

ISLAMIC CONCEPT OF THE ADMINISTRATION OF CRIMINAL JUSTICE

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Islam is a complete code of life and it guides its believers in every temporal and spiritual matter. The concept of justice in Islam is all pervading and has to be manifested in every sphere of human life. Like other fields of life, Islam has stressed on justice in criminal field and has laid down clear injunctions for maintaining criminal justice. The Holy Quran says, "O ye who believe! stand out firmly for justice as witnesses even against yourselves or your parents or you kin, and whether it be against rich or poor for Allah can best protect both." (4:135)

According to the jurists the criminal law of Islam revolves around five fundamental points. These are (i) Protection of religion, (ii) Protection of the sanctity of family (iii) Protection of life, (iv) Protection of property and (v) protection of sense. (Al-Ghazali; Abu Hamid, Muhammad Ibn Muhammad, Al-Mustafa, Volume-II, page 66)

The Holy Quran has laid down some principles for the criminal justice. Some of these are as under:-

- i) Equality of human beings. (49:51)
- ii) One is innocent unless proved guilty.
- iii) No offence without intention. (33:51)
- iv) Concealment of testimony is grave sin. (2:284)
- v) No crime under compulsion. (16:106)
- vi) No one can be held responsible for the acts of others. (35:18)
- vii) Punishment in proportion to the crime. (49:17)
- viii) Evidence must be conclusive and based on justice (28:20)

The Holy Prophet (PBUH) has established many principles for criminal justice. Some of the relevant ahadith are as under:-

- a) The Prophet said, "Burden of proof lies on the complainant and the accused has to take oath."
- b) The Prophet, while sending Hazrat Ali to Yamen as qazi, said to him, "don't decide on the statement of one party until you hear the other party as you have heard the first party."
- c) The Prophet had ordered that the case must be decided in the presence of both the parties.
- d) The Prophet said, "the judge must maintain equality between the parties in sitting, talking and attention." (Jamiul Usul, Ibn Asir, Volume-III, pages 116-118).

Hazrat Umar in a letter to Abu Musa Ashary, writes about Islamic criminal justice, "After the praise to Allah the administration of justice is a definite religious duty and a generally followed practice. Understand the depositions that are made before you, for it is useless to consider a plea that is not valid. Consider all the people equal before you in your court and in your attention, so that the stronger will not expect you to be partial and weaker will not despair of justice from you. The burden of proof is on the claimant and the defendant may be put on oath. All Muslims are acceptable as witnesses against each other except those who have been punished with Hadd-e-Qazf (accusation of adultery) and those who have tendered false evidence and those who are suspected (of partiality) on (the ground of) accuser's status or relationship." (Al-Wakia, Akbar Al-Quzzat, Volume-1, page 70).

Hazrat Ali also in a letter to Ashtar Nakhi, writes about criminal justice "so far as dispensing of justice is concerned you have to be very careful in selecting officers for the same. You must select people of excellent character, superior calibre and meritorious record. They must possess following qualifications. Abundance of litigations and complexity of cases should not make them lose their temper. When they realize that they have committed a mistake in judgment they should not persist in it and should not try to justify it. They must exhibit patience and perseverance in scanning the details, in

testing the points presented as true and in sifting facts from fiction. They should not develop vanity and conceit when compliments and praises are showed upon them. And they should not be misled by flattery and cajolery". (Abdul Hameed, Sherh Nahj Al-Badaghah, Volume IV, page 130)

The instructions of Qazi Aby Yusuf to the judges regarding criminal justice are worth mentioning which are as under:- "You should not accept the complaint alone as proof of the man against another in murder, theft act. He should not be punished for a hadd crime save according to clear and certain evidence or a confession free from coercion. It is impermissible to imprison a man merely as a result of another man's accusation against him. The Prophet did not question the people with accusation. But the proper manner is that you must call both the accuser and the accused together. If he (accuser) produces positive evidence in support of his allegations, the judge will rule for him; otherwise, he will set the defendant free... The friends of the Prophet were so cautious about imposing punishments, for fear they might harm the innocent that they preferred to avoid the penalties... They would say to an accused thief "Did you steal? Say "no". (Abu Yusuf, Kitab al-Kharaj, Page 190)

PERSONAL SECURITY

One of the basic principles of the criminal justice in Islam is personal security. It means that the actor himself is the only person who can be accused of a particular crime and no one else, and no one shall escape responsibility irrespective of blood ties or friendship to the victim or to the judge or ruler. A person who has taken part in a prohibited act whether he is the principle or an accomplice must be incriminated according to the rules of accountability.

The Quran says,

- i) And that man has only that for which he make efforts. (53:39)
- ii) Whose doth right, it is for His should and whoso doth wrong, it is against him. (41:46)
- iii) Each should earns on its own account. (6:165)
- iv) No one will bear the burden of others. (35:18)
- v) He who doth wrong will have the recompense thereof. (4:123)

The Prophet (PBUH) said, " A soul is not held responsible for acts committed by his father or by his brother." (Al-Baihaqi, Volume IX, page 138)

LEGALITY

Another principle in this regard is legality of crimes and punishments which means that no person can be accused of a crime or suffer punishments except as specified by law. The Quran says:-

- a) We never punish until we send a messenger. (47:15)
- b) And never did thy Lord destroy the towns until he had raised up in their mother town a messenger reciting unto them. (38:59)
- c) Every nation had its messenger raised up to warn them. (35:25)

Under the principle of legality applied in Islamic Law a set of penalties should be assigned to all crimes, for which the judge can select the proper penalty according to the circumstances of each case, the background and personality of the accused and his inclination towards criminal conduct. The purposes of penalty in Islamic Law are to deter criminal conduct and to reform and rehabilitate the offender. The penalty should not cause unnecessary harm to the culprit. The penalty should be proportionate to the crime. The Prophet said, "He who imposes a hadd penalty to a non-hadd crime is considered among the oppressors." (Ibn Taimiyyah, Al-Siya sah al-Shariyyah, page 134)

PRESUMPTION OF INNOCENCE:-

An important aspect of criminal justice in Islam is that every one including an accused person is innocent unless proves guilty. The Prophet said, "Every infant is born on pure nature of Islam, it is his parents who subsequently convert him to a Jew, a Christian or a magus." The Prophet (PBUH) said, "prevent punishment in case of doubt." (Ibn Qudamah, Al-Mughni, Volume X, page 210). Since everyone is inherently innocent, only clear, conclusive and convincing evidence can over-come this presumption.

FREEDOM FROM UNREASONABLE SEARCH AND SEIZURE

An right to privacy is an inherent right of everyone, Islamic Law restrains those who may violate this right and search the dwelling of the suspected persons without sound ground. The Quran says:

"O ye believe! Enter not houses other than you own without first announcing your presence and invoking peace upon the people therein. That is better for you, that you may be heedful... and if you find no one therein, still enter not until permission hath been given, and if it be said unto you: Go away, for it is purer for you. Allah Knoweth what you do. (24,27,28)

Thus according to this text, entry into the dwelling is prohibited unless by consent of the owner. This prohibition is not limited to places actually occupied by the owner; it applies also to the owner's property during his absence. This is explicit in the verse cited above which precludes entry without "permission" and requires consent. The Sunnah also is in accord, as is evident from the Prophet's saying:-

"No man who leads a group in prayer should invoke blessing solely upon himself, for if he does, he will have betrayed them. A man should not look inside a house unless he is relieved." (Al-Munziri, Al-Targhip, page 347)

This right also extends to one's clothing in that no one has the right to inspect the clothing of another person to determine what may be concealed therein, without reason and without permission. The inviolability of the dwelling is linked with the inviolability of the person, for the latter derives from the former as a manifestation of individual freedom. It is meaningless to protect the house without protecting the owner as well.

A person's correspondence is also available. It is thus unlawful to read another's private communications after a clandestine seizure. The Prophet (PBUH) says: "He who reads a letter of his brother without his permission, will read it in hell." The protection against infringing the confidentiality of letters as constituting violation of the right of privacy extends to intellectual liberties, particularly the freedoms of opinion and expression, as established under Islamic Law.

The inviolability of the dwelling is not based on a purely religious foundation; it is also partly inspired by the social policy of protecting individual security and freedom in a manner which does not interfere with the right and duty of the state to take necessary action to investigate crime. Thus, under Islamic Law the inviolability of the dwelling is not absolute but is subject to certain exceptions necessitated to maintain social order and safety. State authorities may enter the dwelling to conduct reasonable searches, and they may search the individual if such activity is reasonably related to the public interest. But the state's right is governed by conditions and guarantees aimed at preventing arbitrary and intimidating searches. (The Islamic criminal justice system by Bassiouni, pages 68,69)

The search is restricted by the rule that the warrant should not issue unless sufficient evidence of the crime is obtained, that is, unless there is probable cause that a crime was committed by the accused. Thus, for example, when a trustworthy man informs the authorities that another has tried to kill him, or if he sees a man take a woman aside to commit adultery with her, probable cause exists. The warrant also may issue when the offense becomes perceivable though not seen, as for example, when the smell of alcohol and noise of intoxicated persons emanates from inside a house.

Finally there must be lawful discovery of sufficiently incriminating proof or existence of the offence. If the discovery is a result of spying, the evidence gained thereby cannot be used for incriminating purposes. God says: and spy not"(49:100). This is because dwellings and individuals are immune from infringement unless the offence is apparent,

and they should not be violated or encroached. The Sunnah is also explicit on this issue.

Islam from its very beginning has observed this rule as illustrated by the following incident. Hazrat Umar once found a group of men drinking wine and burning shacks. He said, "I have prevented you from drinking, but you have drunk. I have prohibited the burning of shacks, but you did." They said, "Leader of the faithful, God ordered you not to spy, but you spied. He ordered you not to enter without permission, but you did." The Umar said, "These two of those two" and left without questioning them. Abdur Rehman Ibn Auf related another incident:

"Once at night I accompanied Umar on one of his wanderings at Medina. As we traveled we saw the light of a lamp. We went toward it. When we approached it, we found a locked door concealing some people noisily reveling. Umar took my hand and said, "Do you know whose home this is? I said I did not. He said "It is the home of Rabiaa Ibn Umayyag Ibn Khalaf. They are drinking. What is to be done? I said, "I see that we did what God prohibited. God forbids us to spy. "Umar returned and disregarded them. (Tarikh Ibn Hashim, paged 282-286)

GUARANTEES OF THE ACCUSED DURING INTERROGATION

Interrogation under Islamic Law differs from simple questioning. Besides charging the suspect with a crime, interrogation requires confronting him with the established evidence against him, and discussing that evidence so that he may either refute it or confess because of it. Interrogation is thus as instrument of the investigator to find truth either through confession or denial by the accused. The evidence which is secured through interrogation is oral, whereas a search leads to tangible evidence which can be physically examined.

The first guarantee during interrogation pertains to the persons responsible for conducting the interrogation. It is established that questioning of the accused should be conducted only by a designated officer. In the early days of Islam, crimes were frequently solved through the securing of confessions by the religious zeal of the believers but later it was fear of the ruler which aided in the administration of justice. Then the institution of Muhtasib developed with the defined tasks of receiving reports and investigating crimes, where upon the matter went to the Nazir-e-Mazalim who referred to it the judge to adjudicate to the facts, render his sentence or dispose of the cases by reconciling the parties to the dispute, providing that they agreed to be bound by the decision. The Muhtasib, on the other hand, besides his limited investigatory authority was charged with the prosecution of cases before the judge if the complaining parties failed to do so.

The accused is also guaranteed in Hudood and Qisas crimes from having to take an oath or substituting for the oath by putting up money or other property as a guarantee. In these criminal accusations the investigating authority is not allowed to require an oath from the accused.

A very crucial right of the accused in the investigation of Hudood crimes is the right to refuse questioning and the right to remain silent. An accused who exercises this right is guaranteed that his silence will not be used as incrimination evidence against him. Hudood crimes can be proved only by means of an avowal or other positive evidence and never by means of the accused's silence. Refusal to answer questions is, therefore, inadmissible in evidence to convict the accused. If he is asked to make a statement or give an oath, his refusal to do so will be considered an unreliable confession, for it is no more than silence, and the silent to statement can be ascribed, even if it would be considered as giving rise to an inference, it would be equivalent to a naked admission which in Islamic Law is deemed doubtful, and in Hudood crimes on one can be convicted on the basis of doubtful evidence. (Al-Marghinani, Hidayah, pages 312,313)

Islamic Law expressly prohibits torture, beating, another cruel and inhumane treatment. The Prophet (PBUH) forbade torture saying; "God shall torture on the Day of Recompense those who inflict torture on people in life. The Prophet (PBUH) also forbade the striking of Muslims. (Abu Ubaid, Kitabul Amwal, page 188). Additionally Hazrat Umar addressed his governors as follows: "Hit not the Muslims lest they be humiliated. Deny not their rights, lest they

become faithless, and place them not in the jungle lest they be lost." (Ibn Hajar Asqalani, Fathul Bari Volume XII pages 172-173).

It has been related that Audi Ibn Arrtaa, one of Umar Ibn Abdul Aziz's deputies, sent a letter to Umar asking permission to inflict some torture on those who refused to pay duty to the public treasury. Umar sent a letter forbidding and condemning such measure, saying:

"I wonder at your asking permission from me to torture people as though I am a shelter for you from God's wrath, and as if my satisfaction will save you from God's anger. Upon receiving this letter of mine accept what is given to you or let him give an oath. By God, it is better that they should face God with their offenses than I should have to meet God for torturing them. (Abdu Yusuf, Kitabul Kharaj, page 115)

The Prophet (PBUH) set forth a factual example for creating the accused fairly and humanely and thereby enabling him to speak freely and encouraging him lest he give a false and misleading confession. A man accused of theft was brought before the Prophet. He addressed the accused gently saying, "I do not think you stole. Did you. "(Abu Yusuf, Kitabul Kharaj, page 176)

Islamic Criminal Justice system guarantees that the accused shall not be coerced into incriminating himself. Any confession by the accused given as a result of coercion, torture or unlawful detention cannot be used to sustain a conviction. A confession must be free and of voluntary conduct and it is nullified by interference with the will of the accused. Hazrat Umar said, " A man would not be secure from incriminating himself if you made him hungry, frightened him or confined him.