Muslim Legal System On The Rights Of Accused Under Pre Independent India

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Abstract: The .administration of justice in Islam on the tenets and injunctions is based on *Holy Quran.* The *Quran* may, thus, be described as the supreme legislative Code of Islam which laid down basic rules of justice. Its origin dates back to the character and personality of the great Arabian Prophet, Mohammed. Rightly, Sir William Muir has observed "And so true a mirror is the Quran of Mohammad's character, that the saying became proverbial. His character is the Quran." But the Prophet is said to be not only the founder of the Islamic religion but also executive, legislative and .the judicial head of Islam on all the points wherever the Quran was silent. The adjudications of the Prophet of Islam are unique for their simplicity, fairness and equanimity. It is said that he confessed that in the adjudication, of the disputes he. being like other human beings is liable to err. It is said by Ibn Abbas that the Prophet said, "If man were given according to their claims then they would certainly lay claim to the blood of men as well as their property; but an oath is incumbent upon the defendant." In its infancy the Muslim law required the complaint to produce witnesses and demanded of the accused to take oath. The sufficiency of the evidence of the witnesses has been stated in ***Hedaya,*** thus:The evidence required in a case of whoredom is that of four men, as he has been ordained in Koran….the other evidence required in other criminal cases is that of two men, according to the text of Quran….in all other cases the evidence required is that of two men or one man and two' women whether the case relates to property, or to other rights, such as marriage, divorce, agency, executorship or the like. The rights of the accused in some forms existed under the Muslim Criminal jurisprudence and thus ways and means were devised to insure a fair trial to a person accused of crime. A brief survey of these rights is discussed. The study of Muslim. administration of criminal justice manifests manifold improvements made by the Muslim rulers in the system during the pre-Muslim period.

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1.Introduction: Both the criminal and civil courts were not distinct from each other in Islam. Generally all important crimes such as murder, theft and adultery were tried by the same courts. The administration of justice was carried out by the Kazis whose appointme1 its and dismissals were publicly announced. The prosecution in criminal cases was initiated by the police who were known as *Ahdas* and the officer-in-charge was known as *Sahib-ul-Ahdas*. There were no jails before the reign of Umar only he introduced the jail system by first purchasing a building and converting the same into a public jail in Mecca. He introduced the jails.

2.Restrictions on the Power of Arrest and Custody

In *Hadd* and *Tazir* (cognizable) cases on the production of *prima facie* evidence, arrest (Hirasat) of the accused was made. The right to be released on bail was discretionary; as a matter of policy bail and security were discouraged. Any subject could arrest and' all criminal courts could order the arrest of a person accused of cognizable offence. The Kotwal in charge of arrest had to report the arrest to the *Qazi* and had to obtain his order whether the arrested person was to be released or prosecuted. Aurangzeb laid emphasis on *prima facie* evidence before arrest and warned courts against keeping a man under trial for a term longer than was strictly necessary. A *Shiqahdar* (Police Officer) was-once convicted of the offence of wrongful confine" meant and sentenced to a fine of Rs.200. Security for presence in the court was acceptable. The police had the power to investigate, arrest and search the house on reasonable grounds. A Qazi could also himself search. Wrongful obstruction in search led to punishment, unless Justified. A police officer could also enter the house by force for search provided he had reasonable grounds for suspicion.

2.1. Procedure of Right of Bail

The traveller Tavernier while recording his opinion about Golkunda which lay outside the Moghul dominions in September 1652, stated that there was no custom in' that country to keep a man

accused of an offence in prison, immediately. the accused was taken to the court, examined and sentenced. The right of an accused to be released on bail did exist during Mughal rule in India. Mohammad Amin Khan, the Governor of Lahore put Manucci in prison on a false case of theft. but the Governor-designate. Fidai Khan granted bail for his release by issuing the order of release. inspite of his release order he was required by the Kotwal to furnish surety.When Manrique (traveller) was arrested in Midnapur'in Bengal his release was secured by a Muslim merchant on furnishing bail.

2.2.Right to Get Case Transferred

Power to transfer cases from one Court to another appears to have been vested in the King and the Governor only. Shahjahan transferred the case of a Hindu Clerk to his own Court.103 Nothing is found as to the transfer by a *Qazi* of Sarkar (district) within his jurisdiction. A complainant could withdraw a case from one court and could take the same to the highest court op. the same grounds on which one can move a transfer application at present. The complaint was to be presented to court in person or through a representative. Government prosecutions were instituted by *Mohtasibs* or *Kotwals*. The court could summon the accused at once or after hearing the complainant's evidence first. Evidence could be heard in the absence of an absconding accused, but the prosecution witnesses were to be .recalled when he was .arrested and his trial commenced. In the absence of the complainant the accused was to be released.

A judgment of the court was pronounced by the Presiding Officer in the open court and in the presence of the parties and the same was recorded in a book maintained for it. It was not signed by the Presiding Officer but was sealed on the top; No judgment could. be pronounced in the absence of both the parties or their counsel.

2.3.Right to Counsel for trial

The institution of lawyers was found; and an accused charged with an offence, if, he so desired, had a right to be represented through a lawyer. Expert knowledge of law was required both for practice of law' and for acting as *Qazi*. Contemporary authorities have referred to the institution of lawyers (Vakil).

Every person who could afford to engage a Vakil could engage; especially Zamindars, Mansabdars, Fauzdars, commandants and Kotwals were represented by Vakils in their cases to the Emperor. The Royal princes had also their Vakils. The institution of lawyers thus existed in Muslim period and the right to counsel was available to the accused.

2.4.Rights to hastily remedy

Quick disposal as a right of accused during Muslim rules in India was well recognised. A standing judicial committee for the purpose of expediting justice and saving the people from the distress caused by delay as also for general improvement in tone and practice of justice was created by the Emperor Akbar in the 28th Ilahi year (A.D. 1585) Efforts were made to dispose of the criminal cases on the spot so that the evidence of the witnesses to be adduced in the case might remain greener and the sequence of events might not be obliviated by lapse of time.

2.5.Right of Benefit of Doubt

The right of benefit of doubt was not unknown to the Muslim jurisprudence in the administration of criminal justice. The benefit of doubt was known as the doctrine of *Shuba* (doubt) which entitled an accused to be acquitted. In the case of *Madari Faqir,* the accused was acquitted of the offence of theft as his merely running out of the house at night did not warrant conclusive proof of his guilt, so the benefit of doubt was given to him. Similarly, in *Thief v. Kotwal* while the Kotwal wanted to examine the accused in his room, one of the accused stabbed and killed in 1599 Khairulla Khan, the *Kotwal* of Lahore. The accused escaped punishment probably of the basis of benefit of doubt.

3.Equal Protection of Law to Both parties

The Muslim Law during the Mughal period made no distinction in a criminal case between Hindus only or a Hindu and a Muslim. Two cases relating to the 46th year of Aurangzeb's reign. cited below, are illustrative of the contention that equal protection of the rule of law prevailed.

3.1.Right to Appeal

Appeals were made against the orders of the trial court and the appellate court could either confirm, reverse or remand for fresh trail or refer the point of law to *Quaziul Quazat (*the Chief Justice's Bench) or cause an additional evidence to recorded. The appellate court could also try witness for perjury as Emperor Jahangir ordered in a *Muslim Woman v. Rajpu* and the accused in such cases could run the risk of sentence of death. Appeals could abate on the death of the appellant. It is still in practice in criminal cases. Revision and review were also made.

3.2.Liability imposed on Executive Officers

The state not only punished the criminals but also in cases of the and robbery made the officers in charge of law and order including the Governor to pay compensation to the complainant. In some cases

the Government itself paid from its treasury. The executive officers were liable to be transferred on the slightest lapse of duty and sometime the officers were dismissed on the ground of their oppressive activities on the subject.

The Hindu and Muslim legal systems have steadfast reliance on the Veda and the Quran-"The Book of Revelation, as the word of God which is meant for all times to give law to the people." Both systems have been founded on Divine revelations. Hence after the Hindu system, it was not Ii difficult task for the Turkish Sultans to change over to Islamic con,cept of rule of law. in India. The former derived law from *Manusmriti* and also from some of the important commentaries lik.e *Yajnavalkya, Narada, Brihaspati,* etc., and the latter found amplification in well-known commentaries like *Sahih Muslim, Kitabus Sunnan* by Abu Dawood Sijistani. Muwatta, Minhajut Talebin, Jame-us-Saghir, etc. Both laid emphasis on the trial of cases by the ruler himself and a duty to select learned men to act as judges. In neither of the systems was any importance attached to judge made law. In the absence of Divine Law both emphasised to apply one's own conscience to adjudicate a dispute and none prescribed to follow the judge made law probably because there was no regular method of recording and transmitting points of law in the administration of justice. Because of this resemblance the gradual replacement of Hindu judicial system by Muslim passed without much notice of the masses. It is only exaggeration to say that the judicial system of the Muslim period had its merits only and no demerits. Every system has its advantages and disadvantages so also the Muslim system of criminal justice. It will not be justified to condemn one and to applaud the other. Each age has its ideals of justice and standards of punishment, just as each age has its standard of morality, its measure of judging" social, political, economic and sociological and ecclesiastical evils and the methods of their removal.

4.Discussion

The code of Criminal Procedure provides a set of just and fair rights to the accused so that he can maintain his basic human dignity as envisaged by the founding fathers of our Constitution These rights have been further reinforced by a number of judicial decision that have come about in the past several years. Although implementation of the rights remains suspect the formal law: as it stands today thanks to the foresight' of the framers and the activism of the Judges is more or less. just. and is in conformity with most of the set international standards.

However, it must not be assumed that all is well with the rights of the accused as there have been several attempts at infiring on these basic these basic rights. These have become more conspicuous given the frequency with which special laws are being framed which compromise with vital issues of criminal justice administration like burden of proof, procedures for confession, admissibility of evidence etc. In this regrd, special mention maybe made of statutes like the armed forces (special powers) Act, the terrorist and Disruptive Activities (Prevention) Act (P.O.T.A.) Nevertheless, these provision maybe regarded as aberrations not reflecting the general outlook of the authorities. On the whole, the rights of the accused have been given proper weightage both by the farmer of the law as well as by the judiciary. Adequate caution has been adopted by the Judges, who have donned the armor of sentinels to ensure that the fundamental rights which are conferred uon every individual do not abandon him when he is behind the bars. But this apparent sensitive ness of the authorities should not be taken for granted; rather a constant vigil should be maintained to check any unwanted in gress into the realm of rights of the accused. The paper concludes with the appeal that eternal vigil is the price for liberty, and liberty is the substance that makes life worth it. This liberty that is the quintessence of human existence requires the collective of fort on everyone's part, especially the civil society, so that God's greatest gift to mankind may be saved from being trampled below the heavy boots of the authorities. The author believes that the spirit of the paper may be reflected in the observation of justice V.R. Krishna Iyer, outing pastor Niemoller, in the Prem Shankar Shukla case, where he said thus,

"When they arrested my neighbours, I did not protest. When they arrested the men and women in the opposite house, did not protest. And when they finally came to me, there was nobody left to protest."

The observation though sarcastically made captures the essence of the situation and deserves deep introspection.

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