

**The Right to a Fair Trial under  
Saudi Law of Criminal Procedure**

**A Human Rights Critique**

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## ABSTRACT

This study examines the compatibility of the Law of Criminal Procedure of 2001 in Saudi Arabia with the international human rights standards, and provides recommendations for criminal procedure reforms. The recent developments in the Saudi Arabian criminal justice system make it important to examine the right to a fair trial within the legal system of Saudi Arabia. This study starts by examining the international human rights standards related to the right to a fair trial and the right to a fair trial under the Saudi Arabian legal system. The study then examines the extent to which *Shariah* law recognizes the international human rights standards related to the right to a fair trial. This will involve the sources of *Shariah* and the school of thought in the Islamic jurisprudence as well as the crimes and punishments in Islamic law.

The main argument is highlighted in Chapters Four and Five of this research, the former of which study the pre-trial process in the Saudi Law of Criminal Procedure in the light of international human rights standards, and the latter has evaluated the right to a fair trial under Saudi Arabia legal system. Various cases are examined in these two chapters, and the sources of those cases vary in terms of the level; for instance, some of them were provided by the General Court in Riyadh; others were provided by the Supreme Judicial Council; and others were obtained from the *Modawanat-Al-Ahkam*, which is the publication of the Ministry of Justice containing a variety of cases. Cases in the international domain were brought mainly from the Working Group of Arbitrary Detention in the HRC. The study provides suggestions necessary for the Law of Criminal Procedure in relation to specific articles.

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## TABLE OF ABBREVIATIONS

<b>ACHR</b>	Arab Charter on Human Rights 2004
<b>BIPP</b>	Bureau of Investigation and Public Prosecution
<b>BLG</b>	Basic Law of Governance (Saudi Arabia) 1992
<b>CAT</b>	Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984
<b>CCASG</b>	Cooperation Council for the Arab States of the Gulf
<b>CEDAW</b>	Convention on the Elimination of All Forms of Discrimination against Women
<b>CPS</b>	Crown Prosecution Service
<b>CRC</b>	Convention on the Rights of the Child 1989
<b>ECHR</b>	European Convention on Human Rights 1952
<b>ECOSOC</b>	Economic and Social Council
<b>HRC</b>	Human Rights Committee
<b>IBM</b>	Independent Monitoring Board
<b>ICCPR</b>	International Covenant on Civil and Political Rights 1966
<b>ICESCR</b>	International Covenant on Economic Social and Culture Rights 1966
<b>INGO</b>	International Non-Governmental Organization
<b>KSA</b>	Kingdom of Saudi Arabia
<b>LCP</b>	Law of Criminal Procedure of Saudi Arabia 2001
<b>NSHR</b>	National Society for Human Rights
<b>OIC</b>	Organization of the Islamic Conference
<b>SCPRA</b>	Saudi Civil and Political Rights Association
<b>UDHR</b>	Universal Declaration of Human Rights 1948



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# CHAPTER ONE: INTRODUCTION

## 1. Background

Saudi Arabia has in recent years passed several important legislations to ensure a fair and balanced justice system, including:

- 1) The Law of Procedure Before Sharia Courts of September 2001, which grants defendants the right to legal representation and outlines the process by which pleas, evidence and experts are heard by the courts.
- 2) The Code of Law Practice of January 2002, which outlines the requirements necessary to become an attorney and defines the duties and rights of lawyers, including the right of attorney–client privilege.
- 3) The Law of Criminal Procedure of May 2001, which protects a defendant’s rights with regard to interrogation, investigation, and incarceration; outlines a series of regulations that justice and law enforcement authorities must follow during all stages of the legal process, from arrest and interrogation to trial and sentencing; prohibits torture and protects the rights of suspects to obtain legal counsel; and limits the period of arbitrary detention.<sup>1</sup>

In 2008 the government continued its reform initiative with the allocated sum of approximately £1.3 billion for the planned reforms. The new rules, which emphasize the independence of judges, set up a Supreme Court, the main function of which is to oversee the implementation of the *Shariah* (Islamic law) as well as the various laws issued by the government. The new laws also set up new specialized courts for issues relating to commerce, labour, personal status, and traffic disputes, together with a fund for training old and new judges.<sup>2</sup> Currently, justice in Saudi Arabia is administered by a system of *Shariah* courts, and judges have wide discretion to issue rulings according to

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<sup>1</sup> For these Codes, see the Bureau of Experts at the Council of Ministers <<http://boe.gov.sa/Default.aspx>> accessed 25 March 2013.

<sup>2</sup> See *al-Watan* (Saudi Arabia), No. 2560 (3 October 2007). Also see the Human Rights Watch report on Saudi Arabia ‘Looser Rein, Uncertain Gain A Human Rights Assessment of Five Years of King Abdullah’s Reforms in Saudi Arabia’ P 33 September 2010.

their own interpretation of the *Shariah* texts. Saudi Arabia has never promulgated a criminal code. However, a committee was appointed in 2005 to codify penal provisions but is yet to produce a draft.<sup>3</sup>

Despite these positive developments in the area of legal and judicial reforms, the human rights community continues to maintain that this progress ‘remains seriously undermined by a lack of unequivocal legal safeguards, weak adherence to international human rights obligations and a criminal justice process which fails to meet basic standards of fairness and defendants’ rights’.<sup>4</sup> Saudi Arabia has ratified the Convention on the Rights of the Child (1996) (CRC); the International Convention on the Elimination of All Forms of Racial Discrimination (1997); the Convention on the Elimination of All Forms of Discrimination against Women (2000) (CEDAW); and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) (CAT). It has yet to ratify the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICESCR).<sup>5</sup>

The administration of justice in Saudi Arabia is guided primarily by the principles of the *Shariah*.<sup>6</sup> The judiciary issues its rulings on the basis of what is stated in the Holy Quran and the *Sunnah* (the example of the Prophet Muhammad as a legal and moral norm). The *Shariah* contains many of the guarantees—with respect to the independence of the judiciary, the right to a fair trial and due process—found in international human rights law. It is not disputed that the essence of the *Shariah* is the pursuit of justice. Rather, this study is concerned with the procedures presently applied to achieve this very objective: justice. Accordingly, the focus of the study is Saudi Arabia’s Law of Criminal Procedure (LCP) promulgated in 2002—which explicitly enumerates the rights of defendants—and its implementing regulations.

The introduction of the country’s first Law of Criminal Procedure represents an important step in the regulation of the administration of justice in Saudi Arabia. This study assesses the compliance of the LCP and its implementing regulations with

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<sup>3</sup> See the Committees Procedural on Consultative Council <<http://www.shura.gov.sa/wps/wcm/connect/ShuraEn/internet/committees>> accessed 15 January 2013.

<sup>4</sup> See, for example, *Saudi Arabia: Amnesty International Submission to the UN Universal Periodic Review*, Fourth Session of the UPR Working Group of the Human Rights Council (February 2009).

<sup>5</sup> See United Nations, Office of the High Commissioner for Human Rights, Status of Ratifications <<http://www2.ohchr.org/english/bodies/ratification/index.htm>> accessed 15 January 2013.

<sup>6</sup> See arts 7, 45 and 46 of The Basic Law of Governance of Saudi Arabia (BLG) Royal Decree N A/90, 1412 (1992) <<http://boe.gov.sa/ViewSystemDetails.aspx?lang=ar&SystemID=4&languageid=2>> (English version) accessed on 20 March 2013.

international standards of due process at all stages of legal proceedings—for example, the right of any person deprived of their liberty by arrest or detention to be promptly brought before a court to ensure the legality of their continued detention; the right to access to legal counsel in a timely manner and the right to free legal assistance for indigent defendants; and the right of a defendant not to incriminate himself. The study also examines the degree to which the LCP and its implementing regulations are observed in practice by judges, investigators, prosecutors and other concerned law enforcement agencies. Hence, the study endeavours to reconcile the procedural aspects of the Saudi criminal justice system with a system based on the principles of the rule of law and international human rights standards by highlighting deficiencies in the protection of defendants' rights in Saudi Arabia both in law and practice.

## **2. Thesis statement and research questions**

The main argument in this research work may be in the following statement: 'The human rights of suspect during the fair trial procedure have many issues in the Saudi Arabian legal system and is partly compliant with international human rights standards'. In order to evaluate the compatibility between the Saudi Arabian fair trial and the international human rights standards, this study examines and evaluates the mechanism of the pre-trial and in-trial processes within the Saudi Arabian legal system and compares it with international human right standards found in international treaties.

The main objective of this study is to examine the operation of the criminal justice system in Saudi Arabia in light of the international human rights standards pertaining to the administration of justice. This involves the international human rights treaties and focuses mainly on the instruments in which the right to a fair trial is protected. For instance, the Universal Declaration of Human Rights 1948 (UDHR) and (ICCPR) as well as the CAT are evaluated. It is important to use these instruments as framework in this study as the majority of them provide solid protection of the suspect's rights during the pre-trial and in-trial processes. In pursuit of these objectives, the study attempts to answer the following questions:

- 1- Is the Saudi Arabian domestic Law of Criminal Procedure consistent with Saudi Arabia's international human rights obligations with respect to the right to a fair trial?

- 2- Can the judicial system in Saudi Arabia apply the international human rights standards without violating Islamic law?

The study examines the core of the fair trial system in the international domain. This involves a comparative analysis system between two main groups: the international and regional treaties related to fair trial, and the domestic law in Saudi Arabia found in the LCP and the Law of Procedure Before Sharia Courts. To achieve this objective, the study attempts to answer the following questions:

- 1- Under its present regime, and comparing with international human rights standards, does Saudi Arabia provide for a fair trial in its legal system?
- 2- If fair trial has been protected, to what extent has it been compatible with international human rights standards?
- 3- Do the suspect's rights in both the pre-trial and in the in-trial stages reflect the international human rights obligations protected in the treaties to which Saudi Arabia is a state party? If not, can these obligations be reflected?

### **3. Significance of the study**

The importance of this study lies in its timing. As stated earlier, the Saudi legal system is currently undergoing substantial changes both structurally and procedurally. The government's reform initiative takes place in the context of its desire to better achieve the objectives contained in the *Shariah*, as well as to comply with its international human rights obligations. As a result, the Saudi Arabian criminal justice system is presently in a stage of transition. Depending on its findings, this study recommends the necessary amendments to the LCP in order to evaluate its full compliance with international human rights standards.

The study is also significant to the extent of its evaluation of the right to a fair trial in Saudi Arabia, and how it sheds light on recent case law related to fair trial—for instance, the pre-trial process (inter alia, the right of the accused to have time to prepare its defence). Moreover, there are many cases which have been brought before the Committee against Torture which potentially affect the right to a fair trial in Saudi Arabia.

Another factor contributing to the importance of this study is the frequent reliance on confessional evidence before Saudi courts to prove an offence. In criminal cases, detention is often extended in order to obtain a confession and then proceed to

trial. The judiciary, as part of the overall administration of justice, can only dispense justice effectively if the due process rights of defendants are respected and upheld at all stages of the legal proceedings. The findings of this study will make a significant contribution towards achieving this goal.

#### **4. Methodology**

The research methodology predominantly relies upon textual analysis. The fair trial rights examined in this study involve three groups of rights related to the accused: first, the pre-trial rights; second, the in-trial rights; and finally, the post-trial rights. To address these rights, this study examines and evaluates the rights individually and identifies the compatibility between these rights within the Saudi Arabian legal system and those in the international human rights standards. Regional instruments such as the Arab Charter on Human Rights 2004 (ACHR) are used.

Historical examination is significant for this study. This is due to the fact that the sources of the Saudi legal system are historically different from the sources of international human rights standards. It is important for this study to provide an overview of aspects of the Saudi legal system, and to support this with the development of the human rights movement within the Saudi domestic law.

Comparative methods are applied, as the protection of fair trial under Saudi Arabian domestic law is compared to the international human rights standards. The research also examines two groups of cases related to the right to a fair trial: first, the domestic cases, that is to say those which have been provided by the Saudi Arabian authority in the Ministry of Justice, which are the published cases of the Saudi Courts; and second, the cases from international human rights treaty bodies under the Human Rights Committee (HRC) and the CAT, as well as concluding observations from the UN. The cases have been examined through the domestic law in order to evaluate the violation of the human rights of the accused whether in the pre-trial, in-trial, and post-trial stages.

#### **5. Summary and analysis of chapters**



Chapter One – In this chapter, a general introduction of the study is made by laying out the background of the study and identifying the research questions. It also explains the significance of the study and the methodology that has been used in the research.

Chapter Two – This chapter provides a brief introduction to the study by setting out the concept of fair trial under international human rights standards located in the international instruments. It also refers to the conventions that relate directly to the fair trial such as the ICCPR and the CAT. In addition, this chapter examines the engagement of Saudi Arabia with international human rights and evaluates recent developments in respect of the right to a fair trial. It also examines both the constitutional reform that was made in 1992 and the consequences of this reform on the fair trial.

Chapter Three – This chapter analyzes the right to a fair trial under Shariah law which the Saudi Arabian domestic law based on. Furthermore, it highlights the sources of Shariah and its relationship to the right to a fair trial. The School of thought in Islam has presented and the Ijtihad methodology has been examined under the concept of the right to a fair trial.

Chapter Four – This chapter investigates and compares the pre-trial process in the Saudi legal system with the one in the international and regional domain. It begins by analyzing the group of rights that define the pre-trial stage and compares the legal system of Saudi Arabia. The chapter then, examine the Bureau of Investigation and Public Prosecution (BIPP) and its role in the pre-trial stage. The two main procedure undertaken in this chapter are the preliminary investigation and secondary investigation.

Chapter Five – In this chapter, the research examines the group of rights of the accused during the trial, looking at one of the most important elements of the trial—the impartiality of the court. The chapter, starts by examine the new Judiciary law established on 2008, and evaluate some aspect of the in-trial rights. The cases provided in this chapter are examined in the light of international human right treaties. Cases from Saudi courts are also examined. The post-trial process is presented within this chapter.

Chapter Six – This chapter sets out the road ahead for the Saudi legal system in respect of the pre-trial and in-trial stages. It evaluates and examines the challenges in those stages within the Saudi domestic law and draws its recommendations accordingly.

Chapter Seven – This chapter draw the conclusion of the research and provide some recommendation to the Saudi Arabia domestic law in regard to the right to a fair trial.

# **CHAPTER TWO: SAUDI ARABIA'S HUMAN RIGHTS OBLIGATIONS WITH RESPECT TO A FAIR TRIAL UNDER INTERNATIONAL HUMAN RIGHTS LAW AND SAUDI ARABIAN DOMESTIC LAW**

## **1. Introduction**

This chapter examines the right to a fair trial. It starts by providing a legal framework of the right to a fair trial in the international domain, and then examines the Saudi Arabian right to a fair trial under the international treaties. It also explores some significant treaties such as the International Covenant on Civil and Political Rights (ICCPR) and considers why Saudi Arabia has chosen not to ratify on the same. The Saudi Arabian institutions related to the right to a fair trial will be highlighted and to be examined. The main purpose of this chapter is to evaluate theoretically whether the Saudi domestic law is in compliance with the international human rights standards related to the right to a fair trial.

## **2. The right to a fair trial as a human right in international law**

One of the cornerstones of the rule of law is the notion of fair trial; it is an essential part of all legal systems and requires a fair judicial process administered by an impartial judiciary.<sup>1</sup> The roots of human rights, as a concept, can be seen in the theory of natural law, which, throughout history, has been developed and expanded, ultimately reaching its present state.<sup>2</sup>

The involvement of states in the topic of obligations surrounding human rights has become most important. It was widely considered that if a country was found to be treating its citizens in such a way which may violate their rights, this would ultimately

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<sup>1</sup> Rhona KK Smith, *International Human Rights* (5th edn, OUP 2012) 264.

<sup>2</sup> Jack Donnelly, 'Human rights as Natural Rights' (1982) 4 *Human Rights Quarterly* 2. See more about the argument of the foundation of human rights in J Donnelly, *Universal Human Rights in Theory and Practice* (2nd edn, Cornell University Press 2003) 18-20.

be considered a domestic situation and thus there would be no implementation of intervention.<sup>3</sup> Nevertheless, the growing importance assigned to the law of human rights has a number of significant consequences in regard to human rights within a particular country.

It is known that state sovereignty claims and their jurisdiction have witnessed a gradual decline due to the fact that acknowledgement of fundamental human rights has become more efficient.<sup>4</sup> At the same time, state interventions which are recognized as going against and infringing human rights have increased due to the growth of international organizations geared towards ensuring such rights, including the Human Rights Council. Before this, there had also been the recognition of the list of charters and conventions that place fundamental focus on the protection of human rights, as well as the limitation of state powers in this regard.<sup>5</sup>

The right to a fair trial and due process is recognized as being one of the most fundamental aspects within the criminal process, due to the fact that this process can have a pivotal impact on the liberty of the individual. Accordingly, the objective is to ensure that civil liberties are maintained and that a country does not allow any individual's rights to be abused during the process. The right to a fair trial can be seen across a number of different law-related spheres, both international and domestic. In relation to the latter, this may be seen in the legislation presented by the country, as well as the legal system's drafting of laws, with the former being witnessed in regional and international treaties.

It is accurate to state that a number of political and legal elements have impacted the movement of human rights, and thus, when examining in detail the growth and progression of human rights, there is a need to develop a greater understanding of history in regard to the human rights movement.<sup>6</sup> However, following World War II—the repercussions of which were felt worldwide—states were encouraged and motivated to protect and promote human rights on a global scale. This clear necessity for human rights protection has subsequently resulted in the creation of numerous tools in the arena of human rights—particularly following the Nazi trials and the sheer volume of crimes.<sup>7</sup>

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<sup>3</sup> Abdulhamid Al-Hargan, 'The Saudi Pre-Trial Criminal Procedure and Human Rights' (PhD thesis, University of Kent 2006) 40.

<sup>4</sup> Javaid Rehman, *International Human Rights Law* (2nd edn, Pearson Education Limited 2010) 4.

<sup>5</sup> Rehman (n 4) 25.

<sup>6</sup> Henry J Steiner, Philip Alston and Ryan Goodman, *International Human Rights in Context: Law, Politics, Morals* (3rd edn, OUP 2007) 59.

<sup>7</sup> Steiner, Alston and Goodman (n 6) 115; See also John HE Fried, 'The Great Nuremberg Trial' (1976) 70 *American Political Science Review* 192.

Following the founding of the UN, the 1945 UN Charter provided an official and commanding expression of the movement of human rights; this, from one perspective, created a basis of the human rights movement, and further created a foundation for any associated tools.<sup>8</sup> The following three main tools are regarded as being a bill of rights, including the ICESCR (the International Covenant on Economic Social and Culture Rights), the ICCPR, and the UDHR (Universal Declaration of Human Rights). Importantly, the second of these comprises a number of different topics, including the need for criminal trials, the freedom of conscience, religion and thought, the freedom of movement, the freedom of peaceful assembly, the freedom of family association, and the freedom of involvement in public affairs.

Despite the fact that there is much similarity between the ICCPR and the UDHR, it remains that the former incorporates an obligation to be adhered to by state parties; the latter, on the other hand, provides moral obligations, and thus does not claim to provide a statement of legal obligation or law.<sup>9</sup> Nevertheless, as is seen through the subsequent discussion, the Charter of the United Nations is considered and analyzed, with the ICCPR and UDHR discussed accordingly. Importantly, the ICESCR does not undergo analysis due to this being considered out of the scope of the research as it does not have direct reference to the right to a fair trial.

## **2.1 The Charter of the United Nations**

Following World War II, the UN was established, and the UN Charter became the most noteworthy instrument of the UN. Throughout the Charter, a number of references are made to human rights: for example, during the introduction it is stated that members of the UN should be concerned with strengthening faith in essential human rights, in pursuing the dignity and worth of people, and seeking to achieve equal rights amongst both genders and within nations of all sizes.<sup>10</sup> Moreover, it should also be highlighted that the drafting of the UN Charter required much cooperation and discussion between countries to determine an end result pleasing to all.<sup>11</sup> With this noted, article 1(3) provides a clear statement centred on the encouragement and promotion of human

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<sup>8</sup> Fried (n 7) 134.

<sup>9</sup> Rehman (n 4) 79.

<sup>10</sup> See more about the UN Charter <<http://www.un.org/en/documents/charter/>>; Also, the discussion about the drafting of the Charter in Rehman (n 4) 30-45.

<sup>11</sup> For how the states insist on human rights as one of the elements of their charter: Paul Gorgon, 'First Principals of Racial Equality; History and Politics and Diplomacy of Human Rights Provision in the United Nation's Charter' (1983) 5 Human Rights Quarterly 11.

rights, without discrimination in terms of language, race, religion or sex. In this same regard, article 55 highlights that the UN is charged with ensuring the promotion of universal observance of and respect for human rights and freedom without discrimination in terms of language, race, religion or sex.

Moreover, article 56 further requests members to pursue separate and joint actions in achieving cooperation amongst UN members to achieve that which is outlined in article 55. Economic considerations are also highlighted in two of the Charter's articles, namely article 62(2) and article 68, both of which emphasize that the Economic and Social Council ECOSOC should carry out a number of researches and make suggestions with the aim of endorsing the observance of and respect for human rights and freedom. Importantly, the Charter permits the ECOSOC to establish a committee in the arena of economic and social fields, centred on human rights enhancement.

It may be argued by some that the references to human rights via the Charter are both unclear and unorganized, with the language used not necessarily obligatory, with the exception of article 56 which, to some degree, obliges member states to conduct various activities.<sup>12</sup> A further consideration that should be made is related to article 2(7), which provides:

... Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

This particular article provides clear understanding relating to the UN Charter mechanism, which, to some degree, imposes moral as opposed to legal obligations upon the states. Nevertheless, it may be presumed that the Charter has adopted the concept of human rights, and thus the state parties may assume obligations in regard to human rights.<sup>13</sup> This standpoint may be true due to the belief that the Charter has failed to establish any specific human rights protection regime, with the focus considered in article 2(7) of non-intervention in UN members states' affairs.

There is no direct reference to the right to a fair trial within the Charter,

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<sup>12</sup> Steiner, Alston and Goodman (n 6) 135.

<sup>13</sup> Hesham Al-Eshaikh, 'Human Rights and the Trial of Accused: A Legal Comparative Study Between the Judicial System in Saudi Arabia and the Standards Required in the European Convention on Human Rights' (PhD thesis, University of Newcastle 2005) 17.

however, it can be observed that the establishment of the International Court of Justice (ICJ) was the basic framework to exercise the concept of fair trial internationally. The establishment of the ICJ makes it clear that the Court will be regarded as an important element of the international body (article 92). Furthermore, the UN may seek any legal advice from the court (article 96(B)). This has given the court more credibility as well as a greater role in the sense that it may suggest some recommendations to states parties that reflect positively on their domestic law.

Nevertheless, the Charter's establishment and implementation may be considered a breakthrough by reason of its results garnered in terms of what can be described as the 'Bill of Rights', which began with the UDHR.

## **2.2 The Universal Declaration of Human Rights (UDHR)**

It may be noteworthy to highlight that the UDHR was a remarkable development in the arena of human rights during the middle of the 20th century. The UDHR was adopted on 10 December 1948 through Resolution 278, receiving 48 votes for, 0 against, and 8 non-votes.<sup>14</sup> It has been suggested that, upon drafting, the UDHR was influenced by two key texts, namely, the French Declaration of the Rights of Man and Citizen 1789 and the United States Declaration of Independence 1776.<sup>15</sup> Nevertheless, it remains that a number of different human rights-related aspects are covered by the Declaration, and there is the assertion that human rights are based on the intrinsic esteem and worth of human beings. As can be seen from the UDHR's introduction, there is a keen link between the concept of natural law and the UDHR.<sup>16</sup>

Five different parts were encompassed within Resolution 217.<sup>17</sup> Part A comprised the UDHR document; Part B was centred on the right to petition; Part C of the Resolution of the General Assembly called upon ECOSOC to request the United Nations Commission on Human Rights (UNCHR) and United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities to make a thorough study of the problems of minorities in order that the UN could take effective measures for the protection of racial, national, religious or linguistic minorities. Part D emphasized the

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<sup>14</sup> Saudi Arabia was among those countries that abstained to vote on the UDHR. For more, see Steiner, Alston and Goodman (n 6) 135.

<sup>15</sup> Johannes Morsink, *Inherent Human Rights: Philosophical Roots of the Universal Declaration* (University of Pennsylvania 2009).

<sup>16</sup> Al-Eshaikh (n 13) 18.

<sup>17</sup> General Assembly Resolution 217, UN Doc A/810 (1948) 71.

publicity to be assigned to the UDHR, with consideration that the text could be distributed throughout the globe. Finally, Part E centred on the preparation of a draft covenant on human rights and various draft measures of adoption.<sup>18</sup> Although the UDHR articles imposed a number of moral obligations, without directing attention to legal responsibilities enforced upon state parties, the subsequent conventions have applied solid legal obligation on the states parties, namely the CAT, the ICESCR and the ICCPR, and numerous other regional and international conventions were impacted by the principles provided by the UDHR. It has been highlighted by Steiner, Alston and Goodman that the UDHR was originally intended to pave the way to a more in-depth and all-inclusive provision through the adoption of a single convention to be approved by the General Assembly, and the subsequent submission to the state for approval; however, they add that, during the General Assembly's vote, the UDHR was deficient in terms of formal authority binding its respective parties within international law; nevertheless, it can be seen that, to some degree, it remains the entire movement's 'constitution', in addition to being recognized as the single most cited human rights tool.<sup>19</sup>

Accordingly, there was the potential for the UDHR to attract the attention of private and official organizations; however, it could never be deemed as a source of legal obligation because of its positioning outside the scope of international law.<sup>20</sup> With this taken into account, the UDHR may thus be recognized as the first official text centred on human rights.

In regard to the right to a fair trial, article 10 of the UDHR makes a direct reference to the fair trial. It states: 'Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.'<sup>21</sup> As is seen in the following sections, this article plays a significant role for the subsequent conventions in regard to the right to a fair trial, and the subsequent convention regards this article as the main source for the right to a fair trial.

Moreover, article 11(1) and (2) states that: (1) Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence: and (2) No

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<sup>18</sup> Rehman (n 4) 76.

<sup>19</sup> Steiner, Alston and Goodman (n 6) 136.

<sup>20</sup> *ibid* 147.

<sup>21</sup> UDHR, art (10); GA res 217A (III), UN Doc A/810(1948) 71.



one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.

It might be true to state that articles 10 and 11 of the UDHR both constitute the basis of the concept of fair trial. Nevertheless, it is clear from the articles that the concept of fair trial includes the process from when the person is arrested and throughout the investigation and during the court hearing. This is because the concept of presumption of innocence covers the whole criminal process and is not restricted to the court hearing. Smith argues that the presumption of innocence is an essential principle of the right to a fair trial and the cornerstone of democratic society and that it is established pursuant to the legal process.<sup>22</sup>

### **2.3 The International Covenant on Civil and Political Rights (ICCPR)**

Following the adoption of the UDHR by the vast majority of states, Resolution 217(III) sought to achieve the drafting of an international covenant and measures of adoption by the Human Rights Commission. Moreover, it also sought to motivate the Commission into providing an international bill of rights because the General Assembly overall had the intention of implementing various treaties encompassed within international law, to be regarded as legally binding for state parties. Nevertheless, a vast number of rights were covered through the Covenant, namely:

- Article 1: The right to self-determination
- Article 6: The right to life
- Article 7: Freedom from torture or cruel, inhuman or degrading treatment or punishment
- Article 8: Freedom from slavery and slave trade
- Article 9: The right to liberty and security
- Article 10: The right of a detained person to be treated with humanity
- Article 11: Freedom from imprisonment for debt
- Article 12: Freedom of movement and choice of residence
- Article 13: Freedom of aliens from arbitrary expulsion

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<sup>22</sup> Smith (n 1) 274.

- Article 14: Right to a fair trial
- Article 15: Prohibition of retroactivity of criminal law
- Article 16: Right to recognition everywhere as a person before the law
- Article 17: Right to privacy for every individual
- Article 18: Right of freedom of thought, conscience and religion
- Article 19: Right of opinion and expression
- Article 20: Prohibition of propaganda for war and of incitement of nation, racial or religious hatred
- Article 21: Right of peaceful assembly
- Article 22: Freedom of association
- Article 23: Right to marry and found a family
- Article 24: Right of the child
- Article 25: Political rights
- Article 26: Equality before the law
- Article 27: Rights of persons belonging to minorities.<sup>23</sup>

Importantly, the rights detailed within the ICCPR have been highlighted in the UDHR: for example, individuals' physical integrity protection, the right to liberty, and the right to be involved in a political sphere.<sup>24</sup> Nevertheless, in regard to the Covenant, there is the mention of many rights that have not been protected in the UDHR, such as the rights of children, freedom from imprisonment for debt, and the rights of minorities.<sup>25</sup> Importantly, a number of rights—detailed in the UDHR—have been incorporated within the ICCPR in much greater depth. For example, individuals are protected from unfair trial through articles 10 and 11, with reference made to an impartial and independent tribunal.

Furthermore, a model has been established for the rights mentioned above, and should be safeguarded in the context of criminal proceedings. When considering the corresponding provisions made in the ICCPR through articles 14 and 15, the rights are established in more depth. Moreover, although Saudi Arabia has not ratified the ICCPR, it can nevertheless be utilized as model for civil rights, in addition to the rights

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<sup>23</sup> UN Doc A/6316 (1966). See the full list of rights protected in the ICCPR text <<http://www2.ohchr.org/english/law/ccpr.htm>> accessed 25 August 2012.

<sup>24</sup> Steiner, Alston and Goodman (n 6) 154.

<sup>25</sup> Save for UDHR, arts 25(2) and 26(3), there is no direct reference to the right of a child, in contrast to ICCPR, arts 18(4), 23(4) and 24.

mentioned earlier for those accused. It is argued by some that Saudi Arabia, for example, cannot ratify the ICCPR without committing an infringement or breach of its main principles.<sup>26</sup> However, it is believed that about five Arabic countries have ratified the ICCPR with two of them being part of the Cooperation Council for the Arab States of the Gulf (CCASG) countries, which may lead to the anticipation of the possibility of Saudi Arabian ratification.<sup>27</sup>

The value associated with the ICCPR is believed to stem from the reality that it founded the Human Rights Committee, which is an authoritative, expert organization responsible for the adoption of the ICCPR. The organization works by adhering to four key mechanisms. First of all, there is the compulsory report that needs to be presented to the Human Rights Committee (HRC). In this instance, the report may be preliminary, periodic or supplementary.<sup>28</sup> The report needing to be submitted must be reviewed by the Committee head, with answers to any questions posed needing to be answered by the state party, such as in the case of a citizen's complaint in regard to the state party. Secondly, there may be the need for the HRC to explain to the state parties various elements of the ICCPR, which is referred to as the general comment.<sup>29</sup> The third approach centred on adoption is the compliance process of the inter-state, which has undergone clarification within the ICCPR. Lastly, individual complaints need to be challenged by state parties within a period of three months.

The significance of the ICCPR in regard to the right to a fair trial is contained in article 14. The Human Rights Committee made a general comment on article 14:

The right to equality before the courts and tribunals and to a fair trial is a key element of human rights protection and serves as a procedural means to safeguard the rule of law. Article 14 of the Covenant aims at ensuring the proper administration of justice, and to this end guarantees a series of specific rights.<sup>30</sup>

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<sup>26</sup> Al-Hargan argues that Saudi Arabia is placed in an impossible situation between ratifying the convention and violating the spirit of *Shariah* law: Abdulhamid Al-Hargan, 'Saudi Arabia and the International Covenant on Civil and Political Rights 1966: A Stalemate Situation' (2005) 9 *International Journal of Human Rights* 502.

<sup>27</sup> Bahrain and Kuwait have ratified the Covenant. See the state ratification at <[http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-4&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en)> accessed 19 September 2012.

<sup>28</sup> Rehman (n 4) 115.

<sup>29</sup> See, for example, the general comments on the freedom of expression, General Comment No. 10: Freedom of expression (art 19) <<http://www2.ohchr.org/english/bodies/hrc/comments.htm>> accessed 25 February 2013.

<sup>30</sup> See HRC General Comments on the Right to a fair trial CCPR/C/GC/32.

This article protects not just the right to a fair trial but, as can be seen in the following chapters, the pre-trial (as well the in-trial and post-trial) rights.<sup>31</sup>

## 2.4 The Convention against Torture (CAT)

The value of the Convention against Torture (CAT) in the context of this research derives from the fact that it has been signed and ratified by Saudi Arabia. In addition, it also has many rights linked to the rights of the accused in regard to imprisonment and the criminal process. Importantly, the CAT has followed the Bill of Rights, which opened for signature in 1984 and entered into force in 1987. The rationale justifying the implementation of the CAT is as a result of the belief that the world has increasingly come to witness the exercise of torture in a number of different arenas;<sup>32</sup> nevertheless, for the first time, the Convention has explained the term ‘torture’ in article 1(1) as follows:

The term torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions ...<sup>33</sup>

Moreover, the Convention has outlined and adopted a number of different responsibilities to be carried out by state parties in mind of ensuring efficient administrative, judicial, legislative or other measures aimed at averting torture-centred acts.<sup>34</sup> A further responsibility outlined in article 4 requests that all state parties criminalize any acts—carried out or planned—of torture, with the assignment of pre-

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<sup>31</sup> See more of the scope of article 14: Stefan Trechsel and Sarah Summers. *Human Rights in Criminal Proceedings* (OUP 2006) 84.

<sup>32</sup> Rehman (n 4) 811.

<sup>33</sup> UN Doc A/39/51 (1984). See the full text of the Convention <<http://www2.ohchr.org/english/law/cat.htm>> accessed 15 February 2013.

<sup>34</sup> CAT, art 2.

defined punishments if such acts come to light. Article 11 further instructs that state parties are to ensure the continuous review of interrogation instructions, methods, practices and rules, as well as arrangements for the custody and detention within its territory, with the aim of preventing any instances of torture. Moreover, the responsibility to take the alleged torturers into custody, as well as the rights of the victim to be ensured, is paramount at all times.

It is clear that the CAT has made amendments to and adapted the necessary rights of the accused in the context of detention, and thus adopts a key role in the overall method of criminality. Nevertheless, the actual application of the Convention must be understood, as explained in depth by the CAT Committee.

#### ***2.4.1 The CAT Committee***

The Convention founded a CAT-oriented committee (the CAT Committee), which is known to have the same task of the ICCPR Committee, ie to supervise and oversee the adoption of articles within the Convention (article 17). Moreover, it is recognized that the Committee shall choose its officers for a period of 24 months, and that all processes and associated rules be established. The procedural mechanism is adopted via four main types. First is the reporting, which refers to state parties having to submit to the UN Secretary General a report detailing the state measures implemented in mind of fulfilling its responsibilities under the Convention and within one year after entry to the Convention.<sup>35</sup> The second approach relates to an inter-state process, which may involve one state accusing another of violating Convention provisions.<sup>36</sup> The third is centred on ensuring the delivery of the Convention through a complaints process, and is regarded as being one of the most fundamental approaches, as detailed in article 22 of the CAT. Notably, this emphasizes that:

A State Party to this Convention may, at any time, declare under this Article that it recognizes the competence of the Committee to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim to be victims of a violation by a State Party of the provisions of

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<sup>35</sup> CAT, art 19.

<sup>36</sup> CAT, art 21(1).

the Convention. No communication shall be received by the Committee if it concerns a State Party which has not made such a declaration.<sup>37</sup>

Lastly, there is the performance of an examination and investigation, which depends on there being an adequate basis to suggest that torture is being practised. The Committee will then invite the state party to examine the information.<sup>38</sup> This is a fundamental aspect of the Convention, with some highlighting that this approach is exclusively linked to the CAT.<sup>39</sup>

Moreover, there are others of the opinion that the Convention's application is more problematic due to the required approach:<sup>40</sup> nevertheless, it has been noted that, through the implementation mechanism highlighted previously, states will experience problems in terms of not complying with the Convention's provisions. Furthermore, the significance of the CAT being in line with the Bill of Rights is another consideration which has established law enforcement methods referred to as universal jurisdiction, thus meaning it is assigned the label of an enforcement mechanism.<sup>41</sup>

## **2.5 Should Saudi Arabia consider signing and ratifying the ICCPR?**

It is arguable that Saudi Arabia has ratified the CAT and not engaged with the ICCPR for three reasons. Firstly, although there are many pre-trial and fair trial protection provisions in the ICCPR, the number of political rights stated in the ICCPR may put Saudi Arabia in a situation that makes it difficult to ratify the ICCPR. For instance, articles 1(1) and 2(1) of the ICCPR make it clear that the right to engage in political rights may be problematic to apply in Saudi, as protests for instance are illegal. Secondly, some rights mentioned in the ICCPR may be problematic to apply in Saudi domestic law—for instance, the right to change someone's religion, set out in article 18. Thirdly, there may be doubt from the authority over the Committee's jurisdiction.<sup>42</sup>

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<sup>37</sup> CAT, art 22.

<sup>38</sup> CAT, art 20(1).

<sup>39</sup> Rehman (n 4) 841.

<sup>40</sup> James Raymond Vreeland, 'Political Institutions and Human Rights: Why Dictatorships Enter into the United Nations Convention Against Torture' (2008) 62 *International Organization* 65.

<sup>41</sup> Ahcene Boulesbaa, *The U.N. Convention Against Torture and the Prospects for Enforcement* (Kluwer Law International, 1999) 200. Also see Jay Goodliffe and Darren G Hawkins, 'Explaining Commitment: States and the Convention against Torture' (2006) 68(2) *The Journal of Politics* 358.

<sup>42</sup> For example, the reservation made by Kuwait as to articles 2, 23 and 25: UN Doc A/6316 (1966) 999 UNTS 171 (entered into force 23 March 1976).

On the other hand, Saudi's ratification of the CAT was one of the significant steps Saudi has made, although the government's reservations were a little vague, and we can see an opportunity for the Saudi authority to implement more articles of CAT.

Nevertheless, the political reform which started in 2005 may be a valuable opportunity for Saudi to ratify the ICCPR, as we have seen that there are two countries party to the CCASG (Bahrain and Kuwait) that have ratified the Convention.<sup>33</sup> These two countries are an example for Saudi to ratify for two reasons. Firstly, the political system in the two countries is very similar to the political system in Saudi Arabia, and the government in both countries is ruled by a royal family (the King in Bahrain and Sheikh in Kuwait) that has the power over all political domains. Secondly, it might be an opportunity for the Saudi authority to apply the Convention with the same reservation expressed by the Bahraini or Kuwaiti governments.<sup>44</sup>

Al-Hargan states that 'the Government of Saudi Arabia is placed in an impossible situation, by which it cannot ratify and honour the ICCPR without violating the Shari'ah, which is still to date central to both the Saudi Arabian constitution and the Saudis' way of life'. He build his claims on the fact that even if Saudi Arabia ratifies the ICCPR, it cannot make any reservation on some articles which are in breach of the *Shariah* law due to the fact that it is not permissible for a state to make a reservation on any articles that reflect the core of the Convention.<sup>45</sup> For example, in the ICCPR, the two main objections that Saudi Arabia has not ratified are, first, equality without discrimination on the basis of sex set out in article 2(1) and, second, discrimination on the basis of religion. Nevertheless, we can see that there is an opportunity for the Saudi legislature to comply with the ICCPR by using the methods of *Ijtihad* as one of the main sources in Islam.

In addition, if Saudi Arabia shows its willingness to ratify the ICCPR, it should be done without general reservation. For instance, according to the Committee of the ICCPR it is unacceptable for a country to make a general reservation. Human Rights Committee made another comment regarding the right to a fair trial: 'While reservations

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<sup>43</sup> Note than both Bahrain and Kuwait has accessed the Declaration without signature. However, accession has the same legal effect as ratification based on article (2)1B of Vienna Convention on the Law of Treaties 1155 UNTS 331, 8 ILM 679, entered into force 27 Jan 1980.

<sup>44</sup> See HRC General Comment No 32 (5) CCPR/C/GC/32 23 August 2007.

<sup>45</sup> Al-Hargan A, 'Saudi Arabia and the International Covenant on Civil and Political Rights 1966: A Stalemate Situation' (2005) 9 International Journal of Human Rights 502

to particular clauses of article 14 may be acceptable, a general reservation to the right to a fair trial would be incompatible with the object and purpose of the Covenant.<sup>46</sup>

However, it might be advisable for Saudi Arabia not to make a general reservation on the Convention if it decides to ratify it. Instead, there are different ways to make a significant reservation if any articles are in conflict with the spirit of *Shariah* law. This reservation may be more significant if it is formulated on the basis of contradiction between articles provided in the domestic law and an article in the Convention.

### **2.5.1 Customary international law as pressure on Saudi to ratify the ICCPR**

Customary law is a concept that has been much debated throughout history debate. It is also not easy to define.<sup>47</sup> Many scholars have debated the nature of customary international law and its legal force.<sup>48</sup> However, customary international law is an international law.<sup>49</sup> International law as a concept consists of two categories of law, the law of treaties and customary international law. Thus customary international law is a part of international law.<sup>50</sup>

The purpose of customary international law is to enforce the gable justice and promote fairness;<sup>51</sup> from this point international law can be seen to be a consequence of customary international law. Nevertheless, some may argue that some aspirational treaties such as the UDHR are not a custom and therefore are not part of customary international law.<sup>52</sup> Others may look to human rights advocates to challenge the abuse of human rights within customary international law.<sup>53</sup>

In regard to Saudi Arabia, it might be important to invoke some international treaties such as the UDHR to put pressure on the Saudi legislature to consider ratifying the ICCPR. This might be a way to apply other conventions such as the ICESCR and it

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<sup>46</sup> Human Rights Committee, General Comments, 32 CCPR/C/GC/32.

<sup>47</sup> Amanda Saussine, *The Nature of Customary law, legal, Historical and philological perspectives* (Cambridge, 2007) 228.

<sup>48</sup> *ibid* (279).

<sup>49</sup> I Brownlie, *The rule of law in international affairs: international law at the fiftieth anniversary of the United Nations* 18.

<sup>50</sup> Jose A Cabranes (2011-2012) Customary International law: What It is and What it is Not 22 Duke J Comp & Intl L 143, 147.

<sup>51</sup> John Tasioulas (n 47)307.

<sup>52</sup> Emily Kadens and Ernest A. Young (2012-2013) How customary is Customary International Law? 54 Wm & Mary L Rev 885, 919.

<sup>53</sup> *Beth Stephens* (1995-1996) Litigating Customary International Human Rights Norms 25 Ga J Intl & Comp L 191.



might open the door to domestic legislature contributing to customary international law. By contributing to such international treaties, Islamic law and the judges in Saudi courts will help to build legal theory in customary international law.

### **3. The right to a fair trial under Saudi Arabian domestic law**

When the Charter of the United Nations was formulated in 1945, fifty countries participated, including KSA (Kingdom of Saudi Arabia), which has since become recognized as part of the international community. Following the announcement of the Charter, Saudi Arabia was not involved in the drafting of the initial UDHR text; however, it has been involved in a great deal of debate and negotiation in regard to the Declaration. With this in mind, the representative of the KSA, Jamil Al-Baroody, was involved in the discussion of various clauses within the UDHR, including articles 16 and 18, the former of which provides for both men and women of full age to live without limitations imposed on the basis of gender, nationality, race or religion, to find a family and entitled to equal rights as to marry. The latter of which provides for freedom of conscience and thoughts, in addition to the ability to change one's beliefs, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.<sup>54</sup>

In the case of article 16, Saudi Arabia made the suggestion that both men and women of legal matrimonial age, across all countries, should be afforded the right to marry and establish a family, and should also be afforded the rights associated with the law of marriage pertinent to the country in question.<sup>55</sup> This particular change imposed by Saudi Arabia was not approved due to the belief that it conflicts with the overall concept of human rights universality. With this taken into account, it has been suggested that the opposition of Saudi Arabia to these two articles detailed within the UDHR is based simply on the fact that such articles are Western-oriented; in other words, the objections of the KSA may stem from the belief that the provisions made within the

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<sup>54</sup> AM Alwasil, 'Saudi Arabia's Engagement in, and Interaction With, the UN Human Rights System; an Analytical Review' (2010) 14(7) *The International Journal of Human Rights* 1072.

<sup>55</sup> UN document, GA third committee, 3rd session (1948). A/C.3/240. See the full reports from Saudi Arabia <[http://www.un.org/depts/dhl/udhr/docs\\_1948\\_3rd\\_3c\\_ga.shtml#docList/](http://www.un.org/depts/dhl/udhr/docs_1948_3rd_3c_ga.shtml#docList/)> accessed 28 August 2012.

articles apply only to a Western culture, and thus fail to consider the many other civilizations of the world.<sup>56</sup>

It is held by some that the reason behind Saudi Arabia's oppositions, such as those mentioned previously, is to avoid the exercising of missionaries.<sup>57</sup> In this same context, a similar perspective is provided by Al-Hargan in relation to why the country has refrained from voting on the UDHR and refused to adopt the ICCPR:

Saudi Arabia persisted with their incompatibility argument throughout the debates for the ICCPR held in 1954 and 1960 the proffered objection to joining the ICCPR was based similarly on that of article 18 of the Declaration, as the ICCPR also guarantees freedom of religion including the freedom to change one's faith.<sup>58</sup>

Nevertheless, it may be accurate to suggest that the concern associated with changing someone's belief system is a subject of dispute in the context of Islamic *Shariah*, and even within the Quran.<sup>59</sup> Accordingly, the dismissal of the UDHR article—which is fundamentally based on the inconsistency between the articles and the values of Islam—remains invalid.

Another perspective may suggest that such refutations relating to the ICCPR are influenced and impacted by the political sphere, as well as the lack of compatibility between the conventions implemented for political reasons and the norms of Islam. Such a view is upheld throughout the speech of King Fahad:

The prevailing democratic system in the world is not suitable for us in this region. Our people composition and traits are different from the traits of the world, we cannot import the way other people deal with their own affairs in order to apply it to our people; we have our own Muslim faith which is complete system. Free elections are not suitable for our country, the Kingdom of Saudi Arabia ...<sup>60</sup>

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<sup>56</sup> Alwasil (n 54) 1074.

<sup>57</sup> Gudmundur Alfredsson, and Asbjorn Eide, *The Universal Declaration of Human Rights: A Common Standards of Achievement* (Kluwer Law International 1999) 382.

<sup>58</sup> Al-Hargan (n 3) 67.

<sup>59</sup> 'The truth is from your lord, then whosoever wills, let him believe, and whosoever wills, let him disbelieve', Sura al Kahf 29.

<sup>60</sup> Yahya Sadowski, *Political Islam: Essays From Middle East Report* (University of California Press 1997) 33.

On the other hand, it is argued that such a statement is inaccurate.<sup>61</sup> In some ways, the free election was adopted in mind of Islamic Kalifah where, for instance, after the death of Abu Baker, the Prophet, there was the election by a number of the Prophet's followers.<sup>62</sup> Accordingly, the statement may be deficient of any solid basis. However, it might be logical to surmise the rationale behind King Fahad highlighting this argument as being that the political framework implemented within Saudi Arabia does not facilitate free election, even following the basic law. To some degree, this may be described as the Saudi Arabian constitution suggesting that the right of the dynasty should be limited to the founder, King Abdul-Aziz bin Abdurrahman al Faisal Al Saud, and the sons of sons. Essentially, the most suitable and appropriate of all would be acknowledged as the basic law of the King.<sup>63</sup>

However, the reasons behind Saudi Arabia having misgivings and suggesting changes be made to the UDHR can be seen. Firstly, due to the fact that the UN was established following World War II, and thus considering the controversy between the Soviet Union and the Western culture during the beginning of the Cold War, the UN may hold cynical or disbelieving viewpoints. Secondly, and perhaps of more value, are the attitudes of Saudis in regard to the overall concept and justification behind the UDHR's protection of human rights. In regard to the latter, although there is the implementation of *Shariah* law within the KSA, which may be noted as being in harmony with various articles of the UDHR, it nevertheless remains that Saudi Arabia, as a relatively newly established country, has not yet been recognized by the UN as an Islamic country, and thus the ability of an individual to change his/her beliefs is not upheld by the KSA, and thus such an article is refuted. A further opinion implies that, if the country has adopted *Wahhabi* traditions, it will thus not be possible for the KSA to agree upon and sanction the UDHR; therefore, the country would not be under an obligation to adhere to conventions centred on human rights.<sup>64</sup> Importantly, this means that the adoption of *Wahhabi* traditions does not necessarily impact all elements of Saudi Arabian foreign affairs.

At the present time, Saudi Arabia has ratified a number of regional and international agreements surrounding the concept of human rights, such as those detailed below:

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<sup>61</sup> Al-Hargan (n 3) 71.

<sup>62</sup> Mohammed Al Awabdeh, 'History and prospect of Islamic criminal law with respect to the human rights' (PhD thesis, University of Karak, Jordan 2005) 77.

<sup>63</sup> See BLG, art 5(b).

<sup>64</sup> Alwasil (n **Error! Bookmark not defined.**) 1075.

1. Convention on the Prevention and Punishment of the Crime of Genocide 1948. This was ratified by the KSA in 1950.<sup>65</sup>
2. The International Convention on the Elimination of All Forms of Racial Discrimination 1977. Notably, however, some reservations were made, such as in regard to article 22, which highlights the International Court of Justice in relation to any disagreement.<sup>66</sup>
3. The Convention against Torture and Other Cruel, Degrading or Inhuman Treatment or Punishment, ratified on 1997. Again, reservations were made, such as in relation to the country not recognizing the CAT Committee's jurisdiction, as detailed in article 20, as well as the reference to the time limitation and arbitration highlighted in article 30(1), which relates to the arising of a disagreement between two countries in regard to the interpretation of the Convention's articles. It is noted that the legislation implemented by the KSA makes clear the reservation and its scope as opposed to implementing a general reservation in regard to the Convention.<sup>67</sup> The 1989 Convention on the Rights of the Child (CRC), ratified by Saudi Arabia in 1996 with the general reservation suggesting that, should a conflict arise between that states in the articles and Islamic law, the country would not be held under any obligation. Furthermore, article 43 of the Convention was amended, with the KSA sanctioning this in 1997.<sup>68</sup>
4. The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW): This was ratified by the KSA in 2000, thus illustrating a significant change in regard to human rights, especially in the arena of women's rights within the country. Importantly, a number of Arab countries have sanctioned the Convention during recent times, regardless of the majority of such countries holding reservations in this regard, such as Egypt and the United

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<sup>65</sup> 78 UNTS 277, entered into force 12 January 1951. See the states' ratification on the Convention <[http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-1&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-1&chapter=4&lang=en)> accessed 25 August 2012.

<sup>66</sup> UN Doc A/6014 (1966). See the Saudi Arabia reservation <[http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-2&chapter=4&lang=en#EndDec](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-2&chapter=4&lang=en#EndDec)> accessed 25 August 2012.

<sup>67</sup> UN Doc A/39/51 (1984). It can be observed here that the language of Saudi reservation has changed from invoking the Sharia law in general, to highlighting specific reservation. See declarations and reservations UN Doc A/39/51 (1984)], entered into force 26 June 1987.

<sup>68</sup> UN Doc A/44/49 (1989), UN documents <[http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-11&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en)> accessed 27 August 2012.

Arab Emirates.<sup>69</sup> Furthermore, there are a number of conventions geared towards providing both children and women with support.

5. The Arab Charter on Human Rights (ACHR), which was sanctioned in 2004. Importantly, the original Charter was implemented in 1994;<sup>70</sup> however, changes were made subsequently, to which the KSA agreed. Nevertheless, no direct reference is made to the Charter adopted previously, even within the introduction.

As can be seen when considering the above, the KSA has become increasingly involved in the pursuance and agreement of human rights preservation, and has, to some degree, made a number of attempts directed towards impacting the result of the system adopted by the UN following the establishment of the UN through to the UDHR drafting and running up to the final agreement of a number of international conventions.<sup>71</sup> Such involvement has developed more so within the last two decades, and has impacted a number of different elements within the Saudi domestic law.<sup>72</sup> This has put Saudi Arabia under many human rights obligations, as some conventions have been mainly related to the topic of the research, and in some context attached to fair trial rights.<sup>73</sup>

### **3.1 Fair trial protection under Saudi Arabian law**

It is noteworthy to highlight that the demands of constitutional change within Saudi Arabia were initiated many years before 1992, particularly during the era of King Fasil,<sup>74</sup> due to various pressures.<sup>75</sup> However, three main laws were introduced in 1992,

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<sup>69</sup> UN Doc A/34/46. See the countries that have ratified the Convention and their reservations on the Convention <<http://www.un.org/womenwatch/daw/cedaw/reservations-country.htm>> accessed 27 August 2012.

<sup>70</sup> Mervar Rishmawi, 'The Revised Arab Charter on Human Rights: A Step Forward?' (2005) 5(2) *Human Rights Law Review* 362.

<sup>71</sup> Alwasil, (n54) 1087.

<sup>72</sup> See, for instance, the movement of women rights: Sifa Mtango, 'A state of oppression? Women's rights in Saudi Arabia' (2004) 5(1) *Asia-Pacific Journal on Human Rights and the Law* 49-67.

<sup>73</sup> For further reading on the development of human rights in Saudi Arabia, see Madawi al-Rasheed, *A History of Saudi Arabia* (Cambridge 2002) 166. Also, Thomas Hegghammer and Stephane Lacroix, 'Rejectionist Islamism in Saudi Arabia: The story of Juhaiman Al-Utaibi revisited' (2007) 39(1) *International Journal of Middle East Studies* 103.

<sup>74</sup> Abdulaziz AL-Fahad, 'Ornamental Constitutionalism; the Saudi Basic Law of Governance' (2005) 30 *Yale Journal of International Law* 375. Also, Mohammed Al-Qahtani, 'The Role and Jurisdiction of the Board of Grievances in Saudi Arabia' (PhD thesis University of Newcastle 2007) 45-48.

<sup>75</sup> See more about the internal and external pressure in Andrzej Kapiszewski, 'Saudi Arabia, steps toward democratisation or reconfiguration of authoritarianism' (2006) 41 *Journal of Asian and African Studies* 462 and Robert Lacey, *Inside the Kingdom* (Arrow 2009) 148-153.

namely, the Basic Law of Governance (BLG), the Consultative Council Law, and the Law of Provenance.<sup>76</sup>

In regard to the right to a fair trial, article 38 sets a principle of this right by stating that no one shall be punished for another's crimes. No conviction or penalty shall be inflicted without reference to the *Shariah* or the provisions of the law. Punishment shall not be imposed *ex post facto*.<sup>77</sup> It seems that the concept of legality is protected in the constitutional domain in Saudi Arabia; it is remarkable that the Constitution refers to the provision of law as another source with *Shariah*.

Two main legislations, both of which are linked directly with the movement of human rights, and strongly linked to the right to a fair trial, are to be analyzed, namely, the BLG and the Consultative Council Law.

### 3.2 Basic Law of Governance

Although it may be held that the Basic Law of Governance (BLG) within the country is considered to be the KSA's constitution, throughout the text there is clear indication of the law, stating that: 'the Kingdom of Saudi Arabia is a sovereign Arab Islamic state, and its constitution is the Holy Quran and the prophets' Sunnah'.<sup>78</sup> The value associated with the BLG stems from the fact that there are a number of aspects of what can be described as a constitution: despite the text not being particularly long, the foundation of the state, as an Islamic region, has been clarified through a total of 83 articles.<sup>79</sup>

More importantly, for the first time in Saudi history, there has been a direct link made to human rights through article 26, as can be seen from the statement 'the states shall protect human rights in accordance with the Sharia'. However, it may be stated by some that there is a marked difference between human rights in the context of Saudi Arabia and those implemented within international human rights standards,<sup>80</sup> with a number of rights having been guaranteed, as well as more conventional rights, including the protection of properties and homes (article 18). Moreover, a number of rights

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<sup>76</sup> See the English version of the laws on the Bureau of Experts at the Council of Ministers <<http://boe.gov.sa/Default.aspx>> accessed 29 August 2012.

<sup>77</sup> BLG, art 38.

<sup>78</sup> See the full version of the BLG <<http://boe.gov.sa/ViewSystemDetails.aspx?lang=ar&SystemID=4&languageid=2>> accessed 28 March 2013

<sup>79</sup> Ayoub Al-Jarbou, *Judicial Review of Administrative Actions Under the Saudi law* (King Fahad National library 2011) 73.

<sup>80</sup> Al-Hargan (n 26) 493.

concern the independence of the judiciary (article 46). There is also the right to equality of procedure (article 47).

On the other hand it is noted that the BLG induces a negative attitude from Mayer, who states that this particular law cannot be considered a constitution:

It is noteworthy that only a few political or civil rights are actually provided for in the text of the provision of chapter five on rights and duties. The Basic law tend to formulate provision in terms of obligation of the state to make provision for citizens, only infrequently using the terminology of rights belonging to individual or to citizenry. That is, it seems to offer a conception of Saudi subject as dependent on the states, presenting the states as a paternalistic entity with duties to care Saudi subject, rather than treating Saudi citizens as individuals with entitlement.<sup>81</sup>

It is considered that this particular view may be appropriate in the context of a lack of political involvement within the KSA's political arena, and may also go some way to describing why the country has not ratified the ICCPR, while other countries, such as Bahrain and Kuwait, for example, have done so. Nevertheless, it appears that, following the implementation of the BLG, the country has progressed somewhat towards adopting a more democratic legal framework, without neglecting to address Islamic customs and norms. In some way, this may be one of the major rationales for why all changes implemented within Saudi Arabia have referenced *Shariah* law in a number of its articles. In an attempt to gain understanding into why the authorities have incorporated *Shariah* law within its main reformations, Al-Hargan provides an in-depth argument to explain how a particular country's constitution should reflect the people's desires, adding: 'If the provision of the Sharia were imposed upon the Saudis against their will, it would be meaningless to consider the Sharia in the constitutional domain'. He continued: '[i]f the constitution does not reflect the willingness in Saudi Arabia, then some provision of the Sharia which has been written in the constitution should be abolished to comply with the will of people.'<sup>82</sup>

This can be seen to be accurate when considering Saudi Arabia during the period of the 1990s, particularly in regard to the pressures on the country—both internal and

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<sup>81</sup> Ann Elizabeth Mayer, 'Universal Versus Islamic Human Rights: A Clash of Cultures or a Clash With A Construct' (1994) 15 Mich J Int'l L 357.

<sup>82</sup> Al-Hargan (n 26) 68.

external—in terms of human rights protection and the application of *Shariah* law in terms of civilian and modern approaches.

Nevertheless, the BLG since its establishment has affirmed many rights related to human rights and how the country should protect people's rights. This has placed the BLG in the position of a legal weapon in protecting human rights within the Saudi Arabian domestic law.

### **3.3 Law of Criminal Procedure and the right to a fair trial**

Another shift in regard to the right to a fair trial has emerged in the last decade, with the introduction of the LCP in 2001.<sup>83</sup> The LCP sets rules for arrest and investigation as well as the fair trial process,<sup>84</sup> and more importantly safeguards the accused's right during the pre-trial process.<sup>85</sup>

The LCP comes in six chapters. The first chapter contains a general provision as to the right of the accused and the principle of legality. It is in the first time in Saudi legislation that there is mention of the right of the accused to have a legal representative, in both pre-trial and in-trial stages.<sup>86</sup>

The second chapter sets another important group of rights, and organizes the relationship between the criminal justice institutions. It clearly shows in article Art 16. that the BIPP is the only institution in charge of the criminal process and representing the authority in Saudi courts.

The third chapter clarifies the duties of law enforcement officers, with article 26 clarifying the persons who are in charge of performing the investigation and gathering the evidence. For the first time, article 25 of LCP has established a remarkable control over law enforcement officers by subjecting them to the supervision of the BIPP. Furthermore, the third chapter clearly provides for the human rights of the accused in article 35, which states that in the cases other than *flagrante delicto*, no person shall be arrested or detained except on the basis of an order from the competent authority, and

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<sup>83</sup> To obtain an English version of the LCP, see the Bureau of Experts at the Council of Ministers <<http://boe.gov.sa/Default.aspx>> accessed 12 March 2013.

<sup>84</sup> Zuhair Al-Harhi, 'The role of the Commission for Investigation and Public Prosecution and Its Impact on the Criminal Procedure in the Saudi Criminal Justice System' (PhD thesis, University of Kent 2005) 80.

<sup>85</sup> Issued by Royal Decree 200, 1422 (2001).

<sup>86</sup> Art 4. It is notable, as seen later in this research, that there is no clear mention of the right of the accused to consult a legal representative at the stage of arrest



such person shall not be treated inhumanly and shall not be subject to any bodily or moral harm.

The fourth chapter deals with the investigation process, and contains some important elements related to the personal search during the investigation process as well as safeguards for the accused namely articles 79-80 dealt with this regards. The rule of interrogation is one of the significant aspects of the LCP. This is because of the fact that it has more protections for the rights during interrogation, for example, the place of interrogation and the rules in which the interrogation should take place as shown in article 101 of LCP.

The fifth chapter entitled by (courts) sets the general rules for the courts as well as the jurisdictions of each court this has been clarified in article 128.

In the final chapter the LCP sets out the trial procedure with clear emphasis on the rights of parties and the appeal procedure which can be observed in article 138.

The significance of the LCP is mainly in two areas:

- 1- It is the first document in Saudi Arabia which clearly prohibits any kind of torture, whether during the arrest or investigation process.
- 2- It provides for a right to compensation if a person is found innocent or there has been a miscarriage of justice.<sup>87</sup>

### 3.4 The Consultative Council

There is a strong relation between the concept of ‘Al-Shura’<sup>88</sup> and that of Islamic tradition, and this relationship has been rooted in Islamic history.<sup>89</sup> In the Quran, there is the mention of the term ‘*shurs*’ on two occasions.<sup>90</sup> In Saudi Arabia, the Shura concept is rooted in the framework of the country.<sup>91</sup> However, since the founding of the Consultative Council in 1992,<sup>92</sup> membership has increased from 60 to 120 members.

The Shura Council shall express its opinion on the state’s general policies referred by the Prime Minister. The Council shall specifically have the right to do the

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<sup>87</sup> Art 210.

<sup>88</sup> Shura means (Consultation) in the original Arabia, See Ibn Mandoor, *Lisan al-Arab*, (Dar Al maarif 2011) 850.

<sup>89</sup> R Hrair Dekmejian, ‘Saudi Arabia's Consultative Council’ (1998) 52 Middle East Journal 206.

<sup>90</sup> Verse 38 of Shura Surah, and verses 159 AL-Imran.

<sup>91</sup> See more about the history of Shura in Saudi in Al-Jarbou (n **Error! Bookmark not defined.**) 74-76.

<sup>92</sup> Royal Decree Number A/91, 1412 (1992).

following:

- a. Discuss the general plan for economic and social development and provide its opinion.
- b. Revise laws and regulations, international treaties and agreements, and concessions, and provide whatever suggestions it deems appropriate.
- c. Analyze laws.
- d. Discuss government agencies' annual reports and attach new proposals when it deems appropriate.<sup>93</sup>

Nevertheless, the Shura Council, through its 150 members, made clear that the key role to be adopted in regard to the interpretation of law is most noteworthy. The Council may be described as being the first doorway for any legislation in Saudi Arabia;<sup>94</sup> however, the scope is somewhat restricted, and centred only on consultation. With this taken into account, the role adopted by the Council is nonetheless regarded as valuable and significant for two main reasons. First, the Council has direct contact with the King, who commonly implements the decision taken by the Shura Council, although this may not be the case where there are inconsistencies with the norms of the *Shariah*. Second, the Shura Council members have been chosen from significantly competent arenas, namely, economics, law and politics.

### **3.5 The Council's impact in the human rights field**

The Consultative Council has provided the government with advice relating to the sanctioning of a number of conventions in addition to various voluntary protocols relating to numerous tools of the UN. For example, the CRC was ratified by the country in 1996 and comprises a further optional procedure which has not yet been sanctioned. Nevertheless, during the second meeting, the Consultative Council suggested the government apply the optional element of the CRC; thus, the country opted to incorporate this aspect within its international law.<sup>95</sup>

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<sup>93</sup> Shura Council Law <<http://www.Shura.gov.sa>> accessed 15 September 2012.

<sup>94</sup> It is notable that for the first time in its history women are allowed to be members of the Shura Council with a 20 per cent representation. Royal Decree A/ 44, 1433 (2012).

<sup>95</sup> See more about the optional protocols about the Convention on the Rights of the Child and Saudi Arabia's comments and reservation <[http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-11-b&chapter=4&lang=en#EndDec](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11-b&chapter=4&lang=en#EndDec)> accessed 7 September 2012; See also the Consultative Council

In addition, King Abdulla recently has restructured the consultative council with about 20% female of its members. Such a dramatic development can be seen as significantly progressing the role played by the Consultative Council, both now and in the future.<sup>96</sup>

However, as can be seen, the Consultative Council is able to adopt a key role in regard to legislation, as well as the changes in relation to many international treaties, as well as laws. With this noted, it has been highlighted by Al-Jarbou that:

Even though the council has an advisory role, the Shura council will play a major role in the development and modernisation plans as it evident from its establishment of law, it has been authorised to discuss and give opinion concerning the general plans for social and economic development.<sup>97</sup>

Essentially, this may provide the Council with the role of Parliament in the context of modern-day societies should the progression of such a role within the government be continued. Nevertheless, considering the restrictions in terms of the powers of the Consultative Council and the ability to ensure the Council of Ministry will continue with full power to adopt new regulations and laws, overall success will remain somewhat limited with royal decrees, and thus the Council may not be able to fulfil its maximum capabilities within the following years.

One significant implementation is the Human Rights Commission within the Council's framework, which may result in various enhancements being made in regard to the Council's role in relation to human rights matters. Essentially, the Commission is able to investigate and analyze any issue relating to the violation of human rights and is further able to review reports relating to such, issued by the Human Rights Commission. Moreover, the Commission is also able to examine international conventions surrounding human rights and to assess and report on the sanctions of the country in regard to such rights. The Commission, considering its influence, also has the capacity to study the dual agreement of human rights between Saudi Arabia and other countries. Lastly—and possibly of most importance—the Commission may receive

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Decision Number 31/25/15 to join the optional protocol on the Convention on the Rights of the Child <<http://www.Shura.gov.sa/>> accessed 7 September 2012.

<sup>96</sup> See the interview of the Chairman of the Consultative Council when he refers to the decision as a shift of human rights movement and it going in line with the Islamic view.

<sup>97</sup> Al-Jarbou (n **Error! Bookmark not defined.**) 76.

complaints, which need to be examined and considered, with a report on such provided to the Council's headquarters.<sup>98</sup>

Finally, it can be seen that, since its establishment in 1992, the Consultative Council has adopted a key role in both the human rights field and the less important legislative domain.

### **3.6 Other domestic institutions related to the right to a fair trial**

#### ***3.6.1 The Human Rights Commission***

The Human Rights Commission was established in September 2005.<sup>99</sup> In addition to the Commission's powers—set out in article 5—the Commission's key objective is outlined as being to ensure the application of existing regulations and laws within Saudi Arabia in the field of human rights, and to take the measures necessary with consideration to article 5(1). This article sets a group of the Commission's duties, for instance, the duty to deliver views and perspectives on the laws drafted in relation to human rights article 5(2). The Commission is also required to supervise and oversee the government agencies in regard to their enactment of human rights tools, as sanctioned by Saudi Arabia (article 5(3)). This is an essential aspect of the Commission due to the fact that application monitoring may be involved in more than one institution, ie the Ministry of Interior and the judiciary. Another important task of the Commission is the receipt of complaints from individuals and the taking of legal action as and when necessary (article 5(7)). This may be the most important aspect due to the authority of the Commission within a number of the Saudi ministries.

In particular regard to arrest and detainment, within its regulations, the Commission is afforded the rights, through article 1(6), to 'visit prisons and detention centres at any time without permission from the competent authority, and bring reports on them before the president of the Council of Ministers'. It is considered that this may well be viewed as another fundamental task carried out by the Commission due to its

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<sup>98</sup> See the Commission responsibilities on the Consultative Council <<http://www.Shura.gov.sa/wps/wcm/connect/ShuraArabic/internet/Committees/Committees+Jurisdiction+and+Duties/#14>> accessed 8 September 2012.

<sup>99</sup> Council of Ministers Resolution Number 207, 2005. See the full text of the English version in the Bureau of Experts at the Council of Ministers <<http://boe.gov.sa/Default.aspx>> accessed 14 September 2012.

compatibility with the authority of the Bureau of Investigation and Public Prosecution (BIPP),<sup>100</sup> which is within the authority of the Ministry of Interior (while the Commission is facilitated through direct communication with the Council of Minister's President, ie the King).

### ***3.6.2 The National Society for Human Rights***

The National Society for Human Rights (NSHR)—which was founded a year prior to the Human Rights Commission<sup>101</sup>—is known to encompass tasks similar to those of the Commission, although it is affected by the authority of the government.<sup>102</sup>

In regard to the NSHR basic law, authority is assigned to the NSHR to carry out the following:

- Maintain the implementation of human rights protection which has been stipulated in the BLG.
- Ensure that Saudi Arabia has regard to what is set out in the Cairo Declaration on Human Rights in Islam, as well as in the international conventions.
- Receive complaints from individuals and take any required action on their behalf.
- Advise the governmental institutions and make any appropriate recommendations in the field of human rights.
- Study the human rights issues in the international community and communicate with any international non-governmental organization (INGO).
- Examine the international conventions and covenants and evaluate any implications for Saudi Arabia.
- Hold conferences inside and outside Saudi Arabia in the field of human rights.
- Enhance international and domestic contribution in the field of human rights.
- Publish newspapers, books and reports in the field of human rights in Saudi Arabia.

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<sup>100</sup> The role of the BIPP will be examined in the following chapter.

<sup>101</sup> See the English version of the NSHR constitution <<http://nshr.org.sa/tabid/144/Default.aspx>> accessed 12 August 2012.

<sup>102</sup> See the Royal Decree which gives permission to the NSHR to exercise its authority under the BLG <<http://nshr.org.sa/tabid/146/Default.aspx>> accessed 12 August 2012.

### *3.6.3 Discussion on the effectiveness of the institutions*

Although the founding of the human rights institutions may be considered a step forward in the human rights movement in Saudi Arabia,<sup>103</sup> nevertheless the Human Rights Commission, through its regulations and laws, does not implement significant effects within the field of human rights in the domestic law, which may be recognized as being due to the fact that the Commission is a government entity and therefore is not charged with reflecting other KSA policies. Moreover, the right has been assigned to the Commission to visit prisons and partake in discussion surrounding the violations of human rights possibly arising in regard to prisoners; this has facilitated the potential to play a key role in human rights generally.

In contrast, the NSHR, as is seen during the course of this thesis, has adopted a key role in human rights as a whole. For example, throughout the period 2003–2006, the NSHR received a large number of complaints. Since its establishment in 2005 it has received approximately 30,367 cases, 1,394 of which are related to unfair trial and abuse of criminal process.<sup>104</sup> This report, along with another, was made available during the years of the NSHR's functioning, without any figures provided by the Human Rights Commission.

In another report entitled 'Leadership Ambition and Poor Institution Performance', the NSHR declared its displeasure concerning the functioning of a number of government-centred institutions, emphasizing that 'many governmental institutions have a lack of guarantees of human rights and protection of people's freedom, these institution still have not met the vision of reformation which have been presented from King Abdulla'<sup>105</sup> Moreover, throughout the same report, the NSHR recognized the challenges and issues confronting the judicial system, highlighting the judicial performance: for example, the judge's *Ta'zir* sentencing is unrestricted, which may become an issue and, as has been seen in the arena of public trials, such issues are in breach of the LCP which clearly provides that all trials must be conducted within the public domain.

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<sup>103</sup> Richard Dekmejian, 'The Liberal impulse in Saudi Arabia' (2003) *Middle East Journal* 410.

<sup>104</sup> 8<sup>th</sup> Report of the NSHR (2001) <<http://nshr.org.sa/>> accessed 03 August 2012.

<sup>105</sup> See the English version of the 2012 report <<http://nshr.org.sa/tabid/87/Default.aspx>> accessed 12 September 2012.

In summary, it may be stated that both the NSHR and the Human Rights Commission adopt key roles in the protection of human rights, within the KSA, although the NSHR shows a greater degree of contribution in such an arena.

#### **4. Conclusion**

To conclude, it can be seen that, following its involvement within the UN, Saudi Arabia has sought to address a number of elements inherent within and outcomes associated with human rights decisions and the right to a fair trial. Nevertheless, such involvement has increased dramatically following the domestic reform implemented across Saudi Arabia. However, during the past twenty years, a remarkable shift has been witnessed within Saudi Arabian domestic law, which reflects positively on the human rights of suspects, initiated at the point at which constitutional reform was adopted through the Consultative Council, and spanning up until the establishment of two human rights entities, the NSHR and the HRC.

The establishment of the LCP was one of the practical implementations of the right to a fair trial, after its provision in the BLG. However, there remain notable challenges in relation to the compatibility of Saudi domestic law with international human rights standards.

## **CHAPTER THREE: FAIR TRIAL UNDER *SHARIAH* LAW AND THE DOMESTIC JURISPRUDENCE OF SAUDI ARABIA**

### **1. Introduction**

After discussing the relevant international conventions in the previous chapter that related to human rights and the right to a fair trial, this chapter examines the sources of Islamic law and its reflection on the human rights especially the right to a fair trial. The criminal justice system in Saudi Arabia will be examined due to the fact that the Saudi Arabian criminal justice system is claimed to be based on *Shariah* norms.

### **2. Islamic norms and human rights**

It may be stated that, apparent within the numerous UDHR articles, the impact and influence of various religious traditions cannot be seen. Instead some articles such as 16, 18 may promote the freedom of religion which may be problematic in some Islamic interpretation as we shall see in the case of Saudi Arabia. Nonetheless, there is the viewpoint centring on those who advocate a human rights concept while others promote relativism. There is also the view that the international human rights standards have been devised and founded by the West, thus meaning the rest of the world is required to adhere to a standards framework not necessarily conforming to their views, and thus creating problems.<sup>1</sup> From a philosophical perspective, this argument may achieve further insight and understanding through drawing comparisons between human rights norms in terms of culture relativism and universalism.

Overall, the notion of culture relativism concerns culture as being the pivotal basis of the validity of rules, morals and rights; the universalism of human rights, on the other hand, may make reference only to the belief that basic human rights are something in which all cultures and nations become involved. With this noted, some people further emphasize that the universality of human rights can be recognized when analyzing the

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<sup>1</sup> Mashood A Baderin, 'Abdullahi An-Na'im's Philosophy on Islam and Human Rights' (2010) School of Law Legal Studies Research Paper Series. 4-5.7.



language adopted through the instruments highlighted previously, such as in the UDHR, which makes statements such as ‘all human beings’ and ‘no one’ etc.

Notwithstanding the above, however, the approach in terms of the way in which countries should have reached consensus on the UDHR and the subsequent conventions provides a strong foundation for the argument supporting human rights universality. For example, at the beginning of the UN Charter, it is emphasized that ‘we, the people of the United Nations ...’, which shows a clear target in terms of the countries and relationships between states.<sup>2</sup>

Furthermore, there is also the argument that, from a culture relativism point of view, the concept of right or wrong may not be apparent in certain cultures; therefore, it may then not be possible to impose the universalism of human rights.<sup>3</sup>

Practically, however, identifying a culture that would go against more basic personal rights—such as the right to life, the right to security, the right of liberty, the right not to be tortured, and the right to legal procedure—would be problematic; however, disagreement and dispute arise as a result of the definitions assigned to the application of such rights.<sup>4</sup> Essentially, the between-culture differences in this context stem from the specifics and the ways in which such rights can be implemented. For example, the right to provide a fair trial may be a universally agreed upon concept; however, in reality, there needs to be the institutional exercise of such a right. Issues arise not only due to the stark lack of application, but also due to the legislation of such types of human rights. In order to establish a point to this dispute, the author considers that there should be agreement with international rights norms being viewed as universal with a margin of appreciation according to custom and/or culture; in other words, human rights specifically have been highlighted in regard to the UDHR, and thus the two other main tools need to ensure the adherence to and the respect of cultural relativism.

## 2.1 Fair trial under Islamic law

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<sup>2</sup> United Kingdom Committee for Human Rights, *Human Rights: A Study Guide for the International Year for Human Rights* (Heinemann Educational Books 1968) 4.

<sup>3</sup> Richard Mullender, ‘Human Rights: Universalism and Culture Relativism’ (2003) *Critical Review of International Social and Political Philosophy* 73.

<sup>4</sup> Jack Donnelly, ‘Human rights as Natural Rights’ (1982) 4 *Human Rights Quarterly* 2. See more about the argument of the foundation of human rights in J Donnelly, *Universal Human Rights in Theory and Practice* (2nd edn, Cornell University Press 2003) 95.

It should be highlighted that a number of Islamic countries have added to the UDHR<sup>5</sup> establishment, virtually without reservation—although Pakistan and Saudi Arabia are exceptions; thus, the Muslim world is seemingly in support of the Declaration text. Such agreement may provide the suggestion that there is agreement in relation to the universality of human rights; thus, there is no apparent inconsistency or challenge between human rights standards and Islamic norms.<sup>6</sup> In regard to the right to a fair trial, it seems that the root of the concept was mentioned under the principle of legality under Islamic criminal law. This concept is rooted in the Quran, as well as in the *Sunnah*, and developed within Muslim scholars.<sup>7</sup>

The majority of rights and values protected through the application of international human rights—particularly through the Bill of Rights—have been assured and pledged in Islamic traditions: for example, the Islamic traditions, as well as the constitution of countries adopting Islamic norms, protect the right to life.<sup>8</sup> Some may further suggest that the standards of Islam have adopted a wide range of protections centred on human rights, especially those detailed within the standard of international human rights.<sup>9</sup> Moreover, another perspective highlights that, upon the recognition of human rights by Islam—which is known to have occurred 14 centuries ago—there was ongoing fluctuation between ensuring the people’s welfare and failing to reflect the true traditions of Islam.<sup>10</sup> One further perspective highlights the main illogicality between human rights and Islamic norms, which is acknowledged by Donnelly, as follows:

Traditional Muslim societies, however, simply did not pursue human dignity of flourishing through the practice of equal and inalienable rights held by all human beings, such difference in fundamental legal and political institution and practice made these societies different from modern human rights-based society of any culture, religion or civilization.<sup>11</sup>

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<sup>5</sup> Such as Egypt, Iran, Iraq, Lebanon and Saudi Arabia. See Javaid Rehman, *International Human Rights Law* (2nd edn, Pearson Education Limited 2010) 360.

<sup>6</sup> Al-Eshaikh Hesham Al-Eshaikh, ‘Human Rights and the Trial of Accused: A Legal Comparative Study Between the Judicial System in Saudi Arabia and the Standards Required in the European Convention on Human Rights’ (PhD thesis, University of Newcastle 2005) 33-34.

<sup>7</sup> See more about the principle of legality on Abu Zahrah, *Crimes and Punishments in Islamic Jurisprudence* (Dar al-fikr Al-Arabi 1984).

<sup>8</sup> Mohammad Kamali, *The Right to Life, Security, Privacy and Ownership in Islam* (Islamic Texts Society 2008) 10.

<sup>9</sup> Al-Eshaikh (n 6) 33.

<sup>10</sup> Robert Traer, ‘Human Rights in Islam’ (1989) 28 *Islamic studies* 120.

<sup>11</sup> Donnelly, *Universal Human Rights in Theory and Practice* (n 4) 75.

Such a statement may need to be considered for a number of reasons: firstly, it adopts a political perspective when considering human rights development in the context of Islamic countries which, to some degree, do not accurately decree the tradition of Islam; secondly, as noted by Al-Eshaikh, the concerns surrounding Western advocates' support of human rights and religious values are incorrectly ranked alongside cultural and social values.<sup>12</sup>

One further standpoint emphasizes the disagreement between the international human rights obligations and the adoption of *Shariah* law, with McGoldrick noting the following:

[i]t was difficult to declare one's respect for democracy and human rights while at the same time supporting a regime based on Sharia, which clearly diverged from Convention values, particularly with regard to (i) its criminal law, (ii) its criminal procedure, (iii) its rules on the legal status of women and (iv) the way it intervened in all spheres of private and public life in accordance with religious precepts.<sup>13</sup>

Such an opinion may seem somewhat generalized and unclear: for instance, it may be stated that there is a lack of conformity in regard to international human rights standards and the countries adopting Islamic law. Essentially, therefore, the door is somewhat closed to the developments of human rights through segregating those countries applying the *Shariah* code, and ultimately preventing them from reaching their capacity and fulfilling their promise in regard to human rights development.

### **3. Sources of Islamic *Shariah***

The Saudi legal system originated at the beginning of the Saudi union, during the time when Mohammed Ibn Abdulwahaab and King Abdul-Aziz met in '*alu'eena*', thus establishing the union. At this time, the judicial system was divided into two categories: the rural judiciary and the urban judiciary. In the former, the head of the tribe made decisions and handled any type of crime on his own, whereas the latter was based in towns, such as Al-Riyadh and Mecca. Following the founding of the union, King

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<sup>12</sup> Al-Eshaikh (n 6) 36.

<sup>13</sup> See the Refah Partisi (Welfare Party) and ors v Turkey, Merits, App No 41340/98. Also See, McGoldrick, 'Accommodating Muslims in Europe: From Adopting Sharia Law to Religiously Based Opt Outs from Generally Applicable Laws' (2009) 9 Human Rights Law Review 611.

Abdul-Aziz made the decision to unify the judicial system through amalgamating both the rural and the urban systems, joining them to form one body, which was to be based on *Shariah* law. This development occurred in 1943.<sup>14</sup>

Subsequently, in 1960, the Ministry of Justice was founded during the era of King Faisal, with the establishments following until 1992 during King Fahad's implementation of the Basic Law of Governance (BLG).<sup>15</sup> Importantly, it was in 2008 when the judicial reform was adopted by King Abdullah which subsequently changed the structure of the courts through the introduction of a High Court and by changing the name of 'al tammeez' court to the Court of Appeal. Prior to considering the overall court structure within the Kingdom, it is imperative to provide an in-depth overview of from where the legal system takes its sources. In order to facilitate this, the following discussion will highlight two main sources upon which Saudi Arabia has established its legal system: 1) primary sources, including the Quran and Sunnah, and 2) secondary sources, which include the *Ijma* (consensus) and *Qiyas* (analogy). These sources will lead us to the concept of the school of thought in Islam, upon which the judicial system of Saudi Arabia is based.

#### **4. Primary sources**

Two primary sources which are regarded as major sources of Islamic criminal law are the Quran and *Sunnah*, each of which will be discussed below.

##### **4.1 The Quran**

The Quran is known to be the holy text of Muslims, with the Prophet Mohammed known to have highlighted the responsibility of Muslims to follow its content by considering it to be a relevant source of legislation and reference law. Markedly, the text comprises a number of different definitions and references surrounding crime and punishment. Furthermore, the text also considers issues such as faith prayers, worship, and a number of elements relating to the relationship between God and people. A number of provisions made in the text relate to transactions, and the positioning of

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<sup>14</sup> Ministry of Justice Saudi Arabia, 'History of justice in Saudi Arabia' <<http://www.moj.gov.sa>> accessed 15 September 2012.

<sup>15</sup> See the English version of the BLG, Bureau of Experts in the Council of Ministers <<http://boe.gov.sa/ViewSystemDetails.aspx?lang=ar&SystemID=4&languageid=2>> accessed 25 June 2012.

family affairs is also considered in depth.<sup>16</sup>

It is recognized during modern times that the Quran adhered to the needs of the times, although it was somewhat fragmented; nevertheless, it took over three decades for the entire text to reach a stage of completion.<sup>17</sup> Importantly, it delivers insight into all of the regulations and basic rules to which Muslims should adhere, and also details the rules by which the Muslim world is governed, thus forming the underlying foundation for all links between God and people. In addition, it details the rules by which the Muslim society is governed and organized, and further delivers an avenue through which conflicts between people, as well as people and their state, may be overcome. Accordingly, a complicated and in-depth study is necessary.<sup>18</sup>

There have been various debates surrounding the general nature of the Quran in terms of whether it should be considered a religious or legal text. For example, the view of Rehman emphasizes that the Quran should be read in a religious context, stating the rationale for this as due to the presence of various verses within the text that teach moral values and not legal ones.<sup>19</sup> On the other hand, Kamali contests that the Quran can be considered neither religious nor legal, stating:

... the legal or practical contents of the Quran often referred to as the *Ayat al-ahkam* 'legal verses' constitute the bases of what is known as jurisprudence of the Quran. There are about 350 verses in the Quran, most of which were revealed in response to problems that were actually encountered. This might explain why these verses are also known as practical ruling, pertaining to the conduct of the individual'.<sup>20</sup>

Essentially, it seems that the Quran may be regarded as both a legal as well as a religious document, as will be shown later on in this chapter. In this regard, it is known that the Quran has very specific definitions on crimes, and has further set the punishment for these crimes. Moreover, it may be suggested that the text is a moral document owing to the majority of the verses centring on various general aspects, as

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<sup>16</sup> Zuhair Al-Harhi, 'The Role of the Commission for Investigation and Public Prosecution and Its Impact on Criminal Procedure in the Saudi Arabia Criminal Justice System' (PhD thesis, University of Kent 2005) 4.

<sup>17</sup> Ibrahim Al-Harbi, 'Democracy in Islam and International Law: A Case Study of Saudi Arabia' (PhD thesis, Brunel University 2010) 113.

<sup>18</sup> Al Awabdeh M, 'History and prospective of Islamic Criminal Law with respect to the Human Rights' (PhD thesis, University of Karak, Jordan) 58.

<sup>19</sup> Javaid Rehman, *Islamic States Practice, International Law And The Threat From Terrorism* (Hart Publishing, 2005) 12.

<sup>20</sup> Mohammed Kamali, *Shari'ah Law: An Introduction* (Oneworld 2008) 18.

well as the relationship between a person and his God.

## 4.2 *Sunnah*

*Sunnah* is the Arabic term meaning ‘way’. In the context of Islamic jurisprudence, this particular term has been described by Muslims scholars as ‘deed’, and the saying and approval of the Prophet Mohammed.<sup>21</sup> The *Sunnah* is recognized as the secondary source of legislation, utilized following the Quran, when striving to deduce legal rules. Moreover, it also explains the key behavioural aspects of society and the individual. It is considered that the *Sunnah* provides support, and further highlights what is stated in the Quran. Moreover, the *Sunnah* also describes particular prohibitions which may be mentioned in the Quran, for instance, the forbidding of shirk and giving false testimony, and further details the number of *Rakacāt* (prostrations) in prayers, as well as the specific *Zakah* shares.<sup>22</sup> When considering the *Sunnah*, Abdulgader has divided the text into three groups: oral *Sunnah*, which refers to the spoken words of the Prophet Mohammed through his *Haddiths*; behavioural *Sunnah*, which directs attention towards the rulings made by Mohammed during his time; and agreement *Sunnah*, which details those instances where people have made statements and the Prophet agreed.<sup>23</sup> Overall, the *Sunnah* is known to work in unison with the Quran in three main ways: firstly, it may reiterate what has been mentioned in the Quran; secondly, it may explain various verses in the Quran; and finally—and potentially more importantly—it may comprise a ruling upon which the Quran is silent.<sup>24</sup>

Overall, the primary sources of Islam, ie those detailed previously, are recognized as being authentic by all scholars of Islam; however, there are various issues that may occur in the daily lives of Muslims which are not fully dealt with in either of the sources detailed. This will be examined throughout the subsequent discussion, which will cover the schools of thought in Islam, in addition to the study approach in regard to Islamic norms.

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<sup>21</sup> Auda Abdulgader, *Al'tashree al Jinai al Islami* (Dar al kitab al Arabi 1998) 166.

<sup>22</sup> Asma Zarzour, ‘The Particularity of Human Rights In Islam With reference to Freedom of Faith And Women’s Rights; A Comparative Study with International Law’ (PhD thesis, University of Glasgow 2008) 85.

<sup>23</sup> Abdulgader (n 21) 174.

<sup>24</sup> Kamali (n 20) 25.

## 5. Secondary sources

### 5.1 *Ijma* ('consensus')

The term '*Ijma*' is recognized as 'consensus' amongst scholars after the death of the Prophet Mohammed.<sup>25</sup> Importantly, *Ijma* is known to encompass the collective conscience of the Muslim community, their accord and universal agreement over the correct understanding and explanation. Nevertheless, it is widely acknowledged that the *Ijma* is binding, as second sources after the two main sources of Sharia'a the Quran and *Sunnah*.<sup>26</sup>

Moreover, in order for there to be an *Ijma*, there only needs to be agreement between scholars within the same period, and not necessarily among scholars spanning various periods and times. In addition, *Ijma* only directs attention to those arenas considered in a legal context, owing to the fact that Islamic law permits individuals to make decisions in their personal lives on the basis of the Prophet's teaching that 'you have more knowledge in matters of your life' (Muslim, 2363). However, irrespective of such a generalized rule, *Ijma* has been, and may be, implemented in regard to all of the aspects of a person's life. As a result, although it is considered that evidence should be based on the key sources of Islamic law, this does not mean there is no space for *Ijma* in the context of modern-life occurrences. Realistically, there have been many instances of *Ijma* dealing with sequential issues, such as that which was present amongst the companions of the Prophets in relation to the way in which a head of state should be suitably assigned.<sup>27</sup>

### 5.2 *Qiyas* ('analogy')

The meaning of *Qiyas* in Arabic is 'analogy', which operates on the basis of effective causes '*Illah*', which is known to be common between the old and the new cases, and comparing them together to find the easier one.<sup>28</sup> Nevertheless, four conditions are known to apply to the concept of *Qiyas*: the approach must not be in contradiction with stronger sources of Islam, as mentioned earlier; the old case has to be rooted and explained in the Quran or *Sunnah* in order for the new case to be applied; and the

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<sup>25</sup> Ibn Uthaimen, *al-usul, min Wlm al Usul* (al Eman 2001) 50.

<sup>26</sup> See the extensive argument about the feasibility of *Ijma* on Kamali (n 20) 101.

<sup>27</sup> Al Harbi, (n 17) 117.

<sup>28</sup> Kamali (n 20) 167.

effective cause ‘*Illah*’ has to be in both cases in order to apply the *Qiyas* methods.<sup>29</sup> Importantly, it should be noted here that the *Qiyas* may be an effective methodology in terms of legislation in the context of *Shariah* law, and may apply to those cases where there is no criminal law that may apply to the accused during the court hearing. Nevertheless, it is considered noteworthy to state that, within Islamic law, there are other methods that have been exercised in addition to the four sources mentioned above;<sup>30</sup> however, these are not as important as those highlighted previously.

## 6. Schools of thought in Islam

Over the past fourteen centuries, there has been much development in regard to Islamic jurisprudence, during which time a number of lines of thought have been introduced and subsequently fractured, each providing its own perspective and adoption in regard to the *Shariah*. The key difference between schools was naturally communicated on to whoever implemented the approach of that particular teaching, although the effort of such was subsequently reduced. Nonetheless, it is recognized that nothing disallows a state from codifying the *Shariah*; this may be done in order to ensure a greater degree of certainty, clarity and consistency in terms of its adoption.<sup>31</sup> Nevertheless, the four main lines of thought will not be analyzed within this chapter for the reason made previously that these do not encompass the main sources of *Shariah* law adopted within the KSA;<sup>32</sup> rather, the Ibn Hanbal school of thought will be considered in more depth in the following discussion.

### 6.1 Ibn Hanbal school of thought

The Ahmed Ibn Hanbal school of thought has become the main source of legal norms within the KSA. Ibn Hanbal was born in Bassrah, and began his studies by travelling across a number of different countries.<sup>33</sup> His approach was implemented by the government of Saudi Arabia as a result of the well-organized cases seen in his books; however, Ibn Hanbal has six books that are applied in Saudi courts, namely: *Sharh Al Iradat*, *Sharh Al Ikna*, *sharh Al mostanka*, *sharh Dalil al Talib*, and both *AL Mogny*

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<sup>29</sup> Ibn Uthaimen, (n 25) 56.

<sup>30</sup> These methods are Istihsan, Maslaha mursala and Qaul al Sahabi. Uthaimen Ibid 66-70.

<sup>31</sup> Al-Harhi (n 16) 10.

<sup>32</sup> For more about the four schools of thought in Islam, see Al-Awabdeh (n 18) 77-90.

<sup>33</sup> Abu Zahra, *A history of Islamic sects* (Dar Al-Feker al Al-Arabi 1996) 340.



and its *sharh*.<sup>34</sup> The meaning of *sharh* is ‘explanation’. As such, these books are known to have played a pivotal role in the Saudi legal system, simply due to the number of cases that have been applied, in addition to the large volume of *Fatwa* solved through such books. In addition, King Abdul-Aziz implemented more than one school of thought in case there was no answer for a particular case.<sup>35</sup> As will be seen through reflecting upon and analyzing the case studies in this chapter, there have been a number of instances in which judges have made decisions based on the Ibn Hanbal school of thought.

The main underlying basis of the *Hanbali* school of thought is relatively comparable to that of the *Shaff’ee* School,<sup>36</sup> although there is one significant difference, which is that if there is no obvious text in the Quran and in the *Sunnah*, the *Hanbali* school refers to the juristic judgment. Moreover, Imam Ibn Hanbal, to a significant degree, utilizes the public interest, and thus adopts a number of different approaches—particularly in the case of interpretation matters.<sup>37</sup>

Irrespective of the value associated with the work of Ibn Hanbal, the school of thought did not achieve popularity compared to the other three schools of law. With this noted, the followers of Ibn Hanbal were considered to be troublesome and reactionary owing to their apparent disinclination to provide personal perspectives on various concerns of law, in addition to their rejection of analogy, their obsessive bias in regard to the views of others and their rejection of opponents from judicial office and power. Their lack of popularity subsequently resulted in periodic stretches of persecution. As a result, the subsequent history of the school has become characterized by the fluctuations in their fortunes. Nevertheless, scholars of the *Hanbali* during later years have shown a great deal more open-mindedness to the views of others, and have been fundamental in establishing better access in regard to the teachings of *Hanbali*.<sup>38</sup>

## **7. The role of *Ijtihad* in Saudi criminal law**

*Ijtihad* has played a critical role in Islamic culture over the duration of several hundred

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<sup>34</sup> See more about Hanbali interpretation, Frank Vogel, *Islamic Law and Legal System: Studies of Saudi Arabia* (Brill 2000) 9-13.

<sup>35</sup> Saudi Ministry of Justice, ‘King Abdul-Aziz and the Saudi legal system’ <<http://www.moj.gov.sa>> accessed 14 September 2012.

<sup>36</sup> Al-Harhi (n 16) 12.

<sup>37</sup> Nazeem Golaam, ‘*Ijtihad* and its Significance for Islamic Interpretation’ (2006) Michigan State Law Review 1443.

<sup>38</sup> Zahra (n 33) 280.

years. Following the Quran and *Sunnah*, *Ijtihad* became recognized as the first source in Islamic norms,<sup>39</sup> with Kamali giving the following rationale for why the *Ijtihad* is so significant:

... the difference between *Ijtihad* and the revealed sources of the Sharia lies in the fact that the *Ijtihad* is a continuous process of development, whereas divine revelation and prophetic legislation discontinued upon the demise of the Prophet. In this sense, the *Ijtihad* continues to be the main instrument of interpreting the divine message and accordingly relating it to the changing conditions of the Muslim community in its aspirations to attain justice, salvation and truth.<sup>40</sup>

There are a number of different definitions for the *Ijtihad*;<sup>41</sup> however, this can be defined as ‘rethinking’ or independent thinking in the light of the Quran and the *Sunnah*. The opposite of the *Ijtihad* is the *Taqlid*, which is the acceptance of any opinion without consideration to any idea spanning beyond it, and follows an older jurist. In order to establish and understand the way in which the *Ijtihad* works, there is first the need to outline the requirements of a person wanting to be a *Moujtahid* ‘scholar’:

- He should have in-depth knowledge of the text of the Quran;
- He should memorize the entire Quran in order to aid his conclusions;
- In the field of *Hadith*, he must complete the mystery of *Hadith* and command more than 3,000 *Hadiths*;
- He must be devout and pious;
- He must be familiar with the science of Islamic jurisprudence.<sup>42</sup>

The justification for why *Ijtihad* approach or juridical meaning may play a fundamental role in Islamic jurisprudence is due to the up-to-date process in which *Ijtihad* is involved. It is recognized that this is an important element to ensure compliance with human rights standards; however, this needs to be done with a free mind and without any politicizing of its purpose.<sup>43</sup>

In order to reach a point where the *Ijtihad* may be able to play a significant role

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<sup>39</sup> Mohammed Kamali, the *Principles of Islam jurisprudence* (Islamic Text Society 2003) 315.

<sup>40</sup> *ibid* 314.

<sup>41</sup> Shaista Ali-Karamali and Fiona Dunne, ‘The Ijtihad Controversy’ (1994) 9(3) Arab Law Quarterly 238.

<sup>42</sup> SM Zafar, ‘Accountability, Parliament, and Ijtihad’ in C Kurzman (ed) *Liberal Islam and its Islamic Context* (OUP 1998) 70.

<sup>43</sup> See more about secularism and religion: Abdullah An’a’im, *Islam And the Secular State* (Harvard 2008) 12-15.

within Islamic society, Kamali suggests that the approach of *Ijma* must be changed in regard to various aspects, including:

- The recognition of the collective *Ijtihad* as a group and *Ijtihad* as individuals;
- The option to allow other experts to participate in the *Ijtihad*, such as scientists, economists and so on;
- The changing of the diversity of the *Ijtihad* to become a unity that will reflect positively the quality of the work of Islamic scholars;
- The role of *Ijtihad*, according to point 3 above, must encompass all aspects relating to the life of a Muslim, and not only that related to jurisprudence, in the past; and
- Even in regard to direct references in the primary sources of Islam, the *Ijtihad* may provide a fresh perspective of their context, and thus may create avenues through which primary sources may be studied.<sup>44</sup>

There are many examples where the *Ijtihad* has played a significant role in the context of modern society, such as in relation to the issue of polygamy, which needs to be made by court order in some societies, in contrast with the past, during which the exercising of this right ‘which has a direct reference in both Quran and Sunna’ provided the privilege of such to the husband.<sup>45</sup> Further significant evidence explaining the importance of the *Ijtihad* was when the exercising of slavery was banned in Saudi Arabia, which was clearly based on the role of *Ijtihad*.<sup>46</sup>

In specific consideration of Saudi Arabian law, the influence of the *Ijtihad* approach may be found within government institutions. For example, the Shura Council and its role may be defined as one of the remarkable *Ijtihad* in the Saudi jurisdiction.<sup>47</sup> Furthermore, the responsibilities of the Shura Council are commonly active in relation to the high principles of the government scheme; however, the *Ijtihad* may be divided into two main sections, as follows:

1. *Ijtihad* in all aspects of life: This includes politics, and economic and social matters. This could be exercised by the government, as shown in the example of the Shura Council in Saudi Arabia.

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<sup>44</sup> Kamali (n 39) 171.

<sup>45</sup> *ibid* 172.

<sup>46</sup> Slavery was officially banned in Saudi Arabia in 1962 even though the exercising of the slavery trade was restricted before this date. ‘King Abdul-Aziz institution announcement’ (*Al Riyadh* newspaper 26 May 2008) 14581 <<http://www.alriyadh.com/2008/05/26/article345473.html>> accessed 29 August 2012.

<sup>47</sup> See the Shura’s duties: Kamali (n 39) 40.

2. *Ijtihad* within judicial matters: In this specific *Ijtihad Qudis*, ‘judges’ should clarify the issues of *Ijtihad* and accordingly evaluate the problems within Islamic jurisprudence, *Usul al Fiquh*, with power and independence.<sup>48</sup>

The first of these categories may be found in *Fatwa*—or what is otherwise described as the decision made by Islamic jurists in regard to any matter—private or public.<sup>49</sup>

### 7.1 *Fatwa* and its role

In order to shed some light on the concept of *Fatwa*, it is worth mentioning here that there is a strong link between Islamic law and the concept of the *Fatwa*. Importantly, the word *Fatwa* means a response to a question asked in order to clarify the legitimacy of a certain case.<sup>50</sup> Commonly, *Fatwa* is based on an interpretation of the Quran or *Sunnah*, in addition to the general principles of the *Shariah*; however, in the case where there are no sources within the context of the Islamic Quran or *Sunnah*, the writer will provide an opinion based on what he understands from the principles of *Shariah*. Accordingly, it is essential that there is awareness of the present day as well as the customs of one’s own society. With this noted, we can see here that there is a similarity between *Fatwa* and *Ijtihad*, although Kamali clarifies the differences between the two main concepts as follows:

Fatwa is also different from *Ijtihad* in that *Fatwa* may be attempted in matters that may have been regulated by decisive evidence or by a mere indication in the Quran and Hadith ‘*Sunnah*’. *Ijtihad*, on the other hand, does not relate to matters that are covered by decisive evidence in these sources.<sup>51</sup>

The issue of *Fatwa*, within the context of Saudi Arabia, has been of increasing interest throughout the last decade, with this issue faced by the strong decision made by King Abdullah to limit the power of exercising *Fatwa* and to instead give specialist Saudi jurists the privilege of *Fatwa*; however, *Fatwa*, in this particular context, is much different to that of *Ijtihad* in the judicial arena, simply due to the fact that the latter is a particular decision made in consideration of a particular person, whereas *Fatwa*—

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<sup>48</sup> This case applies in the Saudi legal system; see Ayoub Al-Jarbou, ‘Judicial Independence: Case Study of Saudi Arabia (2004) 19 Arab Law Quarterly 18-20.

<sup>49</sup> See more about *Fatwa* restriction in Saudi Arabia, Fatima Sidat, *Fatwa* only by senior scholars, Arab News <<http://www.arabnews.com/node/352583>> accessed 12 January 2013.

<sup>50</sup> Usuf al Qaradawi, *al-fatwa bayn al indibat wa al tasayoub* (Dar al Sahwah 1988) 10.

<sup>51</sup> Kamali (n 39) 175.

although it uses *Ijtihad* as a source—ultimately extends to public matters.<sup>52</sup> This is what makes *Fatwa* more dangerous if used in an aggressive manner, simply because the followers of *Fatwa* take it as an obvious certification of committing violence.<sup>53</sup>

It is clear from this section that the Saudi legal system derives its sources from a variety of concepts rooted in Islamic norms. Undoubtedly, the primary sources of Islam play a crucial role in the formulation of the legal system within the Kingdom as well as secondary sources. In addition, the *Ijtihad* has been used in the courts, as is seen in the following chapters. Moreover, the importance of *Ijtihad* is apparent in cases where there are no sources in the Islamic law which can be applied to a particular case. More importantly, the role of *Ijtihad* may be regarded as crucial in the absence of criminal law, especially when considering that there are no specific articles centred on criminalizing a given behaviour.

## **7.2 How the Islamic sources reflect on the right to a fair trial**

As pointed out above, the Quran may be regarded in some respects as a legal document, and there are several verses related to criminal law. However, the secondary sources *Qiyas* and *Ijma* may provide legal basis for the human rights of suspects in both the pre-trial and in-trial process. This discussion will be analyzed in the following two areas:

1- In terms of the pre-trial rights, both sources provide the legal framework for the right of suspects not to suffer torture and degrading treatment in the pre-trial stage.<sup>54</sup> The presumption of innocence is another example of where these sources are linked to the human rights of the suspect during the pre-trial stage. It is emphasized that this concept is strongly rooted in Islamic jurisprudence.<sup>55</sup>

2- Regarding the fair trial phase, it seems that many rights have been guaranteed in this stage. For instance, the public hearing that was developed in the history of Islam has emerged from the *Ijma* concept.<sup>56</sup> Another fair trial concept related to the sources of Islam is the theory of non-retroactive criminal law, rooted directly in the Quran Verse

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<sup>52</sup> Vogel (n 34) 11.

<sup>53</sup> See more about how Fatwa can be affected: J Kutscher, 'The Politics of Virtual Fatwa Counselling in the 21<sup>st</sup> Century' (2009) 3 Masaryk University Journal of Law and Technology 30.

<sup>54</sup> Al-Harhi points out some protections regarding the human rights within the pre-trial stage, see Al-Harhi (n 16) 18.

<sup>55</sup> See, for instance, the argument of Lippman, on the presumption of innocence in Islamic criminal procedure: Matthew Lippman, 'Islamic Criminal Law and Procedure: Religious Fundamentalism v. Modern Law' (1989) 12(1) Boston College International and Comparative Law Review 47.

<sup>56</sup> See more on the effect of the crimes on the suspect in Abdulrahman M Almohideb, 'Criminal Procedures relevant to Crimes of Killing in the Kingdom of Saudi Arabia' (University of Glasgow 1996) 40.

22, Sura Nisa (and marry not women whom your fathers married, expect what has already passed).

More importantly, *Ijtihad* may play a significant role in accommodating between the international human rights standards and Islamic law. For instance, and in regard to the criminal law itself, the Quran and the *Sunnah* as we have seen, expressly prescribe punishment to certain offences and are silent in specific elements of offences and procedures. Therefore, *Ijtihad* can be used to imply requirements which render the application of those punishments impossible.<sup>57</sup>

## **8. Crimes and punishments under *Shariah* doctrine**

Crimes and punishment under *Shariah* is considered different in its nature, and needs to be considered. Generally speaking, the violated right will determine how serious the crime and punishment will be.<sup>58</sup> The scholars agree that there are three categories of crime under Islamic jurisprudence: *Hudud* crimes, or what may be referred to as ‘God’s limits’; *Qisas*; and *Al Ta’zir* crimes. These will be examined briefly in the following discussion.

### **8.1 *Hudud* crimes**

Crimes falling into the category of *Hudud* are known to have fixed and mandatory penalties, such as punishment, although these are different depending on the school of thought. *Hudud* crimes are established by God in order to prevent the commission of these offences, namely *Zina* (adultery), *Baghi* (transgression), *Sarqah* (theft), *Shurb al-Khamr* (the consumption of alcohol), *Hirabah* (robbery), *Al-Riddah* (apostasy), and *Qadhf* (defamation). Notably, such crimes have their punishments in the Quran and in the *Sunnah*: for instance, hand amputation for theft, the death penalty for armed robbery, 100 lashes for fornication and 80 lashes for slander.<sup>59</sup> The remaining punishments can be found in the *Sunnah*. However, various crimes, such as adultery, require four witnesses: if one of them is not certain about witnessing the crime, then the

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<sup>57</sup> Shihannah Azzaz, ‘Ijtihad, An Effective Mechanism of Upholding International Human Rights with Islamic Law’ (2008) 21 *Journal of Islamic State Practice in International Law* 40. Also see Vogel (n 34) 223.

<sup>58</sup> Abu Zahra, *Al-Jarimanh wa al Uquba* (Dar al fiker al Arabi 1998) 48. Also see Mohammed Abdel Haleem, Adel Omar Sherif and Kate Daniels, *Criminal Justice in Islam* (Yauris & Co Ltd 2003) 5-6.

<sup>59</sup> See Quran 24, verse 2. Quran 24, verse 4; Quran 5, Verse 38; Quran 5, verse 33.

crime is not actionable, and goes directly against the rest of the witnesses.

In this category, there is no path to be followed in regard to the application of the *Ijtihad* method, nor any techniques associated with the exercising of any kind of *Fatwa*. However, up until recently, there has been a small reform in the field of such punishments: for example, the government has implemented strict conditions in terms of the evidence in the case of *Hudud* crimes.<sup>60</sup> The issue with *Hudud* crimes, more specifically *Baghi* (transgression), which can be defined as a terrorist crime, and *Hirabah* (robbery), is that these are not yet codified. . The evidence for these types of crime should be provided cautiously due to the punishment exercised, which can be capital punishment.<sup>61</sup>

*Hudud* punishment is imposed when a person confesses to the crime, or where there is sufficient evidence for the application of punishment. Importantly, it does not matter if there is only evidence, and not a confession; however, in some cases, both the confession and sufficient evidence should be present. More importantly, if the judge has any doubt about a *Hudud* crime in terms of whether or not the accused has actually committed the crime, then according to *Shariah* law, he has to change the nature of the crime to *Ta'zir*.<sup>62</sup>

Punishments relating to *Hudud* crimes are severe, the main objective of which is to act as a deterrent. In the case of an individual being punished in such a way, the injured party is then not able to remit or compound the penalty as can be done through *Qisas*.

Evidence relating to the crime must be sound and without holes, and there must be competent eyewitnesses to prove the overall credibility of the accusation. For instance, should someone be accused of *Zina* (adultery), punishment should only be administered if there were four male eyewitnesses.<sup>63</sup> As such, a person cannot be punished for *Zina* unless public decency was offended and an offence was committed in the open. For example, an individual could be accused of committing a *Hudud* crime; however, even if the accused confessed, the confession would need to be made before a judge (*Qadi*) at least four times, and could be withdrawn at any point. Aside from the

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<sup>60</sup> It is notable that the evidence required to implement the stoning may be impossible as it needs many conditions. See, for instance, Abdulhamid Al-Harhan, 'The Saudi Pre-Trial Criminal Procedure and Human Rights' (PhD thesis, University of Kent 2006) 21.

<sup>61</sup> Basim Hassuna, *The evidence in Hudud crimes in Sharia and law* (Naif Arab University for Security Sciences 2002) 35-40.

<sup>62</sup> Al-Harhi (n 16) 14.

<sup>63</sup> Quran verse 24.4.

more technical regulations surrounding evidence, any doubt is sufficient to prevent punishment.

The vast majority of Islamic jurists refer to the concept of the right of God and the right of a person to make a distinction between the *Hudud* crimes and others, although this distinction has been criticized by Kamali, who states:

Muslim jurists have simply turned a blind eye to this aspect of the text, and relegated it into insignificance by subsuming repentance under the ambiguous jurists formulation of right of God and right of man. Thus the argument advanced that repentance prior to the arrest in the case of highway robbers and other *Hudud* offences absolves the offender from punishment.<sup>64</sup>

This perspective is considered particularly valuable, as the results of repentance would eliminate the crime and mean direct transfer to *Ta'zir* crimes. With this noted, the role of repentance in the context of *Redda* 'apostasy' crime is illustrated by Audi as follows: 'the consequences of repentance in the apostasy crime is the abolishment of the death penalty, and the punishment will directly will transfer to *Ta'zir* crimes'.<sup>65</sup>

## 8.2 *Al Qisas* crimes

*Qisas*, in Arabic, is defined as 'equality in crime and punishment',<sup>66</sup> whereby the punishment is commensurate with the offence. This punishment has its roots in the Quran: 'And we prescribed for them in it. The life for the life, and the eye for the eye, and the nose for the nose, and the ear for the ear ...'<sup>67</sup>

Essentially, *Qisas* must be differentiated from the revenge exercised in the era of Arab tribes. For example, prior to Islam, Arab tribes used to kill as many as they could of a killer's family without any limitation.<sup>68</sup> In addition, the concept of forgiveness was lacking, which is why the Quran specifically mentions mercy: 'And for him who is forgiven, somewhat by his injured brother, prosecution according to usage and payment to him in kindness ...'<sup>69</sup>

In regard to crimes relating to murder, *Shariah* law has been broken down into

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<sup>64</sup> Kamali (n 39) 193.

<sup>65</sup> Abdulgader (n 21) 727.

<sup>66</sup> Abu Zahrah, *Crime and punishment in Islamic jurisprudence* (Dar al-fikr Al-Arabi 1950) 265.

<sup>67</sup> Quran 5, verse 45.

<sup>68</sup> Abdul-Wahhab, 'Human Rights in Qisas Crimes Between Sharia and International Law' (PhD thesis, Naif Arab University for Security sciences 2000) 170.

<sup>69</sup> Quran 3, verse 178.



three respective categories: *Qatl al Amd* (murder), *Shibh al Amd*,<sup>70</sup> and finally *Qatil al kada* (manslaughter). The *Qaias* may be adopted in the first category (murder) due to the fact that criminal intent is clear in this case. Nevertheless, the punishment in such a situation should be with the consent of the victim's heirs.

Importantly, *Diya* is the money given either as a result of a manslaughter killing or as a result of the abdication of the victim's heirs. Al-Harhi states:

Diya refers to a form of compensation, or blood money, which is to be paid by the person charged with the offence and by his relatives, to the victim or his family as reparation for an injury or murder. Diya is also prescribed in Islamic law as a primary retribution against the guilty party, when the crime is classified as unintentional killing.<sup>71</sup>

Nevertheless, Muslim jurists draw the conclusion that there is no retaliation in the case of accidental killing and, as such, blood money has to be paid in this case.<sup>72</sup> Abdulgader, for instance, clarifies various conditions for the *Qisas* punishment to be implemented, arguing that if the person who has been killed was involved with the killer, such as the murderer being the father or mother of the victim, this case would then be treated as a *Ta'zir* crime, which would be under the evaluation of the judge, if the *Qisas* was not in intention.<sup>73</sup> In this regard, we can see the value of both the conduct element of the crime (*actus reus*) and the mental element of the crime (*mens rea*).

Recently, the death penalty has been implemented in the KSA on the basis of *Qisas*, such as in the case of murder and with full evidence. There is no method, even for the King, to stop capital punishment—this is because this crime is referred to as a blood crime, which is related to other people's rights. Thus, the way in which compliance is achieved between both international human rights standards with its provision will be unachievable due to the differences in the jurisprudence from both perspectives. The way to resolve this issue might be laid in the concept of (Taqin al Ta'zir) which its advantages and disadvantages will be discussed in the following section.

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<sup>70</sup> Abdulgader (n 21) 104.

<sup>71</sup> Al-Harhi (n 16) 15.

<sup>72</sup> Muhammed El-Awa, 'Approaches to Sharia: A response to N.J Coulson's A history of Islamic law' (1991) 2 Journal of Islamic Studies 159.

<sup>73</sup> Abdulgader (n 21) 216-220.

### 8.3 *Ta'zir* crimes

In Arabic, the term '*Ta'zir*' means punishment, and is the last category of the main crimes in the context of Islamic criminal law. This is the field in which the *Qadis* judges widely exercise interpretation in Islamic jurisprudence; therefore, this is based on judgment. *Ta'zir* may be distinguished from *Hudud* and *Qisas* crimes, as the *Ta'zir* has not yet undergone codification in the Quran and the *Sunnah*—despite there being various interpretations to be found in the era of the fourth '*Qulafa*' following the Prophet's death. Notably, the *Qadi* has great latitude in the imposing of punishment. For instance, lashing and monetary fines, as well as the prison sentences, depend on the *Qadis Ijtihad*. In this *Ijtihad*, *Qadi* should be taken from the *Fiqh* interpretation in the Islamic norms, as has been mentioned previously in terms of the role of *Ijtihad*. Notably, the punishment for *Ta'zir* may extend to capital punishment if the crime is proven fully, such as highway robbery, which can be defined as a *Ta'zir* crime—the penalty for which is capital punishment.<sup>74</sup>

One example of *Ta'zir* crimes can be seen in cases brought against defendants. For instance, one case was a wife who claimed that her husband had beaten her on a number of occasions and in many different places on her body, as well as insulting her. The husband claimed that she was immoral and had no responsibility towards the status of marriage. However, the *Qadi*, in this specific case, was required to consult with professionals in order to evaluate any injuries to the victim's body. Subsequently, following a trial, the *Qadi* reached the decision whereby the defendant was ruled as having no right to beat his wife. In addition, the *Qadi* sentenced him to a fine of 9,000 Saudi Riyal (£1,500), as well as a punishment of 30 lashes.<sup>76</sup> In this case, the *Qadi* was able to utilize the power to impose lashes as he was able to use an alternative punishment. In this specific matter, *Ta'zir* punishment works effectively owing to the fact that some *Qadis* prefer to use lashes, such as in the previous case, or use another punishment.

Another case involved someone arrested for drug use, the sentence for which was three years in prison and a fine of 3,000 Riyal (£600).<sup>77</sup> In this situation, the *Qadi* referred to article 40 of the 'Drugs Law', which was previously introduced within the

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<sup>74</sup> Ibn Taymiya, *Al-Syasa al-Shar'iya* (ed Al-afaq al jadidah 1983) 169.

<sup>76</sup> Case books of Saudi judgments (2nd edn, King Fahad Library, Riyadh 2007) 112 16/2117 2002 (1422).

<sup>77</sup> *ibid*, case T/16/250 2006, (1427).

Saudi Arabian legal system.<sup>78</sup>

#### **8.4 How does the punishment reflect on the rights of the accused?**

According to Islamic law, there are five guarantees of Islam: the practice of religion, the development of the mind, the right to procreation, the right to personal security, and the right to possess property and wealth.<sup>79</sup> These rights are the most fundamental rights protected in Islam and therefore formulate its main objective. The reflection of punishment of the rights of the accused can be discussed from two main perspectives:

1- Pre-trial rights: It is highly prohibited in Islam to use any methods of torture during the arrest or interrogation to obtain a confession from the accused. More importantly, the accused has the right to refuse to answer any question during the interrogation process, and such silence will never be used against him during the trial. Furthermore, an example shows that the interrogation methods might go further to protect the accused even at the time of confession. Prophet Mohammed, for instance, when Maiz confessed to adultery, asked him some questions that might encourage Maiz to retract from his confession.

2- In-trial rights: One of the important elements of fair trial protection is the courts' structure and the rule of judges during the court hearing. As we will see in the following chapters, there are many requirements for the judges to be able to conduct the trial—for instance, the qualification of judges and the rule of evidence during the court hearing. Moreover, during the application for punishment, the judges may consider the rights of the accused; for instance, there is a concept in Islam called '*Al Doroof al mokafifa*' which means that any circumstances may affect the ruling of the judges and therefore may reduce the term of imprisonment or the quality of punishment.<sup>80</sup>

### **8. Conclusion**

This chapter set out to review the sources of *Shariah* law, which is applied across Saudi Arabian legal system. It can be seen from the above description and analysis that the *Ijtihad* methodology plays a pivotal role in crimes and punishment, specifically in

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<sup>78</sup> Royal decree number M/39, See the English version of the law on <<http://boe.gov.sa/ViewSystemDetails.aspx?lang=ar&SystemID=31&languageid=2>> accessed 06.02 2013.

<sup>79</sup> Lippman, (n 55) 49.

<sup>80</sup> Muhammed Abdel Haleem, Adel Omar Sherif and Kate Daniels (eds) in *Criminal Justice in Islam: Judicial Procedure in the Sharia* (Taurus 2003) 45.

regard to *Ta'zir* crimes, through influencing judges' decisions, and thus the commutation of sentence. *Ijtihad*, as a liberal methodology, is one of the most important elements in regard to the new jurisprudence of Islamic *Shariah*, and has to be exercised independently. Considering that one of the main sources of *Shariah* in Saudi is the Ibn Hanbal school of thought—which allows the lawmaker to take from other sources by exercising the *Ijtihad* methodology—there is nevertheless the limitation of *Ijtihad*, which is restricted by various conditions, one of which is related to the knowledge of the jurist and his ability to approach a new theory. *Ijtihad* can use methods of interpretation, although the latter are restricted in certain conditions.

The next chapter focuses specifically on the pre-trial process, the pre-trial procedure, which has been defined in the LCP as focusing on crimes, and the way in which criminal investigations can be carried out while respecting human rights.

## **CHAPTER FOUR: THE DOMESTIC APPLICATION OF PRE-TRIAL RIGHTS IN SAUDI ARABIA**

### **1. Introduction**

On an international scale, the pre-trial concept may refer to the group of rights related to the accused before he is brought before a court, and it includes the prevention of arbitrary detention before the court hearing.<sup>1</sup> Moreover, the interrogation methods, as well as the right to challenge illegal detention, are one of the significant procedures that have to be in line with the minimum guarantees set in the international human rights standards.<sup>2</sup>

This chapter seeks to analyze the pre-trial process in the context of the legal system adopted within Saudi Arabia, and also seeks to carry out a comparative legal analysis with international human rights standards. In regard to approaching this comparative research, the concept of the pre-trial process under regional treaties—namely the Arab Charter on Human Rights—and international law will be emphasized throughout the beginning of this chapter. Moreover, the core of this chapter analyzes the two main approaches inherent within the criminal process, ie arrest and interrogation, both of which impact significantly upon personal liberty. Accordingly, it may be appropriate to analyze the safeguards associated with both matters within Saudi's criminal process. For example, attention should be directed towards various elements, including detention time, the right to legal assistance, and the right not to be tortured. Furthermore, there will also be the examination of another two aspects—the privilege of self-incrimination and the right to remain silent—in the context of the Saudi Law of Criminal Procedure (LCP). A number of domestic and international cases will be examined in order to analyze compatibility.

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<sup>1</sup> See ICCPR, article 9, also HRC, general Comments N; 8, Right to liberty and security of person; 10.06.1982. Note 4.

<sup>2</sup> See CAT, General comments N; 2, Implementation of article 2 by state parties, CAT/C/GC/2 24 January 2008.

## 2. Pre-trial under international human rights law

Pre-trial rights have been safeguarded through both regional and international instruments: for example, article 9 of the Universal Declaration of Human Rights (UDHR) provides that ‘nobody shall be subjected to arbitrary arrest, detention or exile’, and further highlights the entitlement of all individuals to full equality in respect of a public and fair hearing, carried out by an impartial and independent tribunal, in regard to the rights and obligations of the individual and the charges being made against him/her as an individual. Importantly, countries are forced to adhere to the moral obligations enforced through a declaration, and thus there is the need to ensure the protection of such rights.<sup>3</sup> Moreover, the European Convention on Human Rights (ECHR) demands the pre-trial right to liberty and security under article 5.<sup>4</sup>

However, the notable improvements in regard to individual rights protection—particularly within the criminal process domain—have been seen in the International Covenant on Civil and Political Rights (ICCPR),<sup>5</sup> which highlights through various articles (7, 9, 10) the number of rights afforded to an individual during the period of arrest and detention, in addition to those rights afforded during the trial process. Moreover, there are a number of cases related to the rights of an individual during the in-trial stage, which have previously undergone examination and observation. Nevertheless, there are a number of regional and international treaties associated with human rights within the criminal process, with the addition of a number of additional safeguards highlighted by the ICCPR due to the fact that it is an international treaty and thus encompasses various rights centred on ensuring protection during the criminal process. More importantly, due to the Human Rights Committee (HRC), it is regarded as being a compulsory treaty, with the ICCPR founded in order to establish a mechanism for the adoption and monitoring of the application of state parties in relation to this Covenant.<sup>6</sup>

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<sup>3</sup> See, for instance, art 17(1-7) which established the Committee against Torture UN Doc A/39/51 (1984).

<sup>4</sup> ECHR, art 5(1-5).

<sup>5</sup> Richard Stone, *Civil Liberties and Human Rights* (8th edn OUP 2010) 79.

<sup>6</sup> UN Doc A/6316 (1966). See, for instance, the HRC’s interpretation of the Covenant jurisdiction in the case of *Massiotti and Baristussio v Uruguay* UN (1985) Doc CCPR/C/OP/1136.

## 2.1 The ICCPR and its stance on pre-trial rights

It might be noted that the ICCPR has the most significant rights in terms of the pre-trial stage as we shall see in Article 14. Nevertheless, in this Covenant, the right to a fair trial has been specifically highlighted in article 14, which makes reference to a group of rights to be afforded to an individual during the pre-trial process, which guarantee the accused “to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him, in addition to being tried without undue delay article 14(3)”. Such rights may have been breached throughout this stage of the criminal process in any judicial system; nevertheless, in regard to the application of a mechanism for adoption, it is stated in article 2(1) of the ICCPR that:

Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present covenant, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

The concern which becomes apparent is the fact that there is no responsibility amongst state parties to incorporate the Covenant within domestic law; nevertheless, article 50 of the Covenant highlights that those aspects considered in the Covenant will encompass all parts of federal states, without restrictions or exclusions. This may be comprehended as full jurisdiction in regard to the power enjoyed by state parties, which may also provide a rationale for why some countries, including Saudi Arabia, have refused to ratify the Covenant, being mindful of the objective to protect its domestic jurisdiction from being bound by this Covenant. In addition, the differences apparent in the main values and philosophies between various articles highlighted in the Covenant and those contained within *Shariah* law are seen to present a number of difficulties in terms of the capacity of the Saudi authorities to sanction the Covenant. This can be seen when considering the text in the elective protocol centred on eradicating capital punishment, and such punishment being legally integrated into *Shariah* law.

In an attempt to ensure the responsibilities of state parties, the HRC was established through the Covenant. The HRC comprises a number of independent experts involved in overseeing the adoption of the Covenant through reviewing state parties’ reports describing the way in which the rights detailed in the Covenant have been adopted. Such reports are examined, with a concluding observation made, which articulates any concerns in relation to the violation of human rights standards within the

Covenant. It is also binding upon each state party as a whole.<sup>7</sup>

In specific consideration to the legal system within Saudi Arabia—with specific regard to the LCP—Saudi authorities should not experience problems in terms of complying with the majority of the rights highlighted throughout the Covenant. For example, the rights of individuals prior to detention have been described and applied widely throughout Saudi criminal procedure, with the same applicable in regard to the right of the individual and the time required for the individual to remain detained prior to appearing in court. Furthermore, the explicit ban of any cruel punishment or torture is assured throughout the Saudi LCP (article 2), as will be considered later in this chapter.

## **2.2 The Convention against Torture (CAT) in the pre-trial process**

The Convention against Torture (CAT), which opened for signature in 1984 and entered into force in 1987, notably provided a full definition on world torture.<sup>8</sup> Importantly, the rights protected throughout this Convention are not much different from those detailed in the ICCPR in regard to the rights of an individual during the pre-trial phase. Nevertheless, the importance associated with this Convention is the fact that Saudi Arabia ratified it in 1997, and therefore it became part of its domestic law.<sup>9</sup> Explicitly, CAT encourage the states parties that they should ensure that, upon training, civil or military, law enforcement, medical, public officials and other personnel should be given education and information highlighting the strict prohibition of torture when dealing with custody, interrogation, or treating any individual during the process of arrest, detention or imprisonment.<sup>10</sup>

It seems that article 10 of the CAT is significant and strictly focuses on the pre-trial rights. It applies a system of rules within which the law enforcement officers should operate.<sup>11</sup>

Furthermore, and in regard to the rights of the accused not to be tortured during the process of interrogation, article 11 of the CAT highlights the following:

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<sup>7</sup> UN Doc A/6316 (1966) art 28; Javid Rehman, *International Human Rights Law* (2nd edn, Pearson 2010) 89. See also Sarah Joseph, Jenny Schulz and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (2nd edn, OUP 2005) 83.

<sup>8</sup> UN Doc A/39/51 (1984). See the controversy relating to the definition and the ambit of the torture in Rehman (n 7) 814.

<sup>9</sup> There are two reservations that Saudi Arabia made on the CAT in articles 30(1) and 20 <[http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-9&chapter=4&lang=en#EndDec](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&lang=en#EndDec)> accessed 28 March 2013.

<sup>10</sup> Art 10(1) CAT.

<sup>11</sup> Rhona Smith, *International Human Rights* (5th edn, OUP 2012) 244. Also see the Code of Conduct for Law Enforcement Officials, GA Res 34/169, annex, 34 UN GAOR Supp.



Each State Party shall keep under systematic review interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment in any territory under its jurisdiction, with a view to preventing any cases of torture.

In regard to the adoption of the CAT, much the same route needs to be applied in regard to the ICCPR through the implementation of the Committee Against Torture, where all of the state parties are required to devise and send reports to the Committee, on a regular basis, in order to demonstrate the way in which rights are being adopted. Furthermore, all of the states—including Saudi Arabia—must begin to send reports one year following the sanctioning of the agreement on the Convention, and then every four years thereafter. Each of the reports is to be examined by the Committee, ensuring concerns and recommendations to state parties are addressed and considered.<sup>12</sup>

It may be important to mention that the optional protocol of the CAT has clearly highlighted the role that the CAT can play in regard to the pre-trial process.<sup>13</sup> For instance, one of the significant measurements to evaluate the state obligation is the process of visiting experts. Article 4(1) draws the attention to the states parties to allow visiting state parties to evaluate and examine any Human rights abuse in detention.<sup>14</sup>

Nevertheless, in the context of Saudi domestic law, an individual's rights when accused are guaranteed during the criminal process, although there have been a number of reports concerning the violation of various articles in the LCP in regard to the pre-trial phase. Such issues will be explored later in this chapter.

### **2.3 Pre-trial rights in the Arab Charter on Human Rights (ACHR)**

The Arab Charter for Human Rights (ACHR) opened for signature in 2004 and entered into force in 2008. Importantly, it highlights a number of rights similar to those in article 2 of the ICCPR, in addition to the CAT, and is broken down into four individual categories: individual rights; the rules of justice and equality before the law; civil and

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<sup>12</sup> See the concluding observation on Saudi Arabia's first report: CAT/C/CR/28/5 12 June 2002; also see the Saudi Report CAT/C/42/Add.2 reports <<http://www2.ohchr.org/english/bodies/cat/cats28.htm>> accessed 02 February 2013.

<sup>13</sup> Optional protocol of CAT, GA Res A/RES/57/199, adopted 18 December 2002.

<sup>14</sup> It is worth mentioning here that the significance of the optional protocol is the establishment of the Sub-Committee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, see article 1(5) of the Optional protocol.

political rights and the freedom of movement; and cultural, economic and social rights, including the right to participate in cultural rights, the rights of women, and the right of development.<sup>15</sup>

As can be seen when reviewing a number of articles (such as 13, 15, 16, 17 and 19), the right to a fair trial is widely recognized and documented in the Charter. Article 16 makes reference to a number of safeguard protections for those who have been arrested. Throughout the Charter, the influence of various international treaties can also be seen, such as the CAT, the ECHR, the ICCPR and the UDHR. Throughout the pre-trial stage, the rights of the accused are outlined in article 16 following minimum guarantees, namely:

1. To be informed promptly and in detail, in a language which he understands, of the nature and cause of the charge against him.
2. To have adequate time and facilities for the preparation of his defence and to contact his relatives.
3. To be tried in his presence in front of a judge, and to defend himself or through legal assistance of his own choosing or with the assistance of his lawyer, with whom he can freely and confidentially communicate.
4. To have free legal assistance of a lawyer to defend himself if he does not have sufficient means to pay for his defence, and if the interests of justice so require. And to have the free assistance of an interpreter if he cannot understand or speak the language of the court.
5. To examine, or have examined, the witnesses against him, and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.
6. Not to be compelled to testify against himself or to confess to guilt.
7. If convicted of a crime, to have his conviction and sentence reviewed by a higher tribunal according to law.
8. To have the security of his person and his private life respected in all circumstances.<sup>16</sup>

Importantly, such rights ensure the accused is assigned full human rights protection throughout the period of arrest and interrogation, as well as throughout a court hearing.

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<sup>15</sup> Mervat Rishmawi, 'The Revised Arab Charter on Human Rights: A Step Forward?' (2005) 5(2) Human Rights Law Review 361.

<sup>16</sup> Rehman (n 7) 378.

Nevertheless, as well as the protection of human rights and safeguards within the Charter, there is also the application of an obligation to state parties to adopt the Charter's various clauses.<sup>17</sup> Regardless, it should be noted that, following its application, the Charter has not suggested any guide through which the clauses be implemented, such as the HRC and ICCPR. Lastly, and perhaps most pertinent, there lacks a mechanism for individual complaints; thus, the Charter may be considered somewhat restricted and unable to fulfil its maximum potential.

### **3. The Saudi Public Prosecution and the right to a fair trial**

This section aims to examine the role of the BIPP. The reason why the BIPP must be examined throughout the course of this chapter is due to the role it can play in terms of the accused's rights whether in the pre-trial or in the in-trial stages. In addition, such cases may need to be investigated independently, with all protection of human rights. Furthermore, the BIPP that was established in 1989 has many functions to perform as a result of the authorization granted by the Ministry of Interior. Essentially, this power does not mean that the Ministry has influence over the BIPP, or has the right to change the decisions made by it. This section will provide a brief overview relating to the BIPP's role, and will also examine its effectiveness in terms of prosecution and also the obstacles it faces in carrying out its tasks.

#### **3.1 History of the Saudi public prosecution**

The Saudi public prosecution has its root in the Islamic legal system; it was exercised widely during the era of Islamic *Caliph*. Markedly, there were three departments exercising public prosecution in Islamic norms, namely, the police, the grievance, and the religious police.<sup>18</sup> However, the establishment of the Bureau of Investigation and Public Prosecution (BIPP) within the Saudi judiciary domain has made it clear that all three departments have come to fall under its Law, which provides in article 5 that: 'The member of the commission enjoying the right of independence, they are not under any supervision except the orders of Sharia and the law applied in Saudi Arabia. No one has

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<sup>17</sup> ACHR, 12 International Human Rights Report 893 (2005), entered into force on 15 March 2008.

<sup>18</sup> Waleed Al-Oshan, 'The Independence of the Commission of Investigation and Public Prosecution in Saudi Arabia' (PhD thesis, Naif Arab University 2007) 44-59.

the right to interfere with the commission.’

Article three of the Bureau Law establishes a Commission that has jurisdiction as to the following:

- a. Investigation of crimes.
- b. The decision of investigation, whether to start or stop the criminal process.
- c. Prosecuting to the judicial instrument according to the law.
- d. Requesting appeal.
- e. Directing the implementation of sentences.
- f. Direction and research of prisons.
- g. Any duties transferred to it.

Moreover, the Ministry of Interior highlights a committee in the Law that contains the Vice President of the BIPP and five members. This committee has the authority to review the decisions of accusation of serious crimes, such as *Hudud* and *Qisas*, and also studies any matter relating to prosecution or investigation when requested by the Ministry of Interior. The committee also produces an annual report including its recommendations about the work in the BIPP, as well as about the cases that have been brought so far during the year. This report has to be submitted to the Minister of Interior, who then submits it to the King (article 4). This leads to the question of whether or not this committee has independence: for instance, it has the power to prosecute and submit its final decision to the Minister of Interior, with the Minister known to be at the second stage of this process. This is the difference between the BIPP and the Board of Grievances.

The relationship between the BIPP and the Ministry of Interior is a procedural one, meaning that the decisions made by the former has its power, and the following steps are a matter of procedure that needs to be followed in the Saudi legal system. However, it has been claimed that the BIPP has judicial power, whereas others believe it has executive power. For those who claim that it has judicial power, this opinion is based on the fact that the BIPP has all the aspects incorporated within judicial power: for instance, considering the investigation of crime and prosecution, as well as its role in the trial, and that all aspects are combined to form the BIPP’s judicial power. In addition, visiting prisons and conducting prisoner investigation provides clear evidence

of the role it can play in the context of the criminal process,<sup>19</sup> which in some contexts is regarded as a judicial power. On the other hand, there are claims that the BIPP is a branch of an executive power, and that all processes lead to less independence, and therefore must be approved by the Ministry of Interior in order to achieve legitimacy; however, it is perhaps important to understand the relationship between the BIPP and other departments within the criminal justice department, as this may provide greater understanding of the way in which the functions of the BIPP can be affected in terms of criminal procedure, as well as the interactive role these departments can play in terms of human rights.

### **3.2 The BIPP and the criminal justice departments**

This section will examine the relationship between the BIPP and four criminal justice departments within Saudi Arabia. These four departments have played a vital role in the context of Law of Criminal Process. The relationship and the authorities detailed throughout this section provide clear insight into the BIPP's role in the criminal process.

#### **3.2.1 BIPP and the police**

The police in Saudi Arabia have the power to perform two main stages of the criminal process—arrest and investigation—in addition to prosecuting. Up until 2001, the LCP had not been enacted. According to article 89 of the Public Security Code, the police have the power to arrest with or without warrant, and to perform investigations and early investigations. Importantly, however, the combination of two main functions, namely, arrest and investigation, are combined within one department, ie the police, which can be abused by the department itself. This is due to the accused having to be given the opportunity to deliver his/her defence. Furthermore, such a situation highlights the separation of powers.

#### **3.2.2 The BIPP and the provinces within the Kingdom**

According to the Saudi Provinces Law—established in 1992—the KSA has been divided into 13 counties, all of which are linked to the King by the Ministry of Interior.

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<sup>19</sup> Al-Oshan (n 18). See also the comments of the National Society for Human Rights (NSHR) on the BIPP in its 2008 report <<http://www.nshr.org.sa>> accessed 20 June 2012.

The head of province has its own duty to implement the judicial decisions, as well as to keep the region in a secure condition by implementing security policy. However, according to the Public Security Code 1982, the duty of investigating any crimes is assigned to each head of province within Saudi Arabia. The provinces, up until recently, have been afforded the power to investigate any crimes within its region. Furthermore, the head also has the power to carry out the gathering of evidences of serious crimes, such as *Hudud* and *Qisas*. With this noted, Al-Qahtani states:

No doubt that the role of the province has not really been effected even after the establishment of the CIP. The head of provinces has the power to receive the complaint and investigate it, in addition to questioning the suspects about the crimes they are believed to have committed.<sup>20</sup>

This opinion is inaccurate because of two main reasons. Firstly, although the head of provinces is one of the criminal operational positions set out in the LCP, there is a limitation on their obligations. For instance, they have only supervisory scope in regard to the BIPP members throughout the stage of investigating crimes. Secondly, a significant contradiction would arise during this stage of the criminal process if the members or the heads of province took on the duty to investigate crimes. Another factor playing a vital role in promoting this conflict is the vagueness in the province rules. Essentially, there is no clear law that defines the role of the members of provinces in terms of crime investigation.<sup>21</sup> From one perspective, this may sustain the conflict between the BIPP and the province; however, the LCP also provides in article 16 that the BIPP is the only institution with the responsibility of investigating crimes within Saudi. This article makes it clear that provinces have limitations in terms of their scope. Article 7 of the draft LCP also provides that:

Criminal officers oblige under the supervision of the Bureau of Investigation and Public Prosecution, and the latter has the right to ask about any abuse which occurred during the stage of investigation.

Notably, the criminal officers, as highlighted in the article above, are not the police

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<sup>20</sup> Fahad Al-Qahtani, 'The Specialisation of the Provinces Between Practice and Criminal Procedure Code in Saudi Arabia' (Master Dissertation, Naif Arab University 2007) 55.

<sup>21</sup> In the Law of Provinces there is no clear indication on the role that the head of province can play in terms of crimes. Royal Decree A/92, See the English version of the Law of province on the Bureau of Experts at the Council of Ministers. <<http://www.boe.gov.sa/ViewSystemDetails.aspx?lang=ar&SystemID=7&languageid=2>> accessed 12 March 2013.

officers who start and conduct the criminal process. They fall into the following categories:

- a. BIPP members.
- b. Presidents of county police stations.
- c. Heads of public security, or heads of intelligence agencies, and all the heads in the immigration service.
- d. Head of provinces.
- e. Captains of the Saudi ships where crimes took place within their jurisdiction.
- f. Head of the religious police under their specialization.<sup>22</sup>

It is important to highlight that the power provided in these categories, as well as the power given to criminal officers, only lasts during the event of the crime. It is the BIPP members who have the right to take the cases after the investigation stage. An issue arising here relates to the religious police and their authority as officers who have the power to arrest. The purpose of the religious police is the *al-amr bil maroof* and *nahi An monkar*, meaning advising people in a good manner and telling them without any prosecution if they have done something immoral. This job has to be carried out without the power of arrest, investigation and detention. As the religious police have power of custody, this authority can be abused by the head and members of the religious police within Saudi Arabia. There are many cases relating to such abuse by the religious police. However, the restriction of the power of the religious police has an effect on their authority, although the legitimacy of their power remains.

### **3.2.3 The BIPP and the judicial institutions**

Police within the Saudi law exerted considerable control over the public prosecution until the creation of the BIPP.<sup>23</sup> It has been argued that the police should never prosecute the alleged offender as the police themselves are required to exert the duty of maintaining order and investigating alleged crimes;<sup>24</sup> however, it may be constitutionally beneficial to combine both the investigation and prosecution departments into one institution, such as in the case of the BIPP. In England, however,

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<sup>22</sup> LCP, art 26.

<sup>23</sup> Fahad Al Qahtani, Bureau of Investigation and Public Prosecution and its Role in the Saudi Criminal Justice System (Naif Arab University 2000) 148.

<sup>24</sup> Andrew Ashworth and Mike Redmayne, *The criminal process* (4th edn, OUP 2010) 194.

there has been the establishment of the Crown Prosecution Service (CPS), which has the responsibility of prosecuting criminal cases investigated by police in England and Wales.<sup>25</sup> For example, the CPS may give the police advice on cases for possible prosecution, and may also review cases submitted by the police and determine any charge in relation to such cases. In addition, the CPS prepares cases and presents them to court. On the contrary, the BIPP, in addition to its function to investigate crimes, has the same power during the trial, with article 60 of the draft regulation providing that the public prosecutor has a responsibility to:

- prosecute the case against the defendant in a judicial institution and in the trial, as well as provide the court with the evidence of the defendant's guilt.
- request the court to pass sentence on the defendant.
- leave the final decision to the court if any evidence of the defendant's innocence comes to light during the trial, and if he has any sufficient evidences that the defendant is innocent he is not obliged to provide the court with this information.

In addition, the public prosecutor's movement is restricted within Saudi, as per article 174 of the LCP. In addition, the claim of fraud is one of the main rights the public prosecutor can apply during the trial (article 175); this, however, has to be done with effective evidence provided from both the prosecution and the defendant, and under the supervision of the court.

### **3.2.4 The BIPP and the Prison Department**

The relationship between the BIPP and the Prison Department within Saudi can be found in article 3 of the BIPP code that stipulates "Monitoring and inspection of prisons, detention centers and any places where criminal sentences are executed, as well as hearing complaints of prisoners and detainees". The jurisdiction covers the visiting of prisons, and investigating abuse in prisons, listening to prisoners and writing reports to the Ministry of Interior; importantly, this is another procedure that the BIPP has the authority to carry out. Notably, there are two institutions involved in visiting prisons, one of which is the Human Rights Commission, which is a governmental organization set out in its law article 5(6):

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<sup>25</sup> See more about its establishment: <<http://www.cps.gov.uk/about/>> accessed 5April 2013.



The commission has the authority to visit the prisons at any time and without permission from anyone, and write a report to the King about the condition in a certain prison.

This can be seen as integration between these two institutions, with such integration not in breach of the independence of authorities encompassed by both institutions. Furthermore, it gives prisoners the human rights protection they need by allowing two institutions to get involved in surveying prisons and writing reports.

The only difference between the BIPP and the HRC rests in the fact that the latter submits its report direct to the President of the Ministries, which is, in this case, the King, whereas the former has to submit the report to the Ministry of Interior which then hands it to the King. The significance of these combinations of institution is to allow the voice of a prisoner to be heard, which avoids delays in the procedural handling of prisoners' complaints, which may take a few months to be heard. Furthermore, in the absence of such system, the complaints procedure could be blocked by the governor of the prison, thus affecting prisoners' rights. The role that the HRC can play in prisons is, to some degree, similar to the role of the Independent Monitoring Board (IMB).<sup>26</sup> Essentially, the only difference is that the IMB has no authority in regard to the prison's governor as it is not a governmental organization like the HRC.

Nevertheless, article 3 of the BIPP law mentions clearly that the searching of prisons is one of the main functions the BIPP is eligible to perform investigating crimes and taking action with respect to an investigation through filing a case or taking no action in accordance with relevant regulations. They also have the right to prosecute before judicial bodies in accordance with the implementing regulations and appealing of judgments. Most importantly, monitoring and inspection of prisons, detention centres and any places where criminal sentences are executed, as well as hearing complaints of prisoners and detainees, ensure the legality of their imprisonment or detention and the legality of their remaining in prison or the detention centres after the expiry of the period.

Notably, the supervision surrounding the adoption of sentences is one of the functions of the BIPP. In Saudi Arabia, for example, the death penalty is in use, and thus it must be exercised with the attendance of members of the BIPP so as to ensure that it is carried out in a sensitive and suitable manner.

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<sup>26</sup> See more: <[www.imb.gov.uk/about/about-us.htm](http://www.imb.gov.uk/about/about-us.htm)> accessed 17 March 2013.

It seems that, during the past two decades, the public prosecutor has played a notable role in investigation and public prosecution within the Saudi judicial system; this is due to the multifunction and enforcement associated with the public prosecution together with its relationship with a variety of administrations and authorities, its performance of an explicit role, and the significance that it plays within the criminal process.

However, there remains a contradiction between the role of the police and the BIPP in terms of investigating crimes. In addition, there are key differences between the districts' authorities and the BIPP, which are known to be well documented; this is due to the conflict between the Bureau Law and the regular legislation written by the district administration itself.

#### **4. The Saudi legal system and pre-trial rights**

So far, it can be seen that the Saudi Basic Law of Governance (BLG) provides various guarantees and safeguards in relation to human rights according to the *Shariah*; thus, there should be compatibility between these and any laws introduced subsequently. At this point, the LCP is known to comprise a number of human rights safeguards, and positively considers civil liberties throughout the various phases of arrest and interrogation, as well as during the court hearing. Notably, the LCP has been divided into nine respective sections, as detailed below:

1. General provisions
2. Criminal action
3. Procedure relating to evidence
4. Investigation procedure
5. Courts
6. Trial proceedings
7. Ways to object to judgment appeals and reconsiderations
8. The force of final judgment
9. Enforceable judgment.<sup>27</sup>

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<sup>27</sup> Baderin, 'A Comparative Analysis of The Right to A fair Trial And Due Process Under International Human Rights Law and Saudi Arabian Domestic Law' (2007) 10(3) International Journal of Human Rights 241.

The initial four of the nine sections provide a model of the rights to be assured during both arrest and interrogation, in addition to during the period of the seizure and search for crime-related artefacts.

In the same context, the ACHR contains a similar provision in relation to the rights of the accused during the pre-trial stage. Such rights have been included in articles 14, 15 and 16, as detailed below:

1. The right not to be arrested without warrant (article 14).
2. The right, if arrested, to be informed at the time of arrest in a language he understands of the reason for his arrest, and to be promptly informed of any charges against him. Anyone who is arrested has a right to contact his relatives (article 14.3).
3. The right to be subjected to a medical examination (article 14.4).
4. The right to be brought promptly before a judge or other officers authorized by the law and to be entitled to trial within a reasonable time (article 14.5).
5. The right to compensation (article 14.7).
6. The right to be presumed innocent until proven guilty (article 16).
7. The right to have adequate time to gather the evidence, and to have a legal assistance (article 16.2).
8. The right not to be compelled to testify against himself (article 16.6).
9. The right of a child who has been accused of a crime to be treated by a special legal regime for minors during the length of the hearing, the trial and the enforcement of sentence (article 17).

It is recognized that the above-mentioned rights may be described as pre-trial rights that are ensured upon the commission of a crime. Moreover, such rights are widely acknowledged in Islamic *Shariah* law, with each state party in the Charter having the responsibility to adopt all of aspects thereof—even those that do not codify *Shariah* law.

It can therefore be concluded that the main criminal process highlighted above may be regarded under the concept of the rights to liberty, and before such rights can be analyzed in detail, there is the need to consider the concept of liberty within Saudi Arabia, in addition to its roots in Islam.

## 4.1 The right to liberty

The term 'liberty' is not mentioned in either the Quran or the Prophet's tradition. Nevertheless, some of the Quran's verses can be described as providing a foundation for this right. For example, it is stated: 'The truth is from your lord, then whosoever wills, let him believe, and whosoever wills, let him disbelieve'.<sup>28</sup> Through this verse, Allah is giving people the option to choose between two paths: belief or disbelief. In the view of various academics, this is a type of free will to be guaranteed to those who opt for their own way.<sup>29</sup>

As a concept, liberty has only been introduced within Saudi Arabia during recent decades;<sup>30</sup> nevertheless, it has been claimed that the concept of liberty was introduced due to the media and the internet, in addition to various civil rights organizations. However, liberty in this particular context refers to the right not to be put under arrest or to be searched in the absence of explicit legislation across all spheres, particularly within the Constitution. In specific regard to domestic law within the country, a person's right to security and liberty has been safeguarded through the KSA's BLG, in addition to the LCP. Nevertheless, although the word 'liberty' is not mentioned specifically, such rights can be understood in terms of the BLG, with article 26 highlighting that '[the] state shall protect human rights in accordance with the Sharia', as well as in article 36, which states that 'the State shall provide security for all citizens and residents on its territories ... no one may be confined, arrested or imprisoned without reference to the Law'. Moreover, individual liberty rights are assured in relation to the entering and searching of properties. For example, a number of rights have been set out in article 37, centred on the searching and seizing of property, with the article noting that the entering of property must adhere to the conditions and laws outlined.

Fundamentally, the right to privacy has also been guaranteed at a constitutional level, with direct reference to the prohibitions of entering any property without the permission of the property owner. Accordingly, in the context of Saudi law, it is not permitted that a property be entered, searched or seized without a formal order from the appropriate authority, which is determined at a constitutional level, as highlighted previously.

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<sup>28</sup> Quran Verses 18:29.

<sup>29</sup> Al-Baqi, Quran interpretation, Verses 18:29.

<sup>30</sup> Some claim that the concept of liberty was developed in Saudi Arabia by a Western journalist who visited Saudi Arabia. See the Lecture of Prof Alqathami, *Al-Liberaliah al Maushomah* (The marked liberty) (Riyadh Newspaper, 15186 21/01/2010).

In a practical sense, individual liberty safeguards may be seen in a number of the LCP articles. For example, article 2 states:

No person shall be arrested, searched, detained, or imprisoned except in cases provided by law. Detention or imprisonment shall be carried out only in the places designated for such purposes and shall be for the period prescribed by the competent authority. An arrested person shall not be subjected to any bodily or moral harm. Similarly, he shall not be subjected to any torture or degrading treatment.

Furthermore, an accused individual should have his/her rights protected under the LCP, article 14, which encompasses the right to seek legal aid or a legal representative for a defendant during investigation and trial. This particular right will be analyzed throughout this chapter, with much overlap between this and the right of the accused to be provided with the necessities to prepare his defence.

#### **4.2 The initiation of the criminal proceedings**

As stated by the LCP, the commencement of criminal proceedings can be assigned to one of two categories: the preliminary investigation and the secondary investigation. In regard to the former, the process comprises stop, questioning and arrest, in addition to the search of the individual and/or his/her possessions. The secondary investigation comprises the interrogation process, where the accused is brought into custody and waits for the interrogation to be started.

Moreover, the detention time may also prove to be an issue, and has strong links with human rights throughout the entire process. In relation to the detention time, this is the period during which the individual will face investigation. In both the preliminary and the secondary processes, there are a number of rights that need to be assured, including the right not to suffer cruel treatment with the aim of securing a confession, and the right to be afforded the necessities to prepare a defence.

Importantly, law enforcement officers should adhere to the LCP; non-compliance may ultimately result in civil or criminal proceedings.<sup>31</sup> Such rights are significant and fundamental by reason of the fact that, during the subsequent court hearing stage, a wealth of evidence may be presented and be challenged. Accordingly, any evidence of abuse or error ultimately affecting the accused could result in a

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<sup>31</sup> LCP, art 25.

miscarriage of justice. Such rights are considered in further detail below, with concentration on various cases in order to establish a comprehensive overview.

### **4.3 Preliminary investigation**

Article 24 of the LCP provides law enforcement officials with the right to initiate the criminal process under condition that they exercise their authority under the supervision of the BIPP. More specifically, the law defines who in power is able to initiate the criminal process. Article 26 provides a clear view centred on what is meant by the term ‘law enforcement officer’:

1. A member of the Bureau of Investigation and Public Prosecution in the appropriate jurisdiction.
2. Directors of police and their assistants in the various provinces, counties and districts.
3. Border guard officers, civil defence and prison directors and officers, intelligence officers, military officers, national guard officers, passport officers, public security officers, secret service officers and special security force officers—all of whom must be in agreement with their outlined roles with regard to crime carried out in their relevant jurisdiction.
4. Chief of District and Head of Counties.
5. Captains of aircraft and ships in Saudi Arabia in respect of crimes carried out while on such vessels.
6. In regard to any matters falling within their jurisdiction, Heads of Centres of Bureau for the Promotion of Virtue and Prevention of Vice.
7. Staff and others who have been afforded the power of criminal investigation in accordance with special regulations.
8. Any commissions, entities and others who has been appointed by government with the power to carry out investigations relating to regulations.<sup>32</sup>

Initially, the law enforcement officers are under the supervision of the BIPP and, in order to be so, they are under a duty to accept notification and any compliance relating to a crime within their jurisdiction. Additionally, they are also obliged to carry out an investigation and to accordingly gather relevant information, which subsequently needs

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<sup>32</sup> LCP, art 26. Also see Yasir Kilzi, *Human rights in the face of the authority of law enforcement officers* (Naif Arab University for Security Sciences 2007) 53.

to be signed. Importantly, the LCP provides that, within their jurisdiction, law enforcement officers must accept complaints and notifications in regard to crimes, and accordingly carry out investigations and gather all pertinent data in the form of records to be signed. These should be summarized and dated and filed in a special register, with the BIPP promptly notified. Subsequently, the crime scene should be attended by criminal investigation officers, who are charged with ensuring the crime scene maintains its integrity, with anything deemed relevant to the crime seized in order to ensure the preservation of evidence. Any actions considered necessary should be taken. Such matters must also be documented and filed in the special register.<sup>33</sup>

The subsequent procedure is centred on sending the relevant documents to the BIPP to start the investigation process. It is clear that the law enforcement officers are afforded the right to arrest, gather evidence, and initiate criminal actions under specific conditions; however, the function of the BIPP will not be analyzed in detail in this research, as its role has already been examined in relation to other institutions.<sup>34</sup>

In the following discussion, four stages inherent with the initiation of the criminal procedure are considered: 1) arrest, 2) seizing property or tracing the suspect's possessions, 3) the right to have a legal representative, and 4) detention. Each of these will be discussed in regard to the LCP. The reason why the right to have a legal representative is mentioned is due to the fact that this right features in more than one procedure in the criminal process. It is also covered in the in-trial stage as one of the fundamental rights related to the accused during the court hearing.

#### ***4.3.1 Stage one: Arrest***

Arrest is recognized as being one of the most fundamental aspects inherent within the pre-trial stage owing to its capacity to control people's liberty and inform them that they are no longer free. In this specific action—both internationally and domestically—a number of international treaties have taken this procedure into account and accordingly emphasized its value.<sup>35</sup>

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<sup>33</sup> LCP, art 27.

<sup>34</sup> See, The BIPP and the criminal justice departments Page 82.

<sup>35</sup> See ICCPR, art 9(1); also see the HRC, *Van Alphen v The Netherlands* 305/88 UN Doc CCPR/C/39/D/305/1988 (1990).

It is essential to note that, within the Saudi legal system, there is no clear distinction between stop and arrest. This is due to the fact that the distinction leads to the question of ‘reasonable suspicion’, which, unfortunately, has not been enshrined within the LCP. Nevertheless, it can be seen that the LCP gives power to the BIPP to take into account any infringements, breaches or oversights by any police officers, and also has the power to take action against an officer without prejudice to bringing a criminal action against that officer if appropriate. Looking at article 25 of LCP, it can be seen that reasonable suspicion has not been mentioned, as well as the right to receive a compensation if there is any misuse of authority.<sup>36</sup> This may, to some degree, work as a bias, with the subsequent amendment of the LCP needing to take this concept into consideration.

However, under the LCP, in the case of *flagrante delicto*, criminal enforcement officers have the power to arrest the suspect where there is sufficient evidence to accuse him (article 33). Moreover, a record of the arrest should be made, with the BIPP informed without delay. Article 35 of the LCP states the following:

In the case other than *flagrante delicto*, no person shall be arrested or detained except on the basis of order from the competent authority, any such person shall be treated decently and shall not be subjected to any bodily or immorally. He shall also be advised of the reason of his detention and shall be entitled to communicate with any person of his choice to inform him of his arrest.

Importantly, when considering article 9(2) of the ICCPR, some degree of compatibility can be seen. Nevertheless, it is recognized that an individual should be informed, at the time at which he is arrested, of the reason behind such actions. It is imperative that this is done immediately prior to the individual being detained.<sup>37</sup> Overall, as a general rule of thumb, the individual should not be detained for more than 25 hours, although exceptions may apply when the investigator provides the written order necessary, describing exactly why an individual should be detained for a longer period of time.<sup>38</sup>

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<sup>36</sup> LCP, art 25 stipulates: ‘Criminal investigation officers shall, in conducting their duties as provided for in this Law, be subject to the supervision of the Bureau of Investigation and Prosecution. This Bureau may ask the competent authority to consider any violation or omission by any such officer and may request that disciplinary action be taken against him, without prejudice to the right to initiate criminal prosecution’.

<sup>37</sup> Notably, art 116 does not clarify when exactly the person should be informed of the reason of his arrest; instead it uses the word ‘promptly’, which may be during the arrest or afterwards in custody.

<sup>38</sup> The time of remaining in custody is explained in LCP, s 8, arts 112-119.



The arrest procedure may be studied from two aspects: arrest without warrant, and arrest with warrant.

#### *4.3.1.1 Arrest without warrant*

It is considered that arrest without warrant should be exercised in the case of flagrante delicto and, according to article 30 of the LCP, any offence can be regarded as 'flagrante delicto' under these circumstances:

- A- When the crime is in the process of being committed, or directly following.
- B- If the victim is seen to be pursuing an individual subsequent to the crime's commissioning.
- C- If a person is found a short time after commission in possession of tools, weapons, property, equipment, or other things indicative that he is the perpetrator or an accomplice, or if there are found on his person at the time some indications or signs.<sup>39</sup>

#### *4.3.1.2 Arrest with warrant*

It is worth mentioning that arrest with warrant is the basis upon which all arrests should be carried out. According to the LCP, the first safeguard of arresting with warrant is to obtain the order of arrest from, the 'competent authority'. However, article 35 does not specify the competent authority and this may be problematic. Nevertheless, article 103 provides the investigator with the power to issue a warrant for a person to appear if there is necessity. In the same context, article 107 states that:

... if the accused fails to appear without an acceptable cause after having been duly summoned, or if it is feared that he may flee, or if he is caught 'flagrante delicto', the investigator may issue a warrant for his arrest and appearance even if the incident is of such kind for which the accused should not be detained.

With this noted, it can be stated that the competent authority, as detailed in article 35, is recognized as the BIPP.

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<sup>39</sup> Also see the power of the law enforcement officer in the case of flagrante delicto to take the testimony of people at the crime scene as well as to ask anyone not to leave, and if a person fails to obey, the law enforcement officer shall write in his report about this matter (art 32).

In reality, the majority of arrests are carried out without a warrant—whether on reasonable grounds of arrest or not.<sup>40</sup> Unlawful arrest can be seen in some cases that have been brought to international organizations, such as that of Mr Al-Utaibi, one of the human rights candidates demonstrating in Saudi Arabia in 2009 who was arbitrarily arrested and detained for more than three years without any legal procedure and in violation of article 35 of LCP.<sup>41</sup>

Other cases illustrate the abuse of arrest, such as the case of Mr Al Karoui and Mr Matari when they visited Saudi Arabia with a business visa having made the decision to start their business in Riyadh, the capital city of Saudi Arabia. During their stay, they were arrested by the Saudi Interior Ministry of Intelligence without the presentation of an arrest warrant. Moreover, they were never notified of any charge against them and, after interrogation, were informed that they were suspected of terrorist activities.<sup>42</sup>

In some instances, the issue arising in unlawful arrest comes from two particular sources: first, as a result of a lack of knowledge on the part of the law enforcement officer himself where, in certain situations, the police officer may arrest a person in the street without providing any notification of the circumstances under which the person should be arrested; and second, when an individual has no knowledge or has not been notified of his or her rights. The issue of educating law enforcement officers has been highlighted throughout the CAT, with such fundamental elements also stipulated in UDH 10.1 provides that:

... each State Party shall ensure that education and information regarding the prohibition against torture are fully included in the training of law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment.<sup>43</sup>

Importantly, it seems that violation of this LCP article remains problematic within the

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<sup>40</sup> See the cases conducted in such way that the arrest may occur without warrant: Abdulhamid Al-Hargan, 'The Saudi Pre-Trial Criminal Procedure and Human Rights: A Comparative and Evaluation Study' (PhD thesis, University of Kent 2006) 221.

<sup>41</sup> See UN, Working Group on Arbitrary Detention, *Utaibi v Saudi A/HRC/WGAD/2011/33* Human Rights Committee, Working Group on Arbitrary Detention.

<sup>42</sup> See the Opinion adopted by the Working Group on Arbitrary Detention 2011, complaint from Mr Cerif and Hicham. UN, A/HRC/WGAD/2011/45.

<sup>43</sup> UN Doc A/39/51 (1984), art 10(1).

KSA, and possibly further violates human rights when it comes to dealing with political crimes.

#### ***4.3.2 Stage two: Search and seize***

Article 12 of the UDHR creates a basis for this right to search and seize, in the same vein as article 17 of the ICCPR, and states: ‘No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home.’

In regard to the general HRC statement, it can be seen that the various safeguards in regard to home and personal searches, carried out by authorities, are limited firstly to gathering the required evidence, and thus should not be permitted to reach the point of harassment. Lastly, if an individual is being investigated by state officials, this should be done by someone of the same gender.<sup>44</sup>

In the context of the KSA, constitutionally, this particular right has been guaranteed through the article 37 of the BLG, which emphasizes that ‘residences shall be inviolable, and they may not be entered without the owner’s permission except in cases set forth in the law’. Moreover, article 40 of the BLG provides further clarification regarding the protection of all forms of communication without delay.<sup>45</sup> Nevertheless, in the context of the LCP, such a right has been assured under section 4, with article 40 providing:

The privacy of person, their dwellings, offices, and vehicle shall be protected; the privacy of a person protects his body, cloths, property and belongings. The privacy of a dwelling covers any fenced area or any other places enclosed within barriers or intended to be used as a dwelling.

Importantly, law enforcement officers may not gain entrance to or search any residence without an official warrant provided by the relevant authorities, stipulating the time and justification behind such actions; this should be deemed adequate in terms of providing the investigating officer with permission, despite the circumstances for entering and searching a residence, in the following circumstances:

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<sup>44</sup> See, for instance, the case of *Rojas Garcia v Colombia* (687/96) UN Doc CCPR/C/71/D/687/1996 (2001).

<sup>45</sup> BLG, arts 37 and 40. Full official English version <<http://boe.gov.sa/ViewSystemDetails.aspx?lang=en&SystemID=4>> accessed 22 February 2013.

- The individual has refused to permit any law enforcement offer to gain entry despite there being an authority-issued warrant.
- The residence may be entered without a warrant in the instance that help is needed from inside, such as in the case of demolition, fire or should there be a perpetrator inside.
- In an instance of ‘flagrante delicto’, a law enforcement officer has the right to carry out a search of a suspect, which includes the individual’s belongings, body and clothes. Should the individual be female, the law enforcement officer must also be female.<sup>46</sup>

Furthermore, the search—whether in normal circumstances or in the emergencies outlined above—must be carried out for anything related to the crime and for the purpose of a certain crime.<sup>47</sup> Furthermore, if law enforcement officers witness any illegal materials during the course of the search, such materials should be gathered with a report written on the situation. In regard to non-flagrante delicto, the search must be carried out with the attendance of the house owner or a representative of such, and must be written in a record detailing precisely what has been done.<sup>48</sup> It can be observed through this article that the individual whose house is being searched may have used a representative during the search; the term ‘representative’ may refer to a person, lawyer or any relative.<sup>49</sup>

The report should contain the law enforcement officer’s name and role, in addition to the date and time of each search, the written text of the search warrant, and/or the justification behind the urgency deeming necessary the search without warrant. Moreover, the names and signatures of those present during the search must also be attained. Furthermore—and in direct relation to ensuring human rights protection—an in-depth explanation of what is discovered must be provided, as well as a statement concerning any actions carried out during the course of the search, as well as those carried out in relation to seizures.<sup>50</sup> In addition, during the course of the entering and the search, if any sealed documents are found, the law enforcement officer should not open these; evidence must be taken by a qualified, professional and

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<sup>46</sup> LCP, arts 41 and 42.

<sup>47</sup> LCP, art 45.

<sup>48</sup> LCP, art 46.

<sup>49</sup> See the draft Regulatory Schedule of the LCP, art 46.

<sup>50</sup> LCP, art 47.

experienced investigator.<sup>51</sup> Finally, the LCP also provides that any search should be carried during the day, between the hours of sunrise and sunset; it is against the law to gain entry to residences after sunset, except in the case of flagrante delicto.<sup>52</sup>

Importantly, upon gaining entry to the residence to be searched, should nobody be present but the accused female, the search should be carried out by the law enforcement officer in the presence of a female by reason of cultural confidentiality, as well as in order to ensure adherence to the Islamic order of '*al kholwah*'.<sup>53</sup> With this in mind, article 53 states:

Subject to the provisions of articles 42 and 44, if there are some women in the dwelling, and if the entry of that dwelling is not for the purpose of arresting or searching these women, the law enforcement officer who in charge shall be accompanied by a woman, the women inside the dwelling shall be given time to put on their veils or leave the dwelling and shall be afforded all reasonable assistance that does not negatively affect search and its result.'

Another important element of the LCP is the seizure of mail and surveillance of conversation, as outlined in Section Five of the LCP. In the context of the KSA, there is no emergency or terrorism law, which in some countries gives law enforcement officers more power to exercise their duties, such as the emergency law in Egypt,<sup>54</sup> England,<sup>55</sup> or the United States of America.<sup>56</sup> However, such legislation could be in breach of fundamental rights, such as the right to privacy, which has been guaranteed in article 12 of the UDHR, as well as in article 17 of the ICCPR. Regionally, it has been clarified under article 14 of the ACHR, which states that all individuals have the right to security and liberty. In Saudi, this right has been guaranteed constitutionally in article 40, which stipulates that correspondence by telegraph and mail, telephone conversation, and other

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<sup>51</sup> LCP, art 48.

<sup>52</sup> LCP, art 51.

<sup>53</sup> LCP, art 52.

<sup>54</sup> The emergency law such as in Egypt. See art 3(1) of this Law. It was widely effective during the Egyptian uprising on 25 January 2011. For more information about how it has been used to justify the human rights abuse, see Alexandra Dunn, 'Unplugging a Nation: State Media Strategy During Egypt's January 25 Uprising' (Summer 2011) 35(2) *The Fletcher Forum of World Affairs*. Also, see Craig M Bradley, *Criminal Procedure: A Worldwide Study* (Carolina Academic Press 2007) 110.

<sup>55</sup> See art 41 on the terrorism act 2000; Peter Wallington, *Public law and human rights* (18th edn, OUP 2008-2009) 299.

<sup>56</sup> Under arrest and seizure of persons, the USA emergency law gives the power for law enforcement officers to seize and search, and gives the authorized law enforcement officer the right to eavesdrop and record a phone conversation without any minimum guarantee for personal privacy; Bradley (n 54) 522-523.

means of communication must be protected; they may not be seized, delayed, viewed, or listened to, except in those cases set forth in the law. Moreover, the LCP has provided assurance of this right in articles 55–61. No communication should not be recorded or listened to without lawful justification, save for the when the following three conditions are satisfied, in which case the LCP has authority to exercise phone-tapping and other means of eavesdropping:

1. The order has to be made by a report submitted to the direction of the BIPP.
2. The grounds for such an order have to be included in the report.
3. The duration of the validity of the report should not exceed a period of ten days renewable according to the requirements of the investigation.<sup>57</sup>

Following such order, all seized contents should be communicated to the addressee or accused, or copies should otherwise be given as soon as possible unless this is considered to have a detrimental impact on the overall investigation.<sup>58</sup>

The individual with the right to the seized items may ultimately claim possession of these items, subject to permission being granted by the investigator. Where such a request is rejected, the head of the department connected to the R may be petitioned.<sup>59</sup>

It seems that the LCP fails to show the exact process if the request has been refused. It would appear that the individual has no other institution, such as the Board of Grievances, to which he/she can apply for denying him possession. In the same context, article 84 prohibits the seizure any correspondence between the representative and the accused, or any document sent between the two.

To summarize, it can be seen that search and seizure has been assured in the context of the criminal process within the KSA, with such protection accentuated constitutionally. Thus, it can be concluded that any process that goes against what is set out in the articles will be viewed as in breach thereof, and thus any evidence presented in the court will then be deemed unacceptable and unfounded, as highlighted in the following chapter.

#### ***4.3.3 Stage three: The right to have a legal representative***

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<sup>57</sup> LCP, art 56.

<sup>58</sup> LCP, art 58.

<sup>59</sup> LCP, art 59.

The accused's right to have a legal representative/legal assistance is divided into two sections: firstly, during the stage of arrest and being in custody; and secondly, during the stage of the trial hearing. Notably, however, focus in this chapter is directed towards the legal representative in the pre-trial stage. On an international scale, a statutory framework provision can be seen in article 11 of the UDHR, which guarantees the right to have legal assistance, which is further clarified in the ICCPR as affording the accused with the right 'to defend himself in person or through legal assistance of his own choosing'.<sup>60</sup> Moreover, both the American Convention on Human Rights<sup>61</sup> and the ECHR have clarified these rights extensively.<sup>62</sup>

Nevertheless, the ICCPR imposes a greater degree of assurance in regard to the rights of the accused by encouraging state parties to apply for legal aid for those who are not in a position to afford legal representation. In some instances, such as when an individual is sentenced to death and seeks a constitutional review of irregularity in a criminal trial but does not have the financial capacity to acquire legal aid in order to establish a solution, the state is then shouldered with the obligation to provide legal assistance, as outlined in the ACHR, article 14.<sup>63</sup>

From a regional perspective, the ACHR (article 14) states that an individual accused should be recognized as innocent until found to be otherwise through the course of a lawful trial and, furthermore, during the process of trial and investigation the individual has the right to legal assistance. This right is acknowledged as comprising the right to request legal assistance following arrest as well as during time spent in custody, in addition to the right to communicate with a lawyer immediately as well as during the investigations. The ACHR goes further by providing the accused with medical treatment if required.<sup>64</sup>

From a domestic standpoint, there are two ways through which legal representation can be achieved: in the police station and during investigation. The latter is considered in greater depth later in this chapter.

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<sup>60</sup> ICCPR, art 14(3)(D).

<sup>61</sup> Article 8. No 36, 1144 UNTS 123 entered into force 18 July.

<sup>62</sup> Notably, the European Court of Human Rights distinguishes between legal assistance in pre-trial proceedings and during the court hearing. During pre-trial proceedings, limiting detainees' right to appoint their own counsel is justified when there is reasonable cause to believe, for instance, that they might alert persons suspected of involvement in the offence who have not yet been arrested. See the violation of article 6(3)(c) of ECHR, *Brennan v United Kingdom* 39846/98 [2001] when the investigator deferred the access to a lawyer.

<sup>63</sup> See HRC general comment, *Currie v Jamaica*, Communications No. 377/1989, para 13.4; No. 707/1996, *Taylor v Jamaica*, para 8.2; No. 704/1996, *Shaw v Jamaica*, para 7.6; No. 845/1998, *Kennedy v Trinidad and Tobago*, para 7.10; No. 752/1997, *Henry v Trinidad and Tobago*, para 7.6.

<sup>64</sup> ACHR, art 14(4).

The accused is afforded the right to seek legal assistance through the codified legislation of the LCP, which outlines in article 64 the rights enabling the accused to seek the legal advice of a lawyer for his defence, both during investigations and trial. The LCP further specifies that, ‘during the investigation the accused shall have the right to seek the assistance of a representative or attorney, and the investigator shall conduct an investigation in the commission of any major crimes as herein provided for’.<sup>65</sup> Nevertheless, this approach is only applicable to serious crimes, and thus does not provide a legal basis from which representation can be achieved for other crimes.

It can be seen through article 64 that seeking assistance can apply only in the investigation and trial stages, and thus cannot be exercised during the police enquiry stage; however, there are no specifications as to exactly when the stage of investigation begins, with some concluding that the end of the first 24 hours in the police station marks the start of the investigation process. Another significant conclusion—which was a six-month study case observation conducted by Al-Hargan—has shown that no significant number of lawyers have been present in criminal cases during the pre-trial stages.<sup>66</sup>

However, there may be various reasons for low numbers of or complete absence of lawyers representing the accused: firstly, this could be due to the fact that the accused himself/herself is not informed of this essential right during his/her arrest; and secondly—and perhaps more importantly—the law itself does not impose an obligation on the law enforcement officer to accept a lawyer into the police station, which, to some degree, can prove problematic.<sup>67</sup>

In the Saudi Code of Law Practice (2002), a clear indication is made to the ‘government agencies’ and it is understood that the police station is deemed one of those agencies. Article 19 of the Code stipulates:

The courts of law, the Board of Grievances, the committees referred to in Article 1 hereof, government agencies, and the investigation authorities shall facilitate the lawyer’s discharge of his assignment, and shall enable

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<sup>65</sup> LCP, art 64.

<sup>66</sup> Abdulhamid Al-Hargan, ‘The Saudi Pre-Trial Criminal Procedure and Human Rights’ (PhD thesis, University of Kent 2006) 255.

<sup>67</sup> Soliman Abdulla Alghozy, ‘The legal status of lawyer in Saudi law’ (PhD thesis, Naif Arab University 2008) 224.



him to attend any interrogation and peruse any relevant documents. His request shall not be denied except for a valid reason.<sup>68</sup>

A recent report of the National Society for Human Rights (NSHR)—which is a non-governmental organization—shows that there is deprivation of the rights to consult a lawyer for those who have been arrested for crimes relating to terrorism. Moreover, there is the violation of their right to have their procedures carried out without delay. It emphasizes that some terrorism suspects have been arrested only for having the intention of travelling to Iraq to fight.<sup>69</sup>

Accordingly, it can be stated here that:

- All individuals have the right to legal aid, as has been stated constitutionally within the KSA, with various references outlined in the LCP.
- There are various issues detailed in the LCP in regard to providing an individual with the right to legal assistance during the process of arrest.
- Realistically, a number of complaints have been made in regard to the individuals being deprived of their rights to attain legal assistance, particularly during the process of investigation.

#### ***4.3.4 Stage four: pre-trial Detention***

Detention is initiated following the arrest of an individual should there be an adequate basis for the law enforcement officers to detain. The rights to detain an individual are fundamental during this phase of the criminal procedure by reason of the fact that detainees are susceptible to false confession, ill-treatment, and torture.<sup>70</sup> Nevertheless, this right has been assured through article 9 of the UDHR, which states: ‘No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.’

In its general statement, the ICCPR (article 9) sets out the safeguards that have been provided to those under detention—such as the right not to be subjected to

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<sup>68</sup> See the English version of the law in the Bureau of Experts at the Council of Ministers <<http://boe.gov.sa/>> accessed 16 September 2012.

<sup>69</sup> National Society for Human Rights (NSHR), Second report on the Status of Human Rights in the Kingdom of Saudi Arabia 30. See the translated version of this report <<http://nshr.org.sa/english/aRightMenuCMS.aspx?mid=30>> accessed 5 October 2012. Also see the Opinions adopted by the Working Group on Arbitrary Detention at its sixtieth session, 2–6 May 2011 *Alsamhi v Saudi Arabia A/HRC/WGAD/2011/19*.

<sup>70</sup> Ralph Crawshaw and others, *Human rights and policing* (Kluwer Law International 1998) 161.

arbitrary detention (article 9(1)) and the rights of the individual to exercise judicial power, and to be tried in a reasonable period (article 9(3)).<sup>71</sup> Importantly, there are a number of rights to be afforded to the accused upon detention, which are clarified through the ECHR, for example.<sup>72</sup> Nevertheless, in article 9(3) of the ICCPR there is an apparent overlap with article 14(3C) of the ICCPR, both of which concern the period of detention. In order to ensure clarity in this regard, article 9 (3) makes reference to the time of detention prior to the investigation, while article 14(3C) may consider the total time, ie that ranging from the time of arrest through to trial.<sup>73</sup>

#### 4.3.4.1 Length of detention

The time for which the detainee remains in custody prior to charge varies from one country to another based on the legislation exercised: for example, in the case of England, the maximum time for a suspect to remain in custody is 96 hours (4 days).<sup>74</sup> On the other hand, under Saudi law, this right has been constitutionally guaranteed in the BLG, which sets a comprehensive framework for the protection of the rights of the detainee within Saudi law, which highlights the fact that ‘the states shall provide security to all its citizens as well as the residents, and a person’s action may not be restricted, nor may he be detained or imprisoned, except under the provision of the law’.<sup>75</sup> Moreover, and in specific regard to the conditions of detention, it is stated by the LCP that no individual should be detained except in locations designed for that purpose and approved by law. Furthermore, any prison or detention centre administration should not accept a person into its system without an order; this needs to be signed and must clearly stipulate the reason for imprisonment and the duration of such. Under article 36 of the LCP the accused is free if this order then expires. The LCP, in great depth,

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<sup>71</sup> *Dev Bahadur Maharjan v Nepal*, Communication No. CCPR/C/D/1863/2009.

<sup>72</sup> Art 14.5: ‘Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorised by law to exercise judicial power, and shall be entitled to trial within a reasonable time or to release.’

<sup>73</sup> *Fillastre Bizouarn v Bolivia*, Communication No. 336/1988, UN Doc CCPR/C/43/D/336/1988 (1991) 96. The Committee held that there to be a violation of arts 9(1), (2) and (3) of the ICCPR when the accused were held in custody for ten days without being informed of the charge against them as well as the delay in the case for three years before the court hearing.

<sup>74</sup> Under PACE 40-46, see more: ‘limits on period of detention without charge’ <<http://www.homeoffice.gov.uk/publications/police/operational-policing/pace-codes/>> Accessed 22. November.2012. However, after charge the maximum period is 112 days; See Madeleine Colvin, *Human Rights in the Investigation and Prosecution of Crime* (OUP 2009) 173.

<sup>75</sup> BLG, art 36.

guarantees this right under section 4.5, starting by giving the Ministry of the Interior after the recommendation of the BIPP to specify the major crimes requiring detention.<sup>76</sup>

Generally, the detainee, under any circumstances, shall not be detained for a period exceeding six months, and detention must be performed under certain conditions. Firstly, the law provides the investigator with the right to issue the detention order if he believes that there is sufficient evidence with which to charge the detainee, or if there is a fear of losing important data during the interrogation process by releasing the detainee. However, this order should not exceed the period of five days.<sup>77</sup> The periods during which the accused remains in detention is divided into three main categories, with every period having to be exercised by a different authority:

1. After five days, the detention should end unless the investigator sees that it should be extended for a further period. At the end of the fifth day, he has to submit the case to the direction of the BIPP branch in the relevant province, which has the authority to extend the detention for a particular duration or for consecutive durations which do not exceed forty days in total from the date of arrest.
2. If the case requires a longer period of detention, it shall be transferred to the head of the BIPP, who may issue a detention for one or more periods—none of which should exceed thirty days.
3. After six months' detention, the individual should be transferred directly to the competent court or otherwise be released.<sup>78</sup>

Furthermore, in article 120, the LCP provides the leading investigator with the right to issue an order for the accused to be released; this can be done at any time, either by himself or at the request of the accused. However, this can be done only if there is not adequate reason to justify the detention of the individual, as well as on the basis that the investigation would not be hampered by the release, and also that there is no fear of disappearance or flight. Such a process should be exercised under certain situations, provided that the accused makes an appearance when summoned to do so. However, the application of this article is restricted to less serious offences, with the majority of those

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<sup>76</sup> LCP, art 112.

<sup>77</sup> LCP, art 113.

<sup>78</sup> LCP, art 114.

accused of less serious offences being released following questioning by the investigator.<sup>79</sup>

A number of cases come to light in the CAT in relation to the period of detention, which was sanctioned by the KSA in 1998. For example, the CAT Committee states that prolonged periods of detention pre-trial increase the risk of violation of the Convention. Moreover, it is noted by the committee that there is concern in respect of the limited degree of judicial supervision surrounding pre-trial detention. In this regard, it is stated that there are:

... reports of incommunicado detention of detained persons, at times for extended periods, particularly during pre-trial investigations. The lack of access to external legal advice and medical assistance, as well as to family members, increases the likelihood that conduct violating the Convention will not be appropriately pursued and punished.<sup>80</sup>

In the same reports, the Committee has considered various issues relating to accused individuals who may have been deprived of their rights during the detention. Detainees, as held by the General Intelligence Service (Mabahith), cannot exercise their right to counsel or to a representative and be heard before a court, and are also denied communication with their families.<sup>81</sup> This may prove to be an issue within the KSA due to the obligation imposed on the country as part of the CAT, and thus having responsibility to explain such a case. In addition, the reformation in Saudi Arabia—particularly within the judicial sphere—may show that the country is more interactive in terms of international obligations. In the same context, a number of complaints have been made and submitted to the HRC and are under assessment by the Working Group of Arbitrary Detention. This stresses that various individuals remain in custody for periods exceeding the time prescribed in the LCP. Moreover, such individuals have been deprived of rights to contact the outside world.<sup>82</sup>

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<sup>79</sup> Al-Hargan (n 66) 228.

<sup>80</sup> Conclusions and recommendations of the Committee against Torture, Saudi Arabia, UN Doc CAT/C/CR/28/5 (2002). Also see the summary record of the Human Rights Committee Human Rights Council Sixteenth session Agenda item 3 UN Doc A/HRC/16/L.13 ‘Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development’ 10.

<sup>81</sup> See the List of issues prior to the submission of the second periodic report of Saudi Arabia (CAT/C/SAU/2).

<sup>82</sup> See the Opinions adopted by the Working Group on Arbitrary Detention at its sixty-third session, 30 April-4 May 2012 in the cases of *Al-Fouzan, Al-Twijri, Al-Brahim and Al Khamisi v Saudi Arabia* A/HRC/WGAD/2012/8.

#### 4.4 Issues of implementation

Another problem in relation to the time of detention brought before the NSHR, which has noted, through its report, that a number of detainees have been in detention for in excess of four years without being brought to court. Such a circumstance markedly violates the BLG in addition to the LCP. The reports of the NSHR contain some details that may describe the situation of prisoners:

[t]he Society has continued receiving complaints from citizens and expatriates concerning the arrest of their relatives by the investigative body for periods spanning up to four years without bringing them to justice. In response to its correspondence to inquire into the Ministry of Interior concerning the causes of arrest and non-litigation, the Society often receives belated replies, the essence of which is that the suspects have links with the devious faction; that they intend to go to Iraq; or that they would be brought to justice without specifying a date. Moreover, the Society has received complaints about suspects who have already spent their imprisonment sentence, and yet they have not been released.<sup>83</sup>

In addition, it has also become public knowledge that various detainees have been transferred from prisons located in the same area as their family to other areas, without justification, thus resulting in various problems for their families to establish contact. This goes against the legislations outlined and clarified by the LCP, and further highlights overall inefficiency due to the responsibilities and obligations of the BIPP in regard to the right of accused to be visited.

Importantly, since its establishment, the NSHR has received a number of criticisms in regard to detainees' rights being dishonoured and infringed, such as the individuals being detained for periods longer than those permitted, in addition to reports of verbal abuse and physical assault.<sup>84</sup> Such complaints are commonly received without the NSHR being permitted to visit and listen to the prisoner, particularly in circumstances where such individuals may have been detained for terrorism etc. Nevertheless, steps can be taken during the trial when the authority enables representatives of the suspect to enter court.

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<sup>83</sup> NSHR 2011, 'The eighth report of the National Society for Human Rights' 52 <<http://www.nshr.org.sa>> accessed 15 July 2012.

<sup>84</sup> *ibid* 55.

Another significant observation can be seen when considering the visiting of the NSHR to the place of custody, and enabling its representatives to meet the accused when their imprisonment has been extended beyond six months. The report shows the following:

- Many accused have spent more than one year without clarification about the nature of the allegation being made against them. The majority are held for political reasons and have been deprived of many basic rights, including consulting a legal representative.
- The deprivation of the right of the accused to contact a lawyer throughout the period of detention is known to be one of the main issues facing those who have been arrested and detained.
- There is deprivation of the rights of accused to contact the outside world by not allowing family to visit during the period of detention.<sup>85</sup>

#### **4.5 Concluding remarks**

Throughout the primary investigation, the following has been ascertained:

- There are significant gaps in relation to the law as it is and the practice in terms of the arrest methods implemented within the KSA. This may be due to the fact that there is no mechanism for the implementation of the LCP provisions. Furthermore, the lack of knowledge on the part of law enforcement officers is one of the main obstacles preventing the authorities from reaching their potential.
- The length of detention set out in articles 113, 114 and 115 has not been considered in many cases, as established in the above discussion; this may prove problematic and make it a challenge for the KSA to adhere to international human rights standards, particularly the conventions signed and sanctioned by it.
- No clear mention has been made of when the accused has the right to contact a lawyer following arrest—whether with or without warrant. As can be seen, the articles provide the investigator with the rights to ‘allow’ the accused to contact

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<sup>85</sup> An interview with NSHR Vice President AL-Fakhri 15 September 2012. Riyadh, Saudi Arabia. See the report of the National Society for Human Rights 2012, which refers to the poor performance of the government initiation, especially the one related to the Ministry of Interior <<http://nshr.org.sa>> accessed 2 December.2012.

a lawyer during the investigation process; nevertheless, the time during which the accused is at the police station may make the individual vulnerable. This allowance may ultimately affect the suspect's rights; this should come in the format of the suspect's rights instead of an allowance.

## **5. Secondary investigation**

The safeguards and protection of human rights throughout this process are vitally important due to the fact that, during this process, the accused remains in custody alone and without representation, except where a lawyer can gain permission to enter, discuss with and question the accused. The possibility of abusing this ultimately rests on a number of factors. Firstly, it depends on the safeguards provided in the legal system itself. Crawshaw states: 'some victims of torture have indicated that they were willing to say anything in order to bring the torture to an end'.<sup>86</sup> This abuse of human rights has to be dealt with in order to provide an independent willingness for the accused to say nothing but the truth; however, the meaning of such interrogation has to be clarified before the role of the authority in charge of exercising the interrogation in Saudi Arabia—which, in this case, is the BIPP—can be examined.

### **5.1 The meaning of interrogation**

The interrogation process is the most fundamental process in the criminal procedure, because the accused is vulnerable, and his rights may be abused. It has been claimed that the term 'interrogation' can be defined in terms of whether or not the suspect has been asked a question that intends to incriminate, or whether the police, through their questioning, create the functional equivalent of an interrogation. There are fundamental principles able to clarify the difference between questions and interrogation within the criminal process: for instance, asking the accused his name and address, even in the police station environment, may be defined as interrogation.

Al Marsafawi provides a clear meaning for the concept of interrogation within the criminal process: 'Interrogating the accused is a discussion with him about the evidences against him ... so he will have the opportunity to defence himself against any

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<sup>86</sup> Ralph Crawshaw and others, *Human Rights and Policing, Standards for Good Behaviour and a Strategy for Change* (Kluwer Law International 1998) 186.

evidence as well as a way where the interrogator have a full overview about the case.<sup>87</sup> It might be clear from this statement that the Egyptian criminal procedure, in this regard, has distinguished between interrogation and question. More importantly, distinguishing in this way has an effect on the previous procedure, as the LCP makes no clear difference between the concept of interrogation and the concept of questioning, thus meaning that, once the police enforcement officer has found a reasonable ground to suspect a person, arrest may following according to the LCP.<sup>88</sup> Markedly, it is observed that the enforcement officer has the exceptional right to send the police officer to perform the interrogation. This can be clearly seen in the *F v M* case<sup>89</sup> when F claimed that M tried to kidnap his brother L. The case was transferred to the BIPP, which sent an official paper to the police station to carry out an investigation and listen to the witness under the supervision of a BIPP member. It is clear from the case that the police officer may not have had the sufficient skills to take over the investigation process. Furthermore, this can be in breach of article 3 of the BIPP, which gives the BIPP the jurisdiction to investigate crimes, as well as to take action with respect to an investigation through to filing a case. Nevertheless, this action has to be limited to some cases, and may be a clear indicator that the abuse of various processes has occurred.<sup>90</sup>

## **5.2 Safeguards of interrogation in the international and regional spheres**

The UDHR contains a range of civil rights, one of which is contained in article 5, which is the freedom from torture or cruel, inhuman or degrading treatment. This is a framework for the accused's rights during this process. However, article 10 of the ICCPR states the following:

All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person. Furthermore, the rights contained in Article 10 cover the segregation of the suspect from a convicted person, as well as juvenile persons and the prison's conditions.<sup>91</sup>

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<sup>87</sup> AL-Marsafawi, Hasan Sadik, *The Fundamentals of Criminal Procedure*, (Dar-Almaarif 1998) 412.

<sup>88</sup> LCP, art 33.

<sup>89</sup> Case number 13/40, 1427, 2007. In the list of cases provided by the Ministry of Justice the Saudi Arabian cases are referenced with the first initials L, K, G, etc.

<sup>90</sup> Hadi Al-Subaie, 'Crime Control Officer to Perform Some of Investigation Acts Under Saudi Criminal Procedure Act: Analytical and Comparative Study' (Master Dissertation, Naif Arab University for Security Sciences 2006) 250.

<sup>91</sup> These rights have been given a broad ambit in the ICCPR Committee. See Rehman (n 7) 102.



Regionally, article 16 of ACHR stipulates that the accused shall be presumed innocent until proven guilty at lawful trial during the investigation and the trial. One of the rights during this process is ‘to have the security of his person and his private life respected in all circumstances’.

From a domestic standpoint, there are various issues relating to the abuse of the accused’s rights during the stage of interrogation: for instance, the right of the accused to be attended by a representative has been violated in some cases.<sup>92</sup> However, there are three groups of rights relating to the interrogation stage: 1) The rights of an accused to have adequate time and facilities and to prepare his defence; 2) The right of the accused not to be subjected to cruel or degrading treatment or methods centred on obtaining a confession; and 3) The right to remain silent and the privilege against self-incrimination.

### ***5.2.1 The right to have adequate time and facilities to prepare a defence***

Everyone charged with a criminal offence has the right to adequate time and facilities to defend their case. This right has been guaranteed in the contents of a number of international and regional treaties: for instance, the ICCPR provides the accused with the right to have adequate time and facilities for the preparation of a defence, and to communicate with counsel of his own choosing.<sup>93</sup> In addition, various regional conventions have made guarantees for an accused to have adequate time, which is taken from the time of his arrest, such as in the case of article 6.3 of the ECHR, which clarifies these rights.<sup>94</sup> The purpose of the right of the accused to have adequate time to prepare a defence is to ensure protection against a rushed trial.<sup>95</sup> In addition, the meaning of ‘adequate time’ is recognized as being one of the most pivotal arguments in the HRC during recent years.<sup>96</sup> The meaning varies from one case to another, and also depends on the circumstances of the case.<sup>97</sup>

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<sup>92</sup> The Fourth Report of the National Society for Human Rights 2006, 28.

<sup>93</sup> Art 14.3(B).

<sup>94</sup> Also see ECHR, art 5.

<sup>95</sup> Hesham Al-Eshaikh, ‘Human Rights and the Trial of the Accused ‘A Legal Comparative Study Between the Judicial System in Saudi Arabia and the Standards Required by the European Convention on Human Rights’ (PhD thesis, University of Newcastle 2005) 73.

<sup>96</sup> Especially in the case of *Smith v Jamaica*, Communication No. 282/1988, UN Doc CCPR/C/47/D/282/1988 (1993) when the Committee pointed out a violation of art 13.3(b) due to the fact that the accused had not had sufficient time to meet with his lawyer.

<sup>97</sup> See for instance *Sawyers, Mclean and Mclean v Jamaica*, para 13.6. (226, 256/87).

The meaning of ‘adequate facilities’ can be seen clearly when reviewing international cases.<sup>98</sup> The right of the accused to have adequate facilities is not just implied during the arrest and investigation process, and can also be challenging in the trial stage where the suspect prepares all the necessary documents to defend the case. Moreover, this right may imply further in terms of can be defined as post-trial rights where the person sentenced has the rights to appeal.<sup>99</sup>

In specific regard to the KSA, the LCP states that the victim or accused, the claimant in regard to the private right of action, and their lawyers or other representatives, shall all have the right to attend any proceedings related to the investigation.<sup>100</sup> Moreover, the investigator may also carry out the investigation without the presence of any of the aforementioned whenever this is considered essential when seeking to establish the truth. Following the urgency of such, the investigator has to allow the investigation to be reviewed by such individuals. Within the context of this article, it can be understood that the adequate facilities can be implied not only for the paperwork needing to be provided to the accused, but also in regard to the right to have a legal representative.

In article 70 of the LCP, some cooperation can be seen between the two articles—both of which are in favour of the accused’s rights:

The Investigator shall not, during the investigation, separate the accused from his accompanying representative or lawyer and the representative or attorney shall not intervene in the investigation except with the permission of the Investigator. In all cases, the representative or attorney may deliver to the Investigator a written memorandum of his comments and the Investigator shall attach that memorandum to the file of the case.<sup>101</sup>

The former article provides the accused individual’s representative with the right to attend the interrogation process, while the investigator, if there is a necessity to do so, has the right to perform the interrogation in the absence of any representative of the accused. However, the latter article provides that the investigator does not have the right to separate the accused from his representative during any stage of the interrogation. It

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<sup>98</sup> *Harward v Norway*, Communication No. 451/1991, UN Doc CCPR/C/51/D/451/1991 (1994), when the Committee ruled a violation of art 14 of the ICCPR by depriving the accused of having a translated document. See also *Yasseen and Thomas v Republic of Guyana* Communication No. 676/1996, UN Doc CCPR/C/62/D/676/1996 (31 March 1998).

<sup>99</sup> Al-Eshaikh (n 95) 74.

<sup>100</sup> LCP, art 69.

<sup>101</sup> LCP, art 70.

is also recognized that the absence of a representative may affect the accused's rights during this particular stage due to the vital right of information to be delivered to the accused by his or her representative. Accordingly, a report has been published by the NSHR which highlights various issues in regard to the legal representative.<sup>102</sup>

Mr Al-Shammari is a case of an example of the absence of the right to have adequate time and facilities. Upon the arrest of Mr Al-Shammari in 2007, he was taken to an unknown location, and was therefore deprived of his right to prepare his case, and was also deprived of his right to consult with a lawyer. Between the time of his arrest and 2009—almost a year—Mr Al-Shammari was able to confirm that he had neither been brought before a judge from the time he was arrested nor had there been made any legal plans guaranteeing his right.<sup>103</sup> With this taken into account, it can be seen that the procedure carried out was in breach of articles 69 and 70 of the LCP, as well as article 73 of the same Law, which provides the right of the accused—or his legal representative—to provide the investigator with any type of document that may help the accused in his case.

Another case relating to the right to adequate time and facilities is that of *Muhammad Geloo v Saudi Arabia*. When Mr Geloo was arrested by the Saudi Security Services, Al-Mabahith, next to the university campus in front of his university residence at Madinah, he was not presented with an arrest warrant or any other decision by a judicial authority. Furthermore, he was not provided with any information regarding the reasons for his arrest. Immediately, he was detained and held incommunicado. He was afforded no access to legal assistance, and was not permitted to have regular contact with his friends or family, who had sought a lawyer for the preparation of his defence.<sup>104</sup> In such a situation, two main violations of his rights can be seen: firstly, the right to have a legal representative was delayed, thus meaning he was made vulnerable to any degrading, cruel or otherwise inhuman treatment; and secondly, the right to be provided with suitable and adequate resources through which a defence could be made was violated.

It might be notable that the regulatory schedule of the LCP contains some references to the right of the accused in this stage:

During his interrogation, the suspect has a guaranteed right to avail himself

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<sup>102</sup> NSHR 2011 (n 83).

<sup>103</sup> See UN, Opinion No 21/2009 (Saudi Arabia) Communication addressed to the Government on 11 May 2009 Concerning Mr Khalid Said Khalid Al-Shammari, A/HRC/16/47/Add.1

<sup>104</sup> UN, Opinions adopted by the Working Group on Arbitrary Detention at its sixty-first session, 29 August-2 September 2011, A/HRC/WGAD/2011/44.

of the services of a lawyer or legal representative who, having attended the examination, is entitled to submit a written memorandum containing his comments, which the examiner must include in the case file.’

Moreover, the following points are also detailed:

1. The investigator is not afforded the right to separate the legal representative and the accused at any point during the examination.
2. Throughout the course of the examination, the accused or the legal representative are afforded the right to carry out a case file inspection in the presence of the investigator.
3. The accused is afforded the right to make contact with his legal representative in order to implement the right to establish a defence, and the investigator cannot prevent this in any way.<sup>105</sup>

Importantly, it is essential that these rights are adopted throughout the entire procedure implemented within the KSA in order to ensure the efficient assurance of the rights of the accused throughout this stage.

### ***5.2.2 The suspect’s right not to be subjected to cruel treatment***

As has been highlighted through the ICCPR, in articles 7 and 10.1, the accused has the right not to be subjected to any kind of poor treatment in order to gain a confession. Article 10.1 provides: ‘All persons deprived of their liberty shall be treated within humanity and with respect for the inherent dignity of the human person’. It also states in article 14 (1) of the CAT:

‘Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation’.

Undoubtedly, this is a fundamental right and needs to be assured; even when an individual is being held due to the belief a crime has been committed by him, self-

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<sup>105</sup> Baderin (n 27) 258.

respect and dignity should still be maintained.<sup>106</sup> Moreover, one of the most valuable and fundamental dignities as a human being is the right not to experience any degree of torture. In this particular context, the occurrence of ‘torture’ is described in the CAT as being any action through which a person is intentionally inflicted with suffering—mental or physical—with the aim of securing a confession.<sup>107</sup>

Cruel and degrading treatment implies not only physical treatment, as discussed earlier, but also makes reference to mental treatment, such as interrogating the accused for more than a certain number of hours, or if the accused becomes under threat of providing a false confession. Other methods can be used to secure a false confession, such as using a specific kind of drug and being beaten while in police custody; however, all illegal methods are linked with the inadmissibility of the evidence in court as a result of the unreliable methods via which the confession was extracted.<sup>108</sup>

Significantly, this right has been guaranteed in Islamic jurisprudence: in a pre-trial stage, it is forbidden that a confession be acquired through the use of forbidden methods. The four schools of thought in the context of Islamic jurisprudence maintain that, if a confession is to be secured, this should be offered willingly. One of the most fundamental circumstances to ensure satisfaction in this regard, to facilitate the acceptance of a confession, is freedom of choice. Ultimately, a confession must be provided through the desires of the individual. By willingly providing a confession, it is more likely there will be a greater degree of accuracy.<sup>109</sup>

From a domestic perspective, the LCP clarifies this concept in article 102, which stipulates:

The interrogation shall be conducted in a manner not affecting the will of the accused in making his statement, the accused shall not be taken on oath nor shall he be subjected to any coercive measures. He shall not be interrogated outside the location of the investigation bureau except in an emergency to be determined by the investigator.

With the above taken into account, any cruel treatment exercised during arrest or during the course of the interrogation will be in contradiction with article 102 of the LCP; this violation can be challenged in the court. However, Al-Hargan states that, in fact, there remains the widespread allegation of torture, and in practically every case where the

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<sup>106</sup> *ibid* 256.

<sup>107</sup> CAT 1984, art 1A.

<sup>108</sup> Andrew Choo, *Evidence* (2nd edition, OUP 2009) 91.

<sup>109</sup> Tāhā J al 'Alwānī and Yusuf Talal DeLorenzo, ‘The Rights of the Accused in Islam’ (1995) 10(3) Arab Law Quarterly 241.

confession is used in evidence against the defendant, the claim is made by the scholar that there would have been no confession if there was no torture used. He further states that the verification of this fact cannot be performed due to the difficulty in proving the same.<sup>110</sup> There are no clear cases within the KSA where the accused was subjected to cruel or degrading treatment; however, the only reliable cases in which we can assume there are violations of this right are in the international domain. For example, the cases of *Salman M Al-Fouzan v Saudi Arabia* is one of the cases brought to the HRC. Mr Al-Fouzan disappeared from the local market when shopping with his mother in 2009. Subsequently, it was concluded by the HRC that Mr Al-Fouzan was detained unlawfully and, according to his family, suffered from ill-treatment.<sup>111</sup>

It seems that the tragedy of torture may not be blamed upon just the BIPP as it has the interrogation authority. For instance, the Ministry of Justice, as a higher authority, is required to play a significant role in terms of supervising the investigative role of the BIPP. Moreover, the Ministry of Interior has a number of influences on the BIPP's performance, as shown through its law. This influence needs to be limited to some degree.

### ***5.2.3 The right to silence and the right not to self-incriminate***

#### *5.2.3.1 International law*

It may be worth highlighting here that this right has a direct link to the right not to be tortured in order to obtain a confession. The privilege against self-incrimination and the right to silence are both elements that can be regarded as central to a fair trial. It has been stated that the right to remain silent has its roots in the English legal system, in law and in civil law traditions.<sup>112</sup> However, the right to remain silent may be exercised through two different stages within the criminal process: the interrogation stage and the in-trial stage. The latter will be examined later in this research, which is concerned with human rights throughout the in-trial stage. In specific consideration to this right during the stage of interrogation, the right to remain silent has been incorporated into various

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<sup>110</sup> Al-Hargan (n 66) 161.

<sup>111</sup> UN, Opinions adopted by the Working Group on Arbitrary Detention at its sixty-third session, A/HRC/WGAD/2012/8.

<sup>112</sup> Joseph L Kibitlewski, *Comparison of Citizen's Right to Silence Under American and English Political System* (Criminology Study 2004) 86.

different international conventions, including the ACHR, the ICCPR and the UDHR.<sup>113</sup>

According to article 14.2 of the ICCPR, ‘anyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty, according to law’. This provision is also further safeguarded in article 14(3)(g) of the ICCPR. The main justification behind this right is centred on saving the accused from a false confession that may be exercised—whether physically or psychologically—against the accused.<sup>114</sup> It is important to highlight that such a point is regarded as being notably controversial in the most advanced legal system,<sup>115</sup> due to the fact that it is difficult to prove any such attempts to influence the accused.

### 5.2.3.2 Saudi Arabia

Significantly, Islamic jurisprudence recognizes the right of silence; this may be a reliable and important clarification of the right of silence, and shows the validity of this right in the Islamic norms. In this same vein, *Taha* states that:

The accused may choose not to respond to questions. If he or she does respond and it is later determined that the answers were false, he/she may not be charged with, or punished for, bearing false witness. If the accused acknowledges liability or confesses to a *Hudud* crime, he/she may retract his/her statement and thereby nullify the earlier confession.<sup>116</sup>

However, a number of scholars agree that the application of cruel methods to obtain a confession is correct to be prohibited, although this is not discussed in this thesis as, despite Saudi law being based on *Shariah* law, the LCP has made clear that the use of force to obtain a confession is prohibited and therefore is illegal under any circumstances.

Under Saudi law, prior to the LCP, the exercising of force was permitted due to some scholars’ opinions; however, since the enactment of the LCP in 2001, it can be observed that the privilege of self-incrimination can be seen in article 2, which stipulates *inter alia* that anyone who has been arrested must not be subjected to any bodily or moral harm. Another mention of this right is made during the interrogation

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<sup>113</sup> John Jackson, ‘Re-Conceptualizing the Right of Silence as an Effective Fair Trial Standard (2009) 58 International and Comparative Law Quarterly 835.

<sup>114</sup> See, for instance, the case of *Sanchez Lopes v Spain* UN Doc CCPR/C/67/D/777/1997.

<sup>115</sup> Choo (n 108) 150.

<sup>116</sup> Al 'Alwānī and DeLorenzo (n 109) 238.

process, which provides that the interrogation needs to be exercised in a manner not affecting the will of the accused in making his statement. This reference can, at a certain point, draw privileges of self-incrimination; however, the right to remain silent does not appear in the LCP, which could lead to controversial issues—even for an accused exercising this right during the interrogation or during the trial.<sup>117</sup>

However, in practice, in all Saudi written law there are no provisions centred on the admissibility of a confession obtained against the will of the accused. The only reference to this right is made in article 162 of the LCP, which stipulates the following:

... if the accused at any time confesses to the offense of which he is charged, the court shall hear his statement in detail and examine him. If the court is satisfied that it is a true confession and sees no need for further evidence, it shall take no further action and decide the case. However the court shall complete the investigation if necessary’.

However, this right is limited to the in-trial stage, which will be discussed in the following chapter of this thesis.

## **6. Conclusion**

During the course of this chapter, there has been discussion of human rights during the pre-trial stage in Saudi Arabia, compared with international human rights standards, with specific mention of the UDHR, the ICCPR and the CAT, as well the ACHR. It may be appropriate for the Saudi legal system to protect the rights of the accused by making the articles in the LCP and the BLG more effective and more protective—especially in terms of entering, searching and seizing properties. The rights of persons under arrest have been guaranteed under domestic law, which may mean a significant opportunity for the Saudi law to comply with international human rights standards. More importantly, the search and seizure of properties and people has its safeguards in the Constitution of Saudi Arabia, which has been obtained in regard to its perspective from Islamic jurisprudence. The right to have legal assistance has been recognized in the LCP, which could improve the safeguards, assurances and the protection for human rights in this particular area. Moreover, the detention periods are one of the most significant rules established by the LCP in Saudi—even though some implementation is

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<sup>117</sup> LCP, art 102.



still needed in order to ensure the efficiency of its rule.

In regard to the interrogation procedure, consideration has been directed towards the Islamic jurisprudence from which the Saudi legal system has obtained its rules, as well as the notion of the presumption of innocence throughout the course of the arrest and the interrogation, which have been recognized in the Islamic *Shariah*. The accused must not be made to experience torture, and should not be treated inhumanely; this is well-recognized in the international scope, as well as in the LCP. The chapter has highlighted the rights of the accused to be respected—even if the accused refuses to speak during the process of interrogation or even during the trial. The issue of arresting people without reasonable ground is yet a further challenge to Saudi lawmakers. As seen in this chapter, there are a number of cases in which the concept of ‘reasonable ground’ has been misunderstood, or is perhaps considered unclear.

The Saudi LCP, which was introduced in 2001, has played a significant role in the stages of investigation and prosecution; nevertheless, there has been much interaction between the BIPP and other institutions, such as the prison administration. However, there has also been a lack of authority for non-governmental organizations in terms of the criminal process, particularly in relation to prison inspection, which may reflect negatively on the right of accused during this stage.

## **CHAPTER FIVE: THE DOMESTIC APPLICATION OF IN-TRIAL RIGHTS IN SAUDI ARABIA**

### **1. Introduction**

The main objective of this chapter is to draw a comparison between international human rights standards relate to the right to a fair trial referred to with the Saudi Arabian domestic law, with the main focus on the in-trial process. During the course of the previous chapter, it was seen that the Saudi legal system has in theory protected the suspect's rights, in accordance with human rights standards considered throughout the pre-trial phase, despite there are various concerns in regard to the way in which the law is applied by police enforcement officers.

However, there are notable issues in relation to human rights within the in-trial phase in Saudi Arabia, which may be better understood through assessing international human rights standards, and by analyzing the overall compatibility, in practice, between such rights and the Saudi legal system.

Such standards may be assigned to different groups. The first group is of those concerning the judicial system, such as the degree of impartiality, which draws attention to the performance of the judge, and the subsequent quality of decisions. The second group is those concerning the parties' rights in court, such as through the analysis of evidence. The chapter will therefore focus on the two main procedures associated with in-trial rights: the right to trial before an independent impartial adjudicator, and the right to have a public hearing, taking place during the trial, with the case tested by the examination of witnesses as well as the equality of arms.

The second group of rights falls into the post-trial rights, which will be divided into two sections, namely the right to appeal and the right to receive compensation for unlawful detention. Such rights will be analyzed through a comparative legal analysis by introducing a number of cases from the Saudi courts and evaluating them in light of international human rights standards.

It might be important to examine the courts' hierarchy in Saudi Arabia; this is due to the fact that this recent reform was established in 2008 and is highly relevant to the right to a fair trial.

## 2. The courts' hierarchy following recent reforms

During recent times, the Saudi Arabian legal system has been under systematic reform. The Royal Decree Number M/78, signed in 2008, divided the courts into three categories, and further presented the founding of the Court of Appeal. The King exercised his power according to the BLG, which assigned him the power and authority to introduce any law he deemed necessary;<sup>1</sup> however, the new Royal Decree divided the judicial institution into two main categories: the judicial system and the Board of Grievances. Both of these will be examined in the following sections.<sup>2</sup>

The old Law of Judiciary 1975 has been exercised in the KSA and, according to article 5 thereof, comprises the following *Shariah* courts: Supreme Judicial Council, Appeal Court, general courts and summary courts.<sup>3</sup> The differences in the new law include the establishment of the Supreme Court and the Court of Appeal, in addition to the reformation of the members of the Supreme Judicial Council. For example, the President of the Bureau of Investigation and Public Prosecution (BIPP) has become one of the members of the Supreme Judicial Council, which was not included in the previous Law.<sup>4</sup> This could be a significant change in terms of enhancing the role of the BIPP, as will be seen later on in this chapter. However, in order to gain an understanding of the court hierarchy within the legal system, according to the new Judiciary Law (2008), it is worth noting two main aspects of this law, namely, the High Judicial Council, and the courts and their jurisdiction.

### 2.1 The High Judicial Council

The powers of the General Assembly which is the most important element within the high judicial council can be found in articles 5–8 of the Law of Procedure Before Sharia Courts. These articles have clarified the authority and powers, and further state that the General Assembly can refuse any verdict that has been passed in the courts of first instance. The General Assembly comprises 11 members—all of whom have been

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<sup>1</sup> BLG, arts 50, 55, 56 and 62.

<sup>2</sup> Royal Decree Number m/78, 19/9/1428 (2008). This Royal Decree has also enacted a new Law of Grievance.

<sup>3</sup> See the examination of the old law on Hisham, Al-Eshaikh, 'Human Rights and the Trial of Accused: A Legal Comparative Study Between the Judicial System in Saudi Arabia and the Standards Required in the European Convention on Human Rights' (PhD thesis, University of Newcastle 2005) 135.

<sup>4</sup> Art 5 of Judiciary law (2008)

appointed by royal decree<sup>5</sup> for a period of four years. The powers of the General Assembly can be found in article 6, which sets out the following:

- All matters relating to the judges' employment status, such as their appointment, promotion, and holidays and training.
- Introducing laws that regulate the judges' employment.
- Establishing courts, if required, in any area of the KSA.
- Appointing Presidents of the Courts of Appeal, and their assistants.
- Introducing rules that regulate the way in which the judges, and their assistants, are appointed.
- Introducing rules pertaining to the way in which judges can obtain a scholarship.
- Writing annual reports concerning the achievement of and obstacles facing the judicial system, and presenting the same to the King.<sup>6</sup>

The High Judicial Council has its own budget, separating it from other judicial constitutions. Through such authorities, it has the power to independently regulate the court system. Importantly, the Royal Decree places significant emphasis on the separation of power so as to make the General Assembly a Head Officer for the courts without making or refusing any decisions—except in the case of those deemed absolutely necessary.<sup>7</sup>

## **2.2 Courts and their jurisdiction**

In regard to the Judiciary Law (2208), the KSA courts are divided into three main categories: the High Court, the Court of Appeal, and the courts of first instance. Each of these is described as follows:

- A- The High Court—which is located in Riyadh and comprises a number of judges, depending on the issue under consideration—deals with serious criminal offences, including those for which capital punishment can be ordered. The courts have to be structured with the incorporation of at least five judges.<sup>8</sup> In addition to the High Court jurisdictions, which are mentioned in the Law of Criminal Procedure (LCP), the role of the High Court, in the context of this Act, is to evaluate whether or not the principles of *Shariah* law have been

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<sup>5</sup> Art 5 of Judiciary law. (2008)

<sup>6</sup> Art 6 of Judiciary law.

<sup>7</sup> Art 8(d) of Judiciary law.

<sup>8</sup> Art 10(d) of Judiciary law.

implemented in accordance with the decision made by the courts.

Therefore, the High Court within the Saudi judicial system has the power to review and reject a decision made by the Court of Appeal or the courts of first instance. Importantly, however, such a rejection procedure has to be based on: whether or not the judgment has an obvious contradiction with *Shariah* law; whether the judgment has been carried out through a court, which is not formulated according to the judiciary court; whether the judgment has been processed from a court without jurisdiction; and whether there is a serious mistake or miscarriage of justice apparent in the context of the judgment.<sup>9</sup>

B- Courts of Appeal. The Judiciary Law introduces Courts of Appeal in all thirteen Saudi provinces.<sup>10</sup> These courts have the power to review the judgments that have been made through the public court. In normal circumstances, each Court of Appeal is formed by three judges, except in the case of serious crimes, such as *Hudud* or *Qisas*, which must be formed by five judges.<sup>11</sup> In the context of these Courts of Appeal, the procedure should be according to the LCP and the Judiciary Law. They are divided into five departments, with every single department having its own jurisdiction on specific issues relating to its scope.

C- As can be observed below, the five departments in the Courts of Appeal are based on the nature of the case from the court of first instance. This is the first time in the Judiciary Law that the Court of Appeal has comprised five departments as follows:

- Employee department
- Financial department
- Human Rights department
- Personal status department
- Criminal department.<sup>12</sup>

D- In the case of the courts of first instance, the new judicial reform has divided these courts into five courts, which work according to the issues related to specific matters. The first court is the general court, which is spread across all regions of Saudi Arabia. The main role of the court is to review the judgments made by other courts, which the latter reject on the ground of non-clarification

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<sup>9</sup> Art 11(b) Judiciary law(2008)

<sup>10</sup> Art 15(a) Judiciary law(2008)

<sup>11</sup> Art 15(b) and (c) Judiciary law (2008)

<sup>12</sup> Art 16 Judiciary law (2008)

of the judgment. In addition, the court also has the jurisdiction to convene cases related to road traffic accidents.<sup>13</sup>

E- The second type of court is the criminal court, which examines cases related to *Qisas* crimes and *Ta'zir* crimes, as well as cases involving minors. Each court must be formed by three judges, except in the case of the Supreme Judicial Council, which should comprise only one judge.<sup>14</sup>

The third category of first instance courts is the personal status courts, which comprise one judge. Their main purpose is to examine the cases related to marriage and divorce, as well as child custody, and the issues related to costs.<sup>15</sup> In the case of the last two categories—the financial courts and the employee courts—the former examines issues relating to companies where the case has been transferred from the High Court, containing one or more judges depending on the order made by the Supreme Judicial Council, and the latter courts, on the other hand, examine and review cases relating to employees, comprising advice from the Supreme Judicial Council.<sup>16</sup>

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<sup>13</sup> Art 19 Judiciary law (2008).

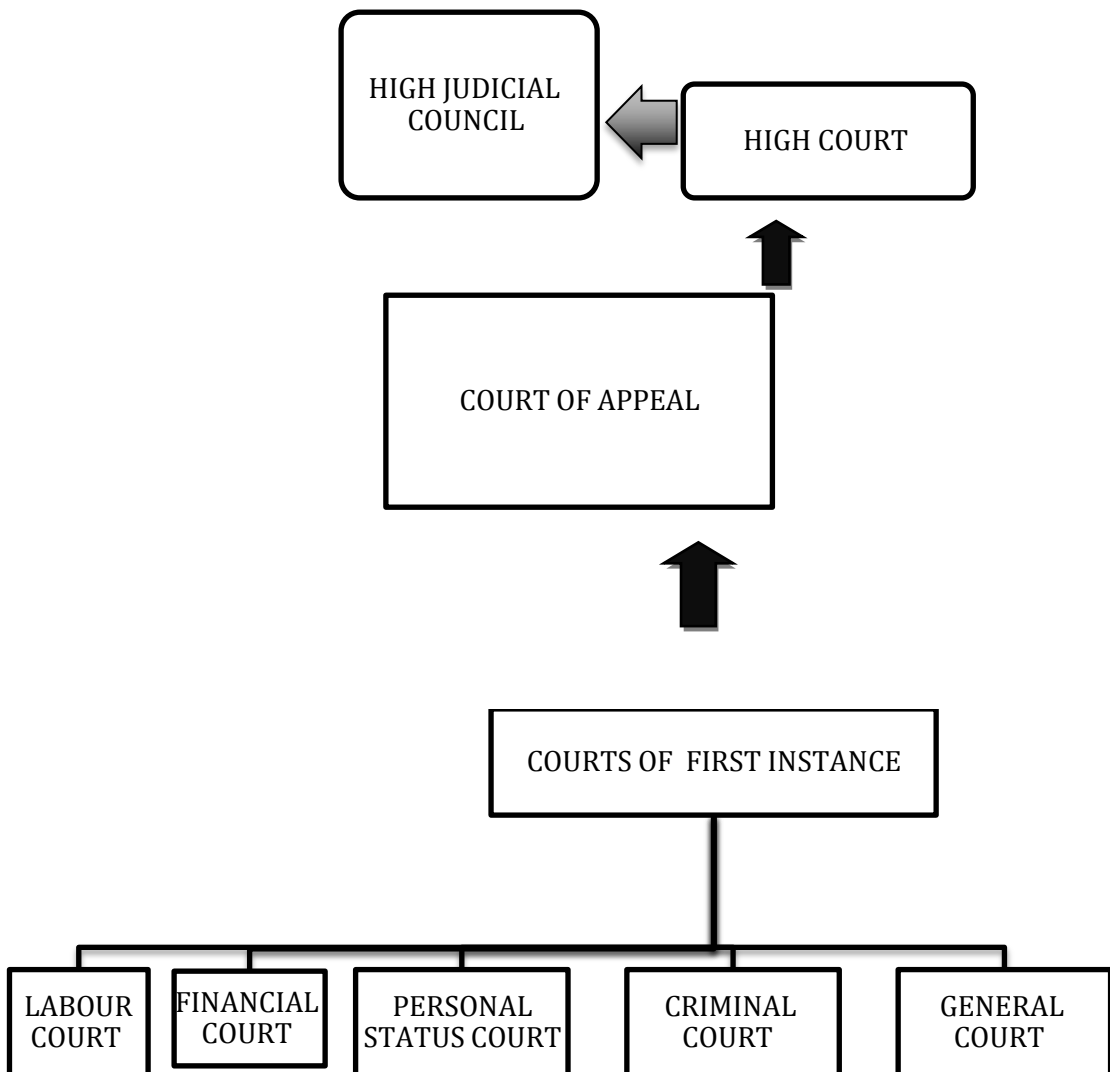
<sup>14</sup> Art 20 Judiciary law (2008).

<sup>15</sup> Art 21 Judiciary law (2008).

<sup>16</sup> Art 22 Judiciary law (2008).

Figure 1-1

### Court hierarchy in the 2008 judicial system<sup>17</sup>



<sup>17</sup> The Judiciary Law Royal Decree M/78, Bureau of Experts at the Council of Ministers accessed 20 <http://www.boe.gov.sa/ViewSystemDetails.aspx?lang=ar&SystemID=131> 12 December 2012.

## 2.3 The Board of Grievances

Grievance has been rooted in Islamic culture since the time of the Prophet Muhammad, and was exercised by the head of state with the objective to enhance justice. In a historical context, grievance was exercised without official institution. The head of state received complaints from people, and transferred them directly to judges. This was achieved with the help of Caliph himself. Al-Qahtani illustrates this by stating the following:

In the period of the Umayyad and Abbassid caliphates, a separate day was allocated to hear complaints against any oppression. The first Caliph who devoted such a day was Abdol Malik Bin Marwan (685-705). His practice was to examine all individual complaints that were brought to him and then refer them to a judge to try under his supervision. It seems that there were two reasons for the Caliph's giving personal attention to such grievances: to underline that such complaint were to be considered important, and to exercise a form of supervision by the head of state over his officials.<sup>18</sup>

In the case of Islamic jurisprudence, *Mawardi* clarified the role of the *Madalim* 'grievance' in Islam through: the *Madalim* concept, which has to be implemented only if the problem has arisen between the ruler and a person who is not in an official position; misuse by employers, who are in charge of conducting *Zakat*; and the enforcement of a judgment the court cannot enforce.<sup>19</sup>

However, conceptually, the position within the KSA has been the same in regard to Islamic jurisprudence, although the new Law of the Board of Grievances was made by the King in 2008, which replaced the old one established in 1982. The amended version emphasized, in its first article, that the Board of Grievances is a separate judicial institution related directly to the King, and that all the judges in the institution should have the same safeguards as those mentioned in the Judiciary Law.<sup>20</sup> This power has provided legitimate grounds for the Board of Grievances to act in accordance with what has been written and incorporated within the Law of the Board of Grievances. Importantly, this can be considered from two different perspectives.

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<sup>18</sup> Mohammed Al-Qahtani, 'The Role and Jurisdiction of The Board of Grievances in Saudi Arabia' (PhD thesis, Newcastle University 2007) 73.

<sup>19</sup> Al-Mawardi, *Al-Ahkam al-Sultaniah*, (Ibn al Qutbiyah Press 1989) 102.

<sup>20</sup> Judiciary Law, art 1 (2008)



Firstly, it can be seen that the Board of Grievances will receive any complaint in which the government is involved, without there being any need to submit the complaint to the King or any institution, such as the Supreme Court or the Court of Appeal. The significance of the Board of Grievances can be seen in the fact that it is an independent judicial institution—even though there are similarities in terms of structure. For example, the administrative judicial council, in the Board of Grievances, has the same power set out for the High Judicial Council in the Judiciary Law. In addition, the judges, employees and all workers in both institutions have the same job status in relation to the Law of the Board of Grievances.

Secondly, the Board of Grievances has its own legitimate grounds; thus, approval from the King is obtained in procedural matters. Furthermore, the review committee of the Board of Grievances makes its decision on the issue, and the decision of appeal is then finally transferred to the Board of Grievances headquarters in Riyadh.<sup>21</sup> The Board of Grievances has a range of authority in:

- Cases related to the public service and issues related to retirement.
- Any complaint pertaining to government institutes.
- Compensation cases, if the government is a party.
- The implementation of a foreign court's decision.<sup>22</sup>

According to the new Law of the Board of Grievances, the Board of Grievances has a high judiciary administration, which has the same power in its courts, alongside the High Judiciary Committee mentioned earlier.<sup>23</sup> Moreover, there are three different types of court within the Board of Grievances: the high administrative court, the administrative court of appeal, and the administrative court.<sup>24</sup> It is recognized that the high administrative court shall be formed with a chief judge and a sufficient number of judges, the ranks of whom shall not be less than that of the judge of appeal. The administrative court of appeal shall be formed from a chief and sufficient number of judges. Finally, the administrative court shall comprise a chief and a sufficient number of judges.<sup>25</sup>

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<sup>21</sup> Al-Qahtani (n 18) 174.

<sup>22</sup> Faisal Al-Shihri, 'The High Administrative Court in the Board of Grievances' (PhD thesis, Naif Arab University 2009) 75.

<sup>23</sup> Art 5.

<sup>24</sup> Art 8.

<sup>25</sup> Art 8 (b)

Simultaneously, the Board of Grievances adopts the same rules to which the ombudsman adheres in the administrative law in England. However, there are various differences between submitting complaints with the ombudsman and to the Board of Grievances within the system adopted within the KSA. For instance, in the Board of Grievances, the complaint is submitted personally by a person who has had his rights breached. The complaint will then be studied with the objective of evaluating whether or not there has been maladministration on the part of a certain administration in the government. Subsequently, it will then be decided whether or not the Board of Grievances will take action. This is in contrast to the ombudsman in England to whom complaints are initially presented by a member of Parliament.<sup>26</sup>

#### **2.4 Special courts and the right to a fair trial**

Generally speaking, the special courts that not fall under the jurisdiction of the domestic legal system may affect the credibility of the criminal process and therefore the right to a fair trial.<sup>27</sup>

In the Saudi Arabian criminal justice system, there is no clear mention of the special courts in the courts hierarchy. Another important element of the special courts is the attitude of the *Shariah* law, which clearly regards the special courts as forms of illegal institutions.<sup>28</sup>

Nevertheless, it was mentioned in 2006 that Saudi Arabia was about to create special courts dealing with the terrorism and national security crimes.<sup>29</sup> It might be fortunate that such courts have not yet seen the light. As we have seen in the courts hierarchy under the 2008 Judiciary Law, it was clearly provided that the general courts have jurisdiction over the majority of crimes, which means that terrorism crimes and crimes defined as ‘disobeying the ruler’ will fall under general courts, which will benefit the accused in terms of legal protection during the trial.

It seems that the problem lies not in the structure of the courts within the Saudi Arabian legal system, but with the performance of the courts and the judges and the process before the court hearing. In gathering the information in this research, it was

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<sup>26</sup> AW Bradley and KD Ewing, *Constitutional and administrative law* (15th edn, Pearson 2011) 658-668.

<sup>27</sup> For more, see Said Wadie, ‘The Message and Means of the Modern Terrorism Prosecution’ 21 *Transnational Law & Contemporary Problems* 178-182.

<sup>28</sup> Abdullah al Duh, ‘Special and Exceptional Courts and its effect on the accused rights, authenticated comparative study in due to international laws and conventions’ (PhD thesis, Naif Arab University for Security Sciences 2010) 140.

<sup>29</sup> Asharq Al-Awsat, 05 May 2006 Issue N 10020.

observed that in the majority of cases the accused claimed that he was deprived of his right to a fair trial in the courts, and the majority of the reports refer particularly to the deprivation of this right to have an impartial and independent trial.<sup>30</sup>

### **3. The right to be brought before a competent, independent and impartial adjudicator**

Internationally, through the Bill of Rights, the right to a competent, independent and impartial adjudicator has been both maintained and protected: for example, article 14 of the International Covenant on Civil and Political Rights 1966 (ICCPR) states that, upon establishing any criminal charge, the rights and responsibilities of an individual highlight entitlement to a fair and public hearing, to be carried out through the use of a competent, independent and impartial tribunal, as established by law.<sup>31</sup> Moreover, the same is applied in article 10 of the Universal Declaration of Human Rights (UDHR), and in the regional treaty.<sup>32</sup> Importantly, through article 13, the Arab Charter on Human Rights (ACHR) provides that all individuals should be afforded the right to a fair trial, providing suitable guarantees before a competent, independent and impartial court established by law; such a court is assigned to hear the charges put to an individual. Importantly, it is further stated that all state parties need to ensure those without the capacity to afford legal representation are nevertheless provided with the ability to defend their rights. Article 13 stipulates:

Everyone has the right to a fair trial that affords adequate guarantees before a competent, independent and impartial court that has been constituted by law to hear any criminal charge against him or to decide on his rights or his obligations. Each State party shall guarantee to those without the requisite financial resources legal aid to enable them to defend their rights.<sup>33</sup>

However, such stipulations are acknowledged as being the absolute bare minimum for impartiality, and the importance of this specific article is the fact that Saudi Arabia has ratified thereon to become its domestic law.

With the above noted, it can be concluded that the key aspect associated with the independent and impartial adjudicator mainly makes reference to the way in which the

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<sup>30</sup> See Opinions adopted by the Working Group on Arbitrary Detention at its sixty-first session. In Regard to *Mr Thamer Al Alkhodr v Saudi Arabia* 2011 A/HRC/WGAD/2011/43.

<sup>31</sup> ICCPR, article 14, UN Doc A/6316 (1966).

<sup>32</sup> For instance, ECHR, art 6, the right to a fair trial; Andrew Grotrian, *Article 6 of the European Convention on Human Rights: The Right to a Fair Trial* (Council of Europe 1994) 27.

<sup>33</sup> ACHR, art 13(1) (2005) 12 International Human Rights Report 893.

judges are assigned, to their qualifications and to their duration in office. For instance, in concluding observations on Romania, the Human Rights Committee (HRC) endorses the concept of separation of powers, particularly in terms of the interference from the executive power with the judicial power, which may affect the decision made by judges in some cases.<sup>34</sup>

In the context of the Saudi legal system, from a domestic standpoint, and in the light of the Judiciary Law—promulgated in 2008<sup>35</sup>—impartiality can be seen and acknowledged through analyzing four different considerations: 1) judge independence, 2) the way in which the judge is appointed, 3) restrictions in terms of the authority of the judge, and 4) the discipline of the judge, otherwise referred to as ‘*Tadeeb al Quddat*’. Each of these aspects is discussed in greater depth below.

### 3.1 Judicial independence

Article 46 of the Basic Law of Governance (BLG) states that the judiciary must be a self-governing and impartial authority, and that there should be no power over judges in the context of their judicial operations, other than that highlighted in regard to the *Shariah*. Irrespectively, however, it is acknowledged that there is some degree of inconsistency between this article and other BLG articles, which provide the monarch with the power and authority to both assign and remove judges.<sup>36</sup> Nevertheless, the first stage of judge appointment in the country is carried out through the High Judicial Council making recommendations, whereby the Council delivers sound evidence supporting such a recommendation. Moreover, as highlighted through the Judiciary Law of 2008, a judge appointment should be made only if the candidate has the qualifications deemed appropriate (articles 31–48).<sup>37</sup> Furthermore, such recommendations need to be communicated to the Council of ministers, prepared by way of royal decree by the King (article 47), whereupon the King reviews the decision made by the High Judicial Council, and accordingly signs the decision.

However, in unusual circumstances, the King may be able to refuse the recommendation, which notably raises concerns of impartiality. For example, judges who are, in some way or another, dependent upon the individual appointing them (the King) cannot be considered impartial and able to provide high-quality, legitimate,

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<sup>34</sup> See for instance the HRC concluding observation on Romania, UN doc CCPR/C/79/add 111 para 10.

<sup>35</sup> Enactment by Royal Decree M/78 1428 (2008).

<sup>36</sup> Art 52 of the BLG refers to the King as having the final decision.

<sup>37</sup> Al-Jarbou, ‘Judicial Independence: Case Study of Saudi Arabia’ (2004) 19 Arab Law Quarterly 41.

neutral decisions.<sup>38</sup> As such, in order to overcome this particular problem, it may be considered proper for judges to be selected by the Supreme Judicial Council; it is recognized that this can help to ensure the judicial system's impartiality and to subsequently improve the overall power of judges, in addition to achieving greater credibility within the system. Moreover, the theory of separation of power would be effective through the Council appointing judges without any involvement or interference from the King.

Another consideration concerning the special court and its impartiality is that such courts have jurisdiction in relation to terrorism-related activities. For example, during 2011, within the KSA 16 individuals—14 Saudis, 1 Afghan and 1 Pakistani—were found guilty, and accordingly sentenced to imprisonment, in relation to acts of terrorism; all attended the special criminal court and were convicted of terrorism activities.<sup>39</sup> Despite the fact that consideration was afforded to the safeguards in these special criminal courts, combined with the role of media and publicity in the trial, which is recognized as a fundamental aspect, questions have nevertheless been raised in regard to the overall legitimacy of such a court.

Moreover, there are additional questions surrounding human rights and the approach adopted by such courts, in addition to the role played by administrative authorities. Importantly, as mentioned previously, the first article of the Judiciary Law states: 'judges are independent and they shall no authority over their judgment except the authority of Shariah law and the rules in Saudi Arabia, and no one has the authority to interfere with the judge's ruling'.<sup>40</sup> Notably, such a situation may be open to interpretation in regard to the judicial system's safeguards in terms of interference, which may impact overall judicial performance.

### **3.2 Qualification of judges**

The role of the judge, in the context of the KSA, can be seen as stemming from the role of a judge as outlined in the Islamic *Shariah*, which essentially adopts a combination of adversarial and inquisitorial approaches, the latter of which sees the judge actively

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<sup>38</sup> Nuno Garoupa and Tom Ginsburg, 'Guarding the Guardians: Judicial Councils and Judicial Independence' (2009) 57 Am J Comp L 104.

<sup>39</sup> Al-Sulami 'Terror Cell Plotted to Kill Top Officials' *Arab News* (Issue 403300, 7 January 2012) <<http://www.arabnews.com/node/403300>> accessed 30 December 2012.

<sup>40</sup> Judiciary Law of Saudi Arabia, art 1.

seeking to establish further details about the accusation.<sup>41</sup> Nevertheless, in the context of a Saudi court, there is a need for the judge to carry out a case evaluation through inquiring into the truth of the situation, involving questioning the prosecution in terms of evidence.

Article 31 of the Judiciary Law clarifies the qualification required to be appointed as a judge. It states that a person should be of Saudi nationality and have a good reputation and the competence to exercise his position. In addition, the individual must also have graduated from a *Shariah* college in Saudi Arabia, or another college, where they have to pass the exam sets by the High Judiciary Commission. He must not be under forty years old if the position for which he is applying is as a judge of appeal, and twenty-two years old if he is applying for any other job within a judicial institution. Lastly, he should not have been convicted of any crime related to his religion or his honour or dismissed from his previous job, even if he received compensation or proved that his conviction constituted a miscarriage of justice.<sup>42</sup>

It can be seen here that the language used in article 31 refers to the judge as a male; therefore it might be true to say that there is no mention in the Saudi law whether women can be member of judiciary. The issue of female judges is quite problematic. In the Judiciary Law, there is no absence or mention of the right of women to be appointed as judge; however, in Saudi Arabia women have been allowed to study law in Saudi universities since 2006, which might suggest that there is a trend to include women in the judicial system as judges.

### **3.3 Limitations on the exercise of judicial authority**

The restrictions placed upon judges in terms of authority may be traced back to Islamic jurisprudence. Although the strength of the argument can be assessed by the judge, the authority and power of such an individual will only apply to *Ta'zir* crimes; such crimes are linked with no explicit punishment in the Quran. Furthermore, in regard to the limitations of judges' authority in the context of the Saudi legal system, there are no clear references to such, particularly in the case of *Ta'zir* crimes, which require that the judge decipher fully the context of the Quran when deciding on a suitable punishment.

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<sup>41</sup> Malcolm Davies, Prof Hazel Croall and Jane Tyrer, *Criminal Justice* (4th edn, Pearson Education Limited 2010) 304.

<sup>42</sup> See art 31(f).

Nevertheless, according to the Judiciary Law, there are various references made to the limitations of judges' authority. For instance, article 51 refers to a judge not participating in more than one job; he must be perform as a judge and not, for example, exercise any business activities outside the institution of the court. Another reference refers to a judge not disclosing what has been mentioned in the trial even if the media was in attendance. Finally, in terms of absence, restrictions are applied strictly to judges; in accordance with the Judiciary Law a judge has to provide the Supreme Judicial Council with all necessary information explaining the reasons and circumstances for any absence.<sup>43</sup>

### **3.4 Discipline of judges**

When striving to understand judicial independence, the final aspect to be taken into account is that of a judge's removal from office. In terms of the Judiciary Law, the Supreme Judicial Council is responsible for making a decision in regard to the removal of a judge from his position, usually during the time of a trial period, commonly lasting a year,<sup>44</sup> although the final decision is usually made by royal decree. Generally speaking, a judge may be removed in the following circumstances:

- If he has reached the age of seventy.
- If he has died.
- If he has applied for retirement.
- If, under any circumstances, he has shown his incapacity to assume his responsibilities under article 44.
- If his performance has been declared 'unsatisfactory' on evaluation forms on three occasions.
- If any acts have been committed that are defined under section 5 of the Law.<sup>45</sup>

In the same context, article 2 of the Judiciary Law stipulates that judges should only be removed from office in certain circumstances. Moreover, Al-Eshaikh clarifies the meaning of the word 'removal' as being: 'understood to mean either dismissal or

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<sup>43</sup> See, for instance, Judiciary Law, s 3, arts 51-54.

<sup>44</sup> Al-Jarbou, *Judicial Review of administrative actions under the Saudi law* (King Fahad National Library 2011) 125. Also the Saudi Judiciary Law 2008, art 44(2).

<sup>45</sup> Al-Jarbou (n 37) 126.

transferral of judges to other jobs'.<sup>46</sup> Nevertheless, the disciplining of judges is mentioned in articles 58–68 of the Judiciary Law. However, the disciplining of judges, in general, should be under the authority of the High Judicial Council, the latter of which has to carry out a meeting and decide with three members (article 59). The three judges are required to be of the status of appeal judge for the panel to be correctly formed (article 60). Significantly, under the new Judiciary Law, a judge's disciplinary hearing should be carried out in the context of a closed hearing (article 64); however, the Law does not clarify whether or not the closed hearing refers to the disciplining of judges or otherwise to any case in which one of its parties is a judge.

However, the four above-mentioned aspects (judicial independence, qualification of judges, limitation on exercise of judicial authority, and judges' discipline) are known to play an important role in terms of helping to achieve a competent, impartial and independent trial system, particularly in the context of the Saudi legal system. In addition, it has been seen that, in theory, both judge and judiciary independence are subject to debate due to the executive authority's influence on judges' decisions. Importantly, power segregation has to be guaranteed, as set out in the BLG. Furthermore, an additional element of ensuring judicial independence is provided in article 51 of the Judicial Law, which explicitly provides that judges are strictly prohibited from performing any external activities that do not adhere to judicial independence, with the High Judicial Council having the authority to remove judges who partake in such activities. As has been observed through the four main aspects of the independence of the judiciary, it can be concluded that the Saudi legal system does empower judges where there can be no clear interference with the judge's decision; however, judge appointment is still problematic in the context of the Saudi Arabian legal system due to the fact that it can be influenced by the King as a main power in the country. This is because even though the appointment of the judges may be carried out by the High Judicial Council, there still remains the question of who is choosing the Council members. In this case they are appointed by a royal decree which may affect the degree of independence; this could be solved by implementing a mechanism of free election for the members of the High Judicial Council.

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<sup>46</sup> Hesham Al-Eshaikh, 'Human Rights and the Trial of Accused: A Legal Comparative Study Between the Judicial System in Saudi Arabia and the Standards Required in the European Convention on Human Rights' (PhD thesis, University of Newcastle 2005) 172. It should be noted Al-Eshaikh's comment was on the Judiciary Law that was abolished by the 2008 Law; however, the same article has been mentioned in the new Law.



#### **4. The right to a public hearing**

One of the most important aspects of any fair trial is the right to a public hearing, which is recognized as being founded on the idea that ‘justice should not only be done but be seen to be done’.<sup>47</sup> Importantly, such controversy can be observed when the media and the press enter the courts. It is recognized, on the grounds of confidentiality and morality, that the public can be excluded. With this in mind, on an international scale, such rights have been recognized, such as through article 10 of the UDHR, which provides that all individuals are entitled to full equality in terms of a fair and public hearing. Furthermore, article 11(1) provides that all individuals charged with a penal offence are innocent until otherwise proven guilty, with article 14 (1) stating:

All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (order public) or national security in a democratic society.<sup>48</sup>

Regionally, it is stated through the ACHR that trials shall be public, except in exceptional cases that may be necessary for the interests of justice in a society that respects human freedoms and rights.<sup>49</sup> Even though there is no clear definition of the society that respects human freedoms, article 24(7) states the concept of democratic society as a society respectful of human rights.

Before the issue of the right to have a public hearing can be approached and examined, it might be more helpful to look at the issue from an Islamic perspective, as that is from where the Saudi Arabian legal system takes its rules.

##### **4.1 Islamic theory on public hearing**

The public hearing in Islamic was exercised in the time of the Prophet in the mosques, and even following the death of the Prophet, all scholars agreed on the use of the mosque as a court. This demonstrates the early days of Islam where the mosque could

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<sup>47</sup> Richard Stone, *Civil Liberties and Human Rights* (8th edn, OUP 2010) 361.

<sup>48</sup> ICCPR, art 14(1), UN Doc A/6316 (1966).

<sup>49</sup> Art 13(2).

be regarded as a court.<sup>50</sup> However, there is much evidence to suggest that trials should be in public. *Shuraih al-qadi*, for instance, when all parties went to the trial, asked the public to be informed about the trial, as it was important for them to attend and bear witness.<sup>51</sup> Furthermore, various Qadis, throughout Islamic history, have made their own houses as courts, where the public, without any exception, are afforded the right to attend. Another famous event indicated the right to a public hearing in Islamic history, which was when a man went to the Caliph al-Ma'mun and made a complaint against him in his house, with the attendance of the judge, Yahia bin-kaltham. The Caliph asked the judge to start the trial, to which the judge replied, 'The Caliph doesn't make his house as a place for judgment'. The Caliph replied, 'I do from now on'. The judge asked the Caliph to call people to attend, as the trial between the man and Caliph should be carried out publicly.<sup>52</sup> With this in mind, it may be concluded that a public hearing in Islamic traditions has always been exercised, with all the public entitled to attend.

#### **4.2 Public hearings in Saudi Arabia**

From a domestic standpoint, the Law of Procedure Before Sharia Courts (article 61) expressly provides that all hearings must be conducted in an open court unless the judge closes the hearing with the aim of ensuring order or the privacy of the family, or in order to facilitate observing public morality. Furthermore, article 155 of the Law of Criminal Procedure (LCP) states that the court hearing must be in public but one or another aspect may be assigned to a closed hearing, or a certain class of people may be barred from attending for the sake of public morality or security, or if this is otherwise considered fundamental in terms of establishing the truth. However, in regard to the implementation of article 155 in the case of courts operating within the Saudi legal system, there is a fundamental issue which was highlighted in the 2010 report by the NSHR, namely, a no-public hearing where secret sessions are deemed the best option in certain cases.<sup>53</sup>

A recent case illustrates a potential issue in a public hearing. A co-founder of the Saudi Civil and Political Rights Association (ACPRA), Mohammed Al-Qahtani, was arrested by Saudi Intelligence in 2011, and was accordingly charged with nine crimes. During the process of his trial, Mr Al-Qahtani asked the court to hold the trial in public,

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<sup>50</sup> Nasir Al-Joufaan, 'Public hearing in the judicial domain' (2001) 5 Al-Adl 10.

<sup>51</sup> *ibid* 21.

<sup>52</sup> See the story in Al-Eshaikh (n 46) 301; Also in Al-Joufaan (n 50) 26.

<sup>53</sup> NSHR, Second report, 2010, 21. <<http://www.nshr.org.sa>> accessed 26 August 2012.

and the special court allowed the media to be in attendance, as well as various human rights activists in Saudi Arabia. During the trial, Mr Al-Qahtani claimed that the authorities in Saudi Arabia exercised pressure on him to sign papers that would incriminate him. He responded as follows to a question regarding political reform: ‘we have been doing our work for several years, the authority kept quiet for a long time, but now they are coming after us hard’.<sup>54</sup> The case of Mohammed Al-Qahtani has raised a number of critical points for consideration:

- The legality of what is referred to as the ‘special court’, in which four people were labelled as having been involved in terrorism-related crimes. However, these courts, in the case of *Al-Qahtani*, were used against people who demanded political reform and more civil and political liberties.<sup>55</sup>
- For the first time in a Saudi court, the trial of an individual accused of a political crime was conducted in public, which is a slight improvement; however, the attendance of the media and the public was nevertheless limited.
- It may be clear that the publicity of the *Al-Qahtani* trial goes hand in hand with both article 155 of the LCP and article 61 of the Law of Procedure Before Sharia Courts, both of which state the principle of the public trial.<sup>56</sup>

Another case highlighting restrictions on the public trial is the NSHR report in which it is claimed that trials are not public due to courtroom access being restricted by police presence, which is also in breach of the aforementioned article 155. Some claim that there was no free access for the public to attend the trial.<sup>57</sup> Nevertheless, in this case, it can be seen that there has been a breach of article 61 of the Law of Procedure Before Sharia Courts, which is recognized in the exception article, which provides the judge with the power to conduct the trial privately if:

- 1- some parties ask the judge to conduct it privately;
- 2- if there is a fear that the trial may affect public morality;
- 3- if the judge prefers to carry out proceedings privately due to family privacy.

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<sup>54</sup> BBC News, ‘Saudi campaigner Mohammad al-Qahtani goes on trial’ (1 September 2012) <<http://www.bbc.co.uk/news/world-middle-east-19448323>> accessed 15 September 2012.

<sup>55</sup> It is significant as being the first time that the trial of Al-Qahtani was covered in the local media, *Al-Riyadh* newspaper (11 November 2012, Issue number 16211).

<sup>56</sup> It may be worth mentioning here that such cases are highlighted in the media and it has not been possible to find them in official reports, See ‘Saudi Arabia court jails activists al Qahtani and al-hamid’ BBC <<http://www.bbc.co.uk/news/world-middle-east-21726466>> accessed March 2013.

<sup>57</sup> Report on the mission to the Kingdom of Saudi Arabia Oct 2002, UN Doc E/CN4/2003/65/Add 3, 14 January 2003.

In line with article 155 of the LCP, there is another exception in addition to the three above exceptions, which is ‘security reasons’, although the LCP does not clarify what is meant specifically by ‘security’. Ultimately, however, this restriction may be used broadly to exclude the public from a wider range of trials, such as those where the accused are human rights activists.

Article 155 of the LCP and article 61 of the Law of Procedure Before Sharia Courts are consistent in terms of what is stated in article 14 of the ICCPR, which provides the right to a public hearing. Moreover, we can also observe through the *Al-Qahtani* case that the public, including the press, attended, which may be regarded as achieving compatibility between the practice of the judicial system in Saudi Arabia and that of the spirit of the UDHR as well as the ICCPR, although there are some violations in this regard, such as in the case of *U’taibi v Saudi*.<sup>58</sup> However, the restriction, in some cases, remains problematic in KSA courts, which thus draws attention to the contradiction between various practices of Saudi procedures, the Islamic rules in the public trial considered above and various contradictions with international human rights instruments.

One additional element of the trial is the issue of recording, with article 156 of the LCP clearly stating that all court hearings must be attended and recorded by a clerk, the minutes of which should be overseen by the chairman. This recording should make note of the names of the judge, prosecutor, defendant and lawyer, as well as all claims and statements made. Moreover, a summary of the case, including testimony and all evidence, should also be detailed. Each of the pages of the record should be approved by the chairman, clerk, and members of the court.

Moreover, no clear mention is made in terms of whether the accused, during his trial, may be under the supervision of what can be regarded as a faceless judge to protect his identity, especially in some crimes relating to the issue of terrorism. In regard to the faceless judge, Joseph, Schulz and Castan point out that, in a system of faceless judges, there is no guarantee of either the independence or the impartiality of the judge.<sup>59</sup> However, the HRC condemns any trial carried out or presented by anonymous judges.<sup>60</sup>

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<sup>58</sup> See the Working Group on Arbitrary Detention when it concluded that Mr-Utaibi’s detention was inconsistent with art 10 of the UDHR which states that everyone is entitled to a fair and public hearing by an independent and impartial tribunal: UN Doc A/HRC/WGAD/2011/33.

<sup>59</sup> Sarah Joseph, Jenny Schulz and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (2nd edn, OUP 2005) 424.

<sup>60</sup> See, for instance, *Polay Compos v Peru* (577/94) CCPR/C/61/D/577/1994.

To summarize the cases, it can be seen that the judicial system of Saudi Arabia has many challenges in regard to the rights of the accused to be afforded a public trial. This challenge has become much more significant in crimes related to security, where the special courts have no specific law to adhere to. It can be shown that, in practice, Saudi courts are far away from both the international human rights standards and Islamic rules in public trials; however, such gaps have arisen in specific trials, namely political trials where the influence of the government can be observed.

## **5. The right to a legal representative**

It should be noted that the right to have a legal representative during the trial differs to the one in the pre-trial process. Importantly, this right focuses on the right of the accused to have a legal representative after the case has been submitted to the court and the trial is ready to commence.<sup>61</sup> Internationally, human rights have been safeguarded through many different tools. Despite the fact that the UDHR makes no straightforward link to such rights, it is nevertheless acknowledged within article 11(1) thereof that ‘all the guarantees necessary [are made] for his defence’.<sup>62</sup> Moreover, article 14(3d) of the ICCPR states the right of an individual ‘to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him’.<sup>63</sup> Here it can be stated that both the UDHR and the ICCPR have set general requirements for the accused’s rights to enjoy a legal representative without clarifying exactly which procedure will be implemented.

Furthermore, in direct regard to the ACHR, a clear reference to the right to free and legal assistance is made through article 16(4), detailing circumstances where the accused is not able to pay, with the further provision that assistance should be provided if the accused does not understand the language spoken within the court.<sup>64</sup>

In particular regard to the Saudi legal system, it is not compulsory to have a lawyer, and so the accused may ultimately choose to defend himself in person and not be assisted by a lawyer; this means that the law does not necessarily view the right to

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<sup>61</sup> See the HRC general comment See HRC general comment, *Currie v Jamaica*, Communications No. 377/1989, para 13.4; No. 707/1996, *Taylor v Jamaica*, para 8.2; No. 704/1996, *Shaw v Jamaica*, para 7.6; No. 845/1998, *Kennedy v Trinidad and Tobago*, para 7.10; No. 752/1997, *Henry v Trinidad and Tobago*, para 7.6.

<sup>62</sup> UDHR, art 11(1).

<sup>63</sup> ICCPR, art 3(d).

<sup>64</sup> ACHR, art 16(4).

legal assistance as an aspect within the judicial administration. In the case of more serious crimes, the actual attendance of the lawyer is not obligatory, provided that a representative or an attorney represents him; however, an order permitting the personal appearance of the accused may be issued by the court if the interest of justice so requires.<sup>65</sup> As highlighted in the LCP, the defendant's rights are markedly safeguarded through the trial presentation, and thus it is the right and duty of the defendant to raise a defence through the course of the trial; otherwise, a lawyer will not be assigned by the court. Such an issue has proven challenging in the Saudi courts due to the large amount of legislation recently entering into force.<sup>66</sup>

The topic of the right to a legal representative is discussed in section 4 of the Law of Procedure Before Sharia Courts, with the name of the lawyer through such a process referred to as '*Wakalah*' which, in a *Shariah* context, refers to the Arabic word '*Wakeel*'; this is defined as an individual taking an action on behalf of someone.<sup>67</sup> Essentially, the *Wakeel* may refer to a lawyer that behaves in such a way so as to defend individuals. Moreover, as highlighted through article 140 of the LCP, it is noted that, in the context of major crimes, the accused is required to appear in court, without prejudice, and also has the right to request and obtain legal assistance, and thus be represented by a legal entity for his defence. In this regard, the accused may be summonsed to appear in court. If the accused fails to seek out and accordingly obtain representation, a court cannot make the decision to assign a lawyer during a court hearing; it remains the responsibility of the accused to provide his own representation.<sup>68</sup>

A comparison between the international requirement set out in the Bill of Rights and the law within the KSA reveals that there is an incompatibility between article 106 of the LCP and the requirements detailed in international human rights standards as well as the rights in the ACHR. Such a contradiction comes from the fact that Saudi law does not guarantee representation for an accused who has no sufficient means to pay for a lawyer, namely, article 14(3)(d), which refers to the accused's right to defend himself, in person, through a legal representative. Essentially, the contradiction comes from the fact that there are no other provisions in Saudi law clarifying this right during the in-trial stage. Al-Eshaikh states:

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<sup>65</sup> LCP, art 140.

<sup>66</sup> Abdullah Al-Barrak, 'The Rights of Accused to Defend Himself in the Saudi Criminal Procedure and in International Conventions' (PhD thesis, Naif Arab University for Security Sciences 2007) 562.

<sup>67</sup> Badaywe, kalaf allah, *Ijraat Raf'a al-dawa Fi Nizam al Murafaa't al-sharia*, (Qibba 2006) 219-221.

<sup>68</sup> See the Law of Procedure Before Sharia Courts, art 50.

As far as legal assistance in Saudi Arabia is concerned, if the accused has no means to pay for a lawyer he cannot have a legal assistance; this fact is open to criticism because it simply means that the rich accused can enjoy the same right and no one can deny that an accused who is represented by lawyers is more likely to exercise the right of defence effectively.<sup>69</sup>

The above statement encourages individuals to think about the role of legal aid in Saudi Arabia, which has not been yet established. The issue of legal aid has been a controversy in the context of Saudi law due to many factors, including the number of practising lawyers in Saudi Arabia not being sufficient to warrant the provision of such a service;<sup>70</sup> secondly, as has been seen through the LCP and the Law of Procedure Before Sharia Courts, there are no provisions providing the accused, whether during the pre-trial or in-trial stages, with free legal assistance. Finally, the only free assistance that may be seen in terms of the accused's right is the role of the NSHR, which has taken action on behalf of many accused in the Saudi courts, as will be demonstrated through numerous cases in the following discussion.

Importantly, the NSHR report details a number of concerns, such as the lack of commitment litigation in proceedings, where it may be witnessed that the accused is prevented by the judge from defending himself or from otherwise obtaining legal representation of his choice.<sup>71</sup> Notably, this issue has the potential to affect a defendant's basic rights. Accordingly, it is understood that providing judges with training is a key factor in overcoming such a problem; this may reflect positively, and thus deliver greater accountability into the judicial system. Other cases illustrate the issue of the deprivation of the legal assistance, namely, *Alkodar v Saudi*,<sup>72</sup> and the case of *Al-Abdulkarim v Saudi*.<sup>73</sup> It can be seen that there are many violations of the right to have a legal representative, whether during the arrest and investigation stage or otherwise during the trial phase.<sup>74</sup> With this in mind, we can conclude here that the right to have a legal representative in Saudi Arabia faces a number of challenges: firstly, the challenge to comply with international human rights standards, particularly in regard to

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<sup>69</sup> Al-Eshaikh (n 46) 199.

<sup>70</sup> Some point out that the majority of Saudi lawyers are involved in commercial and civil cases because they are more profitable. See Abdulhamid Al-Harhan, 'The Saudi Pre-Trial Criminal Procedure and Human Rights' (PhD thesis, University of Kent 2006) 258.

<sup>71</sup> NSHR, Second report 2010 (n 53).

<sup>72</sup> See Opinions adopted by the Working Group on Arbitrary Detention UN, A/HRC/WGAD/2011/42.

<sup>73</sup> UN, A/HRC/WGAD/2011/43.

<sup>74</sup> See the discussion of the Working Group on Arbitrary Detention in the case of *Abu Haikal* where the group found a lack of adequate legal representation for the complainant: UN, A/HRC/WGAD/2011/31.

legal aid; and secondly, the challenge associated with implementing the provisions in the LCP and in the Law of Procedure Before Sharia Courts, and making them effective in practice. From these cases, it can also be seen that there is deprivation of the right to legal assistance, particularly in cases involving human rights.

## **6. Testing the case by the examination of witnesses**

The right to have the case tested through the examination of witnesses has been safeguarded on an international scale through the ICCPR, which states that, when establishing a criminal charge against an individual, there are a number of minimum guarantees to be adopted, including ‘to examine, or have examined the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same condition as witnesses against him’.<sup>75</sup> Moreover, it is also stated throughout the ACHR that the accused has the right to examine or have his lawyer examine the prosecution witnesses and those of the defence according to the conditions applied to the prosecution witnesses.<sup>76</sup>

Domestically, when considering the LCP, there are two fundamental rights to be highlighted: the right of the accused to have the prosecution witnesses examined, and the right of the accused to call defence witnesses and under the same conditions as those for the prosecution. With this taken into account, it is provided that, during the court sessions, testimonies should be provided, with witnesses being heard on a separate basis. Moreover, where it is considered necessary, witnesses should be separated and then confronted with each other. In addition, there should be the refusal—enforced by the court—of any questions to be answered that may influence or otherwise lead the witness. Furthermore, improper questions shall not be permitted unless these have a strong and direct link to material facts. Lastly, the witness should be protected against any attempt to confuse or intimidate.<sup>77</sup>

Upon reviewing article 169 of the LCP, it is clear that witness confidentiality is taken into account, although the following cases illustrate the role of witnesses as well as their cross-examination. The cases were heard in Riyadh, where the defendant had been accused of apostasy and threatening to kill his mother. The testimony suggested that he refused to believe that there was a creator, and that he was also an alcoholic.

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<sup>75</sup> ICCPR, art 14(3)E.

<sup>76</sup> ACHR, art 16(5).

<sup>77</sup> LCP, art 169.



During his stay at his mother's house, he threatened her with a knife on several occasions. She called the police. The prosecutor claimed during the trial that the defendant committed apostasy and threatened to kill his mother. The judge asked the witnesses—the defendant's brothers and two employees—if they all agreed that the defendant had committed apostasy. The judge asked the defendant to reply to the testimony to which he replied, 'all what they said was not true. I did engage with some fighting with my brothers, but I have not threatened my mother, and they did so because they wanted me out of the house'. Another witness was examined in the trial after the judge asked him to attend and give his testimony. This witness stated that the defendant had threatened his mother several times, and claimed there was no God, and all that is seen in life is a matter of coincidence. The defendant claimed that the testimony of the witness was not true. However, the judge decided that the defendant's stay in the home with his mother may affect her, and so he ordered the defendant to be removed from the home. In regard to the claim of apostasy, the judge ruled that there was no clear evidence that the man had committed apostasy—even though the testimony was sufficient.<sup>78</sup>

In this case, two main points can be seen: firstly, the defendant was given the opportunity to cross-examine the prosecution witnesses during the trial, and was free to challenge the claims being made against him; secondly, the judge in the *Shariah* court allowed the testimony to be exercised during the trial.

Moreover, in situations where the witness is considered to be in danger as a result of acting as a witness, the judge may make decide to ensure such an individual is not positioned within the public arena; this can be achieved by adopting the British position, such as through providing the witness with a screen when giving evidence, or otherwise by removing all individuals from the courtroom when the witness is present.<sup>79</sup>

Although it is recognized that no direct statement has been made regarding the rights of the accused to have the witness examined, it is nevertheless noted that this right has been guaranteed, with the statement made that the defendant has the right to call any witness and review any and all evidence, and to further call for certain actions to be taken in regard to the investigation.<sup>80</sup>

In addition, as opposed to a causational approach, an inquisitorial one must be implemented by the judge within the Saudi legal system, particularly when cross-

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<sup>78</sup> High Court, Riyadh, 41/10, 4/3/1422 (2002).

<sup>79</sup> Davies, Croall and Tyrer (n 41) 321.

<sup>80</sup> LCP, art 174.

examining witnesses. In specific regard to the judge's role in the case, article 118 provides that, before the *Shariah* court, 'if the witness has exceptional circumstances which prevent him from attending the court to present his or her testimony, the judge has to move to the place of witness or the court has to send one of its judges to take the testimony'.<sup>81</sup> It is also stated in the regulatory schedule of the Law of Procedure Before Sharia Courts that the role of the judge can be defined as a positive role, which can be observed by virtue of article 118.<sup>82</sup> It is also highlighted in the LCP that the judge by himself or by requesting from any parties has the right to examine or ask the witness any question related to the case.<sup>83</sup>

In this context, a consideration arises in regard to witness examination, with the NSHR raising various concerns in relation to testimony quality, with discrimination highlighted as a possibility due to a lack of thorough examination of witness statements by investigators, police, or other officials.<sup>84</sup> Such an issue has caused attention to be directed towards the overall independence of the judiciary, as well as the quality of case verdicts. However, the approach implemented in mind of overcoming this problem is centred on adopting strong legislation with a mechanism for application with the objective of decreasing any potential for human rights to be breached, particularly during the course of testimony. Such issues have resulted in the development of the concept of 'equality of arms' in common law, which is known to have deep roots in Islamic jurisprudence.

## **7. Equality of arms in the Saudi legal system**

On an international scale, the equality of arms concept has been safeguarded through the UDHR, which draws attention to a fair and public hearing.<sup>85</sup> Furthermore, article 14(3)(e) of the ICCPR and article 6 of the ECHR have both sought to ensure the provision of this right throughout the criminal process under what can be defined as 'fairness of proceeding'.<sup>86</sup>

The ACHR is acknowledged as not making any direct reference to the equality of arms right; nevertheless, there are a number of articles that discuss this right

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<sup>81</sup> Law of Procedure Before Sharia Courts, art 118.

<sup>82</sup> Law of Procedure Before Sharia Courts, art 118(1), (2).

<sup>83</sup> Law of Procedure Before Sharia Courts, art 121.

<sup>84</sup> NSHR Second Report (2010) (n 53).

<sup>85</sup> UDHR, art 10.

<sup>86</sup> Grotrian (n 32) 40.

indirectly. For example, direct references have been made to the rights of the accused in the context of the in-trial process.<sup>87</sup>

Two different meanings are assigned to the concept of equality of arms: the first considers the accused's rights to be provided with interpretative assistance should there be problems, such as if the accused is a minor or suffers from a mental illness;<sup>88</sup> secondly, equality of arms may be defined as the degree of equality between parties throughout the trial process, wherein the accused should be given the opportunity to present himself to the court under the same conditions as those enjoyed by the prosecution.<sup>98</sup>

It is highlighted by Gans, Henning and Hunter that, 'Equality of Arms between the prosecution and the defence presupposes the defendant to have equal access to justice and creates a new measure of equality of recourses to that between the individual and the state'.<sup>90</sup> In this way, it can be stated that, in this particular context, equality of arms is seen to be between the individual and the state. Nevertheless, it is emphasized by Cassese that there are four different elements inherent in equality of arms, namely:

- To know, in depth, the charges made against the individual;
- To have the witness against the accused examined;
- To assign counsel; and
- To ensure the attendance of any and all witnesses.<sup>91</sup>

With the above taken into consideration, it can be argued that each of these rights has been devised in mind of the accused and not the prosecution. Notably, equality of arms must consider all parties equally; however, although it may be seen that the four aspects refer to the accused's rights due to his position as the weaker party. Both parties must nevertheless be afforded and able to enjoy equal protection and fairness.<sup>92</sup> It is also noted that the four inherited elements of equality of arms are compatible with the equality of arms in Islamic law.

In a domestic context, the LCP stipulates that the accused should not be physically restrained, in any way, during the court hearing, and should be adequately

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<sup>87</sup> See Arab Charter on Human Rights, May 22, 2004, *reprinted in* 12 Int'l Hum Rts Rep 893 (2005), *entered into force* 15 March 2008, arts 16 and 17, 1-7.

<sup>88</sup> Jeremy Gans, Terese Henning and Jill Hunter, *Criminal Process and Human Rights* (The Federation Press 2011) 485.

<sup>98</sup> Al-Eshaikh (n 46) 80.

<sup>90</sup> Gans, Henning and Hunter (n 88) 486

<sup>91</sup> Antonio Cassese, *International Criminal Law* (2nd edn, OUP 2008) 385-386.

<sup>92</sup> Stefania Negri, 'The Principle of "Equality of Arms" and the Evolving Law in International Criminal Procedure' (2005) 5 International Criminal Law Review 518.

protected and not dismissed from any hearing throughout the duration of case deliberations, unless there is just cause; in such a situation, the proceedings will continue with the admittance of the accused whenever such a case for removal arises. Importantly, however, the court must, at all times, ensure the accused is kept informed of all developments made during any period of absence.<sup>93</sup>

### 7.1 Case 1<sup>94</sup>

The case was before Taar Court in the south of the Saudi, where ‘K’ was accused of being in possession of a drug tablet in the rear seat of the car he was renting. The prosecution claimed that K was driving, at which point he was stopped by police and searched. The police found the tablet in K’s car, after which he was arrested and taken to the police station where the tablet was sent to the lab for examination. The result showed that the tablet found was Captagon, an illegal drug under Saudi Arabian domestic law. However, the prosecutor asked the judge to sentence K in accordance with the Law of Combating Narcotic Drugs and Psychotropic Substances.<sup>95</sup> When the judge asked K whether or not he noticed the substance in the rear of the car, K claimed that he had no idea as the vehicle was from a car hire company. The judge asked K about the time he had rented the car, with K subsequently responding that he had rented the car for three days. Subsequently, the judge asked the prosecutor whether there was any other evidence to support the case, to which the reply was given that all evidence had been given to the court. After consideration, the judge decided that the claims from the prosecutor were invalid due to the fact that there was not enough evidence to incriminate K. In addition, the drug substance found in the car did not necessarily suggest that the accused knew about it, and therefore the prosecution case was dismissed.

In this case, some points can be considered, as follows:

1. There was an interrogation process during the court hearing and, although the evidence was sufficient, the judge played a positive role and did not rely upon

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<sup>93</sup> LCP, art 158.

<sup>94</sup> K, Case number 128, Reviewed by the Court of Appeal, G/1/3/991, 8/1/1427 (2007).

<sup>95</sup> The Law Combating Narcotic Drugs and Psychotropic Substances, art 39 gives the judge authority to sentence for up to five years if the person uses the drug, and capital punishment for the drug dealer. See the full English version of the Law at the Bureau of Experts at the Council of Ministers <<http://boe.gov.sa/ViewSystemDetails.aspx?lang=ar&SystemID=31&languageid=2>> accessed 15 March 2013.

the prosecution evidence. This is in accordance with the international safeguards set out in the UDHR, as well as article 16 of the ACHR.<sup>96</sup>

2. The case highlights the influence of Islamic jurisprudence on *Shariah* courts, where the role of the prosecutor as well as the role of the accused can be seen to have been treated equally.

In relation to the final point, it may be worth highlighting that the influence of Islamic theory in regard to equality of arms is rooted in the Quran through general statements. For example, the Quran states: ‘Verily, Allah commands that you should render back the trusts to those to whom they are due, and that when you judge between men, you judge with justice’.<sup>97</sup>

A comparison between equality of arms in Saudi Arabia and the international human rights standards leads to a particular conclusion being drawn. Firstly, equality of arms, in the domestic law within the KSA, is similar to that required in the international human rights standards, particularly in the cases brought in the Saudi courts. It seems that there are no direct references made to the right to equality of arms in the context of Saudi Arabia, although it remains that the concept can be understood within the practice of the cases in relation to the *Shariah* court. Secondly, equality of arms in Islam is considered, albeit in a general statement without in-depth study or any reference to the concept.

Nevertheless, in its first and third reports, the NSHR has highlighted a number of issues surrounding the prevention of the accused from defending himself during the court hearing, which means to some extent a lack of equality of arms. In addition, the NSHR has been subject to a number of compliance-related claims, stating that litigation has been rejected by the court in writing. Moreover, a number of issues have been raised in regard to the pressure placed upon the accused during the process of the trial, which is seen as violating article 158 of the LCP, as well as various regional and international treaties sanctioned by the KSA.<sup>98</sup> Equality of arms ultimately results in the need to examine one of the main aspects of the right of the accused during the court hearing, which will be clarified in the following discussion.

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<sup>96</sup> UDHR, art 10; see also ICCPR, art 26.

<sup>97</sup> Surah 4, Verse no. 58.

<sup>98</sup> See, for instance, ACHR, art 15.

## 8. The right to be tried without undue delay

Throughout the criminal process, one of the most prominent and significant rights is the right to be tried without undue delay, which is due to the fact that the right of the accused, throughout the criminal process, could be affected by the time spent in the pre-trial or in-trial process. Importantly, this right has its roots in common law jurisprudence,<sup>99</sup> although it is known that the right has been guaranteed through the ICCPR, which states: ‘Everyone shall be entitled to the following minimum guarantees, in full equality ... to be tried without undue delay.’<sup>100</sup> Moreover, the ACHR—again, sanctioned by the KSA—makes direct and keen reference to the fact that any individual considered deprived of such a liberty, whether through arrest or detention, is recognized as being entitled to proceed before the court so as to ensure that the lawfulness of such an arrest is determined by the court. With this taken into account, it is emphasized that any individual arrested or detained on the basis of a criminal accusation should be quickly and without delay brought before a judge or other official recognized by law with the aim of exercising judicial power, and shall also be afforded the right to a trial within an adequate time or otherwise released. Ultimately, it is stipulated that release may be subject to guarantees to appear for trial, although pre-trial detention should, in no case, be the general rule of thumb.<sup>101</sup>

Furthermore, there are also a number of cases wherein a breach of the right of due process has been recognized, especially in the context of international criminal court jurisprudence.<sup>102</sup> For example, there is the case of *Michael and Brian Hill v Spain* where the accused was held for almost three years between arrest and final appeal.<sup>103</sup> Furthermore, the case of *Paul Kelly v Jamaica* shows the complainant claiming that his right was violated through the delay of his trial for more than eighteen months.<sup>104</sup> It seems that there is an apparent overlap between article 14(3)(d) and article 9(3) of the ICCPR in relation to the right of the accused to have a speedy trial, with both articles referring to the right of the accused to be provided with a timely trial. However, as seen

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<sup>99</sup> Gans, Henning and Hunter (n 88) 471-73; See also David Corker and David Young, *Abuse of Process in Criminal Proceedings* (2nd edn, LexisNexis 2003) 22-23.

<sup>100</sup> Art 14(3).

<sup>101</sup> ACHR, art 14(5-6).

<sup>102</sup> Wayne Jordash and Scott Martin, *Due Process and Fair Trial Rights at the Special Court: How the Desire for Accountability Outweighed the Demands of Justice at the Special Court for Sierra Leone* (2010) 23 *Leiden Journal of International Law* 607.

<sup>103</sup> See *Michael and Brian Hill v Spain*, Communication No 526/1993, UN Doc CCPR/C/59/D/526/1993 (2 April 1997) para 12.4.

<sup>104</sup> *Paul Kelly v Jamaica*, Communication No 253/1987, UN Doc CCPR/C/41/D/253/1987, 60 (1991) para 15.2.

in the previous chapter, article 9(3) regulates the length of detention before trial, whereas article 14(3)(d) refers to the actual time between arrest and trial.<sup>105</sup>

In relation to Saudi law, as detailed in the previous chapter, delay during the in-trial process has been assigned much attention in terms of protection through the LCP, which details a maximum time of six months from the time of arrest.<sup>106</sup> However, it is known that any delay during the trial process can be challenged by the accused, along with the exercising of the right to compensation during the trial. Trial delays may be accrued in two different ways:<sup>107</sup> first, by the court judges owing to absence; and second, for some other reason. In this same context, under the Saudi Judiciary Law, a committee has been established and assigned with a number of functions; nevertheless, the committee's tasks must adhere to the Judiciary Law, as detailed below.

1. The High Judicial Council is required to establish a committee known as 'Judges Investigation', which must be assigned a director and various judges, all appointed by the committee, and recognized as being from the Court of Appeal and the High Court.
2. The responsibilities of the committee are as follows:
  - a. Supervision and investigation of the judges' rulings in both the High Court, and the Court of Appeal; this is to ensure a date upon which the capacity of judges is clear.
  - b. Investigation into the compliance of judges in regard to certain cases.
  - c. Conduct of visits and investigations, whether or not any complaint has been made, with supervision twice annually.<sup>108</sup>

Under article 56, the committee is given its own rating. Notably, the committee is required to communicate with the judge in terms of the results of any complaints against him, at which point the judge has 30 days during which an appeal can be made. Furthermore, all appellant papers must be transferred to the High Judiciary Council, with a decision required to be made within 56 days.

Undoubtedly, the committee is perceived as being fundamental within the judicial system of the KSA, and it is acknowledged that visitation twice annually is

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<sup>105</sup> Joseph, Schulz and Castan (n 59) 432.

<sup>106</sup> LCP, s 8, arts 12-19.

<sup>107</sup> It might be worth mentioning here that there are different ways to delay in Islamic jurisprudence than in the Saudi legal system, see Al-Eshaikh, 'Mabda, surat al bat Fe Alkada al Shari' (2002) 8 Al Adl Journal.

<sup>108</sup> Judiciary Law 2008, art 55.

critical in order to ensure effective adherence to the rules. Nevertheless, at this point in time, no significant decisions have been made by this committee, which could be due to the fact that the committee has only been recently established, and may therefore require additional time to be more effective.

A comparison drawn between international human rights standards and the Saudi law shows that there is no direct reference in regard to the latter to the right of the accused to be tried without undue delay; the only mention in regard to the detention time that is compatible with article 14(3c) is in the LCP. However, in some cases, it can be seen that the trial may be extended for more than five years,<sup>109</sup> which is not from the time of detention where the accused is under the interrogation, but is the actual length of the trial. More importantly, the delay may occur not because of the time given to the accused to prepare a defence, but due to the complaint of the accused during the hearing that the confession was made under torture. In such a situation, the judge (in this case in *Shariah* law) will ask the accused to be sent back to the interrogation institution (which is in this case the BIPP) to be investigated and to ensure that the confession is valid.

## **9. The right not to be subjected to retroactive criminal law or more severe punishment**

The prohibition of retroactive criminal law is known to have its roots in international law as well as in Islamic jurisprudence.<sup>110</sup> Although ignorance of the law is no excuse, it is essential that individuals can ascertain the content of the law which governs their behaviour. The prohibition of retroactively criminal law is strongly linked to the right to a fair trial, as it is irrevocably an example of an unfair trial.<sup>111</sup> Accordingly, the following discussion attempts to examine this right in both the international domain and the Saudi Arabian legal system.

### **9.1 International law**

From an international perspective, this right has been safeguarded through article 15(2) of the ICCPR, which provides:

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<sup>109</sup> *Salman Mohamed Al Fouzan and others v Saudi Arabia*, Working Group on Arbitrary Detention A/HRC/WGAD/2012/8.

<sup>110</sup> UDHR, art 11(2).

<sup>111</sup> Rhona KM Smith, *International Human Rights* (5th edn, OUP) 268.



No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.<sup>112</sup>

By this article, it can be seen that this right has been guaranteed at a worldwide level, and may also be defined as one of the important aspects of the concept of due process.<sup>113</sup> Also seen in this article are the principles of ‘no crime except in accordance with the law’ and ‘no punishment except in accordance with the law’.<sup>114</sup> Furthermore, this article shows that retroactive penalties are prohibited, and there are various cases illustrating the breaches of this principle.<sup>115</sup>

However, regionally, the ACHR does not directly consider the right not to be subject to retroactive criminal law or heavier punishment, although it makes reference to another concept wherein retroactive principles may be applied, stating that: ‘No crime and no penalty can be established without a prior provision of the law. In all circumstances, the law most favourable to the defendant shall be applied’.<sup>116</sup>

## 9.2 Saudi Arabia

Importantly, *Shariah* law is widely acknowledged as being the underlying concept of non-retroactivity within Islamic jurisprudence: for example, the Quran states: ‘And we never punish until we have sent a messenger’.<sup>117</sup> Moreover, it is highlighted by Haleem, Sherif and Daniels that: ‘the Islamic criminal justice system under Islamic Sharia adopted and applied the principles of non-retroactivity of criminal laws long before this was known in a modern positive legal system’.<sup>118</sup> In this regard, within the Saudi legal system, such rights have been guaranteed constitutionally through the BLG, with article

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<sup>112</sup> Art 15(1).

<sup>113</sup> Mashood Baderin, ‘A Comparative Analysis of the Right to a Fair Trial and Due Process under International Human Rights law and Saudi Arabia Domestic Law’ (2006) *The International Journal of Human Rights* 270.

<sup>114</sup> Joseph, Schulz and Castan (n 59) 462.

<sup>115</sup> *ARS v Canada*, Communication No 91/1981, UN Doc CCPR/C/OP/1 29.

<sup>116</sup> ACHR, art 15.

<sup>117</sup> Al-Isra Verse 15.

<sup>118</sup> Abdel Haleem, Adel Omar Sherif and Kate Daniels (eds), *Criminal Justice in Islam* (Tauris 2003) 45.

38, for example, clearly stating that punishment is not to be assigned on a personal basis, and that punishment should not be considered on any basis other than that of the *Shariah*. Furthermore, the statement is made that ‘there shall be no punishment except for deeds subsequent to the effectiveness of a statutory provision’,<sup>119</sup> which provides clear insight into the principles centred on the legality<sup>120</sup> and prohibition of non-retroactive criminal law under Saudi Arabia’s constitution, corresponding with the Islamic norms of non-retroactive criminal law.

However, without the presence of criminal law, the non-retroactive criminal law concept is no longer considered efficient within the Saudi legal system due to the fact that, despite the *Hudud* and *Qisas* crimes, the non-retroactive criminal law concept must be adopted in the case of *Ta’zir* crimes, which have not yet been codified.

In an attempt to overcome this issue, the Saudi judiciary may consider enactment of criminal law which places focus on such crimes and punishment. Thus, in this context, the accused person may benefit retroactively from lighter punishment.

Clearly in line with international human rights standards, the Saudi Arabian judicial system adopts the principle of legality within the sphere of domestic law. The principle of retroactive criminal law has been regarded across Islamic traditions, as well as the principle of legality as the Islamic law, which cannot be applied retroactively unless it is in the interest of the accused.<sup>121</sup>

## 9. Post-trial rights

During the post-trial process, there are two rights that need to be safeguarded: the right to appeal to a higher tribunal and the right to receive compensation following wrongful conviction.<sup>122</sup> Each of these is discussed further below. The former involves the right to have the judgment revised and who has this right.<sup>123</sup> Whereas the latter concerns on how the process of compensation should be regarded.<sup>124</sup> This will be examined in light

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<sup>119</sup> BLG, English version  
<<http://boe.gov.sa/ViewSystemDetails.aspx?lang=ar&SystemID=4&languageid=2>> accessed 14 March 2013.

<sup>120</sup> See more about the principle of legality: Jonathan Herring, *Criminal Law, Text, Cases and Materials* (4th edn, OUP 2010) 10.

<sup>121</sup> Al-Eshaikh (n 46) 175.

<sup>122</sup> Cassese (n 91).

<sup>123</sup> It should be noted that the procedure of the appeal is different form jurisdiction to another, see Davies, and others, *Criminal Justice* (4th edn, Pearson Education Limited 2010) 335.

<sup>124</sup> Joseph, Schulz and Castan (n 59) 460.

of international human rights standards set in the Bill of Rights.<sup>125</sup> Further, the rights to a compensation arising out of a miscarriage of justice, and will be highlighted through various case studies taken from a Saudi court.<sup>126</sup> The main argument in this section will be the compatibility between the international human rights standards with the domestic law of Saudi Arabia and both rights will be highlighted and examined in the following.<sup>127</sup>

### **10.1 The right to appeal to a higher tribunal**

Following conviction, there is the right to appeal, which may be described as a critical human right.<sup>128</sup> The reason for this right is based on the fact that a miscarriage of justice may occur following a conviction or acquittal; thus, the right for appeal provides a further opportunity for all parties to have the case reconsidered by a higher tribunal. This is rooted in both civil and common law.<sup>129</sup> Importantly, this right has been considered and safeguarded directly in the ICCPR, which states: ‘Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to the law’.<sup>130</sup> With this there are many cases relating to the right of the accused to have his case reviewed by a higher tribunal, such as in the case of *Reid v Jamaica*.<sup>131</sup>

However, the word ‘according to the law’ in article 15(5) of the ICCPR presumably refers to the domestic law of the state party which, to some degree, sets a comprehensive framework on the jurisdiction of the state party’s domestic law. It is therefore under the decision of the state parties to abuse article 14(5) by establishing a law which denies the right of appeal in criminal cases.<sup>132</sup> The position within the KSA differs, as the Saudi legal system derives its rule from Islamic, and thus it may be worth providing a brief summary relating to the concept of appeal in the Islamic system, and accordingly examining the exercise of this right in the Saudi Arabian courts.

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<sup>125</sup> The UDHR and the conventions related to the right to a fair trial.

<sup>126</sup> The cases highlighted in this section have been approved by the High Judiciary Council.

<sup>127</sup> Note that the right to appeal will highlighted according to two main laws: the LCP and the Law of Procedure Before Sharia Courts.

<sup>128</sup> Cassese (n 91).

<sup>129</sup> See more about the kinds of miscarriage of justice in Peter D Marshall, ‘A Comparative Analysis of The Right to Appeal’ (2011) 22 Duke Journal of Comparative & International Law.

<sup>130</sup> ICCPR, art 14(5).

<sup>131</sup> Communication No 355/1989, UN Doc CCPR/C/51/D/355/1989 (1994).

<sup>132</sup> Joseph, Schulz and Castan (n 59) 454.

### 10.1.1 Islamic law

The right to appeal in Islam is one of the controversial issues amongst the scholars of *Madahib*. Some take the view that that Islamic law has no appeal system. Shapiro states:

... because two distinct judicial systems existed in Islam, some of the uses of appeal are not relevant to the Sharia courts of the kadis. Appeal as a sampling of administrative performance was irrelevant because the Qadis were not in the main line of administration. Appeal as a means of hierarchical control and coordination was irrelevant for the same reason.<sup>133</sup>

It is mistakenly claimed by some writers that Islamic law has no appeal process; however, in regard to Islamic law, the judge has to form his judgment from two main sources, namely the Quran and the *Sunnah*. If the judge exercises this method, he will be placed in the position of *Mujtahid*.<sup>134</sup> However, the *Mujtahid* is vulnerable in terms of mistakes, as his decisions are based on what he considers to be the meaning of both sources. Therefore, his decision will not be perfect, and will be subject to appeal.<sup>135</sup>

### 10.1.2 Saudi Arabian courts

The legal system of Saudi Arabia has two approaches in protesting against decisions: the right to appeal and the right to request review. Notably, in the case of the former, article 193 of the LCP affords the right to appeal to both parties. Moreover, through this same article, in the case of a claim of lack of jurisdiction, the right to appeal can also be exercised with consideration to court jurisdiction rules;<sup>136</sup> this is also clarified in the Law of Procedure Before Sharia Courts.<sup>137</sup> Notably, it is emphasized in the regulatory schedule of the law of Law of Procedure Before Sharia Courts that ‘the only person who has the right to protest against the judgment is the defendant or his lawyer.’<sup>138</sup>

However, article 194 of the LCP considers in depth the process of appealing a judgment, which needs to be initiated within 30 days of the judgment. At this point, following the judgment reading, a date for the receipt of a copy of the judgment should

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<sup>133</sup> Martin Shapiro, ‘Islam and Appeal’ (1980) 68 Cal L Rev 350

<sup>134</sup> ‘*Mujtahid*’ is an Arabic word for ‘thinker’.

<sup>135</sup> Al-Eshaikh (n 46) 230.

<sup>136</sup> As highlighted in LCP, arts 128-134.

<sup>137</sup> Law of Procedure Before Sharia Courts, art 174.

<sup>138</sup> Law of Procedure Before Sharia Courts, Regulatory Schedule 1/174.

be designated by the court, within 10 days, with this detailed in the case record. Moreover, an acknowledgement of receipt needs to be signed by the appellant. In the event of a failure to appear on the date established, a copy shall then be deposited within the case file, in addition to a note to the same effect, which would need to be entered into the record pursuant to the order of the judge.<sup>139</sup>

It is recognized that the efficiency of the right to appeal can be seen in the case of an appellant who, unhappy with a conviction, appealed within 15 days.<sup>140</sup> The case involved a husband violently beating his wife on a number of occasions, with the judge subsequently ruling in favour of the wife, awarding 9,000 Riyals, equal to GBP 1,500, by way of compensation. The Court of Appeal subsequently approved the decision on the basis that there was no reasonable ground to believe that the court's decision violated the rights of the appellant in any way.<sup>141</sup>

The second method of protesting against a judgment is for reconsideration,<sup>142</sup> which has been highlighted in the LCP,<sup>143</sup> where reconsideration can be requested by any of the litigants in the following situations:

1. If the accused is convicted of murder but the individual supposedly murdered is found to be alive.
2. If an individual is convicted of an act but another individual has committed the same act, thus resulting in contradiction and necessitating that one of the two be acquitted.
3. If evidence upon which the judgment was made is found to be false.
4. If the judgment is made on the basis of a previous judgment which is subsequently quashed.
5. If, following judgment, new facts or evidence emerge, which would have seen the accused acquitted of the crime.<sup>144</sup>

The final judgment process is detailed in the regulatory schedule to the Law of Procedure Before Sharia Courts, applies to:

- Cases that are not commonly under appeal.
- A judgment which has been accepted by the defendant.

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<sup>139</sup> See Law of Procedure Before Sharia Courts, Regulatory Schedule 1/176, 2/176.

<sup>140</sup> *ibid* art 178, and the Regulatory Schedule 1/178.

<sup>141</sup> Court of Appeal decision a\5G\310 2002.

<sup>142</sup> LCP, arts 206-212

<sup>143</sup> It is worth mentioning here that this method has been clarified in both the LCP and the Law of Procedure Before Sharia Courts.

<sup>144</sup> LCP, art 206.

- Cases in which the time for appeal has been exceeded.
- Judgments issued and/or signed by the Court of Appeal.<sup>145</sup>

As a way of drawing a comparison between the law within the KSA and international human rights standards, it can be seen that, theoretically, the right to appeal in the higher tribunal featured in the Saudi legal system even before the establishment of the Bill of Rights. This right has been recognized in Islamic jurisprudence as being one of the important elements of fair trial, although in the case of the Saudi Arabian legal system, the right to appeal—which has been guaranteed to the accused—comprises a number of challenges. Firstly, in the practical sense, there are some issues regarding the methods in which the appeal should be conducted: for instance, it has been noted that the right of appeal has been violated in the special court in Saudi Arabia, which may subsequently have a significant impact on the right of a sentenced person to exercise this right. Moreover, through various cases, it can be seen that the Court of Appeal in Saudi Arabia tends to send the case to the same judge who has sentenced the accused, which can be seen in the Court of Appeal’s decision ‘287/ 1392’: ‘the court has decided to send the case to the judge to reconsider the amount of the imprisonment’.<sup>146</sup> Such a procedure affects the right of the accused in the trial, as the same judge will have the same perspective and reasoning upon which the initial decision was made. Furthermore, it will affect his right to appeal again as, according to the Law of Procedure Before Sharia Courts, the Court of Appeal has to consider a case only once.

## **10.2 The right to receive compensation for wrongful conviction**

When an individual is found guilty of a crime and there is the assignment of punishment, the individual in question then has the right to compensation should there be the emergence of evidence which proves the individual innocent.<sup>147</sup> The award of compensation due to a miscarriage of justice is a concept largely accepted in international human rights law, as shown in article 8 of the UDHR, which places emphasis on establishing an efficient solution. Furthermore, through article 9 of the ICCPR, the right to compensation is maintained, with the statement made that ‘anyone who has been the victim of unlawful arrest or detention shall have an enforceable right

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<sup>145</sup> Al-Adel Journal (Muharram 1426 (2005).

<sup>146</sup> Court of Appeal decision, 287, 5/11/1392 (1972).

<sup>147</sup> Baderin (n 113) 272.

to compensation'. However, it seems that this right has been violated in many countries.<sup>148</sup> Moreover, article 14(1) and (2) of the CAT also highlights that the victims of torture have the right to compensation, although this right may apply to the pre-trial stage, it has the same meaning as article 9 of the ICCPR. Nevertheless, the right to compensation has been regarded in Islamic law as well as within the KSA. Importantly, the following discussion examines the Islamic notion of the right to compensation, and then the legal system within the KSA, with a comparison drawn at the end.

### **10.2.1 Islamic law**

Importantly, there are three different types of damages that may be incurred following a miscarriage of justice: incorporeal damages, corporeal damages and financial damages.<sup>149</sup> Jurists agree with the notion that the judge has no responsibility for any verdict made unless he is found to have deliberately delivered an incorrect judgment.

It is pertinent to highlight that Islamic jurisprudence acknowledges compensation, although the concept must be defined and distinguished as being separate from '*Diya*', which is money needing to be paid to a victim's family.<sup>150</sup> However, scholars in Islamic law have agreed that the right to compensation started from the principle of Islam which states that the tort has to be removed or '*Al darrar yoza'l*'.<sup>151</sup> The methods of compensation for miscarriage of justice can be divided into two, both giving the victim money. Firstly, the days he remained in prison or in detention are counted and he is awarded money for the number of days.<sup>152</sup> The second method is what can be defined as an evaluation of the time he spent in the detention or in prison.<sup>153</sup> However, the person who has the right to award the compensation in Islamic law is the judge or anyone who has been given the permission from the judge to award the compensation.<sup>154</sup>

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<sup>148</sup> Joseph, Schulz and Castan (n 59) 456.

<sup>149</sup> Al-Eshaikh (n 46) 345.

<sup>150</sup> Zuhair Al-Harhi, 'The Role of the Commission for Investigation and Public Prosecution and Its Impact on the Criminal Procedure in the Saudi Criminal Justice System' (PhD thesis, University of Kent 2005) 31.

<sup>151</sup> Ibn qudamah, *Al mugni*, 429/7, and *Jawahir al Ikleel*, Imam Malik, 151/2.

<sup>152</sup> Mohammed al-Ramli, *Nihayat al Muhtaj fe Sharh al minhag*, 5/71.

<sup>153</sup> Ibn qudamah '*al mughni*' (Dar Al-hiya Alturath al Arabi 1985) 429/7.

<sup>154</sup> Allahim, Abdulkarim, *Ta'aweed a'n an sejn*, (2002) 12 *Al Adl journal* 72.

### ***10.2.2 Saudi Arabia***

From a domestic standpoint, the right to compensation has been maintained and detailed in article 20 of the LCP, which highlights that the individual accused, who may have experienced harm as a result of wrongful accusations or who may have been imprisoned as a result of such, is entitled to compensation. Furthermore, in the same article, it is also noted that moral and material compensation should be paid when there is an acquittal judgment pursuant to petition, so as to ensure the damage suffered is mitigated.<sup>155</sup> In the Law of Procedure Before Sharia Courts, the only reference to compensation is in article 80, which is codified under the title ‘urgent requests’. This right allows the defendant to apply for compensation during the trial if he has proven that his right has been breached; however, it is for the court to accept or reject his request.<sup>156</sup>

In addition, if one of the methods of reconsideration is utilized by the appellant and it is subsequently found that there was, in fact, a miscarriage of justice, both financial and moral compensation should be awarded in consideration of the damage suffered by the appellant. In this regard, it is important to provide a distinction between the two different phases of compensation, which is fundamental in terms of jurisdiction:

1. Firstly, during the pre-trial phase, should abuse of process occur, the victim has the right to claim compensation by communicating to the court or challenging the abuse in the in-trial stage.
2. Secondly, during the in-trial phase, should abuse of process occur, the accused is not able to make a claim to the Board of Grievances owing to the fact that such an action would stand in contradiction to article 14 of its Law, which entered into force in 2008. This article explicitly prohibits the Board of Grievances courts from handling or governing cases from either the General Court or the High Judicial Council: ‘it is illegal for the Board of Grievances to accept or rule any objections which has been published by the courts or under its jurisdiction nor the verdicts from the High Judicial Council’.<sup>157</sup>

### ***10.2.3 Comparison***

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<sup>155</sup> LCP, art 217.

<sup>156</sup> Law of Procedure Before Sharia Courts, art 180 and the Regulatory Schedule, 1/180.

<sup>157</sup> Law of Grievances 2008, art 14.



It is clear that the right to compensation as a result of a miscarriage of justice is recognized in international human rights standards. In the case of Saudi Arabia, this right has been constitutionally recognized by virtue of article 18 of the BLG which provides the right to compensation. However, in the domestic context, the distinction between the right to compensation in the pre-trial stage is a little vague when compared with the procedure for this right in the international human rights standards. Moreover, it seems that the law within the KSA has some issues relating to the concept of compensation: as has been seen, there is an overlap between the compensation which the accused claims against the other party, and the compensation claimed against the court itself.<sup>158</sup>

The two systems derive their norms from different sources, as has been shown through Chapter Two; however, there is an apparent similarity between the Islamic concept and the practice of compensation with the international human rights concept of compensation which, in the case of Saudi Arabia, does not reflect in terms of its domestic law. This may be problematic as, when comparing the standards of international human rights with the Saudi legal system, the implementation of such remedies are not organized into one clear and enforceable law. On the other hand, when going back to the root source from which Saudi Arabia takes its law, which is, in this case, *Shariah* law, we see that the image *is* clearly compatible with international human rights standards. This may possibly indicate poor performance, or a lack of implementation, of the law within the legal system of Saudi Arabia.

## **11. Conclusion**

By examining human rights throughout the in-trial phase, it has been observed that, in theory, such rights have been guaranteed, although Saudi legislature has gone further by legitimizing this right in the BLG, which may be regarded as the constitution of Saudi Arabia. Furthermore, judicial independence becomes problematic when it comes to judges' appointment and removal, which may have been solved by the Judiciary Law promulgated in 2008, which refers to the High Judicial Council appointing the judges. The public hearing, as one of the in-trial human rights elements, has become a controversy when it comes to the accused in crimes related to national security. In

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<sup>158</sup> See Regulatory Scheduled of the Law of Procedure Before Sharia Courts, arts 173-174. To obtain an English version of the law and its regulatory schedules, Saudi Arabia Ministry of Justice <[http://www.moj.gov.sa/ar-sa/Pages/judgment\\_systems.aspx](http://www.moj.gov.sa/ar-sa/Pages/judgment_systems.aspx)> accessed 12.March.2013.

addition, presentation during trial has taken many steps further, although in some cases the accused may be deprived of his right to a legal representative. Nevertheless, according to the NSHR—as well as BIPP reports—the implementation of the right of the accused to have a legal representative has improved dramatically during the last decade.

The equality of arms has also been regarded as one of the significant aspects inherent in *Shariah* law; this area has been stipulated in many articles within the law of the KSA, such as through the LCP as well as the Judiciary Law, and most significantly, the BLG (which as stated above is widely recognized as the constitution of Saudi Arabia).

Nevertheless, various issues can be problematic in regard to the accused's rights to be tried without undue delay. It has been observed that many complaints have been submitted domestically to the NSHR or in the international sphere through the UN, as well as published in the media, relating to being held without trial or, in the in-trial stage, deprived of the right to trial within a reasonable time. Although the accused has the right to receive compensation, there is no explanation to illustrate why or on what legal basis the delayed has occurred. Such breaches are in contrast with the international human rights instruments sanctioned by the KSA, as well as the conventions such as the ACHR. Moreover, some cases presented in this chapter show that the right to appeal to a higher tribunal has been guaranteed in the post-trial phase.

## CHAPTER SIX: THE ROAD AHEAD FOR THE RIGHT TO A FAIR TRIAL IN SAUDI ARABIA: REFORMING THE SYSTEM UNDER INTERNATIONAL HUMAN RIGHTS LAW AND SHARIA

### 1. Introduction

Saudi Arabia, as we have seen through the course of this research, is facing significant challenges in its legal system especially in the pre-trial process.<sup>1</sup> It might be important for Saudi to adopt a creative methodology to comply with international human rights instruments namely the ICCPR, which of course has to be not in contradiction with its domestic law<sup>2</sup>; the ratification of the Convention against Torture (CAT) in 1984 was one of the significant advancements made in the last three decades in the Kingdom<sup>3</sup>, even though there are some reservations on this Convention.<sup>4</sup> However, the reform that Saudi Arabia should consider will apply to the pre-trial and fair trial procedures as well as the post-trial procedure.

The positive factor in reforming the judicial system of Saudi Arabia and making it comply with international human rights standards is the fact that these standards, as we have seen, are in harmony with many articles of *Shariah* law; thus it might be easy to consider such reformation without affecting the core of *Shariah* law.

The engagement of Saudi Arabia with international law reflects on its legal traditions and, since the participation of Saudi Arabia in the Universal Declaration of Human Rights (UDHR), we have seen the legal system improve and adopt some of these norms. This is further evidence that the opportunity for the Saudi legal system is significant. In the following discussion, the human rights of the accused during the pre- and in-trial stages, as highlighted throughout Chapters Four and Five, are examined, as well as various measurements to improve the quality of legal system performance.

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<sup>1</sup> See for example Opinions adopted by the Working Group on Arbitrary Detention at its sixty-fourth session, 27–31 August 2012, A/HRC/WGAD/2012/22.

<sup>2</sup> Al-Hargan A, 'Saudi Arabia and the International Covenant on Civil and Political Rights 1966: A Stalemate Situation' (2005) 9 International Journal of Human Rights 502.

<sup>3</sup> It is worth mentioned here that the Saudi has not ratify the optional protocol of the CAT convention that introduced a Subcommittee on Prevention of Torture (SPT), see resolution A/RES/57/199 entered into force on 22 June 2006.

<sup>4</sup> The reservation made by Saudi Arabia related to the jurisdiction of the Committee Against Torture (CAT) art 20, as well as the arbitration procedure in art 30(1), United Nations, Treaty Series, vol 1465, 85.

## 2. The codification of *Shariah*

As we have seen throughout the course of this chapter, the principle of legality has been regarded within the soul of *Shariah*. However, the principle of legality may lead to another significant concept which is highly linked to the right to a fair trial, which is the codification of *Shariah*.

The principle of legality means that no one may be incriminated or punished without a legal text which specifically defines the crimes and punishment in question. It also means that the judge may not punish anyone on the basis of his own wishes without lawful evidence and proof.<sup>5</sup> Furthermore, the principle of legality was mentioned in the main text of the Quran; however, this may act as a framework of this concept without giving specific details on how the rules can be formed.<sup>6</sup> Rehman has given an important distinction between the Islamic legal system and the fundamental principles of Islam, arguing that the latter remains unalterable and it can be changed under any circumstances, as mentioned in the Quran and *Sunnah*, the two main sources in Islam. He added that the development of the legal system under Islamic law was basically based on the jurist's understanding on the *Shariah* text, and thus it is man-made law.<sup>7</sup> Such statement might be used as a base to build up an argument of the possibility of codification of the text of *Shariah* law within the legal system.

In addition, we have noticed that the development of the legal system was based on (*Usul fiqh*) as a body of rules and principles that are developed by each and every Muslim jurist's reasoning aimed at approaching as closely as possible the highest ideals of Islamic doctrinal aspiration.<sup>8</sup> *Usul al Fiqh* as a doctrine has been playing a significant role in the criminal procedure, and it affects even the quality of the verdicts.<sup>9</sup> The codification of *Shariah* is not a new topic in the Islamic legal system; it has been debated and studied in many legal systems, and more importantly many countries have applied the

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<sup>5</sup> See more about the principle of legality in Islam: Mohammad Kamali, *The Right To Life, Security, Privacy and Ownership in Islam*, (Islamic Text Society 2008) 84.

<sup>6</sup> Cherif Bassiouni, *The Islamic Criminal Justice System*, (Oceana Publication 1982) 157.

<sup>7</sup> Javaid Rehman, *Islamic States Practices, International Law and The Threat of Terrorism; A Critic of The 'Clash of Civilisation in the New World Order'* (Hart Publishing 2005) 16.

<sup>8</sup> Mahdi Zahraa 'Characteristic Features of Islamic Law: Perceptions and Misconceptions' (2000) 15(2) Arab Law Quarterly 168-196.

<sup>9</sup> For more information about the *Usul al fiqh* Wael B Hallaq, 'Usul al-fiqh: Beyond Tradition' (1992) 3(2) Journal of Islamic Studies 188. Also, Mohamed Elewa Badar, 'Islamic Law (*Shari'a*) and the Jurisdiction of the International Criminal Court (2011) 24 Leiden Journal of International Law 424.

codification of *Shariah* law.<sup>10</sup> Al-Jarbou argues that some traditional scholars reject the codification of *Shariah* law, and concludes that: 1) codification will limit the discretionary authority that the *Shariah* judge enjoyed, and then the judge will be bound by the rules in the criminal law; 2) the *Shariah* codification will minimise the role of *Ulama* within the community; and 3) scholars fear that the establishment of panel codes will involve people who are not expert in the Islamic jurisprudence to create the law.<sup>11</sup>

It may be worth mentioning here that the codification of *Shariah* law may be able to do more than fulfil the international human rights standards mentioned in universal charters and treaties; it may go further to safeguard the domestic law from abuse from the authority and it may increase the stability of the legal system.

The categories of crimes and punishment, as seen in this research, are divided into three sections: *Hudud*, *Qisas* and *Ta'zir*. The first two categories are punished by penalties set out in the *Shariah* law; however, punishment for *Ta'zir* crimes is left to the discretion of the judge. Nevertheless, we have seen through case studies that the judges refer to the law when they are ready to make their decisions; however, an issue may arise when there is no law to refer to—for instance, if a crime which has not been defined as *Hadd*, or *Qisas* may directly fall under the concept of *Ta'zir*. In this situation the codification of *Ta'zir* is the cornerstone of the Saudi legislature. This codification of *Ta'zir* will reflect positively on the quality of the legal system.

The recommendation of the establishment of a criminal code/law is highly important for two reasons:

- A- Such code/law will satisfy the international human rights demands on Saudi Arabia in the field of human rights and the domestic legal reputation of the legal system. Further, the Saudi obligations under international treaties such as the UDHR and the CAT will be fulfilled to some degree.
- B- Such code/law will reduce the disparity between sentences, as seen where the crime has not been defined as *Hudud* or *Qisas* and where the judges apply different punishments. The codification of *Ta'zir* will reflect positively and encourage consistency between verdicts.

Nevertheless, the codification of sharia law may be a bit problematic if we consider the flexibility that may disappear, if codify the sharia. This point of

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<sup>10</sup> See for example, the *Safiyatu* case in Rudolph Peters, *The Re-Islamisation of Criminal Law In Northern Nigeria and The Judiciary: The Safiyatu Hussaini Case* (Brill 2005) 220.

<sup>11</sup> Ayoub Al-Jarbou, 'The Role of Traditionalists and Modernists on the Development of the Saudi Legal System' (2007) *Arab Law Quarterly* (Issue 21) 197.

view may need further search and might be one of the important elements coming up with a new Islamic criminal code.

### **3. The increased concern for the human rights of suspects in Saudi Arabia**

From a legal perspective, the legal system adopted within Saudi is clearly facing a significant challenge in terms of adhering to the international human rights standards highlighted in the Bill of Rights, and it has not sufficiently met the standards required in the CAT or the ACHR.<sup>12</sup> Although there is some degree of compliance with elements highlighted in the Bill of Rights—namely, the rights to liberty and security—it remains a notable challenge in terms of political freedom. This research has examined from a more legal perspective, and has not assessed political reformation without considering its value. In regard to reformation, the writer's viewpoint will be adopted based on the case studies mentioned, with the inclusion of any recommendations within each category of rights.

It is widely acknowledged that the LCP within the Saudi legal system, in addition to the Law of Procedure Before Sharia Courts, plays a notable role in terms of safeguarding the rights of accused individuals, whether this may be during the pre-trial or in-trial process. The presentation of the new Judiciary Law has a number of advantages in regard to the independence of the judiciary, and also in terms of allowing the judicial authority to function without any degree of obstruction or intrusion from the executive. Moreover, the role of the BIPP is also recognized as being one of the most important assurances in terms of protecting the rights of the accused. Nevertheless, the following discussion looks at two main aspects of the right of the accused, namely, 1) pre-trial rights and 2) in-trial rights. The discussion evaluates whether or not these rights both theoretically and practically are in line with international human rights standards. It also examines aspects of judicial performance in Saudi Arabia, such as judicial independence, and accordingly draws its conclusions and recommendations.

### **4. Pre-trial rights**

Pre-trial rights are considered in regard to the right to liberty which, as an overall concept, is acknowledged as having wide scope and a number of meanings. Nevertheless, the writer has sought to define and narrow down the meaning of such a

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<sup>12</sup> See Chapter Four (n 12). Also see the Conclusions and recommendations of the Committee against Torture CAT/C/CR/28/5 12.

right in regard to the scope of the pre-trial phase within the Saudi legal system. It has become apparent throughout the duration of this research that the right to liberty has been safeguarded within the Saudi constitution through the Basic Law of Governance (BLG), which grants a number of rights in relation to *Shariah* law. However, practically, there are a number of obstacles relating to human rights in terms of the right to liberty in the pre-trial stage, as are shown through the following discussion.

### **3.1 Necessity for restriction on arrest**

Although it can be seen that the protections from arbitrary arrest that are based on international human rights standards are protected in the LCP, in reality there remains a significant gap between these standards and the rights of the accused when under arrest.<sup>13</sup> The overall concept of ‘reasonably suspicious’ has not been preserved in the LCP, therefore raising the question of the legality of arrest. Furthermore, in theory, the law has acknowledged the concept of *flagrante delicto*, as provided in the LCP (articles 30 and 35). The issue surrounding arrest in the Saudi legal system is primarily the fact that most arrests are carried out without a warrant. For example, the question of the legality of arrest arose in the case of *Al Utabi*.<sup>14</sup> In this same context, no clear differentiations have been made between the concept of ‘stop’ in the criminal process and that of arrest.

One way to overcome the issue of arbitrary arrest within Saudi domestic law may be through decreasing the role played by the Ministry of Interior, which is known to interfere with the liberty of individuals; it may also be significant to empower the BIPP to play its role effectively and freely from the interference of the Ministry of Interior. It has become apparent throughout the study that the BIPP has prosecuted a number of cases where the individual accused claims that arbitrary arrest was carried out, which subsequently raises the question of the legality of the arrest. In contrast, however, and in regard to the decline of the role of the Ministry of Interior, it seems that the vast majority of arrests carried out by the Ministry of Interior and its department (Mabahith) are connected to political crime. For example, vague names are often assigned to crimes justifying such an arrest, including ‘social security’ or ‘interruption of the general system, such concepts are particularly dangerous for two main reasons:

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<sup>13</sup> See the cases in Chapter Four (n 41) and (n 42).

<sup>14</sup> *Utaibi v Saudi A/HRC/WGAD/2011/33* Human Rights Committee, Working Group on Arbitrary Detention.

1) As a result of the lack of criminal law within Saudi law, such definitions may apply to any type of crimes; it might be under the interpretation of the authority to define any act as being in breach of ‘social security’. Thus, the implementation of criminal law that clearly defines crimes might be one of the priorities for reforming the judicial system in Saudi Arabia, as seen early on in this chapter under the concept of codification of *Shariah*.

2) In a practical sense, such terms may be used as a weapon against those who support reformation or liberal movement within Saudi Arabia.<sup>15</sup> For instance, the human rights activists, who seek a greater degree of liberal and political freedom, may be under the concept of national security mentioned earlier and therefore they may be vulnerable to any action taken against them. Here, we can see clearly that such courts were used against Mr Al-Qahtani.<sup>16</sup>

### **3.2 Liberty and search and seize**

The right to privacy has been protected constitutionally, such as through the BLG (article 37) and in the criminal process, with various references made to this right in the LCP’s articles, namely, articles 40, 42 and 45.<sup>17</sup> However, one consideration regarding the right of law enforcement officers to enter and search a property is noted in article 41 of the LCP as necessitating a written order from the BIPP; however, no such documentation is required if the location needing to be searched is not a ‘property’. Essentially, the issue in this regard is that this article fails to explain the meaning of the term ‘property’, and merely states ‘place where people live’. Such a vague description can be a problem in the sense that the place should have been clearly clarified; unfortunately, however, the regulatory schedule of the LCP shows no description in this regard, which may constitute a problem for the suspect. It might be advisable for the administration to include an article within the LCP explaining in specific detail how the research must be conducted, and include a definition of ‘property’, as these elements are not clarified within the LCP.

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<sup>15</sup> Richard Dekmejian, ‘The Liberal Impulse in Saudi Arabia’ (2003) 57 Middle East Journal, 411.

<sup>16</sup> See Ellen Knickmeyer, ‘Saudi Court Convicts Rights Activist’ *Wall Street Journal* (9 March 2013).

<sup>17</sup> BLG Royal Decree A/90  
<<http://www.boe.gov.sa/ViewSystemDetails.aspx?lang=ar&SystemID=4&languageid=2>> accessed 18 March 2013. Also see Chapter Two 3.2 Basic Law of Governance.



### 3.3 The right to have a legal representative

It can be seen that the right to legal assistance within the Saudi legal system has been assured constitutionally and within the texts of the LCP,<sup>18</sup> as well as in the Code of Practice. Nevertheless, in the case of the latter, no clear reference has been made in terms of where this right is compulsory. For instance, it is not shown whether the right to have a legal representative should be effective during or following charge. However, it seems that there is a clear incompatibility between domestic law and international human rights standards when it comes to legal representation. The only dissimilarity between the legal system in Saudi and the requirements is the fact that the Saudi law does not differentiate between the right to legal representation during the investigation and during the detention time.<sup>19</sup> This can be overcome by clearly stating this right in the LCP, or otherwise through the implementation of a provision describing the difference between both stages of the criminal process.

Moreover, some cases illustrate the incompatibility between the international human rights and the domestic law of Saudi Arabia in regard to lawyer consultation:

- 1) The case of *Al-Samhi* has shown that access to a legal representative has been one of the significant issues facing the accused before the trial. The report shows that the accused was not been presented before a judge nor did he benefit from legal assistance or access to a lawyer.<sup>20</sup>

It seems that there are some obstacles for the lawyers to present their defence. The case of *Gellani v Saudi Arabia* shows that there are some obstacles for the lawyer to access the court.<sup>21</sup>

It might be worth mentioning in this regard that there should be implementation of articles related to the legal representative pursuant to articles 4, 17, 18 and 19 of the LCP. The above cases show that there are incompatibilities between the criminal procedure in Saudi domestic law and those requirements set out in international human rights standards.

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<sup>18</sup> See Chapter Four (n 69).

<sup>19</sup> The only mention is in article 4, which provides that suspects be allowed to contact their lawyer.

<sup>20</sup> *Al-Samhi v Saudi Arabia*, see the Opinions adopted by the Working Group on Arbitrary Detention at its sixtieth session, 2–6 May 2011, A/HRC/WGAD/2011/19.

<sup>21</sup> *Gellani v Saudi Arabia*, see Opinions adopted by the Working Group on Arbitrary Detention at its sixtieth session, 2–6 May 2011, A/HRC/WGAD/2011/2.

### 3.4 Detention controversy

Undoubtedly, detention is a significant issue facing the criminal process within the Saudi legal system. Accordingly, in an attempt to understand the issue of detention, there is a need to carry out an analysis through adopting two different perspectives which will facilitate the formulation of the concept of arbitrary detention: the length of detention and interrogation safeguards. It should also be attempted to set a measurement to overcome problematic detention.

#### 3.4.1 Length of detention

Subsequent to the discussion provided in Chapter Four, under Saudi law the length of detention can be up to six months including the implementation of a number of procedural matters prior to reaching six months.<sup>22</sup> Nevertheless, in practice, there have been a number of cases where the six-month period has been exceeded, with some periods lasting several years without the individual being released.<sup>23</sup> Moreover, as has been seen in the same chapter, even within the international human rights standards, particularly in the case of the ICCPR, there is a significant overlap between a number of different articles in relation to detention length.<sup>24</sup> Practically, there is no limit for the pre-trial detention in Saudi Arabia, even though the law strictly sets a specific time for the length of detention.

The phenomena of detaining a suspect for a period exceeding six months has become one of the main challenges facing Saudi Arabia. Nevertheless, it has been recognized that, following its establishment, the National Society for Human Rights (NSHR) has adopted a key role in terms of emphasizing such an issue, such as in relation to arbitrary detention.<sup>25</sup> Furthermore, some cases illustrate the exceeding of the time of detention; for instance, in the opinion adopted by the Working Group of Arbitrary Detention, it can be seen that in the case of *Mr Al-Fouzan and others v Saudi* the suspects were deprived of their right to be brought promptly before the court and remained in detention for periods which were clearly in breach of the LCP.<sup>26</sup>

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<sup>22</sup> See LCP, arts 109, 112, 113 and 114.

<sup>23</sup> *Hwieti v Saudi* A/HRC/WGAD/2011/30.

<sup>24</sup> See, for instance, ICCPR, arts 9(3) and 14(3)(c).

<sup>25</sup> Chapter Four, 4.4 Issue of implementation (n 83).

<sup>26</sup> See the Opinions adopted by the Working Group on Arbitrary Detention at its sixty-third session, 30 April-4 May 2012 in the cases of *Al-Fouzan, Al-Twijri, Al-Brahim and Al Khamisi v Saudi Arabia* A/HRC/WGAD/2012/8. Chapter Four (n 82).

The Saudi Arabian administrative may choose to reconsider the length of detention as it could result in violation of human rights. The LCP sets the length of detention at up to six months; however, recent developments show that the Consultative Council may play a negative role in this regard.<sup>27</sup> Unfortunately, through the course of this research, it has been observed that the Council is studying a draft law which may extend the length of detention, which may reflect negatively on human rights conditions and may make Saudi Arabian domestic law incompatible with human rights norms.

In its annual report, the CAT Committee showed its concerns about allegations of prolonged pre-trial detention of some individuals beyond the statutory limits prescribed by law, which heightens the risk of, and may on occasion of itself constitute, conduct in violation of the Convention. In this connection, the Committee expressed its concern at instances of denial, at times for extended periods, of consular access to detained foreigners. Moreover, the Committee was concerned at the limited degree of judicial supervision of pre-trial detention.<sup>28</sup>

#### ***3.4.2 Measure to challenge unlawful detention***

As mentioned above, under the Saudi Arabian LCP the time of detention may last up to six months, and in some cases the time will exceed the limits. However, one key issue in this regard is the procedure of complaining when the detention times are exceeded. It has been seen in this research that there are more than two departments responsible for receiving the complaint from the accused and then raising the issue with the BIPP, being the NSHR (a non-governmental organization) and the Human Rights Commission.<sup>29</sup> During the period of detention, the suspect will be vulnerable to the abuse of his rights or may be tortured to obtain a confession. Nevertheless, it is not clear either in the LCP or in the Law of Procedure Before Sharia Courts how the suspect can complain about any breach of his rights either after the exceeding of the six months set out in the LCP or during the period of his or her detention.<sup>30</sup>

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<sup>27</sup> Shura Council <<http://www.shura.gov.sa/>> accessed 12 January 2013. See also the NSHR on this drafting law, *Al-Riyadh* newspaper (Issue 16155, 16 September 2012).

<sup>28</sup> Report of the Committee against Torture Twenty-seventh session (12-23 November 2001) Twenty-eighth session (29 April-17 May 2002) General Assembly Official Records Fifty-seventh session Supplement No 44 (A/57/44) note 100 (d).

<sup>29</sup> Council of Ministers Resolution Number 207, 2005. See the full text of the English version in the Bureau of Experts at the Council of Ministers <<http://www.boe.gov.sa/ViewSystemDetails.aspx?lang=ar&SystemID=255&languageid=2>> accessed 08 January 2013.

<sup>30</sup> The LCP explained how compliant may be made regarding the length of detention; however, the Regulatory Schedule does not explain.

This study has seen that many cases related to the detention have arisen either from the NSHR or the Human Rights Commission (HRC) or from the CAT Committee.<sup>31</sup> For example, the CAT Committee states that prolonged periods of detention pre-trial increase the risk of violation of the CAT that Saudi Arabia has ratified. Moreover, it is noted by the Committee that there is concern with regard to the limited degree of judicial supervision surrounding pre-trial detention. In this regard, it is stated that there are: ‘reports of incommunicado detention of detained persons, at times for extended periods, particularly during pre-trial investigations. The lack of access to external legal advice and medical assistance, as well as to family members, increases the likelihood that conduct violating the CAT will not be appropriately pursued and punished.

It might be appropriate to apply a method to challenge the unlawful detention; an independent complaints institution might be one of the significant ways in which to challenge such detention.

The BIPP has the duty to investigate crimes and at the same time progress the case in the court. However, within BIPP law, there is no clear mention of whether this institution can effectively handle complaints.<sup>32</sup> It might be difficult for the BIPP to both investigate crimes and at the same time receive complaints from detainees. This could be overtaken by an independent complaints institution which could become part of the government body and receive quarterly reports as to how the implementation of the criminal procedure is taking place in the BIPP. Furthermore, the independence complaints institution could have the duty to visit the detention centres and receive any complaints from detainees as well as challenge any unlawful breaches of detention periods.

### ***3.4.3 Interrogation safeguards***

Throughout the period of detention, the accused is commonly recognized as being vulnerable throughout the interrogation, despite such a process known to provide various assurances in terms of the Saudi criminal process. Nevertheless, such interrogation safeguards can be broken down into three main protections: the right to

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<sup>31</sup> Chapter Four (n 81), the second periodic report of Saudi Arabia (CAT/C/SAU/2).

<sup>32</sup> See art 3(f) that gives the BIPP the duty to inspect detention centres and prisons. See the English version <<http://www.boe.gov.sa/ViewSystemDetails.aspx?lang=ar&SystemID=124&languageid=2>> accessed 3 March 2013.

adequate time for defence preparation, the right to legal representation, and the right to be free from cruel treatment.

In regard to the right of the accused to have adequate time to prepare a defence, it has been seen that the LCP has many protections in this regard, such as, for example, articles 69, 70 and 73, which set out the rights of the accused to have sufficient time and facilities to prepare a defence. The meaning of the facilities, in this context, refers to legal representative as a lawyer, which has been explained in the earlier discussion. In the case of *Geloo v Saudi Arabia*,<sup>33</sup> such rights were violated, even though this right was expressly provided in the LCP. This case, as well as others, draws attention to the role of the BIPP within the context of Saudi domestic law.

The second safeguard protection is the right to legal assistance, which is an issue requiring in-depth examination in an attempt to completely understand the limitation of the LCP within the domestic sphere. The right to legal representation has been assured in the domestic law of the KSA, such as through article 64 of the LCP, which stipulates clearly the right of the accused to have legal representation throughout the investigation process. However, no mention has been made in the LCP surrounding the right of the accused to have legal assistance prior to the investigation, which is at the beginning of the detention and immediately after the arrest. It might be significant to include such an article to highlight the accused's right to have legal assistance after his arrest and during his first appearance in the police station.

A lack of such a right may be acknowledged in terms of there being no express mention of the same, and it is clear from this study that law enforcement officers are not necessarily under any obligation to inform the arrested person of the right to have a legal representative. This can be another problem, and thus it might be advisable to enshrine various provisions in the LCP referring to the right of the accused to have a legal representative directly following arrest. On the other hand, this should be discussed in depth in the LCP's regulatory schedule.

In the same context, it seems that the lack of lawyers is another issue to be taken into account within the Saudi Arabian legal system, with the number of practising lawyers not in line with the number of cases.<sup>34</sup> The law of practice within Saudi Arabia refers to 'government agencies' as institutions to which the lawyer can speak on behalf

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<sup>33</sup> See Chapter Four (n 104).

<sup>34</sup> According to statistics, the number of registered lawyers in Saudi Arabia is about 1,600 as at 2012. For more, see the Ministry of Justice <<http://www.moj.gov.sa/ar-sa/Pages/default.aspx>> accessed 15 January 2013.

of the accused. Nevertheless, as has been acknowledged, the police station has not been mentioned directly in the LCP, and thus the lawyer's role in the police station is somewhat vague owing to the fact that there is no clear reference made to such.

The third safeguard throughout the interrogation process is the right of the accused not to be subjected to cruel or otherwise inhumane treatment. It seems to be the case—as gathered throughout the course of this research—that there is a significant gap between the right of the accused not to suffer torture in both theory and in practice. It has been observed that the law in Saudi Arabia has been emphasized in more than one area concerning the prohibition of using any methods of torture that make it clear that using torture is strictly prohibited in the criminal procedure.<sup>35</sup> For example, article 102 of the LCP refers to the right of the accused not to experience any form of degrading treatment. The right protected in this article can be seen through the explanation of the meaning of 'torture' throughout the Saudi Arabian process. The explanation progressed further to protect the accused even from the oath during the investigation, which is known to be a significant distinction, as the normal meaning of torture could possibly refer to physical pressure on the accused. In this way, in a theoretical sphere, there is some degree of compatibility between international human rights standards and the domestic legal system in Saudi Arabia; thus, reference is made to the definition of torture in the CAT.

From a more practical perspective, one of the key issues in regard to this study is establishing reliable sources within the KSA to track any abuse of law enforcement power. Two key resources have been highlighted: the NSHR and the HRC.<sup>36</sup> One case providing a sound example is that of *Utaibi*, which attracts focus due to arbitrary detention within the country.<sup>37</sup> So as to eradicate such a problem, it may be considered fundamental to:

- 1) improve the overall transparency of such by published cases within the Saudi journal, which can then be examined in depth;
- 2) alter the role adopted by the Ministry of Interior. This role should be restricted by giving the Ministry of Justice, in addition to the BIPP, responsibility in the human rights process to ensure the protection of individual liberty.

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<sup>35</sup> See, for instance, LCP, arts 2 and 102.

<sup>36</sup> See the discussion of the effectiveness of these two organizations in Chapter Two (n 104) and (n 105).

<sup>37</sup> Chapter Four (n 41).

Another concern that may relate to the right of accused not to be subjected to torture is the interaction between the authority of Saudi Arabia and international human rights instruments, and the CAT is an example of this interaction. It seems that the Saudi authority has not fully interacted with the CAT, and this can be clearly seen in the periodic reports initiated by Saudi in 2002. Even though the report was a significant step toward explaining how the right of the accused can be applied under Saudi Arabian domestic law, there is just one report concerning the CAT Committee.<sup>38</sup> The second report has not yet seen the light yet; however, it might be advisable for the authority in Saudi Arabia to provide the CAT Committee with the report showing the recent developments in the criminal justice system including:

1- The recent development in the field of human rights in general which goes in line with the recommendation of the CAT Committee. This recommendation was about the establishment of a human rights institution in Saudi Arabia.<sup>39</sup>

2- What has been done in the judicial domain; for instance, the Judiciary Law promulgated in 2008 was one of the significant steps in the field of human rights, as seen early in this research by applying the concept of separation of powers.

### **3.5 The right to silence and the right not to self-incriminate**

In line with the discussion throughout this research, the right to silence and the right not to self-incriminate is one of the significant challenges facing the pre-trial and in-trial stages within the domestic law of Saudi Arabia, There is no direct reference to the suspect's right to silence; nevertheless, article 102 of the LCP makes some mention which, to some degree, may prove the acknowledgment that the suspect has the right not to self-incriminate.

Ultimately, it may be recognized that the Saudi criminal justice system needs to be clearer and needs to ensure separation when it comes to the right to silence, essentially for two main reasons:

- 1) This right has been guaranteed in Islamic jurisprudence as well as in the Saudi legal system.<sup>40</sup>

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<sup>38</sup> See the Saudi Arabia Initial Report. CAT/C/42/Add.2, 20 September 2001.

<sup>39</sup> See the Recommendations to Saudi Arabia in the Report of the Committee against Torture, G.A Fifty-seventh session, 44 (A/57/44) note 101(k).

- 2) This right, as has been seen, has been protected internationally as a key safeguard for the right to a fair trial, namely, in the ICCPR, article 14(3)(G), and with a distinction being made between this right during the interrogation and in-trial stages.

It can be concluded here that in the LCP the right to silence is neither explicitly highlighted nor prohibited. Moreover, in line with this conclusion, it can be seen that this right may be implemented during the criminal process within the KSA, despite there being no direct reference made to such. In article 64 of the Law of Procedure Before Sharia Courts, if the defendant refuses to answer a question from the judge, the judge will repeat the question three times in the same trial; if the defendant chooses not to answer, then he will be regarded a *Nuqool* which means ‘rejection’, and the judge accordingly will apply the necessary in the case. We can observe here that this article fails to examine what should be done in the event of rejection by the defendant, and it might be considered to expand extensively the role of rejection.

#### **4. Problems facing the right to a fair trial in the Saudi legal system**

As we have already stated in this chapter, the opportunity for the Saudi legal system to be compatible with international human rights standards is significant. For the first time, the right to a fair trial is one provided for in both the LCP as well as the Judiciary Law in Saudi Arabia. These two laws, enacted just in the last decades, open the path to the Saudi legislature to improve the quality of judgments. It might be valuable to consider some aspects of the fair trial within the Saudi judicial system in the light of the two laws, and evaluate the effectiveness of the implementation of these laws on the judicial performance.

##### **4.1 Some observations on the right to trial by independent courts**

It should be highlighted here that the Judiciary Law in Saudi Arabia—enacted in 2008—makes a number of references to the concept of judicial independence. For example, the first four articles highlight the power from which the judiciary takes its role.<sup>41</sup> Article 1 begins with the words, ‘The judges are independent’, and thus no

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<sup>40</sup> See LCP Appendix, art 2.

<sup>41</sup> See Chapter Five (Judicial independence) (n 34),(n 35) and (n 36).



authority or any type of control is adopted in regard to judges' decisions. Moreover, it is clearly stated that no one has the right to interfere with judges' decisions.<sup>42</sup>

Nevertheless, although the Judiciary Law stemmed from the potential to achieve efficiency of judicial performance, it has nevertheless been highlighted that there are a number of elements undermining the independence of the judicial system within Saudi Arabia. In an attempt to gain insight into this problem, two main aspects of such independence will be examined, including the appointment of judges and the limitation of judges' authorities.

As has been seen throughout the course of the study, the procedure by which the judges are appointed and transferred can be found in articles 31–50 of the Judiciary Law, throughout which a number of issues, in addition to interferences, are seen in regard to executive power. Essentially, this could result in poor performance, which could in turn lead to a significant miscarriage of justice. For example, article 31(d) sets out the requirements for working as a judge and refers to 'a person, who has graduated from any Shariah college, or any college equal to the Shariah college'. This can be acknowledged as being anyone who has not graduated with qualification of *Shariah*, and that such an individual should not be eligible to work as a judge. This article should be more wide-ranging so as to only include those who have graduated from a legal background. This is due to the fact that not all aspects of the judicial system are related to *Shariah* law.<sup>43</sup>

The appointment of judges is another consideration within the judicial system of Saudi Arabia. It can be seen that the executive power has the last say in the appointment of judges, as seen in article 47, which refers to the royal decree for the appointment of a judge based on the recommendations of the High Judiciary Council.<sup>44</sup> The impact of this for the independence of the judiciary is clear, as the judges are appointed by election from the High Judiciary Council, with election subsequently decided by the King.

In relation to restrictions upon judges' authority, it has been shown that, in the criminal process, there are no limitations upon judges' authority, with the exception of the spirit of *Shariah* norms.<sup>45</sup> This is one of the most important elements associated with

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<sup>42</sup> Judiciary Law 2008, art 1.

<sup>43</sup> LCP, art 1 is identical to the Law of Procedure Before Sharia Courts, art 1.

<sup>44</sup> In the Judiciary Law, there is more than one reference to the royal decree regarding the judges' appointment. See, for instance, art 5(f).

<sup>45</sup> See Judiciary Law, art 51, Also See this limitation in Chapter Five, section 3.3 (n 43).

the Saudi Arabian legal system; compatibility between Saudi Arabian law and Islamic law is the most fundamental consideration for the judge when announcing his decision.<sup>46</sup>

One of the main elements associated with the limitation upon the judges' authority is stipulated in the Law of Procedure Before Sharia Courts, namely, the disqualification of hearing a case if any of the parties has a relationship with a judge. For example, article 90, section 8 of the Law of Procedure Before Sharia Courts states that the judge is directly disqualified from hearing the case if *inter alia* he provided any of the parties with *Fatwa* even before being appointed as a judge, or if he has given his personal opinion on the case before the trial. Such safeguards make it clear that, in terms of impartiality, the Saudi legal system may go further in terms of protecting the independence and impartiality of the judiciary.<sup>47</sup>

It can be concluded here that the legal system implemented within the Saudi legal system has one strong issue in terms of independence, which is that relating to the potential interference of executive power, and the impact of decisions made by judges. With this noted, as has been highlighted previously, such issues may be overcome through the independent election of judges as well as the member of the High Judiciary Council. It might be appropriate for the judge appointment issue to consider the importance of the High Judicial Council and make its role stronger by granting more power to the Council. On the other hand, the role of the royal decree in terms of judge appointment could simply be as a procedural matter.

#### **4.2 Another concern for the right to a public hearing**

Undoubtedly, the right to a public hearing is one of the most controversial issues apparent within the Saudi legal system. This particular right has been acknowledged in Islamic *Shariah* that makes it incomprehensible for Saudi law not to apply the right to a public hearing. Moreover, as has been seen through this study, in many cases in the Islamic history, a judge announces the trial and asks people to attend.<sup>48</sup>

Nevertheless, in accordance with Saudi law, the right to a public hearing has only been assured through article 61 of the Law of Procedure Before Sharia Courts and through article 155 of the LCP without any practical implementation, except in specific

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<sup>46</sup> Nasir Al-Joufaan 'Public Hearing in the Judicial Domain' (2001) 5 Al-Adl 15.

<sup>47</sup> Law of Procedure Before Sharia Courts, art 90, clarified in the Regulatory Schedule of the same Law 9/90.

<sup>48</sup> Al-Joufan (n 46).

cases.<sup>49</sup> The only exception mentioned in the two previous articles are to firstly protect the privacy of any parties, and secondly in the case of public morality.<sup>50</sup> Essentially, both articles do make it clear that the trial within the Saudi legal system must be in public to ensure compliance with domestic law. However, incompatibility can be seen between the requirements noted in the international human rights standards, namely, article 11(1) of the UDHR and the regional treaties such as article 13(2) of the ACHR.<sup>51</sup>

From a practical perspective, it has been acknowledged that there are various issues relating to the publicity of the trial within the context of the Saudi Arabian legal system; this can be seen through issues stemming from two main dimensions:

- 1) In regard to normal crimes—or even serious crimes. In this sense, publicity has not been considered in the Saudi Arabian courts, although through this research it has been noted that attending trials has to be done through a bureaucratic procedure, thus making it difficult to attend the trial without facing a number of challenges.<sup>52</sup>
- 2) The special trial—which is that set for ‘security reasons’—is where the accused has been deprived of many rights, whether during the pre-trial stage or the in-trial stage. Publicity has been clearly lacking in the case of such trials against people accused of terrorism activities, which should be exercised in very limited cases, and never extended further than necessary. However, there has been some slight improvement in relation to the publicity of such crimes, with the case of *Al-Qahtani* raising the question of publicity within Saudi Arabia.<sup>53</sup>

In an attempt to overcome this problem, two key viewpoints—legal and procedural—may have to be considered:

- A- Legal perspective: it seems that, in the case of both article 61 of the Law of Procedure Before Sharia Courts and article 155 of the LCP mentioned earlier, emphasis is placed on publicity; however, in depth, there are various exceptions that may be considered unnecessary, such as in the case of article 61 of the Law of Procedure Before Sharia Courts, which affords judges more power to make

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<sup>49</sup> The only public hearing was the case of *Al-Qahtani*, see Chapter Five (n 54) and (n 55).

<sup>50</sup> These two exceptions are mentioned in the Regulatory Schedules of the Law of Procedure Before Sharia Courts; however, these remain as exceptions

<sup>51</sup> See the Human rights Watch report on Saudi Arabia ‘Precarious Justice Arbitrary Detention and Unfair Trials in the Deficient Criminal Justice System of Saudi Arabia’ 2008 vol 20, no 3(E) 100.

<sup>52</sup> This happened during the course of this research, as there were some bureaucratic obstacles to overcome.

<sup>53</sup> Chapter Five (n 54) and (n 55).

the trial private—albeit under vague circumstances. Importantly, the article fails to clearly highlight what is ‘public order’, upon which judges rely to make the trial private. Essentially, there is no explanation in the regulatory schedule of the Law of Procedure Before Sharia Courts for this article. Therefore, it might be appropriate to include an article in the regulatory schedule centred on providing in-depth clarification of the circumstances required for making the trial private.

- B- The procedural perspective refers to the way in which publicity needs to be adopted. Essentially, it can be seen that the law within Saudi Arabia refers to one type of court; this particular court is known to have jurisdiction in regard to all crimes within the legal system of Saudi Arabia, including those relating to ‘public security’. Importantly, special courts have not been examined to a significant degree due to the fact that there is no sound legislation explaining their performance. With this noted, it can be observed that all Law of Procedure Before Sharia Courts or any pre-trial actions may be carried out in direct consideration of the two main laws: the LCP and the Law of Procedure Before Sharia Courts.

The problem associated with the special courts focuses attention upon the role adopted by the executive power, which is seen through those cases where an individual is accused of a crime relating to terrorism. It has been seen that a number of safeguards are absent. For example, the right to publicity in the special court is not recognized as being as efficient as in normal crimes. Another issue relates to publicity in terms of recording equipment.<sup>54</sup> Moreover, the media has, in certain cases, also been prohibited from attending various hearings. The admission of the media into the courtroom has therefore been somewhat limited and, in some cases, has been entirely prohibited.

### **4.3 Presence of the accused**

The accused’s right to be present during the trial cannot be separated from the right of the accused to have legal representation during the custody and interrogation process.

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<sup>54</sup> Al-Qahtani trial, Chapter Five (n 56). It might be notable that the trial of Mr Al-Qahtani ended during the course of this research. He was sentenced to 10 years’ imprisonment. See Amnesty International, ‘Saudi Arabia punishes two activists for voicing opinion’ (Annual Report 2011) <<http://www.amnesty.org/en/news/saudi-arabia-punishes-two-activists-voicing-opinion-2013-03-11>> accessed 23 March 2013.

Attendance during the trial is a concept that has been protected in the Saudi legal system—both in the LCP and the Law of Procedure Before Sharia Courts. Such presence has been codified under ‘*Wakalla*’, which, to some degree, refers to a lawyer.<sup>55</sup> The right of an accused to be represented during a trial within the Saudi legal system is seen to adhere to international human rights standards and reflect various safeguards noted in the UDHR, and in line with the ACHR, article 16(3).<sup>56</sup>

The only issue of concern can be seen as stemming from two main arguments: firstly, the law within the KSA has highlighted this right, although this is not obligatory, thus meaning that if someone commits a serious crime, he or she has the right to choose not to be represented by a lawyer, subsequently making it difficult for the accused to defend himself—particularly in the case of serious crimes; secondly, this point is related to the previous point in the sense that, within the Saudi jurisdiction, there is no mention of legal aid, which is a legal issue and another area of concern due to the KSA failing to recognize the concept of legal aid, and thereby putting Saudi Arabia’s legal system in line with Islamic jurisprudence. Such a situation has the potential to result in serious contradictions between international human rights standards and the domestic law of Saudi Arabia.

In an attempt to overcome this issue, it is advisable that some provisions be included within the LCP referring to the right of the accused without means to pay for legal representation.

The issue of legal aid has been one of the controversial issues in Saudi Arabia during recent years, as has been recognized throughout the course of this research. The absence of legal aid may be explained by the following:

- 1) The legal framework for the practising lawyers means that there is no clear recognition from the court or the judges of the role of the lawyer in Saudi Arabia, even though the Code of Practice was established in 2001. In addition, the accused is never asked if he wants a lawyer during the trial.<sup>57</sup>
- 2) Possibly more significant is that the number of practising lawyers is inadequate in terms of setting a regulation for practising lawyers.<sup>58</sup> It may

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<sup>55</sup> See Code of Law Practice, art 1, Royal Decree No. M/38. To obtain English version, see the Bureau of Experts at the Council of Ministers <<http://boe.gov.sa/ViewSystemDetails.aspx?lang=ar&SystemID=126&languageid=2>> accessed 23 March 2013.

<sup>56</sup> It is in line with ICCPR, art 14(3)(d).

<sup>57</sup> Ahmed Al-Suqaih, ‘The Relationship Between Judges and Lawyers’ (2011) 3 Al Adl Journal 331.

<sup>58</sup> It is stated that in 2011 the number of practising lawyers in Saudi Arabia was 2,000: Report from Ministry of Justice, *Al-Riyadh* newspaper (edition 15761, 2011). Also see the interview with Mansur Al-

therefore be important to consider new regulations of legal aid as this problem may involve more than one institution, and the role of the Consultative Council should be more effective in terms of studying this type of regulation.

#### **4.4 Testing the case by the examination of witnesses**

During the examination of witnesses, compatibility between international human right standards and the Saudi Arabian domestic law has been considered and examined. In the case presented in Chapter Five,<sup>59</sup> it was seen that the accused was afforded the opportunity to examine the testimony of witnesses without any prejudice to either party; however, there are a number of concerns found in the course of this research as to the giving of testimony. There are various reports highlighting the influence of law enforcement officers upon witnesses providing their testimony. Such a problem can be overcome by including some articles in the LCP referring directly to the defendant to examine the witnesses; it is also necessary to explain how these arguments should be take place.

The role of the judge within the legal system of Saudi Arabia is positive (or what can be defined in the legal domain as ‘inquisitorial’), meaning that the judge may interfere with the testimony and pose additional questions when considered necessary.

#### **4.5 Equality of arms in the Saudi legal system**

Further to the discussion in Chapter Five, the concept of equality of arms has been considered in relation to international human right standards, despite there being a lack of direct reference in terms of whether the term ‘equality’ refers to equality between the prosecution and the defendant or between the two parties where there is no prosecution in the trial. It is recognized through Islamic norms that equality of arms has clearly been exercised, and thus a more in-depth examination is required in some cases.

Nevertheless, as has been demonstrated through the case study, equality of arms is exercised but without direct reference, whether in the LCP or in the Law of Procedure Before Sharia Courts.<sup>60</sup> The equality of arms in the case of *K* mentioned in Chapter Five shows that the law in Saudi Arabia makes no direct mention of the concept but has a practical implementation. However, it is advisable to expressly include such a provision

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Qifari, spokesman for the Ministry of Justice: Al Arabiya News (20 September 2012) <<http://www.alarabiya.net/articles/2012/09/20/239083.html>> accessed 15 January 2013.

<sup>59</sup> See Chapter Five (n 78), High Court, Riyadh, 41/10, 4/3/1422 (2002).

<sup>60</sup> Case number 128, Reviewed by the Court of Appeal, G/1/3/991, 8/1/1427 (2007).

in the LCP as to equality of arms between the parties, as this will reflect positively in judicial performance.<sup>61</sup>

#### **4.6 The right to be tried without undue delay**

In addition to the discussion provided in Chapter Five, the international human rights standards have clarified the right of the accused to a speedy trial in article 9(3) of the ICCPR, as well as in article 14(5) of the ACHR, which makes reference to the right to a speedy trial. Nevertheless, it seems that there lacks clarification surrounding the right of the accused to have a speedy trial throughout the in-trial process, thus posing a significant challenge in regard to Saudi criminal law. It is understood from the Judiciary Law that the Judiciary Maintenance—as set out in article 55—has jurisdiction as to the judge’s performance, and also has the power to investigate any complaints made against judges, and which, in a sense, may then have to deal with issues regarding trial delays. However, it is advisable to include a clear provision making reference to the right of the accused to a speedy trial equally to the right of the suspect to be brought before court in the pre-trial stage. Such provision could be included in the regulatory schedule of the Judiciary Law or may otherwise be included in the Law of Procedure Before Sharia Courts.

International cases involving Saudi Arabian nationals examined in Chapter Four shows that the lack of speedy trial could lead to human rights abuse. *Al-Fouzan and others v Saudi Arabia*<sup>62</sup> was one of the significant cases involving the absence of speedy trial. It is recognized that the right to a speedy trial is part of the criminal process, and in some cases it is important for the judicial performance to work accordingly. The report of the NSHR also reflects the importance of the speedy trial as one of the fundamental human rights issues and, during the course of this research, we have read of many accused being held in detention for long periods of time, sometimes exceeding four years.<sup>63</sup>

#### **4.7 The right to appeal and receive compensation**

The right to appeal, as has been seen, has been assured within the Saudi law based on the fact that this right is protected in Islamic jurisprudence. Nevertheless, through the

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<sup>61</sup> *ibid.*

<sup>62</sup> *Al-Fouzan and others*, A/HRC/WGAD/2012/8 Chapter Five (n 109).

<sup>63</sup> Sarah Joseph, Jenny Schulz and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (2nd edn, OUP 2005) 424.

various case studies,<sup>64</sup> it has been seen that there have been a number of violations of this right when it comes to the special courts. The special courts, as highlighted previously, fall under the jurisdiction of the Saudi court, which consequently is binding under its ruling. Therefore, it has to be under the jurisdiction of the Court of Appeal. This may slightly protect the accused's rights during the appeal process; however, the special courts as a concept may be under some consideration due to the fact that their purpose is not clear and that if there is a criminal law in Saudi Arabia, there may be no need for such courts.

In regard to receiving compensation in the case of unlawful convictions, it has been observed that this concept has its roots in Islamic law, under the general principle of *Al-darrar yozal*. Nevertheless, in the context of Saudi Arabian criminal law, this right has been protected in the LCP with regard to the pre-trial stage. However, in the trial and also following conviction, there has been only limited reference made in the Law of Procedure Before Sharia Courts, with the right to compensation in article 80, which refers to the right of the defendant to request compensation for damage suffered. Essentially, the only issue in this regard is that neither the LCP nor the Regulatory schedule of the Law of Procedure Before Sharia Courts clarifies the process by which the defendant can apply for compensation. It may therefore be appropriate to clarify such a procedure, assuming that the procedure should start with an appeal to the Court of Appeal.

It may be concluded here that the right to appeal has been protected in the Saudi Arabian criminal process; nevertheless, the right to receive compensation due to wrongful conviction is clearly not in line with the rights stipulated in the international human rights standards.

## **5. Conclusion**

It seems that the Saudi legal system has some challenges in regard to the right to a fair trial, whether in the pre-trial and in-trial stages or in the post-trial process. This chapter clarifies the necessity to amend the legal system and include some essential articles related to the right to a fair trial within the process. The LCP, in my view, is a

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<sup>64</sup> Communication No. 355/1989, UN Doc CCPR/C/51/D/355/1989 (1994); Court of Appeal decision, 287, 5/11/1392 (1972).



significant opportunity for the Saudi authorities to enhance and apply an effective human right mechanism through the legal system.

The cases analyzed throughout this research may draw attention to the necessity to establish an independent complaints institution within the framework of the Saudi legal system. Such institution could play a significant role in terms of human rights protection in the pre-trial and in-trial stages. It is also important to codify some punishment under the *Shariah* law and this would be the *Ta'zir* crimes.

## CHAPTER SEVEN: CONCLUSION AND RECOMMENDATIONS

### 1. The summary of chapters

The sections of this study are summarized throughout this conclusion, with all chapters presented through a brief overview. Chapter One provided an introduction to the paper, significance of the study as well as the methodology. Chapter Two studied the fair trial within the international human rights law. The international human rights law was also given a brief overview as the thesis is centred on carrying out a comparative study; thus, it is considered important that various conceptualizing frameworks are taken into account. The UN Charter provides a foundation for the Universal Declaration of Human Rights (UDHR), the latter of which can be regarded as the main source for various national instruments related to the right to a fair trial. It is worth highlighting that the International Covenant on Civil and Political Rights (ICCPR), in addition to the Convention against Torture (CAT), has set a number of guarantees in regard to human rights safeguarding, particularly the rights relating to civil liberties and to the right to a fair trial.

Furthermore, Chapter Two also examined the engagement of Saudi Arabia in international human rights law, starting with a discussion of the UDHR provisions through a Saudi Arabian representative. Importantly, the reservation of various provisions in the UDHR can be understood in a historical context. Nevertheless, although Saudi Arabia has not sanctioned the ICCPR, it has ratified various significant conventions, which are a part of its domestic law, such as the CAT, which sets out various obligations on the Saudi Arabian authority to prohibit various applications of arbitrary arrest surrounding the use of torture during the investigation process. In addition, Saudi Arabia has been seen to have sanctioned the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), which emphasizes the importance of the development of women's rights.

Chapter Three analyzed the criminal justice system under *Shariah* and its exercising under the Saudi Arabian legal system. This is important due to the fact that, in order to understand how the fair trial can be applied, especially in the in-trial process, the conceptual framework of Saudi Arabia needs to be understood. Furthermore, this chapter clarified the roots of the legal system within the KSA, and showed that the

Saudi Arabian legal system has relied only on one school of thought and how these sources and schools may reflect of the right to a fair trial.

Moreover, the role of *Ijthads* was clarified in this chapter, as well as the way in which the legal system has been used. Such a methodology was examined, together with the categories of crime and punishment known to be amongst the most important elements of the Saudi Arabian legal system. In the same context, the Law of the Board of Grievances was analyzed, being one of the administrative laws

Chapter Four tackled the issue of the human rights of the accused during the pre-trial stage, and started by providing a legal framework of these rights in the international domain. The role of the public prosecution is also regarded as being one of the most important elements within this thesis; for this reason, the chapter dealt with its role since its establishment in 1989. The relationship of the Bureau of Investigation and Public Prosecution (BIPP) with other criminal justice departments was also examined and clarified.

The chapter went on to extensively explore the pre-trial procedures. It examined the right to liberty within the domestic law in Saudi Arabia, and then in relation to two main stages: the preliminary investigation, involving the human rights of the accused during the arrest stage (whether with or without warrant) and the requirements of the search and seizure of persons and properties. It directed the spotlight on detention as one of the important elements of the criminal process, making reference to both the length of detention and the safeguards provided during the detention.

The chapter then considered the secondary investigation, and examined the interrogation process and safeguards provided throughout the process. Both the preliminary and secondary investigations were examined in light of the requirements set out in the international human rights standards. The chapter then went on to examine a group of rights, including the rights of the accused to have a legal representative and to have adequate time to prepare a defence, as well as the right not to suffer any degree of torture or cruel treatment. The right to silence and the privilege against self-incrimination were also examined in relation to international human rights standards, as set forth in the Bill of Rights.

Chapter Five dealt with the in-trial stage of the criminal process. It started by underlining the court hierarchy under the new Judiciary Law enacted in 2008. An examination of the concept of judicial independence was examined, and the right to a public hearing was evaluated—in regard to both the international domain and at a domestic level. It was also recognized that there was the necessity to include an Islamic

perspective towards the right to a public hearing; therefore, Islamic views were highlighted. In addition, the chapter evaluated the meaning of presentation during the trial, and compared such rights with the requirements set out in the international human rights standards. During the course of the chapter, various cases were examined in regard to the aforementioned rights, including the right to examine witnesses and the right to equality. The cases presented were from the Saudi courts, whereas another group of cases were provided through the written judgments of the Ministry of Justice.

The chapter subsequently made reference to the right of the accused to have a speedy trial, and the right not to be subjected to retroactive criminal law or heavier punishment. It showed that both concepts have roots in Islamic jurisprudence, with the chapter examining this perspective alongside international human rights standards. Two main post-trial rights were included in the chapter: the right to appeal and the right to receive compensation. Both of these rights were examined and evaluated in direct consideration to the Saudi Arabian criminal process, with a comparison drawn with international human rights standards.

Chapter Six focused on issues of reform, which were highlighted in regard to various rights and examined in relation to the way in which the reformation of the judicial system of Saudi Arabia can be implemented. Essentially, this chapter focused on various articles in the Law of Criminal Procedure (LCP) and the Law of Procedure Before Sharia Courts, as well as the Judiciary Law. The recommendations made in Chapter Six are centred on achieving sound reform.

## **2. Recommendations: How far is Saudi Arabia from implementing fair trial?**

The impact of both the LCP and the Law of Procedure Before Sharia Courts enacted in the last decade has been significant on the Saudi Arabian criminal justice system. It has been observed that many improvements have taken place in regard to the pre-trial and in-trial stages. However, the challenges that Saudi Arabia still faces regarding these rights may come from, firstly, the need to comply with international human rights standards and, secondly, the need to comply with *Shariah* law itself.

## **2.1 The need to ratify the ICCPR**

As stated in Chapter Two, Saudi Arabia has further opportunity to ratify the ICCPR, as this Convention has more safeguards for the suspect in the pre-trial stage. It also has a greater mechanism for implementation of its provisions, with such recommendation having been made by the Human Rights Committee (HRC). In the process of ratifying the ICCPR, the Saudi Arabian authority has the right to choose to inform of its reservation on any provisions that it believes to be in breach of the *Shariah* norms. For instance, articles 18 and 20(1), (2) and (3) of the ICCPR can be in conflict with the Basic Law of Governance (BLG) of Saudi Arabia because, pursuant to article 1 of the BLG, the duty of the government of Saudi Arabia is to protect *Shariah* law in all its boundaries. It seems that the absence of the ratification of Saudi Arabia on the ICCPR may be because of the fear held by the government for the group of civil rights protected within the Convention. This rejection is partly pragmatic, in the sense that giving people more civil and political rights may affect the structure of the whole regime in the Kingdom, which may result in more demand to change the political framework. However, in the long term, providing people with more civil and political rights will lead to stability in the political system.

Nevertheless, we have seen that there is no clear contradiction between the articles of the ICCPR and Islamic law, as the latter supports the political rights as well as the fair trial rights. More importantly, the main sources of Islamic law (the Quran and *Sunnah*), as we have seen through the research, do not provide specific details on every single aspect of life, which opens the path to the secondary sources (namely the *Ijthad*) to play a significant role.

## **2.2 Does *Shariah* law exist for the pre-trial and in-trial rights of the suspect?**

In considering the previous chapters, we have seen that the right of a suspect has been recognized within the soul of *Shariah* law, which Saudi Arabia claims to be implemented. However, the absence of various essential rights presents the judicial system of Saudi Arabia with a big challenge.

Starting with the pre-trial rights, the detention period fails to meet the requirements of human rights standards, and in some cases we have seen that detention in some cases has exceeded four years. The Saudi legislature should consider both the length of detention in the LCP as well as setting a mechanism for complaints for those whose rights have been abused by being detained for long periods in detention centres.

Furthermore, even though *Shariah* law forbids any kind of torture during the detention in the police station, there is evidence that such methods are used during detention. For instance, many accused have complained to the National Society for Human Rights (NSHR) that they were pressured into making a confession. Furthermore, a large number of cases have been presented to the CAT Commission for Arbitrary Detention. Such pressure should be abolished, and to do so it might be recommended to set up a complaints institution, as set out in Chapter Six, which would replace the role of the BIPP in receiving complaints from detainees. If implemented, such institution could play a significant role in terms of both protecting detainees from abuse and putting more pressure on the authority to protect the detainees' rights. It would also be important to enable this institution to act independently and to report directly to the Prime Minister, which is in this case the King.

In contrast, the right to a fair trial within the Saudi Arabian criminal justice system seems to be in line with the *Shariah* law. In terms of judicial independence, the Judiciary Law enacted in 2008 (as explored in Chapter Five) has undermined this concept. Nevertheless, although there is no clear mention of the concept of 'special courts', some cases were under the influence of the authority which make it in some extent similar to special courts, those cases related mainly to political crimes. It is highly recommended that Saudi Arabia do not consider applying this kind of court as it has been seen to affect the suspect's rights during the court hearing.

Another recommendation concerns the right to a speedy trial. As seen in Chapter Five, one of the main causes of delay of the trial is when the accused presents at court and claims that his confession was given under torture or duress. To counter this problem, it might be advisable for the Saudi courts to have a complaints system whereby the judiciary, upon the accused claiming his/her confession to be false or improperly obtained, is able to refer the accused to the BIPP to recommence the interrogation stage, without any consideration as to whether any torture may have been used. This is an issue to be considered by the Saudi authority to give the courts the jurisdiction to handle complaints arising from the accused's treatment.

Having reached the end of this research, it appears that the treatment of human rights of suspects in Saudi Arabia is facing a big challenge, from the moment when a person is arrested, throughout the interrogation process and at trial. The LCP, which provides for the majority of these aspects, has highlighted in its provisions some aspects of these rights, making the judicial system partly compliant with the international human rights standards. However, in other areas, there are many gaps to be filled, and if

the recommendation provided in this research considered, it might be a step forward to the right to a fair trial to be compatible with international human rights standards.

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## **APPENDIX**

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