Part III:

Human Rights

The Testimony of Women in Islamic Law

The only Qur'anic verse to equate two women's testimony to that of one man is Qur'an 2:282, the so-called "verse of debt" (*āyat al-dayn*). This verse contains a significant amount of material that later jurists categorized as recommended or merely instructional (*irshād*) and without legal import. However, a very few jurists opined that recording debts, witnessing, and all other matters dealt with in the verse may be categorized as obligatory (*wājib*).

Whether we agree or disagree with a particular school, there is near unanimity among all jurists that the Qur'an's mention of testimony in relation to transactions was revealed to advise Muslims about how they might reduce the possibility of misunderstandings arising among themselves. Therefore, the entire matter of testimony was revealed to humanity by way of instruction. Obviously, instruction is one thing, while binding legal precepts are another matter entirely.

The verse of debt, moreover, may be seen as connecting testimony, the taking of witnesses, the agreement of both parties to the contract at the time of its ratification, and the judge's (*qāḍī*) acceptance of testimony given by the witnesses, as follows:

> … and call upon two of your men to act as witnesses; and if two men are not available, then a man and two women from among such as are acceptable to you as witnesses ... (2:282)

The verse goes on to explain the reason for seeking testimony from two women in place of the testimony of one man, by saying "... so that if one of them should make a mistake, the other could remind her" (2:282).

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Thus, the verse clearly indicates that there are differences in the ability of women to serve, under the prevailing social conditions, as competent witnesses and givers of testimony in cases involving financial transactions. The relevant wording implies that, in general, transactions were not often matters of concern to women at that time. It also indicates that the actual witness would be one woman, even though her testimony might require the support of another woman who would "remind" her if necessary. Thus, one woman acts as a guarantor for the accuracy of the other woman's testimony.

Obviously, then, the two are not on the same level, for one witness is supposed to be knowledgeable and aware of that to which she is testifying. As such, her testimony is legally acceptable. The other witness is considered merely a guarantor, for the basis of all legal testimony is that it should aid the judge in reviewing the case as if he/she had been an actual witness thereof. Moreover, testimony is considered a legal responsibility so as to instill within the witness a heightened sense of his/her awareness of God and the importance of the undertaking, so that he/she will not be careless with the testimony or swayed by emotions or personal feelings. If the verse were understood in this way, probably many of the past and present disputes surrounding it could have been avoided, for the main cause of such disputes has been the belief that the verse has binding and legal significance.

Furthermore, classical scholars appended another matter to the verse's guidelines concerning testimony, one that had absolutely nothing to do with the distribution of responsibilities addressed in the verse: their assumption that the verse pointed to women's natural inferiority, especially in terms of their mental and physical abilities, despite its clear reference to women living at the time of revelation – a time when there were few or no opportunities for women to receive an education, occupy positions of responsibility in society, or undertake work that would increase their experience in ways that would make "being reminded" unnecessary. However, once society passes beyond that stage and women are allowed to participate more fully in its affairs, and in transactions in particular, there should no longer be a need for such arrangements.

The question for consideration is whether or not, on the basis of the verse's circumstantial context (*ʿillah*), the testimony of one woman may be accepted even when the verse states that two women should testify. Before dealing with this question, however, and before examining whether or not it is legitimate or whether it may be answered in the affirmative or the negative, we must reflect on several other issues.

The First Issue. The Qur'an, as discourse, was directed toward a people who, before its revelation, had little or no regard for women and did not allow their inclusion in matters considered the domain of men. In fact, pre-Islamic Arab society sanctioned female infanticide:

> And they ascribe daughters unto God, who is limitless in His glory, whereas for themselves [they would choose, if they could, only] what they desire; for, whenever any of them is given the glad tidings of [the birth of] a girl, his face darkens and he is filled with suppressed anger, avoiding all people because of the [alleged] evil of the glad tiding that he has received, [and debating with himself:] shall he keep this [child] despite the contempt [which he feels for it] – or shall he bury it in the dust? Oh, evil indeed is whatever they decide! (16:57-59)

According to the Qur'anic commentator Fakhr al-Dīn al-Rāzī:

> During *jāhiliyyah,* men would hide when they knew that their wives were about to give birth. If they were told they had fathered a son, they rejoiced. But if they learned that the newborn was a girl, they were saddened and would stay in seclusion, trying to make up their minds about what they should do with the child: *Shall he keep this [child] despite the contempt [which he feels for it] – or bury it in the dust?* Should he keep the child alive, as an object of perpetual disdain, or simply do away with it?[1]

Nor was this phenomenon very far removed from the period of revelation. In fact, some early Muslims had killed their infant daughters. Qays ibn ʿĀṣim once said to the Prophet:

> "O Prophet of God! In the days of ignorance I buried alive seven daughters." The Prophet replied: "For each one of them, set free one slave." The man said: "But I have only camels." So the Prophet told him: "Then for each one, sacrifice a camel (at the hajj)."[2]

Another man told the Prophet:

> "I have never been able to taste the sweetness of faith, even though I have accepted Islam. In the days of ignorance I had a daughter. One day, I told my wife to dress her up. When my wife sent her out to me, I took her to a distant valley in the desert where nothing grew. At that place, I threw my daughter down from my camel, and rode away. When I left her, I heard her calling to me: 'Father! You have killed me!' Now, whenever I think of her and what she said, I find that nothing helps me." The Prophet replied: "Whatever wrongs took place in the days of ignorance are abolished by Islam. And whatever wrongs take place in Islam may be abolished by repentance (*istighfār*)."[3]

The Qur'an transported the people of those times to the realm of faith in absolute gender equality. This single article of faith, perhaps more than any other, represented a revolution no less significant than Islam's condemnation of idolatry and its censure of blind faith passed, without examination, from one generation to another. Theoretically, such equality may seem a relatively simple matter to accept. But when it comes to the practical implementation of any new social model, problems are certain to arise. In the case of early Muslim society, given the long-established customs, attitudes, and mores of pre-Islamic Arabia, it was necessary to implement such changes in stages and to make allowances for society's capacity to adjust itself accordingly. For example, if God had prohibited wine by degrees, as related by ʿĀ'ishah,[4] it follows that He would do the same in the case of an issue of far greater importance and sensitivity in that society, namely, the equality of men and women.

It would appear that the Qur'an sought gradual change via prudent and judicious means, rather than all at once, in which case the possibility of rejection and negative reactions might have been greater. Thus, its initial intent was to instruct Muslims in the ways of a truly civilized society, one in which economic, social, or other changes would be integral to its development. Such change, moreover, is designed to occur in accord with the Qur'anic teachings for introducing reform on the basis of the two readings: that of revelation and that of the natural universe. And this is what the verse of debt brings to us.

In its own subtle manner and with characteristic sagacity, the Qur'an places the reclassification of women as fully participating members of society on its agenda for reform. By establishing a role for woman in the witnessing of transactions, even though at the time of revelation they had little to do with such matters, the Qur'an seeks to give concrete form to the idea of woman as participant: "… and if two men are not available, then a man and two women from among such as are acceptable to you as witnesses" (2:282).

The objective is to end the traditional perception of women by including them, "among such as are acceptable to you as witnesses," and to bring about their acceptance as full partners in society by means of this practical recognition. In this way, the Qur'an seeks to overcome the psychological impediments that prevent men from accepting women as their equals in society. At the time of revelation, the question of numbers was irrelevant, as it was the equality of women that the Qur'an sought to emphasize. Even the matter of witnessing served merely as a means to an end or as a practical way of establishing the concept of gender equality, for what was critically significant was the Qur'an's application of the principle of equality not only on a

religious or otherworldly level, but on the levels of human society, interpersonal relations and, most pointedly, commerce. Under the prevailing circumstances, all of this was extremely important.

Thus, it was as if the Qur'an, in its subtle attempt to bring about major change in a society whose customs constituted a major obstacle in the way of that change, sought to address that society in an "acceptable" manner by implying that women were somehow less important as witnesses in such matters. As a result, the testimony of two women would equal that of one man. It was as if the Qur'an had recognized society's view that women, in general, are quicker to forget matters related to affairs with which they had little or nothing to do, especially when these were usually conducted and concluded orally.

Furthermore, the society's oral culture was dominated by two cultures: that of pagan Arabia and its female infanticide and that of the People of the Book (Christian and Jewish inhabitants of Arabian towns) who considered woman the chief reason for humanity's fall from Paradise. Under those circumstances and by means of this approach, the change sought by the Qur'an was not change that would completely overturn the society's customs, but rather a modification or a judicious laying of foundations for accepting its teachings about equality in general. Otherwise, it is more than obvious that the "forgetfulness" taken as a circumstantial context for the legal ruling regarding the acceptance of two women's testimony in place of one man's is a trait shared equally throughout the world. From the beginning of history, each man and woman has been subject to it. In fact, Adam is characterized as having forgotten the covenant of his Lord, a matter of far greater importance.

Both the pagan Arabs and the Arabian People of the Book believed that women were somehow a lesser breed than men. Indeed, the dominant culture on the Arabian peninsula at the time was that of the Christians and the Jews, both of which refused to grant equality to women.[5]

The Second Issue. Christian, Jewish, and Muslim scholars have neglected the wisdom of their respective revelations concerning the equality of the sexes. Qur'anic commentators and jurists in particular seem to have ignored the broader intellectual aspects of a woman's testimony. In addition, some seem to have allowed themselves to completely overlook the basic Qur'anic principle of gender equality, even though this teaching is mentioned in literally hundreds of Qur'anic verses. Instead, they have engrossed themselves in studies emphasizing biological and psychological differences, thereby

attempting to derive evidence from divine revelation to support the attitudes and customs of their pre-Islamic heritage.

Such a decidedly un-Islamic bias has prevented Muslim scholars from considering the issue of a woman's testimony in light of the broader Qur'anic teachings of equality. Instead of looking at the issue as a mere division of labor, they considered it as one based on natural incompetence. Taking their cue from Jewish, Christian, and pagan Arab traditions and attitudes, they dwelt on a "woman's natural tendency to be forgetful and fall into error" and her physical "disabilities." Did God not say, they argued, that "if one of them should make a mistake, the other could remind her" (2:282), thereby reading no more than the letter of revelation and without taking into consideration the verse's context or attempting a balanced reading of woman or of nature?

In essence, Muslim jurists and Qur'anic commentators allowed their cultural prejudices to color their discussions on women. In their ignorance, they used those verses declaring the competence and equality of women to "prove" the contrary. Using the same perverted logic, they dealt with the subject of the shares due to women through the laws of inheritance.

The Third Issue. Let us turn now to a discussion of the meaning of "mistake" (*ḍalāl*) in the verse in question. According to the *Arabic Lexicon*,[6] the underlying meaning is "absence." Later, the word was used to indicate any turning from the right way, whether intentionally or otherwise.[7] The word came to be used in the sense of "to forget," for one who forgets is one for whom the right way is absent. The wisdom in the Qur'an's choice of this word, rather than the one usually chosen to mean "to forget" (*nisyān*) or "to err" (*khaṭa'*) is perhaps that the meaning of *ḍalāl* is broader and more comprehensive than the other two, as a mistake in testimony may be either intentional or unintentional.[8]

The Fourth Issue. Since most commentators have explained that the meaning of *ḍalāl* in this verse is probably "to forget," it would be best here if we paused to consider the meaning of the infinitive, "to forget," which is oversight and dereliction. This also may come about either intentionally or unintentionally.

The Fifth Issue. Commentators differ in their interpretations of "reminding" in the verse "if one of them should make a mistake, the other could remind her" (2:282). For example, Ṣufyān ibn ʿUyaynah opined that

a woman who gives testimony and who is helped through another woman's reminding becomes legally equal to a man. Other commentators, including al-Ṭabarī, rejected this view on the grounds that the other's "reminding" has the effect of causing the first woman to remember something she had forgotten:

> Clearly, the mistake that might be made by one of the women in the testimony she gives would be her forgetting, like the mistake made by a person in a matter of religion, when they are unsure of something and stray from the truth. So, if one woman should become this way, how is it possible that another's reminding her will make her as if she remembered the testimony she had forgotten and mistaken?

Qur'anic commentators who came after al-Ṭabarī did not go beyond these two positions, namely, that the woman remembered after being reminded (and could then be legally equal to one man, but only with the help of a "reminder") or that the combination of the reminding woman and the forgetful woman is, in legal terms, equal to one man who remembers.

In his *Aḥkām al-Qur'ān*, Ibn al-ʿArabī, first mentioned the opinions summarized above, then asked rhetorically: "What if there is one woman with one man, so that the man can remind her if she forgets?[10] What is the wisdom in that?" Immediately, however, he goes on to nullify the question by stating: "The answer is that Allah legislates what He wills, and He knows better what wisdom lies behind His legislation. It is certainly not essential that His creation should know and understand the wisdom in what He legislates for their betterment and welfare."

In their interpretations of "mistake" and "remind," Qur'anic commentators have approached the issue from a perspective based on the assumption that the division of testimony for women into halves is somehow connected with women's inherent inequality to men. This idea has been shared by classical and modern commentators alike, so that generation after generation of Muslims, guided only by *taqlīd* (imitation), have continued to perpetuate this faulty understanding. Certainly, the attitudes engendered by such a misunderstanding have spread far beyond the legal sphere.

Based on the above, I would like to say that the purpose of this particular article of legislation was to emphasize the Qur'anic principle of gender equality by means of a practical formula. The subject of this principle is, furthermore, by no means limited to witnessing and legal testimony, regardless of whether we consider this a right, a responsibility, or a partnership in the affairs of society. The important thing is that the presence of two women as

witnesses to such affairs is held to be essential, even if one is there only to remind the other in the event that she forgets.

Thus, Ibn al-ʿArabī's question is valid: "What if a man is there to remind the female witness?" If the point is to remember the event after it has been forgotten, it should suffice that a man remind a woman if she forgets. The emphasis, however, on the necessity of having two women is so that they may support one another in the testimony and in breaking down the psychological barriers erected by society, regardless of their numbers. All of this is a part of the miraculous nature of the Qur'an, which has paved the way for major social changes in economics, law, relationships, and social structure in a single verse.

The Sixth Issue. But how was this "miracle" perverted into the indictment (or the insinuation) that it became, and one that generations of Muslims have had little success in refuting? There are several reasons for this, among them the following:

- The dominant culture at the time of revelation was, as mentioned earlier, a mix of pagan Arab, Christian, and rabbinical Jewish, all of which had little regard for women, minimized their role, stressed their natural inferiority to men, and refused to grant them equality.
- The prevailing social customs were dictated by an oral legal tradition passed down from generation to generation by the male elders of the tribes. This tradition was perpetuated via the proverbial Arab veneration of their elders and their ancestors.
- The prevailing social structure was predicated on military and commercial success, and both, owing to their physical nature, were the domain of men – military success depended on the force of arms and commercial success depended on caravans traveling across vast expanses of desert.
- Family honor was a key element in that society, and women were perceived as weak links in the chain that preserved that honor. Thus, men felt it was their duty to control women.

These and other factors led Islamic-Arabic thought to dwell upon the physical and mental differences between men and women whenever it encountered texts from the Qur'an or the Sunnah that dealt differently with

men and women, especially in matters of witnessing, inheritance, and indemnity for bodily injury. For example, consider al-Rāzī's extraordinarily biased commentary, written in the seventh Islamic century, on Qur'an 2:282[11]:

> The nature of women is dominated by forgetfulness, owing to a predominance of cold and wetness in their physical constitution. The joining of two women in forgetting is less likely than the occurrence of forgetting in just one woman. This is why two women are to take the place of only one man.

He also maintains that the verse in question can be read in different ways, namely, "so that when one makes a mistake," as if making a mistake is a foregone conclusion, and, "willing that when one makes a mistake," as if to say that it is God's will that one of them make a mistake. He justifies this bizarre assertion by saying:

> Here, there are two purposes. The first is to bring about testimony, and that will not take place unless one of the two women reminds the other. The second is to explain that men are better than women, so that it becomes clear why it is just to equate two women to one man. This explanation will be served only if one of the two women actually forgets. Moreover, if both purposes are to be served, and there is no way that will happen unless one of the women forgets and the other reminds her, then, without doubt, that is what is sought.

The reader will note how this greatly respected scholar attempted to put words in the mouth of the Qur'an for the sole purpose of supporting prevalent social ideas, despite the fact that this would destroy a principle that the Qur'an seeks to establish as one of its most important principles – gender equality! But consider how a scholar of al-Rāzī's stature could state with authority that God stipulated that there be two female witnesses just so He could cause one of them to forget and thereby establish the principle of male superiority!

Before discussing the evidence presented in the Sunnah, I should explain that witnessing (*shahādah*) and legal authority (*wilāyah*) are two totally separate matters. However, many jurists ignore this point when discussing why a woman's testimony is equal to only half of a man's. Rather, witnessing should be understood as an attempt to present the judge with an objective acount of an event so that he/she can make a fair judgment. All of the ten or more conditions stipulated by the jurists for witnesses were formulated in such a way that the ruling could not be dictated to the judge. Since Islam

considers the ruler as God's deputy (*khalīfah*) and as being responsible for carrying out His will by implementing the Shari'ah (i.e., the ruler has no sovereignty in his/her own right), then how can one say that a witness has legal authority over, or dictates the judgment to, the judge?

To summarize, then, there is no difference between men and women in terms of their abilities and propensity to forget, the possibility of colluding to present false witness, or their ability to speak either the truth or fabrication. Moreover, the Qur'an's objectives do not include anything that would indicate otherwise. Therefore, no evidence suggests that there is anything other than equality between the sexes.

THE EVIDENCE OF THE SUNNAH

I shall examine the evidence of the Sunnah as it pertains to this issue. But before doing so, I would like to emphasize that preeminence in this matter, and in all others, belongs to the Qur'an alone, for only the Qur'an is without blemish, as its text is protected by God.[12] Furthermore, Prophet Muhammad was ordered to recite it to the people, impart its wisdom, and purify them by means of it. After this, the people were commanded to learn it, ponder its meanings, and disseminate its knowledge openly. The Qur'an was revealed "to clarify everything" (16:89), and therefore no other source can share in its qualities and attributes. Thus, it is to be consulted whenever differences occur: "... and on whatever you may differ, the verdict thereon rests with God" (42:10). The Sunnah, on the other hand, clarifies the Qur'an and helps us understand and interpret its meaning. It does not overrule the Qur'an, overstep its bounds, abrogate its texts, contradict it, or violate its principles.[13]

Therefore, the Sunnah does not transgress the bounds set by the Qur'an in regard to the principles of the equality of all human beings and of men and women. Rather, this is a firmly established principle, one of the highest of all Islamic values and a fixed methodological and epistemological truth. Furthermore, many hadiths emphasize this point. For example, Abū Dawūd related a hadith in which the Prophet is reported to have said: "Verily, women are the partners of men."[14] Likewise, al-Bukhārī related a hadith in which 'Umar ibn al-Khaṭṭāb said: "In the Days of Ignorance, we considered women to be worthless. But when Islam came and God mentioned them, we realized that they had rights over us."[15] Another version of the same hadith states: "By God! In the Days of Ignorance we never used to consider women to be important. But then God revealed what He revealed concerning them, and granted them what He granted them."[16]

If the Qur'an equated, in absolute terms, the humanity of both sexes and said that men and women are equal, no one has the right to say otherwise. In addition, they certainly have no right to say that the Sunnah states otherwise, for the Sunnah is there to clarify the Qur'an, not to contradict or reject its basic principles. Such "rights" cannot be tolerated, especially when the Prophet dealt with the issue in his final message, which was delivered to the Muslims on the occasion of the farewell pilgrimage:

> Verily the Almighty has distanced you from the time of ignorance and its aggrandizement of your male forebears. All people come from Adam, and Adam came from dust.

In his commentary on the Qur'anic verse concerning the creation of each soul from a male and a female, al-Zamakhsharī writes:

> ... that is, from Ādam and Ḥawwā' (Eve). And the Almighty said that He created every one of you from a father and a mother, so that there are none among you who may claim other than that he or she was created like every one else was, in exactly the same way.[17]

There is no basis, then, for claiming that one is somehow less than the other. Such a view only manifests its holder's ignorance of the Sunnah and its true relationship to the Qur'an, for, in effect, it states that the Sunnah contains something that refutes, ignores, or contradicts the Qur'anic principle of absolute gender equality.

Hadith scholars expended a great deal of effort on the Sunnah during the classical period. In fact, had the *ʿulamā'* continued to refine these scholars' methodologies, the Muslim world might not have fallen into the intellectual difficulties and pitfalls that robbed it of its vitality and impeded its progress to such an extent that, even today, it continues to suffer from the effects of intellectual stagnation.

The inability to use these methodologies has persisted since the advent of the herd mentality encouraged by *taqlīd* (imitation). Moreover, this same mentality has led the Muslims to neglect the differences between the concepts of service to God and slavery to despots, so that the one was equated to the other with disastrous consequences for Muslim society. While *taqlīd* legitimized the abandonment of performing ijtihad (effort to determine the actual meaning) and renew their faith, both of which resulted in the Muslim world following a handful of imams in matters of fiqh, it also prompted them to accept the opinions of a few selected scholars concerning the degree

of authenticity, or lack thereof, of hadiths and what could and could not be accepted from the Sunnah.

The methodologies for dealing with the Sunnah remained the same as those used by their initial developers, and underwent little or no change. Thus, it is as if they were used in the first age of ijtihad and then abandoned. Such an oversight has resulted in the Muslim world's continued acceptance of an understanding of the Sunnah based on the individual efforts of a few classical-era scholars or from the first three Islamic centuries. In terms of women's testimony, any discussion on this subject was abandoned early on in our history and at a time when prevailing social attitudes were antithetical to women. For the last several centuries, whenever the subject came up, reference was made to the thinking of earlier generations and the matter was closed.

Let us consider the differences, in the classical period, between ijtihad on questions of fiqh and ijtihad on questions of certain hadiths' authenticity. Entire schools grew up around the imams of fiqh. For example, Abū Ḥanīfah never ruled on an important question until he had presented it to his dozens of students and discussed it with them at length, often for an entire month.[18] On the other hand, hadith scholars worked as individuals to collect, remember, and transmit narrations. As the majority of hadiths were transmitted by certain individuals to other individuals, the criteria and methods used were highly individualized. For example, in regard to a certain hadiths' authenticity, we read that "this was authenticated in accordance with the conditions (established by) al-Bukhārī" or by some other hadith scholar. These conditions, of course, represent the scholar's own preferences and criteria based on personal experience and taste. All of this points to major differences between the *fuqahā'* and the *muḥaddithūn*.

Within fiqh, an entire body of knowledge (viz., *uṣūl al-fiqh*) gradually to studying the methodological principles and guidelines regulating the actual processes involved in deriving juridical rulings and classifications from the Shari^{c}ah. Owing to its theoretical nature and importance in the eyes of scholars, *uṣūl al-fiqh* passed through several stages of development and refinement as a discipline in its own right. The "conditions" of the hadith scholars, by comparison, largely remained the result of individual efforts and thus never attained the sophistication of *uṣūl al-fiqh*. Any attempt to discern a comprehensive methodological framework would take a great deal of effort to collect and piece together an assortment of methods and criteria from the works of various hadith scholars. No single set of "conditions" would ever yield anything approaching a comprehensive methodology.

There is a world of difference between the existence of such "conditions" throughout the corpus of classical Hadith literature and their being ordered in such a way as to facilitate a formal process of ranking hadiths in accordance with established methodological criteria.

Over the centuries, many controversies have arisen over the Sunnah and its validity as a source of Shari'ah classifications and rulings, for while its validity is obvious, the methodology for dealing with it has remained difficult.[19] Furthermore, while the integrity of the Qur'anic text is guaranteed by God, the Prophet insisted that the Companions memorize and preserve it. So great was his insistence that he once prohibited them from collecting his sayings (hadiths) and treating them as they treated the Qur'an. Nonetheless, several Companions memorized and transmitted what the Prophet had said and done. In many cases, however, they used their own words to convey what he had said, as they were concerned with the meaning rather than the exact wording. Such changes opened the way to possible further distortion, for other narrators felt free to express the hadith's meaning rather than its exact text. This, in turn, increased the possibility of intentional distortion. Moreover, as the meaning grew further from the one originally intended by the Prophet, whether intentionally or otherwise, the sense of context was also lost and, in many cases, the hadith's true import became impossible to discern.

With the rise of theological disputes and sectarianism, a great deal of spurious Hadith literature was circulated. This caused the great hadith scholars to look for a way to preserve the Sunnah, which involved stipulating methods and procedures for sifting sound narrations from those that were unsound. While their efforts continue to enrich all Muslims, the methods they used were determined by the age in which they lived and the available methodological tools.

In fact, the methods they employed were quite varied, and some even became widespread. Chief among these were the methods developed for classifying and authenticating the chain of transmission (*isnād*). Highly specialized and technical studies were conducted on every person who related even a single hadith, so that his/her strengths and weaknesses as a narrator could be known and used in assigning a rank to the hadith related. Volume upon volume of biography, in the forms of history (*tārīkh*), ranking (*ṭabaqāt*), and biographies (*siyar* and *rijāl*) were written to cover the intellectual life histories of hundreds of thousands of narrators. Even so, as the "conditions" or criteria differed from biographer to biographer, there was a great deal of disagreement over which narrators could be (or could not be)

considered trustworthy or accurate, especially in regard to those who came after the first generation.

In addition, these scholars developed methods for criticizing the text and exposing what they considered "fatal" textual faults that would disqualify the hadith in question from serious consideration, even if no fault could be found in its method of narration or chain of narrators. The hadith scholars emphasized that a hadith could not be cited as a proof (legal indicator) until it had satisfied all of the methodological criteria used to authenticate both its chain of transmission and its text. Had this been the case in regard to what the Sunnah had to teach regarding women, their status in the Muslim world today would very likely be quite different.

Muṣṭafā Sibāʿī, who sought to summarize the methodological considerations devised by the hadith scholars for criticizing the texts of hadiths, counted around seventeen.[20] Not every hadith scholar accepted all of these criteria, however, and there were significant differences in how they applied the criteria that they did accept. Some of these criteria may appear to overlap, while some seem more concerned with the chain of transmission than with the actual text. Nevertheless, the important thing is that the hadith scholars recognized the need for such criteria, in addition to the criteria they developed for classifying the chain of transmission.

In recent years, Muṣfir Gharām Allāh has done some important work regarding the criteria used in hadith textual criticism. He has summarized the criteria collected by Sibāʿī into seven,[21] as follows:

1. It should not contradict the Qur'an.
2. Its different versions should be in agreement.
3. The practice (Sunnah) recorded in the hadith should agree with what is known about that particular practice.
4. It should concur with known historical facts and events.
5. It should be free of grammatical and stylistic weaknesses.
6. It should not contradict established Sharīʿah principles or Islam's universal truths.
7. It should not contain material that is impossible to imagine as having originated with the Prophet.

Even so, the Muslim mind is still confronted with material from the Hadith literature that clearly contravenes the natural laws formulated for the

universe. For example, several Hadith collections include the narration by Asmā' bint ʿUmays, who reported that the Prophet would receive revelation while his head was in ʿAlī's lap. Once, the revelation took so long that ʿAlī was unable to perform the *ʿaṣr* prayer until the sun had set. Then the Prophet said: "O God! He was busy obeying You and Your Prophet! So, please, return the sun." Asmā' said: "I saw the sun go down and then I saw it come back above the horizon after it had set."

It appears that the intention of those who fabricated this hadith was to compete with the Jews. If the Jews could boast of a miracle when the sun remained on the horizon long enough for Joshua and his army to defeat their enemies and bring victory to Banū Isrā'īl, then why should Prophet Muhammad's nephew not have a similar miracle attributed to him? Many hadith scholars, including Aḥmad ibn Ḥanbal, Ibn Kathīr, Ibn Taymiyyah, al-Dhahabī, Ibn al-Jawzī, and Ibn Qayyim, say it is a fabrication. Even so, many others have upheld its authenticity, including such learned and respected imams as al-Bayhaqī, al-Ṭaḥāwī, Ibn Ḥajr, Qāḍī ʿAyāḍ, al-Haythamī, al-Qusṭalānī, al-Suyūtī, ʿAli al-Qārī, and others.[22]

But how could this have happened? How could the Muslim mind have accepted a single-narrator narration[23] of such an incredible event? How did such a hadith escape their scrutiny or pass their criteria for textual criticism? Why did they not compare it with another hadith that has been authenticated by both al-Bukhārī and Muslim, in addition to many others? This particular hadith related that during the Battle of Aḥzāb, when the fighting was so intense that the Muslims were unable to perform the *ʿaṣr* prayer, the Prophet said: "May God fill their (the idolaters') homes and their graves with fire, for they have prevented us from performing the *ʿaṣr* prayer!" God did not stop the sun's progress or return it to the horizon after it had set so the Prophet and his Companions could pray the *ʿaṣr* prayer, even though they had been engaged in jihad.

Among contemporary hadith scholars, Muḥammad ʿUmrānī Hafashī has completed an excellent study in which he applies the *muḥaddithūn's* methodology to both the hadith's chain of transmission and text as related by al-Bukhārī and Muslim and held by both to be authentic. Hafashī, however, establishes that this hadith is unquestionably a fabrication. The hadith in question, related by Abū Dharr al-Ghifārī:

> One day the Prophet said to his Companions: "Do you know where the sun goes (at night)?" They replied: "God and His Prophet know best." So the Prophet replied: "It continues on its path until it comes to its resting

> place beneath the Throne, where it falls into *sajdah* (prostrates itself). It remains in this position until it is told to rise and return from whence it came. It gets up and goes back, so that it rises from its place on the horizon. It then continues on its way until it again reaches the Throne and falls into *sajdah*. Again it stays in that position until it is told to rise and return to its place of rising on the eastern horizon. Again and again it will do this, and no one will notice anything wrong until, one day, when it is in the *sajdah* position, it will be told to rise from the western horizon. Do you know when that will be?" the Prophet asked his Companions. "That will be on a day when faith will avail no one who has not previously had it or earned by means of it some good."

Hafashī writes:

> No one today who knows even a little about geography or astronomy will doubt that this hadith is unsound, especially if they consider the two principles for rejecting hadiths: first, that the hadith should not contradict what can be sensed and witnessed, and second, that it should not contradict the laws of nature or the natural order of the universe. The hadith, moreover, is not open to explanation as it clearly speaks of the sun below the Throne, waiting for permission to rise. Thus, the hadith cannot possibly be the words spoken by the Prophet, as he never spoke out of caprice. Rather, since most of the hadith scholars knew nothing of the natural sciences, I shall employ their own methodology for authenticating both the text and the chain of transmission of hadiths to establish that the hadith is spurious.

He then reexamines its chain of transmission as related by al-Bukhārī, Muslim, and other major hadith scholars, as well as the works of those Qur'anic commentators who related it. During his analysis, he found fourteen versions and demonstrated that its chain of transmission, as recorded by al-Bukhārī and Muslim, revealed serious weaknesses when subjected to the methodology and criteria developed by the hadith scholars themselves. He went on to show that the same was true of each version. Applying this criteria to the criticism of the text itself, he pronounced the hadith a fabrication. Hopefully, the International Institute of Islamic Thought will be able to publish this study in its series of methodological studies on the Sunnah.

All of this emphasizes the need for a close examination of the hadiths related in the "authentic" collections before all others. This exercise must be carried out by qualified experts in accordance with the methodology and criteria developed by the *muḥaddithūn* so that the Sunnah may be cleansed of everything that contradicts or opposes the Qur'an's authority, the laws of nature, reason and logic, or historical fact. In addition, linguistic, sociolog-

ical, and psychological studies of the Hadith literature are needed in order to consider the impact of sectarianism and/or theological and ideological orientations. Only if this is done will the subject of gender equality receive its due from the Hadith literature.

The neglect of criteria for textual criticism of the Hadith, as well as the lack of sufficient interest in this subject, have led to many of the Sunnah-related problems facing Muslims. A prime example is that of gender equality, or the place of men and women in terms of their common humanity, their intellectual and psychological constitution, and controversies as to their roles in society. Nearly all of the legislation that arose in regard to inheritance, witnessing, marriage, divorce, and indemnity (for bodily injury) is based on differences perceived in men's and women's religious and social roles and functions. Obviously, there will be significant differences in the opinions and positions of those who adhere to a worldview based on an intellectual paradigm formulated by the Qur'an (with its concepts of divinity, worship, covenance, trial, vicegerency, creation, unicity, the oneness of humanity, the oneness of the universe that was created as the abode of humanity and as a mist, and the oneness of the ultimate destination) and the positions taken by those whose worldview may best be represented by the following verse: And yet they say: "There is nothing beyond our life in this world. We die as we come to life, and nothing but time destroys us" (45:24).

One of the greatest calamities to befall Muslim society, and one that led to a truly dangerous rift, was when the religious legacy of the Jews and Christians, with all of its twisted notions concerning women, was taken as a source for interpreting the Qur'an and the Sunnah. An even greater catastrophe occurred when certain hadith narrators began adding words and expressions carrying Jewish and Christian concepts to their narrations and then presenting these as having come from the Prophet. In fact, many hadiths were misunderstood or given interpretations based on that time's dominant cultural influences, even if they were untenable or incompatible with the originally intended spirit and meaning. All of these factors, in turn, influenced the legislation or judicial opinions governing the institution of the family, which is the cornerstone of all existence, creation, and humanity, and of the totality of each person's role as a *khalīfah*.

The first home of the Prophet's message, the cultural environment of Makkah with its pagan practices and attitudes, represented a major obstacle to social change and a real challenge to establishing a sound family system. In addition to female infanticide, other practices were even more insidious in terms of the family structure, such as sons inheriting the wives of their

fathers and other customs that debased and degraded women. As a result, the pagan Arab concept of family was confused and ambiguous at best.[24]

All of these factors constitute a backdrop against which certain hadiths need to be read in order to acquire an accurate understanding. The Prophet was a wise and practical man when it came to education and upbringing. Thus, when Islam began to restructure the family by teaching the principle of gender equality, the Prophet was forced into the role of a mediator between the forces of the newly liberated and those of traditional reaction. In this capacity, he was regularly called upon to educate, advise, and caution his followers about many of the details occasioned by the ensuing social revolution. In some instances, he needed to correct people. Such corrections, taken out of context, have led to the misinterpretation of certain hadith texts that became "key" to the classical understanding of issues concerning women.

One such hadith was related by both al-Bukhārī and Muslim on the authority of ʿAbd Allāh ibn ʿUmar, who reported that the Prophet, after performing a special prayer (*ṣalāt al-khusūf*) during a solar eclipse, said:

> "The sun and the moon are among God's many signs and do not go into eclipse for the death or the life of any person. When you see an eclipse, remember God." On that occasion, the Companions said: "O Prophet of God. As you were standing there, it appeared to us that you were taking something, and then we saw you flinch." He replied: "Verily, I had a vision of Paradise, and I reached for a bunch of grapes ... Had I been able to grasp them, you would have eaten from them for as long as the world remains. Then I had a vision of the Fire. To this day, I have never seen a more horrible sight. And I noticed that most of its residents were women." The Companions asked: "Why, O Prophet?" He replied: "For their ingratitude." They asked: "For their ingratitude to God?" The Prophet replied: "No, for their ingratitude to their husbands. If you do something good for one of them, and then you displease her with the slightest thing, she'll be the first to tell you that you've never done anything good for her."

On this occasion, it seems clear that the Prophet took the opportunity to direct a few words of advice to the female Muslims. His words were certainly not intended to drive them to despair or lead them to think less of themselves. On the contrary, the intent was to caution and advise. In fact, the Hadith literature is filled with thousands of examples of such admonitory narrations, sometimes directed toward individuals and sometimes stated generally. In regard to this particular hadith, Ḥāfiẓ ibn Hajr wrote that another version indicated that the women seen in the Fire were those who

exhibited serious character flaws, for the other version included: "I noticed that most of its residents were women who, if entrusted with something would betray that trust, or if asked for charity would refuse to give it, or if given something would not appreciate it."

Clearly, this particular hadith is an example of admonition and instruction that exhorts all Muslims to strive for Paradise and avoid Hell. It then went on to explain to the women how one aspect of their behavior might need their attention. On other occasions, the Prophet addressed various shortcomings among men, merchants, soldiers, husbands, and fathers.

Abū Saʿīd related another hadith, included in the collections of al-Bukhārī and Muslim, in which he reported that the Prophet went out on the Day of ʿĪd to the place of prayer and passed by a group of women. He said:

> "O you assembly of women. Never have I seen so intellectually or religiously deficient a person, or one more capable of driving away the good judgment of a man, than one of you." The women asked: "And how are we intellectually and religiously deficient?" The Prophet replied: "Is the testimony of one woman not equal to the testimony of half a man?" They replied: "Quite right, it is." The Prophet said: "Then, there is your deficiency of intellect. And is it true that you do not pray or fast when you have your period?" The women answered: "Quite right, it is true." So the Prophet replied: "There is your deficiency of religion."

Such hadiths have contributed to basic misunderstandings in regard to gender equality. Moreover, these misunderstandings have resulted in serious legal and intellectual consequences, even to the extent of confining and overshadowing the Qur'anic principle of equality. In addition, the ensuing misconceptions have served as the basis on which the practical Islamic position on women's issues was formulated. Thus, the Qur'anic teachings about equality and the general principles derived from those teachings were ignored, and very nearly buried, save for the conclusions derived from the verse "then a man and two women." The matter was further complicated when the classical jurists considered the relevant Hadith literature as having significant legal import, for it is clear that a legal ruling has real consequences not only for the law, but for history, society, and culture as well.

The positions of the classical legal schools were summarized by Ibn Rushd, as follows:

> The entire legal community agrees that the testimony of women will not be accepted in *ḥudūd* cases. The Ẓāhirī jurists, however, opined that the testimony of more than one woman can be accepted if it is corroborated

by (testimony from) one man, because this is what the verse literally says. Abū Ḥanīfah said that their testimony may be accepted in financial matters and in non-*ḥudūd* matters having to do with the person, such as divorce, marriage, manumission, and the like. Imām Mālik, however, held that their testimony may not be accepted in matters related to the person. The testimony of women on their own, in which only women (and not men) give testimony, is accepted by the entire legal community in matters related to the person on the condition that the matter is of the nature that only women would have knowledge of it. Such matters include childbirth, monthly courses, hidden physical defects, and the like. There is no disagreement on this matter, save in regard to suckling and establishing foster relationships.[25]

Ibn Ḥazm wrote:

It is not lawful to accept, in cases of adultery, the testimony of fewer than four men who are both Muslim and deemed trustworthy (*ʿudūl*) by the court. Two trustworthy Muslim women may, however, take the place of each man. In all cases involving rights, like *ḥudūd*, blood, *qiṣāṣ*, marriage, divorce, return to marriage (*rajʿah*), and financial affairs, only the testimony of two men, or one man and two women, or four women may be accepted. In all such cases, except for those of *ḥudūd,* if the one seeking rights gives an oath, then the testimony of only one trustworthy male witness will suffice, or one male and two female witnesses, or four female witnesses. Likewise, in all such cases, except for those of *ḥudūd*, the testimony of one man or two women will be accepted if it is accompanied by an oath taken by the plaintiff. In matters of suckling only, the testimony of one trustworthy woman or man will be accepted.

Ibn Taymiyyah wrote:

The verse – "and if two men are not available, then a man and two women from among such as are acceptable to you as witnesses, so that if one of them should make a mistake, the other could remind her" – indicates that the reason for equating the testimony of two women with that of one man is so that one woman may remind the other if she makes a mistake. Generally speaking, the sort of mistake that will take place is forgetfulness and the inability to remember. This is what the Prophet alluded to when he said: "... as to the deficiency in their intellect, it is (attested to by the fact that) the testimony of two women is equal to that of one man." Thus, he clarified that the reason for halving their testimony is attributable to a deficiency in their intellect and not in their religion. From here, we learn that the trustworthiness of women as witnesses is the same as the trustworthiness of men, but that their intellect is inferior. Thus, in regard to testimony on matters in which it is not feared that they will make mistakes, their testimony is not equal to half the tes-

> timony of men. As for matters on which the sole testimony of women is accepted, these are matters that women have an opportunity to witness by themselves, or hear, or otherwise sense, so that their intellects play no part in the testimony. These are matters like childbirth, monthly courses, hidden physical defects, suckling, and the like. Usually, such matters are neither easily forgotten nor require great intellect to comprehend, as opposed to words spoken in acknowledgment of a debt and the like, all of which are complex and generally require a great deal of experience before they can be understood. Having established this point, we may say that the testimony of a man and two women is accepted in every case in which the testimony of a man and the oath of the plaintiff are accepted. Both ʿAṭāʾ and Ḥammād ibn Sulaymān held the opinion that the testimony of one man and two women will be accepted in cases of *ḥudūd* and *qiṣāṣ*. And, according to one narration, they accepted such testimony in cases of marriage and manumission as well. The same was related about Jābir ibn Zayd, Iyās ibn Muʿāwiyyah, al-Shaʿbī, al-Thawrī, and others from the rationalist schools of jurisprudence. The same holds true, according to another narration, in regard to cases involving damages and reparations.

The passages quoted above should suffice as examples of how the classical scholars of Islam understood the Qur'anic verses we are considering and the Hadith literature on the subject. Clearly, the legal rulings derived from these texts came not only from statements made in the imperative or prohibitive mode, but from every aspect of the reported texts.

It also appears that the word for "make a mistake" in the verse was interpreted as a deficiency when considered in conjunction with the relevant Hadith literature. The reader will recall that the meaning of the word was interpreted variously by Qur'anic commentators and lexicographers as either "to forget" or "to overlook." Also, the hadiths related by ʿAbd Allāh ibn ʿUmar was interpreted in various ways. For example, Imām Muslim related it in a chapter entitled "An Explanation of Deficiency in Faith by Means of Deficiency in Devotion, and an Explanation of How the Word 'Kufr' Does Not Always Mean Disbelief in God But Is Sometimes Used To Denote Ingratitude."

Sharaf al-Dīn al-Nawawī, when explaining Abū Saʿīd's hadith concerning a woman's "intellectual deficiency," stated that the meaning of the Prophet's statement, "there is your deficiency of intellect," should be understood as meaning "there is a sign of your deficiency."[26]

In any case, when we examine the classical commentaries on these hadiths, we find that none of them applied the criteria that they or their predecessors established for textual criticism. The *muḥaddithūn* themselves

stated that the authenticity of a hadith's chain of transmission alone does not guarantee the text's authenticity. So, in what follows, I will apply some of these criteria to authenticate the hadiths' texts. For the purposes of this paper, I shall deal only with the texts and the classical criteria for their criticism.[27]

The difficulty in the hadith alleging women's "intellectual and religious inferiority" is that it ascribes to the Prophet a statement that indicates the religious inferiority of people who do no more than what God has commanded them to do, both in the Book of Nature and in the Qur'an. Therefore, the assertion that women are deficient in their religion because they cannot pray or fast during their menstrual periods is clearly suspect. Several hadith commentators have attempted to explain this in one way or another, but the fact remains that God ordered women not to fast or pray during such times. Thus, when they follow these instructions they are rewarded for obeying His commands, and He "does not lose sight of the labor of any who labors, be it man or woman" (3:195).

In comparison, the Shari^{c}ah considers the shortening of prayer while on a journey to be the original state of affairs. In one hadith, ^{c}Ā'ishah related: "When prayer was first prescribed as a duty for Muslims, the number of *rak^{c}ahs* was two. Later on this was increased to four for those not traveling, while the number for those on journeys remained the same."[28] So the shortening of prayer for a traveler has nothing to do with deficiencies on the part of anyone.

In addition, it is extremely difficult to reconcile the matter of "intellectual deficiency" with the Qur'anic principle of equality between the sexes. Had it been a matter of deficiency in testimony, there might not have been a problem. But when the hadith mentions "intellectual deficiency" in clear contradiction to the evidence of both nature and the Qur'an's unequivocal texts in regard to equality, a problem arises. Furthermore, the difficulty does not become any less important just because it has come to light only in modern times. The message of Islam is, after all, universal and applicable to every time and place. These truths are beyond dispute.

Western intellectual trends, including the scientific method, are now widespread and have led to the development of important critical and analytical skills and tools. Modern thinkers are very reluctant to consider anything that cannot be subjected to their various critical methodologies. This has led to reservations and doubts about nearly everything related to religion and religious experience. In order to counter these doubts, we must develop methodologies based on Qur'anic paradigms and strive to develop our methodologies for critiquing hadiths, rather than leave our intellectual legacy

to the depredations of others. What the Muslim world expects of its hadith scholars, hadith colleges, and university departments of hadith studies is not a mere rehash of what was produced in the past, but a renewal, in the sense of further development based on the foundations laid in the past, so that these can be strengthened by modern methods of criticism. If we want to serve the Sunnah, this is the direction we must take.

We know that the early imams of hadith rejected some hadiths with sound chains of transmission because their texts were unsound, and that they rejected hadiths with sound texts because their chains of transmission were unsound. In addition, they allowed their rulings on those hadiths' authenticity to be swayed by the fact that they had been included in al-Bukhārī's and Muslim's collections. Al-Bukhārī, for example, selected the 2,602 hadiths in his collection from over 600,000 hadiths. Nor does it detract from his efforts to include only the most authentic hadiths if later scholars discover that some were not actually authentic or that some did not meet the criteria he had established for their authenticity.

If the ijtihad performed by the four major imams of fiqh was disputed by others, why should it be difficult to imagine that there might be criticism of the ijtihad performed by al-Bukhārī and Muslim in ascertaining which hadiths were authentic and which were not? In fact, their work was corrected by many great hadith scholars, among them Abū Masʿūd al-Dimashqī, Abū ʿAlī al-Jiyānī al-Ghassānī, and Abū al-Ḥasan al-Darquṭunī, who found 200 hadiths in al-Bukhārī's and Muslim's collections that did not measure up to the criteria for authenticity set by these two collectors. Likewise, the two great *rijāl* biographers Abū Zurʿah al-Rāzī and Abū Ḥātim listed the mistakes made by al-Bukhārī in his biographical works. Abū Ḥātim even wrote a book on the subject: *Bayān Khatā' Muḥammad ibn Ismāʿīl al-Bukhārī fī Tārīkhihi*. Al-Khātib al-Baghdādi did the same in his *Muwaḍḍiḥ Awhām al-Jamʿ wa al-Tafrīq*.[29]

Thus, the real problem is one of methodology. There is a very real need today for developing a methodology for dealing with the Sunnah and then applying it carefully so that balance may be maintained in regard to the Hadith literature. Only in this way can we protect the Sunnah from baseless attacks and incorrect applications (through assumptions or deductions drawn from less-than-authentic hadiths). In order to address this problem in a suitable and effective manner, the gulf between the classical scholars' criteria and today's methodologies must be bridged by building upon the classical era's foundations and developing these in light of the Qur'anic epistemology. Once these issues have been clarified, it will be

possible to review much of Islam's legal legacy in regard to women and issues of gender equality.

It is not my intention to cast doubt upon the works of al-Bukhārī and Muslim. Rather, I am concerned with serious scholarship and devoted academic attention to using modern methods to criticize and analyze hadiths. Finally, our current problems with the Hadith literature are not the result of anything done by the classical *muḥaddithūn*, but rather with the failure of our scholars to follow up their predecessors' work and develop it further. If today's scholars would apply as much energy to studying and critiquing hadith texts as the classical scholars applied to studying and critiquing hadith chains of transmission, we would be able to join our reading of the Qur'an with our reading of the Sunnah, and our reading of the Qur'an with our reading of the "book" of the real-existential.

These are some of my reflections on the subject of women's testimony. I hope that they may inspire others to ponder that subject and those related to it in greater detail and from the perspectives of their respective disciplines. Clearly, owing to shortcomings in our intellectual history, our attitudes toward women and their roles in society have been less than the Qur'anic ideal. If we are to make progress in this particular matter, or in any other of the imbalances that exist in our societies, we have to reconsider the teachings of the Qur'an and the Sunnah and how we deal with them.

NOTES

1. Fakhr al-Dīn al-Rāzī, *Al-Tafsīr al-Kabīr* (Cairo: Maṭbaᶜah al-Bahiyyah, n.d.), 12:54–56. Italics added for emphasis.
2. Ibn Kathīr, *Tafsīr al-Qur'ān al-ᶜAẓīm* (Cairo: at Maktabah al-Ṣalafiyyah, n.d.), 4:478; al-Rāzī, *Al-Tafsīr al-Kabīr*.
3. Al-Rāzī, *Al-Tafsīr al-Kabīr*.
4. Al-Bukhārī, "Kitāb Faḍā'i1 al-Qur'ān" (Virtues of the Qur'an), in *Al-Jāmiᶜ al-Ṣaḥīḥ*, hadith no. 4707.
5. Numerous passages can be cited from the Bible, such as the following: "I will put enmity between you and the woman, between her seed and your seed" (Genesis 3:15) and "Let the woman learn in silence with all subjection" (Timothy 2:11–12). The Qur'an exposes something of these attitudes in its story of how Mary's mother vowed that the fruit of her womb would serve God and how she was startled to learn that she had given birth to a girl. See Qur'an 3:35–37. [Trans.]
6. Aḥmad ibn Muḥammad al-Fayyūmī, *Al-Miṣbāḥ al-Munīr*, 3d ed. (Egypt: al-Maṭbaᶜah al-Āmiriyyah, 1912), 496.

7. Al-Ḥusayn ibn Muḥammad al-Rāghib al-Aṣfahānī, *Mufradāt fī Gharīb al-Qur'ān*, 297.
8. For a detailed discussion of the uses of the word, compare Abū Zakarīyā al-Farrā', *Maʿānī al-Qur'ān* (Cairo: Dār al-Kutub al-Miṣriyyah, 1955), 1:184 and 2:181. See also Muḥammad ibn Jarīr al-Ṭabarī, *Jamiʿ al-Bayān fī Tafsīr al-Qur'ān*, 2:62-67 and 16:132-33; and Abū Bakr al-Jaṣṣāṣ al-Rāzī, *Aḥkām al-Qur'ān*, 1:507-14; and Ibn al-ʿArabī, *Aḥkām al-Qur'ān*, 1:252-56.
9. In other words, these jurists refused to equate a woman's testimony with that of a man because neither she nor her partner could deliver reliable testimony; not her's, because she might forget, and not the other's, because her role is merely to remind and not to give testimony. [Trans.]
10. In other words, under those circumstances, is the woman's testimony to be considered equal on its own as a result of the man's reminding her or equal in combination with the man's reminding? See Abū Bakr ibn al-ʿArabī, *Aḥkām al-Qur'ān* (Cairo: Dār Iḥyā' al-Maktabah al-ʿArabiyyah, 1958), 1:252-56.
11. Al-Rāzī, *Al-Tafsīr al-Kabīr*, 2:366-67.
12. Qur'an 42:41.
13. Muḥammad ibn Idrīs al-Shāfiʿī, *Kitāb al-Umm* (Cairo: Maktabat al-Kulliyyah al-Azhariyyah, 1961), 7:264-65.
14. Nāsir at Dīn al-Albānī, *Ṣaḥīḥ al-Jāmiʿ al-Saghīr* (Beirut: al-Maktab al-Islāmī, 1969), hadith no. 2329.
15. Muḥammad ibn Ismāʿīl at Bukhārī, *Al-Jāmiʿ al-Ṣaḥīḥ*, "Kitāb al-Libās."
16. This version was related by both al-Bukhārī and Muslim.
17. Abū al-Qāsim Jār Allāh al-Zamakhsharī, *Al-Kashshāf ʿan Ḥaqā'iq al-Tanzīl* (Būlāq, Egypt: al-Maṭbaʿah al-Āmiriyyah, 1318 AH), 3:569.
18. See the introduction written by Zāhid al-Kawtharī on Zaylaʿī, *Nasb al-Rayah* (India: al-Majlis al-ʿIlmī, 1936), 1:37-38.
19. The number of Qur'anic verses attesting to the Sunnah's validity is such that there is hardly a chapter in which this fact is not mentioned. Significant among these, however, are the following: Qur'an 4:105, 59:7, 4:59, 4:80, 16:64.
20. Muṣṭafā Sibāʿī, *Al-Sunnah wa Makānatuhā fī al-Tashrīʿ al-Islāmī* (Damascus: al-Maktab al-Islāmī, 1979), 271.
21. Muṣfir Gharām Allāh al-Damīnī, *Fī Maqāyis Naqd Mutūn al-Sunnah* (Riyadh: Imām Muḥammad ibn Saʿūd University Press, n.d.), 127-29.
22. Ibn Qayyim, *Al-Manār al-Munīf fī al-Ḥadīth al-Ḍaʿīf* (Aleppo: Maktabat al-Maṭbūʿat al-Islāmiyyah, 1970), 58.
23. The term *single-narrator narration* (*khabr al-wāḥid*) refers to a hadith transmitted, at some point, by only one narrator. The authenticity of such transmissions was disputed among the hadith scholars and the *fuqahā',* many of whom held that such narrations were acceptable only as corroborative evidence. [Trans.]
24. Al-Bukhārī relates a lengthy hadith from ʿĀ'ishah, in which she narrates the variety of forms taken by pagan marriages. See hadith no. 4835.
25. Ibn Rushd, *Bidāyāt al-Mujtahid* (Cairo: n.d.), 2:174.

26. Sharaf al-Dīn al-Nawawī, *Sharḥ Ṣaḥīḥ Muslim* (Beirut: Dār al-Fikr, 1990), 5:226.
27. ʿAbd al-Ḥalīm Abū Shuqqah, *Taḥrīr al-Mar'ah fī ʿAṣr al-Risālah* (Kuwait: Dār al-Qalam, 1990), 1:271-91.
28. Ibn Abū Shaybah, *Al-Muṣannaf* (Beirut: Dār al-Fikr, n.d.) 14:132.
29. See the introduction by Ibn Ḥajr al-ʿAsqalānī to his commentary, *Fatḥ al-Bārī* (Beirut: Dār al-Fikr, n.d.), 346, 375-76, 465.

Naturalization and the Rights of Citizens

Naturalization, an integral part of the concept of identity and its related problems, has been an issue in the Muslim world since its first contacts with western thought, culture, military, and politics. Even though the matter was decided, in practical terms, by the emergence of ethnic and geographic nation-states out of the wreckage of the Ottoman Empire, it remains an open topic at the cultural and academic levels. Whether it is addressed as a challenge, an excuse, or as a means to an end, it remains a major and very sensitive question. As new ethnic and regional Muslim nation-states begin to show signs of instability, the subject grows more complex: It takes on new aspects of identity and affiliation and seeks to discover the best way of ordering relations between the peoples of each region or between them and the (factional, military, or otherwise) elitist governments controlling them.

With the stirrings of a new Islamic movement and its members' belief that Islam represents a viable political alternative, the question of naturalization has become a major challenge. In fact, it is often thrown in their faces by their secularist opponents. Thus, the question has become instrumental in the current political struggle taking place in the Muslim world. Many Muslim governments cite indigenous non-Muslim minorities as an excuse to deprive their Muslim majorities, who often represent 98 percent of the total population, of the right to be ruled by the Shari^{c}ah. These are the same governments that discredit Islamic movements by viewing their very presence, principles, demands, and objectives as threats to national unity. To counteract such "threats," they promulgate "emergency measures" and suspend constitutional legal codes.

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Naturalization is the basis of nationalism, which gives identity to the modern state and may be defined as an affiliation with a geographically defined region. All people who trace their lineage to that region are subject to all accompanying rights and responsibilities. Thus, the bond between them is secular and worldly. The same is true of bonds between states, for they are entirely secular and measured in terms of profit and loss. It is considered essential that all citizens, regardless of their religious, ethnic, or sectarian background, melt into this regional and profitable affiliation by casting off those parts of their background that might lead them into conflict with the state. In this sense, then, naturalization must occur in an atmosphere in which secular concepts, order, and methodology reign supreme. This is why secularists in the Muslim world saw the presence of non-Muslim minorities as a powerful argument that could be used to quell the demands of the Islamic political agenda. As a result, they opposed the Islamists and called for a "civil society," or what they suppose to be the opposite of a "religious society."

Several Islamist leaders have emphasized that the Islamic agenda can create the desired civil society, but within an Islamic framework. They have also asserted their readiness to accommodate many of the foundations of western society, as it is considered the best example of civil society. Even so, many secularists remain unconvinced. For their part, Islamist leaders have given a great deal of thought to the secularists' objections to the Islamic agenda. Many Islamists have written on democracy, proclaimed their acceptance of it, and found precedents for it in authentic Islamic sources. They have even announced their acceptance of political pluralism, as one of the foundations upon which democracy is built, and of civil liberties, though some have done so with certain reservations. In his *The Rights of Citizens*, Rāshid al-Ghannūshī states clearly that Islam can accept naturalization, as it is popularly understood, and then cites and explains the reasons for his claim and gives precedents for it. However, some secularist groups continue to reject and fear the Islamic political agenda. It seems that they prefer to live in the shadow of dictatorship and repression rather than accept the Islamic political agenda, regardless of how it may be altered.

We now come to a point of fundamental importance: understanding that the logic of Islamic thought (i.e., the basis of the Islamic agenda for civilization) is based on the constants, and not the variables, of Islam. In other words, the Islamic agenda for civilization looks at these variables within the framework of those constants. In addition, borrowing concepts from a civilization with pagan roots and a significantly different system of principles is not the same as borrowing a few simple words or translating mechanical, agricul-

tural, industrial, and other terminologies. Certainly, underlying ideas must not be overlooked in terms of their effect on thought and culture. Still, there is less danger in borrowing terms from such fields than there is in borrowing such terms based on underlying ideas and values that may have an effect on practical life, such as "nationalism" and "democracy."

In what follows, I will give some examples of the dangers inherent in borrowing key concepts from entirely different civilizations. There is clearly a need to establish suitable regulations and standards for this type of borrowing so that the division between a society's variables and constants remains intact.

First, the word *citizen* did not appear until after the French Revolution of 1789. Before that time, people were grouped in terms of religion, language, ethnicity, or tribal background. Nowhere did people affiliate themselves with the land on which they lived. Second, secularism sought to minimize or overcome all differences between people, as differences cause problems for secularism and detract from its ability to establish comprehensive organizations based on expediency, pleasure, and worldly benefits, all of which it venerates in place of religious and moral values.

Third, the relevant texts of the Qur'an and the Sunnah, as well as the actual implementation of these concepts (i.e., the Covenant of Madinah and the resulting decisions of the first four caliphs and the Companions), indicate that Islam is especially concerned with helping those who have not yet converted to preserve their religious, cultural, and ethnic characteristics.

All Muslims are guaranteed five basic necessities. Upon entering into a *dhimmah* (covenant of protection) contract, all non-Muslims are guaranteed the same rights as Muslims, as well as official recognition, defense, and protection of their communal or racial traits. If these are threatened, Muslim soldiers are duty-bound to defend them. Thus, non-Muslims enjoy the freedom of thought and comparison so that they may decide for themselves whether to adhere to their old ways or to convert. In fact, Islam views non-Muslims from the perspective of a universal message that rejects compulsion: "Let there be no compulsion in religion" (Qur'an 2:256).

Islamic law protects non-Muslims in two ways: It offers them the same protection and rights given to Muslims, and it protects their cultural and ethnic characteristics by guaranteeing the armed protection enjoyed by Muslims. It would seem, then, that non-Muslims enjoy a privilege not enjoyed by Muslims. How is it that a privilege may be viewed as a sign of contempt on the part of those who granted it? Islam grants respect and privilege to *dhimmī* (i.e., protected non-Muslim people) subjects because it is

a universal religion that views each individual in exactly the same way: a descendant of Adam, who came from dust, with some special characteristics that distinguish him/her from all others. This is why Islam attaches such importance to all relationships, particularly those binding followers of the Abrahamic religions – Judaism, Christianity, and Islam – to each other and to the rest of humanity. Ultimately, this diversity is to be used as a means of mutual recognition and acquaintance among the children of Adam.

Fourth, the scholars of Islam, particularly Muslim social scientists, should engage in ijtihad and thereby participate in building an ideal Islamic society. In matters of legal significance and creativity, the Islamic movement needs ijtihad in order to address issues of social significance and to lay the foundations for an Islamic civilization. Its practitioners must be careful not to embrace unfounded ideas or draw analogies between Islam and other religions, for ijtihad is a human undertaking and therefore subject to error. It is also essential to understand that earlier rulings cannot be nullified – new rulings are no more than additions to existing *fiqhī* knowledge.

Fifth, among the most consistently misunderstood and misinterpreted rulings are those related to *dhimmīs*[1] and the division of the world into two warring camps: *dār al-ḥarb* and *dār al-Islām*. Many classical legal scholars misinterpreted the verses related to the *dhimmīs*, especially the following one: "Fight against such of them as have been given the scripture until they pay the tribute [*jizyah*] readily, having been brought low" (9:29). They overlooked the simplest meaning: Once vanquished, the new subjects would abide by Islamic rule and pay the *jizyah*. Instead, classical jurists interpreted the phrase "having been brought low" to mean that the vanquished should be humiliated as they pay the *jizyah*. Undoubtedly, this outlook created many doubts and questions as to how a Muslim majority today would treat a non-Muslim minority.

These rulings have generated a great deal of criticism from modern secularists. If their original sources were considered anew and in light of the progress made in the social sciences, however, they might well provide solutions to long-standing problems and offer the basis for a harmonious blend of divergent elements, and then be transformed into sources of strength instead of tension (i.e., racial tension in the United States). Indeed, owing to gaps in American social thought, ethnic, religious, and racial conflict can never be entirely dismissed.[2]

The peace and outward sense of tranquility found in the United States, for example, and the relative ease in relations between the different ethnic, religious, and racial groups, are only apparent. Such harmony seems to be

based on the principle that an individual's freedom ends where the group's freedom begins and on the open acceptance of each person's individuality and special characteristics as part of their human rights. This concept of freedom, however, is erroneous. Likewise, this ideal of human rights leaves much to be desired. The balance found in American society and in those that have followed its example may best be described as a balance of tigers,[3] for western thought and philosophy, based on the rejection and attempted destruction of the "other," are inherently dualistic, argumentative, and contentious. Balance, if ever it occurs, is only a temporary stalemate among opposing forces or interests of equal power. For example, Europeans overcame the weaker Native Americans and then decimated them and took their lands. Thereafter, Europeans discriminated against people of color, women, and all other minorities. So whenever they speak of balance, they do so in terms of temporary solutions imposed upon them by the force of transient interests. The corollary to this is that such solutions are always subject to deterioration and breakdown.

Given this, if the breakup of the Soviet Union is explained by the inability of Marxism, which is based on class struggle, to overcome the individual's natural inclination for self-expression, the other western model carries many of the same seeds. The idea of freedom alone may be transformed into a paradigm for a temporary balance that may well collapse under pressure, making of freedom a negative means that can be used to destroy any true balance between various groups.

What brings Americans together is the shared perception that they are a diverse group of people from different countries who have come together under a social contract to which they have access as taxpayers. Thus, a citizen's proper characteristic is the regular and timely paying of taxes, while at the same time benefiting from the facilities that those taxes provide. Marxism was essentially an attempt to treat maladies in western thought and civilization. But it failed. This does not mean, however, that the patient has been cured and restored to health. On the contrary, it is far more likely that the illness has become more serious, and that the need for treatment has become more acute.

But Islam, with its community-based organization and codified placement of each individual within the framework of the group, addresses the psychological and spiritual needs of those living within its borders. Thus, no majority has the right to suppress a minority or erase a minority's special or distinguishing characteristics. By the same token, no minority has the right to establish its uniqueness by detracting from the majority's rights or

destroying its distinguishing features. Thus, the Islamic concept of social balance is based upon a mutual recognition of all of a given society's traits and characteristics and upon their codification in a way that allows both the majority and the minority to develop and prosper. This allows a society's differing traits and characteristics to be transformed into a positive social diversity.

If understood in a conceptual context, Islam's treatment of non-Muslims contains much that may be of value in treating the hidden crises of modern societies, especially of those societies based on the American pattern. Historically, minorities in the Muslim world maintained their cultures and ways of life because the Islamic system legislated and codified their special characteristics and thus accorded them state protection. In this way, non-Muslim minorities coexisted with Muslims for centuries and even played important roles in Muslim societies. In the Muslim world, there is hardly a city without its Christian or Jewish quarter. In the West, however, despite repeated waves of immigrants, all of their religious and other distinctions seem to have been lost in the melting pot of worldly secularism, which strips everything of its sacred nature.

Colonialism brought about attacks on all indigenous thought, both Muslim and non-Muslim. Gradually, the colonialists gave their own interpretations to many concepts, thereby confusing and misleading people on matters of religion. As a result, Islamic legislation for minorities came to be understood as degrading and segregationist, and certain minorities sought to destroy the system in the belief that only the majority would be adversely affected. However, both groups were harmed, for all religious and cultural distinctions fell victim to the foreign secularist agenda. Members of majority and minority groups would do well to remember the past before trying to block Islamic legislation.

Presently, Muslims are suffering from serious rifts in their cultural and intellectual lives as a theoretical war rages around them. One side features the factions of the secularists, modernists, and atheists, and the other side features those of the fundamentalists and traditionalists. The Ummah does not need any of these factions or their compromises to reach some imagined political equilibrium. What it needs is to discover its own unique self and define the frame of reference from which all of its factions may derive their principles, legitimacy, and standards. While the various factions may agree on the need for freedom, democracy, renaissance, and nationalism, they cannot agree on a single interpretation or method of implementation. Look at how democracy was rejected in Tunisia and Algeria when national polls showed that the

Islamists had won. The reason in both cases was differences in standards. In the wake of those rejections came a strong secularist current that preferred military dictatorship to Islamic rule. Clearly, the Ummah's need to agree on a single standard and frame of reference, as well as the rectification of its thought and its intellectual, cultural, political, and social foundations, is far greater than its need for accommodation and compromise, for these fade away as quickly as the circumstances that caused them.[4]

We do not want to be forced by political pressures to accept a median solution involving concessions by the secularists or nationalists in exchange for a proportional concession from the Islamists. We are fully aware that this takes place within the framework of the secular-materialist western culture that has imposed itself on every other civilization. The new center of this culture, the United States, views the acceptance of its culture and worldview as an essential condition for the success of what it calls the "New World Order."

Had Muslim intellectuals sought to understand such concepts as naturalization and democracy within a universal Islamic milieu, a central Islamic culture, or at least within a self-sufficient Islamic culture, they might have avoided many of these [negative] observations or found satisfactory answers. Under the present circumstances, however, caution is required. For the most part, secularist and atheist intellectuals in the Muslim world, particularly in the Arab world, contribute nothing more than translations of western criticism of Islam. They have cleverly altered these works in order to direct them against the Qur'an, the Sunnah, and Islamic law in general. Thus they have nothing new to say. It also follows that Muslim thinkers and intellectuals would be wasting their time if they tried to refute these borrowed criticisms.

When secularists see Islamists engaging in innovative and independent thought, they quickly adopt traditional orthodox positions and hide behind the same texts as the orthodox. For example, one of them has said: "We know, naturally, that the absolute equality spoken of by the revolutionary Islamic groups is incorrect from the standpoint of Islamic law. The texts of the Qur'an and the Sunnah speak unambiguously about differences in rank."

When Shaykh Nadīm al-Jisr published an article in the Lebanese daily newspaper *Al-Nahār*, one that sought to find a theoretical connection between the modern theory of light and supernatural beings (i.e., angels and jinn), Ṣādiq Jalāl al-ʿAẓm refuted him by writing a book entitled *Naqd al-Fikr al-Dīnī* (A Critique of Religious Thought). In it, he asserted that the Qur'anic texts could be interpreted only according to the rulings of the

first generations of Muslim scholars. Moreover, he argued that the knowledge spoken of in the Qur'an and enjoined upon Muslims is knowledge of the Shariᶜah and nothing more. In support of his argument, he cited the definition of knowledge given by al-Ghazālī (d. 1111) in his *Iḥyā' ᶜUlūm al-Dīn*.

To follow up on this sort of scholarship done by the secularists would require a separate study. What is clear, however, is that it is very unlikely that the secularists will pay serious attention to the Islamists' arguments. But that in itself does not detract from the value or need of Islamist thought, especially when it is placed in context and used to deliver the Muslim mind from the crisis with which it is presently beset. Ijtihad, in the sense of independent and innovative thinking, is what Islamists need.

And now for my final point: From the beginning of our contact with the West until only a few decades ago, the Muslim mind was often occupied with the idea of rapprochement – an attempted bridging of the gulf between Islamic thought and western ideas and civilization. This idea's time has now passed, for its negative ideas clearly far outweigh the positive. It has proven to be a failure. This is also true of comparative thought and of considering issues in Islamic thought from the perspective of western thought. If the idea of rapprochement helped to weaken the Muslim character and rob Muslims of their intellectual and cultural heritage, then the idea of considering issues from a western perspective has coerced Muslims into modernization or forced them to seek refuge in the past – to "progress backwards." Obviously, the consequences in either case have been to further widen the gulf between Muslims and the modern age, as well as between Muslims and their counterparts in the modern world.

NOTES

1. In *Towards an Islamic Theory of International Relations* (Herndon, VA: IIIT, 1993), ᶜAbdulḤamīd AbūSulaymān writes: "In classical jurisprudence, this term (*al-dhimmah*) is defined as a sort of permanent agreement between Muslim political authorities and non-Muslim subjects which provides protection for Muslims and peaceful internal relations with non-Muslim subjects. In return, the latter accepted Islamic rule and paid the *jizyah* as a substitution for being drafted into the army. Jurists were fully aware that, in turn, the Muslim state was obliged not only to tolerate with sincerity the non-Muslims' faith, religious practices, and laws, but also to provide them with protection for their lives and properties: 'Their blood is as our blood, and their possessions are as ours'" (p. 28).

2. Refer to Abdelwahab Elmessiri's *Al-Firdaws al-Arḍī* and his series of articles on the recent racial violence in Los Angeles in "*Hākadhā Taḍīʿ al-Aḥlām,*" in *al-Muṣawwar* (Cairo: 1993). Compare these with what Fahmī Ḥuwaydī has written on these events.
3. This phrase was first used by Ismāʿīl al-Fārūqī in his lecture "The West and Us."
4. See the excellent analysis by Ṭāriq al-Bishrī, "*Mustaqbal al-Ḥiwār al-Islāmī al-ʿIlmānī,*" in *Mushkilatān: Wa Qirā'atān Fihimā* (Herndon, VA: IIIT, 1992).

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."[1]

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. ʿAlī was sent as a judge to Yemen, and others, among them Abū Mūsā and Muʿādh, became judges.[2] 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).[3] 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:[4] "Proof is the responsibility of the claimant; whereas, for the claimed against, an oath is sufficient."[5] 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 ʿUmar ibn al-Khaṭṭāb. Owing perhaps to ʿUmar'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, ʿUmar 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-Ashʿarī judge of Basrah, and ʿUthmān ibn Qays judge of Egypt. For the territories of Sham (Greater Syria), a separate institution was established.

ʿUmar set a remarkable example for his judges to follow and warned then not to deviate from it. In his letter to Muʿādh, 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 *ḥadd* 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 ʿUbayd 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.[6]

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 Shariʿah 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.[7]

Under the four rightly guided caliphs, the judiciary was limited to resolving civil disputes. Other types of disputes, such as *qiṣāṣ* (where capital punishment may be prescribed), *ḥudūd* (where punishment, including capital punishment, is prescribed by the Qur' an), or *taʿzīr* (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 Muʿāwiyah ibn Sufyān, when Salīm ibn Muʿizz, 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.[8] 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.[9]

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 ijtihad, 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-Shāfiʿī.[10]

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-Nabahī 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."[11] 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 *ḥākim* or judge.[12]

JUDICIAL ORGANIZATION AND ITS SOURCES

It should be clear from the historical survey presented above that the Shariᶜah 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,[13] 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 Shariᶜah 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 Shariᶜah's conditions.[14]

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-maᶜālim*), the military authority (*amīr*), the police commissioner (*sāḥib al-shurṭah*), the market authority (*ḥisbah*), and the judge (*qāḍī*), in the limited sense represented by Ibn al-Qayyim above.[15] 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.[16]

Usually, the governor or the police commissioner was responsible for investigating such serious crimes as *ḥudūd* or *qiṣāṣ*. Likewise, the market authority was usually responsible for assigning a punishment designed to deter an action (*taᶜzīr*) 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 *ḥākim*, was responsible for settling civil disputes that involved upholding rights and making sure that these were enjoyed by those entitled to them.[17]

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.[18]

We mentioned earlier that the Shari'ah does not provide a specific procedural system, but leaves such details to the ijtihad 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.[19]

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 *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.[20]

In legal terminology, the word can be traced to several hadiths. For example, Ibn Abū Shaybah related in his collection *Al-Muṣannaf*, 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."[21]

Ibrāhīm used to say: "The testimony of one concerning whom you have misgivings is not acceptable."[22]

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.[23] The word for claim, *daʿwah*, has the meaning of the infinitive. Thus, if Zayd claims a right over ʿAmr in the case of money, Zayd becomes the claimant, ʿAmr 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[24]; the Mālikīs say that it is a statement that, if accepted as true, will entitle the one making it to a right[25]; the Shāfiʿis say that it is notification of one's right to something over someone else before a judge[26]; 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.[27]

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.[28]

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 (*khulʿ*), 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.[29] 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.[30]

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 Shar^{c}iah 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."[31] 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."[32] Other jurists considered detention as being in the same class of punishments as the *ḥudūd.* 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.[33]

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. ^{c}Alī ibn Abū Ṭālib used to make surprise visits to the prison in order to inspect its condition and listen to the inmates' complaints.[34]

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^{c}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.[35]

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.[36] 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.[37] 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 Masʿūd, when he was governor of Iraq, was told that "Walīd ibn ʿUqbah'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 ʿUmar ibn al-Khaṭṭāb was informed that Abū Miḥjan al-Thaqafī was drinking wine in his home with some friends. ʿUmar 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 ʿUmar: "This is not permitted to you. Allah has prohibited you from spying." ʿUmar turned and walked out.

ʿAbd al-Raḥmān ibn ʿAwf related:

> I spent a night with ʿUmar 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. ʿUmar said to me: "This is the house of Rabīʿah 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 ʿUmar 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 ʿUmar when he refrained from spying on Abū Miḥjan al-Thaqafī and Rabīʿah ibn Umayyah, for both were well-known for their love of strong drink. The same was true when Ibn Masʿūd did not spy on al-Walīd ibn ʿUqbah, although he was notorious for his drinking habits.

Based on these principles, the Shari ʿah 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 Shariᶜah's rulings. This authority, obviously, must also be able to interpret correctly the Shariᶜah'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, *Iᶜlām al-Muwaqqiᶜīn*, 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-Ḥukmiyyah*, 218.
8. *Kitāb al-Qaḍā'*, 309; Maḥmūd Arnūs, *Al-Qaḍā' fī al-Islām*, 49; Ibrābīm 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-ᶜArabiyyah li al-Difāᶜ al-Ijtimāᶜī*, 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 Shariʿah'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-Ḥukkām*, 226; ʿAlā al-Din al-Tarabulsi, *Muʿīn al-Ḥukkām*, 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 ʿArafah*, 468.
28. *Ḥāshiyat 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-Fatḥ 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 Shariʿah 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 ʿAlī, who he had just appointed as governor of Yemen: "O ʿAli! People will come to you asking for judgments. When the two parties to a dispute come to you,

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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 ʿUmar ibn ʿAbd al-ʿAzīz 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, *taʿzīr* 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 Shariʿah 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 ijtihad. In such a case, it is quite possible that the best opinion and the one closer to the spirit of the Shariʿah 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 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.[1] 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 ijmaᶜ, 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.[2]

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."[3] Abū Dāwūd related that:

> Goods were stolen from the Kalāᶜī tribe, who accused certain weavers [of the crime]. When they brought the matter to Nuᶜmān ibn Bashīr, the Prophet's Companion, he imprisoned the weavers for a few days and then let them go. The tribesmen went to Nuᶜmān and said: "How could you let them go without beating them or otherwise subjecting them to tribulation?" Nuᶜmān 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?" Nuᶜmān said: "That is the ruling of Allah and His Messenger."[4]

ᶜUmar said: "A man is not responsible for himself if he is starved, fettered, or beaten."[5] Shurayḥ said: "Confinement is duress, a threat is duress, prison is duress, and beating is duress."[6] Shaᶜbī said: "[Subjecting people to] tribulation is a [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 Shariʿah. 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 ʿUrāk ibn Mālik that he [ʿUrāk] said:

> Two men from the Ghaffār tribe approached an oasis, fed by the waters of Madinah, at which members of the Ghaṭfān tribe were grazing their camels. When the Ghaṭfān tribesmen awoke the next morning, they discovered that two of their camels were missing and accused the two Ghaffārīs. When they took the two to the Prophet and told him what had happened, he detained one of them and said to the other: "Go and look." The man in custody was treated as a prisoner until his companion returned with the two camels. The Prophet said to one of them, or to the one he had kept with him: "Ask Allah to forgive me." So the Ghaffārī tribesman said: "May Allah forgive you, O Messenger of Allah." And then the Prophet said: "And you. And may He grant you martyrdom in His way." Later, at the Battle of Uḥud, the man died a martyr.[7]

It is related on the authority of ʿAbd Allāh ibn Abū ʿĀmir that he [ʿAbd Allāh] said:

> I set out with some riders. When we arrived at Dhū al-Marwah, one of my garment bags was stolen. There was one man among us whom we thought suspicious. So my companions said to him: "Hey, you, give him back his bag." But the man answered: "I didn't take it." When I returned, I went to ʿUmar ibn al-Khaṭṭāb and told him what had happened. He asked me how many we had been, so I told him [who had been there]. I also said to him: "O Amīr al-Mu'minīn, I wanted to bring the man back in chains." ʿUmar 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." ʿUmar became very upset. He never recompensed me nor did he make any inquiries.[8]

In the first example, the Prophet sought forgiveness from one he had detained on the basis of no more than an accusation. ʿUmar considered the rights of one whose property had been stolen to be invalid, for the man told him that he wanted the accused arrested even though there was no evidence to indicate his guilt. As for 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.[9]

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

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

Some later Ḥanafī scholars upheld the validity of a confession obtained under duress. Sarkhasī wrote, in his *Al-Mabsūṭ*: "Some of the later scholars from among our shaykhs gave 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 ʿIsām ibn Yūsuf, an associate of Abū Ḥanīfah's two companions,[12] was asked about a thief who denied (having committed a theft). ʿIsām replied: "Let him take an oath to that effect."[13] 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. ʿIsām said: "Praise Allah! Never have I seen injustice appear so similar to justice than in this case."

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

Ibn ʿĀbidīn wrote: "Beating one accused of theft is a matter of politics. So opined al-Zaylaʿī. A *qāḍī* may do what is politic, as politics are not the exclusive domain of the imam."[15] Yet there is nothing to support the opinions offered by these scholars. It should suffice (by way of refutation) that a Ḥanafī, ʿIsām ibn Yūsuf, described it as an injustice.

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

But even then, there is no evidence to support their opinion. In fact, Ḥanafī scholars agreed with the majority that a confession made under duress was always invalid, except in the case of theft. Even in cases of theft, they held that duress might be resorted to only in order to recover stolen goods. Otherwise, the *ḥadd* penalty of severing one's hand may not be carried out even when there is suspicion that force had been used.[16]

Ibn al-Qayyim, following the opinion of his shaykh, Ibn Taymiyyah, upheld the beating of those who were accused of theft if they already had a notorious record of evil deeds. But this was only done in order to recover the stolen goods. In his opinion, this admission under duress was not the reason for carrying out the *ḥadd* penalty, as the thief's possession of the stolen goods was sufficient reason to punish him. He wrote:

> If the accused is beaten in order to obtain his confession and he does confess, and then the stolen goods are found where he said they would be, his hand may be severed. The sentence will not be carried out as a *ḥadd* penalty on the basis of the confession obtained under duress, but because the stolen goods were found where he, in his confession, had indicated they would be.[17]

Ibn Ḥazm wrote:

> In a case, if there is no more [evidence] than a confession obtained under duress, then this will amount to nothing, for such a confession is condoned by nothing in the Qur'an, the Sunnah, or ijmaʿ. 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 ijmaʿ. 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 per-

petrator, it then becomes obligatory to carry out the *ḥadd* penalty against him.[18]

I do not suppose that Ibn al-Qayyim intended anything other than what Ibn Ḥazm intended when he mentioned conclusive evidence obtained by other means, so that the case may be decided by that rather than on the basis of the confession alone. As mentioned previously, the majority of jurists held that a confession obtained under duress was invalid. Moreover, they maintained this to be so even when circumstantial evidence indicated the contrary, as in the presence of the stolen goods in the accused's home, owing to the possibility that the goods may have been placed there by someone hoping to implicate the accused.[19]

Undoubtedly, the majority's opinion 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 carried out 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. Therefore, duress must be considered a source of innumerable evils.

CONFESSIONS OBTAINED BY DECEIT

The use of deceit to obtain an admission of guilt from the accused was preferred by Ibn Ḥazm, who cited a hadith[20] 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.[21]

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

THE ACCUSED'S FREE CONFESSION AND RIGHT TO RETRACT

In terms of the validity of the accused's retracting his/her confession, one's rights are of two varieties:

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

This difference of legal opinion occurred in regard to the *ḥadd* penalties for theft and intoxication. The jurists generally agreed 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.[24]

The evidence for accepting a retracted confession comes from the hadith in which Mūʿiz 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. Retracting such a confession 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 retracting a confession is not valid. These are the rights of people. Clearly, the one confessing has no rights of disposal over another's property. However, since the

confession has the effect of establishing such a right for someone else, it follows that its retraction invalidates someone else's right. For this reason, such a retraction, either by declaration or indication, may not be accepted.

THE ACCUSED'S RIGHT TO COMPENSATION FOR MISTAKES IN ADJUDICATION

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

It was reported to ʿUmar ibn al-Khaṭṭāb that a woman whose husband was away had been entertaining male visitors. Finding this reprehensible, ʿUmar sent someone to question her. When she was told that ʿUmar had summoned her to explain her behavior, she exclaimed: "Woe unto me! What chance do I have with someone like ʿUmar!" 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. ʿUmar sought the counsel of several Companions. They told him that he was not responsible for what had happened. Then he turned to ʿAlī, who had remained silent, and asked his opinion. ʿAlī 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 ʿUmar gave instructions to pay the money.[25]

The Ḥanbalī school says that the ruler must pay the blood money. If the mother dies for the same reason, the ruler also has to pay her blood money.[26] On this point, the Shāfiʿī jurists agreed with the Ḥanbalī, arguing that the child died through no sin of its own and pointing out that the ruler is responsible for blood money in case a pregnant woman miscarries as a result of a *ḥadd* punishment.[27]

Imposing a *ḥadd* punishment is the ruler's duty. If he is remiss in carrying out this duty, he will have sinned against Allah and His Prophet. As visits by strange men to the home of a woman whose husband is away is a questionable matter, the authorities should look into it so that it will not lead to any social evils. In the case described, it is possible that ʿAlī took the posi-

tion he did because he felt the matter should have been dealt with in a different manner. For example, the woman could have been counseled in her home and in a non-threatening manner. So, perhaps what ʿAlī meant to say was that if a ruler needs to talk to someone, he should summon the individual in a polite and dignified manner, not harshly. Otherwise, a ruler's summoning the accused in an appropriate manner should never subject the ruler to such a responsibility, unless he oversteps his right and transgresses the rights of the accused.[28]

It should also be noted that the woman gave birth before she had been accused of anything and before knowing why ʿUmar had summoned her. Therefore, it is 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 Shariʿah's principles are certainly not averse to the government's doing a good turn for those who suffer as a result of its mistakes while it seeks 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 Ghaffārī 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 by 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 they 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, just as anybody else would be. After all, the Prophet took himself to task.

Finally, the jurists were divided on whether payment for the ruler's mistakes or transgressions should be made from his personal funds, those of his family and neighbors (*ʿaqīlah*), or from public funds (*bayt al-māl*). Each option had its supporters.[29]

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 shames 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. 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 these rulers' barbarism and 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?

NOTES

1. Samīr al-Janzūrī, *Al-Majallah al-ʿArabiyyah*, no. 7 (March 1978): 119.
2. Ibn Ḥazm, *Al-Muḥallā*, 11:141.
3. There are several versions of this hadith, some of which are authentic. For details, see my edition of al-Rāzī's *Al-Maḥṣūl* (Beirut: al-Risālah, 1992), 1:233.
4. Abū Dāwūd, *Sunan*, hadith no. 4382. The same was related by al-Nasā'ī, hadith no. 4878.
5. ʿAbd al-Razzāq, *Al-Muṣannaf*, 10:193.
6. Ibid.
7. Ibid., 216.
8. Ibid.
9. See Ibn Qudāmah, *Al-Mughnī*, 15:12; Al-Bāhūtī, *Kashshāf al-Qināʿ*, 6:454; Al-Baṭlayūsī, *Al-Insāf*, 12:133; Al-Shaharābādī, *Mughnī al-Muḥtāj*, 2:240; Al-Fayruzabādī, *Al-Muhadhdhab*, 2:362; Al-Kaysānī, *Badā'iʿ al-Ṣanā'iʿ*, 7:189; Al-Mīrghanānī, *Al-Hidāyah*, 3:275; Al-Sarkhasī, *Al-Mabsūṭ*, 9:184-85; Al-Dasūqī, *Hashiyat al-Dasūqī ʿalā al-Sharḥ al-Kabīr*, 3:348; Al-Kharāshī, *Al-Kharāshī*, 6:87; Ibn Ḥazm, *Al-Muḥallā*, 2:288; and Ibn al-Matūrīdī, *Al-Baḥr al-Zakhkhār*, 5:3.
10. 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.
11. This version was related by a sound chain of narrators in Bayhaqī's *Sunan al-Aḥkām*, 9:137. Abū Dāwūd related it (3006), but without mention of the uncle being turned over to Zubayr. This is how it was related by Ibn Ḥajr in his *Fatḥ al-Bārī*, 7:366-67. See also Ibn ʿĀbidīn's *Ḥāshiyyah*, 3:270; and Ibn al-Qayyim's, *Al-Ṭuruq al-Ḥukmiyyah*, 7-8.

12. These were Abū Yūsuf and Muḥammad ibn al-Ḥasan al-Shaybānī, the two of his companions most responsible for ensuring the preservation and dissemination of his legal thought and opinions. Otherwise, it is well known that Abū Ḥanīfah was surrounded by companions who jointly participated in the process of ijtihad. See Zāhid al-Kawtharī. *Fiqh Ahl al-ʿIrāq wa Ḥadīthuhum.* [Trans.]
13. The general rule in cases involving a claim is that the case may be decided, if the claimant cannot produce evidence, by an oath taken by the party denying the claim. This accords with the juristic principle that "evidence is for those who affirm, and the oath for those who deny." This was not used often in cases involving a *ḥadd* punishment, such as theft, and explains why the *amīr* objected to the ruling. [Trans.]
14. See al-Rifāʿī, *Tanwīr al-Abṣār* and Ibn ʿĀbidīn's commentary on it, 3:270.
15. See Ibn ʿĀbidīn's *Ḥāshiyyah*, 3:259.
16. Ibid., 4:651. The general rule in regard to *ḥadd* penalties is that they may not be administered if there is the least doubt about the case. [Trans.]
17. See Ibn al-Qayyim, *Al-Ṭuruq al-Ḥukmiyyah*, 104.
18. Ibn Ḥazm, *Al-Muḥallā*, 11:142.
19. See al-Zarqānī, *Sharḥ al-Muwaṭṭā'*.
20. This hadith, related by Anas ibn Mālik, was included in the collections of Bukhārī, Muslim, Abū Dāwūd, Ibn Mājah, Imām Aḥmad, and others. [Trans.]
21. Ibn Ḥazm, *Al-Muḥallā*, 11:142.
22 See *Al-Iḥṣāh*, 2:406; *Kashf al-Qināʿ*, 6:99; *Al-Qawānīn al-Fiqhiyyah*, 344, *Bidāyat al-Mujtahid*, 2:477; *Mughnī al-Muḥtāj*, 4:150; *Badā'iʿ al-Ṣanā'iʿ*, 7:61; and *Al-Mabsūt*, 9:94.
23. See Ibn Rushd, *Bidāyāt al-Mujtahid,* 2:477.
24. See al-Nawawī, *Al-Muhadhdhab*, 2:364.
25. This incident was narrated in the following works: ʿAbd al-Razzāq, *Al-Musannaf*, 9:454, 10:18; 11:18; Ibn Qudāmah, *Al-Mughnī*, 9:579; Ibn Ḥazm, *Al-Muḥallā*, 11:24; al-Nawawī, *Al-Muhadhdhab*, 2:192.
26. Ibn Qudāmah, *Al-Mughnī*, 9:579.
27. Of course, a pregnant woman is not to be given a *ḥadd* punishment until after she has given birth and weaned her child. However, if a mistake is made and she is punished, then the imam is responsible for whatever results. [Trans.]
28. The opinion of the Ẓāhirī jurists was that the ruler or his representative cannot be held responsible in such cases. See Ibn Ḥazm, *Al-Muḥallā*, 11:24–25. Both al-Māwardī and Abū Yaʿlā differed between *ḥadd* and *taʿzīr* punishments, holding the ruler responsible only when the latter led to the prisoner's death. See al-Māwardī, *Al-Aḥkām al-Sulṭāniyyah,* 238 and Abū Yaʿlā, *Al-Aḥkām,* 282.
29. See the sources listed at the end of the previous footnote.