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Islamic Approach towards the Fundamental Rights Regarding Arrest and Detention

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Abstract: *Pakistan is an Islamic state which came into being in the name of Islam. The state religion is Islam according to the Constitution of the Islamic Republic of Pakistan. According to the constitution, no law can be enacted in Pakistan against the teachings laid down by Quran and Sunnah. The reason why any legal research is incomplete without discussing the Islamic Perspective is incorporated in Article 228 of the Constitution, according to which all the laws must be in conformity with the injunctions of Islam. 14 centuries ago, Islam gave a complete code of conduct for the entire humanity. This means, that when no such formal developed legal systems were present, Islam came forward for the protection of the rights of people. Quran and Sunnah constitute the primary sources of Islamic law. The reason behind this is quite genuine, the divine message from Allah Almighty is present in the shape of the Holy Quran, and that message is translated by the Holy Prophet (PBUH) which is called Sunnah. Islamic law derives its authority from these two primary sources. This research which aims to discuss the Enforced disappearances rotates around basic Human Rights such as the right to a fair trial, the right to due process of law, the right to protection from arbitrary arrests etc. As already discussed, any research is incomplete without being validated by Islamic law.*

Key Words: Islam, Human Rights, Enforced Disappearance, Islamic Law, Protection

Concept of Human Rights in Islam

It aims to address the questions such as whether Islamic law provides any standard of arrest and detention, whether the rights of fair trial and due process are recognized in Islamic criminal jurisprudence, what are the very basic rights of prisoners/ detainees according to Islam, which principles guide the State officials to show restraint while exercising their authority in criminal matters and last but not the least, what is the concept of Justice according to Islam and how contemporary Muslim jurists have played their role in devising mechanism to protect human rights.

While the West has been able to provide Charters and Conventions on Human rights in the 20th century, Islam provided us with all those rights 1400 years ago. The only difference is that, unlike modern Human Rights charters, these rights are not codified into a uniform document to be called a charter. Rather, the Human Rights provided by Islam can be found in the

Quran, the Sunnah of the Holy Prophet (PBUH), the lives of the Companions and the Family of the Holy Prophet (PBUH). In Islamic law, we find all the basic Human Rights such as the right to life, the right to privacy, the right to honour and dignity, the right to protection from inhumane treatment, the right to justice, the right to freedom of expression etc. This research will attempt to discuss all these Human Rights provided by Islam in relation to the safeguards and guarantees regarding arrest and detention.

Concept of Arrest in Islamic Jurisprudence

While there is no specific provision regarding arrest in Holy Quran, we find a number of occasions in which the Holy Prophet (PBUH) ordered the arrest of persons. But the real matter to be investigated is not whether the arrest is allowed in Islam or not. Certainly, an arrest is allowed in Islam and a number of cases have been reported in the time of the Holy Prophet (PBUH), as well as during the times of Holy companions. What

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is to be researched and investigated is the question that whether a person can be detained illegally as a preventive step based merely on some suspicion. Although we do not find an exact answer to this question, we find several cases in which the Holy prophet (PBUH) was reluctant to arrest the persons and accept some other kind of punishment or compensation as an alternative. On one occasion when there was an issue of debt between the parties, the Holy Prophet (PBUH) ordered the opposite party to accept what was available and not arrest or detain the debtor. (Attia, n.d.).

On another occasion, Prophet (PBUH) is reported to have been delivering a lecture in a mosque where a man stood and asked Him about the charges against which his neighbours were arrested. The prophet (PBUH) remained silent. He again asked and the Prophet (PBUH) again remained silent. It was the third time when a man asked the same question, Holy Prophet (PBUH) instantly ordered the release of his neighbours. The reason behind the silence of the Holy Prophet (PBUH) for the first two times is reported to be the silence of the police officer who arrested the neighbours of that person. Had there been any strong reasons for the arrest, the police officer would have raised and justified the arrest. But he did not do the same. Therefore, the Prophet (PBUH) ordered the release of those persons. (Mawdudi, 2019). This example clears so many confusions. It makes it very clear that there is no place for the arrest and detention of any person without proper reasons and evidence.

Procedural Requirements in Islamic Criminal Jurisprudence

Islamic law does not provide us complete procedure to be adopted in the course of criminal matters. There is no single verse in the Holy Quran which provides us with a mechanism and procedure for investigations and trials. Similarly, we find the Sunnah of the Holy Prophet (PBUH) also silent on the procedural requirements of the formal Islamic Criminal jurisprudence. There is also no consensus among Muslim scholars on how the investigations should be started, how the people should be arrested and what the pre-trial requirements are. Therefore, we find the basic Islamic principles helpful in this regard. The strong and self-explanatory principles guide modern-day legal systems in defining the limits of their authorities and in understanding the true intention of Islamic Criminal Jurisprudence. These principles are discussed hereunder.

Concept of Justice in Islam

The principle of justice is provided by Islam in clear and definite words. Islam enunciates that justice should prevail in society at every cost. Quranic verses, Hadith of the Holy Prophet (PBUH), sayings and teachings of Holy Imams and Companions of the Holy Prophet (PBUH), all describe the importance of a just and fair society. According to Islam, an unjust society cannot sustain itself. Hatred should not lead to aggression and injustice. In this respect, Holy Quran mentions:

- “Do not let your hatred of people incite you to aggression” (Holy Quran, 5:2)
- In another instance, Holy Quran mentions:
- “O believers! Stand firm for Allah and bear true testimony. Do not let the hatred of people lead you to injustice. Be just! That is closer to righteousness.” (Holy Quran, 5:8)
- “O believers! Stand firm for justice as witnesses (for truth and) fair play” (Holy Quran, 4:135)

Holy Prophet (PBUH) said:

“Verily, the just (those who practice justice as to their judgments, their kin and their subordinates) will in the day of judgment stand upon light pulpits in the presence of God, on His right side, and both His sides are right.” (Nahj al fasahah, 2677).

Furthermore, there are several traditions reported by Hazrat Ali ibn Abu Talib (A.S) regarding justice. Some of these are reproduced hereunder:

“Justice is the regulatory system of authority.” (Ghurur ul Hikam, 74)

“The masses behave righteously through justice.” (Ghurur al Hikam, 4215)

“The yardstick of good management is justice.” (Ghurur al Hikam, 9714)

Hazrat Umar (RA), the second caliph of Muslim Ummah, laid down the very foundations of the justice system in an Islamic state. In one of his Farmaans or guidelines issued to the Judges or Qazis of that time, he said:

“Praise to be God. Verily justice is an important obligation to God and man. Treat the people equally in your presence, in your company and in your decisions; so that the weak despair not of justice and the high-placed have no hope of your favour.” (Islamic History of Khalifa Umar bin Al-Khattab | Political and Governmental Actions - Judicial Administration, n.d.)

All these commands clearly portray that there is no place for injustice in an Islamic society. Justice seems to be the very basic principle of Islamic law, which is the basis of all aspects of human life. It is very

evident, from the Quranic verses, that Allah Almighty favours the just person. He has commanded that every single person, whether a Muslim or a non-Muslim, shall be treated equally with justice and fair play. The guidelines of Hazrat Umar (RA) made justice a duty of Muslim Ummah in daily affairs. The sayings and teachings of the Holy Imams have made it clear that Islam is utterly against injustice.

Through all the commands regarding justice, it is again very clear that the practice of Enforced Disappearances is against the Islamic principle of Justice. What justice requires is fair treatment and equality. It is a very basic principle of natural justice as well, that no one should be condemned unheard. When a person is forcibly disappeared, he is denied all his basic human rights. In fact, he is not made aware of the charges against him. As evident from the Islamic principle of justice, the crime of enforced disappearances is against Islamic teachings regarding justice and fair play because it ignores and violates the basic principle of justice according to Islamic Jurisprudence.

Accused and Presumption of Innocence

According to Islamic law, an accused person should be presumed innocent unless he is proven guilty. There is a very strict standard for proving an offence under Islamic Criminal law. We find it through many traditions of the Holy Prophet (PBUH) and interpretations by Islamic Scholars that an accused is not liable to be treated as a sinner or convict unless the guilt is proven through proper due course of law through a competent court. The maxim is derived from the Arabic maxim '**Al-Asl bra'tu al-dhimmat'** which means that "the basic presumption is innocence" (Munir, 2017). Prophet (PBUH) is the pioneer of this concept in Islamic law that the claimant is required to prove his case and the defendant is only to rebut the allegations. Prophet (PBUH) said, "the onus of proof lies with the claimant and denial shall be supported by oath." (Munir, 2017).

The modern versions of the theories regarding the burden of proof and presumption of innocence have evolved long after the Islamic concept of these theories. Islam has given us a complete code along with the guiding principles which enable modern legal systems to fulfil the criteria of justice if implemented in true spirit. Islam is even very strict in deciding the fate of the accused persons and it prefers the acquittal of the offender over the conviction of an innocent person. In this regard, we find a saying of the Holy Prophet (PBUH) that "it is better for a ruler to make a mistake in

forgiving someone rather than punishing him." (Sunnan ibn Tirimdh, 1424)

From these traditions and principles which Islam has laid down, we find out that the standard of punishing an accused according to Islamic law is very strict. It does not allow punishing someone on the basis of some doubt or suspicion. Everyone is deemed innocent and any traces of guilt on his part must not be decided by an individual or organization, rather the guilt should be proved in an open court by following all the legal standards and due process of law. Hence, Enforced Disappearances, which nullify this Islamic concept, are unlawful and not justified by keeping in view the Sharia law.

Respect for Privacy, Human Dignity, and Honour

The right to privacy is given due importance in Islamic Law. Any encroachment into the private lives of individuals is barred in Islam. Holy Quran mentions that:

"Do not spy on one another." (Holy Quran, 49:12)

Hence espionage is considered extremely regretful in Islamic law. Every individual has his own private life. In modern times, security agencies try to track the private sphere of opponents or suspected persons. Even politicians, journalists, and human rights activists are being monitored and tracked. Their privacy is at stake which is not justified keeping in view Islamic principles. Hence any kind of espionage by the state on its own citizens is not allowed and cannot be justified. Holy Prophet (PBUH) himself mentioned that:

"If you try to find out the secrets of the people, then you will definitely spoil them, or at least you will bring them to the verge of ruin." (Sunan Abi- Dawd, 4888)

Similarly, the right of honour and dignity of an individual is protected in Islam. Whenever a person is detained arbitrarily by labelling him a traitor or a terrorist, his dignity and honour both are at stake. Islam has emphasized the presumption of innocence of an accused person. No one can be labelled as such without being duly proved by the competent court. Enforced Disappearances embark on the concept of punishment before proving the guilt of the victim. It is highly formidable because the reputation, honour and dignity of the victim and his family in society are shattered.

Fair Trial and Due Process through Islamic Lens

As evident through already discussed principles of Islamic criminal law, one can say that these principles are part and parcel of the fair trial concept. Though Islamic law has not provided us with any clear-cut procedure to be adopted in legal proceedings as compared to the modern-day criminal procedure codes, the Islamic guidelines are enough to validate the concept of fair trial and due process and to negate the concept of arbitrary arrests and detentions.

The concept of a fair trial is an essential part of the justice system. The goal of doing justice cannot be achieved without a fair trial. In Islamic law, we have already discussed the importance of justice. So even though the words fair trial and due process are not available in Islamic criminal jurisprudence, all the factors and basic principles lead towards these concepts. According to Islamic law, the competence of judges who will conduct a trial is a basic criterion of their selection. Judges should be competent enough to ponder upon the matter with an independent mind. Islamic law recognizes that punishment is valid after a complete process of evidence and testimony is given by the competent court. The openness of the trial in Islamic jurisprudence is also recognized which means that the trial should be held open so that the public may attend it. The presumption of innocence of the accused and the principle of ultimate justice are also very essential in Islamic jurisprudence. Hence, all these principles are the essentials of fair trial and due process of law through Islamic lenses.

When Prophet (PBUH) sent Hazrat Ali (A.S) as a governor to Yemen, He said:

“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).” (Jawaid, 2021)

This guide can be equated with the modern maxim that no one should be condemned unheard and an opportunity to defend himself should be given to the defendant. The judgment should be announced after a fair and impartial hearing of the case from both sides. Hence, we can say that this guideline can be regarded as the founding stone of fair trial and due process in Islamic jurisprudence.

Another masterpiece, which elaborates nearly all the elements of fair trial and due process, is the letter which Hazrat Umer ibn Khatab had written to Abu Musa al Ash’ari regarding the role of the judiciary. Some important extracted lines are reproduced hereunder:

‘Treat them equally when you address them so that no noble man will hope that you side him unfairly and no weak man will despair of your justice. The burden of proof rests with the plaintiff and an oath is required of one who denies it. Carefully examine each issue which you are unsure about. Judgments must be based on evidence and oaths.’ (‘Umar’s Instruction to the Judge, 2011)

This letter clears many ambiguities. According to these guidelines, everyone should be treated equally in front of the law, the burden of proof is on the claimant, justice is the cornerstone of Islamic jurisprudence, and judgments should be based upon cogent evidence and oaths. All these are part and parcel of the fair trial. Hence it is very evident that the arbitrary arrests and detentions which deny all these Islamic rights are not allowed under Islamic law. And any attempt to nullify Islamic principles should be highly condemned.

Torture and Custodial Deaths from Islamic Perspective

Torture is a kind of oppression upon a person who is already been deprived of life. The very question which arises is whether is torture allowed on a person who is already in custody’ the answer can be found through many verses of the Holy Quran and traditions of the Holy Prophet (PBUH), Ahl e bait (A.S) and companions of the Holy Prophet.

Holy Quran says:

‘And do not help one another in sin and oppression.’ (Holy Quran, 5:2)

Holy prophet (PBUH) said:

‘Keep away from oppression, for it will bring darkness on the Day of Judgment.’ (Nahj al Fasahah, 1120)

Hazrat Ali (A.S) said:

‘If an unjust king kills someone out of oppression and enmity or does any other injustice, you should not remain over there...’ (Qasim Ali Bin Tauoos Al Husaini, 1896)

Allama Tabatabai said:

‘Torture is a clear form of oppression, violation of dignity and justice, and anything which violates dignity and principles of justice are forbidden in Islam. For this reason, torture and ill-treatment, and any kind of activity that is considered oppression, is forbidden, and condemned by Islam. Islamic sources such as books, traditions, reason, and consensus clearly indicate sanctions on torture and desecration of human beings.’ (Najafi, n.d)

The right to life provided by Islam is absolute and human life is given immense sanctity in Islamic law.

Holy Quran on a number of occasions considers it a sin to take the life of any human being without any strong reason. According to Holy Quran:

'Do not kill a soul which Allah has made sacred except through the due process of law' (Holy Quran, 6:51)

Due process of law means that if life is to be taken as a consequence of a grave offence, then it should be after a fair and free trial. It does not mean that the accused person, whose guilt has not yet been proven through a competent court, is deprived of his right to life as a result of torture and oppression.

Holy Prophet (PBUH) during his last sermon emphasized the importance of the life of an individual in the following words:

'Your lives and properties are forbidden to one another till you meet your Lord on the day of Resurrection.' ([Jannah](#), n.d.)

Hence, according to Islamic jurisprudence, torture, and any kind of death while in custody due to torture and manhandling are clearly forbidden and condemned. In the cases of Enforced Disappearances, many of the times the disappeared persons die while still in custody, due to an unhealthy environment and extreme torture. Hence discussion on the prohibition of torture and any kind of oppression of the persons in custody was very imperative according to the Islamic legal theory.

Pre-Trial Arrest and Detention and Islamic Perspective

On another issue that whether a person can be detained even before complying with the proper fair trial standards and procedural requirements, the Islamic perspective can be inferred through some traditions of the Companions of the Holy Prophet (PBUH) and through the works of Islamic jurists. It is reported that once a thief was brought to Hazrat Umar (RA) handcuffed and without any evidence, Hazrat Umar (RA) scolded and responded to the claimant that he would not hear the matter if Abu Amir (the claimant) had brought the accused without any evidence. Hence, he not only denied taking any action but also ordered to set the accused free in the case of the absence of any evidence.

Although the objection can be raised here that the offence in this said case was that of theft and that can be taken lightly, the persons who are forcibly detained by the state are accused of heinous offences such as offences against the state or terrorism. The question involved is not about the severity of the offence, but it is about the legal procedure which is to be adopted in the case of any kind of offence. The mere accusation

does not mean that the person has committed an offence, and in case he has committed it, it must be duly proved in a competent court and then a sentence should be awarded.

When it was the caliphate of Hazrat Ali (A.S), people used hate speech as a weapon against the Caliph. They were used to threatening him publicly. Khawarij was used to issue murder threats to the Caliph. It is reported that when they were arrested and brought before the Caliph, He used to set them free on the basis that mere threats and the use of abusive language cannot be used as a weapon to detain them unless and until an offence is committed. Hazrat Ali (A.S) said:

'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.' (Abul A'la Mawdudi, [2019](#))

This implies that offences against the state, which are perceived as the worst form of offence according to the severity, also require cogent evidence to be proved. Freedom of Speech cannot be curtailed in an Islamic Society and a mere dissenting voice cannot be made a reason to disappear a person forcibly.

On the same issue, many classical Islamic scholars and jurists have tried to elaborate on the basis of material available through the primary and secondary sources of Islamic law. One clear example is the direction given by Abu Yusuf, who was the Chief Justice of Baghdad during the Caliphate of Haroon al-Rasheed, to the Caliph. It is reported that he advised Haroon al-Rasheed that

'Instruct your governors not to arrest the people on an accusation; 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 upon. If not, a surety should be taken from the defendant and should be released. The same goes for all those who are detained upon accusation.' (Yusuf, 1968)

This makes it very clear that individual liberty has got prime importance in Islamic law. The detention of persons according to Islam is an exceptional thing which should only be based on strong and undeniable evidence. Otherwise, they should not be detained merely upon accusation or suspicion.

Conclusion

The concept of arbitrary arrests and detentions is not precisely explained in Islamic law, but we find its

prohibition through various connected traditions of the Holy Prophet (PBUH) and His companions. The practice of Enforced Disappearance involves a violation of several basic human rights such as the right to life, right to dignity and honour, right to protection from torture, right to a fair trial and due process of law etc. All these rights are given by Sharia law. The concept of basic Human Rights was provided by Islam at a time when no modern charters of human rights were available. It is very imperative to note that Islam introduced these rights when the concept of Human Rights was not available, and people were treated inhumanly. Research has shown that Islamic jurisprudence envisages all fair trial and due process guarantees in raw form. It can be discussed that Islam has provided us with the initial concepts of fair trial and due process. It has laid the foundation of these very concepts through the guarantees available to the accused persons regarding the prohibition of his arrest without evidence, the right of defence available to the accused, the concept of open and competent Court, the concept of justice, the concept of prohibition of torture, the guidelines provided to the Courts and through the general guarantees available to the

accused persons during the criminal trial. All these factors jointly contribute towards the very strong conclusion that Enforced Disappearances of individuals are completely prohibited and impermissible in an Islamic society.

Islam provides some basic fundamental standards of fair trial which must be adhered to in all circumstances. The guilt of a person should be proved through strong evidence and any person should not be kept in long-term detention on the basis of any suspicion. Islam provides the rights of prisoners as well, which include their right to meet their family members as well. In the case of Enforced Disappearances, the victim is kept at an unknown place which is highly formidable according to Islam because it not only violates the rights of the victim but also violates the rights of his family members. Hence, in Islamic states, which call them Islamic by every means and where Islam is the state religion and no law can be passed which is violative of Islamic law, the practice of Enforced disappearance is highly formidable and should be eliminated in all its forms.

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