

# The Rights of the Accused in Islam

## (Part One)

### 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, one that is not to be affected by one's preferences or dislikes or the existence (or absence) of ties of blood. Rather, as the Qur'an states, it is a goal to be achieved and an ideal to be sought: "Surely, Allah commands justice and the doing of good" (16:90); "And I was commanded to deal justly between you" (42:15); and "Do not allow your rancor for a people to cause you to deal unjustly. Be just, for that is closer to heeding" (5:8). Many hadiths also command justice and prohibit wrong. Moreover, achieving justice is one of the objectives toward which human nature inclines, while its opposite – injustice – is something that people naturally abhor.

Allah has ordained measures by which justice may be known and 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 [*qāḍā*]) clear to them.

Allah prescribed the institution of legal judgment so "that people may stand forth in justice" (57:25). This institution ensures that everything will be measured by the same criteria, which would make it impossible for one

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Translator's Note: In view of the recent interest shown by scholars of human rights and how they are neglected in many lands, the journal presents the following study. Among all of the rights accorded to individual human beings, perhaps those of the accused are the ones most often transgressed. Owing to the study's length, it will be published in two installments.

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 contentment envelops their hearts, souls, persons, honor, and wealth.

#### 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 Muhājirūn and the Anṣār and their Jewish and polytheistic neighbors. This treaty states: "Whatever occurrence or outbreak is feared to result in corruption shall be referred for judgment to Allah and to Muhammad, His Prophet."<sup>1</sup>

During the Prophet's reign, Madinah was small and the community's legal problems were few and uncomplicated. And so only one judge (*qāḍī*) – the Prophet – was needed. But as the territory 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 oppose inequity. 'Alī was sent as a judge to Yemen, and others, among them Abū Mūsā and Mu'adh, became judges.<sup>2</sup> The Prophet's judgments 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).<sup>3</sup> He was careful to explain that his decisions should not be cited in order to permit what was prohibited or prohibit what was permitted. He explained the proof and evidence as well as the means of defense and denial:<sup>4</sup> "Proof is the responsibility of the claimant; whereas, for the claimed against, an oath is sufficient."<sup>5</sup> In other words, confession, with all of its conditions, is proof against the confessor, and no judgment is to be passed until both parties have been heard. The Prophet had no apparatus to collect and verify evidence to the advantage or detriment of either party.

When Abū Bakr became the political ruler (*khalīfah*) upon the Prophet's death, he entrusted the judiciary to 'Umar ibn al-Khaṭṭāb. Owing perhaps to 'Umar's reputation for severity, two years passed without his having to judge a single case. When he became the ruler, however, the situation changed. During his reign, Islam's major conquests 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 Abū al-Dardā’ judge of Madinah, Shurayḥ ibn al-Ḥārith al-Kindī judge of Kufa, Abū Mūsā al-Ash‘arī judge of Basrah, and ‘Uthmān ibn Qays judge of Egypt. For the territories of Sham (Greater Syria), a separate institution was established.

‘Umar set a remarkable example for his judges to follow and warned them not to deviate from it. In his letter to Mu‘ādh, 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 judgments, 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.

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 (*ḥalāl*) is made unlawful (*ḥarām*) 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.

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.

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.

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, Abū ‘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.<sup>6</sup>

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, registering claims, delineating jurisdictions, or for any other matters that would arise later, for the people’s lives were not yet complicated enough to require such refinements. Even the Shari‘ah specified no details, but left them to be determined by *ijtihād*. 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.<sup>7</sup>

Under the four rightly guided caliphs, the judiciary was limited to resolving civil disputes. Other types of disputes, such as *qisās* (where capital punishment may be prescribed), *hudūd* (where punishment, including capital punishment, is prescribed by the Qur’an), or *ta‘zīr* (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 Umayyads, particularly under the early rulers, and so the procedures remained uncomplicated. Major developments were confined mostly to recording decisions in order to avert evasion and forgetfulness. In fact, such an incident occurred during the reign of Mu‘āwiyah ibn Sufyān, when Salīm ibn Mu‘izz, the judge of Egypt, decided a case of inheritance. When the heirs reopened the dispute and returned to him, he recorded his decision in writing.<sup>8</sup> This period also saw agreement upon a judge’s qualifications, where the judicial procedure would be carried out, and the development of a system to address injustices in public administration.<sup>9</sup>

With the coming of the Abbasids, the judiciary made significant progress. Its sophistication grew both in form and procedure, and its vistas increased with the variety of cases heard. The court register was introduced, the judge's jurisdiction was increased, and the state established the position of chief judge (*qāḍī al-quḍāh*), which today is comparable to the office of the chief justice. One negative development, however, was the increasingly infirm nature of *ijtihād*, which limited the judges to following the previous rulings of the four established Sunnī schools of legal thought: *taqlīd*. Thus in Iraq and the eastern territories, judges ruled according to the rulings of Abū Ḥanīfah; in Syria and Spain according to Mālik; and in Egypt according to al-Shāfi'ī.<sup>10</sup>

After the Mongol destruction of Baghdad and the subsequent end of the Abbasid Empire in 606/1258, 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 that they followed.

Ibn al-Ḥasan al-Nabāhī portrayed the judiciary of Muslim Spain during the eighth Islamic century 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."<sup>11</sup> 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 *ḥisbah*, and the one responsible for it is called the *ḥisbah* 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 *wazīr*. 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 collections. 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 *ḥākīm* or judge.<sup>12</sup>

### 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,<sup>13</sup> 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.<sup>14</sup>

It is also clear that the responsibility for judging criminal cases was divided among such different authorities as the ruler (*khalīfah*), the appellate authority (*wālī al-ma‘ālim*), the military authority (*amīr*), the police commissioner (*sāhib al-shurṭah*), the market authority (*hisbah*), and the judge (*qāḍī*), in the limited sense represented by Ibn al-Qayyim above.<sup>15</sup> The responsibilities of each were not always exclusive or well-defined, for they differed in scope and overlapped. In fact, certain responsibilities associated with one sometimes would be entrusted to another in accordance with the ruler’s desires or as a result of his policies.<sup>16</sup>

Usually, the governor or the police commissioner was responsible for investigating such serious crimes as *hudūd* or *qiṣās*. Likewise, the market authority was usually responsible for assigning a punishment designed to deter an action (*ta‘zīr*) 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 the *hākim*, was responsible for settling civil disputes that involved upholding rights and making sure that these were enjoyed by those entitled to them.<sup>17</sup>

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

- *The System of Accusation.* Criminal cases are heard to resolve 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 evi-

dence of both sides, decide which argument seems stronger, and rule in accordance with his findings.

- *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.
- *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 other stages, features of another will appear dominant.<sup>18</sup>

We mentioned earlier that the Shari'ah does not provide a specific procedural system, but leaves such details to the ijihad and understanding of those responsible for ensuring that justice is done. History shows that rulers used one system or a combination of these systems, depending upon their preference. 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.<sup>19</sup>

#### THE ACCUSED

*The Rights of the Accused at the Investigative Stage.* The word *muttahaam* (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 *tuhāmah*, means "doubt" and "uncertainty." The initial "t" is no doubt a substitute for the letter *wāw*, 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 or his/her actions.<sup>20</sup>

In legal terminology, the word can be traced to several hadiths. For example, Ibn Abū Shaybah related in his collection *Al-Muṣannaḥ*, on the authority of Abū 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 misgivings."<sup>21</sup>

Ibrāhīm used to say: "The testimony of one concerning whom you have misgivings is not acceptable."<sup>22</sup>

The jurists (*fuqahā'*) 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.<sup>23</sup> 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: The Ḥanafīs, a claim is one's notification of one's right to something over another person present in the court<sup>24</sup>; the Mālikīs say that it is a statement that, if accepted as true, will entitle the one making it to a right<sup>25</sup>; the Shāfi'īs say that it is notification of one's right to something over someone else before a judge<sup>26</sup>; and the Ḥanbalīs define it as a person's ascribing to himself/herself an entitlement to something in the hand or in the safekeeping of another.<sup>27</sup>

The 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 *the 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.<sup>28</sup>

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'*), manumission, lineage, and agency. These were the kinds of cases that were usually referred to a judge for a decision.

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: someone well-known for his/her piety and integrity and thus unlikely to have committed the crime; someone notorious for his/her wrongdoing and profligacy and who is thus likely to have committed the crime; and someone whose circumstances are unknown, so that nothing may be surmised concerning the likelihood of his/her committing the crime.

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 dishonor them. There are two differing opinions regarding the punishment for those who make false claims or accusations against such people: that of the majority of the jurists, which says that the person should be punished, and that of Imām Mālik and Ashab, who held that punishment should not be meted out unless it can be proved that the accuser 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 crime 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, 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 Mālik, Aḥmad, Abū Ḥanīfah, 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.<sup>29</sup> The meaning of detention, as understood by classical jurists, is to hinder and limit freedom, regardless of whether this is accomplished by confinement in a prison, surveillance, or 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.<sup>30</sup>

#### 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 on it. Moreover, this principle may only be overruled if there is irrefutable evidence. 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 resembles the relationship of a branch to a trunk, for the two are found together throughout jurisprudential 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 protecting 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. 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 individual 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, eavesdrop on private conversations, open one's mail, or 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 temporarily curtailing or suspending the rights of an individual, then such an

act will be done based on the nature of what is dictated by necessity, which 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 investigator's power 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 Sharī'ah allows the investigator or the judge to place certain restrictions on the rights of the accused to maintain the principle of the rights of society, 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 the accused is limited and, if it encroaches on some of the accused's rights, it certainly does not extend to any of his/her other basic rights. This is why the Prophet called such a person a "prisoner."<sup>31</sup> This also establishes that the accused will be maintained at the state's expense.

Ibn al-Qayyim defined detention as "preventing the individual from dealing with others in any way that would lead to their being harmed."<sup>32</sup> Other jurists considered detention as being in the same class of punishments as the *hudūd*. 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" (67:15). Thus, a person cannot be detained or deprived of freedom of movement without a legally valid reason.<sup>33</sup>

Islam has shown a great deal of consideration for the prisoner and his/her affairs. For example, 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. 'Alī ibn Abū Ṭālib used to make surprise visits to the prison in order to inspect its condition and listen to the inmates' complaints.<sup>34</sup>

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, the sentencing judge must 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-Māwardī wrote 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-Māwardī'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 be left to the discretion of the imam or the relevant court official. Indeed, the latter view is the more reasonable.<sup>35</sup>

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 the objective for which the accused was detained, the position of the one doing the sentencing, the sentencing itself, and the length of the sentence.<sup>36</sup> 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 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.<sup>37</sup> 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 (24:27-28),

and “O you who have faith! Avoid being overly suspicious; for suspicion in some cases is wrong; and do not spy on one another” (49:12).

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. Once, Ibn Mas‘ūd, when he was governor of Iraq, was told that “Walīd 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-Khaṭṭāb was informed that Abū Miḥjan al-Thaqafī was drinking wine in his home with some friends. ‘Umar went straight to Abū Miḥjan’s house, walked inside, and saw that there was only one other person with Abū Miḥjan. This man said to ‘Umar: “This is not permitted to you. Allah has prohibited you from spying.” ‘Umar turned and walked out. ‘Abd al-Raḥmān 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 Rabī‘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 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-Qurṭubī, said that what the verse was prohibiting 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 do not spy 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 distin-

guishes 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 *ḥarām*. 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 *ḥarām*. 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 the verse prohibits.

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. In fact, they distinguished between those whose apparent lifestyles indicated their honesty or dishonesty. 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 was lawful.

The Qur'an and the Sunnah prohibit spying 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 Abū Mihjan al-Thaqafī and Rabi'ah ibn Umayyah, for both were well-known for their love of strong drink. The same was true when Ibn Mas'ūd 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, surveillance of personal conversations, censorship of personal mail, and 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 is a violation of what those two sources have established. Therefore, the above actions are permitted only if they can help determine the circumstances a crime, protect society by ensuring that criminals are not punished, and ensure that the innocent are not punished.

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 in which 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 following article.

## NOTES

1. Ḥasan Ibrāhīm, *Tārīkh al-Islām al-Siyāsī*, 1:102.
2. *Ibid.*, 1:458.
3. 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-Rāzī’s *Al-Maḥṣūl* (Beirut: Mu’assasat al-Risālah, 1992), 80-83.
4. The hadith was related by al-Tirmidhī, Abū Dāwūd, al-Nasā’ī, al-Bayhaqī, and al-Ḥākim. See al-Shawkānī, *Nayl al-Awṭār* (Beirut: Dār al-Jīl, n.d.), 9:220.
5. 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 affirmer or claimant. [Trans.]
6. Ibn al-Qayyim, *I’lām al-Muwaqqi’īn*, 1:85; al-Māwardī, *Al-Aḥkām al-Sulṭāniyyah*, 71-72; al-Bayhaqī, *Al-Sunan al-Kubrā*, 10:115.
7. Ibn al-Qayyim, *Al-Ṭuruq al-Hukmiyyah*, 218.
8. *Kitāb al-Qaḍā’*, 309; Maḥmūd Arnūs, *Al-Qaḍā’ fī al-Islām*, 49; Ibrāhīm Najīb Muḥammad Awad, *Al-Niẓām al-Qaḍā’ī*, 48.
9. Ibn Khaldun, *Al-Muqaddimah*, 741.
10. *Ibid.*, 1150. See also Ibrāhīm, *Tārīkh al-Islām al-Siyāsī*, 2:55, 3:306.
11. Ibrāhīm, *Tārīkh al-Islām al-Siyāsī*, 4:377-86; Awad Muḥammad Awad, *Al-Majallah al-‘Arabiyyah li al-Difā’ al-Ijtimā’ī*, no. 10 (October 1979): 98.

12. Ibn al-Qayyim, *Al-Ṭuruq*, 215-16.
13. Al-Māwardī, *Al-Aḥkām al-Sulṭāniyyah*, 69-73; Ibrābīm, *Tārīkh al-Islām al-Siyāsī*, 4:377-86.
14. These are faith in Islam, maturity, the ability to reason intelligently, freedom and trustworthiness, having all of one's faculties, and knowledge of the Shari'ah's sources.
15. Ibn al-Qayyim, *Al-Ṭuruq*, 215.
16. Ibn Khaldūn, *Al-Muqaddimah*, 740.
17. Ibid., Ibn al-Qayyim, *Al-Ṭuruq*, 218-19.
18. Ibn Khaldūn, *Al-Muqaddimah*, 740-43; Awad, *Al-Majallah al-ʿArabiyyah*, 101-3.
19. Ibn Khaldūn, *Al-Muqaddimah*.
20. *Al-Miṣbāḥ*, 107, 129; See "T-H-M" in al-Zabīdī, *Tāj al-ʿArūs*.
21. Ibn Abū Shaybah, *Al-Muṣannaf*, 8:320; al-Bayhaqī, *Al-Sunan al-Kubrā*, 10:201; al-Tirmidhī, *Al-Sunan*, hadith no. 2299; al-Khaṣṣāf, *Adab al-Qāḍī*, 2:112, 1:229.
22. Ibn Abū Shaybah, *Al-Muṣannaf*, 8:321.
23. Aḥmad ʿAbd al-Razzāq al-Kubaysī, *Al-Ḥudūd wa al-Aḥkām*, 228; Abū al-Walīd ibn Shahnah al-Ḥanafī, *Lisān al-Hukkām*, 226; ʿAlā al-Dīn al-Tarabulsi, *Muʿīn al-Hukkām*, 54.
24. Al-Kubaysī, *Al-Ḥudūd*, 288.
25. Al-Jurjānī, *Kitāb al-Taʿrifāt*, 93; al-Muṭṭarizī, *Al-Muʿarrab min al-Mugharrib*, 164.
26. Al-Kubaysī, *Al-Ḥudūd*, 287.
27. *Sharḥ Ḥudūd Ibn ʿArafāh*, 468.
28. *Hāshiyat Qaylūbī wa ʿUmayrah*, 4:334.
29. Ibn al-Qayyim, *Al-Ṭuruq*, 101, 103.
30. Al-Māwardī, *Al-Aḥkām al-Sulṭāniyyah*.
31. Ibn al-Qayyim, *Al-Ṭuruq*.
32. Ibid.
33. Ibn Ḥazm, *Al-Muḥallā*, 11:141.
34. Abū Yūsuf, *Kitāb al-Kharāj* and its commentary *Fiqh al-Mulūk*, 2:238.
35. Ibn al-Qayyim, *Al-Ṭuruq*, 103.
36. Awad, *Al-Majallat al-ʿArabiyyah*.
37. This is part of an authentic hadith. See al-Suyūṭī, *Al-Faḥ al-Kabīr*, 3:256.

# The Rights of the Accused in Islam

## (Part Two)

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 by proving that the evidence cited is invalid or presenting contradictory evidence. 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 the defense. By comparing the evidence presented by the defense with that of the accuser, the truth will become clear – which is, after all, the investigation's objective.

Therefore, self-defense is not only the right of the accused to use or disregard as he/she pleases, but it 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. Society must ensure that the innocent are not convicted and that the guilty do not escape punishment. This is why 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 had 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-‘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 deaf mute cannot be punished for *ḥadd* crimes, even when all of the conditions regarding evidence have been satisfied. The reasoning here is that if the deaf mute were capable of speaking, he/she 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/she may not be able to express all that he/she 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-qāḍī*) 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, Abū Ḥanīfah ruled 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. An authentic hadith relates 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.

Many Shari<sup>h</sup> texts 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) 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, what the law says, the weight of the evidence presented, and 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 rights to defend himself/herself and 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 accused, it is also true that he/she might be more capable than the other party. 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 the accused 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 ijtihād. In such a case, it is quite possible that the best opinion and the one closer to the spirit of the Shari<sup>h</sup> 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 *ḥudūd* 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, the accused will obviously 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 *ijtihād* 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.

#### 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 *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.<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 truth is more probable than its falsehood. 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 truth 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. 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 canceling the sin of unbelief and the prescribed punishment for apostasy. Therefore, it may be considered grounds for canceling 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:

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 a [blameworthy] innovation.”