam were underway and the territory under Islamic rule was becoming truly vast. Thus, legal issues began to come to light for the first time. In response, 'Umar laid the foundations for an institutionalized juridical order in which judges, chosen by the ruler on the basis of certain criteria and functioning as his deputies, would hear cases, arbitrate disputes, and pass legal judgments. He appointed Abu al Darda' judge of Madinah,

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[١] See Hasan Ibrahim, *Tarikh al Islam al Siyasi*, vol. ١, ١٠٢.

[٢] Ibid., vol. ١, ٤٥٨ .

[٣] The Prophet said, "I rule on the basis of externals." The same meaning may be derived from several other hadiths, many of which are authentic. For details, see the author's footnotes in his edition of al Razi's *al Mahsul* (Beirut: Mu'assasat al Risalah, ١٩٩٢), ٨٠-٣.

[٤] The hadith was related by al Tirmidhi, Abu Dawud, al Nasa'i, al Bayhaqi, and al Hakim. See al Shawkani, *Nayl al Awtar* (Beirut: Dar al Jil, n.d.), vol. ٩, ٢٢٠.

[٥] The general juristic principle says that "evidence is for him who affirms, the oath is for him who denies," and thus lays the burden of proof on the afirmer or claimant. Trans.

Shurayh ibn al Harith al Kindi judge of Kufa, Abu Musa al Ash'ari judge of Basrah, and 'Uthman ibn Qays judge of Egypt. For the territories of Sham, a separate institution was established.

'Umar himself set a remarkable example for his judges to follow and also warned them not to deviate from it. In his letter to Mu'adh he wrote:

> As to what follows: Verily, legal judgment is an established religious responsibility, and a practice (*sunnah*) to be emulated. So if it is assigned to you, remember that speaking the truth, when there is nothing to back it up, is useless. Make peace between people in your sessions, in your countenance, and in your judgment, so that no decent person will ever have anything to say about your unfairness and so that no oppressed person will ever despair of finding justice with you.
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> The burden of proof is on the claimant, and for the defendant there is the oath. Arbitration is lawful between Muslims, except in cases where the lawful (*halal*) is made unlawful (*haram*) and vice versa. If someone claims a right to something that is not present and has no proof of it, then set him something like it. If he describes it, give him his due. But if he cannot do so, then you have solved the case for him in a most eloquent and enlightening manner.
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> Do not be impeded by your prior decision to change your mind about the truth if you reconsider and are guided by your understanding to take another decision. Indeed, the truth itself is eternal and nothing can change it. It is better for you to change your mind about it than to insist upon what is false.
>
> With the exceptions of those Muslims who are guilty of perjury, who have been lashed in accordance with *hadd* punishments, or who are suspect because of their relationship to the accused, all Muslims are reliable witnesses. Only Allah knows the secrets of His servants and He has screened their misdeeds, except for those that are attested to by evidence and witnesses.
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> You must use understanding when a question that has not been mentioned specifically in either the Qur'an or the Sunnah is raised. Make use of analogy and know the examples that you will use. And then undertake the opinion that seems more pleasing to Allah and closest to the Truth.
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> Avoid being angry, annoyed, irritated, or upset by people. Do not be hostile when hearing a case (or, "towards one of the parties to a case," [the narrator, Abu 'Ubayd was unsure], for surely a right

decision is rewarded by Allah and is something that will be spoken well of. Thus, one whose sincere intention is to serve the truth, even if it were to go against him, will be sufficed by Allah in what transpires between him and others.

One who adorns oneself with what one does not possess will be shown to be unsightly by Allah. For, indeed, Allah accepts from His servants only that which is done for His sake.

So keep in mind Allah's rewards both in this life and in the Hereafter.

May Allah grant you His peace, blessings, and mercy.[٦]

The institution of legal judgment during the times of the four rightly guided caliphs remained simple and uncomplicated. Judges had no court scribe or written record of their decisions, for these were carried out immediately and under the individual judge's direct supervision. No detailed procedures were worked out for the judicial process, the registration of claims, the delineation of jurisdictions, or for any other matters that would arise later, for the lives of the people were not yet complicated enough to require such refinements. Even the Shari'ah specified no details, but left them to be determined by ijtihad. In other words, the juridical system was allowed to develop in a way that would be the best suited for the peoples' circumstances and customs.[٧]

Under the four rightly guided caliphs, the judiciary was limited to resolving civil disputes. Other types of disputes, such as *qisas* (where capital punishments may be prescribed), *hudud* (where punishment, including capital punishment, is prescribed by the Qur'an), or *ta'zir* (where punishment, including capital punishment, is left to the discretion of the judge or the ruler) were decided by the ruler or his appointed governor.

Not a great deal of change in this institution took place under the Umayyids, particularly under the early rulers, so that procedures remained uncomplicated. The major development was confined mostly to recording decisions in order to avert evasion and forgetfulness. In fact, such as incident occurred during the reign of Mu'awiyah ibn Sufyan, when Salim ibn Mu'izz, the judge of Egypt, decided a case of inheritance. When the heirs reopened the dispute and returned to the judge, he recorded his decision in writing.[٨] This period also saw agreement upon the qualifications for a judge, the specification of a place in which the judicial procedure was to be carried out, and the development of the system by which injustices in public administration would be addressed.[٩]

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[٦] See Ibn al Qayyim, *I'lam al Muwaqqui'in*, vol. ١, ٨٥; al Mawardi, *al Ahkam al Sultaniyah*, ٧١-٢; al Bayhaqi, *al Sunan al Kubra*, vol. ١٠, ١١٥.

[٧] See Ibn al Qayyim, *al Turuq al Hukmiyah*, ٢١٨.

[٨] See *Kitab al Qada*,' ٣٠٩; Mahmud Arnus, *al Qada' fi al Islam,* ٤٩; Ibrahim Najib Muhammad Awad, *al Nizam al Qada'i*, ٤٨.

[٩] See Ibn Khaldum, *al Muqaddimah*, ٧٤١.

With the coming of the ‘Abbasids, however, the judiciary made significant progress. Its sophistication grew in both form and procedure, and its vistas increased with the variety of cases heard. During this period the court register was introduced, the judge’s jurisdiction was increased, and the state established the position of Chief Judge (*qadi al quddah),* which today is comparable to the office of the Chief Justice. One negative development, however, was the increasingly infirm nature of ijtihad, which limited the judges to following the previous rulings of the four established schools of legal thought: *taqlid*. Thus in ‘Iraq and the Eastern territories, judges ruled according to the rulings of Abu Hanifah; in Syria and Spain according to Malik; and in Egypt according to Imam Shafi‘i.[١٠]

After the Mongol destruction of Baghdad and the subsequent end of the ‘Abbasid Empire in ١٢٥٨ CE/٦٠٦ AH, several smaller states emerged and developed their own legal institutions. While these legal institutions differed hardly at all in their foundations and the principles upon which they were established, they did differ significantly in matters of organization, procedures, criteria for the appointment and removal of judges, and in the schools of legal thought followed.

Ibn al Hasan al Nabahi portrayed the judiciary of eighth-century (*hijri)* Spain as follows: “The authorities who deal with legal rulings are first the judges, then the central police, the local police, the appellate authority, the local administrator, and then the market controller.”[١١] Ibn al Qayyim described the contemporaneous institutions of the eastern Islamic states, after mentioning questions of rulings on claims, by saying that

> the maintenance of authority in matters not connected to claims is called *hisbah,* and the one responsible for it is called the *hisbah* commissioner. Indeed, it has become customary to assign a commissioner especially for this type of authority. Likewise, a special commissioner, called the appellate commissioner, is assigned to the appellate authority. The collection and spending of state funds comes under the authority of a special commissioner, called the *wazir*. The one entrusted with calculating the wealth of the state and seeing how it is spent and how it should be controlled is called the performance commissioner. The one entrusted with collecting wealth for the state from those who possess it is called the commissioner of malice. The one assigned to deciding disputes and upholding rights, making decisions on matters of marriage, divorce, maintenance, and the validity of transactions is called the *hakim* or judge.”[١٢]

[١٠] Ibd., ١١٥٠. See also Ibrahim, *Tarikh al Islam al Siyasi*, vol. ٢, ٥٥, vol. ٣, ٣٠٦.

[١١] *Ibrahim, Tarikh al Islam al Siyasi*, vol. ٤, ٣٧٧-٨٦; Awad Muhammad Awad, *al Majallah al ‘Arabiyah li al Difa ‘al Ijtima‘i,* no. ١٠ (October ١٩٧٩): ٩٨.

[١٢] Ibn al Qayyim, *al Turuq,* ٢١٥-٦.

Judicial Organization and Its Sources

It should be clear from the historical survey presented above that the Shari'ah did not specify a particular juridical framework. Rather, it established the principles, general foundations, objectives, and sources of legislation. Organizational details (i.e., the extent of a judge's jurisdiction,[١٣] limitations of his authority in terms of time and place, the assignment [or lack thereof] of another judge to work alongside him) were to be determined by the people's customs, needs, and circumstances. As there is nothing in the Shari'ah that entrusts the juridical process to an individual or an institution, it was left up to the Muslim leadership to decide. The responsibility could be spread among several officials or confined to one, as long as the sole requirement was met: the ruler must ensure that those entrusted with this responsibility meet the Shari'ah's conditions.[١٤]

It is also clear that the responsibility for judging criminal cases was divided among such different authorities as the ruler (*khalifah*), the appellate authority (*wali al ma'alim*), the military authority (*amir*), the police commissioner (*sahib al shurtah*), the market authority (*hisbah*), and the judge (*qadi*), in the limited sense represented by Ibn al Qayyim above.[١٥] Indeed, the responsibilities of each were not always exclusive or well-defined, for they differed in scope and overlapped, so that sometimes certain responsibilities associated with one would be charged to another in accordance with the desires of the ruler or as a result of his policies.[١٦]

Usually, the governor or the police commissioner was responsible for investigating such serious crimes as *hudud* or *qisas*. Likewise, the market authority was usually responsible for assigning a punishment designed to deter an action (*ta'zir*) for crimes against the general public interest or misdemeanors. This authority was often called the market controller, as most of the cases were related to crimes committed in the market place. The judge, sometimes called *hakim*, was responsible for settling the civil disputes that involved upholding rights and making sure that these were enjoyed by those entitled to them.[١٧]

Scholars of the procedural systems used in criminal cases divided these systems into three categories:

١. *The System of Accusation.* Criminal cases are heard on the basis of their involving a dispute between two equal parties. Such cases are brought directly to the judge, who has conducted no prior investigation, so that he can weigh the evidence of both sides, decide which argument seems stronger, and rule in accordance with his findings.

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[١٣]al Mawardi, *al Ahkam al Sultaniyah*, ٦٩-٧٣; Ibrahim, *Tarikh al Islam al Siyasi*, vol. ٤, ٣٧٧-٨٦.

[١٤]These are: faith in Islam, maturity, ability to reason intelligently, freedom and trustworthiness, having all of one's faculties, and knowledge of the Shari'ah's sources.

[١٥]Ibn al Qayyim, *al Turuq*, ٢١٥.

[١٦]Ibn Khaldun, *al Muqaddimah*, ٧٤٠.

[١٧]Ibid.; Ibn al Qayyim, *al Turuq*, ٢١٨-٩.

٢. *The System of Investigation.* The accusation is investigated before the actual trial starts. It resembles the present system, under which the state apparatus (i.e., the police in cooperation with the district attorney) undertakes these responsibilities. The authorities have enough power and authority to discharge their responsibilities. The accused's defense consists of gathering evidence to refute the charges.

٢. *The System Combining Both of the Above.* This system involves an investigation in its first (pretrial) stage and an accusation at the final, courtroom stage.

Modern systems of legal procedure combine, to a greater or lesser extent, aspects of these systems. At certain stages, features of one will appear dominant, while at others features of another will appear dominant.[١٨]

We mentioned earlier that the Shari'ah does not provide a specific procedural system, but rather left such details to the ijtihad and understanding of those responsible for ensuring that justice is done. History shows that one or a combination of these systems were employed at different times by various Islamic states. And even though the Shari'ah did not specify details of a legal system, it did put forth general principles, the most obvious being that its laws must be enforced and that justice must be done in accordance with it.[١٩]

The Accused

The Rights of the Accused at the Investigative Stage. The word *muttaham* (accused) comes from the root *t-h-m* meaning " to taint or decay" in the case of spoiled milk or meat. The Arabs also used it to say that "the heat is rotten," meaning that the air was still and the temperature was very high. The area known as Tihamah, in present-day Saudi Arabia, most probably got its name from the second meaning.

The word *tuhmah,* or *tuhamah*, means "doubt" and "uncertainty." The initial "t" is no doubt a substitute for the letter *waw*, because the root of the word is *w-h-m,* which connotes suspicion or misgiving. The Arabs used to say that "the man gave rise to suspicion" when someone gave other people reason to suspect himself/herself of his/her actions.[٢٠]

In legal terminology, the word can be traced to several hadiths. For example, Ibn Abu Shaybah related in his collection *al Musannaf*, on the authority of Abu Hurayrah, who said: "The Prophet of Allah, may Allah bless him and grant him peace, sent someone to call out in the market place that the testimony of a party to a dispute, like that of one who is suspect, is not admissible. When the Prophet was asked what he meant by one who was suspect, he replied: 'One concerning whose religion you have

[١٨]Ibn Khaldun, *al Muqaddimah*, ٧٤٠-٣; Awad, *al Majallah al 'Arabiyah*, ١٠١-٣.

[١٩]Ibn Khaldun, *al Muqaddimah.*

[٢٠]See *al Misbah*, ١٠٧, ١٢٩; T-H-M in al Zabidi, *Taj al 'Urus.*

misgivings.'"[٢١] Ibrahim used to say: "The testimony of one concerning whom you have misgivings is not acceptable."[٢٢]

The jurists (*fuqaha'*), however, used the term "the claimed against" instead of "the accused." In other words, they used the root for "claim," which is one's seeking to establish that one has more of a right to something than somebody else.[٢٣] The word for claim, *da'wah*, has the meaning of the infinitive. Thus, if Zayd claims a right over 'Amr in the case of money, Zayd becomes the claimant, 'Amr the claimed against, and the money the claim or claimed. Lexically speaking, however, a claim and an accusation are different things, for a claim is essentially notification.

The jurists understand this in the following ways: a) according to the followers of Abu Hanifah, a claim is one's notification of one's right to something over another present in the court[٢٤]; b) the followers of Imam Malik say that it is a statement that, if accepted as true, will entitle the one making it to a right[٢٥]; c) according to the followers of Imam Shafi'i, it is notification of one's right to something over someone else before a judge[٢٦]; and d) the scholars of the Hanbali school define it as a person's ascribing to himself/herself entitlement to something in the hand or in the safekeeping of another.[٢٧]

Jurists also disagree in their interpretations of the words "claimant" and "claimed against." Some have defined the claimant as one who is left alone if he/she leaves (his/her claim) alone, while the claimed against is one who is not left alone even if he/she leaves the claim alone. Others, however, have defined a claimant as one who claims that something is not as it is and effaces something that is evident, while the claimed against is one who establishes that something evident is as it is. Still others define the claimant as one who is not required to enter into a legal dispute, and the claimed against as one who is required to do so.[٢٨]

The words derived from claim are used by jurists in cases pertaining to financial rights and personal law, such as loans, usurpation, sales, rentals, collateral, arbitration, bequests, criminal malpractice related to wealth, marriage, divorce, allowing a wife to leave her husband (*khul'a)*, manumission, lineage, and agency. These were the kinds of cases that were usually referred to a judge for a decision.

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[٢١]Ibn Abi Shayah, *al Musannaf*, vol. ٨, ٣٢٠; al Bayhaqi, *al Sunan al Kubra*, vol. ١٠, ٢٠١; al Tirmidhi, *al Sunan*, hadith no. ٢٢٩٩; al Khassaf, *Adab al Qadi*, vol. ٢, ١١٢, vol. ١, ٢٢٩.

[٢٢]Ibn Abi Shaybah, *al Musannaf*, vol. ٨, ٣٢١.

[٢٣] See Ahmad 'Abd al Razzaq al Kabisi, *al Hudud wa al Ahkam*, ٢٨٨; Abu al Walid ibn Shahnah al Hanafi, *Lisan al Hukkam*, ٢٢٦; 'Ala al Din al Tarabalusi, *Mu'in al Hukkam*, ٥٤.

[٢٤]al Kabisi, *al Hudud*, ٢٨٨.

[٢٥]al Jurjani, *Kitab al Ta'rifat*, ٩٣; al Muttarizi, *al Mu'arrib min al Mugharrib,* ١٦٤.

[٢٦]al Kabisi, *al Hudud*, ٢٨٧.

[٢٧]*Sharh Hudud Ibn 'Arafah*, ٤٦٨.

[٢٨]*Hashiyat Qaylubi wa 'Umayrah*, vol. ٤, ٣٣٤.

There is nothing, however, to prevent the use of the word “accused” in criminal cases. On the contrary, its use there is more suitable, particularly in view of what we have discussed above regarding its lexical derivation and legal significance.

Categories of the Accused in Criminal Cases. Jurists divide those accused in criminal cases into three categories: a) someone well-known for his/her piety and integrity and thus unlikely to have committed the crime of which he/she is accused; b) someone notorious for his/her wrongdoing and profligacy and who is thus not unlikely to have committed the crime of which he/she is accused; and c) someone whose circumstances are unknown, so that nothing may be surmised concerning the likelihood of his/her committing the crime of which he/she is accused.

In reference to the first category, the accusation will not be accepted unless it is accompanied by legally valid evidence. No legal action may be taken against such people on the basis of an accusation alone. In this manner, decent people may be protected from the deprecations of those seeking to bring dishonor upon them. There are two differing opinions regarding the punishment for those who make false claims or accusations against such people: a) the opinion of the majority of the jurists, which says that the person should be punished, and b) that of Imam Malik and Ashab, who held that punishment should not be meted out unless it can be proved that the one who made the accusation intended to harm or otherwise discredit the accused. The legal principle upon which the majority’s ruling is based is that consideration must be given to the circumstantial state of innocence.

As regards the second category, the principle of considering the circumstantial evidence and following the principle of abiding by what is most prudent, the accused may be deprived of personal freedom. Thereafter, an investigation must be made of the alleged wrongdoing to determine whether the accusation should be upheld or rejected. The accused's’denial of the charges is not sufficient as evidence, nor is his/her sworn oath. Rather, it is essential to prove or disprove the truth of the accusation. In such cases, the court authority (i.e., the ruler or the judge) has the right to detain the accused for the duration of the investigation.

In regard to the third category of the accused, one whose circumstances are unknown, the ruler or the judge may detain the accused until his/her circumstances are better known. This ruling, which was accepted by the majority of scholars, including Malik, Ahmad, Abu Hanifah, and their companions and students, was derived from a hadith in which it is related that the Prophet detained someone accused of a crime for a day and a night.[٢٩] The meaning of detention, as understood by classical jurists, is to hinder and to limit freedom, regardless of whether this is accomplished by confinement in a prison, by surveillance, or by being required to stay within a defined area. The permissible period of detention is also disputed. Basically there are two opinions: some have determined it to be one month, while others have opined that the matter should be left to the legal discretion of the official.[٣٠]

[٢٩]Ibn al Qayyim, *al Turuq*, ١٠١, ١٠٣.

[٣٠]al Mawardi, *al Ahkam al Sultaniyah.*

Principles That Must Be Considered

The Shari‘ah is concerned with the circumstantial state of a person’s innocence, and jurists have based several legal rulings upon it. Moreover, this principle may only be overruled due to irrefutable evidence or, in other words, evidence about which there is no doubt. Thus, it is connected closely with the principle that certainty may not be erased by doubt. Indeed, the relationship of one principle to the other is as the relationship of a branch to a trunk, for the two are found together throughout jurisprudence literature. In addition, they must be reconciled to the principle of protecting society, by implementing preventative measures, from perceived dangers with a high likelihood of occurrence. The same is true with regard to the protection of what is considered essential to society.

May the principle of circumstantial innocence be superseded by something that is likely to harm society if the principle is abandoned? Part of that answer can be found in the above threefold division of the accused. And perhaps the rest of the answer may be found in the principles of opting for what is most prudent, for limiting opportunities for wrong, and for doing away with what is detrimental.

Islam, which seeks to protect the rights of the individual, also seeks to protect the rights of society as a whole. Therefore, no individual may presume to overstep the rights of society while hiding behind the veil of personal rights and freedom, and society may not trample on the rights of the individuals or deprive him/her of his/her rights on the pretense of some alleged peril. Islam honors and exalts humanity and has given human beings many rights, above all the right to life, physical well-being, honor and respect, personal freedom, freedom of movement, and many others. Thus, an individual’s home and personal life are sacred. No one has the right to enter another person’s home without permission or to look inside his/her home, to eavesdrop on private conversations, to open one’s mail, or to do anything else that infringes upon those rights.

Society, in its capacity as society, enjoys similar rights. It is essential that peace and security be maintained for society, that its interests be upheld, and that crime be eradicated. If it becomes necessary to maintain these rights by curtailing or suspending temporarily the rights of an individual, then such an act will be done based on the nature of what is dictated by necessity, which, in turn, is determined by the extent of the necessity. What is dictated by necessity represents the limit of power, set by the authorities, given to the investigator over the accused. Thus, the power of the investigator is essentially a departure from a legally established principle for the purpose of realizing another legally established principle that cannot otherwise be realized.

If the Shari‘ah allows the investigator or the judge to place certain restrictions on the accused’s rights to maintain the principle of the society’s rights, it has also placed restrictions on the power of the investigator, which represents guarantees to the accused.

The Authority of the Investigator. The authority enjoyed by the investigator in relation to one concerning whom there is doubt is limited and, if it encroaches on some of the rights of the accused, it certainly does not extend to any of his/her other basic rights. It was for this reason that the Prophet called such a person a “prisoner”.[٣١] This also establishes that the accused will be maintained at the expense of the state.

[٣١] Ibn al Qayyim, *al Turuq al-Hakmiyah.*

Ibn al Qayyim defined detention as "preventing the individual from dealing with others in any way that would lead to their being harmed."[٣٢] Other jurists considered detention as being in the same class of punishment as the *hudud.* Accordingly, they opined, it should not be prescribed on the basis of suspicion alone. In fact, the overriding principle here is that the individual is guaranteed personal freedom and the right of free movement: "He it was Who made the earth tractable for you; then go forth in its highlands" (٦٧:١٥). Thus, a person cannot be detained or deprived of freedom of movement without a legally valid reason.[٣٣]

Islam has shown a great deal of consideration for the imprisoned and his/her affairs. The Prophet once left a prisoner in the care of a certain individual. He ordered the latter to care for and show respect to the former and, thereafter, often visited the man and inquired after the prisoner's welfare. 'Ali ibn Abi Talib used to make surprise visits to the prison in order to inspect its condition and listen to the inmates' complaints.[٣٤]

It is the state's responsibility to provide ample food, clothing, and medical treatment for all prisoners and to ensure that their rights are protected. Moreover, Shari'ah scholars have ruled that a judge's first responsibility, upon assuming his position, is to go in person to the jails and free all who have been detained unjustly. He should go to each prisoner and ascertain the reasons for his/her imprisonment. In certain cases, he may meet with the accusers to determine whether the reasons for imprisonment are still valid and if justice was done.

When someone is imprisoned, it is the responsibility of the sentencing judge to record the prisoner's name and ancestry, the reason for imprisonment, and the beginning and ending dates of the period of imprisonment. Likewise, when a judge is retired and another takes his place, the new judge must write to the old judge and ask him about the people he sent to prison and why he did so.

The Authority for Sentencing Someone to Prison. Jurists have differed over who has the right to sentence someone to prison. Al Mawardi was of the opinion that an investigator's authority differs in accordance with his position. For example, if the investigator is an official or a judge, and someone accused of theft or adultery is brought before him, he cannot imprison the accused until he learns more about the individual, for mere accusation is not sufficient grounds for imprisonment. If the investigator is a ruler or a judge in a criminal court, however, and if he deems the evidence to be sufficiently convincing or incriminating, he may arrest and detain the accused. Later on, however, if the accusation should prove to be unfounded or untenable, he must release the accused. In these details, most legal scholars accepted al Mawardi's opinion.

The Period of Imprisonment. Scholars also differed over how long a person can be confined. Some said that it should not exceed one month, while others felt that it should

[٣٢]Ibid.

[٣٣]Ibn Hazm, *al Muhalla*, vol. ١١, ١٤١.

[٣٤]See Abu Yusuf, *Kitab al Kharaj* and its commentary *Fiqh al Muluk*, vol. ٢, ٢٣٨.

be left to the discretion of the imam or the relevant court official. Indeed, the latter view is the more reasonable.[٣٥]

By now, it should be apparent that precautionary detention is allowed only when the need for it is great and when certain conditions are satisfied, such as matters related to: a) the objective for which the accused was detained; b) the position of the one doing the sentencing; c) the sentencing itself; and d) the length of the sentence.[٣٦] All of these are matters in which there is a great deal of scope for the concerned court official to organize things in accordance with the dictates of the legal policies of a particular time or place. In other words, these are not fixed matters that are closed to all change or development.

Investigating the Accused's Person, Residence, and Conversations. Allah has protected and honored humanity and prohibited the touching of an individual's person, skin, or honor.[٣٧] Likewise, He has declared that a person's home is sacred and must not be violated: "O you who have faith! Do not enter the homes of others without first seeking permission, and then wishing peace upon its inhabitants. That is better for you, so that you may remember. If you do not find anyone at home, do not enter until permission is given to you. If it is said to you, 'Go back,' then go back, for that will be purer for you (٢٤:٢٧-٨) and "O you who have faith! Avoid being overly suspicious, for suspicion in some cases is wrong; and spy not on one another (٤٩:١٢).

The Prophet said: "Everything about a Muslim is sacred to another Muslim; from his blood, to his wealth, to his honor"; Those who listen to what people say about another, even when (they know) those people are unfriendly toward that person, will have molten lead poured into their ears on the Day of Judgment"; and "If the amir seeks to uncover the doubtful things about people, he will ruin them."

There are also other instances. For example, Ibn Mas'ud, when he was governor of Iraq, was told that "Walid ibn 'Uqbah's beard is dripping with wine!" He replied: "We have been prohibited from spying. But if something should become obvious to us, we will take him to task for it." It is related that one time 'Umar ibn al Khattab was informed that Abu Mihjan al Thaqafi was drinking wine in his home with some friends. 'Umar went straight to Abu Mihjan's house, walked inside, and saw that there was only one other person with Abu Mihjan. This man said to 'Umar: "This is not permitted to you. Allah has prohibited you from spying." At that, 'Umar turned and walked out.

'Abd al Rahman ibn 'Awf related:

> I spent a night with 'Umar on patrol in the city (Madinah). A light appeared to us in the window of a house with its door ajar, from which we heard loud voices and slurred speech. 'Umar said to me: 'This is the house of Rabi'ah ibn Umayyah ibn Khalf, and right now they're in there drinking. What do you think?" I replied: 'I think we are doing what Allah has prohibited us from

[٣٥] Ibn al Qayyim, *al Turuq,* ١٠٣.

[٣٦] Awad, *al Majallat al 'Arabiyah.*

[٣٧] This is part of an authentic hadith. See al Suyuti. a*l Fath al Kabir, vol.* ٣, ٢٥٦.

from doing. Allah said not to spy, and we are spying.'
So 'Umar turned away and left them alone.

Clearly, the privacy of the individual and all other types of privacy must be respected and preserved. This is true unless something occurs that requires otherwise.

The meaning of "suspicion" in the above verse is "accusation." The famed authority on legal interpretations of the Qur'an, al Qurtubi, said that what was being prohibited in the verse is an accusation that has no basis in fact, such as accusing someone of adultery or drinking wine in the absence of any supporting evidence. He wrote:

> And the proof that the word "suspicion" in this verse means "accusation" is that Allah then said: 'And spy not on one another.' This is because one might be tempted to make an accusation and then seek confirmation of one's suspicion via spying, inquiry, surveillance, eavesdropping, and so on. Thus the Prophet prohibited spying. If you wish, you may say that what distinguishes the kind of suspicion that must be avoided from all other kinds of suspicion is that the kind of suspicion for which no proper proof or apparent reason is known must be avoided as *haram.* So if the suspect is well-known for goodness and respected for apparent honesty, then to suspect him/her of corruption or fraud, for no good reason, is *haram.* The case is different, however, in relation to one who has achieved notoriety for dubious dealings and unabashed iniquity. Thus there are two kinds of suspicion: that which is brought on and then strengthened by proof that can form the basis for a ruling and, secondly, that which occurs for no apparent reason and which, when weighed against its opposite, will be equal. This second type of suspicion is the same as doubt, and no ruling based on it may be given. This is the kind of suspicion that is prohibited in the verse.

This indicates that an individual may not be subjected to a search of his/her person or home, surveillance, the recording of conversations over the phone or elsewhere, the invasion of privacy in any manner, or the disclosing of any confidences merely on the basis of a dubious suspicion that he/she may have committed a punishable crime. This is because unfounded suspicion is the worst possible kind of suspicion, and the one who holds such a suspicion is a wrongdoer. It adds nothing to the truth, and nothing may be built upon it unless there is information to indicate it, grounds to confirm it, and evidence to prove it.

It should be noted here that Qur'anic commentators and authorities on the legal interpretation of the Qur'an have all followed the legal scholars in allowing arrest and precautionary detention. Indeed, they made a distinction between those whose apparent lifestyles indicate that they are honest and good and those whose apparent lifestyles indicate that they are dishonest and unreliable. Thus, they considered the prohibition to

apply only to spying on honest and decent people. In relation to others, however, these scholars felt that spying on them is lawful.

The Qur'an and Sunnah's prohibition of spying is put forth in general—not specific—terms. One's previous record of having transgressed or being accused is not sufficient to violate the sacredness of his/her person or privacy in the absence of hard supporting evidence. This view was upheld by 'Umar when he refrained from spying on Abu Mihjan al Thaqafi and Rabi'ah ibn Umayyah, for both were well-known for their love of strong drink. The same was true when Ibn Mas'ud did not spy on al Walid ibn 'Uqbah, although he was notorious for his drinking habits.

Based on these principles, the Shari'ah does not allow the searching of a person or of one's home, the surveillance of personal conversations, the censorship of personal mail, and the violation of one's private life unless there is legally valid evidence to show his/her involvement in a crime. Such evidence must be considered by the authority responsible for carrying out the Shari'ah's rulings. This authority, obviously, must also be able to interpret correctly the Shari'ah's teachings and higher purposes, realize that these rights are guaranteed by the Qur'an and the Sunnah, and that any attempt to alter or particularize them will be considered a violation of what those two sources have established. Therefore, the above actions are permitted only if they can help determine the circumstances of a crime, protect society by ensuring that criminals do not go unpunished for their crimes, and ensure that the innocent are not punished for the crimes of others.

In short, the investigating authority may not go beyond what is absolutely necessary. Moreover, those in authority should always maintain proper Islamic behavior. For instance, if the person in authority is male, he should not conduct a body search of a woman, or enter a house where women are present. In addition, personal property that has no relation to the alleged crime should not be destroyed or confiscated.

Questioning the Accused. The investigator may question the accused on any topic that will help to reveal the truth and may confront the accused with the accusation. The accused, however, does not have to answer those questions, as will be seen in the sequel to this article, which will appear in a future issue of the journal.

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.

In a well-known hadith, the Prophet is reported to have told 'Ali, who he has just appointed as governor of Yemen: "O 'Ali! 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 'Aziz 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 dumb mute cannot be punished for *hadd* 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 *hadd* punishment (for a lesser, *ta'zir* 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 *hadd* punishment is administered, justice will not have been served, because the *hadd* 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 (*ahkam al qada'*) and the behavior of judges (*adab al qadi)* 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 Abu Hanifah 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 Khashini reports that two men brought their dispute before Ahmad ibn Baqi. 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 Maridi, 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 *hudud* 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.[٣٨] 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 *hadd* crime, he/she may retract his/her statement and thereby nullify the earlier confession.

Statements Made under Duress

> The accused may not be pressured to confess. Ibn Hazm 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 *ijma*, 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.[٣٩]

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 it 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 *fuqaha'* have ruled that any admission of guilt or liability obtained duress is invalid and legally inadmissible.

In the Qur'an, we read: "save he who is compelled, though his heart be content with faith (١٦:١٥٦)." Here, Allah has said that compulsion in 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."[٤٠] Abu Dawud related that:

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[٣٨]Samir al Janzuri, research in *al Majallah al 'Arabiyah*, no. ٧ (March ١٩٧٨): ١١٩.

[٣٩]Ibn Hazm, *al Muhalla*, vol. ١١, p. ١٤١.

[٤٠]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 Razi's *al Mahsul*, vol. ١ (Beirut: al Risalah, ١٩٩٢), ٢٣٣.

> Goods were stolen from the Kala'i tribe, who accused certain weavers [of the crime]. When they brought the matter to Nu'man ibn Bashir, the Prophet's Companion, he imprisoned the weavers for a few days and then let them go. The tribesmen went to Nu'man and said: How could you let them go without beating them or otherwise subjecting them to tribulation?" Nu'man 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'man said: "That is the ruling of Allah and His Messenger."[٤١]

'Umar said: "A man is not responsible for himself if he is starved, fettered, or beaten."[٤٢] Shurayh said: "Confinement is duress, a threat is duress, prison is duress, and beating is duress."[٤٣] Sha'bi 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 'Urak ibn Malik that he said:

> Two men from the tribe of Ghaffar approached an oasis fed by the waters of Madinah at which a number of the Ghatfan tribe were grazing their camels. When the Ghatfan tribesmen awoke the next morning, they discovered that two of their camels were missing and accused the two Ghaffaris. 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 one of them, or to the one he had kept with him: "Ask

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[٤١] Abu Dawud, *Sunan*, hadith no. ٤٣٨٢. The same was related by al Nasa'i, hadith no. ٤٨٧٨.

[٤٢] Abd al Razzaq, *al Musannaf*, vol. ١٠, p. ١٩٣.

[٤٣] Ibid.

Allah to forgive me!" So the Ghaffari 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.[٤٤]

It is related on the authority of ʻAbd Allah ibn Abi ʻAmir that he said:

I set out with some riders and, when we arrived at Dhu 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 ʻUmar ibn al Khattab 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 Amir al Mu'minim, I wanted to bring the man back in chains." ʻUmar 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." ʻUmar became very upset. He never recompensed me nor did he make any inquiries.[٤٥]

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 ʻUmar 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.[٤٦]

Even so, certain scholars did consider a confession obtained under duress as valid if the accused was known for corruption and evil doing, such as theft and the like. They cited the hadith of Ibn ʻUmar, 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

[٤٤]Ibid., p. ٢١٦.

[٤٥]Ibid.

[٤٦]See *al Mughni*, vol. ١٥, p. ١٢; *Kashshaf al Quina'*, vol. ٦, p. ٤٥٤; *al Insaf*, vol. ١٢, p. ١٣٣; *Mughnl al Muhtaj*, vol. ٢, p. ٢٤٠; *al Muhadhdhab*, vol. ٢, p. ٣٦٢; *Bada'i al Sana'i* , vol. ٧, p. ١٨٩; *al Hidayah*, vol. ٣, p. ٢٧٥; *al Mabsut*, vol. ٩, pp. ١٨٤-٨٥; *al Dasuqi 'ala al Sharh al Kabir*, vol. ٣, p. ٣٤٨; *al Kharashi*, vol. ٦, p. ٨٧; *al Muhalla*, vol. ٢, p. ٢٨٨; and *al Bahr al Zakhkhar*, vol. ٥, p. ٣.

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 Huyayy ibn Akhtab which he had brought with him when he was banished with the Nadir tribe. The Prophet asked Huyayy's uncle: "What happened to the musk that your nephew brought with him from the Nadir?" 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[٤٧] Huyayy, in the meantime, was spotted hiding in the midst of some ruins. So they went there and searched, and found the must hidden in the ruins.[٤٨]

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 Hanafi scholars upheld the validity of a confession obtained under duress. Sarkhasi wrote, in his *al Mabsut:* "Some of the later scholars from among our shaykhs gave *fatwas* 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 'Isam ibn Yusuf, an associate of Abu Hanifah's two companions,[٤٩] was asked about a thief who denied (having committed a theft). 'Isam replied: "Let him take an oath to that effect.[٥٠] But the amir objected: "A thief and an oath? Get the whip!" Before ten lashes had been administered the man confessed, and the stolen goods were recovered. 'Isam said: "Praise Allah! Never have I seen injustice appear so similar to justice than in this case."

In Bazaziyah's collection of *fatawa*, the validity of confessions obtained under duress is also upheld. When Hasan ibn al Ziyad 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."[٥١]

Ibn 'Abidin wrote: "Beating one accused of theft is a matter of politics. So opined al Zayla'i. A *qadi* may do what is politic, as politics are not the exclusive domain of the

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[٤٧] 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.

[٤٨] This version of the hadith was related by a sound chain of narrators in Bayhadi's *Sunan al Ahkam*, vol. ٩, p. ١٣٧. Abu Dawud related the hadith (٣٠٠٦), but without mention of the uncle being turned over to Zubayr. This is how it was related by Ibn Hajr in his *Fath al Bari*, vol. ٧, pp. ٣٦٦-٦٧. See also Ibn 'Abidin's *Hashiyah,* vol. ٣, p. ٢٧٠; and Ibn al Qayyim's, *al Turuq al Hukmiyah*, pp. ٧-٨.

[٤٩] These were Abu Yusuf and Muhammad ibn al Hasan al Shaybani, 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 Abu Hanifah was surrounded by companions who jointly participated in the process of ijtihad. See Zahid al Kawthari, *Fiqh Ahl al 'Iraq wa Hadithuhum.* Trans.

[٥٠] 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 justice prinicple that "evidence is for those who affirm and the oath for those who deny." This was not used often in cases involving a *hadd* punishment, such as theft, and explains why the amir objected to the rulding. [Trans.]

[٥١] See *Tanwir al Absar* and Ibn 'Abdin's commentary on it, vol. ٣, p. ٢٧٠.

imam."[٥٢] Yet there is nothing to support the opinions offered by these scholars. It should suffice (by way of refutation) that a Hanafi, 'Isam ibn Yusuf, 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 *hadd* 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 Hanafi 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 *hadd* penalty of severing one's hand may not be carried out even when there is suspicion that force had been used.[٥٣]

Ibn al Qayyim, following the opinion of his shaykh, Ibn Taymiyah, 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 *hadd* 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 *hadd* 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."[٥٤]

Ibn Hazm 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 *ijma'*. 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 *ijma'*. 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 *hadd* penalty against him.[٥٥]

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[٥٢] See Ibn 'Abidin's *Hashiyah*, vol. ٣, p. ٢٥٩.

[٥٣] Ibid, vol. ٤, p. ٦٥١. [The general rule in regard to *hadd* penalties is that they may not be administered if there is the least doubt about the case. Trans.]

[٥٤] See Ibn al Qayyim, *al Turuq al Hukmiyah*, p. ١٠٤.

[٥٥] Ibn Hazm, *al Muhalla*, vol. ١١, p. ١٤٢.

I do not suppose that Ibn al Qayyim intended anything other than what Ibn Hazm 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 possibility that the goods may have been placed there by someone hoping to implicate the accused in the crime.[٥٦]

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 Hazm, who cited a hadith[٥٧] 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.[٥٨]

Ibn Hazm likewise mentioned that the Companions used deceit to obtain admissions of guilt. As there is no coercion or torture involved, Ibn Hazm considered it a good method. Earlier, Imam Malik had opined that deceit was reprehensible, but Ibn Hazm disagreed and refuted his arguments. However, it is more likely that Imam Malik'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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[٥٦] See al Zarqani, *Sharh al Muwatta.*

[٥٧] This hadith was related by Anas ibn Malik and was included in the collections of Bukhari, Muslim, Abu Dawud, Ibn Majah, Imam Ahmad, and others. [Trans.]

[٥٨] Ibn Hazm, *al Muhalla*, vol. ١١, p. ١٤٢.

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 *hudud*, which are the rights of Allah and may be waived whenever doubts arise in relation to them. Thus if a person accused of a *hadd* crime retracts, there is the chance that the original admission was false and that the retraction is true. As *hadd* 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 Abu Layla, 'Uthman al Batti, Ibn Abi Thawr, and the *ahl al zahir* (the literalists).[٥٩] Imam Malik, however, is reported to have said that a retraction is acceptable only if it leads to doubt. Actually, there are two versions of Malik'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.[٦٠]

This difference of legal opinion occurred in regard to the *hadd* 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.[٦١]

The evidence for accepting a retraction of a confession to a *hadd* crime comes from the hadith in which Ma'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 *hadd* penalty may be made by declaration, 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.

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[٥٩] See *al Ifsah*, vol. ٢, p. ٤٠٦; *Kashf al Qina'*, vol. ٦, p. ٩٩; ; *al Qawanin al Fiqhlyah*, p. ٣٤٤, *Bidayat al Mujtahid*, vol. ٢, p. ٤٧٧; *Mughni al Muhtaj*, vol. ٤, p. ١٥٠; *Bada'i' al Sana'i'*, vol. ٧, p. ٦١; *al Mabsut*, vol. ٩, p. ٩٤.

[٦٠] See Ibn Rushd, op. cit., vol. ٢, p. ٤٧٧

[٦١] See al Nawwawi, *al Muhadhdhab*, vol. ٢, p. ٣٦٤.

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 'Ali 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 Khattab 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 'Ali, who had remained silent, and asked his opinion. 'Ali 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.[٦٢]

The position taken by the Hanbali school is that the responsibility for paying the blood money is the ruler's. If the mother dies for the same reason, her blood money will also have to be paid by the ruler.[٦٣] On this point the Shafi'i jurists agreed with the Hanbalis, 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 *hadd* punishment.[٦٤]

Imposing a *hadd* 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 'Ali 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 'Ali 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

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[٦٢]This incident was narrated in the following works: "Abd al Razzaq, *al Musnnaf*, vol. ٩, p. ٤٥٤, vol. ١٠, p. ١٨, vol. ١١, p. ١٨; Ibn Qudamah, *al Mughni*, vol. ٩, p. ٥٧٩; Ibn Hazm, *al Muhalla*, vol. ١١, p. ٢٤; al Nawwawi, *al Muhadhdhab*, vol. ٢, p. ١٩٢.

[٦٣]Ibn Qudamah, *al Mughni*, vol. ٩, p. ٥٧٩.

[٦٤]Of course, a pregnant woman is not to be given a *hadd* 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.]

appropriate manner should never subject the ruler to such a responsibility, unless he oversteps his right and transgresses the rights of the accused.[٦٥]

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 Ghafari tribesman he had detained and then asked the tribesman to pray and ask Allah’s forgiveness for him. When he did so, the Prophet 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 ‘*aqilah* (family and neighbors), or from public funds (*bayt al mal*). Each option had supporters.[٦٦]

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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[٦٥]The opinion of the Zahiri jurists was that the ruler or his representative cannot be held responsible in such cases. See Ibn Hazm, *al Muhalla*, vol. ١١, pp. ٢٤-٢٥. Both al Mawardi and Abu Ya‘la differed between *hadd* and *ta‘zir* punishments, holding the ruler responsible only when the latter led to the death of the prisoner. See al Mawardi, *al Ahkam al Sultaniyah* (٢٣٨) and Abu Ya‘la, *al Ahkam* (٢٨٢).

[٦٦]See the sources listed at the end of the previous footnote.