# The Rights of the Accused in Islam

*Ṭāhā J. al 'Alwānī*

## Introduction

As a faith and a way of life, Islam includes among its most important objectives the realization of justice and the eradication of injustice. Justice is an Islamic ideal under all circumstances and at all times. It is not to be affected by one's preferences or dislikes or by the existence (or absence) of ties of blood. Rather, it is a goal to be achieved and an ideal to be sought: "Surely, Allah commands justice and the doing of good" (Qur'an 16:90); "And I was commanded to deal justly between you" (42:15); and "Allow not your rancor for a people to cause you to deal unjustly. Be just, for that is closer to heeding" (5:8). There are also many hadiths in the Sunnah that command justice and prohibit wrong. Moreover, the achievement of justice is one of the objectives towards which human nature inclines, while its opposite—injustice—is something that humans naturally abhor.

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

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**Translator's Note:** In view of the recent interest shown by scholars on the subject of human rights and the ways they are neglected at different places in the world, the journal presents the following study. Of all the rights accorded to individual human beings, perhaps the rights of the accused are the ones most often transgressed. Owing to the length of the study, it will be published in two installments. The translation from the original Arabic was done by Yusuf Talal DeLorenzo of the IIIT Department of Research.

Allah prescribed the institution of legal judgment "that men 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 to be unjust to another's person or wealth. As a result, all people will live in the shade of peace and justice, where their rights are protected and where contentment envelops their hearts, souls, persons, honor, and wealth.

## 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 Madīnah. This is clear from the treaty between the Muslims, both the *Muhājirūn* and *Anṣār*, and their Jewish and polytheistic neighbors. In the treaty, it is written that "Whatever occurrence or outbreak is feared will result in corruption shall be referred for judgment to Allah and to Muhammad, His Prophet."[1]

During the Prophet's reign Madīnah was small, and the community's legal problems were few and uncomplicated. And so there was a need for only one judge (*qāḍī*)—the Prophet. But when the territories ruled by Muslims began to expand, the Prophet began to entrust some of his governors with judiciary responsibilities and permitted some of his Companions to judge cases. He sent them to different lands and advised them to seek justice for the people and to oppose inequity. 'Alī was sent as a judge to Yemen, and others, such as Abū Mūsā and Mu'ādh, became judges.[2] The judgments passed by the Prophet were always based on what Allah had revealed to him.

In most cases, the two disputing parties would agree to present their case to the Prophet. After listening to both sides, he would tell them that he was deciding their case solely on the basis of the externals (i.e., evidence and testimony).[3] He was careful to explain that his decisions should not be cited in order to permit what was prohibited or to prohibit what was permitted. He explained the proof and evidence and the means of

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[1]See Ḥasan Ibrāhīm, *Tārīkh al Islām al Siyāsī*, vol. 1, 102.

[2]Ibid., vol. 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), 80-3.

defence and denial:[4] "Proof is the responsibility of the claimant; whereas, for the claimed against, an oath is sufficient."[5] Confession, with all of its conditions, is proof against the confessor. No judgment is to be passed between two disputing parties until both have been heard. The Prophet had no apparatus to collect and verify evidence to the advantage or detriment of either party.

When Abū Bakr became the (political) ruler (*khalīfah*) upon the Prophet's death, he entrusted the judiciary to 'Umar ibn al Khaṭṭāb. Owing perhaps to 'Umar's reputation for severity, two years passed without his having to judge a single case. When 'Umar became the ruler, however, the situation changed. During his reign, the major conquests of Islam were underway and the territory under Islamic rule was becoming truly vast. Thus, legal issues began to come to light for the first time. In response, 'Umar laid the foundations for an institutionalized juridical order in which judges, chosen by the ruler on the basis of certain criteria and functioning as his deputies, would hear cases, arbitrate disputes, and pass legal judgments. He appointed Abū al Darḍā' judge of Madīnah, Shurayḥ ibn al Ḥārith al Kindī judge of Kufa, Abū Mūsā al Ash'arī judge of Basrah, and 'Uthman ibn Qays judge of Egypt.For the territories of Sham, a separate institution was established.

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

> As to what follows: Verily, legal judgment is an established religious responsibility, and a practice (*sunnah*) to be emulated. So if it is assigned to you, remember that speaking the truth, when there is nothing to back it up, is useless. Make peace between people in your sessions, in your countenance, and in your judgments, so that no decent person will ever have anything to say about your unfairness and so that no oppressed person will ever despair of finding justice with you.
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> The burden of proof is on the claimant, and for the defendant there is the oath. Arbitration is lawful between Muslims, except in cases where the lawful (*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

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[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.), vol. 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.

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 'Ubayd was unsure]), for surely a right decision is rewarded by Allah and is something that will be spoken well of. Thus, one whose sincere intention is to serve the truth, even if it were to go against him, will be sufficed by Allah in what transpires between him and others.

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

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

May Allah grant you His peace, blessings, and mercy.[6]

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[6]See Ibn al Qayyim, *I'lām al Muwaqqi'īn*, vol. 1, 85; al Māwardī, *al Aḥkām al Sulṭānīyah*, 71-2; al Bayhaqī, *al Sunan al Kubrā*, vol. 10, 115.

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

Not a great deal of change in this institution took place under the Umayyids, particularly under the early rulers, so that procedures remained uncomplicated. The major development was confined mostly to recording decisions in order to avert evasion and forgetfulness. In fact, such an incident occurred during the reign of Mu'āwiyah ibn Sufyān, when Salīm ibn Mu'izz, the judge of Egypt, decided a case of inheritance. When the heirs reopened the dispute and returned to the judge, he recorded his decision in writing.[8] This period also saw agreement upon the qualifications for a judge, the specification of a place in which the judicial procedure was to be carried out, and the development of the system by which injustices in public administration would be addressed.[9]

With the coming of the 'Abbasids, however, the judiciary made significant progress. Its sophistication grew in both form and procedure, and its vistas increased with the variety of cases heard. During this period the court register was introduced, the judge's jurisdiction was increased, and the state established the position of Chief Judge (*qāḍī al qudāh*), 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 estab-

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[7]See Ibn al Qayyim, *al Ṭuruq al Ḥukmīyah*, 218.

[8]See *Kitāb al Qadā'*, 309; Maḥmūd Arnūs, *al Qaḍā' fī al Islām*, 49; Ibrāhīm Najīb Muḥammad Awaḍ, *al Nizām al Qadā'ī*, 48.

[9]See Ibn Khaldūn, *al Muqaddimah*, 741.

lished 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 Imām Shāfi'ī.[10]

After the Mongol destruction of Baghdad and the subsequent end of the 'Abbasid Empire in 1258 CE/606 AH, several smaller states emerged and developed their own legal institutions. While these legal institutions differed hardly at all in their foundations and the principles upon which they were established, they did differ significantly in matters of organization, procedures, criteria for the appointment and removal of judges, and in the schools of legal thought followed.

Ibn al Ḥasan al Nabahī portrayed the judiciary of eighth-century (*hijrī*) Spain as follows: "The authorities who deal with legal rulings are first the judges, then the central police, the local police, the appellate authority, the local administrator, and then the market controller."[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 malice. The one assigned to deciding disputes and upholding rights, making decisions on matters of marriage, divorce, maintenance, and the validity of transactions is called the *ḥākim* or judge."[12]

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[10]Ibid., 1150. See also Ibrāhīm, *Tārīkh al Islām al Siyāsī*, vol. 2, 55, vol. 3, 306.

[11]*Ibrāhīm, Tārīkh al Islām al Siyāsī*, vol. 4, 377-86; Awaḍ Muḥammad Awaḍ, *al Majallah al 'Arabīyah li al Difā' al Ijtimā'ī*, no. 10 (October 1979): 98.

[12]Ibn al Qayyim, *al Ṭuruq*, 215-6.

## Judicial Organization and Its Sources

It should be clear from the historical survey presented above that the Shari'ah did not specify a particular juridical framework. Rather, it established the principles, general foundations, objectives, and sources of legislation. Organizational details (i.e., the extent of a judge's jurisdiction,[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 Shari'ah that entrusts the juridical process to an individual or an institution, it was left up to the Muslim leadership to decide. The responsibility could be spread among several officials or confined to one, as long as the sole requirement was met: the ruler must ensure that those entrusted with this responsibility meet the Shari'ah's conditions.[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 ma'ālim*), the military authority (*amīr*), the police commissioner (*ṣāḥib al shurṭah*), the market authority (*ḥisbah*), and the judge (*qāḍī*), in the limited sense represented by Ibn al Qayyim above.[15] Indeed, the responsibilities of each were not always exclusive or well-defined, for they differed in scope and overlapped, so that sometimes certain responsibilities associated with one would be charged to another in accordance with the desires of the ruler or as a result of his policies.[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 (*ta'zīr*) for crimes against the general public interest or misdemeanors. This authority was often called the market controller, as most of the cases were related to crimes committed in the market place. The judge, sometimes called *ḥākim*, was responsible for settling the civil disputes that involved upholding rights and making sure that these were enjoyed by those entitled to them.[17]

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[13]al Māwardī, *al Aḥkām al Sulṭānīyah*, 69-73; Ibrāhīm, *Tārīkh al Islām al Siyāsī*, vol. 4, 377-86.

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

[15]Ibn al Qayyim, *al Ṭuruq*, 215.

[16]Ibn Khaldūn, *al Muqaddimah*, 740.

[17]Ibid.; Ibn al Qayyim, *al Ṭuruq*, 218-9.

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

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

2. *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.

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

Modern systems of legal procedure combine, to a greater or lesser extent, aspects of these systems. At certain stages, features of one will appear dominant, while at others features of another will appear dominant.[18]

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

[18]Ibn Khaldūn, *al Muqaddimah*, 740-3; Awad, *al Majallah al 'Arabīyah*, 101-3.

[19]Ibn Khaldūn, *al Muqaddimah.*

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 Tihāmah, 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'*), however, used the term "the claimed against" instead of "the accused." In other words, they used the root for "claim," which is one's seeking to establish that one has more of a right to something than somebody else.[23] The word for claim, *da'wah*, has the meaning of the infinitive. Thus, if Zayd claims a right over 'Amr in the case of money, Zayd becomes the claimant, 'Amr the claimed against, and the money the claim or claimed. Lexically speaking, however, a claim and an accusation are different things, for a claim is essentially notification.

The jurists understand this in the following ways: a) according to the followers of Abū Ḥanīfah, a claim is one's notification of one's right to something over another present in the court[24]; b) the followers of Imām Mālik say that it is a statement that, if accepted as true, will entitle the

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[20]See *al Miṣbāḥ*, 107, 129; T-H-M in al Zabīdī, *Taj al 'Urūs*.

[21]Ibn Abī Shaybah, *al Muṣannaf*, vol. 8, 320; al Bayhaqī, *al Sunan al Kubrā*, vol. 10, 201; al Tirmidhī, *al Sunan*, hadith no. 2299; al Khaṣṣāf, *Adab al Qāḍī*, vol. 2, 112, vol. 1, 229.

[22]Ibn Abī Shaybah, *al Muṣannaf*, vol. 8, 321.

[23]See Aḥmad 'Abd al Razzāq al Kabīsī, *al Ḥudūd wa al Aḥkām*, 288; Abū al Walīd ibn Shahnah al Ḥanafī, *Lisān al Ḥukkām*, 226; 'Alā al Dīn al Tarābālūsī, *Mu'īn al Ḥukkām*, 54.

[24]al Kabīsī, *al Ḥudūd*, 288.

one making it to a right[25]; c) according to the followers of Imām Shāfi'ī, it is notification of one's right to something over someone else before a judge[26]; and d) the scholars of the Ḥanbalī school define it as a person's ascribing to himself/herself entitlement to something in the hand or in the safekeeping of another.[27]

Jurists also disagree in their interpretations of the words "claimant" and "claimed against." Some have defined the claimant as one who is left alone if he/she leaves (his/her claim) alone, while the claimed against is one who is not left alone even if he/she leaves the claim alone. Others, however, have defined a claimant as one who claims that something is not as it is and effaces something that is evident, while the claimed against is one who establishes that something evident is as it is. Still others define the claimant as one who is not required to enter into a legal dispute, and the claimed against as one who is required to do so.[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 (*khul'a*), 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: a) someone well-known for his/her piety and integrity and thus unlikely to have committed the crime of which he/she is accused; b) someone notorious for his/her wrongdoing and profligacy and who is thus not unlikely to have committed the crime of which he/she is accused; and c) someone whose circumstances are unknown, so that nothing may be surmised concerning the likelihood of his/her committing the crime of which he/she is accused.

In reference to the first category, the accusation will not be accepted unless it is accompanied by legally valid evidence. No legal action may

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[25]al Jurjānī, *Kitāb al Ta'rīfāt*, 93; al Muṭṭarizī, *al Mu'arrib min al Mugharrib*, 164.

[26]al Kabīsī, *al Ḥudūd*, 287.

[27]*Sharḥ Ḥudūd Ibn 'Arafah*, 468.

[28]*Ḥāshiyat Qaylūbī wa 'Umayrah*, vol. 4, 334.

be taken against such people on the basis of an accusation alone. In this manner, decent people may be protected from the deprecations of those seeking to bring dishonor upon them. There are two differing opinions regarding the punishment for those who make false claims or accusations against such people: a) the opinion of the majority of the jurists, which says that the person should be punished, and b) that of Imām Mālik and Ashab, who held that punishment should not be meted out unless it can be proved that the one who made the accusation intended to harm or otherwise discredit the accused. The legal principle upon which the majority's ruling is based is that consideration must be given to the circumstantial state of innocence.

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

In regard to the third category of the accused, one whose circumstances are unknown, the ruler or the judge may detain the accused until his/her circumstances are better known. This ruling, which was accepted by the majority of scholars, including 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 to limit freedom, regardless of whether this is accomplished by confinement in a prison, by surveillance, or by being required to stay within a defined area. The permissible period of detention is also disputed. Basically there are two opinions: some have determined it to be one month, while others have opined that the matter should be left to the legal discretion of the official.[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 upon it. Moreover,

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[29]Ibn al Qayyim, *al Ṭuruq*, 101, 103.

[30]al Māwardī, *al Aḥkām al Sulṭānīyah*.

this principle may only be overruled due to irrefutable evidence or, in other words, evidence about which there is no doubt. Thus, it is connected closely with the principle that certainty may not be erased by doubt. Indeed, the relationship of one principle to the other is as the relationship of a branch to a trunk, for the two are found together throughout 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 regard to the protection of what is considered essential to society.

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

Islam, which seeks to protect the rights of the individual, also seeks to protect the rights of society as a whole. Therefore, no individual may presume to overstep the rights of society while hiding behind the veil of personal rights and freedom, and society may not trample on the rights of the 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, to eavesdrop on private conversations, to open one's mail, or to do anything else that infringes upon those rights.

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

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

*The Authority of the Investigator.* The authority enjoyed by the investigator in relation to one concerning whom there is doubt is limited and, if it encroaches on some of the rights of the accused, it certainly does not extend to any of his/her other basic rights. It was for this reason that the Prophet called such a person a "prisoner."[31] This also establishes that the accused will be maintained at the expense of the state.

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 imprisoned and his/her affairs. The Prophet once left a prisoner in the care of a certain individual. He ordered the latter to care for and show respect to the former and, thereafter, often visited the man and inquired after the prisoner's welfare. 'Alī ibn Abī 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'ah scholars have ruled that a judge's first responsibility, upon assuming his position, is to go in person to the jails and free all who have been detained unjustly. He should go to each prisoner and ascertain the reasons for his/her imprisonment. In certain cases, he may meet with the accusers to determine whether the reasons for imprisonment are still valid and if justice was done.

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

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[31]Ibn al Qayyim, *al Ṭuruq*.

[32]Ibid.

[33]Ibn Ḥazm, *al Muḥallā*, vol. 11, 141.

[34]See Abū Yūsuf, *Kitāb al Kharāj* and its commentary *Fiqh al Mulūk*, vol. 2, 238.

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

*Investigating the Accused's Person, Residence, and Conversations.* Allah has protected and honored humanity and prohibited the touching of an individual's person, skin, or honor.[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 (24:27-8) and "O you who have faith!

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[35]Ibn al Qayyim, *al Ţuruq*, 103.

[36]Awad, *al Majallat al 'Arabīyah.*

[37]This is part of an authentic hadith. See al Suyūţī, *al Fatḥ al Kabīr*, vol. 3, 256.

Avoid being overly suspicious; for suspicion in some cases is wrong; and spy not 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. For example, Ibn Mas'ūd, when he was governor of Iraq, was told that "Walīd ibn 'Uqbah's beard is dripping with wine!" He replied: "We have been prohibited from spying. But if something should become obvious to us, we will take him to task for it." It is related that one time 'Umar ibn al Khaṭṭāb was informed that Abū Mihjan al Thaqafī was drinking wine in his home with some friends. 'Umar went straight to Abū Mihjan's house, walked inside, and saw that there was only one other person with Abū Mihjan. This man said to 'Umar: "This is not permitted to you. Allah has prohibited you from spying." At that, 'Umar turned and walked out.

'Abd al Raḥmān ibn 'Awf related:

> I spent a night with 'Umar on patrol in the city (Madīnah). A light appeared to us in the window of a house with its door ajar, from which we heard loud voices and slurred speech. 'Umar said to me: 'This is the house of Rabī'ah ibn Umayyah ibn Khalf, and right now they're in there drinking. What do you think?' I replied: 'I think we are doing what Allah has prohibited us from doing. Allah said not to spy, and we are spying.' So 'Umar turned away and left them alone.

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

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

> And the proof that the word "suspicion" in this verse means "accusation" is that Allah then said: 'And spy not on one another.' This is because one might be tempted to make an accusation and then seek confirmation of one's suspicion via spying, inquiry,

> surveillance, eavesdropping, and so on. Thus the Prophet prohibited spying. If you wish, you may say that what distinguishes the kind of suspicion that must be avoided from all other kinds of suspicion is that the kind of suspicion for which no proper proof or apparent reason is known must be avoided as *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 is prohibited in the verse.

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

It should be noted here that Qur'anic commentators and authorities on the legal interpretation of the Qur'an have all followed the legal scholars in allowing arrest and precautionary detention. Indeed, they made a distinction between those whose apparent lifestyles indicate that they are honest and good and those whose apparent lifestyles indicate that they are dishonest and unreliable. Thus, they considered the prohibition to apply only to spying on honest and decent people. In relation to others, however, these scholars felt that spying on them is lawful.

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

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

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

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