

Rights of the Accused in the Islamic Legislation: A Comparative and Analytical Study

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Abstract

This study aims to shed light on the extent to which the accused's right in Islamic jurisprudence is in harmony with the conventional law. The accused may be exposed to some harmful acts during his trial which may entirely affect his rights which will give him the entitlement to defend himself. The researcher pays attention to explaining the rights of the accused person in Islamic jurisprudence compared to the conventional law. The study adopts inductive approach to gather information written in Islamic jurisprudence, and adopts comparative approach in order to make comparisons between the views of ancient and contemporary jurists in question under discussion, and transfer ideas of Shariah experts to the legal studies field in order to compare the approach and benefit and vice versa. The study concludes that the conventional law does not differ much from the Islamic jurisprudence in terms of providing personal rights to the accused; both Islamic jurisprudence and conventional law agree on the principle that the accused is innocent until proven guilty.

Keywords: Rights, Accused, Defense, Innocence and Equality, Shariah and Law.

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INTRODUCTION

Preface

The right of the accused in Islamic law to defense is regarded of the most important elements of the administration of justice which is one of the greatest human rights derived from Allah (swt) directly, as Allah (swt) leaves judgment on Himself where He said: (judgment is for Allah alone). There is no doubt that the judgment of Allah is purely just as Allah does not support favoritism or courtesy or prejudice. Allah says in His Book: (We sent aforetime our apostles with Clear Signs and sent down with them the Book and the Balance (of Right and Wrong), that men may stand forth in justice). Allah (swt) says again: (We have sent down to thee the Book in truth, that thou mightest judge between men, as guided by Allah. so be not (used) as an advocate by those who betray their trust).

And the link between the divine right and justice lends deeper ideological rights, which leads one to claim his right with insistence and firmness, as it is

from Allah's command, and is thus within the framework of duties and rights [1].

The right to defense is also considered sacred right aims to achieve equality in the procedural centers between submission before the court, and where the equality differs the idea of justice itself differs, and this imbalance leads to serious consequences for society, because it makes the rules of substantive law governing relations between individuals in the community in vain and useless.

Of the most important security and confidence and a sense of tranquility and psychological comfort is for man to feel that he is in complete immunity from any judicial injustice, or what is attributed to him of charges that is not believed at first glance, but takes a clear path of investigation and trial, in an atmosphere of justice, and defense opportunities are made available and the issues are scrutinized based on fairness and accuracy, so that the innocent will not be punished and the criminal will not escape [2].

The right of defense in Islam is considered – just like in the conventional law- among indictment issues, that are obvious, although there is no general theory of the right of defense, where the scholars of Islamic law did not address all the main points as done by scholars of conventional law, but they have offered some different applications of the accused's right to defend himself before the courts or seek the help of someone else to defend him in this regard [3].

Definition of the accused

The literal definition of the accused means to suspect someone and accused him of committing an offence [4].

The technical definition: is suspecting someone by committing an offense in the judicial council to claim a right. There is difference between the accused and the offender; and if both of them [5] a right is demanded from them, the agreement between them in this does not lead to their agreement in all aspects, so that when the accused is mentioned it means the offender or vice versa; perhaps the first difference that appears between them is that from aspect of the literal meaning and they differ in terms of the technical meaning; majority of scholars mentioned that the offender is liable for what he committed of killing and injury and that only occurs on the body. And other scholars refer offence to only those that require hudud and qisas (retribution) [6].

The meaning of the accused from the Shariah point of view indicates that it is linked to all crimes whether or not it requires hudud or qisas or tazir and is not only to offence that requires hudud and qisas, and not only to offences of killing and injury. And there is an important difference; that is the offender has already been found guilty for committing the offence, but the accused is not yet found guilty for the crime he has been accused of [7].

The accused is of three types [8]:

First: the accused is innocent, and they mean the person that is not known for committing these kind of crimes, and this include everyone known with righteousness, religion or known to be of good character; this shall not be punished by consensus of the scholars.

Second: the accused whose characters are unknown, and they mean someone who is not known between people with righteousness and immorality; and he is to be detained until his characters are known, and this is the view of majority of scholars.

Third: the accused known with immorality, which means he is known with committing sins and his insistence on the forbidden things, such as to be famous with theft or murder or robbery etc. The leader must

make all effort to detect these kinds of people and to use all means to direct charges to them, which should be based on the offense they commit; perhaps he may use imprisonment or beating [5]. The majority of scholars are unanimous that it is permissible to punish this kind of accused. Ibn Qayyim narrated consensus on this matter and condemned those that say the Shariah does not punish and considered this opinion as contradicting the Shariah texts and the consensus of the Ummah, and the Sunnah has elaborated on this [8].

The conditions to be fulfilled by those who bring charge and those who are charged

The conditions differ according to the charge situation; the one who accuses someone with a particular issue must fulfill the following conditions [9]:

- To be sane: charge cannot be brought by insane as he may tell lie.
- To be an adult: charge is not accepted by small boy as he may also tell lie and there is no confidence in him.
- To be committed to Muslim provisions.
- To be the person concern with the matter or his agent.
- To be specific as charge is between two parties, as such they must be specified.

The conditions to be met for those who are charged [10].

- To be capable of committing the crime 2- To be known 3- To be belligerent 4- To be pious and righteous.

Ways of Proving Charge

There is no doubt that to achieve justice for the accused there must be evidence to prove the charge. I have discussed the necessary conditions that must be established to prove the charge, which are summarized as follows [11].

In every charge to the accused there must be evidence to prove it; the Shariah provides the accused rights to rebut that and to defend himself. Some ways of establishing charge are as follow:

Testimony: is among the strongest evidence to substantiate lawsuit. The scholars are unanimous that it is acceptable; in fact, a case built on testimony cannot be rejected, Allah (swt) said: (and get two witnesses, out of your own men, and if there are not two men, then a man and two women). Allah (swt) commanded in this verse and others testimony, which shows it is a provision, and this indicates admissibility of testimony. Although, testimony is among the strongest evidence to prove a charge on the accused but the Shariah provides certain conditions to establish validity of testimony, which shows taking strong precaution on the part of the accused; and to ensure the correctness of testimony, the judge has a role to play in the correctness of the testimony, where he will discuss and make dialogue

with the witnesses to verify the truth of their testimony besides identifying them [12].

Another means of proving charge is confession, where the accused admits the charge against him. Confession has been used in the Shariah as evidence to prove a charge, and the Holy Qur'an and Sunnah have confirmed this. There are conditions before confession of the accused is admissible, and they are mentioned in Fiqh books, researches and special studies on that. And another evidence is circumstantial evidence; it is evidence that supports the one agreed upon by consensus as not all scholars accept it in order not to be unjust to the accused; and even those who accept it limit that to the strong one and they said it has to be supported by Qasamah [13]: which is oath to be taken by the people of his locality or house or a place outside city or village near him where sound may be heard from there, if something is found is acceptable. Qasamah is performed by taking oath from everyone mentioning that I did not kill him and did not know who killed him [11]. In accepting Qasamah as evidence on charge there is protection of blood and this brings security and comfort in the hearts.

Right of the accused to defend himself

The Shariah has ensured the accused the right to defend himself before the judicial council; and all the provisions of the principles and foundations that emphasize this right in human rights declarations, and the body of the global constitutions, are only revealing as decided by Islamic law valid for every time and place [9].

Though Islamic law has not expressly mentioned the rights of the accused to defend himself as mentioned in the conventional law, but this right has many aspects in Islamic law, including:

The Right of the Accused to Be Present

The judge should not judge on the absent defender, because no matter the evidence presented to him against the accused, the accused may bring evidence that refute the evidence brought to accuse him, as narrated by Umar bin Khattab (ra) that a man came with a gouged eye, and Umar said to him: bring your opponent, and the man said to him: O Amir al-Muminin: this is what you see, and Umar said to him: maybe you have gouged two eyes of your opponent, and when the opponent with two eyes gouged came [14], then Umar said: the argument of others shall be heard in any case, they said: none of the companions oppose Umar in his judgment.

As also narrated from Umar bin Abdul Aziz, Luqman said: if a man comes to you with gouged eyes, do not judge until his opponent arrives.

However, it is required that for the accused to enjoy this right he must be present in the jurisdiction of

the judge and not hidden, but in case of the contrary, the scholars differed. According to the Hanafi School of Law, no judgment on absent person until he is present, but Shafi'i, Maliki, Hanbali and Zahiri Schools of Law permit judgment on a person absent from the country or judicial council or hide from the judiciary, and their authority is the saying of Allah (swt): (O ye who believe! stand out firmly for justice, as witnesses to Allah), they said the command to stand firmly for justice is general and includes the one who is present and the one who is absent, as such judgment for both is the same, and they said judgment on the absent person does not prejudice the right of the accused to defend himself in court [19], because if the accused attends the judgment is a stand argument, and it can be heard and used even if this led to overturning a ruling.

In our opinion, judgment should not be made on the absent accused until he comes, as his presence guarantees his right most in defending himself; it is possible for the judge to know the truth if the accused does not attend to present his evidence and refute the evidence of his opponent; the accused when he attends may be able to present arguments that may abrogate or weakens all what has been presented by his opponent [7].

However, at the same time we see that in order not to judge on the absent person there must be two conditions, which are:

- The accused decline to attend without an acceptable excuse, intending for not attending to evade appearing before the judicial council; in this case he may have abused his right to defense, and then with this he has missed this right.
- The absence of the accused should not result in crippling or neglecting a part of the litigation because of the damage to the rest of the parties to the proceedings without any acceptable justification, which is contrary to the purposes of Islamic law of 'no harm or reciprocating harm'.

The Right of the Accused to Equality

The principle upon which the right of defense stands is the equality of parties in litigation to defense; it should not only be given to one party and ignore other parties; no discrimination shall be applied "There is no difference between Muslim and non-Muslim, or between a Muslim and his brother except fear of God" as Allah (swt) said: (the best amongst you is the one who fears Allah the best). No enmity and hatred should be allowed as Allah (swt) said: (O ye who believe! stand out firmly for Allah, as witnesses to fair dealing, and let not the hatred of others to you make you swerve to wrong and depart from justice. Be just: that is next to piety). Close relationship, favoritism or courtesy should have no impact at the expense of equality, Allah (swt) said: (O ye who believe! stand out firmly for justice, as

witnesses to Allah, even as against yourselves, or your parents, or your kin). In order for all parties in litigation to have equality [9], Islam required the judge to take into account procedures and other things required by litigation, which shows the necessity of equality between the litigant parties in the way to summon, listen and allowing them to express their defense with full freedom without discrimination between the rich and the poor or between the weak and the strong, or between less prestige and the one with influence; it is in this effect the Prophet (saw) said: "He who is tested with being a judge between the Muslims should make them equal in the council and in terms of pointing and looking; he should not raise his voice to one of the two rivals more than the other."

According to the book of Umar bin Khattab from Abu Musa al-ash'ari: "treat people alike in your face, your council and your judgment, so that a person with influence will not covet your right, and the weak one will not despair of your justice" [14].

It was narrated that Amr bin Zabair has reported Abdullah bin Zabair to Sa'eed bin al-As while he was on the bed, and when Abdullah bin Zabair arrives, Sa'eed asked him to sit near him on the bed, but he said: here, then Abdullah bin Zubair said: I will sit on the ground, this is the ruling of the Messenger of Allah (saw) or this is the Sunnah of the Messenger of Allah (saw) for the two litigant parties to sit in front of the judge.

If the judge selects one of the parties to enter his council and receives him with smile and happiness [15], that is an indication of injustice, and this will lead to two bad issues, **first**: the party who gets good reception from the judge will feel the judge is with him, **second**: the other party will despair from the justice of the judge. In fact, the equality between the two litigant parties as mentioned, the conventional law and its scholars have not elaborated on it with this detail, despite its significant impact on the confirmation of confidence in the fairness of the judiciary, as well as providing appropriate means to show the truth conditions and access to fair judgment.

It is regrettable that some conventional systems specify a special seat for the representative of the public prosecutor to the right of the court, and above the bench, when at the same time the accused is locked into the dock surrounded with guards, and even if he has a lawyer, his seat has less respect than that of the representative of the public prosecutor which indicates lack of equality.

Since the accused is innocent until proven guilty in accordance with Article 24 of the Human Rights Draft Document submitted to OIC, then there must be equality between the prosecutor and the defender of the accused in the Council [3].

The right of the accused for the judge to hear his view

Of the most prescribed principles in Islamic law to achieve justice between opponents is the right of the accused for the judge to hear his review, which is inherent right that must not be forfeited under any circumstances, as each owner of right has a say. The origin of this principle is the Hadith of the Prophet (saw) to Ali bin Abi Talib (ra) when he sent him to Yemen as a judge, narrated by Ali bin Abi Talib (ra) he said: The Messenger of Allah sent me to Yemen as a judge and I said: O the Messenger of Allah you sent me and I am young and not aware of judiciary...? The Messenger of Allah (saw) said: "Allah (swt) will guide your heart and strengthen your tongue, if two rivals sit in front of you do not judge until you hear from the other as you have heard from the first, this is more likely to lead you to the right judiciary" he said: I am still a judge or I never questioned judiciary after that [2].

From this hadith, it appears to us that a judge must not pass judgment on the accused until he hears his view on the issue and if not the judgment is invalid because the Messenger of Allah (saw) forbade passing judgment before hearing the argument of the accused, which indicates the invalidity of that act. The presence of the accused to defend himself is a condition to the validity of judiciary. In the case where two opponents climbed over the wall on Prophet Dawood to judge between them with justice, and the plaintiff has a strong argument as mentioned by the Holy Qur'an: (This man is my brother: He has nine and ninety ewes, and I have (but) one: Yet he says, 'commit her to my care,' and is (moreover) harsh to me in speech) and based on this Prophet Dawood (AS) passed judgment for him before hearing the defendant (accused) as mentioned in the Holy Qur'an: ((David) said: "He has undoubtedly wronged thee in demanding thy (single) ewe to be added to his (flock of) ewes: truly many are the partners (in business) who wrong each other: Not so do those who believe and work deeds of righteousness).

Since this judgment has been passed before hearing the two opponents, Dawood (AS) felt that the judgment was wrongly passed he sought forgiveness and repented quickly from Allah, as Allah (swt) said: (and David gathered that We had tried him: he asked forgiveness of his Lord, fell down, bowing in prostration, and turned to Allah in repentance). This was a guide from Allah (swt) to His Prophet Dawood and warning to anyone who becomes a judge until the Day of Judgment not to pass judgment until he hears both opponents, and this is deviation from the truth and obeying lust [16], which will be punished severely on the Day of Judgment, as Allah (swt) said: (O David! We did indeed make thee a vicegerent on earth: so judge thou between men in truth (and justice): Nor follow thou the lusts (of thy heart), for they will mislead

thee from the Path of Allah. For those who wander astray from the Path of Allah, is a Penalty Grievous, for that they forget the Day of Account).

The Right of the Accused Not To Prove His Innocence

The principle of presumption of innocence until proven guilty has been found in Islamic law for more than fourteen centuries, as this is mentioned by the Holy Qur'an and the Sunnah, and thus, the Shariah has presided the Conventional law which only knew this principle in late eighteen century, where it was introduced in the French positive law as a result of the outcome of the French Revolution, and introduced for the first time in Article 9 of the Universal Declaration of Human Rights, issued in 1789, then the principle moved from French legislation to other legislations until it became a universal principle in all man-made laws [10].

In application of this rule in Islamic law, the burden of proof lies with the defendant, he has to prove the crime of the defendant (accused) and his responsibility to it pursuant to the saying of the Prophet (saw): "the burden of proof lies on the defendant" and there is no obligation on the defendant in principle to prove his innocence, he is considered by everyone innocent until proven guilty, but there is nothing to prevent the accused from contributing to prove his innocence by presenting evidence to the judiciary that would deny the charge and ward off criminal responsibility, or the expression of the cause of permissibility, or lack of responsibility or any legitimate excuse [6].

The Accused's Right to Choose the Way of His Defense

The most important aspects of the right of the accused to defend himself in Islamic law is highlighted in the freedom of the accused to choose the means to defend himself, there shall never be influence on him during his interrogation by anything that prejudice his willingness and force him to admit whether that influence is physical or mental or by using any means [17].

And also it is not permissible to coerce the accused during his interrogation whatever the reasons may be to get him to confess to having committed the crime being investigated for; if he confessed as a result of using this means against him, that shall not be recognized or relied on, as the Prophet (saw) said: "Allah has forgiven my Ummah mistake, forgetfulness and what they have been coerced to commit". It was narrated that some people from Alkalain their belongings were stolen, and they accused some people from Hakah, and they came to Numan bin Basheer, a companion of the Prophet (saw) and he detained them for some days and then released them and they came to Numan and said: you released them without beating and

interrogation and he said: what do you want? If you want I can beat them, and if your belongings are found that is the end and if not I will do to you what I do to them, and they said: is this your ruling? And he said: this is the ruling of Allah (swt) and his Messenger (saw)". Abu Dawood said: he threatened them with this statement, which means: beating shall be done after confession", and in clearer word the legitimate beaten is that of hudud and ta'azir and that shall be after proving of guilt [18].

Imam Malik said: Confession of the accused is not recognized if it is obtained as a result of impact on his will by threatening or intimidating or imprisonment or beating, because this confession is a result of coercion; and confession of the accused is not recognized until he does it at the state of full freedom, security and reassuring.

Imam Ibn Hazm said: there shall not be interrogation by beating, or imprisonment or threatening as this is not supported by the Holy Qur'an and Sunnah and Ijma, but Allah swt forbade this on the tongue of His Messenger (saw): Surely, your bloods, wealth, honor and skin is forbidden on you".

Allah forbade skin, honor; it is impermissible to beat or abuse a Muslim except by a right made compulsory by the Holy Qur'an or established Sunnah [19].

What ensures the right of the accused to defend himself by himself is that this Shariah had given the accused the right of return from his confession prior to implementing the punishment, even if it is after the sentence; and the case of Maiz bin Malik is an example to this when he tasted touching of stones and tried to escape and they chased him and stoned him until he died, and when they informed the Prophet (saw) with that He said: "Why didn't you leave him"

And this statement shows a clear indication that the attempt to escape from beating means withdrawal of confession, and that shall drop the punishment even if that is after the verdict, because implementing the hudud is the sequel of judiciary.

However, this reversal from confession does not stop ta'azir punishment.

CONCLUSION AND RESULTS

From the foregoing the greatness of Islamic law is clear evident in ensuring the rights of the accused; and whoever studies these rights and looks at them will find that they preceded a lot of man-made laws and so-called human rights. The origin of preservation of these rights is to achieve justice, which is the features of this law of Allah; this is achievable because the Islamic law is revealed by the Creator of the universe and He knows what He created (But who, for a people whose faith is assured, can give better

judgment than Allah). Of the most important means to achieve justice is to implement punishment on those who deserve and not others; no one should be punished for the offense committed by other (No bearer of burdens can bear the burden of another). Of the most important means of achieving justice is to hear the appeal of the convict and to give him some right towards the ruling and the opponent or the evidence and enable him to provide list of his objection; and that is why they include the rules and regulations to ensure realization of this right, which is a guarantee for the accused to be given a last chance to defend himself through courts and supreme judicial council, and we reached to:

- Islam authorized the detention of the accused, and considered it wise policy and fair act; and that is if charge is established by a circumstantial evidence and sign of doubt appeared on the defendant, or he had a precedent in delinquency and crime.
- An accused shall not be imprisoned unless where a circumstantial evidence or string evidence is found that indicates his crime or breach; and he shall not be detained more than the time required to know his situation; and the Shariah provides that he should be compensated for the damage done to him during his detention if his innocence is confirmed after.
- The presumption of innocence in the accused requires that he must be treated gently on the grounds that he is innocent in all stages of the proceedings, both at the stage of collection of evidence or investigation, and the basis of this rule is the statement of the Messenger of Allah (saw): “Block punishment (hudud) with suspicion” and “Block punishment (hudud) as much as you can”.

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