

Spy Not - Do not seek faults, lest you corrupt them.

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This article discusses the concepts of reasonable suspicion vis-à-vis investigative powers under the Code of Criminal Procedure, 1898 and the use of covert investigative techniques such as surveillance and human intelligence, property interference, wire-tapping and communication interception etc. in view of the commands of Quran and Sunnah. By conclusion, any investigation technique which transgresses the fundamental mandatory pre-requisite of reasonable suspicion and transforms into an exercise to find faults in others is not only contra Quran and Sunnah but also infringes upon the rights of the others, effects the social fiber of the society as a whole; and encourages political mischief and corruption at the state level.

“If you seek out people’s faults, you will corrupt them, or bring them very near to corruption.” [Muhammad (PBUH)]¹

By and large all criminal prosecutions, other than those in which the offender himself, on his own volition, submits to the criminal justice system begin with a suspicion. The suspicion is not so much as to the nature of the offence but largely revolves around the issue of identifying the offender, which makes him the suspect. This suspicion then leads on to an investigation² of the suspected offence as well as the suspected offender and his ultimate prosecution³ before a court of law.⁴ This triggers several stakeholders: investigating authorities, suspect-accused, victim, witnesses, prosecution, courts, etc. What may give birth to someone’s fundamental rights⁵, potentially being taken away by the state⁶ quite often start with the play of “reasonable suspicion” or “suspicion”. These words appear in various sections of The Code of Criminal Procedure, 1898⁷ applicable in Pakistan and have time and again been debated, interpreted, explained and elaborated upon by the Pakistani superior courts for our guidance and understanding.⁸

¹advising Mu’awiya, the Governor of Damascus: Abu Dawood, Sunan Abī Dāwūd 4888

² The Code of Criminal Procedure, 1898; Section 4(1)(l): “Investigation” includes all the proceedings under this Code for the collection of evidence conducted by a police officer or by any person (other than a Magistrate) who is authorised by a Magistrate in this behalf.

³ The suspect has by this stage become an accused.

⁴ Inquiry is also an integral part of the criminal prosecution process, and the difference between an inquiry and an investigation is an elaborate topic, which is out of the scope of this article.

⁵ as guaranteed under the Constitution of Pakistan, 1973

⁶ Imprisonment for life in some cases.

⁷ Sections 22-A, 45, 54, 99A, 102, 109, 169, 174, 187, 190, 344, 523, 550

⁸ PLD 2018 SC 595: *Mst. Sughran Bibi vs. The State* states that suspect was not to be arrested straightaway or as a matter of course, unless the situation on the ground so warranted, the arrest was to be deferred till such time that sufficient material or evidence became available on the record of investigation prima facie satisfying the investigating officer regarding correctness of the allegations leveled against such suspect or regarding his involvement in the crime.

On the legal canvas, it is now well settled that reasonable suspicion does not mean a mere vague surmise, but a bona fide belief on part of the investigating authorities that an offence has been committed by a particular person(s). Such belief must be founded on some definitive averments tending to throw suspicion on that person,⁹ therefore a general definition of what constitutes reasonableness in suspicion cannot be given, but must depend on the existence of tangible legal evidence within the cognizance of the investigating authorities and they must judge whether it is sufficient to establish the reasonableness and credibility of the suspicion.¹⁰

REASONABLE SUSPICION - SPYING

The point that we understand with relevant ease is that if the first brick of “reasonable suspicion” is laid out correct; the rest follows as a natural and legal consequence. Having said, there may be situations where in the course of the investigation (based on acceptable reasonable suspicion), the investigating authorities adopt means and methods such as covert surveillance and human intelligence, property interference, wire-tapping and communication interception etc. which are usually ascribed with the act of “spying” to further and conclude the investigation; or much worse where despite lack of a known apparent reason the investigating authorities start an investigation by adopting such means and methods akin to spying.

Under the Pakistani law, it is only the Investigation for Fair Trial Act, 2013¹¹ that, subject to the checks and a strict regime as stated therein, allows investigative techniques such as interception and recording of telephonic communication of the suspect, video recording of any person, premises, event, situation etc., interception or recording or obtaining of any electronic transaction, interception and taking over of any equipment such as telephone, cell phone, mobile sims, electronic database, demonstrating linking of electronic communication with the database belonging to the suspected person, use of human intelligence, covert surveillance and property interference, and access to any information or data in any form related to a transaction, communication or its content.¹² This Act deals with investigation of specialized and very serious offences related to terrorist activities and understandably such offences may in certain unique circumstances (and not in all cases) require specialized investigative techniques.¹³ Needless to emphasize, the stated investigative techniques allowed under the Act are not available for investigation of ordinary crimes and are presumably, in any case used very rarely.¹⁴

2014 SCMR 1762 *Sarwar etc vs. The State* allows that even in most heinous offences, the police was under no statutory obligation to necessarily arrest an accused person during an investigation.

2005 YLR 915: *Rasool Bux vs. The State* states that intention of law makers while giving powers to police was that reasonable suspicion should at least be founded on some definitive facts tending to throw suspicion on person arrested.

PLD 2017 K 243: *Shoaib Warsi vs. FOP* With reference to offences under the NAB Ordinance, 1999, it was held that if chairman NAB forms an opinion on the material placed before him, only then he can make arrest or permit investigating officer to make arrest of accused, otherwise an accused cannot be arrested on the basis of mere allegations or suspicions in absence of sufficient incriminating material or evidence available.

⁹ 2013 PCrLJ 553: *Manthar Ali vs. SHO etc*; 2010 MLD 271: *Allah Rakhi vs. SHO*

¹⁰ 1999 SCMR 944 *Muhammad Zakaria vs. State*

¹¹ The Act deals with specific offences of terrorism. For investigating only the offences under the Act, modern investigative techniques such as covert surveillance and human intelligence, property interference, wire-tapping and communication interception are allowed, subject to the checks given in the Act.

¹² Investigation for Fair Trial Act, 2013: Section 16

¹³ Investigation for Fair Trial Act, 2013: Schedule 1

¹⁴ To the best knowledge of the author, there is no case law available on the Investigation for Fair Trial Act, 2013, which is indicative of the fact that use of the investigative techniques permitted under the Act have so far not been a subject matter of scrutiny by the superior courts of Pakistan.

Having said, be it the run of the mill investigation means and methods in relation to the ordinary and usual offences or the specialised ones¹⁵, wherever transgression from authorised investigative powers (and techniques) happens which inevitably results in unjustified invasions of privacy, unwarranted deprivation of liberty or property, and censorship or persecution, the unavoidable conclusion is violation of the general criminal procedure as well as the founding injunctions for an Islamic criminal justice system.

A review of certain provisions of the Investigation for Fair Trial Act, 2013 with regards to the permitted investigative techniques as stated therein indicate that the law to that extent, prima facie seems not to be in accordance with the injunctions of Islam. Quran clearly forbids spying. The divine words are clear:

“Oh you who believe! Avoid too much suspicion, for suspicion in some cases is a sin. And spy not on each other, nor speak ill of each other behind [your] backs.”¹⁶

Further, the Prophet (PBUH) also warned us about suspicion and ordered not to spy when he (PBUH) said:

“Beware of suspicion, for suspicion is the worst of false tales; and do not seek out [others’ faults], and do not spy” [Muhammad (PBUH): Sahih al-Bukhari; Sahih Muslim]¹⁷

What did God mean by avoiding “too much suspicion” and that suspicion only in “some cases is a sin”? And the Prophet (PBUH) also only warned us about suspicion¹⁸ but categorically stopped us from spying? Can it be said that the element of leeway (as expressed in the language used) as regards suspicion commanded by God and re-iterated by the Prophet (PBUH) also extends to spying i.e. only too much of spying is prohibited? Does it mean that spying is only expressly prohibited if the same is adopted to seek faults of others and hence impliedly this strict restraint is inapplicable while investigating crimes (which is not equal to seeking faults of others)? Does the criterion for suspicion and spying and the prohibitions so worded only govern individuals inter se and is not applicable to the relationship between a state and its individuals i.e. God and the Prophet (PBUH) has dissuaded only individuals from suspecting each other unreasonably and

¹⁵ Under the Investigation for Fair Trial Act, 2013

¹⁶ Surah Al-Hujurat, Verse 12. Other English translations bear more or less the same words: “O those of you who believe! Guard yourselves against suspicion, for verily suspicion can deteriorate into sin! And pry not into other peoples affairs.....” YUSUFALI: “O ye who believe! Avoid suspicion as much (as possible): for suspicion in some cases is a sin: And spy not on each other behind their backs.....” PICKTHAL: “O ye who believe! Shun much suspicion; for lo! some suspicion is a crime. And spy not....” SHAKIR: “O you who believe! avoid most of suspicion, for surely suspicion in some cases is a sin, and do not spy....”. <https://quran.worldofislam.info>

¹⁷ Sadiq Reza, Islam's Fourth Amendment: Search and Seizure in Islamic Doctrine and Muslim Practice; Georgetown Journal of International Law, Vol. 40, Issue 3 (2009), pp. 703-806 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1426152: “Two others warn of penalties for specific forms of “spying” - namely, eavesdropping and reading the correspondence of others. On eavesdropping: “Whoever listens to others' conversations against their wishes will have molten lead poured in his ears on the day of judgement.” On reading others' correspondence: “He who reads a letter of his brother without his permission will read it in hell.”

¹⁸ Hence the significance of the words of the Prophet (PBUH) that “He who conceals a Muslim’s faults will have his faults concealed by God, in this world and the next.”

refrain from spying on matters of each other; this aspect to be pondered in view of the fact that till the state of Medina was established, there actually was no as such state for which the divine rules of suspicion and spying were needed to regulate the state-individual relationship in this sphere. To re-iterate, are these rules more for regulating the lives of individuals with each other so that a harmonious and peaceful society would exist and flourish?¹⁹ And lastly, as a rule, can restrictions be imposed on the investigating authority's investigative powers, even if reasonable suspicion exists, on the premise that according to the well settled Islamic injunctions, any offence that is committed openly and is manifest, may be pursued; but an offence that is not may not?

As an attempt to understand the answers to these questions, it is to be noted that Quran in Surah Al-Hujurat does not forbid all suspicion but only that which is excessive. Too much or excessive suspicion can arguably be taken to include suspicion for which there is no proper proof or a known apparent reason ("unreasonable suspicion"). As stated above, our criminal justice system²⁰ also endorses the doctrine of "reasonable suspicion". On the other hand, the categorical prohibition to "spy not" and searching out peoples' faults and trying to discover wrong doing does not come with a caveat. Therefore, the "spy not" rule is applicable only to situations where covert investigative techniques or generally speaking spying is used to bring out faults of someone and the rule is not attracted where such techniques are used to investigate an offence or catch an offender. The command to "spy not" has a broader spectrum, and contrary to what it may seem, it not only applies inter se individuals but also between state officials-investigating authorities and individuals. The latter is the subject matter of this article. These commands together address the concern that if there is a lack of "reasonable suspicion", then there may exist a likelihood that an individual or an investigating authority might be tempted to make or even create an accusation and then seek to establish it through spying so that some fault of the other is highlighted. As an undesired consequence, such acts have the potential that (i) infringe upon the rights of the others (ii) effect the social fiber of the society as a whole; and (iii) encourage political mischief and corruption (in the case of state actors).

INFRINGEMENT OF THE RIGHTS OF THE OTHERS

The Islamic injunctions mandate that personal privacy must be honoured in the process of detecting crime and investigating criminal suspects and accordingly stops investigating authorities in carrying out their official duties, even when that means discontinuing an investigation, and thereby permitting a crime to go unprosecuted and unpunished; indeed, even when it means allowing criminal behaviour that is underway to continue.²¹ Nothing short of these canons are also attracted to covert investigative techniques.

It is settled that investigating authorities while exercising their investigative powers may not seize or search suspected offenders themselves without a reasonable quantum of individualized suspicion i.e. a particular indication of guilt. Also, homes in which an offence is suspected may not be entered into as long as evidence of the offence does not travel outside of the home. One exception, meanwhile, is that the entry in a home may be made, if, there is "indicative evidence"

¹⁹ Ibid 17: Other warnings given by the Prophet (PBUH) regards eavesdropping and reading the correspondence of others also arguably seem in the first glance to be for individuals inter se.

²⁰ Generally, criminal justice systems prevalent in other countries all over the world also have their roots entrenched in the doctrine of "reasonable suspicion".

²¹ "Ward off punishments from the Muslims in doubtful cases as far as you can. If you find a way out for a Muslim, then set him free. If the Imam makes a mistake in granting forgiveness, it is better for him than that he should commit a mistake in imposing punishment."

that a serious crime is underway. But beneath this threshold, the message is clear: state is generally forbidden to intervene in the private lives of its citizens.²² With such clear dictates, no room is left for covert investigative techniques to be justifiably taken up as means of initiating or extending investigative powers.

On the other hand, there may be situations where the spying does not lead to any harm; it in fact, arguably, leads to some good.²³ But this is more so true only for situations where there is no crime or offence sought to be resolved at the end and the suspicion cum spying is to prevent a probable harm, hence it may not be seen in the pure context of investigating a suspected criminal offence or a suspect. A hypothetical example can be of a person who suspects or has reason to believe that his neighbour is in some kind of trouble and with an intention to help this person watches his neighbour's house from across the street with the hope to successfully ascertain the extent of the trouble so that he may rectify it. Somewhat in a like manner, but on a much broader scale, the state may embark upon seeking information on its people to find out their worries and concerns, so that the state can take appropriate steps for a resolution and thus consequently protect the welfare of the people and ensure peace and prosperity.²⁴ Will the often cited example of Hazrat Umar's (RA) nocturnal rounds of the city to inquire about the well-being of the citizens be of any support to us in the current times?²⁵ Of course, the permissibility of "reasonable suspicion" and the resultant covert investigative techniques can also only be justified when the means and methods adopted for confirming the suspicion are within the parameters of law and do not infringe upon the fundamental rights of the other person. The person who is keeping a look out on his neighbour's house, cannot be allowed to enter that house without the latter's permission or adopt any such investigative techniques which violate the rights of his neighbour, just to confirm his suspicion, regardless of how much good it may result in for the neighbour. Similarly, investigating authorities cannot justify covert investigative techniques (used in pursuance of a reasonable suspicion or otherwise), when their acts are not authorised and validated by law. Having said, the more contemporary view seems to tilt in favour of the test

²² Sadiq Reza, Due Process in Islamic Criminal Law, *The Geo. Wash. Int'l L. Rev.* Vol 46, 2013

²³ Although solving a crime is arguably a good thing in itself.

²⁴ Distinction can be drawn between a law which obligates a citizen to compulsorily provide his information to the state so that the information may be used for the larger public good as opposed to there being no law as such and the state obtaining such information on its own through means and methods not approved or sanctioned by any law, regardless of the ultimate use of this information for the public good.

²⁵ Sadiq Reza, Islam's Fourth Amendment: Search and Seizure in Islamic Doctrine and Muslim Practice; *Georgetown Journal of International Law*, Vol. 40, Issue 3 (2009), pp. 703-806 available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1426152: Three incidents of Hazrat Umar (RA) as narrated by Companions of Prophet (PBUH): (1) I went out in the city with Hazrat Umar (RA) one night, and while we were walking we saw the light of a lamp. We proceeded toward it, and when we reached it we found a closed door and the sounds of revelry from inside. Hazrat Umar (RA) took my hand and asked me, "Do you know whose home this is?" I said I did not. Hazrat Umar (RA) said, "It is the home of [so-and-so]. They are drinking. What do you think?" I said: "I think we have committed a forbidden act; God said we should not spy." So Hazrat Umar (RA) left them alone.

(2) Hazrat Umar (RA) was walking in the city one night when he heard a man singing in his home. He climbed over [the wall of the home] and found the man there with a woman and wine. Hazrat Umar (RA) said: "Oh enemy of God! Did you think God would conceal you while you sinned?" The man responded: "Commander of the Faithful, do not rush to judgment. I have indeed committed a sin, but you have committed three. God said, 'spy not,' and you have spied. God said, 'It is no virtue if you enter houses from the back,' and you have climbed my wall. And God said, 'Enter not houses other than your own,' and you entered my home without my permission and without greeting me." Hazrat Umar (RA) replied: "Will you do right if I pardon you?" "Yes, Commander of the Faithful," said the man. "If you pardon me I will never do anything like this again." So Hazrat Umar (RA) pardoned him and left.

(3) Hazrat Umar (RA) was informed that [a certain man] was drinking wine in his home with some friends. Hazrat Umar (RA) went to [that man's] house and entered it, and found him with only one other man. [The homeowner] said to Hazrat Umar (RA): "Commander of the Faithful, you are not allowed to do this; God forbade spying." Hazrat Umar (RA) responded: "What are you trying to say?" [The homeowner's guest] replied: "True, Commander of the Faithful. This is spying." So Hazrat Umar (RA) left.

that balances the harm of an unlawful intrusion against the harm thereby prevented or detected. This is especially more relevant, for very serious offences, such as terrorism²⁶, where there is a huge threat to the life of a large number of individuals or the state itself. But, modern investigative techniques such as covert surveillance and human intelligence, property interference, wire-tapping and communication interception cannot justifiably be used by the investigating authorities on the grounds that it needs to know the secrets of individuals who may be potential law offenders.

SOCIAL FIBER OF THE SOCIETY AS A WHOLE

Furthermore, Quran's "spy not" rule has much more embedded in it than just protection of privacy of person or home and dignity of individuals. These commands and the *Sunnah* and the traditions that build on them are not just about privacy, nor are they necessarily, or even primarily, about particular aspects of criminal procedure at all. They are, instead, ultimately rules of civil society, establishing positive norms of personal conduct and interpersonal relations that Muslims are enjoined to follow. Islam aims at establishing its society on clearness of conscience and mutual trust, promoting individual virtue and a just and moral social order for all, not based on doubts, bad suspicion, accusations and mistrust. The fundamental presumption is that people are innocent, therefore, a mere suspicion should not be allowed to result in the accusation of an innocent person and any spying is therefore condemnable and impermissible.²⁷ This argument holds force for relationship between individuals and also state officials-investigating authorities and individuals.

POLITICAL MISCHIEF AND CORRUPTION

Islamic injunctions that discourage suspicion and forbid spying, bind the state for the same reason they bind individuals, though perhaps more compellingly given the state's power over the social order: to maintain the dignity and integrity of civil society. The state which adopts spying, as a tool to keep a check on its citizens does so out of apprehension of dissent against the state through free political thought and expression. The basis of this is the fear with which the state views those citizens who are dissatisfied and question the official policies. This has no nexus with the investigative powers or investigation of a crime, and this is what Islam has called the root cause of mischief in politics²⁸ and should clearly be abstained from. The wisdom in the Prophet's (PBUH) following words also confirm and warn us about the hidden political mischief and corruption:

*"The ruler who sows suspicion among the people corrupts them."*²⁹

²⁶ Investigation for Fair Trial Act, 2013: Preamble: "AND WHEREAS in order to neutralize and prevent the threat or any attempt to carry out scheduled offenses it is necessary that the law enforcement and other agencies be given certain specific authorizations to obtain evidence in time and only in accordance with law; AND WHEREAS it is also in order to declare the admissibility and use of the material obtained during lawful investigation under the present law, in judicial proceedings and all other legal proceedings or processes to ensure fair trial"

²⁷ Abul Ala Mawdudi, Human Rights in Islam (1980) available at

https://archive.org/stream/MaulanaMaududiHumanRightsInIslam/Maulana_Maududi_Human_Rights_in_Islam_djvu.txt

²⁸ Abul Ala Mawdudi, Human Rights in Islam (1980) available at https://archive.org/stream/MaulanaMaududiHumanRightsInIslam/Maulana_Maududi_Human_Rights_in_Islam_djvu.txt

²⁹ Abu Dawood

CONCLUSION

Reasonable suspicion is permissible under the law as well as under the Islamic criminal justice system. If all forms of suspicion were forbidden, it would lead to illogical and impractical consequences as it would become impossible to solve crimes; a situation which in itself would be contradictory to many other injunctions of Islam. Despite lack of a conclusive definition of “reasonable suspicion”, no criminal justice system can function or sustain without this doctrine. Likewise investigations and exercise of investigative powers, short of spying become the means to achieve the end. Investigations are an integral part of the procedural criminal law and hence cannot be dispensed with. It is that important part of the transaction which connects the suspect with the offence and ultimately plays its role in the protection of the rights of the victims and dispensation of justice. As regards spying and use of covert investigative techniques, which by its own nature is riddled with secretiveness and if which aims at seeking faults of others is forbidden – both between individuals and between state and individuals. Spying between individuals to seek faults of other draws irk of God and the Prophet (PBUH). No man made law or exercise of the same by any investigating authorities is justifiable or sustainable if the same s aimed at finding faults and arguably not solving crimes. Spying as an off shoot of an investigation by investigating authorities is impermissible when “reasonable suspicion” is missing. Spying as a tool to keep a check on the citizens by the state through any means is simply unlawful, even if the same results in a positive for the larger segment of the society. Whether between individuals or at the level of state and individuals, spying was warned against more than a thousand years ago by God and his last Messenger (PBUH). The caveat is, if faults of others is not sought.