

PRE-TRIAL (ARBITRARY) ARREST & DETENTION – ITS PLACE IN ISLAMIC LEGAL JURISPRUDENCE

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This article aims at highlighting the permissibility and the limitations put on the exercise of Pre-trial Arrest & Detention¹ in Islamic criminal law and procedure as derived from the fundamental sources of Islamic law: Quran, Sunnah of the Prophet (PBUH), Traditions of the Companions (RA) of the Prophet (PBUH) and writings of a few of the Islamic jurists.² Specific sources on the issue of Pre-trial Arrest & Detention are scant and reflect a lack in a uniform body of rules and procedures under Islamic law.

INTRODUCTION

The requirement of religious legitimacy for any law in Pakistan is well spelt out in Article 227 of the Constitution of Pakistan, 1973.³ Therefore, we need not have any other academic reason, of which there are many, to justify making laws for Pakistan ‘Islamic’. Suffice to say, the Pre-Trial Arrest & Detention powers conferred on state officials under the Pakistani criminal justice system must also satisfy the mandate of Article 227 and therefore such powers (and the exercise thereof) must conform with the injunctions of Islam as laid down in the Quran and *Sunnah*.

What are criminal offences and what conduct is considered criminal and what punishments follow in the Islamic legal system (although not the subject matter of this article) has been well established over a thousand years ago and is a major component of Islamic legal jurisprudence.⁴ Quran and the *Sunnah*, being the primary source of Islamic law gave the basis to categorize the forbidden acts (crimes) and accompanying penalties. In addition to this, we also find some references to due process or judicial procedural matters as guided by the Prophet (PBUH), such as when he instructed that “the onus of proof lies with the claimant and denial shall be supported by oath”⁵ and “remove punishments as possible as you can; and set the accused free if he has a

¹ The term ‘Pre-Trial Arrest & Detention’ has been used in this article to express the full expression ‘Pre-Trial (Arbitrary) Arrest & Detention for the purposes of investigation of an offence’.

² This article does not include every single report from the examples from the Sunnah or the life of the Companions (RA), nor does it include every statement on the topic by a Muslim jurist or scholar.

³ Article 227. Provisions relating to the Holy Qur'an and Sunnah. (1) All existing laws shall be brought in conformity with the Injunctions of Islam as laid down in the Holy Quran and Sunnah, in this Part referred to as the Injunctions of Islam, and no law shall be enacted which is repugnant to such Injunctions.

⁴ Gamal Atia, An Interpretive Memo on the Questionnaire of “Right to Fair Trial”, available at <http://hrlibrary.umn.edu/fairtrial/wrft-att.htm>

⁵ Prof. Dr. Muhammad Munir, Fundamental Guarantees of the Rights of the Accused in the Islamic Criminal Justice System, Hamdard Islamicus Page 45, Vol XL, No.4 available at <https://ssrn.com/abstract=3093026>

chance, because it's much better for the judge to be wrong in acquittal than to be wrong in punishment.”⁶ The Prophet (PBUH) while sending Ali b. Ibi Talib (RA) to Yemen as governor instructed him that “people will bring their cases to you, so when litigants come to you, then don't decide for the one [claimant] till you hear from the other [defendant]. It is a better way to know who should have the case decided in his favour.”⁷ One of most comprehensive narrations on procedural law and administration of justice comes from Hazrat Umar (RA) in his letter⁸ to Abu Mosa al-Ashari.

Based on the *Sunnah* and the traditions of the Companions (RA), the early muslim jurists also set out rules of procedures to be applied in court for the purposes of adjudication, such as the order of proof, number of witness and their qualifications, and other relevant and necessary evidentiary burdens.⁹ These scholars, however, did not set out a single corresponding set of rules of procedure that would dictate how crimes or suspected offenders should be investigated by the state (officials). There is therefore no template of procedural rules similar to the types of substantive crimes and offences as well as rules of evidence in formal Islamic jurisprudence. We also do not find a consensus amongst the muslim scholars and jurists, on any specific set of procedural rule(s) in this respect. There exists a variety of opinions. Thus procedural Islamic criminal law in respect of Pre-trial arrest and detention never developed with clarity and resultantly has never been fully articulated in Islamic legal theory.¹⁰

QURAN

Quran does not specifically lay down any procedure to be adopted while arresting or otherwise detaining persons accused or suspected of committing crimes. What appears to be the closest reference is Ayat 106 in Surah al-Maidah which validates brief detention of witnesses and states:

*“.....Detain them after the prayer and let them both swear by Allah if you doubt [their testimony, saying], ‘We will not exchange our oath for a price, even if he should be a near relative, and we will not withhold the testimony of Allah. Indeed, we would then be of the sinful’.”*¹¹

Quran thus instructs detention of a witness in circumstances where the witness is doubted to have committed perjury. The purpose of such a detention is not to punish the witness but to, as a precautionary step, achieve the end result i.e. verify the truth of the witness's testimony. The non-punitive nature of this detention also finds support from the fact that the such detention of a witness is for a short period of time (“presumably until the next prayer time on the same day,

⁶ Gamal Atia, An Interpretive Memo on the Questionnaire of “Right to Fair Trial”, available at <http://hrlibrary.umn.edu/fairtrial/wrft-att.htm>

⁷ *Ibid* 7.

⁸ Translation by M. Cherif Bassiouni available in his article, “Crimes and the Criminal Process”, Arab Law Quarterly, 12:3 (1997), pp. 269-286 at 275-276 referred to in *Ibid* 7.

⁹ “The judge has no powers to detain anyone unless it is for violation of a right that is clearly established” Abu Yusuf, Chief Justice of the Abbasid State under Caliph Harun Al-Rashid - Ali Ibn Muhammad al-Mawardi, Kitab Al-Ahkam al-Sultaniyya (Cairo, 1986) p. 193

¹⁰ Sadiq Reza, Due Process in Islamic Criminal Law [46 Geo. Wash. Int'l L. Rev. 1 (2013-2014)] available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3097229

¹¹ <https://quran.com/5/106?translations=20,85>

which may be well within the parameters of the mosques and may not even involve detention in the usual sense of the word.”¹²) The mechanism of detention ordained in Quran is thus restricted to be used upon witnesses and for achieving a specific purpose. The pre-trial arrest or detention of a suspect for the purposes of investigation, let alone the rules of procedure or mechanism for doing so finds no mention in the Quran. Can the permission and instructions in Quran to detain witnesses, albeit with qualifications and conditions be taken as a baseline principle of detention and hence be extended to exercise preventive pre-trial detention of suspects of crime for the purposes of investigation? Will such an analogy¹³ strengthen the given fact that Islamic system of laws supports any procedure which may aid in advancing justice and fair treatment? If the Quran allows detaining witnesses under certain prescribed conditions than can arresting or detaining suspects of crimes for investigation stand at an equal footing because when a witness is detained, he has been suspected of committing a crime i.e. perjury, therefore he does not remain a witness for the purposes of detention, he becomes a suspect of a crime. The purpose of detaining a witness is to inquire into the truthfulness of his testimony which can only be achieved as a result of putting questions to the witness or perhaps producing some evidence to counter or negate his statements. How is this process, by whatever name it may be called different from an investigation? We do not have a straightforward answer and whatever the answers to these questions may be, it is evident that any parallel derived or analogy drawn will come with the broad qualifications and conditions as stated in the Ayat.

SUNNAH

While seeking guidance from the *Sunnah*, we find very few reported examples which can be used as a conclusive source to determine the issue at hand. It is reported in various sources that in exercising the authority to seize alleged wrongdoers, in one instance, the Prophet (PBUH) is said to have “detained a person upon accusation”¹⁴. In another hadith, on the authority of Abu Hurayra, it is known that “the Prophet (PBUH) detained (on occasions) for a day and a night for investigation on precautionary grounds.”¹⁵ Unfortunately, neither of these often quoted occurrences specify the nature of the alleged wrongdoing, the basis of the accusation, or the nature of the detention carried out by the Prophet (PBUH). Regardless of the lack of details, it is clear that detention was effectuated by the Prophet (PBUH) for investigating something. Likewise, it is also reported that in one instance, Prophet (PBUH) ordered the arrest of *Banf Qurayza* to force them to accept an arbitrator.¹⁶ Will three precedents from the *Sunnah* suffice to justify pre-trial arrest or detention of a suspect for the purposes of investigation? However, any

¹² Mohammad Hashim Kamali, *The Right to Personal Safety (Haqq al-Amn) and the Principle of Legality in Islamic Shari'a* published in *Criminal Justice in Islam – Judicial Procedure in the Shari'a* edited by Muhammad Abdel Haleem, Adel Omar Sherif and Kate Daniels; page 57.

¹³ Drawing analogy (qiyas or ijtihad and other forms of analogy as permissible under Islam) are each very extensive and broad topics in purview of Islamic law and are not within the scope of this article.

¹⁴ III Sunan Abu Da'ud page 314; Ibn Qayyim: *al-Turuq* page 102: reference in *Islam's Fourth Amendment: Search and Seizure in Islamic Doctrine and Muslim Practice*; Sadiq Reza; 2009 available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1426152

¹⁵ al-Hakim: *al-Mustadrak*, IV, page 102; Ibn Qayyim: *al-Turuq*, page 102: reference in *The Right to Personal Safety (Haqq al-Amn) and the Principle of Legality in Islamic Shari'a* by Mohammad Hashim Kamali published in *Criminal Justice in Islam – Judicial Procedure in the Shari'a* edited by Muhammad Abdel Haleem, Adel Omar Sherif and Kate Daniels; page 80, footnote 99.

¹⁶ *Imprisonment in Pre-Classical and Classical Islamic Law*; Irene Schneider available at: <http://www.jstor.org/stable/3399373>

conclusion in favour of detention perhaps will not be right as we also find instances where the Prophet (PBUH) did not approve of arresting or detaining a suspect. In another instance, while deciding a case of debt, the Prophet (PBUH) is reported to have told the debtor's opponents to take what was available, indicating that they should not detain or even punish the debtor.¹⁷

One of the most often quoted example is when once the Prophet (PBUH) was delivering a lecture in the mosque, and a man asked him: "O Prophet of God, for what crime have my neighbours been arrested?" The Prophet (PBUH) heard the question and did not answer. The man repeated the same question. The Prophet (PBUH) again did not answer and continued his speech. The man raised the same question the third time. Then the Prophet (PBUH) ordered that the man's neighbours be released. It is said that the reason why the Prophet (PBUH) had kept quiet the first two times was that the police officer who had made the arrest was present in the mosque and if there were proper reasons for the arrest, he would have got up to explain his position. Since the police officer gave no reasons for these arrests, the Prophet (PBUH) ordered that the arrested persons should be released.¹⁸ Detention in absence of any reasons was, therefore, considered by the Prophet (PBUH) to be wrong. Supposing, the police officer had indeed gotten up and given a reason for detaining the accused, then perhaps the ultimate order of the Prophet (PBUH) might have been different, and perhaps in favour of the police officer; allowing the detention. This incident also highlights the rule that if the investigating authority has any evidence of committal of an offence than that must be presented to justify the detention of the person suspected of committing the offence. In case, no explanation is given, then the detention will be unlawful. In the current times, in criminal matters, such evidence is presented to the court before which the accused is being tried. If the investigating authority or the prosecutor has no evidence of the offence, then the court must not allow the detention to continue just so that evidence may be collected.

TRADITIONS OF THE COMPANIONS (RA)

An incident from the times of Hazrat Umar (RA) confirms the view that pre-trial arrest or detention on the basis of accusations has no place in the Islamic legal jurisprudence. It is reported that a leather bag which belonged to Abd Allah ibn Abi Amir (RA) was stolen while he was on a journey with a group. One of the members of the group was suspected of the theft and was questioned about it. He denied doing the theft. Abu Amir (RA) later reported this matter to Hazrat Umar (RA) who was the Caliph at that time and told Hazrat Umar (RA) that he had intended to bring that person who was suspected of the theft tied up before the Caliph. To this Hazrat Umar (RA) angrily informed Abu Amir (RA) that he would not have anything about the matter if Abu Amir (RA) had tied up the accused and brought him before him without any evidence. Abu Amir (RA) then said that Hazrat Umar (RA) not only refused to take any action against the suspect but also disapproved of him being tied up which was equivalent to detention as there was no evidence to support the accusation.¹⁹

¹⁷ *Ibid* 8.

¹⁸ Syed Abul A'la Maududi, Human Rights in Islam available at https://archive.org/stream/MaulanaMaududiHumanRightsInIslam/Maulana_Maududi_Human_Rights_in_Islam_djvu.txt

¹⁹ Mohammad Hashim Kamali, The Right to Personal Safety (*Haqq al-Amn*) and the Principle of Legality in Islamic *Shari'a* published in Criminal Justice in Islam – Judicial Procedure in the *Shari'a* edited by Muhammad Abdel Haleem, Adel Omar Sherif and Kate Daniels; page 79.

We also find support from Hazrat Ali's (RA) saying that detention in a civil debt matter is unjust.²⁰ In the days of the caliphate of Hazrat Ali (RA), the attitude and activities of the Kharijis were notorious for being unlawful. They used to abuse Hazrat Ali (RA) openly, and threaten him with murder. But whenever they were arrested for these offences, Hazrat Ali (RA) would set them free and tell his officers that 'as long as they do not actually perpetrate offences against the State, the mere use of abusive language or the threat of use of force are not such offences for which they can be imprisoned'.²¹ In another instance, Al-Numan ibn Bashir (RA) detained some accused persons for a few days and then released them. The group of people who had brought the claim of theft did not like it and protested to al-Numan (RA) that he released those men without beating them or testing the truth. Al-Nu-man (RA) replied that if those men were punished wrongfully, then the accusers would be liable to retaliation themselves. "The accusers then asked: 'Is this your judgement?' Al-Numan replied: 'This is the judgement of God and His Messenger.'" ²² Thus it shows that Allah did not ordain nor the Prophet (PBUH) approved of detention of a suspect in absence of any evidence of his wrong doing.

Ibn Umar (RA) said that people may not be arrested merely on the basis of a mere accusation, and no claim of theft or murder should be admitted unless it is supported by upright witnesses or a confession that is free of threat and intimidation. Ibn Umar (RA) added further that it was unlawful to imprison a man on the grounds of mere suspicion, since the Prophet (PBUH) refused to arrest people on the basis of suspicion alone. However, it is proper that the claimant and the defendant be brought together before the court. If there is evidence, the claim should be adjudicated upon, otherwise the defendant should be released or asked to give a surety.²³

MUSLIM SCHOLARS & JURISTS

The classical muslim jurists and scholars such as al-Ghazzali, al-Mawardi, Ibn Taymiya, Ibn Khaldun, al-Farhun, al-Khassaf, Abu Hanifa, Abu Yusuf propounded rules governing detention or detaining suspects accused of wrongdoing, on the basis of the Quran and the precedents in *Sunnah* and examples of the Companions (RA). Their vast writings, details of which are out of the scope of this article, more pertinently, emphasize and deliberate on the issues of the grounds of detention and also the allowable time period for such detentions.

Abu Yusuf who remained the chief justice of Baghdad in the times of the caliph Harun al-Rasheed was plainly clear that detention of a suspect on the basis of mere suspicion or accusation is impermissible under the Islamic criminal legal system. Abu Yusuf is reported to have advised the caliph to "instruct your governors not to arrest people upon accusation..... A man comes to

²⁰ Ibn Al-Qaiyem (d. 751h.), *Al Torok Al Hokmia*, Dar Al-Kutub Al-Ilmia, Beirut, 1953, pp. 63-64 reference in Gamal Atia, An Interpretive Memo on the Questionnaire of "Right to Fair Trial", available at <http://hrlibrary.umn.edu/fairtrial/wrft-att.htm>

²¹ Syed Abul A'la Maududi, *Human Rights in Islam* available at https://archive.org/stream/MaulanaMaududiHumanRightsInIslam/Maulana_Maududi_Human_Rights_in_Islam_djvu.txt

²² Mohammad Hashim Kamali, *The Right to Personal Safety (Haqq al-Amn) and the Principle of Legality in Islamic Shari'a* published in *Criminal Justice in Islam – Judicial Procedure in the Shari'a* edited by Muhammad Abdel Haleem, Adel Omar Sherif and Kate Daniels; page 80.

²³ Abu Yusuf: *Kitab-al-Kharaj* p.162

[the governor] and says, 'This man has accused me of stealing from him,' and people arrest him and others upon that. This is an unlawful act It is [also] unlawful and impermissible to detain.....a man upon another's accusation [Rather,] the complainant and the defendant should be brought together, and if the complainant has proof....., then it should be ruled on. If not, a surety.... should be taken from the defendant and he should be released The same goes for all those who are detained.....upon accusation."²⁴

Al-Mawardi referred to adopting a reasonable suspicion standard for assessing the need to detain. Ibn Farhun, listed in his well-known legal treatise ten categories of individuals who can lawfully be detained. Al-Khassaf appears to endorse detaining an individual accused of at least one particular crime, the fixed crime of false accusation of adultery.

However, the view of the majority muslim scholars has been that arrest and detention for investigation upon an accusation of criminal wrongdoing was generally permissible especially in cases of convicted criminals, debtors whose financial status is unknown, people accused of depravity, murder, theft or any of the other fixed crimes and bodily injury crimes. Further, while deciding exercise of the power to detain, other considerations have also been seen to play a role, such as the quantum and quality of evidence against the accused as measured by the number of witnesses who have come forward and what is known about their integrity, gravity of the alleged crime i.e. the more serious the alleged crime the more readiness to allow pre-trial detention.

Although, objective indicia of guilt is an extremely relevant factor leading to a lawful arrest or detention, the factor the muslim jurists seem to list more than any other as the key to deciding whether to arrest and detain a suspect is the suspect's reputation for good deeds or bad ones. Ibn Taymiyya points out three kinds of suspects. First, those who are 'known by others for their religiosity and piety' and 'not the type to be [thus] accused'; second, those whose reputations or notoriety are not known; and third, those who are immoral, known for prior crimes or other 'loathsome behavior'. The first kind, according to Ibn Taymiyya, are not to be detained or beaten to extract a confession; nor are they required to swear an oath of innocence. Accused in the second category, those whose reputations are unknown, should be detained 'for investigation of their status,' and accused in the third category can be detained. Ibn Qayyim and Ibn Farhun agree with these stipulations.

As regards the length of the investigative detention, there are varying findings by the scholars. The range discernable from the writings is between a day to one month, though extendable. Interestingly, Al-Mawardi, preferred leaving the matter to the ruler's discretion. The list of criteria is non-exhaustive and such considerations evolved with times to which such muslim scholars belonged to respectively.

CONCLUSION

Is pre-trial arrest and detention of suspects permitted by Islamic law and criminal procedure? The answer seems to be in the affirmative. However, what is also clear is that arrest or detention on the basis of a mere suspicion is impermissible and hence arguably unlawful. The natural and

²⁴ *Ibid* at pp.754

legal progression leads us to understand and accept that there must be some form of evidence which should exist against an accused before he is detained for the purposes of further investigation. This pre-existing evidence cannot be equated to a mere suspicion of committing an offence. The quality, nature and amount of that 'some' evidence which should be pre-existing has not been, and rightly so, can never be put down in an exhaustive list, therefore, we do not know how much that 'some' evidence should be. The rules for pre-trial arrest and detention for the purposes of investigation in our current criminal justice system echo the Islamic legal jurisprudence and any investigating authority, exercising their power of arrest or detention, cannot arrest or detain merely because it is suspected by them that the accused might have committed the offence and therefore it is necessary that the accused must be arrested or detained so as to enable the investigating authority to start the exercise of collecting evidence of the offence from him.

Quran has thus laid out for us the fundamentals in Ayat 106 of Surah al-Maidah, the essence and spirit of which has been built upon by the Prophet (PBUH) through his *Sunnah* and the examples of the Companions (RA). Fourteen hundred years have gone by and the nature of offences and types of crimes have increased and evolved with time. Issues of white collar crimes, banking frauds, administrative corruption, mis-use of authority for illegal monetary gains, cyber-crimes, offences related to mis-use of technology, money laundering, corporate layering and frauds, tax frauds, terrorism, to name a few have taken their place in the list of well-known crimes. The nature of crime has become much more complicated and complexed than it was fourteen hundred years ago and requires attention and action to be dealt with accordingly. On the other hand, while the crimes have become complex and are now not only restricted to simple thefts of leather bags or chattels or civil debts, the methods of procuring evidence have also improved. All crimes, complex or not, can now be investigated with the help of science, technology, forensics, and there is arguably not much room left for suspicion based arrest and detention.

The Prophet (PBUH), when assigning the duties of *qada* of Yemen to Mu'adh b. Jabal, inquired of him as to how he would proceed with the decision in cases before him. Mu'adh replied: "By the guidance of Kitab-Allah". The Prophet (PBUH) said, "If you do not find anything to guide you in Kitab-Allah, what would you do then?" Mu'adh replied, "The guidance would then be taken from the *Sunnah* of the Prophet". The Prophet (PBUH) next inquired, "What would you do if you do not find any provision either in Kitab-Allah or in the *Sunnah*?" Mu'adh replied, "I would, then, come to a decision by my own lights". It is said that the Prophet (PBUH) placed his hand on his breast and said, "Thank Allah Who showed the true light to my representative and made him adhere to the principles to which I am agreeable."²⁵

²⁵ Tanzil-Ur-Rehman, Adab Al-Qadi, Islamic Studies, Vol. 5, No. 2 (JUNE 1966), pp. 199-207 Published by: Islamic Research Institute, International Islamic University, Islamabad available at: <http://www.jstor.org/stable/20832838>

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