

# **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”**

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**Thesis submitted for the degree of Ph.D. in the School of Law**

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- 56- *Konig v. Germany* A27(1978) (Application no. 00006232/73)
- 57- *Kostovski v. Netherlands* A166 (1989) (Application no.00011454/85)
- 58- *Kremzow v. Austria* A268-B(1993) (Application no.00012350/86)
- 59- *Kruslin v. France* A176-A(1990) (Application no. 00011801/85)
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Decision No. 15/T (1401H)  
Decision No. 155/ D G/ 2 (1421H)  
Decision No. 162/ D/ G (1422H)  
Decision No. 169/ D / G/ 1 (1422H)  
Decision No. 18/1/3/D/G/2/76 (1415H)  
Decision No. 18/D/G/3 (1421H)  
Decision No. 19/D/G/3 (1421H)  
Decision No. 219/T/ 3 (1415H)  
Decision No. 242/T/3 (1416H)  
Decision No. 259/T/ 3 (1416H)  
Decision No. 3/D/F/ 39 (1422H)  
Decision No. 37/T (1401H)  
Decision No. 453/T (1414H)  
Decision No. 6/D/A/18 (1422H)  
Decision No. 8/D/ F/35 (1419H)  
Decision No. H/1 (1421H)  
Decision No. H/1/20 (1401H)  
Decision No. H/1/59 (1400H)  
Decision No. H/1/75 (1401H)  
Decision No. H/1/93 (1401H)  
Decision No. H/2/149 (1401H)  
Decision No. H/2/18 (1402H)  
Decision No. H/2/2 (1400H)

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Decision No. (20) 1416 H  
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## ABSTRACT

Irrespective of its Western origin, the idea of human rights is widely acknowledged. Following the establishment of the United Nations, the movement of human rights has been dramatically extended from its local boundaries to a more global domain by means of international treaties, declarations, conferences etc by which a universal standard of human rights has been established. However, a sharp contrast has occurred between advocates of relativism of human rights and supporters of the universalism of human rights as a result of attempts to impose a single interpretation to human rights instruments that is the western liberal tradition.

After the collapse of the communist regimes, the conflict about the universalism of human rights takes place between developed and less developed Countries, or between Islam, and the West. Therefore, this thesis explores the extent to which human rights jurisprudence can accommodate different cultures.

The thesis concerns particular aspects of the subject of human rights. It compares rights provided for the accused person during trial in the judicial system in Saudi Arabia with those embodied in the European Convention on Human Rights. It examines in particular; the presumption of innocence, the principle of legality, legal assistance, an interpreter, adequate time and facilities, a speedy trial, prompt information of the accusation, trial in the presence of the accused, the accused's right to defend himself in person, equality of arms, the calling and cross-examination of witnesses, the right not to be compelled to confess guilt, an independent and an impartial trial, an open court, a reasoned judgment, an appeal against conviction or punishment, double jeopardy, and compensation for miscarriage of justice.

The thesis shows that (a) generally speaking, the judicial system in Saudi Arabia provides the accused during the trial stage with similar rights to those called upon by the European Convention although it sometimes uses different terminology. (b) Suggestions to readdress deficiencies in the Saudi judicial system can be adopted without violating Islamic law. (c) The Saudi judicial system in certain areas provides the same rights with a higher standard of application. (d) Due to the fact that it is based on the religion of Islam, the Saudi judicial system provides the accused with rights totally unknown to the European Convention.



## TABLE OF CONETNTS

List of cases .....	i
Abstract .....	vi
Table of contents .....	vii
Introduction.....	1
A- Background.....	1
B- Objective of the thesis .....	4
C- Statement of the problem.....	4
D- Significant of the thesis.....	5
E- Method of the thesis.....	6
F- Thesis gap.....	6
G- Structure of the thesis.....	7

### CHAPTER 1

#### International Human Rights

Introduction.....	8
Section I: Natural Law.....	8
Section I 1: Human Rights and the United Nations.....	15
(1) The UN Charter.....	15
(2) The Universal Declaration on Human Rights.....	18
(3) The International Covenant on Civil and Political rights.....	20
Section III: Universalism versus Relativism.....	24
Section IV: Universalism and Islamic Societies.....	29

### CHAPTER 2

#### The European Convention and the Accused during the Trial Stage

Introduction.....	37
Part One: The European Convention on Human Rights.....	40
(1) Historical background.....	40
(2) Rights protected.....	41
(3) The system of enforcement.....	44
(a) The European Commission of Human Rights .....	44
(b) The Committee of Ministers.....	45
(c) The European Court of Human Rights.....	46
(4) The interpretation of the Convention.....	48
1: The margin of appreciation.....	48
2: Proportionality.....	50
3: The Convention as a living instrument.....	51
4: Interpretation in the light of the ' <i>Travaux Preparatoires</i> ' .....	51
5: Autonomous concepts.....	51
6: Interpretation in accordance with Vienna Convention.....	52
Part Two: The Convention and the Trial of the Accused.....	52
General aspect of the right to fair trial.....	52
Section I: Fundamental Principles of Criminal Law.....	58
(A) The presumption of innocence.....	58

(B) The principle of non-retroactivity in criminal law.....	63
Section II: Defence Rights of the Accused during Trial.....	67
(A) The right to legal representation.....	67
(B) The right to an interpreter.....	71
(C) The accused right to adequate time and facilities.....	73
i- Adequate time.....	73
ii- Adequate facilities.....	73
(D) The right to trial within a reasonable time.....	74
(E) The right of the accused to be informed of the accusation.....	77
(F) The accused right to be tried in his presence.....	78
(G) The right of the accused to defend himself in person.....	80
(H) The right to equality of arms.....	80
(I) The right to call and cross-examine witness.....	80
(J) The right not to be compelled to confess guilt.....	83
Section III: The Rights of the Accused in respect of the Independence of the Judiciary.....	84
(A) The right to an independent court.....	84
(B) The right to a competent and impartial court established by law.....	87
1: A competent tribunal established by law.....	87
2: The impartiality of the tribunal.....	88
(C) The right to a public hearing.....	90
(D) The right to a public pronouncement of judgments.....	93
(E) The right to a reasoned judgment.....	93
Section IV: The Rights of the Accused after Criminal Judgment.....	94
(A) The right to appeal in criminal cases.....	95
(B) The right to compensation for miscarriage of justice.....	98
(C) The right of the accused not to be prosecuted or punished again.....	99

### CHAPTER 3

#### The Main features of Islamic Law and the Judicial System in Saudi Arabia

Introduction.....	106
Part One: Main Features of Islamic Law.....	107
Section I: The Sovereignty of Islamic Law.....	107
Section II: The Dignity of Human Beings.....	110
Section III: Sources of Islamic Law.....	113
1: The <i>Qur'an</i> .....	114
2: The <i>Sunnah</i> .....	117
3: <i>Ijmah</i> (consensus).....	118
4: <i>Al-Qiyas</i> (Analogy).....	119
5: <i>Al Masalah Al Morslah</i> (Public Interest).....	120
Section IV: The Four Schools of Islamic Law.....	120
Section V: The Nature of Islamic Law.....	121
Section VI: Crimes in Islamic Law.....	125
1: <i>Haddud</i> Offences.....	126
2: <i>Qisas</i> Offences.....	127
3: <i>Ta'azir</i> Offences.....	128
Implication of this classification.....	129
Part Two: The Judicial System in Saudi Arabia.....	130



Section I: Historical Background.....130

    (A) The judicial system in the Arabian Peninsula prior to the  
        Unification of Saudi Arabia.....131

    (B) Historical development of the judicial laws.....132

Section II: Courts or the Judicial Institutions.....132

    One: The *Shari'ah* Courts.....133

        (a) The Supreme Judicial Council.....133

        (b) The Appellate Court.....134

        (c) General Courts.....134

        (d) Summary Courts.....135

    Two: The Board of Grievances.....135

    Three: Administrative Committees that have Judicial Jurisdiction  
        and their Function within the Judicial System.....137

        Legal deficiencies of the administrative committees.....138

        Reasons for the establishment of administrative committees.....139

        Reasons for the *Shari'ah* courts' attitude towards enacted laws...142

        Proposed solution: reconciliation of tradition with innovation.....146

## CHAPTER 4

### Fundamental Principles of the Saudi Criminal Law

Introduction.....148

Section I: The Presumption of Innocence.....148

    Scholar Abdullah al- Monee's perspective regarding the presumption of  
    Innocence?.....150

    The application of the presumption of innocence in the judicial system in  
    Saudi Arabia.....154

Section II: The Principle of Legality.....159

    The scope and application of the principle of legality in Western  
    thought.....159

    Components of the principle of legality.....163

        (1) Non-retroactivity.....164

        (2) Maximum certainty of criminal law.....164

        (3) The strict construction of criminal law.....170

        (4) The accessibility of criminal law.....170

    The source of the principle of legality in Islamic law.....170

    The application of the principle of legality in Islamic law and the Saudi  
    judicial system.....172

        (1) The principle of non-retroactivity in Islamic criminal law.....175

        (2) Maximum certainty in Islamic criminal law .....178

        (3) The strict construction of criminal law.....184

        (4) The accessibility of criminal law.....185

## CHAPTER 5

### Defence Rights of the Accused during Trial

Introduction.....	187
Part I: The Right to Legal Representation.....	188
Section One: Islamic Law.....	189
Section Two: Saudi law.....	195
1: <i>Shari'ah</i> Courts.....	195
(A) The right of the accused to be assisted by a lawyer prior to the current laws.....	196
(B) The right of the accused to be assisted by a lawyer subsequent to the current laws.....	197
2: The Board of Grievances.....	200
3: Comments on the Code of Law Practice.....	202
Part II: The Right to an Interpreter.....	206
Section One: Islamic law.....	206
Section Two: Saudi law.....	209
1: <i>Shari'ah</i> Courts.....	209
2: The Board of Grievances.....	213
Part III: Right of the Accused to Adequate Time and Facilities.....	214
Section One: Islamic law.....	214
1- Adequate time.....	215
2- Adequate facilities.....	217
Section Two: Saudi law.....	218
1: <i>Shari'ah</i> Courts.....	218
2: The Board of Grievances.....	220
Part IV: Right of the Accused to Trial within a Reasonable Time.....	221
Section One: Islamic law.....	222
Section Two: Saudi law.....	225
1: <i>Shari'ah</i> Courts.....	225
2: The Board of Grievances.....	228
Part V: Right of the Accused to be informed of the Charge.....	230
Section One: Islamic law.....	230
Section Two: Saudi law.....	231
1: <i>Shari'ah</i> Courts.....	231
2: The Board of Grievances.....	233
Part VI: Right of the Accused to be tried in his Presence.....	233
Section One: Islamic law.....	233
Section Two: Saudi law.....	235
1: <i>Shari'ah</i> Courts.....	235
2: The Board of Grievances.....	238
Part VII: Right of the Accused to defend himself in Person.....	239
Section One: Islamic law.....	239
Section Two: Saudi law.....	240
1: <i>Shari'ah</i> Courts.....	240
2: The Board of Grievances.....	241
Part VIII: Right to Equality of Arms.....	241
Section One: Islamic law.....	241



Section Two: Saudi law.....	244
Part IX: Right of the Accused to Call and Cross-examine Witnesses against him...	246
Section One: Islamic law.....	247
Section Two: Saudi law.....	249
1: <i>Shari'ah</i> Courts.....	249
2: The Board of Grievances.....	252
Part X: Right of the Accused not to be compelled to Confess Guilt.....	253
Section One: Islamic law.....	253
Section Two: Saudi law.....	255
1: <i>Shari'ah</i> Courts.....	255
2: The Board of Grievances.....	257

## CHAPTER 6

### Independence of the Judiciary and the Right of the Accused

Introduction.....	259
Part I: The Right to an Independent Court.....	260
Section One: Islamic law.....	260
Section Two: Saudi law.....	268
Part II: The Right to an Impartial Court.....	281
Section One: Islamic law.....	281
Section Two: Saudi law.....	288
Part III: The Right to Public Hearing.....	300
Section One: Islamic law.....	300
Section Two: Saudi law.....	303
Part IV: The Right to A Reasoned Judgment.....	313
Section One: Islamic law.....	313
Section Two: Saudi law.....	316

## CHAPTER 7

### The Accused's Rights after Criminal Judgment

Introduction.....	322
Part I: The Right to Appeal.....	323
Section One: Islamic law.....	323
(1) The legality of reversing judgment.....	326
(2) The legal status of reversal of judgment.....	327
(3) Who has the right to reverse judgment?.....	328
(4) Grounds for reversing the judgment.....	329
Section Two: Saudi law.....	331
1: <i>Shari'ah</i> Courts.....	332
2: The Board of Grievances.....	341
Part II: The Right to Compensation for Miscarriage of Justice.....	343
Section One: Islamic law.....	344
(A) Compensation in Islamic law.....	344
(B) The Right to compensation owing to judge's error.....	346
Section Two: Saudi law.....	347
Part III: The Right not to be tried twice for the Same Offence.....	352

Part IV: The Right to a Pardon.....	355
One: <i>Haddud</i> crimes.....	355
Two: <i>Qisas</i> crimes .....	357
Third: <i>Ta'azir</i> crimes.....	360
Part V: The Right to Stay the Execution of Punishment.....	361
One: Islamic law and Saudi <i>Shari'ah</i> Courts.....	362
Two: The Board of Grievances.....	362
Part VI: The Right to Repent.....	365
(1) The concept of repentance.....	365
(2) The sequences of repenting.....	366
One: <i>Qisas</i> crimes.....	366
Two: <i>Ta'azir</i> crimes.....	366
Third: <i>Haddud</i> crimes.....	366
(3) How repentance can be achieved.....	367

## CHAPTER 8

### Conclusion

Introduction.....	370
Reflective Equilibrium.....	371
The Saudi Judicial System.....	373
The Presumption of Innocence.....	374
The Principle of Legality.....	376
Defence Rights.....	378
Judicial Independence.....	379
Rights after the delivery of Judgment .....	384

### Bibliography

Arabic Sources.....	I
English Sources.....	VII



## Introduction

### **A- Background:**

The subject of human rights is not confined to lawyers, but rather it is a civil and cultural issue. Human rights have a general effect on all philosophical, social, political, moral and legal levels. Human rights influence the lives of human beings in most parts of the present day world, and live deeply in people's minds and hearts. During the second half of the twentieth century and especially after the unprecedented violations of human rights during the two World Wars, human rights have been dramatically moved from narrow local confines towards an international level by means of declarations, conventions, conferences, non-governmental organisations etc. This movement has resulted in the establishment, one way or another, of an international standard of human rights.

Human rights are manifold and cannot be precisely investigated unless each right or at least an interrelated set of rights is examined separately. This thesis is, therefore, devoted to one part of human rights that concerns rights provided for an accused person. In a criminal action the position of the accused is significant and serious as he faces the state with all its power and capabilities. He should be provided with adequate rights to enable him to exercise the right of self- defence.

Since the rights and guarantees of the accused at all the criminal proceedings are important issues, international conferences, treaties and charters as well as constitutions and regulations are always concerned to observe this. However, the criminal trial stage is the most significant stage where such rights and guarantees should be observed. It is the stage where the criminal action is resolved, and deemed as the last opportunity for the accused to exercise the right of self- defence. Apart from the fact that the judicial ruling is the symbol of justice, it is difficult to correct any fault committed at this stage. Therefore, article 14 of the International Covenant on Civil and Political Rights (1966) and article 6 of the European Convention on Human Rights (1950), articles 2, 3 and 4 of Protocol No. 7 to the European Convention on Human Rights defined the rights to be provided to the accused during the criminal trial stage.

This study is limited to one aspect of human rights i.e. the right to fair trial in criminal cases. In other words it is confined to the rights of the accused in the criminal trial stage. Other criminal stages, such as inference, investigation or execution of punishment, are excluded.

Despite the fact that the European Convention on Human Rights is not applicable to Saudi Arabia, it has been used in this study as a model for the international standards of human rights for the following reasons:

- (a) Saudi Arabia has not joined the International Covenant on Civil and Political Rights. And the basic premise here is that if not in all circumstances at least in most circumstances the standard of human rights in Europe is fully consistent with the standard of human rights within the UN.
- (b) All rights that are stipulated in the International Covenant on Civil and Political Rights regarding the accused during trial are also provided in the European Convention on Human Rights and its Protocols. Not only that but also jurisprudence developed by the European Court of Human Rights has widened the scope of these rights and clarified their meaning precisely.
- (c) The European Convention establishes not only the world's most successful system of international law for protection of human rights, but one of the most highly developed forms of any kind of intentional legal process. Mark Janis argues that "*European human rights law provides, therefore, not only the most important body of case law about the substance of international human rights law, but one of the most refreshing and interesting examples of an effective international legal process.... In some way, this makes European human rights law a good model.*"<sup>1</sup> in addition, another feature that distinguishes the European human rights law from human rights law within the UN is the fact that the European Court of Human Rights has recognized the diversity between cultures and therefore a margin of appreciation is given to accommodate differences. Unfortunately, this important tool has not been recognized by the UN's Human Rights Committee.<sup>2</sup>
- (d) From a practical point of view, the scope of these rights cannot be fully understood unless their application and interpretation are examined in a

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<sup>1</sup> - Mark W. Janis el. (2000) "European Human Rights Law" Oxford University Press. P. 6. Hereinafter will refer to as Mark W. Janis el. (2000).

<sup>2</sup> - Mashood A. Baderin (2003) "*International Human Rights and Islamic Law*" Oxford University Press. P.232 . Hereinafter refer to as Mashood A. Baderin (2003).



particular jurisdiction. Therefore, and since the researcher stays pending the preparation of this study in the UK, the scope and the exact meaning of some of these rights are illustrated by reference to some jurisprudence developed in the UK.

With reference to Saudi Arabia it is an Islamic country, and its judicial system applies strictly Islamic law (*Shari'ah*), as well as enacted laws. Thus, a study of the judicial system in Saudi Arabia entails a study of both Islamic law and codified laws. As to the term "*Shari'ah*" which is used in this thesis interchangeably with the term "Islamic law", it is subject to different understanding and interpretation in different parts of the Islamic World. Muslim worlds are mainly divided into two sects namely *Sunni* and *Shia*, and because the judicial system in Saudi Arabia adheres firmly to the *Sunni* sect and because *Shia* jurisprudence has no application at all in Saudi Arabia, this study concerns the *Sunni* sect especially the four schools of thought.

As to Islamic law the main sources of legislation are the *Qur'an* and the *Sunnah*. The companions of the Prophet after his death and their successors of jurists established from provisions provided by the two divine sources mentioned above general rules (*qawa'id usulah Aamah*). From these general rules jurists have extracted Islamic jurisprudence which contains on many occasions different views regarding a particular issue. This is because although they agree about the general rules derived from the original sources there is disagreement between them in respect of the exact meaning and scope of the general rules (*qawa'id usulah Aamah*).

In order to comply with principle of certainty the judicial system in Saudi Arabia has taken certain steps. (a) Enacting laws and hence the judicial body must apply rules provided in the law. (b) As a general principle, courts in Saudi Arabia adhere to the Hanbali School.

Another area which needs to be pointed out at this stage is that when dealing with Islamic law one can find that there are some stories or dictums for either the Prophet's companions or the jurists of different era of Islam. These are considered by jurists and may be judges in Saudi Arabia as authoritative principles which can be relayed on to support a particular view.

The accused in Saudi Arabia may be subject to trial before the *Shari'ah* Courts, the Board of Grievances, or before one of the administrative committees (tribunals). This

study, however, is restricted to the main judicial bodies. Namely, *Shari'ah* Courts and the Board of Grievances. Administrative committees will be excluded because it is impossible in this limited space to examine rights provided to the accused before more than 30 tribunals that have no unified organisations or laws, but rather every committee has its own formulation and procedures. Therefore, in chapter 3 a general discussion of these committees is undertaken which provide a broad evaluation of the function of these committees.

A reader will realize that cases considered by the Saudi judicial institutions and referred to in this thesis are positive in respect of the right at hand. This is not to say that there are no individual cases where these rights were wrongly adjudicated. But, since judicial decisions from both the *Shari'ah* and the Board of Grievances are not published, the researcher felt that an examination of these rights in Saudi Arabia will be limited to cases available and to demonstrate the prevalent understanding and application of these rights in the Saudi judicial system.

#### **B- Objective of the thesis:**

It is often maintained that a judicial system that is based on Islamic law cannot comply with human rights law. This thesis proves otherwise. So the aim is to challenge this claim. This study correlates the practice of the judicial system in Saudi Arabia in respect of the rights of the accused during the trial stage to the human rights standards required by the European Convention on Human Rights.

On the other hand, it aims to examine the ability of Islamic Law in assimilating the rights called upon by the international instruments to apply so long as they match with the Islamic rules and principles.

#### **C- Statement of the problem:**

Doubtless to say that justice and its application among all human beings on equal terms is one of the most significant concerns that worries people. Certainly, the human feelings are harmed whenever an innocent man is condemned or a person is punished as a result of a trial where freedom of self defence is not secured or he is not provided with all necessary means to prove his innocence or a sanction is imposed on him before proving his conviction under a valid judicial ruling.

This thesis will concentrate on finding out the rights provided by the Saudi legal system to the accused during the trial stage. In Saudi Arabia, courts apply provisions of Islamic Doctrine and abide by all enacted laws. Now, do the guarantees applied by the Saudi judicial system agree with those called upon by European Convention on



Human Rights? And if not can the Saudi judicial system be adjusted to comply with the international human rights law without violating Islamic law? Finally if this last task is impossible what is the solution?

**D- Significance of the thesis:**

The importance of this thesis, in general, arises from the correlation between these rights and human rights. This is due to the fact that establishment of these rights means the maintenance of these rights against squandering and irregularities while lacking or violation thereof shall mean depriving a human being from his rights. This is because these rights are the effective means he needs to prove his entity and to develop his character – the fact which is the most valuable aspect that humanity is keen to preserve. This thesis has special importance for Saudi Arabia since the claim that human rights are fundamentally a domestic matter is no longer acceptable. The obligation of the member states of the United Nations to cooperate with the organization in the promotion of human rights provided the United Nations with the necessary legal power to embark on an attempt at defining and codifying these rights. Furthermore, it is agreed that total rejection of the United Nations recommendations is contrary to article 56 of the UN Charter. Moreover, recommendations concerning certain United Nations human rights standards constitute or strengthen a rule of customary international law.<sup>3</sup> The Human Rights Committee, in this context, disclosed the human rights text in the Charter to be part of international customary law, and thus obligatory for all states.<sup>4</sup>

On the other hand, being in English this thesis should gain special attention from non-Muslim for the increasingly wide recognition of Islam. As a western writer Vogel rightly observes: *“we must expect... that over the next few decades Islamic law will become much more prevalent, both in domestic legal systems and as wielded internationally by Islamic blocs of nations. Muslim states’ legal systems will reinstate Islamic legal norms, perhaps to the extent of becoming a new family of legal systems, like that of the civil-and common-law countries. In international affairs the influence of Islamic theories of international law and relations, human rights and economic*

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<sup>3</sup> - Ghali, B. (1995). *“The United Nations and Human Rights”*. New York, United Nations Publication. P. 7

<sup>4</sup> - Year Book of the International Law Commission 1976, Vol. 2 part 2 P. 105

*order will increase. Facing these events and prospects, the West must take stock of its knowledge of Islamic law and its ideal.”*<sup>5</sup>

I have decided to confine this thesis to the rights of the accused during the trial stage for two reasons: (1) the subject of the accused rights in criminal actions at all stages is so vast and ramified that this thesis would not suffice for its investigation. (2) The trial stage is the significant and decisive stage that determines the fate of the accused.

#### **E- Method of the thesis:**

As this thesis is an attempt to answer the question whether rights provided for the accused during the criminal trial stage in Saudi Arabia comply with the standards required by the European Convention on Human Rights, a comparative study is the most useful method for achieving this goal. The approach used in this study is that each right formulated in the European Convention or its Protocols regarding the rights of the accused during trial is examined separately. The meaning and scope of each right is identified firstly in the European human rights law, and then applied to the judicial system in Saudi Arabia to see if it guarantees the same right. If the answer is negative or if the Saudi law has a different understanding or interpretation of the right concerned an attempt is undertaken to reconcile the diversity by way of proposing an adjustment of the legal system in Saudi Arabia while refraining from violating Islamic law and principles. This approach also considers circumstances where the judicial system in Saudi Arabia provides the accused with rights that have no counterpart in the European Human rights law or where the judicial system provides the same right with a higher standard of application and interpretation than the European human rights law.

#### **F- Thesis gap:**

Human rights studies in general, and the rights of the accused during the trial stage in particular are very rare in Saudi Arabia. As to studies written in English I did not find a single study concerning human rights and the accused in Saudi Arabia. The only thesis that can be regarded, one way or another, as relevant to the current study is a PhD thesis submitted by Salim Ali Farrar to the department of Law at the University of Warwick in (1999). Its title is “*The Role of the Accused in English and Islamic Criminal Justice*”. Nevertheless, this thesis differs from my study in two main ways; (a) it is limited to rules relating to evidence and proof. It focuses on rules concerning

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<sup>5</sup> - Vogel, Frank Edward (1993) “*Islamic law and legal system studies of Saudi Arabia*” Ph.D. Harvard University p. 3. Hereinafter will refer to as Vogel, Frank Edward (1993)



questioning and confession. So, unlike my thesis it does not examine other human rights provided for the accused; and (b) Salim's thesis explores the Malaysian experience, while the current thesis examines the judicial system in Saudi Arabia. In addition, there are a number of studies comparing human rights in Islamic law and international law. But two things distinguish my study: 1- all previous studies are confined to theory. In contrast this thesis links theory to application of Islamic principles as interpreted and applied by an Islamic state. The importance of this approach is recognised by Vogel when he states that: "*if Islamic law is studied in isolation from application, we can add little to our legal understanding of Islamic law.*"<sup>6</sup> 2- Most previous studies have compared human rights in general between Islamic law and the international human rights law. Such an approach provides only a general perspective of each system, but cannot provide a precise answer to the question whether a particular right is provided in Islamic law and in a manner consistent with human rights law.

#### **G- Structure of the thesis:**

This thesis is divided into eight chapters, which are sequenced to provide an overall legal perspective on the rights of the accused during the criminal trial stage in Saudi Arabia. Chapter 1 attempts to provide a descriptive account of the international concern with human rights. A separate thesis would be required to present a proper study in this regard, but I do not pretend to do more than just acknowledge some highly relevant topics here. Chapter 2 concerns the rights of the accused in the European Convention on Human Rights. Chapter 3 mentions some key principles of Islamic Law and the judicial system in Saudi Arabia. Chapter 4 is devoted to cover fundamental principles in the Saudi Criminal Law. Chapter 5 examines the defence rights of the accused. This chapter is concerned with the right to legal representation and other rights that provide a fair trial. The rights of the accused in respect of the independence of the judiciary are discussed in chapter 6. The right of the accused after the criminal judgement is examined in chapter 7. Finally, chapter 8 covers the conclusion.

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<sup>6</sup> - Vogel, Frank Edward (1993) p. 8

# CHAPTER 1

## INTERNATIONAL HUMAN RIGHTS

### “GENERAL BACKGROUND”

#### Introduction:

The contemporary concept of human rights finds its origin in the theory of natural law, which has been subject to considerable development through different stages of history. The expression “human rights” is a relatively recent term dating from the Eighteenth century<sup>1</sup>, but the concept is seen as an extension of philosophers’ thinking throughout different ages. It is essential to trace these historical and philosophical developments, because the scope of a notion can be better understood within the culture that has witnessed its birth and development. The first section of this chapter thus discusses the theory of natural law. The second section concerns the United Nation and human rights. Three topics are covered in this section, namely: the Charter of the United Nations, the Universal Declaration of Human Rights, and the International Covenant on Civil and Political Rights. Finally, section three addresses the question of whether human rights have a universal or a relative nature.

It is worth mentioning here that the discussions provided in this chapter are not intended to offer detailed description of their topics. Rather, this chapter aims to serve as an introduction for subsequent parts of the thesis.

#### Section I Natural Law<sup>2</sup>

The concept of human rights is the product of philosophical debate that in European societies has lasted over 2000 years. Despite the fact that the term ‘human rights’ was

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<sup>1</sup> - By the philosopher Henry David Thoreau. J.M.Kelly (1992) “*A Short History of Western Legal Theory*” p. 2. Hereinafter will refer to as Kelly (1992).

<sup>2</sup> - In this section I refer mainly to J.M. Kelly’s book mentioned above save other details for your bibliography. My justification for doing so is: 1- my aim in this section is to provide a basic background for the subject in hand, and I do not pretend to undertake an investigation on the subject. 2- This book traces the historical development of the subject through succeeding ages, an approach which shows the relationship between modern human rights and the natural law in a very clear manner.



first mentioned in the eighteenth century<sup>3</sup>, it is widely accepted that the theory of natural law is the foundation of the modern concept of human rights.<sup>4</sup>

Owing to the impossibility of identifying the different meanings of the word 'nature', the concept of natural law is equivocal. Historically speaking, the theory of natural law has not been used to denote a single unified conception, but has been developed by philosophers and jurists throughout the ages, from the ancient Greeks until the 20<sup>th</sup> century when the expression 'human rights' became a prominent concept<sup>5</sup>. D'Entrevés asserts that there is no one tradition of natural law, claiming for example that the similarity between medieval and modern conceptions of natural law does not go beyond a shared vocabulary.<sup>6</sup>

In the following an attempt will be undertaken to outline the development of the theory of natural law in, respectively, the Classical eras of Greece and Rome, the early Middle Ages until 1100, the high Middle Ages (1100-1350), the eras of the Renaissance and Reformation (1350-1600), the 17<sup>th</sup> century, the 18<sup>th</sup> century (the Age of Reason), the 19<sup>th</sup> century, and the 20<sup>th</sup> century.

To begin with, the Greek philosopher Aristotle believed that natural law embodied elementary principles of justice. He distinguished between two kinds of justice, namely, one whose validity is universal and absolute; and one owing its existence to human convention.<sup>7</sup>

The Roman philosopher Cicero added fresh parameters to Aristotle's theory, stressing the vital agency of human reason as mediator of the eternal principles of justice which are embedded in nature. Moreover, he characterised "Law" as the highest product of man's reason, thus creating a direct link between nature and law, which he called a "natural force"<sup>8</sup>

Cicero also links natural law with God, thus creating a connection between the concept of absolute justice and divinity: "*the true and primal Law, designed for command and prohibition, is the right reason of the high God*"<sup>9</sup>

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<sup>3</sup> - By the philosopher Henry David Thoreau. Kelly (1992) p.2

<sup>4</sup> - See for example Andrew Heard (2001) "Human Rights: Chimeras in Sheep's Clothing?" <http://lw15fd.law.hotmail.msn.com> (20/07/2001) p. 6. Hereinafter will refer to as Heard (2001).

<sup>5</sup> - A. P. d'Entrevés (1970) "Natural Law: An Introduction to Legal Philosophy". Hutchinson University Library. London. p 1. Hereinafter will refer to as D'Entrevés (1970)

<sup>6</sup> - Ibid, p. 17

<sup>7</sup> - Lynch, J (2001) Natural Law. [http://Encarta, msn.com](http://Encarta.msn.com) P. 1 (2.9.2001). hereinafter will refer to as Lynch (2001)

<sup>8</sup> - Kelly (1992) P. 58

<sup>9</sup> - Ibid, p. 58

Moving to interpretations of natural law in the early middle Ages, the religious influence is now clearly discernable, as a result of the Christian Church's domination of the spiritual realm after the collapse of the Roman Empire. The Classical and the Christian philosophies are fundamentally divided by their different conceptions of the divinity. Cicero's God is an abstract force which men tap into by means of their reason; whereas the God of Christianity is personal, and communicates his commandments to chosen individuals by revelation.<sup>10</sup>

However, Christian philosophy offered many points of integration with Classical principles. St Thomas Aquinas (c.1225-74) made a synthesis of Christian teachings and the natural law that results from reason. Like Aristotle, St Thomas distinguished divine or natural law from human law, though he linked the former to Decalogue and Christ's commandment to love one's neighbour. Again, St Thomas stressed the antecedence and supremacy of natural law over man-made statutes. The latter, whether secular or ecclesiastical, were invalid if contrary to natural law.<sup>11</sup> But natural law lays down only general principles which can, in the form of positive law be applied in different ways to meet different circumstances. Including different cultural traditions. Equally he emphasises the importance of human reason: "*Human law has the quality of law only so far as it proceeds according to right reason: and in this respect it is clear that it derives from the eternal law.*"<sup>12</sup>

Thus, during the twelfth and thirteenth centuries, that is the high middle Ages, the Aristotelian tradition that reason, not revelation, was man's link with eternal law remained an influence<sup>13</sup>. It is also interesting to note that in St Thomas's theology, individuals have certain immutable rights as part of the law of God.<sup>14</sup> Within the limits of reasons, there could be different applications of natural law in different societies.

After St. Thomas, a different doctrine began to shape the individual's obligations: one which centres human duties on the will of God. The will of God is binding on all people solely because it is His will<sup>15</sup>; natural law is perceived as meaning that the

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<sup>10</sup> - Ibid, p. 102&103

<sup>11</sup> - Ibid, p. 142

<sup>12</sup> - Ibid,p.144

<sup>13</sup> - Ibid p. 142

<sup>14</sup> - Symonides, J. (2000) "*Human Rights: Concept and Standards*". Aldershot, Burlington USA, Singapore, Sydney, UNESCO Publishing. P. P. 37. Hereinafter refer to as Symonides (2000).

<sup>15</sup> - Kelly (1992). P.145

duty to do something or to abstain from acting in particular way is not what human reason views as right, but what God commands.<sup>16</sup>

From now until after the Reformation, philosophy was obliged to accommodate itself within theological dogma. However, the perception of an antecedent natural, or divine, law to which human law must conform still persisted.<sup>17</sup>

In the 17<sup>th</sup> century the previous status of natural law underwent dramatic change. Not only was its medieval connection with religion challenged<sup>18</sup>, but also the idea that natural law had transcendental value was attacked by philosophers such as the Dutchman Grotius (1583-1645)<sup>19</sup>, the Englishman Hobbes (1588-1679), and the Portuguese Spinoza (1632-77). Regardless of personal religious convictions they not only returned human reason to the centre of human conduct, but also placed natural law on a secular basis, relating man's motivation to the facts of his physical existence<sup>20</sup>. In addition, the divine nature of natural law was challenged by the 17<sup>th</sup> century philosophers. John Locke (1632-1704) was one of the most influential of the new, rational voices of this century. In "The Reasonableness of Christianity" Locke does not deny that certain moral laws are God-given, but he insists on the paramount importance of human reason in controlling the operation of these laws. In his "Second Treatise of Government" Locke develops his views on the role of human reason in determining positive law: reason is the "law of nature" which exists prior to positive law: reason is the mediator of the principles of natural law, on which civil government is based<sup>21</sup>.

Grotius's theory of natural law led to a theory of natural rights that is considered to be the oldest precursor of the concept of human rights<sup>22</sup>. He held that a part of the nature of man is the social desire to coexist peacefully with others. The implications of this perspective produced principles involving the individual's natural rights. Accordingly a shift of tone from natural law to natural rights took place during the seventeenth century. Thus Grotius is considered the founder of the modern theory of natural law.<sup>23</sup>

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<sup>16</sup> - Ibid, p.186

<sup>17</sup> - Ibid, p. 188

<sup>18</sup> - Heard (2001) p. 6

<sup>19</sup> - D' Entreves (1970) p. 55

<sup>20</sup> - Kelly (1992) p. 222-224

<sup>21</sup> - Mautner, Thomas, ed. (2000) "*The Penguin Dictionary of Philosophy*". London: Penguin. P. 321&322

<sup>22</sup> - Symonides (2000). p. 37 & Lynch (2001) p.1.

<sup>23</sup> - D' Entreves (1970) p. 55



The development of natural law theory in the 18th century must be seen in the context of the Enlightenment, which dominated the intellectual and political life of Europe and beyond. This movement was centred on belief in the power of human reason and intelligence. Man was seen as capable of huge advances in science and technology in the interest of humankind. This mood led to the rejection of all kinds of orthodoxies, and an emphasis on the importance of empirical proof.<sup>24</sup>

Furthermore, although they routinely mentioned the spirit of God, the majority of lawyers perceived natural law in terms of reason. Natural law was invoked in some parts of Europe to provide material from which the complete internal system of a particular country could be extracted. For instance, Christian Wolff (1679-1754) presented a whole system of law based on human nature. This work was rewritten with a system of international law in 1752. In this treatise all rights and obligations are deduced from human nature.<sup>25</sup>

In 1776 the American Declaration of Independence was promulgated, stating that *“men are created equal, and are endowed by their Creator with certain inalienable rights, among which are life, liberty, and the pursuit of happiness; the purpose of the institution of government is to guarantee those rights; that institution rests on the consent of the governed; and if government becomes destructive of those rights, it can be abolished and replaced with a new form”*.

In 1789 the French Revolution saw the French citizens' overthrow of their monarchy and the declaration of the Rights of Man, in which seventeen rights were proclaimed as *“natural, inalienable, and sacred rights of man”*. The English revolutionary writer Thomas Paine supported the idea of natural rights. In his book *“The Rights of Man”* published in two parts in 1791 and 1792, he differentiated natural rights from civil rights in terms of those rights which appertain to man as an individual, and another set of rights which appertain to man as a member of a society.<sup>26</sup>

However, the assertion of universal natural rights also had vehement critics. Edmund Burke (1729-1797) argued that rights are different from one society to another because they are the result of political struggles through history.<sup>27</sup> David Hume (1711-1776) claimed that there is no single unified standard of natural law by which human conduct can be scrutinized. Hume maintained that emotion is a stronger

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<sup>24</sup> - Kelly (1992) p. 249 & 250

<sup>25</sup> - Ibid, p. 260

<sup>26</sup> - Heard (2001) p. 5

<sup>27</sup> - Ibid, p. 5



motivator than reason in all human actions: human behaviour is the consequence of individual inclinations, and if coincidentally patterns of conduct can be identified within a society, this is only a matter of custom. As Kelly comments, Hume's denial of universal reason underlying human behaviour "*naturally undermined belief in reason-based natural-law doctrine; his analysis... introduced a new era.*"<sup>28</sup>

Empirical science had its effect on legal theory. Specifically, the idea found currency that laws are only suited to their own countries, and that accordingly every country will have its particular regulations. When the government of Maria Theresa proposed a unified code of law for the Habsburg empire the plan was opposed on the ground that: "*the geographical situation of the provinces is not the same, nor is the air they breathe, the food they consume or their constitution*".<sup>29</sup>

Jeremy Bentham also rejected the idea of natural rights regarding natural rights as simple nonsense. His criticism of natural rights was based on the position that rights cannot be discussed in isolation from law.<sup>30</sup> In the pragmatic mood of his century, he claimed that there are no natural rights because rights are created by the laws of society.<sup>31</sup> Interestingly, he also drew attention to the risk that brutal leaders could abuse the concept.

It therefore appears that many writers in this period debated the expression 'natural rights', and thus the term 'human rights' began to be used.<sup>32</sup>

In the 19<sup>th</sup> century, following the widespread objection to the idea of natural law which was the consequence of the Enlightenment, clear acceptance of the theory is not to be found outside the Catholic Church. Here a connection between morality and the law was still perceived.<sup>33</sup> However, a significant development on the natural rights debate in this era was the introduction of issues such as slavery and child labour. The campaigners against these abuses, however, saw them as instances of

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<sup>28</sup> - Kelly (1992) p. 271

<sup>29</sup> - Ibid, p. 274

<sup>30</sup> - Ibid, p. 276. Bentham declares: "*When a man is bent upon having things his own way and can give no reason for it, he says: I have a right to have them so. When a man has a political caprice to gratify...when he finds it necessary to get the multitude to join with him...he sets up a cry of rights... the language of natural rights requires nothing but a hard front, a hard heart and an unblushing countenance. It is from beginning to end so much flat assertion: it neither has any thing to do with reason nor will endure the mention of it.*"

<sup>31</sup> - Waston, B (1992) "Human Rights". In the international Human Rights in Context. 2000. P. 32 & Heard (2001) p. 5

<sup>32</sup> - "A Short History of the Human Rights Movement: Early Political, Religious, and Philosophical Sources." [Http: lw15fd.law15.hotmail.msn.com](http://lw15fd.law15.hotmail.msn.com). Created on july14, 1994/ last edited on January 25, 1997. p. 2 (20/07/2001)

<sup>33</sup> - Kelly (1992) p. 334

uncivilised and unchristian practice. Only in the 20<sup>th</sup> century were they identified as violations of human rights.<sup>34</sup>

Instances of the operation of a notion of natural law can be found in first part of the 20<sup>th</sup> century. In Ireland, for example, a spontaneous Catholic influence on the secular legal system of the Irish state was discernable.<sup>35</sup> In 1934 the Irish Chief Justice Hugh Kennedy, invoked natural law in *the state (Ryan) v. Lennon*, referring to “*that acknowledged ultimate Source through which the legislative authority has come . . .*” as well as explicitly to the term “*Natural Law*”.<sup>36</sup>

An important revival of the notion of natural law took place as a result of the atrocities of the Second World War. The founder of the new natural law theory was Gustav Radbruch (1878-1949). To demonstrate the illegality of Nazi cruelty, it was necessary to refer to a code of justice superordinate to Nazi statutes: “*a law which is above statute, however one may like to describe it: the law of God, the law of nature, the law of reason.*”<sup>37</sup>

After the Second World War, natural law reappeared in a new form. Radbruch explained that the Nazi laws were not just wrong laws, but they were not laws at all since they contravened the paramount legal value of treating similar cases equally. He further argued that law is invalid and null if it is inconsistent with the notion of justice.<sup>38</sup> In the same context, the Federal Constitutional Court in Germany has more recently invoked the theory of natural law as an authoritative principle in some judgments. In separate cases in the 1950s and 1960s the German courts described the Nazi laws as void on the ground that these laws infringe the basic tenets of justice.<sup>39</sup>

The idea of transcendent law is taken further when some writers recommend resistance to unjust laws. Helmut Coing (born 1912) stated: “*but in the face of a criminal government, deliberately acting in a manner forbidden by the natural law, resistance is by natural law both permissible and legitimate.*”<sup>40</sup>

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<sup>34</sup> - “A Short History of the Human Rights Movement: Early Political, Religious, and Philosophical Sources.” [Http: lw15fd.law15.hotmail.msn.com](http://lw15fd.law15.hotmail.msn.com). Created on July 14, 1994/ last edited on January 25, 1997. p. 2 (20/07/2001)

<sup>35</sup> - Kelly (1992) p. 374

<sup>36</sup> - Ibid, p. 375

<sup>37</sup> - Ibid, p. 379

<sup>38</sup> - Ibid, p. 418 & 419

<sup>39</sup> - Matthias Herdegen “Natural law, Constitutional Values and Human Rights: A Comparative Analysis”. Human Rights Law Journal. 31 August 1998 Vol.19 No. 2-4 P. 37

<sup>40</sup> - Kelly (1992) p. 419



## **Section II                      Human rights and the United Nations**

The current movement of human rights works within the Organization of United Nations. This movement started with the establishment of the Charter of the United Nations followed by many international and regional treaties regarding human rights. In this section three topics will be involved. Namely, the Charter of the United Nations, the Universal Declaration of Human Rights, and the International Covenant on Civil and Political Rights.

Generally speaking, three main instruments compose the International Bill of Rights. These are the Universal Declaration of Human Rights of 1948 (UDHR), and two principal covenants, which were opened to signatures in 1996, but came into force only 10 years later. The first is the International Covenant on Civil and Political Rights (ICCPR), and the second is the International Covenant on Economic, Social, and Cultural Rights (ICESCR). Each covenant protects designated categories of rights. The former ensures the rights of self-determination; legal redress; equality; life; liberty; freedom of movement; fair, public, and speedy trial of criminal charges; privacy; freedom of expression, thought, conscience and religion; peaceful assembly; freedom of family association; and participation in public affairs. It also prohibits torture; cruel, inhuman or degrading treatment or punishment; slavery; arbitrary arrest; double jeopardy; and imprisonment for debt.

Other categories such as the right to gain a living by work; to have safe and healthy working conditions; to enjoy trade union rights; to receive social security; to have protection for the family; to possess adequate housing and clothing; to be free from hunger; to receive health care; to obtain free public education; and to participate in cultural life come within ICESCR. In addition, the rights indicated in the ICCPR constitute what is known as the first generation of human rights, while the rights provided in the ICESCR are called the second generation of human rights.<sup>41</sup>

The third part of the Bill of Rights, namely the ICESCR, will not be examined here because this thesis focuses on the rights of the accused, which would appear to fall within the rights protected by the ICCPR, and have no bearing on the ICESCR.

### **(1) The UN Charter:**

The tragedy of the Second World War emphasised the importance of a new international legal order for the post-war period. Various diplomatic efforts and

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<sup>41</sup> - There is also a third generation of human rights. These are collective not individual rights. See Mashood A. Baderin (2003) p 22-23



debates resulted in the adoption of the Charter of the United Nations at the San Francisco Conference in 1945.<sup>42</sup>

The text of the Charter makes sparse reference to human rights. In the following human rights texts and writers' comments on them will be briefly indicated.

The Charter's Preamble states: "*we the people of the United Nations determined to... reaffirm faith in fundamental Human Rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small...*"

Moreover, article (1)(3) indicates that one of the purposes of the United Nations is "*to achieve international co-operation ... in promoting and encouraging respect for human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.*"

The United Nations is obliged, according to article 55, to promote a universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion. To fulfil this task the United Nations is provided with certain powers falling within one of the three areas of "study", "examination" and "recommendations". By these methods the United Nations recommends states to enter treaties on human rights. Recommendation is the main means of the United Nations in the field of human rights: no legal obligation is imposed upon states save by article 56 which imposes the duty to examine recommendations carefully and in good faith.<sup>43</sup>

Pursuant to article 68 the Economic and Social Council: "*shall set up commissions ... for the promotion of human rights, and such other commissions as may be required for the performance of its functions.*"

Commentators' perspectives vary as to the effectiveness of the above provisions. Those who are not satisfied with these texts argue that despite the confirmation of respect for and protection of human rights, the Charter does not adequately clarify the nature of those rights and freedoms. Moreover, the Charter does not grant individuals the right to be a party in a complaint before the United Nations or the International Court of Justice. Furthermore, it is widely held that the human rights provisions of the Charter are vague and weak and do not define the meaning of the human rights

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<sup>42</sup> - The drafting history is beyond the scope of this study. For more literature on the history of drafting the Charter see for example, Bruno Simma (2002) "*The Charter of the United Nations.*" Second Edition. Volume I. Oxford University Press. p. 1-12. Hereinafter will refer to as Bruno Simma (2002).

<sup>43</sup> - Ghali, B. (1995) "*The United Nations and Human Rights.*" New York, United Nations Publication p.6. Hereinafter will refer to as Ghali (1995).

and fundamental freedoms.<sup>44</sup> Again, it was expected of the United Nations Charter that it would contain provisions establishing a system that could effectively protect human rights at the international level; however, that did not happen because of opposition from the major powers: the United States, the Soviet Union, France and the United Kingdom. These states were not ready to accept strong commitments in that field because they all had serious problems with human rights at that time.<sup>45</sup>

On the other hand, some argue that, although the Charter does not define human rights, it provides for special attention to the correlation between human rights and the maintenance of international peace and security. Steiner and Alston state that "*the UN Charter, at the pinnacle of the human rights system, has relatively little to say about the subject, but what it does say has been accorded a great significance, through interpretation and extrapolation as well as frequent invocation, the sparse text has constituted a point of departure for inventive development of the entire movement*"<sup>46</sup>

As to the question of the obligatory character of the United Nations Charter, it is often maintained that the human rights provisions in the Charter are not of an obligatory character; but that their aim is to promote recognition and respect for human rights. Additionally, some authors have argued that the parties of the United Nations Charter accept only a moral promotional obligation toward human rights.<sup>47</sup>

However, this stance is rejected on the grounds that the Charter internationalises the concept of human rights, and accordingly states must assume some international obligations relating to human rights. Even though, through such great milestones of human freedom as the American Declaration of Independence and the French Declaration of the Rights of Man and Citizen, there was some international recognition of human rights protection prior to the UN charter, the process that proclaims the internationalisation of human rights began essentially with the establishment of the United Nations. Thus the Charter is the first international document to recognise human rights and fundamental freedoms as one of the principles of international law.<sup>48</sup>

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<sup>44</sup> - Symonides (2000) p. 11

<sup>45</sup> - Ibid, p. 11

<sup>46</sup> - Steiner, H. a. A., P (2000). "*International Human Rights in Context*". Oxford, Oxford University Press. P.140

<sup>47</sup> - Waston, B. (1992). *Human Rights. International Human Rights in Context*. H. a. A. Steiner, P. New York, Oxford University Press. P. 23

<sup>48</sup> - Symonides (2000) p. 12



In addition, the claim that human rights are fundamentally a domestic matter is no longer acceptable. The obligation of the member states of the United Nations to cooperate with the organization in the promotion of human rights provided the United Nations with the necessary legal power to embark on an attempt at defining and codifying these rights. Furthermore, it is agreed that total rejection of the United Nations recommendations is contrary to article 56. Moreover, recommendations concerning certain United Nations human rights standards constitute or strengthen a rule of customary international law.<sup>49</sup> The Human Rights Committee, in this context, disclosed the human rights text in the Charter to be part of international customary law, and thus obligatory for all states.<sup>50</sup>

When the legal validity of the preamble of the Charter was questioned, the report of the Rapporteur of Committee 1/1 asserted that: *"The provisions of the Charter, being in this case inadvisable as any other legal instrument, are equally valid and operative... It is thus clear that there are no grounds for supposing that the preamble has less legal validity than the two succeeding chapters."*<sup>51</sup>

## **(2) The Universal Declaration of Human Rights:**

Representatives from Australia, Chile, China, France, Lebanon, the United Kingdom, the United States and the USSR were appointed to prepare the drafted declaration that was adopted on 10 December 1948, with forty-eight votes in favour, none against and eight abstentions.

The Declaration asserts that human rights are based on the inherent dignity of every person. Individuals' dignity and the rights to freedom and equality are inalienable rights, thus human rights are by nature universal rights, and they cannot be abrogated.<sup>52</sup> This view of the rights provided in the Declaration shows the relationship between human rights as presented in the Declaration and the concept of natural law.

In respect of the legal character of the Declaration, the question to be answered is whether the Declaration in itself constitutes a legal document containing obligatory provisions. The answer is to be found in the recognition that the purpose of the Declaration was not to impose legal obligations, but rather to set up international

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<sup>49</sup> - Ghali (1995) p. 7

<sup>50</sup> - Year Book of the International Law Commission 1976, Vol. 2 part 2 P. 105

<sup>51</sup> - Bruno Simma (2002) p.35

<sup>52</sup> - Ghali (1995) p. 24



objectives on human rights for all states. Therefore, the UDHR is not legally binding. The operative part of the Resolution 217 (III) reads: *“now therefore, the General Assembly proclaims this Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of member states themselves and among the peoples of territories under their jurisdiction.”*<sup>53</sup> This character of the Declaration is due to the desire of the powerful members in the Organization to give the Declaration only a moral and educational function. During the adoption of the Declaration the representative of the United States said: *“In giving our approval to the declaration today, it is of primary importance that we keep clearly in mind the basic character of the document. It is not a treaty; it is not an international agreement. It is not and does not purport to be a statement of law or of legal obligation.”* Slightly diverging from the above position the representative of the Soviet Union asserted that any enforcement of these rights is a domestic matter whereby the international community should abstain from playing any role.<sup>54</sup>

But although it is not legally binding many legal documents are essentially influenced by principles provided in the Declaration. The General Assembly has on many occasions asserted the importance of the Declaration's principles. In addition, the Declaration's provisions have influenced most regional treaties and constitutions. Accordingly, some would maintain that these principles are now regarded as part of the customary international law,<sup>55</sup> or at least seen in terms of general principles recognized by civilized nations<sup>56</sup>. Moreover, it is argued that even though not regarded as a legal document containing legal obligations; the Declaration's implications have legal significance. Thus its perspectives on human rights and

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<sup>53</sup> - Robertson. A. a. M., J (1996) *“Human Rights in the World.”* Manchester and New York, Manchester University Press. p. 28. hereinafter will refer to as Robertson (1996)

<sup>54</sup> - Mohammed Al-Qasimi (1999) *“Establishing and Interpreting International Human Rights Standards: A Universal Idea in A Plural Society”*. Unpublished PhD Thesis; University of Durham. p. 95. hereinafter will refer to as Al-Qasimi (1999)

<sup>55</sup> - Robertson (1996) p.28. Against this view some argue that an act to constitute a customary international law, it must be widely practiced. So the mere acceptance and recognition are not sufficient.

<sup>56</sup> - Al-Qasimi (1999) p. 100

fundamental freedoms are seen as authoritative, creating obligations for the United Nation's members. However others reject this view with the argument that for any document to be considered as an authoritative interpretation of another document, the former should be an obligatory legal instrument and have the same significance as the latter<sup>57</sup>.

### **(3) The International Covenant on Civil and Political Rights:**

The General Assembly Resolution No. 217(III) was not limited to the Universal Declaration on Human Rights, but also stipulated that work should continue on the two other aspects of the Bill of Rights. That is, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.

Continuous debate took place regarding the draft of the Covenant. The Committee concerned at first provided a draft of the Covenant that was devoted only to civil and political rights. However, the General Assembly's opinion at that time was that the draft should also cover economic, social and cultural rights. The Security Council noted the difference between civil and political rights on one hand, and social, economic, and cultural rights on the other, and then proposed that the General Assembly reconsider its previous decision. Finally, it was decided to set up two separate covenants, one addressing civil and political rights, and the other economic, social, and cultural rights.

During 1958-1961 provisions concerned with civil and political rights were approved. From 1962 to 1963 there was dispute over the introductory articles, particularly in respect of whether the obligations to respect the rights in the Covenant should have immediate or future effect. In 1966, after almost two decades of negotiations and rewriting, the International Covenant on Civil and Political Rights was agreed upon. It came into force in 1976, after being ratified by the required 35 states.<sup>58</sup> Two Optional Protocols supplement the ICCPR. The first provides individuals with essential procedural rights to submit complaints in the case of their rights being violated. The second Optional Protocol prohibits capital punishment.

To distinguish between civil rights and political rights it is argued that: "*Civil rights covers rights to protect physical integrity, procedural due process rights, and non-*

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<sup>57</sup> - Lauterpacht, H (1950) in Steiner, H. a. A., P (2000). "*International Human Rights in Context*". Oxford, Oxford University Press. P. 151

<sup>58</sup> - Robertson, (1996) p. 30&34



*discrimination rights. Political rights enable one to participate meaningfully in the political life of one's society such as freedom of expression, assembly, and association, and the right to vote.*"<sup>59</sup> However, this statement is not clear-cut. Civil rights are essential to protect political rights.

In order to clarify the general scope and character of the ICCPR two subjects should be studied, namely, the rights protected, and the mechanism to remedy any violation of these rights. In the following these two subjects will be outlined in turn.

**Rights protected:**

During the debate over the provisions some believed that it would be impossible to set forth in great detail the scope and content of each right. Others however, who favoured a more specific approach and felt that the Covenant should not duplicate the UDHR, criticized this approach. The substantive provisions of the Covenant clearly reflect the influence of this dichotomy. Some articles are written in general terms, while others are quite detailed.<sup>60</sup>

The ICCPR guarantees the following substantive rights:

- 1- Right of self-determination.
- 2- Right to life.
- 3- Freedom from torture and inhuman and degrading treatment or punishment.
- 4- Freedom from slavery, servitude, and forced labour.
- 5- Rights to liberty and security of the person.
- 6- Right of detained persons to humane treatment.
- 7- Freedom from imprisonment for inability to fulfil a contract.
- 8- Freedom of movement.
- 9- Right of aliens to due process when expelled.
- 10- Right to fair trial.
- 11- Freedom from retroactive criminal law.
- 12- Right to recognition as a person before the law.
- 13- Rights to privacy.
- 14- Freedom of thought, conscience, and religion.
- 15- Freedom of opinion and expression.

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<sup>59</sup> - Sarah Joseph, Jenny Schultz, and Melissa Castan (2000) *"The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary."* Oxford University Press. p. 3 & 4. Hereinafter will refer to as Sarah Joseph, Jenny Schultz, and Melissa Castan ( 2000)

<sup>60</sup> - Ghali (1995) p. 44&45



16- Freedom from war propaganda and freedom from incitement to racial, religious, or national hatred.

17- Freedom of assembly.

18- Freedom of association.

19- Rights of protection of the family and the right to marry.

20- Rights of protection for the child.

21- Right of participation in public life

22- Right to equality before the law and rights of non-discrimination.

23- Rights of minorities.

Some rights listed in the Universal Declaration of Human Rights, such as the right to own property and the right to asylum, are not included among the rights recognized in the Covenant. Similarly, the Covenant contains rights that are not listed in the Declaration. The following rights are not laid down in the Declaration: the right of detained persons to be treated with humanity, freedom from imprisonment for debt, prohibition of propaganda for war and of incitement to hatred, the rights of the child, and the rights of minorities.

In accordance with article 2(1) a contracted state is obliged to implement the substantive Covenant rights promptly in its domestic law. A state should thus enact legislations, or take other measures to make its internal practice conform with guarantees provided in the Covenant.<sup>61</sup> If these rights are infringed the state concerned must provide effective remedies for the victim.<sup>62</sup> A competent body will decide the remedies.<sup>63</sup>

Paragraph 1 of article 5 provides protection against misinterpretation of the Covenant to justify violation or restriction of a right or freedom. Paragraph 2 of the same article deals with possible conflicts between the Covenant and legislations and customs in any state party, and provides that States are prohibited from limiting rights already enjoyed under their jurisdiction on the ground that such rights are not recognized in the Covenant.

However, Robertson and Merrills maintain that some of the provisions are vague and imprecise, making interpretation an uneasy task.<sup>64</sup> In addition, some criticize the

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<sup>61</sup> - Article 2 (2) of the ICCPR.

<sup>62</sup> - Article 2 (3) (a)

<sup>63</sup> - Article 2 (3) (b)

<sup>64</sup> - Robertson (1996) p. 38

Covenant for permitting governments to temporarily suspend some of these rights in cases of civil emergency.

### **Human Rights Committee:**

In 1966 it was decided that providing the individual with a right to present complaints to the Human Rights Committee should be introduced through an optional protocol. This optional protocol, which came into force in 1976, adds legal force to the Covenant on Civil and Political Rights by allowing the Human Rights Committee to examine individual complaints about alleged violation of the Covenant rights.

The Committee is composed of independent experts selected by a meeting of the State Parties. They serve in their personal capacity. Its task is to consider the periodic reports which all states are required to submit, to formulate general, objective observations, to consider complaints from a State Party regarding another State Party, and to consider complaints from an individual against a State Party.<sup>65</sup>

According to ICCPR the Human Rights Committee of the United Nations is tasked to ensure increased compliance with the provisions of the ICCPR. State parties send "initial", "supplementary" and five yearly periodic reports. The Committee also enters into public discussion with representatives of state parties concerning the human rights situation in the representative states.<sup>66</sup>

With respect to individual complaints, the First Optional Protocol provides individuals with the right to submit complaints to the HRC about a state's alleged breaches of their rights under the Covenant. The HRC has the competence to handle individual complaints only against states that have ratified both the Covenant and the Optional Protocol. Therefore, any matter concerning a state that is not a party to the Protocol is clearly outside Human Rights Committee jurisdiction.

With respect to the procedures before the Committee, it should at first consider the admissibility of the complaint. For the complaint to be admissible, the following criteria should be satisfied: 1- there must be an individual victim: in other words the claimant must be identified; 2- an individual petition must be in written form; 3- the complaint must concern an act within the jurisdiction of the relevant state; 4- the alleged violation must be committed after the state ratification of the First Optional Protocol; 5- the complaint may not be examined before another international body; 6-

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<sup>65</sup> - Ghali (1995) p. 46

<sup>66</sup> - Christopher, H (2000) "The Status of International Covenant on Civil and Political Rights (ICCPR) In Domestic Law of State Parties: An Initial Global Survey Through UN Human Rights Committee Documents." Human Rights Quarterly Journal. Vol.22 P. 188



all domestic remedies must be exhausted; 7- the complaint must also be accompanied with sufficient evidence to prove the case; and 8- the complaint must relate to a matter arising under the Covenant, that is to say, which infringes one of the rights of the Covenant.

Once the complaint is considered admissible, the HRC will study the merits of the complaint. All relevant documents are forwarded to the state concerned, which should submit written explanation to the Committee within six months. The state's observation will then be sent to the claimant who may submit any additional information. Finally, the committee formulates its views on the complaint. The consideration of the HRC on the complaint takes place in a closed meeting, and all documents are confidential. However, the final views are published. The Committee has the right to direct the state concerned to amend its law or any practice that it considers incompatible with the rights of the Covenant.<sup>67</sup> Even though the HRC views are not legally binding because the HRC is not a judicial body, the HRC is "*the pre-eminent interpreter of the ICCPR which is itself legally binding. The HRC 's decisions are therefore strong indicators of legal obligation, so rejection of those decisions is good evidence of a State's bad faith attitude towards its ICCPR obligations.*"<sup>68</sup>

### **Section III Universalism versus Relativism**

Human rights as an idea are generally acknowledged by all nations and states all over the globe. No single country nowadays will accept a description of being a human rights violator, but rather such a description will be regarded as a stigma in its political history thereby the universality of human rights is clearly established. However, this universality of human rights should be distinguished from the universalism of human rights. The latter concept started when an attempt of imposing a single interpretation to the norms of human rights i.e. western liberal tradition was undertaken. In his attempt to distinguish between the two concepts (universalism and universality) Mashood A. Baderin<sup>69</sup> illustrates that: "*Universality of human rights refers to the universal quality or global acceptance of human rights idea ...., while 'universalism in' human rights relates to the interpretation and application of the*

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<sup>67</sup> - Heffernan, L (1997) "A Comparative View of Individual Procedures under the ECHR and the ICCPR". Human Rights Quarterly Journal. Vol. 19. P. 97-103

<sup>68</sup> - Sarah Joseph, Jenny Schultz, and Melissa Castan (2000) p. 14

<sup>69</sup> - p. 23&24



*human rights idea. The universality of human rights has been achieved over the years since the adoption of the UDHR in 1948, and is evidenced by the fact that there is no State today that will unequivocally accept that it is a violator of the human rights. Today, all nations and societies do generally acknowledge the human rights idea, thereby establishing its universality. However, universalism in human rights has not been so achieved. Universalism connotes the existence of a common universal value consensus for interpretation and application of international human rights law. The current lack of such universal consensus is evidenced by the fact that universalism continues to be a subject of debate within the international human rights objective of the UN."*

From this moment the conflict between advocates of both the universalism and the relativism began to take place.<sup>70</sup> In fact, the debate regarding the universalism of human rights takes a very sharp contrast.<sup>71</sup>

The key argument on which the claim for universalism of human rights is based is that every person is sacred and inviolable. A rejection of the sacredness of every person will result in the belief that only some human beings are truly human beings, as illustrated by the following extract: "*Serbian murderers and rapist do not think of themselves as violating human rights. For they are not doing these things to fellow human beings, but to Muslims. They are not being inhuman, but rather are discriminating between the true humans and the pseudohumans.*"<sup>72</sup> This distinction between true and pseudo human beings runs counter to the basic assumption of human rights, namely that every human being is sacred regardless of his status i.e. race, colour, sex, language, religion etc.

Since the adoption of the Universal Declaration of Human Rights the world has witnessed a significant development towards the universality of human rights. This development can be seen from three angles: (1) increase in awareness of human rights; (2) significant increase in the number of human rights documents at international level; which might be helpful in establishing a common understanding of human rights; and (3) in practical terms, the international machinery created by the

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<sup>70</sup>- See, Mashood A. Baderin (2003) p. 23-26.

<sup>71</sup>- An example of this contrast can be identified by a reference for instance to Steiner, H. a. A., P (2000). "*International Human Rights in Context*". Oxford, Oxford University Press. P. 366.

<sup>72</sup>- Michael J. Perry (1997) "*Are Human Rights Universal? The Relativist Challenge and Related Matters.*" Human Rights Quarterly. Vol. 19 No. 1 P. 462-4464

world community to supervise and promote human rights.<sup>73</sup> All this tends to reinforce the theory that some rights such as rights to equal protection and free speech are the same everywhere.<sup>74</sup>

Moreover, Claude and Weston point out that international human rights law has become a substantive part of the international law as a whole, serving as a standard against which to measure national behaviour. They add that despite the variation between different political regimes in the achievements of human rights, and even in the absence of realization of the comprehensive conception of human dignity, the human rights standards that have been adopted universally have become a major feature of the world's political scene.<sup>75</sup> In the 1993 World Conference on human rights, Secretary Christopher argued: "*We respect the religious, social, and cultural characteristics that make each country unique. But we cannot let cultural relativism become the last refuge of repression.*"<sup>76</sup>

Additionally, Universalists often argue that there is no specific pure culture because each culture derives its principles from a variety of sources and borrows from other cultures.<sup>77</sup> In this vein Symonides writes: "*While the modern human rights theories have been articulated largely by Western philosophers, the moral concepts are not exclusively Western and find counterparts in non-Western thought as well. Of course, the truth of a philosophical principle should not depend on its geography but on the soundness of its foundation. Self-determination, for example, is a Western-originated concept, yet it has spawned the birth of many Third World States. It is significant that the key human rights instruments starting with the UDHR were not drafted by Western States alone, in any event, the instruments have been endorsed by nations around the world.*"<sup>78</sup>

However, proponents of the relativism of human rights sharply challenge this perspective. The case for relativist theory rests on the claim that it is not possible to strike a balance between protecting the individual and giving effect to some wider

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<sup>73</sup> - Dato' Param Cumaraswamy (1997) "*The Universal Declaration of Human Rights: Is it Universal?*" Human Rights Law Journal. Vol. 18. No. 9-12. P. 476

<sup>74</sup> - Fernando R. Teson (1985) "*International Human Rights and Cultural Relativism.*" Virginia Journal of International Law. Vol. 25. No.4 P. 874

<sup>75</sup> - Claude, R in Weston, B. (1990). "*Human Rights in the World Community.*" Philadelphia, University of Pennsylvania Press. P. 11

<sup>76</sup> - Michael J. Perry (1997) "*Are Human Rights Universal? The Relativist Challenge and Related Matters.*" Human Rights Quarterly. Vol. 19 No. 1 P. 498

<sup>77</sup> - Kuper, A in Steiner, H. a. A., P (2000). "*International Human Rights in Context.*" Oxford, Oxford University Press. P.379

<sup>78</sup> - Symonides (2000) p. 32



interest in any universal way. The universal principles are simply too general to be self applying. The matter depends entirely on particular cultures. What kind of decision-making procedure is appropriate. This being so, there would seem to be little possibility of overcoming transcultural disagreement over certain conducts.<sup>79</sup>

Relativists would maintain that human rights movements stem from the liberal traditions of western thought. For example, some non-western societies argue that some provisions in the UDHR or ICCDR are in conflict with their own cultures. They claim that these instruments aim to provide universal expression for certain tenets of the liberal political culture; and that those tenets are only appropriate in states which are products of that culture.<sup>80</sup>

A more extreme view of the relativists argue that, international human rights instruments constitute an attempt to destroy the diversity of cultures by universalising the west's notions of human rights. In addition, relativists maintain that in view of the great diversity, no trans-cultural ideas of rights can be agreed on. Therefore, any attempt to impose a specific culture on another is unjustified.<sup>81</sup>

Furthermore, advocates of cultural relativism claim that an understanding of moral rights depends on the cultural context, because conceptions of right and wrong, and therefore substantive human rights standards vary from one culture to another, because these standards reflect domestic circumstances and values. More interestingly they argue that a Western version of human rights must not be imposed upon less developed countries, but rather even if an international standard for substantive human rights should exist, its scope and understanding should vary fundamentally from one society to another.<sup>82</sup>

Panikkar offers three reasons for his objection to the universalism of human rights, in brief:

- (1) Only a universal culture may generate a universal concept;
- (2) Western culture cannot claim universality;

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<sup>79</sup> - Michael J. Perry (1997) "Are Human Rights Universal? The Relativist Challenge and Related Matters." *Human Rights Quarterly*. Vol. 19 No. 1 P. 484

<sup>80</sup> - Steiner, H. a. A., P (2000). "International Human Rights in Context." Oxford, Oxford University Press. P. 361&362

<sup>81</sup> - Ibid, p. 367

<sup>82</sup> - Fernando R. Teson (1985) "International Human Rights and Cultural Relativism." *Virginia Journal of International Law*. Vol. 25. No.4 P. 871

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<sup>80</sup> - Steiner, H. a. A., P (2000). "International Human Rights in Context." Oxford, Oxford University Press. P. 361&362

<sup>81</sup> - Ibid, p. 367

<sup>82</sup> - Fernando R. Teson (1985) "International Human Rights and Cultural Relativism." Virginia Journal of International Law. Vol. 25. No.4 P. 871



(3) Eastern and other cultures are founded on premises incompatible with the assumptions of Western principles.<sup>83</sup>

To elaborate on the first argument: Panikkar asserts that no concept can be described as universal since no concept has validity outside the society which generated it. An essential condition that the universality claim must fulfil is that human rights should be the universal point of reference for any disagreement about human dignity. This means that the culture that witnessed the birth of human rights should in logic be a universal culture too.

With respect to the second point, Pannikar argues that there is no single unified Western culture. The formulation of universal human rights is denied not only from outside the west but also from within this culture. (a) From the theological point of view human rights should derive from a superior unchangeable value, mainly God's value. Otherwise, human rights become a political device in the hands of the powerful. (b) Historians see human rights from a political point of view, as an illustration of the domination of powerful countries wishing to preserve their privileges. (c) Marxists consider human rights as a reflection of the welfare of a particular cast of society. Human rights are only a political weapon.

In a statement on human rights prepared by the American Anthropological Association and submitted to the Commission on Human Rights in the United Nations during the drafting of the Universal Declaration of Human Rights, it was asserted that an attempt to draw up a Bill of human rights must bear in mind the following:

1. Only if the group from which the individual has acquired his cultural values is respected can respect be accorded to the individual.
2. There is no means to evaluate cultures. As a result, to respect cultural differences is obligatory.
3. Values and standards are relative.<sup>84</sup>

Furthermore, at the Vienna Conference of 1993 some Asian states pointed out that Western versions of human rights failed to take into account important elements in their religions and political traditions and that they therefore could not fully accept these provisions. They also challenged the universalism of the Universal Declaration of Human Rights on the grounds that it was prepared and formulated without their

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<sup>83</sup> - R. Panikkar (1992) *Is The Notion Human Rights A Western Concept?* Diogenes Vol. 120. P. 84-86

<sup>84</sup> -The Executive Board of the American Anthropological Association. (1947) *American Anthropologist*. Menasha Wisconsin, USA. Published by American Anthropological Association. Vol. 49 No. 4 P. 541&542

participation. These opinions were reflected in the Bangkok Declaration adopted by Asian states in 1993 prior to the Vienna Conference. Article 8 of the Bangkok Declaration states that: *"while human rights are universal in nature, they must be considered in the context of a dynamic and evolving process of international norm-setting, bearing in mind the significance of national and regional particularities and various historical, cultural and religious backgrounds."*

In any event, the Vienna Conference concluded that human rights could be a universal notion without eliminating local differences; and that despite the importance of religious, historical, and cultural differences between nations, individual states are still responsible for protecting and promoting internationally recognised human rights and fundamental freedoms. This conclusion in my view is only a declaration of the universality of human rights. Therefore, the universalism of human rights has not been achieved yet.

#### **Section IV**

#### **Universalism and Islamic Societies**

The above represents the main arguments of both adherents and opponents of the universalism of human rights. It is important from the outset to point out that during the Cold War, debates between advocates of universalism and supporters of the cultural relativism of human rights took place mainly between the Communist regimes and the democratic west. Today, after the collapse of the Soviet Union, the debate takes place between developed and less developed countries, or in a religious (Islam – West) scenario.

Since the engagement of Islamic law and Muslim practice in this debate is today clearer than ever before, and since this thesis concerns certain aspects of human rights in an Islamic state (Saudi Arabia) one should not leave the controversy without offering a contribution which may provide guidelines for assessing the case in Islamic societies, and a proposal to water down the conflict.

To begin with it is useful to mention that an analytical study of the theories of relativism and universalism presents two conflicting perspectives. On the one hand, the relativist theory has the potential to be used as a screen for human rights infringements. Brutal regimes could rationalize their violation of human rights by



purporting that such a violation is consistent with their cultural norms.<sup>85</sup> On the other hand, the claim for the universalism of human rights is widely and correctly rejected on the ground that it reflects a particular western culture, and these values are not in fact universal.<sup>86</sup>

In the following an attempt is made to provide a solution to the question of universalism. This attempt is a call for further work, both by Islamic states on one side, and by human rights bodies within the United Nations on the other. The significance of this proposal is its potential to mitigate the consequences of adopting an extremist view in either Universalists or relativist terms.

Because the proposal draws on the work of two western thinkers, namely Michael Walzer and John Rawls, it is necessary to shed some light on their political philosophies.

In Walzer's moral philosophy, the terms 'maximalist' and 'minimalist' morality express a basic contrast.<sup>87</sup> The term 'maximalism' applies to the actual practice of morality in any given community. Since maximalism has an empirical basis, its forms are always particular to the community in which it evolved, and further, are always contingent on the previous history of that community.<sup>88</sup> The main concern of maximalist morality is to achieve distributive justice.<sup>89</sup> Walzer's own position vis-à-vis the principles of such a system is strongly relativist: he argues that it is not possible to formulate in universal terms the objectives required for specific communities. It is only possible to achieve distributive justice by taking into account the particular social meanings that attach to particular goods in particular communities.<sup>90</sup> Although he is a relativist, Walzer argues that the detail of a scheme of maximalist morality is shaped around some norms that are very general (or, in Walzer's terminology, 'thin'). These norms might have wider application than to a

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<sup>85</sup> - For instance, Ann Elizabeth Mayer (1997) argues that: "Where there is no settled doctrine in the premodern jurisprudence and no established Islamic authority on a point, states naturally are left free to invent what curbs on rights should be imposed in the name of Islam". "Islam and Human Rights: Tradition and Politics." P.65

<sup>86</sup> - for example, Abdullah A. An-Na'im states: "recent history is also important for understanding apparent psychological and political resistance to human rights when perceived as a tool of Western cultural imperialism" Abdullah A. An-Na'im "Islamic Law and Human Rights Today". Interights Bulletin (1996) Vol.10 p.3-6

<sup>87</sup> - Michael Walzer (2002) "thick and thin" p. 21

<sup>88</sup> - Ibid.

<sup>89</sup> - Ibid, pp. 26-27

<sup>90</sup> - Ibid, p. 26

particular community.<sup>91</sup> These general and more widely applicable norms thus belong in Walzer's second category, that of 'minimalist' morality.

The point about minimalism is its aspiration to be independent of any culture-specific context.<sup>92</sup> Walzer presents the idea that minimalist morality is that which expresses non-specific, and possibly even universal concerns.<sup>93</sup> But despite the fact that minimalism is thus free from specific cultural influences, it can function as an instrument by which to evaluate moral uncertainties arising within specific cultures.<sup>94</sup> However, this function seldom has the outcome that a specific guidance is offered with which to address specific problems within a specific maximalist morality. Typically, it is more likely to reveal possible ways of working towards a solution.<sup>95</sup> Seen as a tool for this purpose, minimalism's usefulness consists in suggesting ways of thinking about, and perhaps remedying, the problems or deficiencies of a specific maximalist morality.<sup>96</sup> It is also the case that if minimalist principles are involved in order to correct the shortcomings of a particular culture, this will inevitably entail engagement with maximalist values.<sup>97</sup> The reason is that it is not possible for individual critics to express even general principles in terms that are free from the idiom of their own culture.<sup>98</sup>

In Walzer's philosophy this is not a problem. According to Walzer's analysis, minimalism is 'thin', that is: it offers insufficient matter to provide practical solutions in an actual context. Any critic of a particular current practice must use 'thickness' with which to frame his argument; and this thickness will necessarily derive from his own culture-specific norms.<sup>99</sup>

Walzer argues that even when people refer to minimalist values for guidance, they should do so in terms of what best suits the background of their own culture.<sup>100</sup>

To sum up, for Walzer there is a distinction between a local level of morality and a more general level which is possibly universal. But, minimalist norms are not

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<sup>91</sup> - Ibid, p. 3

<sup>92</sup> - Ibid, p. 3

<sup>93</sup> - Ibid, p. 50

<sup>94</sup> - Ibid, p. 10 and pp.16-17

<sup>95</sup> - Ibid, p. 6

<sup>96</sup> - Ibid, p. 39

<sup>97</sup> - Ibid, p. xiii

<sup>98</sup> - Ibid, p. 9

<sup>99</sup> - Ibid, p. 11 and p. 17

<sup>100</sup> - Ibid, p. 3



superordinate to maximalist values. According to Walzer's view, decisions about practical measures should be taken only from a basis of strictly local considerations.

Many Muslim societies might favour the adoption of this philosophy, as it would tend to preserve institutions and practices in Islamic countries and thereby to protect the culture-specific values which are fundamental to Islamic States. However, this could widen the gap between practice in Islamic communities on the one hand, and the international standard of human rights on the other. Obviously, a wider gap between cultures could be an obstacle to development and cooperation on the level of politics, economic, security, etc. Therefore, it is preferable to consider a more appropriate solution.

The second philosophy, as we mentioned above, is enunciated by John Rawls. Rawls proposes the use of hypothesis in his philosophy. People in a particular community, in his view, should construct an imaginary situation in which they are making judgments about their society from the outside, without personal bias, and consider what the outsider would decide.<sup>101</sup> These outsider's principles must then be compared with their own societies' considered judgments of justice.

Principles that are reached by the imaginary means, i.e. the hypothetical outsiders, may not be compatible with their societies' considered judgments. Once this is the case people may adjust (change) their considered judgment, or instead they should go back to the construction that is shaped via the imaginary outsiders and consider whether it has any deficiencies.

By this approach Rawls hopes to achieve a position of 'reflective equilibrium' in which the considered judgments of particular society gel with principles which the neutral outsider would choose.<sup>102</sup>

A reflective equilibrium approach does not give priority to either local or overarching norms. Rather, it identifies both sets of norms as potentially useful sources of guidance on the question as to how interests of fundamental importance should be protected. Reflective equilibrium is then used to assess or maybe refine our considered judgments and the neutral guiding principles on which they should be based in the light of one another.<sup>103</sup> A significant feature of this political philosophy

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<sup>101</sup> - J.W. Harris (1997) "*Legal Philosophies*". Butterworths. P. 282

<sup>102</sup> - Ibid, p. 283

<sup>103</sup> - J. Rawls (1971) "*A Theory of Justice*". p 48-49 and p. 20 n.7

is that both considered judgements and guiding principles have equal status. Neither of them has higher order status.<sup>104</sup>

Adopting this approach could serve our goal in this discussion. Rawls' model offers a means of reconciliation of the extreme contrast between a western interpretation of human rights provisions in the current instruments (universalism), and a strict applicability of cultural values (relativism).

Seen as a practical tool to reconcile and accommodate the above conflict on human rights within the context of the Islamic world, this approach makes two demands. (a) Local governments should take account of the international standards of human rights and revise their practice and institutions to make them consistent with international levels. (b) But if that is impossible, human rights bodies within the United Nations should bear in mind that gaps between cultures are sometimes very wide and thus every culture should be given space, especially when the change required by the international standards is destructive to the community concerned.

For the sake of clarification, the following explanation might be helpful. In respect of an Islamic state an adoption of this approach in the field of human rights entails that the current human rights standard should be seen as 'the neutral outsider guidance' mentioned by Rawls; and Islamic society's institutions and practice should be regarded as the 'considered judgements' that are also referred to by Rawls. Thus, any issue arising regarding human rights in Islamic society should be considered from an impartial point of view. Neither the national practices in an Islamic state, nor the international standard of human rights should be preferred.

If there is a conflict between the practices and institutions of the Islamic state on the one hand, and international human rights on the other, the Muslim state should reconsider its practice and modify it to be consistent with international human rights standards. However, if this is impossible because, for example, human rights contradicts Islamic law explicitly, the burden now must be shifted to the international bodies of human rights to apply the principle of 'margin of appreciation' whereby the state concerned (here an Islamic state) will be given the space to apply international human rights norms consistently within its context.

There are a number of reasons for adhering to this approach:

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<sup>104</sup> - J. Rawls, (1993) "*Political Liberalism*". p. 8, n.8



- 1- Most current norms and principles of human rights do not contradict Islamic law, and sometime Islamic law sets a higher standard than that required by the international human rights standards. This fact might be more evident if Muslim societies made a clear distinction between a practice that is based only on a custom or habit of a particular Muslim society and a rule of Islamic law.<sup>105</sup> Islam is widespread in different lands of the world i.e. Asia, Africa, Europe, etc. People from different origins practise Islam. Each Muslim society has its own customs and practices. In many cases these customs or practices overlap with Islamic law, so both those who practice such customs and the outsider observer mistakenly believe that that practice is a requirement of Islamic law.<sup>106</sup>
- 2- By applying the principle of public welfare, Islamic law has the ability to assimilate human rights concepts that are declared in the international instruments on human rights regardless of their origin.
- 3- In the case of an unequivocal difference between Islamic law and international human rights standards, this approach will allow the Islamic state to preserve Islamic rules.
- 4- Human rights today are a political fact and constitute an essential part of the law of nations, not only in the form of treaties, but also as part of the customary law. Governments cannot consider human rights as purely national law since this perspective would contradict contemporary international law.<sup>107</sup> In addition, regardless of their historical origin, human rights are the result of valuable human efforts aiming at enhancing and protecting human beings despite their backgrounds. Human rights call for protection of the dignity of individuals and provide basic freedom and guarantees. The suggested

<sup>105</sup> - Abdullah A. An-Na'im argues that: "much of the violation of human rights, and legal rights in general, of women in Pakistan can be attributed more to local cultural factors than to Islamic norms and Shari'a principles, since many of those abuses such as custodial rape violate Islamic norms and Shari'a principles too." Abdullah A. An-Na'im "Islamic Law and Human Rights Today" *Interights Bulletin* (1996) Vol.10 p3-6

<sup>106</sup> - An example of the statement provided in the text can be found in Richard T. Antoun "The Islamic Court, The Islamic Judge, and The Accommodation of Traditions: A Jordanian Case Study" *Int. J. Middle East stud.* 12 (1980) 455-467. In this article the author presents the case of marriage payment (Maher) as an example of the conflict between local custom in Jordan and rules of Islamic law. & Salim Ali Farrar when discussing Malaysian experience states: "A hybrid system of criminal justice developed in which Malay Customary law/ 'adat' mixed uncertainly with the Shari'ah and Islamic belief." Salim Ali Farrar (1999). "The Role of the Accused in English and Islamic Criminal justice". PhD Thesis. Law department; University of Warwick. P. 222

<sup>107</sup> - Fernando R. Teson (1985) "International Human Rights and Cultural Relativism." *Virginia Journal of International Law.* Vol. 25. No.4 P. 873

approach renders the Islamic states much closer to the international human rights.

- 5- With regard to the application of the margin of appreciation by human rights bodies in the United Nations, this principle has been successfully adopted by the European Court of Human Rights to accommodate differences between European states with regard to the application of European Convention of Human Rights. Logically speaking, if the European Court adopted this principle to reconcile diversity between states relatively closer than the worldwide nations, the need for the adoption of this principle at the international level is then more urgent. In some areas the gap between cultures is extremely wide. Perhaps this is the consequence of the differences in the values on which each culture is based. In fact many human rights writers, when dealing with subjects related to human rights in different cultures fail to realize this diversity.<sup>108</sup>

Theoretically speaking, western culture, for instance, differs from Islamic culture in fundamental aspects. So when western writers make judgments the result often contains basic fallacies. Put differently, the nature of the modern western culture is based on what is called "open culture" or "the culture of an open letter".<sup>109</sup> This notion means that the culture does not restrict or limit itself to a fixed set of values; rather it has the ability to accommodate change and can shift its stated values. This feature of modern western culture, although it has the advantage of adaptability to new values and new norms when change is required, cannot be fully adopted in a Muslim society. It can only be applied in areas where the change concerned is not prohibited by Islamic law.

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<sup>108</sup> - For example, Teson states: "... This principle of moral worth forbids the imposition upon individuals of cultural standards that impair human rights. Even if relativists could show that authoritarian practices are somehow required by a community - a claim which in many cases remains to be proved - they would still fail to explain why individuals should surrender to say their basic rights to the ends of the community. If women in Moslem countries are discriminated against, it is not enough that a tradition, no matter how old and venerable, requires such discrimination." Fernando R. Teson (1985) "International Human Rights and Cultural Relativism." Virginia Journal of International Law. Vol. 25. No.4 P. 892&893. A careful scrutiny of the above argument, and in particular the last sentence, shows its flaws. The rules of Islam are far more than mere traditions: they are powerful religious commands. In fact, this argument is only one example of many popular mistakes made in dealing with human rights in alien cultures. Every writer views things from his or her standpoint.

<sup>109</sup> - Turki Al Hamed (2001) "Al Siyasi been Al Halal Wa Al Haram." Dar Al Saqi. London. P. 91-100



In addition, western human rights advocates mistakenly rank religious values on the same level as social or cultural values. In relation to Muslim societies this is a serious mistake, and a clear manifestation of the poor knowledge they have about the nature of Muslim thought.<sup>110</sup> In the religion of Islam, God's commandments apply to public and private ways of life. Religious rules are unlike social and cultural rules such as how to dress or eat, which may be changed, as this would not contravene the fixed values in the society. This error perhaps stems from the fact that most modern western societies are secular and the separation between church and state is clearly established. As a result of the religious quarrels that divided Europe in the eighteenth and seventeenth centuries, religion in the west is primarily regarded as a private and personal matter. And English law is not committed to any religion.<sup>111</sup> Therefore, the margin of appreciation is an important tool to accommodate cultural differences.

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<sup>110</sup> - Vogel, Frank Edward (1993) p. 4-5

<sup>111</sup> - See e.g. *Bowman v. Secular Society* [1917] AC 406

## CHAPTER 2

### **The European Convention and the Accused during the Trial Stage**

#### **Introduction:**

Chapter 1 offers a background to International Human Rights in historical, legal-political and cultural terms. The development of western theory of natural law, deemed to be the foundation of the concept of human rights, is traced from the Classical era to the Second World War in the twentieth century, the century in which the concept became widely recognised and established. Chapter 1 also includes a study of Human Rights within the United Nations, showing the current form of the movement. This examination particularly addresses human rights in the Charter of the United Nations, the Universal Declaration of Human Rights, and the International Covenant on Civil and Political Rights. The chapter concludes with an examination of the claim for universalism of human rights, and the proposal of a tool whereby to accommodate the sharply contrasting demands of international human rights and of strict Islamic relativism.

Since this study is devoted to the rights of the accused during the criminal trial stage, Chapter 2 will focus on these rights and therefore discussion of other human rights will be excluded.

Although the Charter of the United Nations refers in some of its provisions to human rights, it does not refer in particular to the rights of the accused during criminal trial.

Articles 10 and 11 of the Universal Declaration of Human Rights cover the rights of the accused during trial. These Articles provide everyone charged with a criminal offence with the following rights: a fair hearing, a public hearing, an independent and impartial tribunal, the presumption of innocence, and non-retroactivity in criminal matters. Moreover, Articles 14 and 15 of the International Covenant on Civil and Political Rights guarantee the following rights to the accused during trial:

- equality before the courts and tribunals;
- a fair hearing;
- a public hearing;
- an independent and impartial tribunal established by law;
- a public pronouncement of judgment;



- the presumption of innocence;
- the right to be informed promptly and in detail in a language which he understands, of the nature and cause of the charge against him;
- to have adequate time and facilities to prepare his defence and to communicate with his counsel;
- to be tried without delay;
- to be tried in his own presence, and to defend himself in person;
- to choose his own lawyer, or to have free legal assistance if he has not sufficient means to pay and where the interests of justice so require;
- 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;
- to have free interpretation services if he cannot speak or understand the language used in court;
- not to be compelled to testify against himself or to confess guilt;
- the right to appeal in criminal cases;
- the right to compensation for a miscarriage of justice;
- the right not to be tried or punished twice for the same offence;
- non- retroactivity in criminal matters.

However, most of these rights presented by the Declaration and the Covenant have their counterpart in Articles 6 and 7 of the European Convention on Human Rights and Fundamental Freedoms and Articles 2, 3 and 4 of Protocol No. 7. Moreover, the jurisprudence developed by the European Court of Human Rights has extended the scope of the Convention to include rights not expressly protected by the Convention and its protocols. Therefore, and because this jurisprudence provides an important ground on which to investigate and clarify the scope and the domain of each guarantee, this chapter will be devoted to the rights of the accused during the criminal trial stage as set out in the European Convention.

The scope and the meaning of each right will be examined in order to illustrate and specify the European standard for criminal trials. The chapter is divided into two main parts. Part (1) focuses on the European Convention on Human Rights and Fundamental Freedoms. This requires a study of the historical background of the Convention, of the rights guaranteed, the system of enforcement, and of principles

concerning the interpretation of the Convention's texts. This will be limited to a discussion of general aspects of the topics.

The significance of part 1 is that: (a) understanding the function of the Convention as a whole facilitates the process of understanding the scope of each right, and (b) the principles employed by the European Court to interpret the Convention, in particular the margin of appreciation, are important tools to accommodate diversity between jurisdictions of different nations.

Part 2 of this chapter is devoted to the rights provided to the accused during the criminal trial stage in the European Convention. This part is divided into 4 main sections. Section one concerns fundamental principles of the criminal law. Section two focuses on the defence rights of the accused during trial. The third section is devoted to the rights of the accused based on the independence of the judiciary. Finally, the last section will examine the rights of the accused after criminal judgment.

It should be clarified from the outset that rules of evidence<sup>1</sup> will not be dealt with in this thesis, save the right of the accused not to be forced to confess guilt. This is for the following reasons:

- 1- The study of the rules of evidence, especially in Islamic law, is complex enough to entail a separate thesis.
- 2- As a general rule, the European Court demonstrated that the rule of evidence is a matter that is left entirely to the national court's discretion. In his comment on the European Court's approach regarding the rules of evidence, Brice Dickson argues: "*The convention, after all, is worded in very general terms, not with specific rules of evidence in mind, and its framer did not intend it to be used as a means whereby all decisions on the facts in domestic courts could be reopened in Strasbourg.*"<sup>2</sup>
- 3- The right not to be compelled to confess guilt, although not explicitly mentioned in the European Convention, is explicitly articulated in Article 14 (g) of the ICCPR.
- 4- The right not to be compelled to confess guilt has a particular significance because most alleged violations of human rights with regard to the evidence rule in Saudi

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<sup>1</sup> - Such as hearsay evidence, absconding witnesses, anonymous witnesses, unlawfully obtained evidence, experts' evidence, defence evidence, undercover agent and entrapment, and fear of reprisals. For more material in these subjects see e.g. Keir Starmer (1999) "*European Human Rights Law*" LAG Legal Action Group

<sup>2</sup> - Brice Dickson (1997) "*Human Rights and the European Convention.*" London Sweet & Maxwell. Hereinafter will refer to as Brice Dickson (1997)



Arabia concern this right. It is therefore felt to be importance to shed some light on the issue.

## **Part One                      The European Convention on Human Rights**

This subject will be treated in the following sequence: historical background, rights protected, system of enforcement, and finally principles concerning the interpretation of the Convention.

### **(1) Historical background:**

After the Nazis' violation of human rights in Europe, which was the clear reason for the outbreak of the Second World War, and after the realization of the need to establish public order in Europe on the foundations of democracy, the rule of law and respect for human rights as complementary to the efforts of the United Nations to develop and implement universally an international Bill of human rights, the European community started to think about creating European unity. Consequently, European governments prepared a treaty to establish a council of Europe.<sup>3</sup> More generally, the convention was a response to gross human rights infringements that Europe had witnessed during the Second World War. It also was seen as: (a) a sample of western values, and (b) a remedy that might protect Western Europe from communist subversion.<sup>4</sup>

The statute of the Council of Europe was signed in London in 1949. The first task of the Council was to set up a convention on human rights in Europe<sup>5</sup>. Article (3) of the statute provides that "*every member of the Council of Europe must accept the principles of the rule of law, and of the enjoyment by all persons within its Jurisdiction of human rights and fundamental freedom.*" Accordingly, respecting human rights is a condition of membership of the European Council. The draft of the European Convention on Human Rights was prepared in 1949 by a number of experts and then submitted to the Ministerial Committee of the Council of Europe. However, in the first session it was requested by the majority to eliminate the subject of protection and development of human rights and liberties from the agenda of the coming meeting for the Consultative Assembly of the Council, because this subject

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<sup>3</sup> - Ramcharan, B. (2000). "*Complementarity between Universal and Regional Organizations/ Perspectives from the United Nations High Commissioner for Human Rights.*" Human Rights Law Journal. Vol, 21. P.324

<sup>4</sup> - Harris et al. (1995). "*Law of the European Convention on Human Rights*" London, Butterworths. p.1&2. Hereinafter will refer to as Harris (1995)

<sup>5</sup> - Robertson(1996) p. 120

had been discussed within the ambit of the United Nations, which led to the Universal Declaration of Human Rights.

Despite the Committee of Ministers' decision, many of delegates on the Consultative Assembly insisted on preparing a draft convention on human rights in Europe. Therefore, the Committee of Ministers returned the subject of human rights to the agenda of the Consultative Assembly.<sup>6</sup>

The Convention draft was transmitted to the Consultative Assembly's Committee on Legal and Administrative Questions, which agreed that at this time only the principal rights and fundamental freedom will be protected, and rights in this proposed convention must be based on the declared rights in the Universal Declaration on Human Rights 1948.<sup>7</sup>

The committee report was adopted by the Consultative Council in September 1949 with some alterations, and then the draft of the convention was transmitted to the Ministerial Committee. The Ministerial Committee appointed an experts' committee to study the draft convention. They then prepared a draft based (principally) on the draft that was prepared by the Consultative Assembly. After that the Convention for the Protection of Human Rights and Fundamental Freedoms was drawn up within the Council of Europe.<sup>8</sup> It was opened for signature in Rome on 4 November 1950, and entered into force in September 1953 after 10 states ratified it.<sup>9</sup> This number has increased especially since the end of the Cold War. The Convention has a considerable influence of the lives on over 800 million individuals in the European countries that have ratified it.<sup>10</sup>

The Convention consists of two main parts. Part (1) provides a list of the substantive rights guaranteed by the convention. Part (2) concerns procedural issues. That is the enforcement machinery and rules governed the admissibility of applications.

## **(2) Rights protected:**

Article 1 of the Convention reads: *"The High Contracting Parties shall secure to every one within their jurisdiction the rights and freedom defined in section 1 of the*

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<sup>6</sup> - Mark W. Janis (2000) p. 16&17

<sup>7</sup> - Ibid, p. 19

<sup>8</sup> - Robertson (1996) p. 122

<sup>9</sup> - The United Kingdom was the first country to ratify, on March 6, 1951 and the 10<sup>th</sup> ratification occurred on September 3, 1953. See Brice Dickson (1997) p. 6

<sup>10</sup> - L.J. Clements, Nuala Mole, and Alan Simmons (1999) *"European Human Rights: Taking A Case Under The Convention."* Sweet & Maxwell. London. P. 3. Hereinafter will refer to as L.J. Clements, Nuala Mole, and Alan Simmons (1999)



*convention.*” It is obvious from this text that state parties are obligated to protect any person under their jurisdiction irrespective of his nationality or legal status.

12 rights and freedoms are provided by the Convention:

- 1) the right to life;
- 2) freedom from torture and inhuman or degrading treatment or punishment;
- 3) freedom from slavery and servitude;
- 4) the right to liberty and security of the person;
- 5) the right to a fair trial;
- 6) protection against retroactivity of the criminal law;
- 7) the right to respect of private and family life, the home and correspondence;
- 8) freedom of thought, conscience and religion;
- 9) freedom of expression;
- 10) freedom of assembly and association;
- 11) the right to marry and found a family;
- 12) the right to an effective remedy if ones rights are violated.

Protocol No. 1 adds three further rights:

- 13) the right to property;
- 14) the right of parents to ensure the education of their children in conformity with their own religion and philosophical conventions;
- 15) the right to free elections.

Protocol No.4 adds four more rights:

- 16) freedom from imprisonment for debt;
- 17) liberty of movement and freedom to choose ones residence;
- 18) freedom from exile and the right to enter the country of which one is a national;
- 19) prohibition of the collective expulsion of aliens.

Protocol No.6 adds one further right:

- 20) prohibition of the death penalty in time of peace.

Protocol No.7 adds five further rights:

- 21) the right of an alien not to be expelled from a State without due process of law;
- 22) the right to appeal in criminal cases;
- 23) the right to compensation for a miscarriage of justice;

- 24) immunity from being prosecuted again;
- 25) equality of rights and responsibilities of spouses as regards matters of a private law character between them and their relations with their children.

It is worth mentioning here that these rights are not absolute since many articles restrict some of these guarantees depending on different circumstances. For instance, article 10 (2) restricts the freedom of expression by declaring that: *“The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for prevention of the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”* In the case of Art 6 which is the main subject of this thesis, there is no specific override (except publicity). But, the Court has held that a principle of fair balance applies throughout the Convention.

Robertson and Merrills argue that although political and civil rights that are guaranteed in this Convention are very important because they are deemed as the most distinctive mark of the democratic community, they do not contain all desired rights, therefore many individual complaints were rejected [by the commission] on the ground that the Convention does not stipulate such rights. For example, it does not expressly guarantee the right of members of minority groups, and the right to equality before the law. Furthermore, it does not guarantee freedom from racist or other propaganda or the right to recognition as a person before the law. All these rights are protected by the ICCPR. In addition, some rights are found only in optional protocols that not all parties have accepted.<sup>11</sup> Consequently, it is argued that the Convention in some respects is inadequate, because it provides the minimum standards, which could be agreed by European States in the 1950s.<sup>12</sup>

This criticism may however be opposed on the ground that jurisprudence developed by the Court has broadened the scope of the Convention to include these matters as exceptions or as part of the dynamic interpretation. The dynamic interpretation, as we will see later, considers the Convention as a living instrument. This tool allows the

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<sup>11</sup> - Robertson (1996) p. 124

<sup>12</sup> - Leach, P. (2001). *“Taking A Case to the European Court of Human Rights.”* London, Blackstone Press Limited. p. 4. hereinafter will refer to as Leach, P. (2001)



European Court to keep pace with novel issues and enables the Court to protect rights not mentioned explicitly in the provisions of the Convention.

### **(3) The system of enforcement:**

The Convention system is based on two principles; first, that the best protection can be provided through the national courts, and second, that if the national remedy is inadequate there is an international remedy.<sup>13</sup> In other words, the Strasbourg mechanism is intended to be a subsidiary to national systems to safeguard human rights. Thus, in addition to providing a list of civil and political rights and freedoms, the Convention creates a system of enforcement of the obligations. Three institutions have been established: the European Commission of Human Rights (set up in 1954), the European Court of Human Rights (set up in 1959) and the European Committee of Ministers of the Council of Europe. And above all, in accordance with protocol no .11 the rights of individual application is now mandatory and the new full time court that replaced the Commission and the old Court has automatic jurisdiction with respect to all inter- state cases brought before it.

#### **(a) The European Commission of Human Rights (1953-1998)**

During the negotiation about the Convention in the Council of Europe the delegates confirmed the idea of establishing the commission of human rights in addition to the court. The aim of creating such a commission was to provide two functions: (1) to weed out valueless petitions and (2) to serve as an international organ accessible by individuals.<sup>14</sup>

In terms of organization the Commission consisted of a number of members equal to the number of contracting states. Its members were selected by the Minister's Committee of the European Council among slates prepared by the Consultative Assembly. Their term was a renewable 6 years and they were not governmental delegates, but acted in an individual capacity, and they selected their president.<sup>15</sup>

The increasing case-load of the commission and the court led to a reform of the Convention supervisory machinery by adopting protocol No .11 which merged the commission and the court in 1998. The purpose was to simplify the structure and at

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<sup>13</sup> - Brett, R. (1994). Papers in the Theory and Practice of Human Rights. Is More Better? Essex, The Human Rights Centre, University of Essex. P.51. hereinafter will refer to as Brett (1994)

<sup>14</sup> - Mark W. Janis (2000) p. 27

<sup>15</sup> - Ibid, P. 28

the same time to strengthen the Judicial character of the system by making it fully compulsory and abolishing the Committee of Ministers' adjudicative role.<sup>16</sup>

**(b) The Committee of Ministers:**

The Committee of Ministers of the Council of Europe composed of the Ministers of Foreign Affairs of the member states or their representatives and meeting twice a year, is a political organ. However, it was granted a judicial function in pursuance of the European Convention on Human Rights, because when detailed drafting began, many governments indicated that they were not ready to accept the power of a European court.<sup>17</sup>

If a case was not referred to the court, the Committee of Ministers had to decide whether there had been a violation of the Convention. It took such decisions by a two-thirds majority. In most cases the Committee of Ministers supported the results in the Commission's report. However, sometimes parties succeeded in reaching settlement before the case reached the Committee of Ministers or during its consideration.

In such cases, the Committee of Ministers discontinued examination of the case and did not take a decision to clarify whether the Convention was violated. When it appeared that the Convention was violated; the Committee of Ministers had to set a limited period within which the party concerned had to reform the violation. Nevertheless, the Committee of Ministers had no right to order the state concerned to take certain procedures for remedying the violation, but could only provide recommendations.<sup>18</sup>

However, in accordance with protocol No. 11 the Committee of Ministers no longer has jurisdiction to decide on merits of cases, though it continues to retain its important role of monitoring the enforcement of the Court's jurisdictions.<sup>19</sup> As one might expect this amendment is widely welcomed because it is not acceptable to provide a political tool with a judicial function.<sup>20</sup> According to article 8 of the statute of the European Council, the Committee of Ministers has the right to suspend or expel from the European Council any contracting state when it violates article 3 of the statute. Therefore, the ultimate sanction that can be applied is expulsion from the

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<sup>16</sup> - Mahoney, P. (1999). "Speculating on the Future of the Reformed European Court of Human Rights." Human Rights Law Journal 20. P. 1

<sup>17</sup> - Brett (1994) p. 52

<sup>18</sup> - Robertson (1996) p. 131

<sup>19</sup> - Drzemczewski, A. (2000). "The European Human Rights Convention: Protocol No.11- Entry into Force and First Year of Application." Human Rights Law Journal Vol. 21. P. 1

<sup>20</sup> - Leach (2001)p. 5



organization. This article makes membership of the Organization conditional on exercising human rights as provided by the Convention.

**(c) The European Court of Human Rights:**

Under protocol No. 11 which is ratified by all Council of Europe member states and entered into force on 1<sup>st</sup> of November 1998, the European Commission of Human Rights as well as the European Court of Human Rights were replaced with a new European Court of Human Rights, operating full time. Furthermore, all individual applications now have direct access to the new Court.<sup>21</sup>

As far as the organization is concerned the Court is composed of a number of judges equal to the number of contracting states.<sup>22</sup> Judges sit on the Court in their individual capacity and do not represent any party.<sup>23</sup> The Council of Europe's Parliamentary Assembly elects judges for the renewable term of six years; judges retire at the age of 70.<sup>24</sup>

The court elects its President and two Vice Presidents. Committees of three judges are set up to decide whether or not the individual application is accepted. They exercise a filter role with respect to applications, as did previously the Commission. This committee may, by a unanimous vote, declare inadmissible or strike out of its list of cases an application submitted under Article 34 where such a decision can be taken without further examination. This decision is final.<sup>25</sup> If no such decision is determined a chamber of 7 judges will decide the question of admissibility as well as merits. In addition, if the case involves inter-state application the chamber will decide the question of admissibility and merits.<sup>26</sup> Chambers of seven judges are constituted to form by rotation to deal with the majority of cases. The Grand Chamber of 17 judges is established for 3 years on the basis of rotation, for most important cases. Parties within three months of the judgement by the ordinary Chamber can apply for a rehearing before the Grand Chamber. However, it should be noted that this kind of hearing is not an appeal since the Chamber President and the national judge move on from the Chamber to sit in the Grand Chamber during the rehearing.<sup>27</sup>

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<sup>21</sup> - Drzemczewski, A. (2000). "The European Human Rights Convention: Protocol No.11- Entry into Force and First Year of Application." Human Rights Law Journal Vol. 21. P. 1

<sup>22</sup> - Article 20 of the Convention.

<sup>23</sup> - Article 21 of the Convention.

<sup>24</sup> - Article 23 of the Convention.

<sup>25</sup> - Article 28 of the Convention.

<sup>26</sup> - Article 29 of the Convention.

<sup>27</sup> - Mahoney, P. (1999). "Speculating on the Future of the Reformed European Court of Human Rights." Human Rights Law Journal 20. P. 1

The procedure before the court is public. Hearings are public except in required circumstances. The final decision should be submitted to the Committee of Ministers that supervises the execution.<sup>28</sup> Until October 1994, only the Commission as well as the Contracting state had the right to bring a case to the Court. However, since November 1998 individuals, non-governmental organizations and groups of individuals have the right to bring their cases directly to the Court. The new article 34 provides that *“the court may receive applications, from any person, non-governmental organization or group of individuals claiming to be the victim of violation by one of the high contracting parties of the rights set forth in the convention or protocols thereto. The high contracting parties undertake not to hinder in any way the effective exercise of this right.”*

The individual complaints are first the subject of a preliminary examination by the Committee of three members of the Court that determine their admissibility. There are 2 conditions to accept an application submitted by either the individuals or States parties:

- 1) Domestic remedies must be exhausted.
- 2) The application must be submitted within six months from the date of the final decision of the domestic remedy.<sup>29</sup>

Nevertheless, several other criteria apply only to applications submitted by individuals: an individual application will be rejected as inadmissible if it is (a) anonymous, (b) already examined by the Court or through another international procedure, (c) incompatible with the provision of the Convention, (d) manifestly ill founded, (e) or which constitutes an abuse of the right of petition.<sup>30</sup>

In addition to its power to decide whether the Convention was violated, the Court is empowered to impose compensation. Further, after accepting the case, the Court can according to article 37 drop it in one of the following situations: (1) the applicant does not intend to pursue his application, (2) the matter has been resolved, (3) for any other reason established by the Court, it is no longer justified to continue the examination of the application.

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<sup>28</sup> - Drzemczewski, A. (2000). *“The European Human Rights Convention: Protocol No.11- Entry into Force and First Year of Application.”* Human Rights Law Journal Vol. 21. P. 6

<sup>29</sup> - Article 35 of the Convention.

<sup>30</sup> - Article 35 of the Convention.



#### **(4) The interpretation of the Convention:**

When trying to interpret the provisions of the Convention the Court applies among others the following principles: 1- the margin of appreciation, 2- proportionality 3- convention as a living instrument, 4- autonomous concepts, 5- interpretation in the light of the ‘*Travaux preparatoires*’, and 6- interpretation in accordance with the Vienna Convention. These principles will be highlighted very briefly, save the margin of appreciation which will be discussed in considerable detail because of the importance it occupies in accommodating diversity between conflicting systems.

##### **1: The margin of appreciation<sup>31</sup>:**

The doctrine means that when the state takes legislative, administrative or judicial actions in the field of Convention rights, it is permitted to a certain measure of discretion, subject to European supervision.<sup>32</sup> The importance of the doctrine is described as: “*The margin of appreciation has provided the system with the flexibility needed to avoid confrontations and is considered as a useful tool in the eventual realization of a European –wide system of human –rights protection, in which a uniform standard of protection is secured.*”<sup>33</sup> The function of the European Court is subsidiary to that of the domestic system.<sup>34</sup> This means that its role will apply only if the national authorities fail to safeguard rights protected by the Convention. The national authorities are initially empowered to assess whether a restriction on a particular right breaches the Convention. That is to say the national authorities will assess whether there is a legitimate purpose for any given restriction, whether the imposed restriction corresponds to a pressing social need, or whether the restriction is necessary and proportionate.<sup>35</sup> In fact, the function of the European Court as Keir Starmer puts it is to: “*consider whether the assessments made by the domestic authorities are true to the Convention.*”<sup>36</sup> To carry out this task, the European Court is of the opinion that it cannot employ its own assessment as a substitute for that of the national authorities, but rather the jurisprudence of the Court shows its willingness to

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<sup>31</sup> - Albeit the significant of the margin of appreciation doctrine as a tool to accommodate diversity between cultures, the UN Human Rights Committee surprisingly has not formally adopted the margin of appreciation doctrine. For more discussion about the reason of the HRC refrain from the adoption of the doctrine see for example, Mashood A. Baderin (2003) p. 231 &232

<sup>32</sup> - On the doctrine of margin of appreciation see e.g. Steiner, H.J., and Alston, P., *International Human Rights in Context, Law Politics, Morals* (2000) pp. 845-857

<sup>33</sup> - Mashood A. Baderin (2003) p. 234

<sup>34</sup> - *Handyside v UK* (1976) Para 48; Application No. 00005493/73; *AK divar v Turkey* (1997) 23 EHRR 143 Para 65

<sup>35</sup> - *Handyside v UK* (1976) Paras 4.26 to 4.82; Application No. 00005493/73

<sup>36</sup> - Keir Starmer (1999) p.187



give the view of the domestic authorities margin of appreciation.<sup>37</sup> This is maybe because the state bodies are, as a general rule, in a better position to consider the necessity of restriction.<sup>38</sup> The European Court insisted that: *“It is in no way [the court’s] task to take the place of the competent national court but rather to review... the decisions they delivered in the exercise of the power of appreciation...”*<sup>39</sup> Moreover, the European Court in *Klass v Germany*<sup>40</sup> pointed out that: *“it is certainly not for the Court to substitute for the assessment of the national authorities another assessment of what might be the best policy in this field.”*

Even though, the doctrine of a margin of appreciation is vigorously criticized and described by Anthony Lester as *“slippery and elusive”* and by Rosalyn Higgins as *“objectionable as a viable legal concept”*,<sup>41</sup> it plays a significant function in the interpretation of the Convention in drawing the line between what is properly a matter for each community to decide at local level and what is so fundamental that it entails the same requirement for all countries whatever the variation in traditions and culture.<sup>42</sup>

This should nevertheless not be understood to mean that the domestic authorities have unlimited discretion to adopt whatever measures they regard appropriate.<sup>43</sup> The Court held that: *“in exercising its supervisory jurisdiction, the Court cannot confine itself to considering the impugned court decisions in isolation; it must look at them in light of the case as a whole... The Court must decide whether the interference at issue was proportionate to the legitimate aim pursued and whether the reasons adduced... to justify it are relevant and sufficient...”*<sup>44</sup> in this regard the Court has emphasized that *“the domestic margin of appreciation goes hand in hand with European supervision.”*<sup>45</sup>

The scope of the margin of appreciation will be varied according to the context in question. But the following guidelines are, as a general rule, applied: wide margin of

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<sup>37</sup> - Ibid, p.187-188

<sup>38</sup> - Leach (2001) p. 95

<sup>39</sup> - *Sunday Times v UK* (1979-80) 2 EHRR 245 Para 49

<sup>40</sup> - (1979-1980) 2 EHRR 214 Para 49

<sup>41</sup> - Leach (2001) p.95

<sup>42</sup> - Mahoney, P. (1998). *“The Doctrine of Margin of Appreciation under the European Convention on Human Rights: Its Legitimacy in Theory and Application in Practice.”* Human Rights Law Journal Vol 19. P. 1

<sup>43</sup> - *Klass v Germany* (1979-80) 2 EHRR 214

<sup>44</sup> - *Lingens v Austria* (1986) 8 EHRR 407

<sup>45</sup> - *Handyside v. UK* (1976) Para 47; Application No. 00005493/73



appreciation is usually permitted on matters such as national security<sup>46</sup>, and morals<sup>47</sup>. However, some rights of peculiar concern such as private life, free speech, or corporal punishments<sup>48</sup> entail a narrow margin of appreciation.<sup>49</sup>

There arises the question whether absence or presence of consensus among the Contracting States regarding a given conduct could affect the scope of the margin of appreciation. According to the Court jurisprudence a wide margin of appreciation should be given to a state if there is little common ground amongst the Contracting States regarding a given issue.<sup>50</sup> But, a narrow margin of appreciation will be allowed once the state members in Europe have achieved a general consensus with regard to a particular issue.<sup>51</sup>

## **2: Proportionality:**

The Court applies the principle of proportionality, which means providing a fair balance between the public interest of the society on the one hand, and the requirement to protect fundamental rights of individuals on the other.<sup>52</sup> The Court, in order to evaluate the proportionality of a certain measure, will consider the existence of other methods that could safeguard the public interest concerned less intrusively or without interference at all.<sup>53</sup> Pursuant to the case law of the European Court, the principle of fair balance between the protection of individual rights and the interests of the society at large can be achieved only if restrictions on individual rights are strictly proportionate to the legitimate aim they pursue.<sup>54</sup> In *Barthold v Germany* the applicant, a veterinary surgeon, was given an injunction by the domestic court not to repeat similar statements on the ground that he broke the rules of professional conduct prohibiting advertising and unfair competition. The key argument against him was that he had made disparaging remarks about a number of other professionals and gave special prominence to his own practice in a newspaper. The European Court ruled that: "*It may well be that these illustrations had the effect of giving publicity to Dr. Barthold's own clinic, thereby providing a source of complaint for his fellow veterinary surgeons, but in the particular circumstances this effect proved to be*

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<sup>46</sup> - *Ireland v UK* (1978) 2 EHRR 25

<sup>47</sup> - See for example *Rees v. UK* (1986) 9 EHRR 56

<sup>48</sup> - See for example *Tyrer v Turkey* (1978) 2 EHRR 1

<sup>49</sup> - Keir Starmer (1999) p.189

<sup>50</sup> - *X, Y and Z v UK* (1997) 24 EHRR 143

<sup>51</sup> - Keir Starmer (1999) p.189

<sup>52</sup> - Harris (1995) p. 11

<sup>53</sup> - Leach (2001) p.95

<sup>54</sup> - Keir Starmer (1999) p.170

*altogether secondary having regard to the principle content of the article and to the nature of the issue being put to the public at large. The injunction issued ...does not achieve a fair balance between the two interests at stake. According to the Hanseatic Court of Appeal, there remains an intent to act for the purposes of commercial competition, within the meaning of section 1 of the 1909 Act, as long as that intent has not been entirely overridden by other motives. A criterion as strict as this in approaching the matter of advertising and publicity in the liberal professions is not consonant with freedom of expression. Its application risks discouraging members of the liberal professions from contributing to public debate on topics affecting the life of the community if even there is the slight likelihood of their utterance being treated as entailing, to some degree, an advertising effect”*<sup>55</sup>

### **3: The Convention as a living instrument:**

The Convention must be given a dynamic or evaluative interpretation. This means that it must be interpreted in the light of present day conditions rather than assessed in terms of what was intended by those who formulated the Convention in 1950. However, the interpretation should not result in introducing a right that was not intended to be included when the Convention was drafted. For example, the right to marry cannot be interpreted to include a right to divorce, even though this right is now generally recognized in Europe.<sup>56</sup>

### **4: Interpretation in the light of the ‘Travaux preparatoires’:**

This means that when trying to interpret the Convention the Court should refer to what was intended by the original drafters and then interpret it accordingly. The drafters’ intention can be found in the preparatory drafts. Nonetheless, such an approach is rarely exercised because the principle of interpreting the Convention, as a living instrument, is more likely to prevail.<sup>57</sup>

### **5: Autonomous concepts:**

Legal expressions in the Convention such as civil rights or criminal charges mentioned in article 6 of the Convention are given autonomous meanings. This means in the words of Philip Leach that “*the classification under national law will be a*

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<sup>55</sup> - (1985) 7 EHRR 383.

<sup>56</sup> - Harris (1995) p. 7&8

<sup>57</sup> - Keir Starmer (1999) p.157



factor in the Court's determination as to whether the Convention is applicable, but it will not be decisive".<sup>58</sup>

#### **6: Interpretation in accordance with the Vienna Convention:**

The European Convention should be interpreted according to the general rules of the international law. Harris explains that pursuant to the Vienna Convention on the Law of Treaty 1969, the basic rule in the interpretation is that a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of treaty in their context and in the light of its object and purpose.<sup>59</sup> The Court stated that: "*given that it is a law-making treaty, it is also necessary to seek the interpretation that is most appropriate in order to realize the aim and achieve the object of the treaty, and not that which would restrict to the greatest possible degree the obligations undertaken by parties.*"<sup>60</sup> The objects and purpose of the European Convention include realization and promotion of human rights, democracy, and the rule of law.

#### **Part Two                      The Convention and the Trial of the Accused**

This part investigates guarantees required by the European Convention on Human Rights for the accused during trial. It consists of four sections. Section one focuses on fundamental principles of criminal law. Section two concerns the accused's defence rights. Rights of the accused based on the court independence are covered in section 3. The final section is devoted to rights provided for the accused after criminal judgment. These sections are undertaken in turn, but first general aspects of the right to fair trial are given.

#### **General aspects of the right to a fair trial:**

Article 6 provides that:

1. "*In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly by the press and public may be excluded from all or part of the trial in the interest of morals, public order or*

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<sup>58</sup> - Leach (2001) p.97

<sup>59</sup> - Harris (1995) p. 5&6

<sup>60</sup> - *Wemhoff v Germany* (1979-80) 1 EHRR Para 8

*national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.*

2. *Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.*
3. *Everyone charged with a criminal offence has the following minimum rights:*
  - o *(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;*
  - o *(b) to have adequate time and the facilities for the preparation of his defence;*
  - o *(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;*
  - o *(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;*
  - o *(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.”*

Article 6 protects the right to a fair and public hearing in the determination of an individual's civil rights and obligations, or of any criminal charge against him. It is clear that paragraph one of article 6 applies to both civil and criminal cases, while paragraphs two and three are limited to criminal proceedings.

Generally speaking, the idea of setting up certain procedures to be followed by judicial bodies is that it should serve as a safeguard against a possible abuse of government policy.<sup>61</sup> So, pursuant to the Court jurisprudence this article is interpreted in a broad sense because it is so fundamental to the operation of democracy. The European Court stated that: *“in a democratic society within the meaning of the Convention, the right to a fair administration of justice holds such a prominent place that the restrictive interpretation of article 6 (1) would not*

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<sup>61</sup> - Mark W. Janis et al. (2000) p. 403



correspond to the aim and purpose of that provision.”<sup>62</sup> Furthermore, it is argued that: “the right to a fair trial has a position of pre-eminence in the Convention, both because of the importance of the rights involved and the great volume of applications and jurisprudence that it has attracted.”<sup>63</sup>

Commenting on article 6 Fenwick claims “in order to appreciate the way it operates, it is crucial to understand the relation between Paras 1 and 3. Paragraph 1 imports a general requirement of a fair hearing applying to criminal and civil hearings which covers all aspects of fair hearing. Paragraph 3 lists minimum guarantees of a fair hearing in the criminal context only. If Para 3 had been omitted, the guarantees contained in it could have arisen from Para 1 but it was included on the basis that it is important to declare a minimum standard for a fair hearing.”<sup>64</sup>

Practically speaking, the applications of this Article have created many problems. On the one hand, the understanding of the import and the scope of the rights expressly guaranteed by this Article differ between the States Parties. On the other hand, the notion of the right to a fair trial in this Article entails the protection of other rights not expressly stipulated, such as the right to equality of arms, and the right to a reasoned judgment. Moreover the differences between the common and civil law systems in criminal cases complicate the interpretation of Article 6, since every system follows different means in a criminal investigation.<sup>65</sup> Therefore, the Court has reiterated that the Convention must be interpreted in such a way as to guarantee rights which are practical and effective, as opposed to theoretical and illusory.<sup>66</sup>

Unlike other guarantees in Article 6(1), the right to a fair hearing is less precise, and has been described as a right that is open-ended. Therefore, other rights that are not listed in Article 6 can be added if they are considered as essential elements to a fair hearing.<sup>67</sup> The Court has emphasized that its task is to consider whether the proceedings as a whole in a given case were fair or not<sup>68</sup>. Consequently, a deficiency in the procedure before the court may be overlooked if the proceedings as a whole are

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<sup>62</sup> - *Delcourt v. Belgium* A 11(1970) para25; Application No. 00002689/65

<sup>63</sup> - Harris. (1995) p.164

<sup>64</sup> - Fenwick Helen (2002). *Civil Liberties and Human Rights*. London: Cavendish. p.54

<sup>65</sup> - Harris (1995) p.164

<sup>66</sup> - *Alenet De Ribemont v France* (1995), Para.35

<sup>67</sup> - Harris (1995) p.202

<sup>68</sup> - *Khan v UK* (2000). Para 38; Application No. 00035394/97

fair.<sup>69</sup> The Court has constantly confirmed that it is not its role to deal with errors of facts or law committed by a domestic court unless it may have breached rights guaranteed by the Convention.<sup>70</sup> For example, if the appellate court has remedied any lack of proceedings before the court of first instance then the European Court of Human Rights by considering the fairness of the whole proceedings will disregard the deficiency of the original trial.<sup>71</sup>

## **The concept of a criminal charge**

### **1-The concept of a “criminal”:**

Within the terms of the Convention, the word criminal has an autonomous concept. Thus, the European Court of Human Rights has the jurisdiction to decide whether the conduct concerned is or is not criminal according to the terms of the Convention.<sup>72</sup>

The necessity of assigning an autonomous Convention meaning to the word criminal arises from the fact that relying on the domestic law to classify an offence could mean that a Contracting State can avoid the obligation to guarantee a fair hearing by merely reclassifying the offence from, for instance, criminal to disciplinary. In addition, not giving an autonomous meaning might lead to the undesirable situation of dissimilarities in the application of the term among different state parties<sup>73</sup>. In order to determine whether a conduct is criminal or not, the Court has applied three criteria introduced for the first time in *Engle and others v. the Netherlands*.<sup>74</sup>

First: The classification of the domestic law. A State Party has the ultimate discretion to distinguish in its national law between criminal and disciplinary offences. This is because the right to legislate is a sovereign right, which a state should practice independently. So if the offence is classified in the domestic law as criminal then this classification is decisive<sup>75</sup>. However, classifying the offence as non-criminal, for

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<sup>69</sup> -*Brown v Stott* (2001) 2 All ER 97.

<sup>70</sup> -*Khan v UK* (2000) Para 34; Application No. 00035394/97

<sup>71</sup> -*Edwards v UK* A247-B (1992) Para 39; Application No. 00013071/87

<sup>72</sup> -*Demicoli v Malta* A210 (1991) para.31; Application No. 00013057/87

<sup>73</sup> -Harris (1995) p.166

<sup>74</sup> - A22 (1976) para.82; Application No. 00005100/71;00005101/71

<sup>75</sup> -Clements et al.(1999) P158



example, as a regulatory or disciplinary offence, is not final from the viewpoint of the Convention. It can be only considered as a starting point to the enquiry<sup>76</sup>.

Second: The nature of the offence. Another factor that has been used to determine whether an offence has a criminal character or not is the nature of the offence. To draw a conclusion in this regard attention must be paid to rules invoked. In other words an offence will be considered as criminal if the rules invoked are imposable on the whole population. The fact that these rules are directed not towards all citizens, but rather towards a given group possessing a special status could lead to the offence being regarded as not being of criminal nature<sup>77</sup>. Moreover, when considering the nature of the offence regard should be paid to the sanction imposed. The offence is likely to be of criminal nature if the sanction imposed is of punitive and deterrent nature. In *Ozturk v FRG*,<sup>78</sup> although driving without due care is classed under the German law as a regulatory offence, it was regarded by the European Court as a criminal offence for the purpose of article (6) because this offence was applicable to the public (all road users) and it has a sanction of a punitive and deterrent aim.

Third: The degree of the severity of the penalty that the person concerned risks incurring. With regard to the degree of severity of punishment that might be imposed, the Court considers the offence as criminal if it is accompanied by a prison sentence or a substantial fine that appears to be imposed for the purpose of redressing the wrong which has been inflicted on society rather than to maintain internal discipline within a limited sphere of activity<sup>79</sup>.

It is very interesting to note that the Court applies these factors alternatively. That is to say any one of them is sufficient to satisfy the Court's view as to the presence of criminal conduct. However, when it fails to reach a clear conclusion the Court can also use a cumulative approach by exercising a separate criterion. In *Lauko v Slovakia*<sup>80</sup> the Court stated that "*these criteria are alternative and not cumulative...This does not exclude that a cumulative approach may be adopted where*

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<sup>76</sup> - *Demicoli v Malta* A210 (1991).para.31; Application No. 00013057/87 See also *Engle and others v. The Netherlands* A22 (1976) para.82; Application No. 00005100/71;00005101/71

<sup>77</sup> - *Lauko v Slovakia*. (1998) para.58; Application No. 00026138/95

<sup>78</sup> - A73 (1984). para.53; Application No. 00008544/79

<sup>79</sup> - Mark Janis, Richard Kay, and Anthony Bradley (2000) "*European Human Rights Law*" .P 416

<sup>80</sup> - (1998).para.87; Application No. 00026138/95

*the separate analysis of each criterion does not make it possible to reach a clear conclusion as to the existence of a criminal charge.”*

## **2-The concept of a “charge”:**

Like the word criminal, the word ‘charge’ has an autonomous Convention meaning. The European Court will examine the facts of the situation and determine whether the applicant was substantially affected by the steps taken against him.<sup>81</sup> Thus the Court has defined the word ‘charge’ as *“The official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence.”*<sup>82</sup> Or alternatively when *“the situation of the [suspect] has been substantially affected.”*<sup>83</sup> When the complaint concerns the length of proceedings it is very important to know the precise moment of the charge. However, it is worth noting here that the Court should take into account the substantive, not the formal, meaning of the word. What is significant in this regard is whether steps taken against the accused substantially affect him or not. Thus, it is necessary to look behind the appearances and investigate the realities of the procedures in question.<sup>84</sup> A person has been found subject to a charge, for instance, when arrested for a criminal offence,<sup>85</sup> or when officially informed of prosecution against him.<sup>86</sup>

Interestingly, Article 6 will be applicable until the charge is finally determined. This will include no doubt an appeal proceeding.<sup>87</sup> If the criminal proceedings are discontinued without the accused being brought to trial, Article 6 in respect of the word “charge” ceases to apply as of the date of their discontinuance.<sup>88</sup> Similarly, if the accused is convicted Article 6 will cease to apply since he is no longer charged with an offence. Therefore, Article 6 does not apply on a criminal charge basis to the assessment of costs in criminal cases, or an application for clemency.<sup>89</sup>

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<sup>81</sup> - *Quinn v Ireland* (2000) 29 EHRR CD 234

<sup>82</sup> - *Corigliano v Italy* A57 (1982). para.34; Application No. 00008304/78

<sup>83</sup> - *Demicoli v. Malta* 14 EHRR 47 (1991)

<sup>84</sup> - *Deweer v. Belgium* A 35 (1980) Para 44; Application No. 00006903/75

<sup>85</sup> - *Wemhoff v FRG* A7 (1968). Para.19; Application No. 00002122/64

<sup>86</sup> - *Neumeister v Austria* A8 (1968). Para 18; Application No. 00001936/63

<sup>87</sup> - *Eckle v FRG* A 51 (1982) Para 76; Application No. 00008130/78

<sup>88</sup> - *Eckle v FRG* A 51 (1982) Para 78; Application No. 00008130/78

<sup>89</sup> - Harris (1995) p. 172



## Section I

## Fundamental Principles of Criminal Law

Two topics are involved in this section, namely the presumption of innocence and non-retroactivity in criminal law.

### (A) The presumption of innocence

Article 6 Para 2 provides that: *“Every one charged with a criminal offence shall be presumed innocent until proved guilty according to law.”*

The presumption of innocence is considered in both common and civil law systems as a fundamental principle of criminal justice.<sup>90</sup> Viscount Sankey declares that: *“throughout the web of English criminal law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner’s guilt.”*<sup>91</sup> Moreover, the European Court has stated that this principle is one of the elements of fair hearing that is required by Article 6 (1).<sup>92</sup> The aim of this principle is to protect a person charged with a criminal offence from having a verdict of guilty passed on him without his guilt having been proved according to law. Precisely, the Court has pointed out the scope of this guarantee and its consequences as follows: *“Paragraph 2 embodies the principle of presumption of innocence. It requires, inter alia, that when carrying out their duties, the members of the court should not start with the preconceived idea that the accused has committed the offence charged; the burden of proof is on the prosecution and any doubt should benefit the accused. It also follows that it is for the prosecution to inform the accused of the case that will be made against him, so that he may prepare and present his defence accordingly, and to adduce evidence sufficient to convict him.”*<sup>93</sup>

As in Article 6 (1), the terms ‘criminal’ and ‘charge’ in Article 6(2) refer to autonomously defined Convention concepts. In addition, the application of this Article considers the court proceedings. Thus pre-trial procedures, such as taking a blood test or medical examinations, are not covered by this Article.<sup>94</sup> However and more importantly it applies to appeal proceedings provided that an appeal is against the conviction.<sup>95</sup> But if the appeal concerns the sentence of a convicted person the

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<sup>90</sup> - Ibid, p.241

<sup>91</sup> - Quoted from Andrew Ashworth and Meredith Blake. *“The Presumption of Innocence in English Criminal Law.”* Criminal Law Review [1996] 306-317

<sup>92</sup> - *Alленet De Ribemont v France* A308 (1995) Para.35; Application No. 00011910/85

<sup>93</sup> - *Barbera, Messegue and Jabardo v Spain* A146 (1988) Para.77; Application No. 00010590/83

<sup>94</sup> - Harris (1995) p.242

<sup>95</sup> - *Nolkenbockhoff v Germany* A123 (1987). Paras. 39,40,4; Application No. 00010300/83)

Article does not apply. In *Engel v Netherlands*<sup>96</sup> the Court has held that: “*it deals only with the proof of guilt and not with the kind or level of punishment...*” In respect of the requirement that members of the court should not start with the preconceived idea that the accused is guilty, an official indication of the guilt of the accused before having been tried and found guilty is deemed a breach of the right to be presumed innocent. Therefore, the Court has held that: “*the presumption of innocence will be violated if, without the accused’s having previously been proved guilty according to law and, notably, without his having had the opportunity of exercising his rights of defence, a judicial decision concerning him reflects an opinion that he is guilty. This may be so even in the absence of any formal finding, it suffices that there is some reasoning suggesting that the court regards the accused as guilty.*”<sup>97</sup>

In addition, a court’s declaration that there are some suspicions regarding an accused’s innocence is not regarded as a violation of the right to be presumed innocent, provided that such declaration of suspicions is declared before an acquittal has been made final.<sup>98</sup> It is essential to note that the presumption of innocence may be breached not only by a judge but also by other public authorities. Therefore, the Court in *Allenet De Ribemont v France*,<sup>99</sup> where some of the highest-ranking officers in the French police referred to the applicant as one of the instigators of a murder, held that this was clearly a declaration of guilt which encouraged the public to believe that the applicant was guilty, and prejudged the assessment of the facts by the competent judicial authority. Accordingly, the Court decided that there has been an infringement of Article 6 (2).

Moreover, in a different case the applicant was charged of causing minor injuries to a pedestrian while driving a car. After being charged the applicant stated that he had not been driving the car at the relevant time and refused to make further comment. The domestic court summed up the trial by stating that the circumstances of the case led “*to the sole, and unequivocal conclusion that only the accused could have committed*

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<sup>96</sup> - A22 (1976). Para 90; Application No. 00005100/71; 00005101/71

<sup>97</sup> - *Minelli v Switzerland* A62 (1983) Para. 37; Application No. 00008660/79

<sup>98</sup> - *Sekanina v Austria* A266-A (1993) Para.30; Application No. 00013126/87

<sup>99</sup> - A 309 (1995) Para.41; Application No. 00015175/89



*the offence; presumably he refused to make a statement because he was under the influence of alcohol, but there is no evidence for that finding.”*

The European Court in its observation states that speculating about the possibility that the applicant was under the influence of alcohol contributed to the impression that the national court had a preconceived view of the applicant's guilt. Thus, the European Court was satisfied that the presumption of innocence had been violated.<sup>100</sup>

Accordingly, the significant conclusion from applying the principle of the presumption of innocence under Article 6 Para 2 is that: (1) the burden of proof must lie with the state, and (2) any doubt concerning the evidence has to be interpreted in favour of the accused.

However, the application of this principle is not absolute. In some circumstances the burden of proof is shifted from the prosecution to the defendant. This is justified on the urgent need to take effective action against some sort of crimes, and on the reasonableness of requiring the defendant to adduce evidence of matters better known to him than anyone else.

In practice the presumption of innocence is often subject to contrary legislations. Ashworth and Blake found 219 examples, among 540 offences triable in the Crown Court, of legal burdens or presumptions operating against the defendant. They pointed out that no fewer than 40% of the offences triable in the Crown Court appear to breach the presumption of innocence. In 1972 the Eleventh Report of Criminal Law Revision Committee observed that: *“we are strongly of the opinion that, both in principle and for the sake of clarity and convenience in practice, burdens on the defence should be evidential only.”*<sup>101</sup> This exception of the strict application of the presumption is also recognized by the European Court. According to the jurisprudence of the European Court the presumption of innocence does not contradict the presumption of fact or laws that might operate against the accused, provided that they are confined within reasonable limits which take into account the importance of what is at stake and maintain the rights of defence.

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<sup>100</sup> - *Telfner v Austria* (2002) 34 EHRR 7

<sup>101</sup> - Andrew Ashworth and Meredith Blake. *“The Presumption of Innocence in English Criminal Law.”* Criminal Law Review [1996] 306-317

The European Court in *Salabiaku v France*, for instance, ruled that the trial court took account of the fact that the applicant had been warned by an airline official not to take possession of the goods unless he was sure they belonged to him. The national court inferred that by failing to do so and by having in his possession a trunk containing a quantity of cannabis he committed the offence of smuggling prohibited goods. The European Court was satisfied that the domestic courts had not resorted automatically to the presumption of guilt, but had inferred from the fact of possession a presumption, which was not subsequently rebutted by the applicant. Therefore, the national courts had not applied the Customs Code in a way which conflicted with the presumption of innocence.<sup>102</sup>

In his comment on the European Court judgment Lord Steyn argues that this test depends upon the circumstances of the individual case. Therefore, any interference by the legislative body in the presumption of innocence requires justification and must not be greater than is necessary. The principle of proportionality must be observed.<sup>103</sup>

Although such an approach by the European Court provides guidelines for the matter concerned it does not provide a tool by which the particular court can decide whether shifting the onus of proof from the prosecution to the accused violates the presumption of innocence. Therefore it is necessary to refer to the English jurisprudence on the issue. In fact this dilemma arises from the need to strike a balance between the interests of the individual in protecting his right, and the interest of society at large to guard against the dangers of certain crimes such as uncontrolled drugs and terrorism. Ashworth and Blake suggest two ways in order to find out whether the presumption that shifted the burden of proof to the defendant violates the presumption of innocence. One way is to draw a distinction between irrefutable presumption (deeming provisions) leaving no room for the defendant to prove the contrary, and refutable presumptions that leave open the possibility of refutable by other evidence. A second way is to distinguish between presumptions and mere inferences. Even though the fact that these inferences have been enacted as part of the statutory definition they are essentially permissive. Provisions of this kind do not

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<sup>102</sup> - *Salabiaku v France* 141-A(1988) Para 28; Application No. 0001059/83

<sup>103</sup> - *R v Lambert* [2001] 3 All ER 577-644



reverse the burden of proof. Thus they are compatible with the presumption of innocence.<sup>104</sup>

With regard to the English courts, in his attempt to answer the above question Lord Hope in *R v DPP, ex p Kebeline*<sup>105</sup> suggests that it is necessary to distinct between two kinds of burdens. (1) Law or persuasive burden, and (2) Evidential burden.

A persuasive burden means the burden of persuading the jury as to the accused's guilt or innocence, and requires the accused to prove, on a balance of probabilities, a fact which is essential to the determination of his guilt or innocence. It reverses the burden of proof by removing it from the prosecution and transferring it to the accused.

Evidential burden means the burden on the accused of introducing evidence in support of his case. It is necessary only for the accused to adduce sufficient evidence to raise an issue before it has to be determined as one of the facts in the case. The prosecution is not required to lead any evidence on the point, so the accused must do so if he wishes to bring the point into consideration. However, if this happens, the onus of proof remains with the prosecution. The accused need only raise a reasonable doubt about his guilt.

In *R v Lambert*<sup>106</sup> the defendant was arrested in possession of a bag containing over £140,000 worth of cocaine. He was charged with an offence of possession of a controlled drug with intent to supply contrary to s 5 of the Misuse of Drugs Act 1971. At his trial the defendant relied on the defence provided by s 28 (2) and (3) (b) of the Act asserting that he had not believed or suspected, or had reason to suspect, that the bag had contained cocaine or any controlled drug. The judge directed the jury that the prosecution had to prove only that the accused had knowingly had the bag in his possession and that it had contained a controlled drug, and that thereafter the burden was cast upon the defendant to prove on the balance of probabilities, that he had not known that the bag had contained a controlled drug. In short, the judge directed the jury that s 28 imposed a legal (persuasive) burden rather than merely an evidential

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<sup>104</sup> - Andrew Ashworth and Meredith Blake. "The Presumption of Innocence in English Criminal Law." *Criminal Law Review* [1996] 306-317

<sup>105</sup> - [1999] 4 All ER 801-859

<sup>106</sup> - [2001] 3 All ER 577-644

burden upon the defendant. On his appeal to the House of Lords the accused contended that the judge's direction violated the presumption of innocence.

It was held that in order to reverse the provisions regarding onus in respect of drugs offences, these provisions must satisfy the criterion of proportionality. Provided the overall fairness of a criminal trial is not compromised, presumptions of facts or law will not necessarily violate Art 6 (2) of the European Convention. The majority considered that in the context of drug offences, imposing a legal burden on the defence is a disproportionate means of addressing the legislative goal to ease the task of the prosecution. It was possible to interpret these provisions as imposing only an evidential burden on the defendant.

### **(B) The principle of non-retroactivity in criminal law**

Article 7 is worded as follows:

*"1- 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 the criminal offence was committed.*

*2- This article shall not prejudice the trial and punishment of any person of any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by civilized nations".*

The concept of a "penalty" in this article is an autonomous Convention concept. Therefore the European Court reserves the right to assess whether a particular measure amounts in substance to a "penalty" within the meaning of this provision. When assessing the measure in question, the Court may take into account its nature and purpose, its characterization under the national law, the procedures involved in the making and implementation of the measure, and its severity. However, the most important point in any assessment regarding the existence of a penalty is whether the measure in question is imposed following a conviction for a criminal offence or not.<sup>107</sup> In addition, the word "law" in article 7 as in other articles refers to statutory law and case law.<sup>108</sup>

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<sup>107</sup> -*Welch v UK* A307-A (1995) Paras 27, 28; Application No. 00017440/90

<sup>108</sup> -*Cantoni v France* 1996-V (1996) Para 29; Application No. 00017862/91



Harris and others argue, “Article 7 incorporates the principle of legality, by which, in the context of criminal law, a person should only be convicted and punished on a basis of law”<sup>109</sup>

The impact of the principle of non- retroactivity was elucidated by the Court as that: “Article 7 Para 1 of the Convention is not confined to prohibiting the retrospective application of the criminal law to an accused’s disadvantage. It also embodies, more generally, the principle that only the law can define a crime and prescribe a penalty... and the principle that the criminal law must not be extensively construed to an accused’s detriment for instance by analogy, it follows from this that an offence must be clearly defined in law. This condition is satisfied where the individual can know, from the wording of the relevant provision and, if need be, with the assistance of court’s interpretation of it, what acts and omissions will make him liable.”<sup>110</sup>

Therefore, article 7 should be interpreted in line with its object of providing effective safeguards against arbitrary prosecution, conviction, and punishment.<sup>111</sup>

As to the application of this article it is worth mentioning here that there is little jurisprudence on the principle of non-retroactivity in criminal cases under either the European Court on Human Rights<sup>112</sup> or the International Covenant on Civil and Political Rights.<sup>113</sup>

Non-retroactivity in criminal law embodies two principles. First is *nullum crimen sine lege* i.e. no crime except in accordance with the law. The second is *nulla poena sine lege* i.e. no punishment except in accordance with the law. The retroactive application of the criminal law (*ex post facto* criminal law) infringes both principles.

The relevant law must have existed before the act or the omission in question was committed for the conviction to be based on it. This concept leads to the fact that no person can be convicted if he could not have known beforehand that such an act was a criminal.<sup>114</sup> However, the European Court has noted that the wording of many statutes is some times imprecise. The need to avoid excessive rigidity and keep pace with changing circumstances means that some legislation is inevitably couched in terms which, to a greater or lesser extent, are vague.<sup>115</sup> Furthermore, this Article will be

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<sup>109</sup> - P.274

<sup>110</sup> -*Kokkinakis v Greece* A260-A (1993) Para 52; Application No. 00014307/88

<sup>111</sup> - *CW and CR v UK* (1996) 21 EHRR 363

<sup>112</sup> - Harris (1995) p 274

<sup>113</sup> - Sarah Joseph, Jenny Schultz, and Melissa Castan (2000) p. 340

<sup>114</sup> - *ibid.* p. 60

<sup>115</sup> -*Kokkinakis v Greece* A260-A (1993) Para 40; Application No. 00014307/88

infringed if the law in question is unpredictably interpreted after the commission of the act in question.<sup>116</sup> Therefore, Article 7 requires criminal law to be accessible to the public.<sup>117</sup>

This article does not prohibit the progressive development of the criminal law through judicial law-making, provided it is consistent with the essence of the offence and could reasonably be foreseen.<sup>118</sup> Article 7 will be violated if the definition of a criminal offence is extended to include conduct that was not previously seen as a crime. Nevertheless, if the development of the common law is compatible with essence of the crime concerned and also it could be reasonably foreseen then this development is not in breach of article 7. In *SW and CR v UK*<sup>119</sup> the applicants argued that the House of Lords' removal of the marital rape exception violated Article 7. However, the Court held that the change in the law had been gradually evolved through judicial interpretation and was reasonably foreseeable. Therefore the Court was not satisfied that Article 7 was infringed.

Regarding the term "under national or international law" that is provided by Article 7 (1) this means that a breach of Article 7 will not be found if the act or the omission that is considered as the basis for the conviction is criminalized by the international law at the time the conduct was committed, even if the conduct is not criminal under the national law. Therefore, despite the fact that it is not recognized as an offence in the domestic law, a conviction for torture, for example, will not violate Article 7. The application of the international law in this regard might create some vagueness, since crimes under the international law are not precisely defined. However, it is argued that it is likely that crimes under the international law refer to: "*crimes in respect of which public international law permits individuals to be prosecuted by states under their national law on the basis solely of their custody of the alleged offender (universality jurisdiction). Such offences include, in customary international law, war crimes and piracy. They also include, for the states parties to the relevant treaties, drug trafficking, hijacking...*"<sup>120</sup>

Despite what has been said about universal crimes, and the meaning of the word penalty in the Convention, the application of Article 7(1) is straightforward and does

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<sup>116</sup> - Ibid, Para 40

<sup>117</sup> - Harris p.279

<sup>118</sup> - *SW v. UK; and CR v UK* (1996) 21 EHRR 363

<sup>119</sup> - (1996) 31 EHRR 363

<sup>120</sup> - Harris p. 277



not raise any ambiguity save if the application of the new law retroactively is in the interest of the accused. This could occur when the offence is dropped from the criminal law and becomes no longer a crime, or if the punishment for the offence in question is lightened. At the outset a distinction should be made between two altogether different matters. The first is where the crime falls within the category of temporary crimes. Some conducts are criminalized just for a particular period. For example, for protecting a particular kind of animal such as the fox, the authority concerned in a particular society criminalizes the hunt of this species of animal for a given period. When this period lapses the conduct is no longer an offence. So if someone commits the act during the prohibited period he deserves the penalty even if the charge against him starts only after the expiry of the prohibiting period. Therefore, in this case the accused cannot claim the benefit of the new legislation that decriminalizes the conduct in question. Otherwise the temporary legislation becomes useless. Clearly, this case is irrelevant to the principle of non-retroactivity in criminal law and thus irrelevant to our discussion. The second matter occurs when a person committed a prohibited act, but, after the commission and before the punishment the legislator decriminalizes the conduct which accordingly becomes lawful; or the legislator continues to criminalize the conduct but lightens the penalty for this conduct. In these cases the change in the law is in the interest of the accused. Thus the application of the new law retrospectively will be in favour of the accused. Now the question is whether the European Court requires the same interpretation. According to Ralph Beddard the Strasburg jurisprudence does not guarantee this.<sup>121</sup>

In fact, the Court interpretation is not persuasive. Even though the text provided by the Convention, unlike article 15 of the ICCPR which expressly guarantees this right<sup>122</sup>, does not explicitly provide such a right it would be much better if the Court interpreted this article in a way which could guarantee this right. Trying a person with regard to an act which no longer a crime lacks logic and could end in imposing unnecessary harm, which could run contrary to the objectives of the punishment.

In any event, one should be clear that the Court does not prohibit the retroactive application of a criminal law if it is in the interest of the accused, but rather leaves the case to be decided separately by every Contracting State.

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<sup>121</sup> - (1993) *Human Rights and Europe*. Grotius Publications LTD. P. 165.

<sup>122</sup> - The relevant material reads: "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."

With regard to Para 2 of article 7, it is considered to be the sole exception of this Article. The wording is the same as in Article 38 of the Statute of the International Court of Justice. The International courts and tribunals employ the general principles of law recognized by civilized nations as one of the sources of international law. Considerable decisions taken by international tribunals are based on the general principles. But in reality international tribunals often find it difficult to assert whether a particular principle is in fact a general principle recognized by civilized nations. In pointing out the problem Rudolf B. Schlesinger states: "*in a case after case, the judge writing the opinion simply expressed a hunch, a hunch probably based upon the legal system or systems with which he happened to be familiar.*"<sup>123</sup> Therefore, he was an advocate of the jurists and philosophers' efforts to establish a set of general principles recognized internationally.<sup>124</sup>

As to the meaning of the term-civilised nations, Jeffery Hart argues that: "*the term civilised nations is not being used without politically correct embarrassment. The civilised world consists of advanced modern nations, mostly the West.*"<sup>125</sup> Against this narrow perspective M. Cherif Bassiouni argues that: "*The Statute of the International Court of Justice notes that the Court will apply the general principles of law recognized by civilized nations. Therefore, it is important to perceive and understand the Islamic concepts of human rights since they will be part of those general principles that the Court will have to apply.*"<sup>126</sup>

## **Section II                      Defence Rights of the Accused during Trial**

Within this section 10 rights of the accused are discussed. These are his rights to: (a) have a lawyer, (b) have an interpreter, (c) have adequate time and facilities, (d) have a speedy trial, (e) to be informed promptly of the accusation against him, (f) to be tried in his presence, (g) to defend himself in person (h) to be equally treated (i) to call and cross examine witnesses, and (j) not to be compelled to confess guilt.

### **(A) The right to legal representation**

Article 6 is worded as follows: "*Everyone charged with a criminal offence has the following minimum rights...(c) to defend himself ... through legal assistance of his*

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<sup>123</sup> - Rudolf B. Schlesinger (1957) "*Research on the General Principles of Law Recognized by Civilized Nations.*" The American Journal of International Law. Volume 51 P. 734

<sup>124</sup> - Ibid.

<sup>125</sup> - in 22/9/2001 .On line [www.nationalreview.com](http://www.nationalreview.com) ( 24/11/2003)

<sup>126</sup> - (1969) p. 194



*own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require...*”

The purpose of this Article is to place one accused of a criminal offence in a position which enables him to practice his defence rights effectively.<sup>127</sup> The importance of this guarantee is explained clearly by the Court as: “*one of the fundamental features of fair trial.*”<sup>128</sup> On the whole, rights guaranteed in this Article are applicable in all stages, that is to say the courts for the first instance as well as the appellate courts.

The said Article contains two rights: the right to choose a lawyer and the right to free assistance if he satisfies the required conditions.

With regard to the application of the first right, that is to say, the right to choose a lawyer, since the rights guaranteed in the Convention are considered to be practical and effective and not just theoretical rights, a lawyer must be given the opportunity to visit his client in person out of the hearing of officials.<sup>129</sup> However, the Court is of the opinion that despite the importance of a relationship of confidence between a lawyer and the accused, this right is not absolute.<sup>130</sup> So, privacy between the lawyer and the accused can be subject to some restrictions.<sup>131</sup> This right can be restricted in order to protect public interests.<sup>132</sup> Therefore, providing the accused with the right to appoint his own lawyer does not mean that the Contracting States cannot regulate such practice. A state has the jurisdiction to set up legislation governing the required qualifications and conduct of lawyers.<sup>133</sup>

The decision whether any restriction on the accused’s right to be assisted by a lawyer infringes the right to fair hearing should be considered in the light of the proceedings as a whole. If the lawyer cannot receive instructions in confidence, then there is a risk that legal consultation might lose much of its effectiveness.<sup>134</sup> The Court found violation of Article 6(3) (c) when the court dismissed an appeal at a hearing at which the defence counsel was absent due to the fact he was not informed about the hearing date.<sup>135</sup> In addition, and more importantly, if the accused chooses to be assisted by a

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<sup>127</sup> -Harris (1995) p.256

<sup>128</sup> -*Proitrimol v France* A277-A (1993) Para. 34; Application No. 00014032/88

<sup>129</sup> -*Can v Austria* A96 (1985) Para 17; Application No. 00009300/81

<sup>130</sup> -*Croissant v Germany* (1992) Para 29; Application No. 00013611/88

<sup>131</sup> -*Campbell and Fell v United Kingdom* (1984) 2 EHRR 165

<sup>132</sup> -*Campbell and Fell UK* A80 (1984) Para. 113; Application No. 00007819/77; 00007878/77

<sup>133</sup> -Harris (1995) p.259

<sup>134</sup> - *Brennan v UK* (2003) 34 EHRR 18

<sup>135</sup> - *Alimena v Italy* A195-D (1991).; Application No. 00011910/85



lawyer he still has the right to attend the hearing.<sup>136</sup> But it emerges from *Campbell and Fell v UK*<sup>137</sup> that the right to legal representation is not contingent on the accused's presence.

Moreover, the accused's refusal to be present in the court cannot be regarded as a proper reason for depriving the accused of representation. The Court has held that: "... the fact that the defendant, in spite of having been properly summoned, does not appear, cannot -even in the absence of an excuse- justify depriving him of his right under article 6 Para 3 of the convention to be defended by council"<sup>138</sup>.

Although the court has not provided an explicit answer to the question whether the accused can choose an advocate, a person who has no legal training, to defend him, it seems that a positive answer should be given. Since the accused has the right to defend himself in person, by fortiori, he also has the right to choose to be assessed by a non-lawyer. Apparently, the Court has left this matter to be decided by each contracting state.

Regarding the second right presented by Article 6 (3) (c), that is, the right to have free legal assistance; this right is subject to two conditions:

First, that the accused should lack the means to pay the lawyer's costs. In this regard the accused is responsible for proving his lack;<sup>139</sup>

Second, if the domestic court is convinced that the first condition is satisfied, it should support the accused by giving legal assistance if the interests of justice so require. To fulfil this latter task the court concerned should determine this question in the light of the case as a whole.<sup>140</sup> The national courts under the supervision of the European Court of Human Rights undertake this assessment.<sup>141</sup> Three criteria are taken into account when determining whether the interests of justice require legal assistance or not: 1- the complexity of the case; 2- the ability of the accused to participate effectively in his case; 3- what is at stake for the accused.<sup>142</sup> For instance, in *McVicar v UK* the applicant complained that the unavailability of legal aid in defamation proceedings operated to deprive him of a fair trial. Because he was unable to pay legal costs, he was asked to present himself for the greater part of the proceedings. The

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<sup>136</sup> - Ibid

<sup>137</sup> - A80(1984) Para.99; Application No. 00007819/77; 00007878/77

<sup>138</sup> -*Lala v Netherlands* A297-A (1993) Para.33; Application No. 00014861/89

<sup>139</sup> -*Croissant v Germany* (1992) Para.37; Application No. 00013611/88

<sup>140</sup> -*Granger v UK* A174 (1990) Para. 46; Application No. 00011932/86

<sup>141</sup> -Harris (1995) p.261

<sup>142</sup> -*Granger v UK* A174 (1990) Para. 47; Application No. 00011932/86



European Court explains that whether the national court violated the right to free legal representation would depend upon the particular circumstances of the case. In the instance case the applicant: (1) was a well-educated journalist capable of formulating a cogent argument. (2) The rules relating to the exclusion of evidence were clear and unambiguous and should have been understood by the applicant. Further, the outcome of a libel action turned on the simple question of whether or not the applicant was able to show on the balance of probabilities that the allegations at issue were substantially true. Therefore, the Court did not accept that the law of defamation was sufficiently complex to require a person in the applicant's position to need legal advice. As a consequence, there is not a breach of the right to have free legal aid.<sup>143</sup> However, in a different case the applicant was also refused legal aid. The case was complex and therefore the national court had adjourned the hearing for further consideration of the complex point of law on the merits of the claim. As a consequence the European Court was satisfied that the right to free legal aid was breached.<sup>144</sup>

Pursuant to the Strasbourg jurisprudence the main issue in this regard is the distinction between *de jure* and *de facto* protection. In *Artico v. Italy*<sup>145</sup> the domestic court had appointed counsel to represent the applicant. But the Counsel in reality did not represent the applicant, who was convicted. Before the European Court the government of Italy argued that the law in Italy presumed that an appointed counsel acted on behalf of his client unless explicitly replaced or relieved of his duty. The European Court found that Article 6 (3) (c) was infringed on the ground that the Article dictated assistance not nomination of counsel. In its words the Court stated that: "*article 6 (3) (c) speaks of 'assistance' and not of 'nomination'. Again, mere nomination does not ensure effective assistance, since the lawyer appointed for legal aid purposes may die, fall seriously ill, be prevented for a protected period from acting or shirk his duties. If they are notified of the situation, the authorities must either replace him or cause him to fulfil his obligations.*"<sup>146</sup>

Moreover, when the accused is granted a right to appeal, his right to legal aid is established despite his chance of success.<sup>147</sup> Furthermore, the appointment of more than one lawyer is permissible and may be required in some cases. Nevertheless, the

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<sup>143</sup> - *McVicar v UK* (2002) 35 EHRR 22

<sup>144</sup> - *Granger v UK* A174 (1990); Application No. 00011932/86

<sup>145</sup> - (1981) 3 EHRR

<sup>146</sup> - *Artico v, Italy* (1981) 3 EHRR 1.

<sup>147</sup> - Harris (1995) p.263

national court should pay heed to the defendant's views as to the number of lawyers needed.<sup>148</sup> In addition, when appointing a lawyer the domestic courts should have regard to the defendant's wishes. However, they can override those wishes when there are relevant and sufficient reasons for holding that this is necessary in the interests of justice.<sup>149</sup>

### **(B) The right to an interpreter**

Article 6 Para 3 lays down that: "*Everyone charged with a criminal offence has the following minimum rights... (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court*".

The object of this right is to guarantee equality between an accused who is not capable of speaking the language used in court, and a defendant who can understand and speak the court's language.<sup>150</sup>

The accused's right to have an interpreter is unconditional. Thus lack of sufficient means to pay for an interpreter is not a condition, because providing a proper interpretation is part of the judicial system's organization to ensure a fair and just trial.<sup>151</sup> Moreover, compelling an accused to pay the cost of interpretation after being convicted is regarded as a violation of the right to a fair trial because he may waive his right to be assisted by an interpreter for fear of financial consequences. Therefore, the Court has pointed out that the right guaranteed in Article 6 Para 3 (e) "*entails for any one who can not speak or understand the language used in a court, the right to receive the free assistance of an interpreter, without subsequently having claimed back from him payment of costs thereby incurred*"<sup>152</sup> In addition, the right to the free assistance of an interpreter includes the right to translate all the necessary documents or statements which enable him to understand in order to have the benefit of a fair hearing.<sup>153</sup>

Although the Court's view is not clearly established as to whether the national court is obliged to translate any document presented by the accused in order to support his defence, it seems that the European Court is reasonably of the opinion that only documents provided by the prosecutor must be translated. However, as to documents

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<sup>148</sup> - *Croissant v Germany* (1992) Para.27; Application No. 00013611/88

<sup>149</sup> - *ibid.* Para, 29

<sup>150</sup> - Keir Starmer (1999) p.272

<sup>151</sup> - Harris (1995) p.270

<sup>152</sup> - *Luedicke, Belkcm and Koc v Germany* A29 (1978) Para.46; Application No. 00006210/73; 00006877/75

<sup>153</sup> - *ibid.* Para 48



given by the accused to defend himself, the domestic authority is not legally required to translate such documents. Translation of these is the defendant's duty.

A written translation or interpretation is not always required, provided that sufficient oral information is given.<sup>154</sup> As to the accused, who is represented by a lawyer, the question is whether it is sufficient if the lawyer, but not the accused himself, is able to understand the language used in court. Although, the Court does not say this in so many words, it would appear from the tenor of its considerations as a whole in *Kamasinski v Austria*<sup>155</sup> that the accused himself should understand the proceedings against him in order to discuss any important points with his lawyer. In addition, if the court determines that a lawyer must assist the accused, and the former cannot speak the language that the accused understands, the court is under an obligation to provide the accused with an interpreter to assist his communication with his lawyer.<sup>156</sup>

Obviously, since the rights provided by the Convention must be practical and effective the interpreter has to be qualified. In other words, he must demonstrate an adequate capability to translate sufficiently. In *Kamasinski v. Austria*<sup>157</sup> the Court stated that in order for the right to be assisted by an interpreter to be practical and effective, the obligation of the competent authorities is not limited to the appointment of an interpreter but, if they are put on notice in the particular circumstance, may also extend to a degree of subsequent control over adequacy of the interpretation provided. An assessment of the accused's ability to understand the language used in court is a question of fact, which is left totally to the decision of the national court. Thus, the burden is upon the accused to prove that the domestic court's assessment of his capability to understand the language is wrong.<sup>158</sup>

Moreover, it is argued that the right to be assisted by an interpreter would properly be extended to cover deaf or dumb people.<sup>159</sup> Nevertheless, the right to be helped by an interpreter can be waived.<sup>160</sup>

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<sup>154</sup> - *Kamasinski v Austria* A168 (1989). Para 85; Application No.00009783/82

<sup>155</sup> - *ibid* para 85

<sup>156</sup> - Harris (1995) p. 271

<sup>157</sup> - A 168 (1989) Para 74; Application No.00009783/82

<sup>158</sup> - Harris (1995) p.272

<sup>159</sup> - *Ibid*, p.176

<sup>160</sup> - *Kamasinski v Austria* A168 (1989) Para. 80; Application No.00009783/82

### **(C) The accused's right to adequate time and facilities**

Article 6 (3) lays down that: *“Everyone charged with a criminal offence has the following minimum rights... (b) to have adequate time and facilities for the preparation of his defence”*

#### **i- Adequate time:**

A person charged with a criminal offence is entitled to adequate time to prepare his defence. This guarantee aims to protect the accused from a “hasty trial”.<sup>161</sup> This right applies from the moment that a person is charged with a criminal offence.<sup>162</sup> However, Article 6 (3) (b) does not specify any period in which the adequate time will be examined. Therefore, the Court refers to certain factors when determining whether adequate time is given or not: for example, the complexity of the case,<sup>163</sup> the workload of the accused's lawyer, the stage of proceedings.<sup>164</sup> In addition, an accused's lawyer, or legal aid when needed, should be appointed a reasonable time before the trial.<sup>165</sup> Moreover, if the defence lawyer is replaced, he should be given additional time to prepare his case<sup>166</sup>.

With regard to allowing adequate time for an appeal, this needs, generally speaking, less time than for a trial.<sup>167</sup>

More generally, the case law of the European Court demonstrates that Article 6 (3) (b) requires actual prejudice. The onus of proving this prejudice lies with the defendant. This fact leads to the conclusion that Article 6 (3) (b) will hardly ever be found infringed because it is difficult for an accused to prove actual prejudice. Therefore, the Court found no violation of the Article, in the absence of any evidence of prejudice, even though the applicant had met and instructed his legal aid barrister only ten minutes before a trial that result in a sentence of seven years' imprisonment.<sup>168</sup>

#### **ii- Adequate facilities:**

Article 6 Para 3 (b) guarantees a person charged with a criminal offence, adequate facilities for the preparation of his defence. The meaning of the word ‘facilities’ was

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<sup>161</sup> - Harris (1995) p. 252

<sup>162</sup> - *ibid.* p. 253

<sup>163</sup> - *Albert and Le Compte v Belgium* A58 (1983) Para.41; Application No. 00007299/75; 00007496/76. In this case the Court considered that more than 15 days to prepare the accused defence is reasonable, especially in view of the lack of complexity of the case

<sup>164</sup> - Harris (1995) p 253

<sup>165</sup> - *Perez Mahia v. Spain* no 11022/84,9 EHRR 145 ( 1985)

<sup>166</sup> - *Goddi v Italy* A76 (1984) Para. 31; Application No. 00008966/80

<sup>167</sup> - Harris (1995) p. 253

<sup>168</sup> - *Ibid.*, p 253



defined by the European Commission in *Jespers v. Belgium*<sup>169</sup> as including the opportunity for an accused to acquaint himself with results of investigations carried out throughout the proceedings, whenever they occur and however they are defined. Yet, the European Commission in this case pointed out that an individual could not invoke this definition in order to imply a right of unlimited access to the investigating authorities' files on a case. The right to have adequate facilities means that the prosecution will be required to disclose to the defence all material evidence obtained during the investigation stage whether for or against the accused. A failure to fulfil this task might render the proceedings unfair.<sup>170</sup>

None the less, article 6(3) (b) should not be understood to mean that the prosecution is obliged to reveal to the accused or his lawyer before trial all the evidence when the plan is to present them in court.<sup>171</sup>

The Court described the necessary requirement to satisfy the right to adequate facilities as that the accused is given "*the opportunity to organize his defence in an appropriate way and without restriction as to the possibility to put all relevant defence arguments before the trial court.*"<sup>172</sup>

The right to adequate facilities implies the right of the accused to communicate with his lawyer to prepare his defence.<sup>173</sup> Moreover, if the right to appeal is guaranteed, the accused should be provided with adequate facilities to prepare his appeal. The Court found a violation of this Article where a military court permitted only a short period of time to file an appeal.<sup>174</sup>

#### **(D) The right to trial within a reasonable time**

Article 6 Para 1 lays down that: "*In the determination of ...any criminal charge... every one is entitled to a hearing within a reasonable time...*"

Thus a speedy trial is guaranteed by the Convention. The purpose of such a guarantee was precisely explained by the European Court as to: "*ensure that the accused persons do not have to lie under a charge for too long and that the charge is determined.*"<sup>175</sup>

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<sup>170</sup> - Comm. Rept (1981). Mentioned in Harris (1995) p 255

<sup>171</sup> - *Edwards v. UK* A 247-B (1992) ; Application No. 00013071/87

<sup>172</sup> - Harris (1995) p 255

<sup>173</sup> - *Can v. Austria* A 96 (1958) Para 53; Application No. 00009300/81

<sup>174</sup> - *Goddi v Italy* A76 (1984) Para.31; Application No. 00008966/80

<sup>175</sup> - *Hadjianastassion v. Greece* A252 (1992); Application No. 00012945/87

- *Wemhoff v Germany* A7 (1968) Para 18; Application No. 00002122/64

The right to be tried within a reasonable time in criminal cases is also designed to avoid the situation that a person charged remains too long in a state of uncertainty about his fate.<sup>176</sup>

According to the case-law of the European Court, the reasonable time in Article 6 (1) starts to run from the charge and will continue until the proceedings, including appeal proceedings, are determined.<sup>177</sup> However, a significant issue here is the precise definition of the words "reasonable time". This expression is vague and therefore, it is not possible to determine the exact meaning for reasonableness of time, which can be assessed only in the light of the particular circumstances of each case.<sup>178</sup>

Accordingly, the Court has identified factors to be applied to determine whether or not the accused has been deprived of his right to be tried within a reasonable time. These factors are: 1- The complexity of the factual or legal issue, 2- the conduct of the accused, 3- the conduct of the concerned state, 4- what is at stake for the accused.

Many reasons may cause complications in a case. For example, the need for expert evidence<sup>179</sup>, or the need to obtain evidence from abroad.<sup>180</sup> However, ten years' delay was considered unreasonable in *Konig v Germany*.<sup>181</sup> Moreover, a delay for a period shorter than four years was also regarded by the Court as unreasonable because the case was dealt with at a single jurisdictional level.<sup>182</sup> But the Court did not find a breach of a reasonable time where five years had elapsed before rendering the final judgment, since the proceedings in this case had passed through three jurisdictional levels.<sup>183</sup>

With regard to the application of the second criterion, that is to say, the conduct of the accused, the Court is of the opinion that a violation is not to be found if the delay is caused by the accused himself.<sup>184</sup> Therefore, where the applicant flees from jurisdiction or disappears while subject to a charge, the time during which he is absent is not to be taken into account when determining the length of proceedings.<sup>185</sup> However, the Court has found that the state is still responsible for any delay caused by

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<sup>176</sup> - Ibid, para 19

<sup>177</sup> - Ibid. Paras 18-19

<sup>178</sup> - ibid. Para 1

<sup>179</sup> - *Wemhoff v. FRG* A 7 (1968); Application No. 00002122/64

<sup>180</sup> - *Neumeister v. Austria* A 8 (1968); Application No. 00001936/63

<sup>181</sup> - (1978) Para. 105

<sup>182</sup> - *Zimmerman and Steiner v Switzerland* A66 (1983) Para 23; Application No. 00008737/79

<sup>183</sup> - ibid. Para 27

<sup>184</sup> - Mark W. Janis (2000) p.456

<sup>185</sup> - Harris (1995) p.225



the accused where he refused to appoint his lawyer. The Court has justified this by confirming that Article 6 does not require the accused to co-operate actively with the judicial authorities.<sup>186</sup>

In evaluating the third criterion, the Court considers that a violation of Article 6 will be found if the delay is attributable mainly to the actions of the concerned state. The Court has constantly reiterated: "*Only delays attributable to the State may justify a finding of a failure to comply with the reasonable time requirement*".<sup>187</sup> For instance, a state was found responsible for the delay which resulted from unjustified delays in transforming cases between courts or in hearing of appeal.<sup>188</sup>

In most cases however, such delay results from an increasing backlog of cases in the judicial system in the Contracting States. The basic principle in this regard is that the Contracting States are obliged according to the Convention to organize their legal systems so as to enable the national courts to comply with Article 6 (1)'s requirement.<sup>189</sup>

If the excessive workloads are caused by exceptional circumstances, which are not foreseeable, the State in question is not responsible for such delay, provided that it takes all the necessary steps to avoid this. Thus the Court has repeatedly stated, "... *a temporary backlog of business does not involve liability on the part of the Contracting States provided that they take, with the requisite promptness, remedial action to deal with exceptional situations of this kind*"<sup>190</sup>

A state will be held liable for a delay if the workload is a result of ineffective or insufficient judicial system, particularly if the backlog was expected. In *Guincho v Portugal*<sup>191</sup> for example, it was held that since the backlogs were to be expected, the steps taken by Portugal were evidently insufficient. The Court concluded that the exceptional situations were not such as to deprive the applicant of his right to a judicial determination within a reasonable time.

With regard to the fourth factor, namely what is at stake to the applicant, the Court is of the opinion that, in cases of special importance to the applicant where for example,

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<sup>186</sup> - *Corigliano v Italy* A57 (1982) Para.42; Application No. 00008304/78

<sup>187</sup> - *Zimmermann and Steiner v Switzerland* A66 (1983) Para 24; Application No. 00008737/79

<sup>188</sup> - *Girolami v. Italy* A196 – E (1991); Application No. 00013324/87

<sup>189</sup> - *Milasi v Italy* A119 (1987) Para. 18; Application No. 00010527/83

<sup>190</sup> - *Ibid*, para 18

<sup>191</sup> - A81 (1984) Paras.40-41; Application No. 00008990/80

he is deprived of his liberty by holding him in detention pending trial, the domestic courts are under obligation to act effectively to speed up their procedures.<sup>192</sup>

Nevertheless, not in every case are these factors considered in the same way. The fundamental principle is that the reasonableness of time is to be determined by reference to the particular circumstances of the case in question. Sometimes the circumstances call for a global assessment so that it is not considered necessary to consider these questions in detail.<sup>193</sup> Moreover, it is argued that “*no particular factor is conclusive, the approach must be to examine them separately and then to assess their cumulative effect.*”<sup>194</sup>

#### **(E) The right of the accused to be informed of the accusation**

Article 6 Para 3 is worded as follows: “*Everyone charged with a criminal offence has the following minimum rights... (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him...*”

The aim of this guarantee is to provide the accused with the necessary information that enables him to prepare his defence.<sup>195</sup> Accordingly, this right requires that an accused should be informed of the nature of the accusation against him, that is to say the kind of offence. Moreover, he also must be informed clearly of the cause of the accusation, i.e. the facts that are considered as the basis of the charge against him.<sup>196</sup>

The Court demonstrated that: “*Article 6 Para 3 (a) provides the accused with the right to be informed not only of the cause of the accusation, that is to say the acts he is alleged to have committed and on which the accusation is based, but also the legal characterization of those acts. Thus information should be detailed*”.<sup>197</sup>

In general, the scope of the right to be informed promptly of the accusation must be evaluated in the light of the more general right to a fair trial. The Court has considered that in criminal cases the provision of full, detailed information concerning the charges against an accused, and the legal characterization that the court might adopt in the matter, is an essential prerequisite for ensuring that the proceedings are fair.<sup>198</sup>

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<sup>192</sup> - Mark W. Janis (2000) p. 459

<sup>193</sup> - *Obermeier v Austria* A179 (1990) Para. 72; Application No. 00011761185

<sup>194</sup> - Harris (1995) p.223

<sup>195</sup> - Ibid, p.250

<sup>196</sup> - Ibid, p. 251

<sup>197</sup> - *Pelissier and Sassi v France* (1999) Para.51; Application No. 00025444/94

<sup>198</sup> - Ibid, Para 52



Moreover, the right to be informed of the nature and the cause of the accusation must be considered in the light of the accused's right to prepare his defence.<sup>199</sup>

With regard to the term "in detail" the Court demonstrated that the judicial notification provided in the case of *Brozicek v Italy*<sup>200</sup> was sufficient since it listed the offences of which the defendant was accused, stated the place and date thereof, and referred to the relevant Articles of the criminal law and the victim's name. Yet, it would seem that this information is not in fact sufficient because it did not mention the fact of the accusation.

Article 6 Para 3 (a) does not specify any formal manner in which the defendant is to be informed of the nature and cause of the accusation against him.<sup>201</sup> Although paragraph 3(a) of Article 6 does not clarify whether the relevant information must be provided in a written form or not, the Court is of the opinion that it is usually given in writing. However, an oral explanation is permissible provided that such explanation is sufficient.<sup>202</sup> In addition, the information should be given to the accused in a language that he understands. So if he cannot speak or understand the language used before national courts, the accusation against him must be translated correctly into the language he understands. In this regard the Court pointed out that domestic judicial authorities must take steps to ensure observance of Article 6 Para 3 (a)'s requirements, unless they were in a position to establish that the applicant in fact had sufficient knowledge of the language to understand from the notification the purport of the letter notifying him of the charges brought against him.<sup>203</sup>

#### **(F) The accused right to be tried in his presence**

Although Article 6 does not expressly provide such a right, this has emerged from the obligation in Article 6(1) to guarantee a public hearing. The accused person, as a general principle, has the right to be present at the trial hearing.<sup>204</sup> There is no dispute that the right of an accused to participate effectively in a criminal trial is guaranteed by Article 6 read as a whole. This includes the right to be present.<sup>205</sup>

The Court explains that: "*it flows from the notion of a fair trial that a person charged with a criminal offence should, as a general principle, be entitled to be present at the*

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<sup>199</sup> - Ibid, Para 54

<sup>200</sup> - A167 (1989), Para 42; Application No. 00010964/84

<sup>201</sup> - Ibid, Para 53

<sup>202</sup> - *Kamasinki v Austria* A168 (1989) Paras 79-81; Application No. 00009783/82

<sup>203</sup> - *Brozicek v Italy* A167 (1989) Para. 41; Application No. 00010964/84

<sup>204</sup> - *Ekbatani v Sweden* A134 (1988) Para 25; Application No. 00010563/83

<sup>205</sup> - *Stanford v UK* A282-A (1994) Para 26; Application No. 00016757/90

trial hearing.”<sup>206</sup> In addition, the right to attend the hearing was interpreted broadly by the Court to the effect that the national court should not only guarantee his presence but also should ensure his effective participating in the trial. In response to an applicant’s complaint with regard to hearing difficulties, the European Court stated that: “Article 6, read as a whole, guarantees the right of an accused to participate effectively in a criminal trial. In general, this includes, *inter alia*, not only his right to be present, but also to hear and follow the proceedings.”<sup>207</sup>

This entails that evidence should be adduced in court in the presence of the accused, and any judgment based solely on evidence collected during the investigation stage is not acceptable.<sup>208</sup> Moreover, the state is responsible for ensuring the attendance of the accused if he is in custody.<sup>209</sup>

The right to be present is, however, waivable, provided that it is established in an unequivocal manner.<sup>210</sup> In addition, a trial in the absence of the accused is permitted, provided that the state has acted, although not successfully, diligently to provide the accused with the necessary notification of the trial.<sup>211</sup> Importantly, if the accused who was tried *in absentia* learn of the proceedings, he must be able to obtain fresh determination of the merits of the charge.<sup>212</sup> Moreover, the hearing might take place *in absentia* where the accused is seriously ill and unfit to attend the hearing, provided his lawyer is representing him and the latter is given unrestricted opportunities to counsel the accused.<sup>213</sup>

Clearly trial *in absentia* is permitted where the accused attempts to delay the proceedings by claiming, for instance, a false illness.<sup>214</sup>

Special features of the proceedings at issue may justify the absence of a public hearing before the appellate court, provided that there has been a public hearing at the original court. Thus the right to attend an appeal depends on its scope. If the appellate court’s jurisdiction is limited only to matters of law, attendance is not necessary. On the other hand, if the appellate court deals with both facts and law, the need for the

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<sup>206</sup> - *Ekbetani v. Sweden* (1991) 13 EHRR 504

<sup>207</sup> - *Stanford v. UK* A282-A (1994) Para 26; Application No. 00016757/90

<sup>208</sup> - *Barbera, Messege and Jabardo v Spain* A146 (1988) Paras 81-82; Application No. 00010590/83

<sup>209</sup> - *Goddi v Italy* A76 (1984) Para 29; Application No. 00008966/80

<sup>210</sup> - *Poitrimol v France* A277-A (1993) Para 31; Application No. 00014032/88

<sup>211</sup> - *Goddi v Italy* A76 (1984) Para 29; Application No. 00008966/80

<sup>212</sup> - *Colozza and Rubinat v Italy* A 89 (1985) Para 29; Application No. 00009024/80

<sup>213</sup> - Harris (1995) p 206

<sup>214</sup> - *Ibid*, p 206



presence of the accused depends on what is at stake for him and the court's need to determine the facts.<sup>215</sup>

**(G) The right of the accused to defend himself in person**

Article 6 is worded as follows: "*Everyone charged with a criminal offence has the following minimum rights...(c) to defend himself in person ...*"

With regard the right of the accused to choose to defend himself in person, if according to the legal system in a Contracting State the accused is obliged to receive legal assistance, this obligation however in itself will not contradict the right laid down as mentioned in the Article.<sup>216</sup>

Moreover, if the accused chooses to defend himself, it is his duty to show diligence himself.<sup>217</sup> This is, in fact, an unclear position. But it seems that what is meant by this stance is that if the accused who chooses to defend himself in person is incapable of doing so, the state can prevent him from defending himself in person, and can also oblige him to be defended by a lawyer.

**(H) The right to equality of arms**

The right to a fair hearing entails the application of the principle of equality of arms. This notion means in criminal cases that the accused must be given a reasonable opportunity to present his case before the court under the same conditions provided to the prosecutor. The lack of such equality between the Procurer General and the appellant before the Court of Cassation led the European Court in *Borgres v. Belgium*<sup>218</sup> to conclude that Article 6(1) was violated. In addition, it was held that not treating an expert witness appointed by the accused equally to the one appointed by the court is regarded as an infringement of the principle of equality of arms. But granting the prosecution a longer time to lodge an appeal than that provided to the accused is not considered as a breach of Article 6 (1).<sup>219</sup>

**(I) The right to call and cross-examine witnesses**

Article 6 (3) provides that: "*Everyone charged with a criminal offence has the following minimum rights...(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him...*"

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<sup>215</sup> - Clements, L et al. (1999) p.164

<sup>216</sup> - *Croissant v Germany* A237-B (1992) Para 27; Application No. 00013611/88

<sup>217</sup> - *Melin v France* A261-A(1993) Para.25; Application No. 00012914/87

<sup>218</sup> - A214-B 1991 Paras.27,28,29; Application No. 00012005/86

<sup>219</sup> - *Kremzow v Austria* A268-B (1993) Para 75; Application No. 00012350/86

Again, the word ‘witness’ carries the autonomous meaning given by the Court. In *Kostovski v Netherlands*<sup>220</sup> the Court pointed out that even though only the person whose statements were read out at the trial was considered by the Netherlands’ law as a witness, in the light of the autonomous meaning given to this word, the authors of statements whether read out at the trial or not should be regarded as witnesses for the purpose of Article 6 Para 3(d), because their statements were in fact before the court and were taken into account by it.

The scope of this guarantee is demonstrated by the Court as requiring that “*an accused should be given an adequate and proper opportunity to challenge and question a witness against him, either at the time the witness was making his statement or at some later stage of the proceedings.*”<sup>221</sup>

These rights entail that the accused should be provided with an adequate and proper opportunity to challenge and question a witness against him at some stage in the trial. And this right applies to both trial and appeal proceedings.<sup>222</sup> In addition, all the evidence must normally be produced at a public hearing in the presence of the accused with a view to adversarial argument. Thus, relying on statements taken abroad and preventing an accused or his lawyer from confronting the witness led the Court in *A.M. v Italy* to determine that Article 6 (3) (d) had been infringed.<sup>223</sup>

Nevertheless, if witnesses live abroad and the trial court has no power to enforce them to attend the hearing, they can be examined in their country of residence. Even though the European Court is reluctant to sanction the use of an anonymous witness<sup>224</sup>, it has accepted that in some circumstances evidence can be given by an unidentified witness, provided the accused has ample opportunity to challenge the evidence.<sup>225</sup>

In *Said v France*<sup>226</sup> the applicant, who was convicted for drug offences, claimed that since the judicial bodies refused to organize a confrontation between him and the prosecution witnesses, his right to a fair trial was breached. The European Court pointed out that neither at the stage of investigation nor during the trial was the applicant able to examine the witnesses or have them examined. Thus, the lack of any

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<sup>220</sup> - A166 (1989) Para.40; Application No. 00011454185

<sup>221</sup> - *Kostovski v Netherlands* (1989) Para 41; Application No. 00011454185

<sup>222</sup> - Harris (1995) p.266

<sup>223</sup> - (1999).Paras 26,27,28; Application No. 00037019/97

<sup>224</sup> - Because the defence is unable to test the witnesses reliability or question their credibility. See Leach (2001) p.144

<sup>225</sup> - *Doorson v The Netherlands* (1996) 22 EHRR 330

<sup>226</sup> - (1994) 17 EHRR 251



opportunity to confront the prosecution witnesses violates Art 6. Despite the difficulties involved in securing evidence in relation to offences of drug trafficking, these considerations, according to the European Court, did not restrict the right of the defence guaranteed by Article 6. Consequently, the European Court stated that Article 6 (1) and 3(b) had been violated.

In another case the European Court distinguished between police officers as witnesses and disinterested witnesses or victims. Police officers are frequently required to give evidence in court. Accordingly, the use of anonymous police officers as witnesses should be resorted to only in exceptional circumstances. Less restrictive measures should be used wherever possible.<sup>227</sup>

However, using as evidence statements of witnesses obtained at the pre-trial stage is not in itself inconsistent with the Convention, provided that the defence's rights are guaranteed.<sup>228</sup>

As to the right of the accused to call witnesses on his behalf, the Court has reiterated that the admissibility of evidence is primarily a matter for regulation by a domestic law and as a general rule the national courts have the power to assess the evidence before them.<sup>229</sup> Therefore, as to the right of the accused to call his witnesses the general rule is that the national courts are free to assess whether the justice needs to call them or not. The Convention does not require the attendance and examination of every witness on the accused's behalf: its essential aim is, as indicated by the words "under the same conditions", full equality of arms in the matter.<sup>230</sup>

Obviously, the domestic court is not responsible for the failure of the defence counsel to call a particular witness,<sup>231</sup> or if a defence witness fails to appear for reasons beyond the court's control.<sup>232</sup>

In general, the accused must be present when witnesses are being heard in a case against him.<sup>233</sup> However, in exceptional circumstances, the interest of justice may permit the exclusion of the accused to ensure that a witness gives an unreserved

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<sup>227</sup> - *Van Meahelen and others v The Netherlands* (1997) 25 EHRR 647

<sup>228</sup> - *Kostovski v. Netherlands* (1989) Para. 41; Application No. 00011454185.

<sup>229</sup> - *Vidal V Belgium* A235-B (1992) Para 33; Application No. 00012351/86

<sup>230</sup> - *Ibid*, para 33

<sup>231</sup> - *F v. UK* (1993) 15 EHRR CD 32 (Application no. 18123/91)

<sup>232</sup> - *Harris* (1995) p 269

<sup>233</sup> - *Ibid*, p. 269

statement provided that the lawyer of the accused is allowed to remain and exercise any cross-examination.<sup>234</sup>

**(J) The right not to be compelled to confess guilt**

In principle, evidence extracted by force or maltreatment is not acceptable. The European Commission in *Austria v. Italy*<sup>235</sup> stated that the Convention would be violated if a trial court admitted, as evidence, confession obtained by torture or ill-treatment. Therefore, The European Commission is of the opinion that early access to a lawyer is an important guarantee as to the reliability of confession evidence and implied that a confession obtained during incommunicado detention would require very close scrutiny.<sup>236</sup>

The European Court observed that the Convention does not lay down rules on evidence as such. It cannot therefore as a matter of principle and in the abstract exclude the admission of evidence obtained in breach of the provisions of domestic law. It is for the national courts to assess the evidence they have obtained and the relevance of any evidence that a party wishes to have produced. The Court has nevertheless to ascertain whether the proceedings considered as a whole, including the way in which the evidence was taken, were fair as required by Article 6 (1).<sup>237</sup>

The general principle is that every Contracting State has the power to apply its own rules of evidence in the criminal sphere. The Court has re-iterated that Article 6 does not lay down any rules on the admissibility of evidence, which is a matter of a domestic law. It is not the function of the Court to decide whether particular kinds of evidence, for instance, unlawfully obtained evidence is admissible or whether the accused was guilty or not. Rather it should consider the fairness of the proceedings as a whole including the way in which the evidence was obtained.<sup>238</sup> Variation is thus very wide in the rules of evidence in different European legal systems. However, the Strasbourg authorities have established certain restrictions within which a Contracting State must exercise these rules.<sup>239</sup>

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<sup>234</sup> - Ibid, p. 269

<sup>235</sup> - (1963) 6 year book 740

<sup>236</sup> - *G v. UK* (1984) 35 DR 75

<sup>237</sup> - *Pelissier & Sassi v. France* (1999) Para 45; Application No. 00025444/94

<sup>238</sup> - *Khan v UK* (2000). Para 34; Application No. 00035394/97

<sup>239</sup> - Harris. (1995) p.210



### **Section III The Rights of the Accused in respect of the Independence of the Judiciary**

In this section rights to: an independent court, an impartial court, an open court and a reasoned judgment are examined in turn.

#### **(A) The right to an independent court**

It is believed that: *“Most of the decided cases on the meaning of an independent tribunal concern administrative or disciplinary tribunals, in which the Strasbourg authorities have not imposed standards as high as might be applied to the ordinary courts of law. This is particularly true of such matters as the duration of office of tribunal members and their protection from outside pressure.”*<sup>240</sup>

The European Court has repeatedly stated that the administrative bodies could adjudicate in minor matters without infringing Art 6 (1) provided there was an opportunity to challenge the decision before an independent and impartial tribunal.<sup>241</sup>

The fact that the tribunal in question exercises other functions, for instance, an administrative role, does not infringe the required independence.<sup>242</sup>

The word independent means the court's independence from Parliament,<sup>243</sup> the executive and from the parties of the case.<sup>244</sup> In *Bentham v Netherlands*<sup>245</sup> the Court found that a member of the executive body was not independent. Therefore, a decision that was taken by him did not fulfil the requirement of Article 6(1) regarding an independent tribunal. It is very interesting to know that the European Court's approach in assessing the relation between members of the tribunal concerned and the executive is to differentiate between instructions and mere guidelines. The executive may issue guidelines to members of a court or tribunal about the performance of their functions, so long as any such guidelines are not, in reality, instructions.<sup>246</sup> Directions by the executive that amount to instructions, however, infringe the Convention, because the court thereby surrenders its judicial function to the executive. Further, the Court found that accepting an opinion from a Foreign Minister as binding for a judge is an infringement of the independency of the tribunal.<sup>247</sup> In addition, an involvement

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<sup>240</sup> - Ibid, p. 231

<sup>241</sup> - *Kadubee v Slovakia* (2001) 33 EHRR 41

<sup>242</sup> - *Campbell and Fell v. UK* A80 (1984) Paras 33,81; Application No. 00007819/77; 00007878/77

<sup>243</sup> - Harris (1995), p 232

<sup>244</sup> - *Ringeisen v. Austria* A 13 (1971) Para 95; Application No. 00002614/65

<sup>245</sup> - A97 (1958) Para 43; Application No. 00008848/80

<sup>246</sup> - *Campbell and Fell v. UK* A80 (1984) Para 79; Application No. 00007819/77; 00007878/77

<sup>247</sup> - *Beaumartin v Franc* A296-B (1994) Paras.38-39; Application No. 00015287/89

of ministers in any aspects of the criminal justice process is likely to cause violation of the independency of the court. The Court pointed out that the Home Secretary setting the applicants' tariff following their convictions for murder and sentences of detention during Her Majesty's pleasure, was exercising sentencing powers but was clearly not independent of the executive.<sup>248</sup> To decide whether the tribunal concerned is independent or not, the Court takes into account the manner of appointment of its members, the duration of their term of office, the existence of guarantees against outside pressure, and the question of whether the body presents an appearance of independence.<sup>249</sup>

As to the manner of appointment of the members of the tribunal concerned, consideration must be given to the manner of appointment as a whole in deciding upon the independency of its members.<sup>250</sup> Thus, appointing tribunal members by the executive body is not, in itself, incompatible with the Convention, and does not breach the right to be tried before an independent tribunal<sup>251</sup>. Moreover, the Court found the composition of the courts martial in the United Kingdom, before the reform implemented in 1996, did not satisfy the requirements of independence in Article 6(1). It noted that all members of the court were appointed by a convening officer, an officer, superior in rank to and often holding direct and indirect command over the appointed members.<sup>252</sup>

As far as duration of their term of office is concerned, a short term is permissible, provided that there are reasonable grounds for such shortness. In *Campbell and Fell v UK*<sup>253</sup> the Court found that "*the term 3 years of office is admittedly relatively short, but the Court notes that there is a very understandable reason: the members are unpaid ... and it might well prove difficult to find individuals willing and suitable to undertake the onerous and important task involved if the period were longer.*"

With regard to application of the third criterion, that is to say the guarantees against outside pressures, this element implies that members of the tribunal concerned must be provided with necessary guarantees to prevent them from being removed during their term of office. Yet, not laying down protection from removal in the legal system

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<sup>248</sup> - *Tand V v. UK* (2000) 30 EHRR 121

<sup>249</sup> - *Campbell and Fell v. UK* A80 (1984) Para 78; Application No. 00007819/77; 00007878/77

<sup>250</sup> - Harris. (1995) p 232

<sup>251</sup> - *Campbell and Fell v. UK* A80 (1984) Para.79; Application No. 00007819/77; 00007878/77

<sup>252</sup> - *Findlay v UK* 1997-1(1997) Paras 74, 80; Application No. 00022107/93

<sup>253</sup> - A80 (1984) Para.80; Application No. 00007819/77; 00007878/77



was not regarded by the Court as a breach of independence if such protection is provided in practice. In *Campbell and Fell v. UK*, while serving a sentence of imprisonment for terrorist offences, the applicants were involved in prison violence that led to disciplinary proceedings being brought against them. Following proceedings before the Board of Prison Visitors, they were convicted of disciplinary charges and lost a range of privileges and period of remission. The Court noted that the Rules contain neither any regulation governing the removal of members of the Board nor any guarantee for their irremovability. The Court further observed that regardless of the fact that the Home Secretary could require the resignation of a member, this would be done only in the most exceptional circumstances and the existence of this possibility cannot be deemed as threatening in any respect the independence of the members of a Board in the performance of their judicial function. Therefore the Court unconvincingly concluded that: *"it is true that the irremovability of judges by the executive during their term of office must in general be considered as a corollary of their independence and thus included in the guarantee of Article 6 para.1 ...However, the absence of a formal recognition of this irremovability in law does not in itself imply lack of independence provided that it is recognized in fact."*<sup>254</sup> Such a finding is open to criticism. The guarantee of irremovability is an essential element of the protection against outside pressure. Relevant here is the members' feeling of security from possible removal by high rank executive members. Therefore, it is not sufficient to provide this guarantee in practice but rather it should be articulated explicitly in the law.

Furthermore, transferring the tribunal members to exercise another task was not considered by the Court as a contradiction of the guarantees against outside pressure.<sup>255</sup> The appearance of independence is also an important element when considering the independence of a tribunal. In *Belilos v Switzerland*<sup>256</sup>, the case was decided by a single member, a lawyer from police headquarters and a municipal civil servant. But he sat in his personal capacity and not subject to orders in the exercise of his function. Moreover, he took a different oath from that required of police representatives. In principle, he is not subject to any dismissal during his term of office (4 years). However, despite all the above aspects, the Court concluded that an

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<sup>254</sup> - Ibid, Para 80

<sup>255</sup> - Harris ( 1995) p.233

<sup>256</sup> - A132 (1988). Paras 66-67; Application; 00010328/83

ordinary person might see him as a member of the police force, subordinate to his superior and loyal to his colleagues. In such a situation, what is important is the confidence that must be inspired by the courts in a democratic society.

**(B) The right to a competent and impartial court established by law**

**1: A competent tribunal established by law:**

The Court has defined the word tribunal as follows: "... a tribunal is characterized in the substantive sense of the term by its judicial function, that is to say determining matters within its competence on the basis of the rules of law and after proceedings conducted in a prescribed manner..."<sup>257</sup> The definition implies that the Convention requires that the concerned body must have a judicial role, rendering a binding decision pursuant to prescribed procedures. Thus granting the body in question power to make only recommendations or to give advisory opinions does not satisfy the Convention's requirements in this regard. In *Bentham v Netherlands*<sup>258</sup> the Court held that "a power of decision is inherent in the very notion of tribunal within the meaning of the Convention... 'tendering' only an advice... is only a practice of not binding force...."

With regard to the words established by law, these mean that laws issued by Parliament must regulate the judicial system. But this does not mean that the legislative authority will formulate every detail regarding the organization of the court. The executive authority might have the jurisdiction to regulate matters other than the fundamental rules of the court's organization and jurisdiction, provided that this power is subject to judicial supervision. Moreover, "established by law" also means that function must be in accordance with law.<sup>259</sup>

Robertson and Merrills<sup>260</sup> state that: "the requirement that the tribunal should be established by law is intended to ensure that the administration of justice, in the sense of the organization and structure of the courts, is not a matter of executive discretion, but is regulated by laws made in the usual way. It therefore, prohibits the creation of extraordinary tribunals by executive order and, as it covers jurisdictional as well as institutional matters, also prevents the executive from investing the ordinary courts with special powers in an unconstitutional manner."

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<sup>257</sup> - *Belilos v Switzerland* A132 (1988). para 64; Application; 00010328/83

<sup>258</sup> - A97 (1985) Para 40; Application No. 00008848/80

<sup>259</sup> - Harris (1995) p.339

<sup>260</sup> - (1993) P.99



## 2: The impartiality of the tribunal:

Impartiality means lack of prejudice or bias.<sup>261</sup> Even though Janis and others criticise the approach of the Court when attempting to establish the required standard of impartiality as: “*In its various cases examining the impartiality of a tribunal, the Court has not been entirely consistent in its formulation of the proper standard for deciding whether or not a decision-maker met the required level of objective impartiality*”<sup>262</sup> the impartiality of a tribunal can be tested, as a general principle, according to a subjective test, that is to ascertain the personal conviction of a given judge in a given case, and an objective test, that is to determine whether he has offered guarantees sufficient to exclude any legitimate doubt in this respect.<sup>263</sup>

With regard to the subjective approach, the general principle is that the judge is impartial until the contrary is proven.<sup>264</sup> In order for the impartiality of the court’s members to be challenged an actual bias against the applicant must be shown.<sup>265</sup> Moreover, the doubt regarding the impartiality of a court must be a legitimate one. Accordingly, any judge in respect of whom there is a legitimate doubt must withdraw.<sup>266</sup>

As far as the objective approach is concerned, it must be determined whether, quite apart from the judge’s personal conduct, there are ascertainable facts which may raise doubts as to his impartiality. In this respect even appearances may be of a certain importance. What is at stake is the confidence which the courts in a democratic society must inspire in the public and, above all, as far as criminal proceedings are concerned, in the accused. For example, in *Procola v. Luxembourg*<sup>267</sup> the Court pointed out that the Luxembourg Council of State, which reviewed the legality of administrative decisions, was not acting consistently with the standard of impartiality required by the Convention, when four members sat on a panel that had previously given an advisory opinion concerning the matter in question. The applicant in this case, according to the Court, had legitimate grounds for fearing that the members of the Judicial Committee of the Council had felt bound by the opinion previously delivered. This implies that in deciding whether in a given case there is a legitimate

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<sup>261</sup> - *Piersack v Belgium* A53 (1982) Para 30; Application No. 00008692/79

<sup>262</sup> - p.442

<sup>263</sup> - *Piersack v Belgium* A53 (1982) Para30; Application No. 00008692/79

<sup>264</sup> - *Ibid.* Para. 30

<sup>265</sup> - *Hauschildt v Denmark* A154 (1989) Para 47; Application No. 000104865/83

<sup>266</sup> - *Ibid.* Para 48

<sup>267</sup> - (1995) no 326, 22 EHRR 193. Para 45

reason to fear that the particular judge lacks impartiality, the standpoint of the accused is very important, though not decisive. What is decisive is whether this fear can be held to be objectively justified. Thus, the Court has held that the mere fact that a judge has also made pre-trial decisions in the case cannot be taken as in itself justifying fears as to his impartiality. What matter is the extent and nature of the pre-trial measures taken by the judge.<sup>268</sup> Harris and others illustrate that an objective test of impartiality resembles the English law doctrine that "*Justice must not only be done: it must also be seen to be done.*"<sup>269</sup> Thus, the appearance of the judge's impartiality is very important since it builds the public confidence.

A fair hearing requires that persons who have participated significantly in pre-trial proceedings be excluded. Therefore, any one who served as an investigating judge or as a public prosecutor and took considerable decisions in a certain case is not to be allowed to serve as a judge in the same case because he might incline to maintain the view he has formed. In that sense he may be judging himself in a given case, and thereby be regarded as in contradiction to the common law principle "*no person may be a judge in his own cause.*" The point of excluding any member of a tribunal as a consequence of his previous involvement in the legal proceedings finds its origin in the assumption that individuals are predisposed to maintain positions they have formed.<sup>270</sup>

To evaluate whether such involvement of the judge in a given case is consistent with the maintenance of impartiality under Article 6(1), the Court will review the precise actions of the judge concerned in a stage prior to his instance function. The Court has found no violation where at earlier hearings the trial judge had been entitled to act for an absent prosecution under the actual facts of the case, the Court found that the judge in question had taken no actions of any significance.<sup>271</sup> The Court explained such an approach by stating that: "*The mere fact that [a judge] made pre-trial decisions... cannot be taken as in itself justifying fears as to his impartiality; what matters is the scope and nature of these decisions.*"<sup>272</sup>

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<sup>268</sup> - *Fey v Austria* A255-A (1993) Para 30; Application No 00014396/88

<sup>269</sup> - P.235

<sup>270</sup> - Mark Janis, Richard Kay, and Anthony Bradley (2000) p. 438

<sup>271</sup> - *Thorgeir Thorgeirson v. Iceland* (1992) no 239, 14 EHRR 843

<sup>272</sup> - *Nortier v. The Netherlands* (1993) no 267, 17 EHRR 273



### (C) The right to a public hearing

Article 6 Para 1 provides that *“Every one is entitled to a... public hearing...”*

Generally speaking, the case-law of the European Court with regard to this article is relatively slight small. This is may be due to the fact that the scope of the right to public hearing is clearer than other aspects of the right to a fair trial.<sup>273</sup>

The objective of a public hearing in criminal cases is to (1) maintain the public confidence in the administration of justice and to (2) protect the accused from the dangers of his case being handled in camera.<sup>274</sup> The European Court has constantly elucidated the precise scope of a public hearing: *“The public character of proceedings before the judicial bodies referred to in Article 6 (1) protects litigants against the administration of justice in secret with no public scrutiny; it is also one of the means whereby confidence in the courts, superior and inferior, can be maintained. By rendering the administration of justice visible, publicity contributes to the achievement of the aim of Article 6 (1), namely a fair trial, the guarantee of which is one of the fundamental principles of any democratic society, within the meaning of the Convention.”*<sup>275</sup>

Accordingly, the right to an open court is distinguishable by the fact that it serves not only the interest of the parties but also the whole population.<sup>276</sup>

An important way to build public confidence in the judicial system is by allowing the press and public to hear the trial. Furthermore, a right to a public hearing entails that it should be an oral hearing. However, the right to a public hearing is not absolute since some restrictions are provided for in Article 6 (1) which reads: *“... the press and public may be excluded from all or part of the trial in the interests of morals, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice”*. In *Campbell and Fell v UK*<sup>277</sup>, for example, the Court found no violation of Article 6(1) when prison disciplinary proceedings were held in secret for reasons of public order and security.

Another instance is where the case concerned the interest of a child. The chief concern in this regard is the ability of the child to participate effectively in criminal

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<sup>273</sup> - Donna Gomien (1998) *“Short Guide to the European Convention on Human Rights.”* Council of Europe Publishing. p 43. hereinafter will refer to as Donna Gomien (1998)

<sup>274</sup> - Harris (1995) p.218

<sup>275</sup> - *Axen v Germany* A72 (1983) Para 25; Application No. 00008273/78

<sup>276</sup> - Donna Gomien (1998) p. 43

<sup>277</sup> - *Campbell and Fell v. UK* A80 (1984) Paras. 87-88; Application No. 00007819/77; 00007878/77

proceedings. The European Court found that Article 6 (1) is breached where the Crown Court tried 11-year-old boys who were accused of committing the crime of murder, because of the incomprehensible and intimidating formality and ritual of the court, which was accompanied by a blaze of publicity, and the defendants' inability to follow the proceedings and take decisions in their own best interest.<sup>278</sup>

In addition to these exceptions the right to a public hearing can be waived by the accused. But his waiver should be made in an unequivocal manner and must not run counter to any important public interest. In *Hakansson and Sturesson v Sweden*,<sup>279</sup> although no express waiver was made, the Court held that since proceedings in the court concerned usually take place in private, and since the applicants could have been expected to ask for a public hearing, but did not do so, they must thereby be considered to have unequivocally waived their right to a public hearing. The Court added that it did not appear that the litigation involved any questions of public interest that could have made the public hearing necessary. Accordingly, there was no violation of the public-hearing requirement in Article 6 (1).

As to publicity in the appeal stage the case law of the Court shows that this is a matter which needs to be decided on a case-by-case basis. The Court will consider the special features of each case. However, as general principle, the following rules might be used as guidelines for the Court's approach regarding the issue. Provided that there has been a public hearing before the original court, a public hearing is not required if the appellate court has the power to render a judgment solely in points of law. But, if it has the jurisdiction to deal with points of facts as well as law the requirement of a public hearing depends on the special features of the case in question. In *Ekbatani v. Sweden*, for instance, the applicant was charged with threatening a civil servant in breach of the Swedish Penal Code. During the trial hearing before the City Court of Gothenburg, both the applicant and the traffic assistant (the victim) were heard. On this testimony the City Court in a judgment on the same day found the applicant guilty of the charge brought against him and sentenced him to a fine of 600 Swedish Crowns. At the City Court two public defence lawyers assisted the applicant. Later the applicant appealed against the judgment before the Court of Appeal. He was represented first by a public defence lawyer and later by a private counsel. The Court of Appeal informed the parties that as the case

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<sup>278</sup> - *T and V v. UK* (2000) 30 EHRR 121

<sup>279</sup> - A171-A (1990) Paras 67-68; Application No. 00011855/85



might be determined without a hearing, they were invited to file their final submissions in writing. The applicant's counsel stated his objection to the case being determined on the basis of the case file, on the ground that a hearing was necessary for thorough examination of the case. However, the Court of Appeal held no hearing and confirmed the City Court's judgment. The applicant appealed to the Supreme Court which held: "*The Supreme Court finds no reason to grant leave to appeal, for which reason the Court of Appeal's judgment shall stand.*" Before the European Court the applicant complained that in breach of article 6 (1) the Court of Appeal had decided his case without a hearing. The European Court stated that the question before it was whether a departure from the principle that there should be a public hearing at which the accused has the right to be present and argue his case, could, in regard to the proceedings before the Court of Appeal, be justified in the circumstances of the present case by the special features of the domestic proceedings viewed as a whole. The Court must take account of the nature of the Swedish appeal system, the scope of the court of appeal's powers and the manner in which the applicant's interests were actually presented and protected before the Court of Appeal. The European Court held that provided that there had been a public hearing at first instance, the absence of public hearing before a second or third instance might be justified by the special features of the proceedings at issue. In the instance case the Court of Appeal was called upon to examine the case in respect of the facts and the law. It had to make a full assessment of the question of the applicant's guilt or innocence. The only limitation on its jurisdiction was that it did not have the power to increase the sentence imposed by the City Court. Such a question cannot be determined without a direct assessment of the evidence given in person by the applicant who denied the charge against him. Therefore, the Court decided that: "*having regard to the entirety of the proceedings before the Swedish courts, to the role of the Court of Appeal, and to the nature of the issue submitted to it, the Court reaches the conclusion that there were no special features to justify a denial of a public hearing and of the applicant's right to be heard in person. Accordingly, there has been a violation of Article 6 (1).*" <sup>280</sup>

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<sup>280</sup> - *Ekbatani v Sweden* A134 (1988) Para 31- 33; Application No. 00010563/83

Moreover, if a tribunal that is not subsumed as a classic court deals with the case and if a public hearing is not provided in it, this deficiency can be redressed if a public hearing is provided in the court that hears the appeal.<sup>281</sup>

**(D) The right to a public pronouncement of judgments:**

The relevant text of article 6 (1) provides: “*Judgment shall be pronounced publicly...*” Unlike the right to a public hearing, the right to a public pronouncement of judgment has no exceptions.<sup>282</sup> Judgment therefore, should be pronounced publicly even if part of the proceedings has been held in secret.<sup>283</sup>

The Court has reiterated that the term used in the second sentence of Article 6 (1) “*judgment shall be pronounced publicly*” might suggest that a reading out aloud of judgment is required. However, any member States of the Council of Europe have a long-standing tradition of recourse to other means besides the reading out aloud of the judgment, such as deposit in a registry accessible to the public. The Court therefore does not feel bound to adopt a literal interpretation. It considers that in each case the form of publicity that is to be given to the judgment under the national law of the concerned state should be assessed according to the special features of the proceedings in question and by reference to the object and purpose of Article 6 (1)<sup>284</sup> Moreover, in contrast with the right to a public hearing, the right to a judgment pronounced publicly cannot be waived.<sup>285</sup>

**(E) The right to a reasoned judgment**

Giving reasons for the judgment in criminal cases is an important factor in achieving a fair trial. In general, the national courts have the ultimate discretion to organize the content and the form of the judicial judgment. Nevertheless, they must state precisely the grounds for their judgment to enable the accused to establish his appeal according to the reasons given. In *Hadjianastassiou v. Greece*<sup>286</sup> the applicant was charged, convicted and sentenced to a term of imprisonment by a military court for disclosing military secrets by selling information from his work on the guided missile project to a private company. Upon appeal, before the Courts-Martial Appeal Court, the

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<sup>281</sup> - *Le Compte, Van leuven and De Meyer v Belgium* A43 (1981) Para 51; Application No. 00006878/75; 00007238/75

<sup>282</sup> - Harris (1995) p.222

<sup>283</sup> - Ralph Beddard (1993) “*Human Rights and Europe*” Grotius Publications LTD. p.170. Hereinafter will refer to as Ralph Beddard (1993)

<sup>284</sup> - *Axen v FRG* A72 (1983) Paras. 30-31; Application No. 00008273/78

<sup>285</sup> - Harris (1995) p.222

<sup>286</sup> - [1992] 16 E.H.R.R. 219. Para 33



applicant's conviction was, in substance, upheld, the full reasons for the appeal court's decision being communicated to the applicant after more than one month and a half of the judgment. The applicant had earlier appealed within the five-day time-limit as prescribed by the law concerned to the Court of Cassation alleging the erroneous application and interpretation of the provisions under which he had been convicted. The Court of Appeal held that this appeal was vague and inadmissible on the grounds that it did not identify any concrete and specific error in the contested judgment. The applicant claimed that the lack of reasons in the judgment of the Courts-Martial Appeal Court and the shortness of the time-limit for appealing had infringed his right under article 6 (1) and Article 6 (3) (b). The European Court held that: *"The Contracting States enjoy considerable freedom in the choice of appropriate means to ensure that their judicial systems comply with the requirements of Article 6. This does not, however, exempt the national courts from indicating with sufficient clarity the grounds on which their decision is based. The Court's task is to ascertain whether the method adopted in this respect has led to results which are compatible with the Convention."*

Moreover, a national court is not obliged to provide a detailed answer to every question presented to it unless this is regarded as fundamental to the outcome of the case.<sup>287</sup> In *Helle v Finland*<sup>288</sup> the applicant in his second submission contended that the fairness of the domestic proceedings was vitiated on account of the failure of the Cathedral Chapter and Supreme Administrative Court to articulate clearly the reasons which led them to reject his interpretation of the 1966 decision and the evidence which he had adduced to that end. The European Court notes in this context that while Article 6(1) obliges the courts to give reasons for their judgments, it cannot be understood as requiring a detailed answer to every argument adduced by a litigant. The extent to which reasons must be given depends on the nature of the case.

#### **Section IV      The Rights of the Accused after Criminal Judgment**

The European Convention provides the accused with 3 rights after delivery of the criminal judgment. There are right to appeal against the criminal judgment, the right to compensation for miscarriage of justice and finally the right not to be tried again for the same offence. The following discussion deals with each of these in turn.

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<sup>287</sup> - Clements, L et al. (1999), p.166

<sup>288</sup> - [1997] 26 E.H.R.R 159.para 55

### **(A) The right to appeal in criminal cases**

Article 2 of the Protocol No. 7 lays down that: *“1- Everyone convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal. The exercise of this right, including the grounds on which it may be exercised, shall be governed by law. 2-This right may be subject to exceptions in regard to offences of a minor character, as prescribed by law, or in cases in which the person concerned was tried in the first instance by the highest tribunal or was convicted following an appeal against acquittal.”*

The purpose of establishing such a right is to provide a similar obligation to those provided by the International Covenant on Civil and Political Rights, which covers the right to appeal in criminal cases in Article 14 Para (5).<sup>289</sup> The importance of providing an appeal arises from the possibility that a wrong judgment may be rendered, and providing a convicted person with another chance to challenge his conviction or sentence is a crucial guarantee to avoid possible wrongs.

This article provides a convicted person with the right to have his conviction or sentence reviewed by a higher tribunal. Pursuant to the Explanatory Report of Protocol no. 7 to the European Convention of Human Rights this article does not require that in every case the convicted person should be entitled to have both his conviction and sentence so reviewed. Hence, for instance, if the person convicted has pleaded guilty to the offence charged, the right may be restricted to a review of his sentence.

As far as the organization of the appeal is concerned, it is left totally to be determined by the domestic law. Thus some Contracting States restrict the right to appeal to questions of law, while in other States parties it is allowed against facts as well as law. The Explanatory Report states *“Different rules govern review by a higher tribunal in the various member States of the Council of Europe. In some countries, such review is in certain cases limited to questions of law.... In others, there is a right to appeal against findings of facts as well as on the questions of law. The article leaves the modalities for the exercise of the right and the grounds on which it may be exercised to be determined by domestic law.”*

Interestingly, this view differs fundamentally than the view that is taken by the Human Rights Committee in the application of the ICCPR. In *Domukovsky et al. v*

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<sup>289</sup> A.H. Robertson and J. G. Merrills (1993). *“Human Rights in Europe: A Study of the European Convention on Human Rights”* p.240. hereinafter will refer to as Robertson and Merrills (1993).



Georgia the Committee noted from the information before it that: *“The authors could not appeal their conviction and sentence, but that the law provides only for a judicial review, which apparently takes place without a hearing and is on matters of law only. The Committee is of the opinion that this kind of review falls short of the requirements of article 14 paragraph 5, of the Covenant, for a full evaluation of the evidence and the conduct of the trial and, consequently, that there was a violation of this provision in respect of each author.”*<sup>290</sup>

However, the right to appeal in criminal cases may be subject to exceptions:

- 1- For offences of a minor character, as prescribed by law.
- 2- In cases in which the person concerned has been tried in the first instance by the highest tribunal.<sup>291</sup>
- 3- Where the accused was convicted following an appeal against acquittal.<sup>292</sup>

With regard to the term ‘minor offences’ mentioned in the first exception, the Explanatory Report indicates that an important criterion in deciding upon the meaning of the term is whether the offence is punishable by imprisonment or not.

In respect of the case law of the European Court, one should point out that the European Court even prior to protocol no 7 regards the right to appeal in both criminal and civil cases as an inherent part of the right to a fair trial required by Article 6. Further, since there is no clear case law as to article 2 of Protocol 7, and because there is also no case law that provides a clear scope of the right to appeal in the criminal sphere, it might be worth referring here to cases regarding the right to appeal in civil rights and obligations, in order to gain an overview of the scope of this right.

As to the cases determined by the tribunals or administrative committees that do not satisfy article 6’s requirement, these must be subject to control by a judicial body that has full jurisdiction and provides the requirement of Article 6 para1. The European Court reiterated that: *“Even where an adjudicatory body determining disputes over civil rights and obligations does not comply with Article 6 para.1 in some respect, no violation of the Convention can be found if the proceedings before that body are*

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<sup>290</sup> - Sarah Joseph, Jenny Schultz, and Melissa Caston (2000) p. 332

<sup>291</sup> - For example, by virtue of his status as a Minister, judge or because of the nature of the offence.

<sup>292</sup> - Explanatory Report.

*subject to subsequent control by a judicial body that has full jurisdiction and does provide the guarantees of Article 6 para. 1”*<sup>293</sup>

With regard to ordinary courts Article 6, generally speaking, requires a high level of review in relation to matters of law.<sup>294</sup> As to matters of fact Article 6 requires a right to challenge findings of fact, but not necessarily a full re-investigation of the facts, as an aspect of the right to a fair trial.<sup>295</sup>

In addition; and in accordance with case law of the European Court, it is not necessary for every stage of proceedings to be undertaken publicly. The Court found no violation of Article 6 when the first instance trial had been held in public and an appeal involved only points of law. Moreover, the Court pointed out that it was not necessary for the appeal judgment to be read out in public; handing a written copy to the applicant was sufficient. The Court held that: *“The public character of judicial proceedings protects litigants against the administration of justice in secret with no public scrutiny and maintains confidence in the courts. Nevertheless, in applying the publicity requirements of Article 6 (1) account must be taken of the entirety of the proceedings conducted in the domestic legal order. In the present case the Federal Court of Justice, which solely determines issues of law, was empowered by German law to proceed without a hearing only if it dismissed the appeal and made final the order of the lower court of appeal the proceedings of the lower court complied fully with publicity requirements of Article 6.”*<sup>296</sup>

It seems that the general scope of the right to appeal in civil cases is also applicable to criminal cases. Provided that the trial court complies fully with Article 6, the appellate court might not fully comply with these requirements. For example, the right to a public hearing, or the right to be present at the hearing in criminal cases, can be restricted before the court of appeal if these rights are provided in the trial court. In *Kamasinski v Austria*<sup>297</sup> the applicant complained that he did not have a fair trial in criminal proceedings in Austria, and in particular complained of the non-attendance of the defendant at the hearing on appeal against sentence and compensation order. The Court observes, *“Personal attendance of the defendant does not take on the same*

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<sup>293</sup> - *Bryan v. The United Kingdom* A335-A (1995) para.40; Application No. 00019178/91

<sup>294</sup> - *Ibid*, para.40

<sup>295</sup> - See, *Bryan v. The United Kingdom* A335-A (1995) para.40; Application No. 00019178/91 and also *Chapman v. UK* (2001); Application No. 00027238/95

<sup>296</sup> - *Axen v. Germany* (1984) 6 EHRR 195

<sup>297</sup> - [1989] 13 E.H.R.R 36



*crucial significance in an appeal hearing as it does for the trial hearing. This is an area where the national authorities enjoy a margin of appreciation.”*

**(B) The right to compensation for miscarriage of justice**

Article 3 of protocol No. 7 reads: “ *When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed, or he has been pardoned, on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to the law or the practice of the state concerned, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.*”

Since there is no case-law jurisprudence in the European Courts regarding the issue, the following explanation relies on the Explanatory Report of Protocol 7. There are certain conditions for applying this guarantee:

1- The person concerned must be convicted of a criminal offence by a final decision. A decision is final “*if according to the traditional expression, it has acquired the force of res judicata. This is the case when it is irrevocable, that is to say when no further ordinary remedies are available or when the parties have exhausted such remedies or have permitted the time- limit to expire without availing themselves of them.*” <sup>298</sup>

Thus, a judgment by default is not regarded as final if the national law allows the case to be re-examined. Moreover, if the charge is dismissed or the accused is acquitted, this Article will not apply. So, an unlawful detainee cannot base his compensation claim on this Article. But, under Article 5 of the Convention he can.

2- The basis for reversing the conviction or pardoning the person should be some new facts that show conclusively that there has been a miscarriage of justice amounting to serious failure in the proceedings, leading to prejudice against the accused person. It follows that compensation is not required if the conviction has been reversed or a pardon has been granted on different grounds.

3- A convicted person would lose his right to be compensated if the non- disclosure of facts were attributable totally or partially to him.<sup>299</sup>

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<sup>298</sup> - See Explanatory Report on the European Convention on the International Validity of Criminal Judgments, P.22 (1970). Quoted in the Explanatory Report on the Seventh Protocol. Para, 22

<sup>299</sup> - Explanatory Report.

With regard to the term “according to the law or the practice of the state concerned”, this might mean that it is left to the contracting states to set up the procedures by which the claim for compensation can be exercised, and it might also mean that the national courts have the ultimate discretion to decide the sum of the compensation.

**(C) The right of the accused not to be prosecuted or punished again (no double jeopardy)**

Article 4 of the Seventh Protocol provides that:

- 1- *“No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.*
- 2- *The provisions of the preceding paragraph shall not prevent the re-opening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case.*
- 3- *No derogation from this Article shall be made under Article 15 of the Convention.”*

This Article embodies the principle that a person may not be tried or punished again in criminal proceedings under the jurisdiction of the same state for an offence for which he has already been finally acquitted or convicted.<sup>300</sup> Article 14 (7) of the International Covenant on Civil and Political Rights is almost akin to Article 4 (1) of the Seventh Protocol to the European Convention on Human Rights and Fundamental Freedoms. However, paragraphs 2 and 3 of Article 4 are new and have no counterpart in the International Covenant.<sup>301</sup>

The purpose of Article 4 of Protocol No. 7 was explained by the Court as to prohibit the repetition of criminal proceedings that have been concluded by a final decision.<sup>302</sup>

As a result, for this Article to be applied requires that a person should be finally acquitted or convicted.<sup>303</sup>

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<sup>300</sup> - Explanatory Report. Para.26

<sup>301</sup> - Robertson and Merrills (1993) p.243

<sup>302</sup> - *Gradinger v Austria* A328-C (1995) Para 53; Application No. 00015963/90

<sup>303</sup> - Explanatory Report. Para 29



Paragraph 2 provides the Contracting States with the right to reopen a case if new facts are discovered or if there has been a fundamental defect in the proceedings that could affect the judgment of the case.<sup>304</sup>

Since the prohibition of double jeopardy is established to protect an accused from being exposed to trial and punishment more than once for the same offence, reopening the case to the accused's advantage is allowed.<sup>305</sup> In addition, nothing in this Article precludes an accused from being subject to a different kind of proceedings for the same offence.<sup>306</sup>

As to the importance of the right guaranteed in this Article, it is not subject to any derogation in time of war or other public emergency.<sup>307</sup>

With regard to the Court's application of Article 4 I will refer to 3 cases to clarify the scope and the domain of this Article. In *Gandinger v Austria*, , the accused caused an accident while driving his car which led to the death of a cyclist. He was convicted by the regional court of causing death by negligence and accordingly he was sentenced. Subsequently, the district authority issued a sentence order for driving under the influence of drink. The latter decision was based on a different Act and medical report. In his application to the European Court the accused mentioned that the district authority and the regional government had punished him in respect of the facts that were identical with those on the basis of which the regional court had decided that he did not have a case to answer under the Criminal Code. Therefore, he claimed, there had been a breach of Article 4 of protocol No.7. In its judgment the European Court noted that, according to the regional court, the aggravating circumstances, namely excessive blood alcohol level ,referred to in the Article concerned of the criminal Code, was not demonstrated with regard to the applicant. However, the administrative authorities found that the level required in order to bring the case within the ambit of the Road Traffic Act had been attained.

The Court observed that the provisions in question differ not only as regards the designation of the offence but also, as regards their nature and purpose. Nevertheless, it concluded that since both impugned decisions were based on the same conduct, there had been a breach of Article 4 of the Protocol No. 7.<sup>308</sup>

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<sup>304</sup> - Ibid.Para.30

<sup>305</sup> - Ibid. Para.31

<sup>306</sup> - Ibid. Para 32

<sup>307</sup> - Ibid. Para 33

<sup>308</sup> - *Gandinger v. Austria* A328-C (1995) Para 53; Application No. 00015963/90

The second case is *Oliveira v Switzerland*. In this case the applicant was driving on a road covered with ice and snow when her car veered onto the other side of the road hitting one car and then colliding with a second, whose driver sustained serious injuries. She was first ordered to pay a fine of 200 Swiss Francs by the police magistrate for failing to control her vehicle, as she had not adapted her speed to the road conditions. Subsequently, the district court and the court of appeal imposed a CHF 1,500 fine (from which however, was deducted the amount of the initial fine) for negligently causing physical injury.

In its judgment the Court pointed out that “*that is a typical example of a single act constituting various offences. The characteristic of this notion is that a single criminal act is split up into two separate offences, in this case the failure to control the vehicle and the negligent causing of physical injury. In such cases, the greater penalty will usually absorb the lesser one. There is nothing in that situation which infringes Article 4 of the Seventh Protocol, since that provision prohibits people being tried twice for the same offence whereas in the case in question, a single act constituting various offences, one criminal act constitutes two separate offences*”.<sup>309</sup> The Court went on to clarify that “*it would have been more consistent with the principles governing the proper administration of justice for sentence in respect of both offences, which resulted from the same criminal act, to have been passed by the same court in a single set of proceedings. However, Article 4 of protocol 7 does not preclude separate offences, even if they are all part of a single criminal act, being tried by different courts, especially, where the penalties were not cumulative, the lesser being absorbed by the greater*”.<sup>310</sup>

Moreover, the Court noted that this case is distinguishable from the case of *Gradinger* mentioned previously. In the latter case two different courts reached inconsistent findings on the applicant’s blood alcohol level. Thus, in *Oliveira v Switzerland* it decided that there had been no violation of the Article 4 of the Seventh Protocol.

In the third case, *Franz Fischer v Austria*,<sup>311</sup> the applicant, whilst driving under the influence of drink, knocked down a cyclist who was fatally injured. After hitting the cyclist, the applicant drove off without stopping to give assistance and only gave himself up to the police later that night. In 1996 the St. Polten District Administrative

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<sup>309</sup> - *Oliveira v Switzerland* 1998-V (1998) Paras 25, 26; Application No. 00025711/94

<sup>310</sup> - *Oliveira v Switzerland* 1998-V (1998) Para, 27; Application No. 00025711/94

<sup>311</sup> - (2001) Paras. 25,30; Application No. 00037950/97



Authority finding the applicant guilty of a number of road traffic offences, ordered him to pay a fine of 22,010 Austrian schillings with twenty days' imprisonment in default. This sentence included a fine of 9,000 Austrian schillings with nine days' imprisonment in default imposed for driving under the influence of drink, contrary to the Road Traffic Act. In 1997 the Regional Court convicted the applicant under the criminal Code of causing a death by negligence and sentenced him to six months' imprisonment. The applicant contended that Article 4 of Protocol 7 was infringed because he was punished twice for driving under the influence of drink, first by the District Administrative Authority, and second by the Regional Court. He also maintained that the present case was not comparable to the *Oliveira v. Switzerland* case as in that case the criminal courts had quashed the fine imposed by the police magistrate and stated that, if the fine had already been paid, it was to be deduced from the second fine. However, in this case two sentences were actually imposed.

The European Court recalls that the aim of Article 4 of Protocol 7 is to prohibit the repetition of criminal proceedings that have been concluded by a final decision. The Court admitted that its approach in the cases of *Gradinger* and *Oliveira* in order to judge whether the applicants were being tried or punished again for an offence for which they had already been finally acquitted or convicted appears somewhat contradictory. In each case, the Court reiterated that two sets of proceedings arose out of one traffic accident. In the *Gradinger* case, the applicant was first convicted by the criminal courts for causing death by negligence, but acquitted of the special element under Article 81 (2) "allowing himself to become intoxicated", where there was an irrebuttable presumption of intoxication with a blood alcohol level of 0.8 grams per litre. He was then convicted by the administrative authorities of driving "a vehicle under the influence of drink" contrary to the Road Traffic Act. But in the *Oliveira* case, the applicant was first convicted by the police magistrate for failing to control her vehicle, as she had not adapted her speed to road conditions. Subsequently, she was convicted by the criminal courts of causing physical injury by negligence.

In the *Gradinger* case the Court, while emphasising that the offences at issue differed in nature, found a violation of Article 4 of Protocol no. 7 as both decisions were based on the same conduct. In the *Oliveira* case it found no violation of this provision, considering that it presented a typical example of a single act constituting various offences which did not infringe Article 4 of Protocol No. 7, since that provision only prohibits people being tried twice for the same offence. The European Court

accordingly observed that: “*the wording of Article 4 of protocol No.7 does not refer to “the same offence” but rather to trial and punishment “again” for an offence for which the applicant has already been finally acquitted or convicted. Thus, while it is true that the mere fact that a single act constitutes more than one offence is not contrary to this Article, the Court must not limit itself to finding that an applicant was, on the basis of one act, tried or punished for nominally different offences, ... there are cases where one act, at first sight, appears to constitute more than one offence, whereas a closer examination shows that only one offence should be prosecuted because it encompasses all the wrongs contained in the others. An obvious example would be an act which constitutes two offences, one of which contains precisely the same elements as the other plus an additional one. There may be other cases where the offences only slightly overlap. Thus, where different offences based on one act are prosecuted consecutively, one after the final decision of the other, the Court must also examine whether or not such offences have the same essential elements.*”<sup>312</sup>

The Court also pointed out that in the *Gradinger* case the essential elements of the administrative offence of drunken driving did not differ from those constituting the special circumstances of the Article 81 (2) of the Criminal Code. However, there was no such obvious overlap of the essential elements of the offences at issue in the *Oliveira* case.

The Court noted two differences between the *Franz v Austria* case, and the *Gradinger* case. (1) The proceedings were conducted in reverse order; (2) there was no inconsistency between the factual assessment of the administrative authority and the criminal courts, as both found that the applicant had a blood alcohol level above 0.8 grams per litre.

However, the Court considered that: “*these differences are not decisive. As said above, the question whether or not the non bis idem principle is violated concerns the relationship between the two offences at issue and can, therefore, not depend on the order in which the respective proceedings are conducted. As regards the fact that Mr Gradinger was acquitted of the special element under Article 81(2) of the Criminal Code but convicted of drunken driving, whereas the present applicant was convicted of both offences, the Court repeats that Article 4 of protocol No.7 is not confined to*

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<sup>312</sup> - *Franz Fischer v. Austria* (2001) Para 25; Application No. 00037950/97



*the right not to be punished twice but extends to the right not be tried twice. What is decisive in the present case is that, on the basis of one act, the applicant was tried and punished twice, since the administrative offence of drunken driving under the Road Traffic Act, and the special circumstances under the criminal Code... do not differ in their essential elements... there has, thus, been a violation of Article 4 of Protocol No.7.”*<sup>313</sup>

The explanation of the court did not clarify the exact scope of the principle of no double jeopardy. It is clear from the first case that the reason why the court considered that the single act, that composes two offences, contradicts the article is because the two national courts had reached different conclusions. It is conceivable that one act can constitute more than one crime. This is in fact natural and the greater crime should absorb the lesser one. If, for example, A assaulted B and as a result B died, the assault is a crime and the killing is another crime. Both are caused by a single act. It is natural here to try A with regard to the crime of murder and the punishment for murder will absorb the punishment of the assault.

However, in another instance A may be tried and found guilty of committing the crime of assault but not the murder and after that he was tried before different court and was found guilty of committing the crime of murder. Now even if the second court absorbs the lesser punishment when deciding the punishment for murder, it violates the right not to be prosecuted twice for the same act. The accused in this example is clearly exposed to the danger of the trial twice for one act. This is presumably what is meant by the principle of no double jeopardy. The role the principle should play is that the stability of the legal status of the accused must be protected by not exposing him to the possibility of having him tried for a second time. Any other statement could mean that a person might be subjected to endless proceedings against him.

More controversially, the European Court stated in the first case that article 4 was violated, because the two courts achieved different findings. This means tacitly that if the two courts had achieved the same conclusion, no violation would be found.

This conclusion by the European Court lacks logic. One should ask what is the benefit of having the accused tried before two tribunals if the second tribunal will be restricted by the findings of the first court. For the second court will take into

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<sup>313</sup> - Ibid, para 29&32

consideration when determining the case the fact that if it reaches a different conclusion, the principle of no double jeopardy will be deemed violated. It was expected from the European Court when examining whether the principle in question is breached that it would focus not on the findings but on the process.



## CHAPTER 3

### The Main Features of Islamic Law and the Judicial System of Saudi Arabia

#### Introduction:

An examination of the rights of the accused in the criminal trial stage in Saudi Arabia requires some account of the judicial system. This chapter illustrates the structural elements of the judicial system in Saudi Arabia. The significance of the term “law” cannot be appreciated if it is considered only in terms of its technical meaning<sup>1</sup>. Maududi explains that: *“our assessment of a system is mainly based on and affected by our perception of the ends of human life and by our notions of right and wrong, good and evil and justice and injustice. Consequently, the nature of a legal system depends entirely upon the source or sources from which it is derived. Thus the differences discernible in the legal and social systems of different societies are mainly due to the differences of (in) their sources of guidance and aspiration.”*<sup>2</sup>

The importance of this chapter arises from the fact that Islamic law is not just law in the legal sense nor it is a mere religion that is confined to religious matters.<sup>3</sup> Mawdudi states: *“whatever aspect of the Islamic ideology one may like to study, he must, first of all, go to the roots and look to the fundamental principles. Then and then alone he can have a really correct and satisfactory understanding of the ideology and its specific injunctions and real appreciation of its spirit and nature.”*<sup>4</sup>

This chapter is divided into 2 main parts. The first is devoted to the main features of Islamic law. This part consists of the following sections:

Section one concerns the sovereignty of Islamic law. Section two deals with the dignity of human beings. Sources of Islamic law are covered in section three. Section four outlines the four schools of Islamic law. Section five concerns the nature of

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<sup>1</sup> - Al- Qasimi p.29

<sup>2</sup> - S Abdul A 'La Maududi. “Islamic law and constitutions” 45 (11th ed. 1992). Quoted from Al-Qasimi p.30

<sup>3</sup> - Vogel, Frank Edward (1993) p3

<sup>4</sup> - Abu'l A la' Mawdudi “Political theory of Islam”. In Khurshid Ahmad (1992) “Islam: its Meaning and Message” The Islamic foundation. Leicester p.149.. Hereinafter will refer to as Khurshid Ahmad (1992)





Allah. He has commanded that you worship none but Him (i.e. His Monotheism)}.<sup>10</sup> He also said: {and Blessed be He to Whom belongs the Kingdom of the heavens and the earth, and all that is between them, and with Whom is the Knowledge of the Hour, and to whom you (all) will be returned.}<sup>11</sup>

But God in the *Qur'an* commands us to accept and apply whatever the Prophet Muhammad says because the Messenger never speaks for his own desire rather he says what had been revealed to him. God said: {and whatsoever the Messenger (Muhammad) gives you, take it; and whatsoever he forbids you, abstain (from it)}<sup>12</sup>.

Thus, laws that are stated by Muhammad should be regarded as a divine law as well. Allah said: {Nor does he speak of his own desire. It is only a Revelation revealed}<sup>13</sup>

Democracy in Islam provides Muslims with limited common sovereignty under the suzerainty of God. Mawdudi points out: "every Muslim who is capable and qualified to give a sound opinion on matters of Islamic law, is entitled to interpret the law of God when such interpretation becomes necessary. In this sense the Islamic polity is a democracy. But... it is a theocracy in the sense that where an explicit command of God or his Prophet already exists, no Muslim leader or legislator, or any religious scholar can form an independent judgment, not even all the Muslims of the world put together have any right to make the least alteration to it".<sup>14</sup> To the same effect Abdur Rahman I. Doi (1997) states that: "in the Shari'ah ... there is an explicit emphasis on the fact that Allah is the Lawgiver and the whole (Ummah) the nation of Islam, is merely His trustee. It is because of this principle that the Ummah enjoys a derivative rule-making power and not an absolute law-creating prerogative".<sup>15</sup>

However, one should be clear that the terms "every Muslim who is capable and qualified to give a sound opinion on matters of Islamic law" mentioned above by Mawdudi should not be understood to mean that every person studying Islamic law is capable and qualified to interpret the *Qur'an* or the *Sunnah*. The science of Islamic law is divided into many majors. There is the science of *Al Towheed* means monotheism (belief in God's unity), the science of *Al- Fiqh* means jurisprudence, the science of *Usul Al-Fiqh* means the root of *Fiqh* i.e. the principles Islamic

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<sup>10</sup> - Surah 12. Yusuf. Verses. 40

<sup>11</sup> - Surah 43 . Az-Zukhruf. Verse 85

<sup>12</sup> - Surah 59 Al- Hasher. Verse 7

<sup>13</sup> - Surah 53. An-Najm. Verses 3&4

<sup>14</sup> - Abul A la' Mawdudi "Political Theory of Islam". In Islam Khurshid Ahmad (1992) p. 161

<sup>15</sup> - Abdur Rahman I. Doi (1997) "Shari'ah: the Islamic law" Ta Ha Publishers. London. United Kingdom. p. 5. Hereinafter will refer to as Abdur Rahman I. Doi (1997)



jurisprudence of *Usul Al Fiqh* or the general rules by which a jurist can understand provisions of the *Qur'an* and the *Sunnah*, the science of *Al Tafseer* means the science of interpretation, the science of *Al Agedah* means the science of creed or belief, the Science of *Sunnah*, and the science of *Qur'an*<sup>16</sup>.

A person who studies Islamic law in general will have knowledge of the above subjects that make him qualified to understand what jurists have said about particular issue, and might be qualified to teach Islamic law, but definitely he is not qualified to extract a legal opinion from the provisions of the *Qur'an* or the *Sunnah*, or to interpret the divine texts. Muslims in this regard differentiate between a *mujtahid* and *non-mujtahid* scholar. A *non-mujtahid* scholar knows only the opinion provided by a *mujtahid* scholar regarding particular issue, and accordingly his knowledge is limited to the Islamic rule that is already established but he is not capable of establishing new rules from the original texts. A *mujtahid* scholar, nonetheless, is capable of extracting a new rule from the Islamic original provisions. He is not limited to what other jurists have said about specific issue. A qualification for the second category requires a very deep and comprehensive knowledge of all the above subjects.

In respect of the interpretation of the *Qur'an* and the *Sunnah*, an interpreter must show very high qualifications because, in a Muslim's view, he interprets the word of God. He must have a deep knowledge of the Arabic language, verbal indications, rhetoric, grammar or syntax and the science of *Qur'anic* readings<sup>17</sup>, reasons for revelation in respect of every verse in the *Qur'an* and the abrogator and the abrogated verses.

As a consequence, an authoritative interpretation of a verse of the *Qur'an* is the interpretation provided by another verse of the *Qur'an* itself, the Prophet, and the Prophet's Companions<sup>18</sup> respectively. So, if the verse is interpreted by one of the above means there is then no room for the call for reinterpretation. Moreover, if no interpretation is found the majority of scholars regard interpretation provided consensually by the successors of the Prophet Companions as an authoritative interpretation because they had met the Companions and presumably heard the Companions interpretations<sup>19</sup>.

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<sup>16</sup> - The *Qur'an* and the *Sunnah* are explained later in this chapter.

<sup>17</sup> - There are 7 ways for reading the *Qur'an*.

<sup>18</sup> - The presumption here is that the Companions of the Prophet had better understanding of the *Qur'an* interpretation because they attended the circumstances of the revelation. See Salim Ali Farrar (1999) p 168.

<sup>19</sup> - Leaders of the Four School of Doctrines lived in the successor's era.





*Allah and the more beloved to Him are those who are the most useful to them. There is no preference to one over the other except by righteousness and good conduct.”*

Nevertheless, it is important to point out that equality in Islamic law means an absolute equality of the dignity of human beings, but not an absolute equality in the western sense in which individuals share similar rights and obligations.<sup>25</sup> Equality in Islam means that every category of human beings has obligations and rights appropriate for his nature. For the sake of clarity the following example is given. Some writers when studying human rights in Islamic law argue that Islamic law discriminate between men and women. They cite as an example of this discrimination the Islamic rules regarding inheritance.<sup>26</sup> Pursuant to Islamic rules women are only entitled to half of inheritance that a man is entitled to. From Islamic point of view this rule is not discrimination if it is considered in the light of whole obligations that both men and women bear in Islamic society. A male in Islamic law should bear a complete living cost of his wife and children regardless of his wife's financial status. Even if the husband is poor and his wife is wealthy he is still responsible in providing for the needs of his wife and children. He is responsible for all their needs of accommodation, clothing, feeding, etc. In addition, while a male in Islam is entitled to double the female's inheritance he has the sole responsibility of providing for his parents during their life if they are in need. To express it in another way, despite her financial status a female in Islamic law is not obliged to bear the financial burden of her parents during their life.

Dignity in Islam is not precluded to any group of people for it is inherent in all human beings and it is not subject to denial to any person, irrespective of his origin, race, colour, religion or other characteristics. The Cairo Declaration correctly describes respect for human rights in Islam as a divine obligation whereby a state or an individual is under obligation to protect them. The Declaration states that “ *Based on the belief that fundamental rights and freedoms in Islam constitute a part of the religion of Muslims which no person has the right to partially or wholly suspend or abrogate or violate or ignore, they are divine obligatory provisions that Allah has prescribed in His Books, through His final Messenger ...*”

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<sup>25</sup> - Ann Elizabeth Mayer (1997) “*Islam and Human Rights: Tradition and Politics*”. Westview Press. Printer Publisher. London; p 80

<sup>26</sup> - See for example, Ann Elizabeth Mayer (1997) “*Islam and Human Rights: Tradition and Politics*”. p. 95



Accordingly, once Islamic law provides a guarantee of human rights this right or guarantee is not subject to derogation or suspension. For instance if Islamic law requires, certain evidence to prove the offence, or certain conditions for treating war prisoners, these requirements must be fulfilled in all times and with regard to any person whether the Islamic state is under serious threat or not, whether the person is a Muslim or not and whether he is an ordinary accused or a terrorist.

The prominent position of human beings in Islam confirms beyond any doubt the importance of promoting and exercising respect for human rights. Human existence has a supreme status in Islam. This stature is based on the fundamental persuasion that “God has endowed man with dignity which has made him superior to other creatures; God has made man His vicegerent on earth”.

Salah Al-Deen states that the *Qur'an* declares man's viceregency on earth. This viceregency is interpreted to mean that a human being has agreed to take the responsibility of following the right path and of promoting justice and happiness for mankind. On the other hand, it implies that men are under obligation to show resistance to sin and oppression.<sup>27</sup>

In addition, dignity in Islam is embodied in the prohibition of subjecting a man to humiliation of any sort even by applying to him any description which he may not like. Allah said: *{O you who believe! Let not a group scoff at another group; it may be that the latter are better than the former. Nor let (some) women scoff at other women, it may be that the latter are better than the former. Nor defame one another, nor insult one another by nicknames. How bad is it to insult one's brother after having Faith [i.e. to call your Muslim brother (a faithful believer) as: "O sinner" or "O wicked"]. And whosoever does not repent, then such are indeed Zalimun (wrong-doers, etc.)}*<sup>28</sup>

Another aspect of dignity in Islam may be seen in the fact that mankind is created in an optimum form. God said: *{and He shaped you and made good your shapes}*<sup>29</sup>.

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<sup>27</sup> - Salah Al- Deen “*Huquq Al-Insan W Al-Damanat Al-Qud'ah Fi Al-Islam*” Journal of Law, Kuwait University. Vol. No. 3 September 1983 P. 117

<sup>28</sup> - Surah 49. Al-Hujurat. Verse No. 11

<sup>29</sup> - Surah 64. At-Taghabun. Verse. No. 3

Furthermore, Man has been honoured and God ordained him to worship none except Allah. A man is ordained not to bow down to any other creatures. God said: {*He has no partner. And of this I have been commanded, and I am the first of the Muslims*}<sup>30</sup>

Muhammad Al-Zuhaili points out other aspects of this dignity when he says that the dignity of a man in Islam is embodied in many elements among which are: (a) Angels were asked to kneel to a human being (Adam). (b) Sacred books are revealed to mankind and not to other creatures. (c) Prophets were sent to people.<sup>31</sup>

Accordingly one can summarize the consequences of the dignity of human beings as:

(a) Islamic law is universal and any discrimination based on race, wealth, colour, clan etc is completely forbidden.<sup>32</sup>

(b) Individuals can enjoy absolute freedom and liberty provided that such enjoyment is not incompatible with others' rights, or Islamic law.<sup>33</sup>

(c) As Ansari states, the Islamic state has a duty to ensure the honour of all individuals as human beings. Thus, any law capable of diminishing an individual's dignity is not adoptable in the Islamic state.<sup>34</sup>

(d) Tort, degrading and cruel treatment for any person be he a Muslim or not is forbidden.<sup>35</sup>

### SECTION III Sources of Islamic Law

Islamic scholars define the sources of Islamic law as "the proofs from which legal rulings are derived".<sup>36</sup> Sources of Islamic law can be distinguished as primary or secondary. The primary sources consist of the Holy *Qur'an*, the *Sunnah* (the Prophet traditions), *Ijmah* (consensus), and *Qiyas* (analogy). These sources have been generally accepted and used by Islamic jurists through the ages. There is an agreement among Muslim scholars about the mandatory nature of rules derived from any of the primary sources<sup>37</sup>.

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<sup>30</sup> - Surah 6. Al-An'am Verse. No. 163

<sup>31</sup> - Muhammad Al-Zuhaili (1997) "*Huquq Al-Insan Fi Al-Islam*". Dar Al-Kalm Al-Teeb & Dar ibn Katter. Damascus & Beirut p. 130 & 131. Hereinafter will refer to as Muhammad Al-Zuhaili

<sup>32</sup> - Khurshid Ahmad (1992) p. 40 & 41; see also M. Cherif Bassiouni (1969) p. 164

<sup>33</sup> - Al-Qasimi p. 56 & 57

<sup>34</sup> - Muhammad Fazl-ur-rahman Ansari p. 368

<sup>35</sup> - Ihsan Al-Kelane "Aslamh Al-Shakssah Wa Huquq Al-Defi'a Wa Door Al-Mohamat Fi Al-Islam." Journal of Law, Kuwait University. Vol. No. 3 September 1983. P. 194

<sup>36</sup> - Abdulkader Owdeh "*Al-Teshree' Al-Gena'ee Al-Islami*" Part 1 p. 164. Hereinafter will refer to as Abdulkader Owdeh

<sup>37</sup> - Ibid, p. 164



The secondary sources are: *Istihsan*<sup>38</sup> (juristic preference), *Masalah Morslah* (public interest), *Urf* (custom)<sup>39</sup>, *Sadd Al- Dhara'*<sup>40</sup> (Blocking the Ways) and *Ijtihad*<sup>41</sup>. Muslim scholars disagree about the application of the secondary sources. Moreover, public interest is also called *Istihsan* (juristic preference) or *Istislah*<sup>42</sup>; other scholars have employed *Istidlat*<sup>43</sup> instead of applying the principle of public interest.

An important point here is that there is a difference between the *Qur'an* and the *Sunnah* on the one hand, and the other sources on the other. The Holy Book and the *Sunnah* are the basis for legislation. They alone contain provisions that establish comprehensive rules. The rest of the sources do not provide new comprehensive rules and are only considered as devices to deduce branch rules from texts provided in the *Qur'an* and the *Sunnah*. Therefore, any rules deduced from other sources should not contradict the two sacred sources<sup>44</sup>.

In this section I will give brief illustrations of primary sources. The secondary sources will be excluded save the principle of public interest that can be regarded as an essential tool to deal with new issues.

### **1: The *Qur'an*:**

Kamali defines the Holy Book as “*the book containing the speech of God revealed to the Prophet Muhammad in Arabic and transmitted to us by continuous testimony, or tawattur*”.<sup>45</sup> The *Qur'an* is God's Word. It was revealed to Muhammad over a period of twenty- three years (610-632).

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<sup>38</sup> - Meaning equitable preference to find a just solution. See Abdur Rahman I. Doi (1997) p. 81. It is also defined as “seeking the best” or “aiming at the best”. This principle is very similar to *Istislah*. The Concise Encyclopaedia of Islam. Stacey International. 1991. P. 201

<sup>39</sup> - Custom is also regarded in some Islamic schools as a valid source of Islamic law provided that it does not contradict other sources.

<sup>40</sup> - The use of this source is very rare and rules classified under this principle could be derived from the principle of public interest.

<sup>41</sup> - *Ijtihad* is: “the use of human reason in the elaboration and explanation of the *Shari'ah* law.... It is an exercise of one's reasoning to arrive at a legal conclusion on a legal issue, done by the jurists to deduce a conclusion as to the effectiveness of a legal precept in Islam”. See Abdur Rahman I. Doi (1997) p. 78. Although it is a significant source that is deemed to be a clear reason for development of Islamic jurisprudence during the period of the Fourth schools, a very high qualification is required in order to apply this source, entailing clear distinction between the *Mujtahid* jurist and *non-mujtahid* jurist. After closing the gate of *Ijtihad* this source is not widely used.

<sup>42</sup> - Meaning the seeking of the best solution for general interest. See Abdur Rahman I. Doi (1997) p. 81

<sup>43</sup> - It is the process of seeking guidance, basis, and proof from the sources. See Abdur Rahman I. Doi (1997) p. 82

<sup>44</sup> - Abdulkader Owdeh p. 165

<sup>45</sup> - Mohammad Hashim Kamal (1991). “*Principles of Islamic jurisprudence*” p. 245

The Holy Book consists of 114 *Surah* (chapters) which vary in length, and each *Surah* consists of a number of verses.<sup>46</sup> The *Qur'an* provides three categories of rules:

- 1- Tent or creed rules: rules concerning belief and faith in God, Angels, Holy Books, Messengers and the Day of Judgment.
- 2- Moral and ethical rules: rules concerning virtues and vices.
- 3- Practical rules: rules concerning the practice of an individual Muslim. This type organizes two aspects; (a) Rules concerning worship such as prayer, fast and pilgrimage, which aim at organizing the relationship between God and man. (b) Dealings rules concerning contracts, conduct and punishments, which aim to organize relationships both between individuals and between nations<sup>47</sup>.

The *Qur'an* consists of about 500 verses<sup>48</sup> containing legal injunctions dealing with a variety of subjects such as marriage, rights and obligations of spouses, divorce, contracts, loans, deposits, punishments, wills, inheritance, equity, liberty, justice, human rights, laws of war and peace etc.<sup>49</sup> The *Qur'an* also informs us on everything we need to know about Allah, the nature of human beings, how we should treat each other, where we came from, what is the meaning of life, what is our goal in this life. However, the most distinguished feature of the *Qur'an* is the presence of God in our midst<sup>50</sup>.

One might suggest that the *Qur'an* provides details regarding worship and rules associated with worship, such as family law and inheritance law, since most rules in this domain have a devotional nature and no room for the mind and are not susceptible to development in society. However, civil, criminal, international, constitutional economical laws are given in a very general approach that can provide only basic

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<sup>46</sup> - Galal Al-Deen Al-Suoty (1951). "*Al-E'tkan Fi Olom Al-Qur'an*". Dar Al-Nasher Publisher. Mecca. Part I p. 64, 65 and 67 . Hereinafter will refer to as Galal Al-Dan Al- Suoty (1951).

<sup>47</sup> - Abdulrahman Al-Homady (1989) "*Al-Qadi' Wa Nedamoh Fi Al-Kitaab Wa Al-Sunnah*" Om Al-Qura' University Publisher K.S.A p. 329 & 330. Hereinafter will refer to as Abdulrahman Al-Homady (1989)

<sup>48</sup> - Some have tried to number each subject as to: family law, (70 verses), civil law (70 verses) penal law (70 verses) jurisdictions and procedures (13 verses) constitutional law (10 verses) international law (25 verses) economic and financial rules (10 verses). Abdulrahman Al-Homady (1989) p. 330,331,332 and 333.

<sup>49</sup> - Abdur Rahman I. Doi (1997) p.7

<sup>50</sup> - I G. Zepp, Jr (1992) "*A Muslim Primer*". Sheed and Ward. London p.59 .hereinafter will refer to as I G. Zepp, Jr (1992)



principles and general rules<sup>51</sup>. The reason for this is that these rules are subject to development according to changes in time and place<sup>52</sup>.

The *Qur'an* has been transmitted to us by way of continuous testimony in written and verbal forms. This continuous testimony implies certainty and decisiveness of authenticity of the *Qur'an*. It was written through the Prophet by a reliable group of the Prophet's companions, and was memorized by many others of the prophet's companions. Those groups, it is believed, cannot collude in falsity. It has been transmitted through those groups to other groups, none of which disagreed in one letter or utterance despite distances between countries and differences between societies<sup>53</sup>.

The authenticity of the *Qur'an* is, therefore, not subject to any doubt. Allah had sent it down through Gabriel, through Muhammad. God said { *Verily, We, it is We Who have sent down the Dhiker (i.e. the Qur'an) and surely We will guard it (from Corruption)* }.<sup>54</sup> This verse is a challenge to human beings and people are under obligation to believe in the miracles of the *Qur'an*. It is a clear fact that more than 14 centuries have elapsed and not a single word of this *Qur'an* has been changed. Allah also said: { *this is the Book (the Qur'an) whereof there is no doubt...* }<sup>55</sup>

The *Qur'an* is regarded as a miracle from Allah to the Prophet Muhammad. God said: { *and this Qur'an is not such as could ever be produced by other than Allah (Lord of the heaven and the earth), but it is a confirmation of (the revelation) was before it [i.e. the Taurat (Torah), and the Injeel (Gospel)], and a full explanation of the Book (i.e. laws, decreed for mankind) - wherein there is no doubt- from the Lord of the Alamin (mankind, jinn, and all that exists)* }.<sup>56</sup> The Prophet said: "there was no Prophet among the Prophets but was given miracles because of which people had security or had belief, but what I have been given is the Divine Revelation which Allah has revealed to me. So I hope that my followers will be more than those of any other Prophet on the Day of Resurrection".<sup>57</sup>

Muslims pay great respect and attention to the *Qur'an*. Al- Faruqi describes such concern as:

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<sup>51</sup> - Except in some rare cases.

<sup>52</sup> - Abdulwhab Kelaf (1970) "*Ilm Usul Al-Fiqh Wa Klast Tareek Al- Teshrea' Al-Islami*" Dar Al-Qalm Publisher. Al- Kuwait. P.32, 33 & 34. hereinafter will refer to as Abdulwhab Kelaf (1970)

<sup>53</sup> - Abdulkader Owdeh p. 165

<sup>54</sup> - Surah 15. Al- hijr. Verses. 9

<sup>55</sup> - Surah 2 Al- Baqarah. Verse. 2

<sup>56</sup> - Surah 10. Yunus verse. 37

<sup>57</sup> - Muhammad Khan (1997). *Sahih Al-Bukari*, Vol.9 Hadith No. 379

*“No book ever commanded as wide or as deep a reverence as did the Qur’an; none has been copied and recopied, passed from generation to generation, memorized in part or in toto, recited in solemn worship as well as in salons, marketplaces, and schoolrooms as much as the Qur’an. Above all, no book has ever been the cause of such deep religious, intellectual, cultural moral, social, economic, and political change in the lives of millions, or of peoples as ethnically diverse as has the Qur’an.”*<sup>58</sup>

## **2: The Sunnah**

The *Sunnah* is the second source after the *Qur’an*<sup>59</sup>, and it is defined as *“the saying, deeds and approvals accurately narrated from the Prophet”*.<sup>60</sup> It is also defined as *“the statements and actions of the Prophet Muhammad, as well as the statements and actions of others done in his presence which did not meet his disapproval”*<sup>61</sup>. The *Sunnah* consists of three elements: 1- The Prophet’s words. 2- Deeds of Prophet. 3- The Prophet companions’ words or deeds that were accepted by the Prophet<sup>62</sup>.

With regard to its role, the *Sunnah* has the following functions:

First: it reinforces a rule decided in the *Qur’an*. For example, the prohibition of a murder is stated clearly in the *Qur’an*. The *Sunnah* came to reinforce such prohibition.

Second: it provides details and interpretation to the general principles given in the Holy Book. The *Qur’an* tells us we must pray. The *Sunnah* shows us how. The *Qur’an* indicates that fasting is obligatory to every Muslim in the Month of Ramadan<sup>63</sup>. The *Sunnah* provides details about fasting rules. Allah said in the Holy *Qur’an*: {and We have also sent down unto you (O Muhammad) the Dhiker [reminder and the advice (i.e. the Qur’an), that you may explain clearly to men what is sent down to them, and that they may give thought]}<sup>64</sup>.

Third: it provides new rules to cover matters not decided by the *Qur’an*. For instance, the *Qur’an* does not forbid men to wear gold, but the *Sunnah* does.<sup>65</sup>

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<sup>58</sup> - Isma’il Al- Faruqi (1984) *“Islam”* Niles. Illinois: Argus Publications

<sup>59</sup> - Abdulrahman Al-Homady (1989) p. 341. & Abdulkader Owdeh p. 174

<sup>60</sup> - The Noble Qur’an. English translation of the meanings and commentary. King Fahd Complex for the Printing of the Holy Qur’an. Madianh. K.S.A. 1419 A.H = 1999 A. D. P.865

<sup>61</sup> - Al- Qasimi (1998) p.43

<sup>62</sup> - The Prophet’s acceptance could be derived from his confirmative action or by merely not rejecting the act in question.

<sup>63</sup> - Ramadan: the month of fasting. It is the ninth month of the Islamic calendar. In it the Noble Qur’an started to be revealed to the Prophet.

<sup>64</sup> - Surah 16. An-Nahl. Verse No.44

<sup>65</sup> - Abdulrahman Al-Homady (1989) p. 344 and 345. & Abdulkader Owdeh p. 174 & 175.



The *Sunnah* is an authentic source of Islamic law. This authenticity is indisputable since every care was taken to assure the accuracy of the saying or a deed of the Prophet Muhammad. Reliable specialists under the scrutiny of Muslim jurists undertook this task. The method used here was by tracing back a statement through a chain of reporters, to end with the Prophet himself<sup>66</sup>.

It was collected into books. The most authentic books are called “*As-Shah As-Sittah*”, “the six books of *Sunnah*”<sup>67</sup>

Generally speaking God revealed the *Qur’an* fourteen hundred years ago and the original Words of God are still available. The *Sunnah* have been collected and handed down precisely to us. Therefore, their authenticity is not questionable, and they are compulsory. God said: {*And whatsoever the Messenger (Muhammad) gives you, take it; and whatsoever he forbids you, abstain (from it)*}.<sup>68</sup> Allah also said: {*Nor does he speak of (his own) desire. It is only a Revelation revealed*}<sup>69</sup>

### **3: Ijmah- Consensus**

*Ijmah* can be defined as: the unanimous agreement of the *mujtahideen*<sup>70</sup> on any matter of a Muslim community of any period following the demise of the Prophet Muhammad.<sup>71</sup>

Since this source is based on both the *Qur’an* and the *Sunnah*, it is considered a binding legal source of Islamic law. God said: {*O you who believe! Obey Allah and obey the Messenger (Muhammad) and those of you (Muslims) who are in authority*}<sup>72</sup>.

Scholars believe that by the term “*those of you who are in authority*” it was meant rulers and jurists. So if jurists agree on a point it becomes obligatory<sup>73</sup>. The Prophet said: “*my nation would not all agree to something which was wrong*”.<sup>74</sup> He also said “*Allah would not let my nation be agreed on perversity. Allah puts out His Hand to*

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<sup>66</sup> - I G. Zepp, Jr. (1992) p.83

<sup>67</sup> - *As-Sahih As-Sittah: the six books of Hadith: compiled by Bukari (d. 256 A. H = 870 A.D.) Muslim (d.261 A.H. = 875 A.D), Abu Dawud (d. 275A.H = 888 A.D), Nasa’I (d.303 A.H = 915 A.D), Tirmidhi (d. 279 A.H = 892 A.D), and Ibn Majah (d. 273 A.H = 887 A.D). There collections are called Sahih Sittah.*

<sup>68</sup> - Surah 59. Al- Hashr. Verse. 7

<sup>69</sup> - Surah 53 An- Najm Verse.3&4

<sup>70</sup> - The singular is *mujtahid*, which means a jurist who displays the ability to derive rulings from the *Qur’an* or the *Sunnah* or other Islamic sources.

<sup>71</sup> - Al- Qasimi (1998) p.44

<sup>72</sup> - Surah 4. An-Nisa. Verse No. 59

<sup>73</sup> - Abdulkader Owdeh p. 180

<sup>74</sup> - Al- Qasimi (1998) p.45

*support the group and who leaves the group will be left in hell*<sup>75</sup>. This source is the third after the *Qur'an* and the *Sunnah*. The first leader after the death of the prophet (Abu- Baker), when adjudicating between litigants referred firstly to the *Qur'an*. If he did find an answer he referred to the *Sunnah*. If he did not find an answer he then asked people if they knew an answer to the question in hand. If he did not find the answer he held a meeting with jurists. If they were unanimous he rendered his judgment according to this agreement<sup>76</sup>. Such consensus however, may not contradict the *Qur'an* or the *Sunnah*.

#### **4: Al- Qiyas (Analogy)**

*Al- Qiyas* can be defined as the legal principle from which the law on a certain issue that has to do with the welfare of the Muslims is derived.<sup>77</sup> It is a verdict and a judgement given by an Islamic jurist. This verdict or judgement must be based on the *Qur'an*, the *Sunnah* or on the *Ijmah* respectively<sup>78</sup>.

There are four pillars of an analogical deduction:

First: the original issue whose rule is provided by *Qur'an* or the *Sunnah*.

Second: the associated issue whose rule is not provided by the *Qur'an* or the *Sunnah*.

Its connections with the original issue must be demonstrated in order to show the rule.

Third: the legal rule that is provided explicitly for the original issue and which must be applied to the branch.

Four: the effective cause.<sup>79</sup>

Furthermore the application of the analogy requires the following conditions:

1- Its application is only permitted in the absence of an answer to the question in *Qur'an*, the *Sunnah* and the *Ijmah*.

2- *Al-Qiyas* must not conflict with the three primary sources of Islam or with other Islamic jurisprudential principles.

3- *Al- Qiyas* must be based on the *Qur'an*, the *Sunnah* or the *Ijmah*.<sup>80</sup>

The *Qiyas* has its basis in both the *Qur'an* and the *Sunnah*. Thus it is a legally binding source.<sup>81</sup>

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<sup>75</sup> - Muhammad bin Aeesa (1980) "*Al-Gam'a Al- Sahih; Sonan Al-Tremady*". Dar Al-Faker Publisher. Part 3 P. 315

<sup>76</sup> - Abdulrahman Al-Homady ( 1989) p.356 & 357

<sup>77</sup> - Abdur Rahman I. Doi (1997) p. 70

<sup>78</sup> -The Noble Qur'an p. 880

<sup>79</sup> - Abdulrahman Al-Homady ( 1989) p. 360

<sup>80</sup> -Abdur Rahman I. Doi (1997) p. 77

<sup>81</sup> - Abdulrahman Al-Homady (1989) p. 361.



## **5: Al Masalah Al Morlah (Public Interest)**

*Al – Masalah Al-Morlah* means: “the matters which are in the public interest and which are not specifically defined in the *Shari’ah*”.<sup>82</sup> This is a very important and helpful source for dealing with new issues and is considered as the most valuable source that enables the legislator in the Islamic state to keep pace with new circumstances. To apply this principle the following conditions must be satisfied:

- (a) The interest must be a real one, not only imaginary interest. That is to say, the legislation in question can bring happiness or prevent unhappiness.
- (b) It must be public interest not personal interest.
- (c) Legislation must not contradict rules or principles provided in the *Qur’an*, the *Sunnah* or *Ijmah*<sup>83</sup>.

Criminalizing the possession of arms or guns, for instance, is based on the principle of public interest, because according to the principle that everything is permitted unless prohibited by law<sup>84</sup> the possession of such items is originally not prohibited. However, the state may consider the possession of such items would threaten people’s life and a possible cause of increase in the number of crimes. Consequently, the interest of a society entitles or may oblige the state concerned to criminalize such possession<sup>85</sup>.

In this thesis, according to the principle of public interest I shall answer the question of whether the idea of fundamental human rights, in particular those concerning the accused during the criminal trial stage, is alien to Islamic law, or whether there is a possibility that Islamic law in general and the criminal justice system in Saudi Arabia in particular is able to absorb concepts of human rights as presented in the international instruments, and if so to what extent?

## **SECTION IV                      The Four Schools of Islamic Law**

The jurisprudence developed by the Four Schools of Doctrine has provided a great service to Islam since such comprehensive jurisprudence provides guidance in every aspect of life, in their time and for all time to come.

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<sup>82</sup> - Abdur Rahman I. Doi (1997) p. 8

<sup>83</sup> - Abdulrahman Al-Homady (1989) p. 374 and 375. Scholar Ahmad bin Hanbal (the founder of the Hanbali school of thought) relied on this principle. This is the most prevalent school in Saudi Arabia.

<sup>84</sup> - In accordance with this principle individuals can do everything, except that which they are expressly prohibited from doing by law

<sup>85</sup> - Establishing acts or laws to regulate novel circumstances, such as Traffic acts or Jail laws, is always founded on this principle.

This development of jurisprudence was based totally on Islamic sources, especially the *Qur'an* and the *Sunnah*. Therefore, as far as the main principles of Islam are concerned, an examiner of Islamic jurisprudence will find differences of opinion only in secondary issues: few differences will be found in fundamental concepts.

*Hanafi* school: was founded by Abu Hanafi<sup>86</sup> (81-150 A.H= 700-767 A.D). This school has spread primarily in Turkey, India, Pakistan, and Afghanistan.

*Maliki* School: was founded by Malik Ibn Anas<sup>87</sup> (94- 179 A.H= 716-795 A.D). This school has spread in West Africa and North Africa.

*Shafi'i* School: was founded by Mohammad Al- Shafi<sup>88</sup> (150-205 A.H=676- 820 A.D). This school has spread in Indonesia, Egypt, Philippines, Malaysia, and Sri Lanka.

*Hanbali* School: was founded by Ahmad ibn Hanbal<sup>89</sup> (164-241 A.H =780- 855 A.D). This school has spread in Saudi Arabia<sup>90</sup>.

## SECTION V                      The Nature of Islamic Law

The nature of Islamic law may be considered from more than one angle. Nevertheless for the purpose of this thesis the focus here will be limited to two issues, namely certainty of Islamic belief, and the Islamic approach to legislation. The first point serves as a fundamental theory from which to view and understand the scope and effect of the term "lawful and unlawful" in Islamic society. Even though the point

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<sup>86</sup> - Abu Hanafi is a nickname for Nu'man Ibn Thabit ibn Zuta Ibn Mah. He was a non- Arabic scholar. He lived during the period of the successor of the companions of the Prophet in Kufa in Iraq. Kufa at that time was a famous city for learning. He had met some of the prophet's companions who were still alive and had benefited from their knowledge of Islamic law and he had heard the *Sunnah* from them. He is one of the great jurists of Islam.

<sup>87</sup> - He was born and died in Medina. Medina at that time was considered the centre for Islamic education. He belonged to an Arabic royal family in Yemen, which had moved to Medina. His fame led people to call him the leader of thought in Medina.

<sup>88</sup> - He was born in Gaza in the Mediterranean Sea in the year 150 A.H= 767 A.D. is a descendant of the Prophet Muhammad. His mother took him to Palestine after the death of his father. At the age of ten he travelled with his mother to Mecca. At an early age he studied the *Qur'an*, the *Sunnah* and Islamic jurisprudence under well-known scholars. Then he moved to Medina at the age of twenty and studied with Scholar Malik (the Founder of the Maliki School). From Medina he travelled to Iraq where he devoted his time to research. Al- Shafi benefited from the Maliki School in Medina and the Hanafi School in Iraq. Therefore he became a remarkable expert in both schools. But he was not only a follower of these two schools: rather he established an autonomous approach in his legal studies. Abdur Rahman I. Doi (1997) p. 103-104-105-106

<sup>89</sup> - He was born in Marw in Iraq 164. His father died at the age of 30. So his mother took the responsibility of bringing him up. He started his education in Baghdad at the age of 16. Many scholars thought him. However the most important one is Al- Shafi (the Founder of *Shafi'i* School.). Abdur Rahman I. Doi (1997) p. 108

<sup>90</sup> - The source is I G. Zepp, Jr. (1992) p.150



might seem irrelevant to the topic, my aim is to provide a clear picture of the Muslim's thought and creed, serving as an important background against which to understand what the term "infringement of Islamic law" could mean to Muslims. In respect of the topic of this thesis, this is especially relevant when it relates to one of the human rights principles called upon in the international instruments.

The second point will reveal the capacity of Islamic law for development to bring it up to date.

A distinguishing characteristic of Muslims is their certainty in respect of their religion. An individual Muslim is in absolute assurance of Islam. This certainty is based on revelation and reason.

There is no doubt among Muslims about the definitive revelation "the *Qur'an*" which is described as the "Standing Miracle". Allah said: *{this is the Book (the Qur'an), whereof there is no doubt}*<sup>91</sup>

Islamic logic begins with the premise that the truth of the *Qur'an* is self-validating; its accuracy is concretely established since it is the Word of Allah and God is not subject to error. As Ira G. Zepp, Jr. puts it: "Muslims who follow the *Qur'an*, then, feel they are as free from error as one can be on this earth." He continues to argue that such belief cannot be described as "a blind faith", because Muslim scholars find the words of their scriptures self-evidently true<sup>92</sup>.

The other source of this certainty is human reason. For Muslim the divinity of the *Qur'an* can also be proved by human reason. The *Qur'an* is regarded as a miracle from Allah to the Prophet Muhammad. God said: *{and this Qur'an is not such as could ever be produced by other than Allah (Lord of the heaven and the earth), but it is a confirmation of (the revelation) was before it [i.e. the Taurat (Torah), and the Injeel (Gospel)], and a full explanation of the Book (i.e. laws, decreed for mankind) - wherein there is no doubt- from the Lord of the Alamin (mankind, jinn, and all that exists)}*.<sup>93</sup>

In respect of Muslim faith the *Qur'an* is seen as a living instrument. The Prophet said: "there was no Prophet among the Prophets but was given miracles because of which people had security or had belief, but what I have been given is the Divine Revelation which Allah has revealed to me. So I hope that my followers will be more than those of

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<sup>91</sup> - Surah 2 Al- Baqarah verse. 2

<sup>92</sup> - I G. Zepp, Jr. (1992) p. 254

<sup>93</sup> - Surah 10. Yunus verse. 37

*any other Prophet on the Day of Resurrection*".<sup>94</sup> For Muslim the *Qur'an* contains scientific knowledge of which human beings discover only little. Thus Islam calls for learning all aspect of Cosmos because some scientific facts reinforce the belief of the existence of God. Mind is considered in Islamic religion as one of the most valuable gifts from God, distinguishing human beings from other species. Pursuant to this fact one can conclude that a Muslim be he a jurist or layman feels that the truth of Islam is discoverable by rationality. Recent scientific studies have just discovered facts that were disclosed in Islam 14 centuries ago. Hence, many non-Muslim scientists have admitted this certainty in Islam. For example, in the Holy *Qur'an*, God speaks about the stages of man's embryonic development: *{ We created man (Adam) out of an extract of clay (water and earth). Thereafter We made him (the offspring of Adam) as a Nutfah (mixed drops of the male and female sexual discharge and lodged it) in a safe lodging (womb of the woman). Then We made the Nutfah into a clot (a piece of thick coagulated blood), then We made the clot into a little lump of flesh, then We made out of that little lump of flesh bones, then We clothed the bones with flesh, and then We brought it forth as another creation }*<sup>95</sup>. Hamn and Leeuwenhoek first discovered this scientific fact about human embryonic development only in 1677 (more than 1000 years after Muhammad).<sup>96</sup>

Professor Emeritus Keith L. Moor<sup>97</sup> in his comments on this verse in 1981 stated that: *"it has been a great pleasure for me to help clarify statements in the Qur'an about human development. It is clear to me that these statements must have come to Muhammad from God, because almost all this knowledge was not discovered until many centuries later. This proves to me that Muhammad must have been a messenger of God"*. He emphasized that there is no difficulty for him in accepting the fact that the *Qur'an* is the Word of God.<sup>98</sup>

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<sup>94</sup> - Sahih Al-Bukari, Vol.9 Hadith No. 379

<sup>95</sup> - Surah 23. Al-Mu'minun. Verses. 12- 14.

<sup>96</sup> - However they mistakenly thought the sperm cell contained a miniature preformed human being that grew when it was deposited in the female genital trace.

<sup>97</sup> - Moore is one of the world's prominent scientists in the fields of anatomy and embryology and the author of the book entitled "The Developing Human". This work of scientific reference and was chosen as the best book authored by one person, and has been translated into 8 languages. In 1984 he received the most distinguished award presented in the field of anatomy in Canada.

<sup>98</sup> - This was during the Seventh Medical Conference in Dammam, Saudi Arabia. [www.islam-guide.com](http://www.islam-guide.com) 17/ 6/ 2002. "A brief Illustrated Guide to Understanding Islam". During one conference, Professor Moor stated: *"...Because the staging of human embryos is complex, owing to continuous process of change during development, it is proposed that a new system of classification could be developed using the terms mentioned in the Qur'an and the Sunnah. The proposed system is simple, comprehensive, and conforms with present embryological knowledge. The intensive studies of the*



With regard to the second point, that is to say the Islamic approach to legislation, the need to deal with new issues creates the difficulty of harmonizing between permanence and change. Tendency towards one of these two ends could cause instability or might lead to inadequate treatment of new matters. Thus a balance between these systems is very important.

This need is rightly described by Mr. Justice Cardozo: "*the greatest need of our time is a philosophy that will mediate between conflicting claims of stability and progress and supply a principle of growth*".<sup>99</sup>

Islamic law provides a solution for this task. This solution is based on the Islamic approach regarding rules and laws. Guidance endowed by God in the Holy Sources namely the *Qur'an* and the *Sunnah* is of an eternal nature. As a consequence it is not subject to change. But what is important here is that these two sources have revealed deliberately broad principles and individuals are free to adopt any rules suitable to the circumstances. Hence, it is as Khurshid Ahmad correctly puts it: "*the basic guidance is of a permanent nature, while the method of its application can change in accordance with the peculiar needs of every age*". He further claims that: "*this is why Islam always remains as fresh and modern as tomorrow's morn*"<sup>100</sup>

When the command of Allah or the Prophet is explicitly given, no one is capable of making, or qualified to make the least alteration to it.<sup>101</sup> Nevertheless, if the *Shari'ah* is silent or does not speak explicitly, the Islamic state has the right, or may be obliged, to provide an answer to new circumstances.<sup>102</sup>

Empowering the legislative authority in the Islamic state with the right to enact laws might appear to be in contradiction with the idea that God alone has this right. However, this conclusion would be inaccurate. God exercised His legislative discretion in the *Qur'an* and the *Sunnah*. These sources do not provide detailed laws to

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*Qur'an and the Sunnah in the last four years have revealed a system for classifying human embryos that is amazing since it was recorded in the seventh century A.D. Although Aristotle the founder of the science of embryology realized that chick embryos developed in stages from his studies of hen's eggs in the fourth century B.C., he did not give any details about these stages. As far as it is known from the history of embryology, little was known about the staging and classification of human embryos until the twentieth century. For this reason, the description of the human embryo in the Qur'an cannot be based on scientific knowledge in the seventh century. The only reasonable conclusion is: these descriptions were revealed to Muhammad from God. He could not have known such details because he was an illiterate man with absolutely no scientific training."*

<sup>99</sup> - Harvard Law Review p. 279. Quoted from Khurshid Ahmad (1992) p.42

<sup>100</sup> - Khurshid Ahmad (1992) p.43

<sup>101</sup> - Abdur Rahman I. Doi (1997) p. 5

<sup>102</sup> - M. Cherif Bassiouni (1993) p168

deal with every aspect of life. In fact except in some exceptional cases the *Qur'an* and the *Sunnah* give only general notions. Therefore, the Islamic community or state has the discretion to handle new circumstances, provided that their decision does not breach general Islamic principles.

This approach to legislation demonstrates the flexibility of Islamic law, which makes it applicable in all times and places. Without such an approach Islamic law would certainly have been inadequate after the cessation of divine revelation.

In short, although the *Qur'an* and the *Sunnah* are sovereign over all other laws and cannot be amended, the Islamic *Shari'ah* is not out of date, but can adequately deal with novel issues and meet evolving needs that have not been explicitly addressed in the two sources mentioned previously. The legislative approach of the *Qur'an* and the *Sunnah* make the *Shari'ah* applicable to all times and circumstances: when rules are enacted concerning issues that both the *Qur'an* and the *Sunnah* are silent about or about which they do not speak comprehensively.

## SECTION VI                      Crimes in Islamic Law

Islamic jurisprudence has more than one classification of offences. Some jurists have classified them into crimes against honour, property, and life; others into crimes against society (God's rights) or against the individual's rights<sup>103</sup>. They could also be classified as intentional or non-intentional crimes<sup>104</sup>. Nevertheless the most prevalent classification is founded on the severity of punishment they deserve<sup>105</sup>.

According to the latter classification offences are divided into three categories: *Haddud*, *Qisas* and *Ta'azir*.

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<sup>103</sup> - Muhammad Fazl-ur-Rahman Ansari p.381; for more details see Adel Omer Sherif "Generalities on Criminal Procedure under Islamic Shari'a". In Muhammad Abdel Haleem, Adel Omer Sherif, and Kate Daniels (2003). "*Criminal Justice in Islam: Judicial Procedure in the Shari'a*". I.B. Tauris. London, New York; p. 5

<sup>104</sup> - Abdulkader Owdeh p. 78

<sup>105</sup> - Courts in Saudi Arabia have adopted this classification. See Ahmad Belal (1990) "*AL- Ijra'at Al- Jina'i Al-Mogarnh Wa Al-Nedam Al-Ejrea'ee Fi Al- Mamlakah Al- Arabiah Al- Sudiah*" p. 977. hereinafter will refer to as Ahmad Belal (1990)



## 1: *Haddud* Offences<sup>106</sup>

*Haddud* offences are translated into English as doctrinal crimes<sup>107</sup>. These offences are very harmful to Muslim society and each crime has a certain penalty prescribed precisely in the Islamic law. Therefore one can define them as “crimes that are considered as a transgression against God’s rights (society’s rights) and punishable by certain punishments”<sup>108</sup>. The punishments for these crimes are also called *Haddud*. But to distinguish each one, the terms theft *Hadd*,<sup>109</sup> drinking *Hadd* etc, are used<sup>110</sup>

There are seven *Haddud* crimes<sup>111</sup>:

- 1- The drinking of alcohol
- 2-Theft “Taking someone else’s property by stealth”<sup>112</sup>
- 3- Highway robbery
- 4- Unlawful intercourse<sup>113</sup> “Sexual intercourse between a man and woman not married to each other”<sup>114</sup>
- 5-Slander or defamation “a false accusation of adultery or fornication”<sup>115</sup>
- 6- Apostasy<sup>116</sup> “a rejection of the religion of Islam in favour of any other religion either through an action or through words of mouth”<sup>117</sup>

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<sup>106</sup> - Searching in old Islamic jurisprudence one could not find much discussion about the nature and purpose of this kind of offences. The most likely reason for this is that jurists believe that such crimes and their prescribed penalties are proved in specific and fixed terms and should be imposed without question. However, one can conclude from a few writings about this subject, that punishments in doctrinal crimes have a retributive nature. Mohamed S. El-Awa (1998) “*Punishment in Islamic Law: A comparative Study*”. American Trust Publications. Indianapolis, Indiana. USA, P. 26. hereinafter will refer to as Mohamed S. El-Awa (1998)

<sup>107</sup> - Faruq’s Law Dictionary (Arabic- English) 1997. P.135. Lebanon Library. See also Security Dictionary English- Arabic. Naif Arab Academy for Security Sciences. Riyadh 1997 P.83

<sup>108</sup> - This definition is open to criteizem because there is disagreement between Islamic scholars with regard to the nature of the crime of defamation, which can be argued to come under the right of God or under an individual’s rights.

<sup>109</sup> - The singular of *Haddud*.

<sup>110</sup> - Abdulkader Owdeh p. 79

<sup>111</sup> - Abdulkader Owdeh p. 79. However, there is some disagreement over whether some of these offences fall within the category of crimes of *Haddud*. See Saeed Hasan Ibrahim “Basic Principles of Criminal Procedure under Islamic Shari’a”. In Muhammad Abdel Haleem, Adel Omer Sherif, and Kate Daniels (2003). “*Criminal Justice in Islam: Judicial Procedure in the Shari’a*”. I.B. Tauris. London. New York; p. 19

<sup>112</sup> - Mohamed S. El-Awa (1998) p 3

<sup>113</sup> - In contrast to modern legal systems where sexual relationships between non- married men and women are not deemed an offence, the Jewish, Christian and Islamic religions do not accept this practice. This offence is considered in Islamic society as a harmful act because it destroys the very basis of family and could cause damage to the reputation of the family. It is also a crucial factor in the spreading of some sorts of disease. Therefore the total purity of sex life for both man as well as woman is required in Islamic society. Mohamed S. El-Awa (1998) p 13

<sup>114</sup> - Abdur Rahman I. Doi (1997) p 236. The word adultery is used when one or both parties are married to other person or persons. The word fornication is used when both of them are singles.

<sup>115</sup> - On other words if some accuses another person of committing an adultery crime and cannot prove it he then be regarded as committing the crime of defamation.



7- Rebellion against the Ruler (the Head of the State) without a clear legitimate cause.

## 2: Qisas Offences

Human life is given considerable attention in Islamic law. Allah said: *{because of that We ordained for the Children of Israel that if anyone killed a person not in retaliation of murder, or (and) to spread mischief in the land- it would be as if he killed all mankind, and if anyone saved a life, it would be as if he saved the life of all mankind}*<sup>118</sup>. Qisas is defined as “laws of equality in punishment for wounds etc. in retaliation”.<sup>119</sup>

It is also defined as “crimes that are punishable by qisas (retaliation<sup>120</sup> or law of parity or equality) or by *Diyah* (blood money)”<sup>121</sup>. These kinds of crime are divided into the following categories:

1-Accidental homicide (manslaughter). 2- Quasi- deliberate homicide.  
3- Deliberate homicide (intentional murder)<sup>122</sup> 4- Intentional injury 5- Accidental injury<sup>123</sup>.

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<sup>116</sup> - However, El-Awa considers apostasy as a *Ta'azir* (chastisement) crime. Mohamed S. El-Awa (1998) p. 56

<sup>117</sup> - Abdur Rahman I. Doi (1997) p.265 Conversion from Islam to another faith or religion is considered a crime of *Haddud* (doctrinal crime). An apostasy may be committed when a Muslim person has doubt about the existence of the creature or His Prophet (Muhammad). Likewise rejecting the *Qur'an* is also considered to be apostasy. Allah said {How shall Allah guide a people who disbelieved after their belief and after they bore witness that the Messenger (Muhammad) is true and after clear proofs had come unto them? And Allah guides not the people who are *Zalimun* (polytheists and wrong-doers). They are those whose recompense is that on them (rests) the Curse of Allah, of the angels, and of all mankind. They will abide therein (Hell). Neither will their torment be lightened, nor will it be delayed or postponed (for a while). Verily, those who disbelieved after their Belief and then went on increasing in their disbelief (i.e. disbelief in the *Qur'an* and in Prophet Muhammad) – never will their repentance be accepted [because they repent only by their tongues and not from their hearts]. And they are those who are astray} Surah 3. Al-Imran. Verses. 86, 87, 88, 89, and 90

<sup>118</sup> - Surah 6 Al-Ma'idah verse. 32

<sup>119</sup> - The Noble *Qur'an* p. 879

<sup>120</sup> - Al- Qasimi states “*Qisas* is often translated as the law of retaliation. However, this is an inaccurate definition of the term if the purpose of prescribing such a punishment is taken into account. The aim of *qisas* is to ensure parity between the crime and the punishment, whereas the word “retaliate” means “to hurt someone or do something harmful to them because they have done or said something harmful to you”. In other words “retaliation implies inflicting harm on somebody, for the purpose of revenge or the causing of harm and this is not, of course the case with crimes that are punishable by *qisas*. Thus it is more appropriate to translate the word *qisas* as the law of parity or equality, as does Faruqi.” Al- Qasimi (1998) p.39 & 40

<sup>121</sup> - *Diyah* means blood money (for wounds, killing etc.) as compensation paid by the killer to the relatives of the victim (in unintentional cases). The Noble *Qur'an* p. 863. however, Muhammad Abdel Haleem rejects this definition and states that : “*Diya* is not ‘blood money’, as it is normally translated. The *Oxford English Dictionary* gives the primary meaning of the term ‘blood money’ as ‘a reward for bringing about the death of another’. The word *Diya* has no such association in Arabic, and is therefore better translated as ‘compensation’. Furthermore, it is not a fine since fines go to the state.” Muhammad Abdel Haleem . “Compensation for Homicide in Islamic Shari’a”. in Muhammad Abdel Haleem, Adel Omer Sherif, and Kate Daniels (2003). *Criminal Justice in Islam: judicial Procedure in the Shari’a*. I.B.TAURIS. London and New York; p 97



### 3: *Ta'azir* Offences

*Ta'azir* is translated into English as "chastisement"<sup>124</sup> which is defined as: "disciplinary punishment for a crime for which no specific *Hadd* (punishment) is prescribed nor any form of expiation"<sup>125</sup>. It is also defined as "discretionary punishment to be delivered for transgression against God, or against an individual for which there is neither fixed punishment nor penance".<sup>126</sup> In consequence all offences which are not classed as *Haddud* or *Qisas* shall constitute the crime of *Ta'azir*.

This kind of offence is divided into 2 kinds:

First: an act criminalized by Islamic law but for which no prescribed penalty is provided. For example, false testimony, breach of trust, bribery and usury are forbidden in Islamic law, but no specific punishment is provided for each. In such offences the state can either decide the due punishment, which becomes obligatory to the judge to apply, or it can leave such discretion to the judge according to the circumstances of each individual case. In this kind of chastisement crime the judge can adopt any punishment he believes suitable. Both ways are adopted in the judicial system in Saudi Arabia. In certain kinds of crime the state has enacted laws to regulate some aspects and declared the due penalty for those crimes, placing the court under obligation to render its judgement according to the law concerned. Forgery and bribery for instance are forbidden in Islamic law. However no prescribed penalty is given. Therefore the state in Saudi Arabia has enacted laws in which the prescribed punishment is provided.

Second: an act that is originally permitted, but in the interest of society is made illegal, subjecting anyone who commits it to punishment<sup>127</sup>. For example, pursuant to article 14 of the Woods and Walk Law in Saudi Arabia<sup>128</sup> cutting down trees from public woodland without license from the competent authority is criminalized and punishable by certain penalties. This act is not originally illegal or punishable in Islamic law.

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<sup>122</sup> - Some Islamic jurists have classified homicide into five categories, while others have classified them into only two kinds.

<sup>123</sup> - Abdulkader Owdeh p. 79

<sup>124</sup> - Security Dictionary English- Arabic. Naif Arab Academy for Security Sciences. Riyadh 1997;p. 45

<sup>125</sup> - Abdur Rahman I. Doi (1997) p.226

<sup>126</sup> - Mohamed S. El-Awa (1998) p. 96&97

<sup>127</sup> - Most *Ta'azir* (chastisement) offences come under this kind. When exercising such discretion the Islamic state is obliged to act according to the public Interest and its act must be compatible with general principles of Islamic law. See Abdulkader Owdeh p. 81

<sup>128</sup> - Royal Decree No. 22/M in 1398 A.H (1978 A. D)

However, because protecting trees from harmful acts is necessary for the environment, the government has taken the necessary steps to protect the public interest.<sup>129</sup>

The difference between these two kinds of *Ta'azir* (chastisement) crimes is that the first type is always prohibited while the second type may be forbidden but at a different time could be made lawful according to the interest of people.<sup>130</sup> The latter kind of *Ta'azir* crimes might corresponds to the English notion of regulatory offences which often impose strict liability.

#### **Implications of this classification:**

First: with regard to forgiveness, *Haddud* (doctrinal crimes) are not subject to forgiveness. *Qisas* offences (the law of parity or equality) are forgivable by victim(s). So in case of intentional murder the victim's family could waive their right of punishing the murderer<sup>131</sup>. The head of state has no right to forgive the culprit in this kind of crime. However the head of state can forgive the culprit in *Ta'azir* (chastisement crimes) provided that such forgiveness does not affect the victim's rights.

Second: with regard to the judge's discretion, each crime of *Haddud* (doctrinal crimes) has a fixed penalty. When a *Hadd* crime is proved a judge must render his judgement, which should carry the prescribed penalty. In this kind of crime the judge's power is limited to the application of the text of the *Qur'an* or the *Sunnah*. Thus he has no right to make the punishment more or less severe or to replace the prescribed penalty by any other punishment. Moreover, a judge has no power to stay the execution. In brief his ultimate discretion is limited to the pronouncement of the prescribed penalty. In *Qisas* (law of parity or equality) if the case is proved and the victim does not forgive the criminal, the judge's power is also limited to the pronouncement of the prescribed penalty. In *Ta'azir* (chastisement) crimes the judge has full discretion to choose the kind of punishment and its severity according to circumstances. Moreover he has the right to pronounce stay of execution.

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<sup>129</sup> - Similarly article 59 of the Mining Code enacted by Royal Decree No. 21 M in 1392 A.H (1972 A.D) "any one undertaking mining activities regulated by this code and failing to observe its provisions shall be penalized by a fine of not less than five hundred and not exceeding ten thousand Riyals and by imprisonment for a period of not less than one week and not exceeding six months or by either of the two penalties".

<sup>130</sup> - See Abdulkader Owdeh p. 81

<sup>131</sup> - Either with or without compensation.



Third: with regard to extenuating circumstances, these have no effect in *Qisas* and *Haddud* crimes. On the contrary, in *Ta'azir* (chastisement) the extenuating circumstances could change the kind of punishment and its severity

Fourth: In terms of evidence, the *Haddud* and *Qisas* crimes are only proved by either testimony or confession. But the majority of crimes in Islamic law come under the category of chastisement crimes (*Ta'azir*). When dealing with this kind of crime the court has the ultimate discretion to reach its verdict by means of ratiocination and induction (examination) and by full rational capacity provided that its conclusion is in line with logic and reason.<sup>132</sup>

It should be emphasized here that if either a *Hadd* or a *Qisas* crime is not proved by one of the above-mentioned means, the act is still illegal and the culprit is still subject to punishment. However, the crime will be reclassified as *Ta'azir*. The same applies if the victim's family forgives the murderer. Although *Qisas* crimes are harmful to the victims, society is damaged by such crimes as well. Thus society has the right to defend itself by punishing the murderer even if the victim forgives him. But it only can adjudicate and punish him according to *Ta'azir* categories.

Fifth: it is clear from this classification that certain punishments that are prescribed are not subject to any alteration or change whether or not they contradict the standards of international human right. For instance, the punishment for intentional murder is the death penalty. This punishment is claimed, to be harsh and unnecessary according to international human rights<sup>133</sup>. Such a claim cannot be accepted and there is no room for reinterpretation.

## **Part Two                      The judicial System in Saudi Arabia**

### **Section I                              Historical Background**

The history of Saudi Arabia is divided into three stages. The first stage started by the establishment of the first Saudi State. This stage begun when Muhammad ibn Saud and Sheikh Muhammad ibn Abd al- Wahhab made an oath in 1744 (1157 A.H) to re-establish pure Islam as it was applied during the Prophet era. This state lost power in 1817 (1233 A.H). The Second stage, begun by the establishment of the Second Saudi

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<sup>132</sup> - See the Board of Grievances. Decision No. H/1/93 (1401 H). & Decision No. H/1/75 (1401 H)

<sup>133</sup> - See for example the UN General Assembly resolution no. 44/128 of December 1989 regarding the Second Optional Protocol to the ICCPR aiming at the abolition of the death penalty.

State in 1824 (1240 A.H) and lasted until 1891 (1309 A.H). Lastly, the third stage is the present Saudi State. It started when King Abdulaziz retook Riyadh and established his rule over that region.

The kingdom of Saudi Arabia officially acquired its present name after the unification of all its parts by King Abdulaziz in 1931 (1351 A.H). The foundation of Saudi Arabia was based on a pact between Muhammad ibn Saud, the founder of the first Saudi State, and Sheikh Muhammad ibn Abd al-Wahhab, the founder of the Wahabi Movement, to re-establish Islam and to promote monotheism. This foundation may be clearly recognized from many articles of the Basic Law in Saudi Arabia. For example, article one states, "*Saudi Arabia is ...an Islamic state ...and its constitution is the Qur'an and the Sunnah*". Article two declares, "*The citizens shall acknowledge the rule of the King according to the Book of God and the Sunnah of His Apostle...*" Article seven provides "*the powers of ruling the Kingdom of Saudi Arabia originate from the Book of God and the Sunnah of His Apostle, both of which reign supreme over this and all the other laws of the State*". This foundation is strongly reaffirmed by King Fahad (the present King) in his statement to citizens on the occasion of enacting The Basic Law, The Shura council Law, and The Regional Law. The king states "*in recent history, the first Saudi State was established before two and half centuries on the basis of Islamic law when two pious men made a pact.*"

#### **(A) The judicial system in the Arabian Peninsula prior to the unification of Saudi Arabia**

Historians when writing about this era divide it into the following systems<sup>134</sup>:

The first system was in the *Najd* region. The judiciary in this region did not know any kind of organization regarding courts and procedures because life was very simple. All disputes were settled by the ruler, but if his attempt failed to reach reconciliation the case was then forwarded to a single judge who dealt with cases without any official procedures and whose judgement was final since there was no system of appeal. Judges in this region applied the Hanbali School of law in most cases. The second system was that of the *Hijaz* province with an Ottoman orientation. Since the Ottoman Empire in its more recent time had borrowed western laws to settle criminal and commercial affairs, this region exercised some kind of court organization and

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<sup>134</sup> - Abdulaziz Al-Eshaikh (1421 AH) "*Lamahat Hool Al-Qadi' Fi Al-Mamlakah Al-Arabiah Al-Sudiah*" Second Edition. Alm Al-Fo'd Publisher p. 75. Hereinafter will refer to as Abdulaziz Al-Eshaikh (1421). See also "*AlQadi' Fi Al-Mamlakah Al-Arabiah Al-Sudiah*" (1419 AH) The Ministry of Justice p. 55



procedures.<sup>135</sup> Finally, the third system existed among Bedouins (desert men). Each tribe had its own arbitrator(s) called (*Arefah*), and whose judgments were based on the tribe's custom whether this was compatible with Islamic law or not.

### **(B) Historical development of the judicial laws**

When King Abdulaziz unified Saudi Arabia he was faced with the difficulty of three different existing judicial approaches as mentioned above. Thus his first task was establishing a consistent judicial system. A Royal Decree was issued in 1927 (1346 A.H) to establish a system of hierarchal courts. Its institutions were classified into three hierarchal categories: expeditious courts, *Shari'ah* courts, and the Commission on Judicial Supervision. Subsequently other laws were enacted, however the most important laws, are: the Attributions of *Shari'ah* Jurisprudence Responsibilities Law, and the Organization of Administrative Functions in the *Shari'ah* Courts System Law in 1952 (1371 A.H). In 1975 (1395 A.H) the Law of the Judiciary was enacted<sup>136</sup> which is also still in force. This law reorganized the hierarchal courts, as we will explain later.

However, the most crucial reformation occurred in 2000 and 2001. Three fundamental judicial laws were enacted: the Law of Procedure before *Shari'ah* Courts<sup>137</sup>, the Code of Law Practice<sup>138</sup>, and the Law of Criminal Procedure<sup>139</sup>.

### **Section II Courts or the Judicial Institutions**

The original principle is that *Shari'ah* courts are the sole judicial authority in all criminal cases. The Basic Law declares, "... the courts (*Shari'ah* Courts) have power to adjudicate (resolve) all disputes (litigations) and offences"<sup>140</sup>. They have jurisdiction over all disputes and crimes, except what is excluded by another law<sup>141</sup>. However, recognizable statutes were enacted to repeal the *Shari'ah* courts' jurisdiction in particular areas, as we will point out below. The complexity of modern life and the state's power to intervene in instances of new forms of crime led to the establishment of other judicial institutions to cover certain offences. Besides

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<sup>135</sup> - Some of these laws contradict Islamic law. See Abdulaziz Al-Eshaikh (1421 AH) p. 78

<sup>136</sup> - Royal Decree No. (M/64)

<sup>137</sup> - Royal Decree No. (M/ 21) dated on (2000)

<sup>138</sup> - Royal Decree No. (M/ 38) dated on (2001)

<sup>139</sup> - Royal Decree No. (M/39) dated on (2001)

<sup>140</sup> - Article 49

<sup>141</sup> - Article 26 of the Law of the Judiciary provides: "Courts shall have jurisdiction to decide with respect to all disputes and crimes, except those exempted by law. Rules for the jurisdiction of courts shall be set forth in the *Shari'ah* Procedure Law Courts and Law of criminal procedure. Specialized courts may be formed by Royal Order on the recommendation of the Supreme Judicial Council."

*Shari'ah* courts there are the Board of Grievances and other administrative committees that handle particular criminal suits.

Therefore, the reason for such multiplicity must be examined to evaluate the achievement of the judicial system. But it is imperative to start with some illustrations of *Shari'ah* courts, the Board of Grievances, and the administrative committees that have criminal jurisdiction.

### **One: The *Shari'ah* Courts**

The Law of the Judiciary 1975 declares in article five that *Shari'ah* Courts consist of:

- (a) The Supreme Judicial Council
- (b) The Appellate Court
- (c) General Courts
- (d) Summary Courts.

#### **(a) The Supreme Judicial Council**

The Supreme Judicial Council consists of 11 members. Five of them constitute the Council's permanent Body. They are full time members and a Royal Order appoints them. Other members are part-time. All the 11 members form the Council's General Body.<sup>142</sup>

As far as judicial jurisdiction is concerned, the Council is provided with power to exercise supervision over the courts within the limit set down by the Law of the Judiciary<sup>143</sup>. The Council is empowered to supervise all matters relating to judges affairs such as judges' appointment, retirement and discipline<sup>144</sup>. Besides these powers the Council has the jurisdiction to deal with the following business according to article 8 of the Law of the Judiciary:

- 1- The consideration of legal (*Shari'ah*) matters that are considered by the Minister of Justice to be necessary to determine general principles of Islamic law in respect thereof.
- 2- Hearing matters that the ruler (the king) considers as being necessary to be heard by the Council.
- 3- Giving opinions on matters related to the judiciary upon the request of the Minister of Justice.

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<sup>142</sup> - The Law of the Judiciary, Article 6

<sup>143</sup> - Ibid, Article 7

<sup>144</sup> - Ibid, Article articles 53, 73, and 86



#### 4- Reviewing judgments of execution, amputation, and stoning.<sup>145</sup>

It is thus apparent that some of the Council's jurisdictions are of administrative, judicial, or regulatory nature<sup>146</sup>.

#### **(b) The Appellate Court**

The Appellate Court is composed of a head and an adequate number of judges and is divided into three sections. One deals with criminal matters, the second hears personal disputes, and a third section hears other matters.<sup>147</sup> Judgements of the Appellate Court are rendered by three judges except in cases that involve punishments of execution, stoning, amputation, or crimes of kidnapping or hold-up<sup>148</sup> where five judges must render the judgement<sup>149</sup>. Further, there is a General Board of the Court of Appeal.

With regard to the Appellate Court's jurisdiction, the Appellate Court is empowered to review all judgements made by the lower courts, be they criminal or civil cases. On the other hand, judgements concerning the following disputes or offences must be forwarded directly to the Court of Appeal in all circumstances:

1- Sentences inflicting amputation or execution. 2- Convictions against trustees of endowment property or guardians over minor property. 3- Decisions concerning real estate. 4- Default Decisions. 5- Judgments against juveniles.<sup>150</sup>

#### **(c) The General Courts:**

The Law of the judiciary has left the general courts' formation and jurisdiction to be determined by the Minister of Justice, upon the motion of the Supreme Judicial Council.<sup>151</sup> A single judge delivers his judgement in all suits except cases of execution, stoning and amputation and others, which are designated in the law. For all of these three judges are needed to render a judgement<sup>152</sup>.

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<sup>145</sup> - Article 9 of the Law of the judiciary as amended by Royal Decree No. 76 of 14.10.1395 A.H provides: "The Supreme Judicial Council Shall convene as Permanent Panel ... to look into the issues and sentences mentioned in paragraph 2,3, and 4 of article 8 except those which the Minister of Justice decides that they be looked onto by the Council's General Panel ..."

<sup>146</sup> - By the administrative competences are meant those related to judges' affairs such as their appointment, removal, promotion, duties, termination etc; and by the regulatory authority is meant supervision and giving opinions on reports, projects and drafted laws that are sent to the Council. See, Ahmad Belal (1990) p. 807

<sup>147</sup> - The Law of the Judiciary, article 10

<sup>148</sup> - Kidnapping and hold-up crimes were added by Royal Order on 5. 9. 1409 AH. Based on a decision of the Board Council of senior jurists. See Ahmad Belal (1990) p. 811

<sup>149</sup> - The Law of the Judiciary Article 13

<sup>150</sup> - See Abdulrahman A. Al- Turki (2000) "Capital Punishment for Drug Offences in Islam and its Application in the Kingdom of Saudi Arabia" Unpublished PhD thesis. University of London (SOAS). P.217 & 218. Hereinafter will refer to as Abdulrahman A. Al- Turki (2000).

<sup>151</sup> - Article 22

<sup>152</sup> - Article 23 of the Law of the Judiciary .

According to article 26 of the Law of the judiciary 1975 the General Courts have jurisdiction to settle all lawsuits, except cases that are exempted by law be they criminal or civil. Cases under the power of the courts of Summary Jurisdiction are excluded from the General Court jurisdiction.

**(d) The Courts of Summary Jurisdiction:**

As is the case in the general courts, the composition of the courts of Summary Jurisdiction and the fixing of its powers and jurisdiction was decided by an order of the Minister of Justice based on the recommendation of the Supreme Judiciary Council<sup>153</sup>. A single judge delivers rulings for the Courts of Summary Jurisdiction.<sup>154</sup> These courts are provided with power to adjudicate cases if the case does not involve more than SR.800. Its jurisdiction in criminal matters covers crimes where the compensation does not exceed a fifth of the *Diyah* (blood money), even if the amount exceeds SR 8000. Moreover, misdemeanours, *Ta'azir* crimes, and crimes of *Haddud* are tried in these courts unless these offences come under the General Courts' power.

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**Two: The Board of Grievances (The Administrative Court)**

**(A) Composition of the Board**

Article 2 of the Board of Grievances Statute states that the Board should be made up of (a) the chairman (b) the vice- chairman (c) assistant Deputies (d) Judges who are specialists in the *Shari'ah* and the law. These are supported by a number of technical, administrative and other officials. For the purpose of facilitating the function of the Board, it is divided into circuits according to the subject it deals with. Thus the structure of the Board comprises: (a) The Review Committee. (b) The Committee of Administrative Affairs of the Board Members. (c) The Disciplinary Committee. (d) The General Body. (e) The General Circuits: [Criminal circuit; Commercial Circuit: Administrative Circuit: Disciplinary Circuit: and Subsidiary Circuits.]<sup>156</sup>

**(B) Jurisdiction of the Board**

Pursuant to article 8 the Board has jurisdiction to adjudicate the following:

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<sup>153</sup> - Pursuant to Article 24 of the Law of the Judiciary the Minister of Justice issued order No. 14/12/3 on 20.1. 1397AH to determine the jurisdiction of the Court of the Summary jurisdiction. Thus, any case which does not come under this court's authority is in the General Court's power.

<sup>154</sup> - Article 25 of the Law of the Judiciary

<sup>155</sup> - Abdulrahman A. Al- Turki (2000) p.219&220.

<sup>156</sup> - Abdulrahman A. Al- Turki ( 2000) p.222



- (a) Cases relevant to the rights stipulated in the Civil Service and Pensions Laws applicable to government officials and employees of public autonomous juristic apparatus, or their heirs and beneficiaries;
- (b) Appeals filed by interested persons against administrative orders, on grounds of ultra vires, the existence of a formal defect, violation of Laws or implementation of regulations, misapplication, and misinterpretation or abuse of office. Refusal or abstention by the administrative authority to make an order which is required under the Laws or implementing Regulations, is tantamount to an Administrative order;
- (c) Compensation claims addressed by interested persons to the Government or public persons, which are occasioned their employees or Workers;
- (d) Cases initiated by interested persons regarding disputes relative to contracts to which the Government or a public juristic personality is a party;
- (e) Disciplinary cases initiated by the control and investigation commission;
- (f) Penal cases brought against persons charged with having committed the forgeries stipulated in the Law; the offences provided for in the Law of Combating Corruption; the offences stipulated in Royal Decree No. 43 of 11.1377 AH; offences provided for in the Law of Management of public funds, enacted by Royal Decree no. 77 of 23. 1395 AH; and criminal cases brought against persons accused of having committed the offences and contraventions stipulated in the laws, where the chairman of the council of ministers has made an order to hear them;
- (g) Application for the enforcement of foreign judgements;
- (h) Cases which fall within the jurisdiction of the Board pursuant to specific legal provisions.

This article designates the Board's authority. However, in accordance with paragraph (h) many specific laws give the Board power to adjudicate cases arising from violation of these laws. For instance, Article 59 of the Trademark Law<sup>157</sup> states that the Board of Grievances has jurisdiction over civil and criminal cases or disputes arising from the application of this law. Article 18 of the Mail Statute<sup>158</sup> provides the Board with power to adjudicate infringement of the law. The protection of Public

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<sup>157</sup> - Enacted by Royal Decree N. 5 of 4.5. 1404AH.

<sup>158</sup> - Enacted by Royal Decree N. 4 of 21.2.1406 AH



Utilities Law<sup>159</sup> empowers the Board to inflict prison sentence. Moreover, the second Paragraph of article 8 provides the Council of Ministers with the right to refer cases to be heard by the Board. Accordingly, the jurisdiction of the Board has now been extended to cover subjects irrelevant to the original aim of its establishment as an administrative court<sup>160</sup>.

### **Three: Administrative Committees that have Judicial Jurisdiction and their Function within the Judicial System:**

A feature that clearly distinguishes the judicial system is its multiplicity of judicial institutions. Besides the main two bodies, namely the *Shari'ah* courts as well as the Board of Grievances, there are over 30 administrative committees<sup>161</sup> that have jurisdiction to adjudicate cases. Three of these committees have been selected here to illustrate their range of function<sup>162</sup>.

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<sup>159</sup> - Enacted by Royal Decree N. 62 of 20.12.1405 AH

<sup>160</sup> - Article one of the Board Statute admittedly declares: "*the Board of Grievances is an autonomous body for administrative Justice...*"

<sup>161</sup> - Amad Al-Najar (1997) "*Al-Ed'ah Al-Am Wa Al-Muhakmah Al-Jina'i Wa Tatbegatha Fi Al-Mamlakah Al-Arabiah Al-Sudiah*" Institute of Public Administration. p. 232. hereinafter will refer to as Amad Al-Najar (1997)

<sup>162</sup> - The following are further examples of these Committees:

1- The Committees for Penalizing Traffic Violations: these committees were established according to the Traffic Law to impose penalties on traffic offenders. According to the by-law each committee consists of: 1- the chairman of traffic department in question or his representative. 2- A *Shari'ah* or legal advisor 3- an inspector. 2- The Medical Committees: These are created in accordance with the Private Medical Establishment Law under the supervision of the Ministry of Health to adjudicate all offences and disputes arising under the Law. Each committee is made up of three Members appointed by the Minister of Health. One of them should have legal qualifications and another should be a specialist in a medical field related to the infringement in hand. Decisions are not enforceable unless ratified by the Minister. However if the due punishment is imprisonment the case will be forwarded to the Board of Grievances. These committees exercise both investigative and judicial functions. 3- The Copyright Committee: This committee was established under the supervision of the Ministry of Information to handle all civil and criminal cases arising under the Copyright Law. The Minister of Information forms this committee of three members one of whom is a legal advisor. Its decisions are final after the Minister's ratification. 4- The Commission on the Impeachment of Ministers: This commission was created pursuant to the Impeachment of Ministers Law. It is authorized to try ministers or any equivalent rank for offences they may commit according to the Impeachment of Ministers law. According to article 15 this commission consists of three Ministers selected by the Council of Ministers and two members of the rank of chairman of the General Courts who must be qualified in *Shari'ah*. 5- The Disciplinary Council for Military Personnel: This commission was established pursuant to the Saudi Military Personnel Law to judge all felonies and misdemeanour offences committed by military personnel. This council consists of a chairman, four members, and a legal advisor supported by other employees. Its verdicts are final; however, in exceptional cases the Minister of Defence may reverse them. 6- The Disciplinary Council for Internal Security Personnel: This commission was created pursuant to the Saudi Internal Security Law to judge all felonies and misdemeanour offences committed by Internal Security Personnel. 7- Judicial Committees for Supplies: These committees were created pursuant to the Council of Minister's Decision No. 60 on 25. 1. 1393 AH to supervise the price of goods. Each committee is made up of three legal advisors from the Ministry of Commerce. Another legal advisor, who is not a member of the committee, is appointed to serve as public prosecutor. The Minister of Commerce must ratify the judgments.



### 1- Committees for adjudicating Securities Disputes (the Commercial Paper Committees):

This set has jurisdiction over crimes of uncovered cheques (false cheques) and other relevant crimes<sup>163</sup>, cases concerning the infringement of the law of Commercial Agencies, and the Law of Weights and Measures. A single member is empowered to investigate and adjudicate the case. The convicted person has the right to challenge the decision before the Minister of Commerce.

### 2-Committees for Combating Commercial Deception

These were established pursuant to the Commercial Deception Law<sup>164</sup> to adjudicate offences under the supervision of the Ministry of Commerce. Each committee consists of 3 members, from the Commercial Ministry and one from the Municipal Ministry. One member should have legal experience. Decisions are final after being ratified by the Minister of Commerce except when the punishment is imprisonment, in which case, the accused has the right to challenge the decision before the Board of Grievances<sup>165</sup>. According to the executive by-law these committees exercise both investigative and judicial proceedings.

### 3- The Customs (Tariff) Committees:

These were established pursuant to the Customs Law<sup>166</sup> under the supervision of the Ministry of Finance and National Economy. The committee is considered one of the oldest committees that have a judicial function. According to article 52 of the Customs Law these committees are authorized to adjudicate all smuggling crimes or attempted smugglings. Their minutes are regarded as valid unless contested as forgeries. In addition to these committees, appellant committees exist to consider first instance cases. The customs committees' decision is therefore final. From the procedural rulings one can mention that these committees exercise an investigative function in addition to their judicial role.

### **Legal deficiencies of the administrative committees**

The justification offered for the existence of these committees is twofold: on the one hand, a need for specialized judicial functions for particular areas; on the other, the need to facilitate and expedite the trials of some types of offence. However, these

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<sup>163</sup> - See article 118 and the following articles of the Securities Law enacted by Royal Decree No. 37 of 11.10. 1383.

<sup>164</sup> - Royal Decree No. 11 of 29. 5. 1404 AH (1984)

<sup>165</sup> - Ahmad Belal (1990) p. 867- 869

<sup>166</sup> - The Customs Law was enacted by the Royal Decree No. 425 on 5/3/ 1373 AH (1953)

justifications may not be sufficient to override the problems the committees create.

Six main areas of difficulty can be identified.

First, independence and impartiality of these committees are questionable. Most of these committees have an administrative nature. They are not subject to the Judiciary Statute, which declares the independence of the judiciary. Members of these committees are employees in executive bodies, and their decisions are in many cases subject to ratification of the Minister concerned. This control could affect the impartiality of the tribunal's members.

Second, even though in specific circumstances it is justifiable to give these committees such power to deal with non-serious offences to speed up the administration of justice, many of these committees are eventually empowered to render serious punishments such as imprisonment, heavy fines, seizure and withdrawal of licenses.

A third point in this regard is that the laws that created these committees do not provide clear and sufficient criminal procedures for members of the committees to apply. This deficiency could result in the violation of an individual's rights.

In addition, multiplicity of criminal judicial authorities is considered to be an obstacle to unifying the judicial rulings. Unification of the judicial ruling requires that all judicial institutions be subjected to a single central court which supervises the lower courts in applying and interpreting laws.

Furthermore, most members of these committees have no *Shari'ah* or legal qualifications. One must ask how a person not legally qualified could apply and interpret the law.

Finally, some of these committees are established only in particular cities. A case could be tried by one of these committees if it arises in a city in which the committee concerned is established. However, the same case could be tried in the *Shari'ah* courts if no such committee exists. The *Shari'ah* court will apply the old Islamic jurisprudence while the committee will apply the enacted law. This could create diversity in the judicial rulings.

It must therefore be concluded that these committees are administrative bodies that are incorrectly given considerable judicial power.

### **Reasons for the establishment of administrative committees**

Supporters of the committees claim that they have been established because they provide the best solution for specific needs. They offer three main arguments



Many argue that these committees have been established temporally to cope with new legal matters, be they criminal or civil. They support their claim by invoking many of the government statements confirming the temporary nature<sup>167</sup>.

Another justification for these committees is that a specific committee can deal with new laws more satisfactorily than the ordinary courts since their members specialise in this particular law.

Other scholars argue that the aim of creating these committees was to ease the workload of cases before *Shari'ah* courts<sup>168</sup>.

Nevertheless, these arguments may be questioned.

With regard to the first argument, it may be noted that this does not answer the question. In other words why has such power not been given to the natural judicial authority? In addition, the term "temporary nature" does not clarify how long these committees will last, and if it is temporary what body is proposed as an alternative body. It does not seem that there is any serious attempt to propose an alternative body or any effort to prepare the *Shari'ah* Courts to handle such offences. Rather, every ministry or government agency when preparing new legislations propose their own body and empower it with a judicial role to adjudicate cases arising from the proposed law.

As far as the second argument is concerned, although this argument might be acceptable if the number of these committees were limited, it definitely fails to justify the existence of over 30 committees of which 24 or more deal with criminal cases. Therefore as Al-Jarbou correctly points out "*this argument... does not have any practical support. Issues that are adjudicated by these committees do not demand too much experience and, if so, Shari'ah court judges can be trained to meet such experience*".<sup>169</sup>

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<sup>167</sup> - For example, article 6 of Royal Decree No. 63 of 26. 11. 1407 AH orders the Minister of Commerce and the President of the Board of Grievances to study the status of the current committees in the Ministry of Commerce and to decide to transfer their jurisdiction to the Board of Grievances, and to submit their recommendation to the Council of Ministers. For further discussion in this regard see Ahmad Al-Najar (1997) p.233

<sup>168</sup> - See for example, Ehmadi Al-Najar (1997) p.232, and Soliman A. Solaim, "Saudi Arabia's Judicial System", 25 . The Middle East Journal 403 1971).Pp. 405 and 406.

<sup>169</sup> - Ayoub Al-Jarbou (2002) "*Judicial Review of Administrative Actions: A Comparative Study between the United States and Saudi Arabia*". Unpublished thesis. The University of Virginia. USA . p. 158. hereinafter will refer to as Ayoub Al-Jarbou (2002)

The third argument is refuted by the fact that an increase in the number of *Shari'ah* court judges, if the argument should be upheld, would resolve the problem.<sup>170</sup>

However, closer analysis of the background to the situation reveals that the establishment of the committees may be traced to two altogether different causes. First is that it is in the interest of a particular Ministry, if it is left to its own will, to liberate itself from outside supervision and to grant itself an extensive discretionary power in supervising all its business. The second is the negative attitude of the *Shari'ah* courts towards enacted laws<sup>171</sup>.

As to the first cause, the following facts and points of logic will support my argument: Point one; it may be seen from the above explanation that members of most of these committees were selected from the same Ministry civil servants (employee) and not from the *Shari'ah* Courts judges. Point two; in most of these committees the Minister concerned preserves for himself the ultimate authority to ratify decisions. Most of these committees' decisions are not enforceable unless ratified by the Minister in question. Finally, establishing an independent judicial authority is regarded from the Ministry's point of view as a supervisory authority, which they regard in most cases as undesirable.

This factor in my view is rooted in a fundamental problem in the Saudi Arabian legal system, that is to say the absence of constitutional supervision for the enacting or application of laws. For example the fundamental laws in Saudi Arabia and in particular the Basic Law, which should be regarded in a legal sense as the constitution of Saudi Arabia, explicitly declares the independency of the judicial authority. Article 48 provides "*the judiciary is an independent authority; there is no authority to impose on them, when adjudicating, other than that of the Islamic Shari'ah.*" In practice no one is able to challenge the independency of these committees pursuant to this or other articles. The *Shari'ah* courts or even the Board of Grievances will regard this issue outside their jurisdiction. Another example is that the Basic law confines the

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<sup>170</sup> - Ibid, p. 158

<sup>171</sup> - Abdulmen'am Jecrah (1988) "*Nedam Al-Qadi' Fi Al-Mamlakah Al-Arabiah Al-Sudiah*" The Institute of Public Administration Riyadh. p. 132. Hereinafter will refer to as Abdulmen'am Jecrah (1988). For further discussion and analyses see Ayoup Al-Jarbou in his valuable PhD thesis mentioned above (2002) p. 159. Al-Jarbou states: "*Sharia courts... have declined to apply enacted laws and regulations to cases before them. More importantly, the establishment of these committees has been in some circumstances a response to the Sharia courts' and in recent years to the Board of Grievances' refusal to hear some issues because of their illegality such as issues related to non-Islamic bank activities, insurance contracts, tobacco and musical instruments*"



judicial function to the *Shari'ah* courts and the Board of Grievances.<sup>172</sup> Therefore, the existence of such committees is legally disputable. However, in the event of such dispute objections will not be accepted on the ground that the committees were established according to Royal Decree.

As far as the second cause is concerned, any one who examines the judicial system in Saudi Arabia could not fail to observe the sensitivity in the attitude of *Shari'ah* courts' judges towards the application of man-made laws. This attitude may be seen in more than one instance. In 1990 for instance, the Civil Procedure Statute was enacted. However, owing to the tension from the judges a Royal Order abolished it.

Another example is pointed out by Al-Jarbou as "*because of the sensitivity of having statutory laws, and in order to ease the tension of the traditionalists toward them, the term Nizam (plural Anzimeh, which means regulations) has been used to refer to enacted laws. This is done because the term Qanuwn (law) is very sensitive to the traditionalists, and is used in other legal systems to refer to positive laws (man-made laws)*"<sup>173</sup>. This fact is not only noted by scholars from outside the judicial authority's members but also was subject to criticism from members of the *Shari'ah* court itself. In an interview in a Saudi newspaper<sup>174</sup> the judge Abdulmuhssen Al-Obaikan states that there are attempts from the Ministry of Justice to reorganize and regulate the judicial system by enacting new laws (i.e. the Law of Civil Procedure before *Shari'ah* Courts, the Code of Law Practice and the Law of Criminal Procedure). However, he comments disapprovingly, "the Supreme Judicial Council is the main obstacle to developing the judicial system of Saudi Arabia"<sup>175</sup>.

### **Reasons for the *Shari'ah* courts' attitude towards enacted laws**

Al-Jarbou, trying to account for this negative attitude on the part of traditionalists towards enacted laws during the rule of king Abdulaziz, offers four possible explanations. Although these contain interesting ideas, close critical examination shows them to be only partially valid.

- (a) Ulama (jurists or scholars) had the impression that these laws were incompatible with *Shari'ah* because the Ottoman Empire had borrowed many secular laws in its last era. This idea alone, his argument goes, would

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<sup>172</sup> - Articles 49 & 53 of the Saudi Basic Law

<sup>173</sup> - Ayoub Al-Jarbou ( 2002) p. 34

<sup>174</sup> - Al-Madianh Newspaper. No 14236 dated on 2/2/ 1423 H P. 3

<sup>175</sup> - He was a judge in the General Courts in Riyadh. And now he was appointed as a senior consultant in the Ministry of Justice.

be sufficient for Scholars to deny any law that existed in the *Hijaz* region after the Ottoman Empire. However, one should reveal that ulama (scholars) were under this impression because the Ottoman Empire in its last years had been constrained to adopt Western laws in criminal, commercial and other fields. In fact, these laws contradicted the Islamic law as we mentioned before. Therefore scholars had the right to insist on cancelling these laws, since the legitimacy of the government is based, as we also mentioned earlier, on the application of Islamic law. So this could not be considered as the reason for the current reluctance towards enacted laws that are not incompatible with *Shari'ah*.

- (b) Scholars, he claims, wanted to be more influential in the political decision-making domain. However, this reason is valid with the qualification that the scholars' aim is not personal (individual) interest (benefit) but rather to keep an influential position for the sake of protecting and applying Islamic law.
- (c) The main idea among ulama (scholars) is that God is the sole legislator and accepting man-made law could conflict with this thought. A deep understanding of the nature of Islamic law, however, might refute this argument mentioned by Al-Jarbou. The Islamic state has the right to adopt laws to regulate subjects on which Islamic law is silent or does not speak explicitly, as pointed out previously.
- (d) The rejection of laws in the *Hijaz* region aimed to reconfirm the idea that preserved legal areas exist which are to be governed only by the traditional Islamic *Shari'ah*, that exists in the books of old Islamic jurisprudence. Although this attitude is clearly recognized, that should not be deemed as the main obstacle to applying enacted laws because the same attitude is also found in procedural areas on which Islamic law is silent or provides little. In addition, this attitude is also found with regard to laws that do not contradict Islamic law. The main reasons for the attitude must be found elsewhere.

To find the crucial underlying reasons for the traditionalists' reluctance to accept enacted laws, one must look more deeply into the basic viewpoints and training of *Shari'ah* judges.



Two main reasons explain their attitudes; the first arising from their deep-seated belief that all law must be interpreted from Islamic basic principles, and the second from the parameters within which *Shari'ah* judges are trained

The first reason is that the main idea among Scholars or even laymen in Saudi Arabia is that accepting enacted laws could be a step towards the codification of Islamic law. Codification, it is argued, could end in replacing Islamic law with positive laws since codification makes Islamic laws mere provisions of law which could be subject to an amendment by the legislative authority simply by taking the necessarily legal procedures. They always support their argument by citing the replacements that have occurred in many Islamic or Arab countries.

Even though this argument is logically established, some relevant points may be added. First, the traditionalists' objective is admittedly achieved. The judicial system in general still adheres to Islamic law and applies it in its purist form. This fact is admittedly recognized not only by Saudi citizens but also by foreigners who have been involved in Saudi law's experience. Jeffery K. Walker states that: "*Saudi Arabia is the only major Arab country that still adheres to a more or less unamended form of Shari'ah*"<sup>176</sup>. This is in fact the core and fundamental objective of both governors and citizens in Saudi Arabia<sup>177</sup>.

Second, to draw comparisons between different societies the history of each society must be taken into consideration. Western Governments colonized most of the Arab and Islamic countries that replaced Islamic law by secular laws. This is doubtless an influential factor in such replacements particularly when we know that the presidents during and after the colonized regimes were supported by the colonizing states. The case is different in Saudi Arabia, which did not endure such trials and whose establishment was based on the application of Islamic law, both governors and citizens prefer the application of *Shari'ah*.<sup>178</sup>

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<sup>176</sup> - Jeffrey K. Walker "The Rights of the Accused in Saudi Criminal Procedure". INTNL & Comparative Law JNL 1993 VOL. 15 P. 836. For the same meaning see Parker T. Hart "Application of Hanabalite and Decree Law to Foreigners in Saudi Arabia" George Washington Law Review. 1953 Vol. 22 P. 165. "The Shari'a or sacred law, which is based not only on the Koran, but also on the traditional practices and saying (hadith) of the Prophet Mohammed, is virtually the sole body of law in Saudi Arabia."

<sup>177</sup> -It is common to hear that although there are some deficiencies in different aspect of administration, we (Saudi Arabia) still apply the Law of God, which is more important, and overrides any deficiency.

<sup>178</sup> - Vogel observes that: "in Saudi Arabia Western law and legal conception have not invaded the essential core of the legal system. Saudi Arabia never experienced the Western colonization that in virtually every other Muslim country drastically transformed the legal system." Vogel, Frank Edward (1993) p. 18-19

The third point is as Al-Jarbou precisely puts it “*by refusing to apply statutory laws, the Shari’ah courts have lost a great opportunity to establish a very strong constitutional review of legislative acts.*”<sup>179</sup>

Finally the *Shari’ah* courts’ attitude has led to the eliminating of their jurisdiction from a considerable number of cases which could be tried by either the Board of Grievances or by the Semi-judicial committees that consist of members that have no *Shari’ah* or even legal qualification, as was explained above.

The second reason for refusing to apply the enacted law may be attributed to the fact that judges in *Shari’ah* courts have no legal training other than in Islamic jurisprudence. Their qualification is limited to Islamic law. So if a judge is asked to apply provisions of law without understanding the purposes and objectives of that law, the judge would deem application of this law to be pointless. This reason is recognizable from the difference between judges in the *Shari’ah* courts and judges in the Board of Grievances. In spite of the fact that both are specialists in Islamic law and have studied in one of the Islamic universities, judges in the Board of Grievances have shown willingness to apply enacted laws and some of their decisions are based on legal theories because many of them have been given legal training in the Institute of Public Administration<sup>180</sup>. In other words, modern life in Saudi Arabia has created new activities from which new crimes arise. Out of these activities have emerged new philosophies or interests which require protection by state intervention. The traditional judges do not know the new philosophy and therefore they are not ready to apply the legislation.

To clarify this point the example of new ideas of commerce and business will be given. Modern commerce is based on two principles: (1) trust (2) speed. Creating an attractive atmosphere for investments is undoubtedly in the interest of society. Therefore, the state in Saudi Arabia has enacted laws to protect this interest, among them the Securities (Paper) Statute in which issuing (writing) uncovered checks (false checks) is criminalized and punishable. This act according to the law in Saudi Arabia is illegal despite the agreement between the beneficiary and the writer of the cheque to use the cheque as fiduciary means. This kind of crime is not covered in the old

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<sup>179</sup> - Ayoup Al-Jarbou (2002) p. 70

<sup>180</sup> - Such as doubt in legal cases must be interpreted in favour of the accused. See the presumption of innocence in chapter four of this thesis



Islamic jurisprudence, and in fact this act does not comprise a crime according to the *Qur'an* or the *Sunnah*. However, it is made an offence at the discretion of the state under the terms of *Ta'azir* crimes which tackle new types of offence for the protection of the interest of the state. By this law the state tries to protect the two principles mentioned above. The purpose of this law is that if such an act is tried according to ordinary ideas of (justice) the case will last for longer before the dispute is resolved and could end by acquitting the committer. This extended procedure is incompatible with the two-principles "trust and speed" on which the philosophy is based. Therefore, writing a cheque without due balance is a crime despite the writer's good faith. This philosophy is not known to traditional judges, who therefore regard it as not applicable.<sup>181</sup>

#### **Proposed solution: reconciliation of tradition with innovation?**

Emad Al-Najar<sup>182</sup> suggests that if the existence of these committees continues it is better to enact a single law for all these committees which designate its jurisdiction, formation and procedures and to make all their rulings appealable before the Board of Grievances. Subjecting decisions taken by these committees to an appeal before the Board of Grievances will resolve deficiencies of these committees. Yet an important point to be noted in this regard is that appeal before the Board must be exercised before the Circuit committee in the Board and not before the Scrutinizing (Review) Committee. The reason for that is because the Scrutinizing Committee does not satisfy the requirement of the right to fair trial. The European Court of Human Rights points out that deficiency at one stage can be compensated if the decision concerned made appealable before a tribunal that satisfies the requirement of article 6 of the European Convention.<sup>183</sup>

This suggestion even though could satisfy standards of international human rights law; it does not root out the problem. Discussions provided above indicate that the main cause of this dilemma can be attributed mainly to an ideological cause. Therefore, an alternative solution proposed.

To achieve reconciliation between traditionalist approaches and modern demands, three steps are proposed

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<sup>181</sup> - Another example is that the idea of subjecting administrative decisions to a judicial supervision is not part of their training.

<sup>182</sup> - (1997) p. 239 & 240

<sup>183</sup> - *Bryan v. The United Kingdom* A335-A (1995) para.40; Application No. 00019178/91

The first step towards eliminating the traditionalists' reluctance to apply enacted laws is to ask the Board of senior Ulema (jurists) to study the whole case. The Board should answer the question whether, if enacting laws that are considered to be in the interest of the state contain no provision contradicting the *Shari'ah* law, should they be permitted or forbidden.<sup>184</sup>

Although I am not personally qualified to render a fatwa (legal opinion) in this matter, the following points seem to indicate a positive answer: 1- the flexibility of the Islamic approach to legislation provides the state with discretion to regulate new matters that are not covered in *Shari'ah*. 2- The Ministry of Justice itself has proposed and adopted many laws such as the Law of the Judiciary, the Law of Civil Procedure before *Shari'ah* Courts Law and the Law of Criminal Procedures. 3- Judges in the Board of Grievances even though they have the same qualifications as judges in *Shari'ah* courts accept and apply enacted laws. 4- Some *Shari'ah* court judges strongly call for the adoption and application of new laws.<sup>185</sup>

The second step towards eliminating the traditionalists' reluctance is to agree that all drafted laws must be examined by the Board of Senior Ulema (jurists) before being enacted. However, this study must focus only on whether or not the law in question contains provisions that contradict *Shari'ah* Law. In other words, suitability or properness should be left to the legislative authority.

As a third and final step, the training of judges should be extended to include, legal theories and principles.

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<sup>184</sup> - The aim of this question is to establish a legal ground on which any reformation in this regard will be based.

<sup>185</sup> - See for instance an interview with a previous judge in the *Shari'ah* courts. Sheik Abdul-Muhsin Al-Obaikan. Mentioned above.





the scope of the presumption of innocence is clearer than that of the principles provided by early Islamic jurisprudence, though both may produce similar outcomes. The majority of Muslim scholars<sup>2</sup> argue that Islamic law has the capacity to adopt the presumption of innocence. Scholar Abraham Al-Eshaikh<sup>3</sup>, for example, states that justice requires that an accused should not be punished unless his guilt is proven by a final judgment, since every human being is presumed innocent. He declares that according to Islamic law it is forbidden to punish in the presence of doubt, because doubt should be construed in the interest of the accused<sup>4</sup>. Moreover, the Cairo Declaration of Human Rights in Islam declares in article 19 “ *A defendant is innocent until his guilt is proven in a fair trial in which he shall be given all the guarantees of defence.*”<sup>5</sup>

However, a prominent scholar (*Abdullah Al-monee*)<sup>6</sup> argues against the applicability of Islamic law to the presumption of innocence. The following discussion will first carefully examine his argument, showing its fallacy in his understanding the exact meaning and scope of the presumption of innocence. Secondly, it will consider the application of the presumption of innocence in the judicial system in Saudi Arabia.

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<sup>2</sup> - Examples of this majority are: Al- Salah, O (1985) “The Right of the Individual to Personal Security in Islam” in M. Cherif Bassiouni. *The Islamic Criminal Justice System*. P. 65; Ahmad Adrees Ahmad (1984) P. 9 &10; Abu Musa Al-Ashary (a remarkable judge during the period of the Omer ibn Al Kattab, the Second ruler after the death of the Prophet) states that judge has no right to deliver his judgment unless justice is as clear as the night (darkness), is clear of daylight; Muhammad Mohee Al-Deen Owd (1988). *Huquq Al-Insan Fi Al-Ijra'at Al-Jina'i*. P.3-5; Muhammad Al- Awa (1986) “*Al-Asel Bara't Al- Motahem*” “*Al- Motahem wa Huquqh Fi Al-Shari'ah Al- Islami*” . Essays in Symposium in the Arabic Centre for Security and Training Studies. Riyadh P. 249, 250; - AL-Nadwee, A (2000) “*Gemhurat AL- Goud AL- Fiqheeh Fi AL- Moamlat AL- Maleeh*” Part. 1 p. 243; See also Omer, O (1988) “*Huquq Al-Motahem Fi Al-Shari'ah Al-Islami*” Dissertation of Master submitted to Om Al Kora University in Saudi Arabia p. 22- 34 ; Abdulmajeed Muhmmud Matlob. (1982). *Al-Asel Bara't Al-Motahem*. Essays in symposium in the Arabic Centre for Security and Training Studies. Riyadh p. 232- 233; and Gamil Muhammad Hussein “Basic Guarantees in the Islamic Criminal Justice System”. In Muhammad Abdel Haleem, Adel Omer Sherif, and Kate Daniels (2003). “*Criminal Justice in Islam: Judicial Procedure in the Shari'a*”. I.B. Tauris. London; New York, p, 45

<sup>3</sup> - A previous Minister of justice in Saudi Arabia

<sup>4</sup> - Majelet Al Amen Wa Al he'at (1982). First year P.30

<sup>5</sup> - The Kingdom of Saudi Arabia has joined this Declaration.

<sup>6</sup> - He is the President of the Court of Appeal in the Western Province and a member of the Senior Board of Scholars in Saudi Arabia



**Scholar Abdullah al- Monee's perspective regarding the presumption of innocence<sup>7</sup>:**

In his writing about the presumption of innocence, *Al- Monee*' argues that Islamic law cannot accommodate the idea that the accused must be presumed innocent until the contrary is proven. In order to advance his view he provides two main arguments:

1- His first argument is based on the Arabic definitions of the words "*Ateham*" (i.e. accusation) on the one hand, and "*Bara't*" (i.e. innocence) on the other. He argues that there is a sharp contrast between the two words, which makes their combination impossible. He further explains that "*Ateham*" (accusation) and the "*Bara't*" (innocence) are at the two poles of the same axis. In respect of our consideration there is no distinction in their status, as there is no factual or imagined ground to give preference to one pole over the other. It is the circumstances surrounding the accused or the crime that cause one of the two poles to outbalance the other. Now, he continues to argue, if there are no circumstances supporting the charge against a particular person, this person cannot be called an accused and thus he cannot be arrested, detained etc. But, if circumstances support the criminal charge against a particular person, this person is then an accused and therefore he is not innocent because the accusation creates in our mind a status that contradicts innocence. An accusation in itself is a matter which has substance in the human mind. Therefore, the Arabic expression "*Al- Asel Bara't Al- Motahem*" (which is used to mean the presumption of innocence), is inconsistent with the meaning of the Arabic word "*Ateham*".

2- On the basis of the above analysis, scholar *Al- Monee*' states that the application of the presumption of innocence leads to the situation that, even where the circumstantial evidence clearly supports the prosecution against the accused, pursuant to the presumption of innocence the authority concerned is not allowed to take any investigative actions, such as an arrest or detention, against this accused. Under the jurisdictions of the positive law, he explains, if the accused is arrested on being charged with committing the offence of murder or robbery, for example, and even if the accusation against him is supported by circumstances surrounding the case, the presumption of innocence functions as an obstacle to the proper administration of

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<sup>7</sup> - Abdullah Al- Monee' (1999) Baheth Fi Qa'dat Al-Motahem Bre'a Hata Tathbot Edantoh. in "*Majmo' Fattawa Wa Bohooth*" Volume No 4 Dar Al- Aseemah Le- Ancher Wa Al Tozeeh. Riyadh. Saudi Arabia. P 389- 411

justice. This is because, as he claims, according to this principle, the accused cannot be subjected to the investigation procedures unless conclusive evidence to prove the crime exists.

On contrast the Islamic judiciary, he points out, cannot exclude from its consideration those circumstances and inferences that support the accusation. Therefore, the Islamic judiciary does not guarantee absolute innocence for a person unless the accusation against him is not supported by circumstances.

However, a closer investigation of the above view reveals its fallacy:

In respect of the first argument, regardless of the correctness of the claim that the word "*Ateham*" is inconsistent with the word "*Bara't*" and therefore their combination is impossible, Arabic semantics are of no significance. The principle of the presumption of innocence appeared initially in non-Arabic societies and was then translated into Arabic. What is important here is the legal meaning and consequences. In fact, the ambiguity regarding the Arabic meaning of presumption of innocence is, perhaps, caused by some writers who translate the principle into the Arabic term "*Al-Asel Bara't Al-Motahem*". The latter expression consists of three words. The word "*Al-Asel*" means "the original status", the word "*Bara't*" means "innocence", and the third word is "*Al-Motahem*" which means "the accused". The combination of these three words thus translates into English, as "the original status of the accused is innocence". This translation lacks precision because the opposite of innocence is guilt, not accusation. Accusation in reality is a status between guilt and innocence. Therefore, the correct translation into Arabic is "*Aftrad Bara't Al-Motahem*". The word "*Aftrad*" means presumption. This translation gives the correct meaning of the principle. It alludes to the fact that due to the circumstances surrounding the accused and the crime, he is not in absolute innocence. But despite all that, in order to achieve the required impartiality, the authority concerned, while treating the accused, must presume his innocence and not his guilt.

With regard to the second argument, scholar *Al-Monee'* refers to man-made laws, but he does not mention a particular law. It seems that he assumes that all positive laws apply the principle in a unified manner and thus he speaks of the general meaning of the presumption of innocence. Generally speaking, his understanding of the scope and consequences of the presumption of innocence is completely misleading. The presumption of innocence does not prevent the state concerned from exercising its



power to investigate the crime and subjecting the accused to the investigation procedures such as arrest, detention, interrogation etc. Moreover, the application of the presumption of innocence does not exclude the use of circumstantial evidence. The standard of evidence is a matter left to every individual state. Precisely, the presumption of innocence as declared by the European Court of Human Rights, requires that: “*when carrying out their duties, the members of the court should not start with the preconceived idea that the accused has committed the offence charged; the burden of proof is on the prosecution and any doubt should benefit the accused. It also follows that it is for the prosecution to inform the accused of the case that will be made against him, so that he may prepare and present his defence accordingly, and to adduce evidence sufficient to convict him*”.<sup>8</sup>

In short, the presumption of innocence requires mainly three guarantees: (1) judges should not start their consideration with the preconceived idea that the accused is guilty; (2) the burden of proof must lie with the state, and (3) any doubt concerning the evidence has to be interpreted in favour of the accused.

A third point that could be addressed here to challenge Scholar *al – Monee’s* view is that Islamic law is not only capable of adopting the presumption of innocence, but also it provides principles that have the same meaning and consequences as the presumption of innocence. There are three relevant principles which will be explained in the following, but one should mention, *inter alia*, that the application of these principles is not restricted within the criminal field only, but extends to a wider scope. Islamic law applies these principles to all branches of law.<sup>9</sup> However, our discussion here regarding these principles will be limited to criminal matters.

(1) “*Al- Asel Bara’t Al-deamah*”<sup>10</sup> this principle consists of three Arabic words; the first is “*Al- Asel*” which means the original status; and the two words “*Bara’t*” and “*Al-deamah*” together mean acquittance (quit- claim)<sup>11</sup>. The combination of these words translates into English as “the original status (of a person) is acquittance”. The

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<sup>8</sup> - *Barbera, Messegue and Jabardo v Spain* (1988) 11 E.H.R.R.360

<sup>9</sup> - Muhammad Al Moheedeef (1993) “*Darah Al- Uqubat bee Alshobehat*” Part 1 p. 87. hereinafter will refer to as Muhammad Al Moheedeef (1993)

<sup>10</sup> - AL-Nadwee, A (2000). *Gemhurat AL- Goud AL- Fiqheeh Fi AL- Moamlat AL- Maleeh*. Part. 1 P. 242. Sharkat Al- Rajhee Al- Masrefeah LL- Istethmar. (Al-Raghee Firm for Banking Investment). See also Mohammad Hashim Kamli “*The Right to Personal Safety (Huq-Amn) and the Principle of Legality in Islamic Shari’a*”. In Muhammad Abdel Haleem, Adel Omer Sherif, and Kate Daniels (2003). “*Criminal Justice in Islam: Judicial Procedure in the Shari’a*”. I.B. Tauris. London; New York, p, 65

<sup>11</sup> -Rohi Baalabki (2001) “*Al- Mawrid*” A modern Arabic –English Dictionary. Dar El- Ilm Lilmalayin.P. 230.



starting point of this principle is that every person is born free (innocent) of guilt. The Prophet said: *“every child is born free of sins until his own tongue expresses for him”*. This is, simply, the meaning of the term “the original status is acquittance”.

This principle is linked with the principle of *“Astashab Al-Bara’i”* which means in this context the presumption of continuity of the original “acquittance”. After being born innocent, and while growing up, a person must be presumed innocent until the contrary is proven. In the criminal field these two principles simply mean that the accused must be presumed innocent until guilt is proved.<sup>12</sup>

(2) *“Al- Yageen La Yazol Bi Ashak”*. This principle consists of five words: *“Al- Yageen”* which means certainty; *La* which means “is not”; *Yazol* which means “exclude”; *Bi* means “by”; and finally, *Ashak* which means “doubt”. In combination of their meaning, in English, is “Certainty is not excluded by doubt”. The principle means that any matter that is originally proved with certainty should not be overridden or excluded by doubt, but only through a similar certainty<sup>13</sup>. If this principle is linked to the two principles mentioned above one can argue that the fact that a person is born innocent (original innocence) is certainty. This certainty about original innocence cannot be excluded (invalidated) by doubt. Thus, evidence to prove the guilt must be sufficient, and any doubt regarding the evidence must benefit the accused, because his original innocence is certainly established.

(3) *“Al- Bayyina Ala Al – Moda’ee”* this principle consists of three words. The word *“Al- Bayyina”* means “evidence”; *“Ala”* means “lie” or “bear”; and *“Al- Moda’ee”* means “the plaintiff or the prosecution”. This may be rendered in English as “the burden of evidence lies with the plaintiff”. The legal source for this principle is that, the Prophet said: *were people (to) be given what they claim (without proving their claim) some would have claimed the lives and properties of others but the oath is required from the defendant and the evidence from the claimant.”*<sup>14</sup> In a criminal context, this principle means that the prosecution must adduce the evidence.

Strictly speaking, Islamic law requires (a) the accused is originally innocent, (b) his innocence must be presumed till guilt is proved, (c) his guilt is only proved by conclusive evidence and any doubt will be interpreted in the accused’s interest, and (d) the burden of proof is on the prosecution. Obviously, this requirement is consistent

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<sup>12</sup> - Muhammad Al Moheedeef (1993) p. 88

<sup>13</sup> - Muhammad Mohee Al-Deen Owd (1989). P3-5

<sup>14</sup> - Al- Bukhari (4552) & Muslim (1711).



with international human rights requirements in respect of the presumption of innocence.

Finally, it is very difficult to repair any damage caused by miscarriage of justice, which eventually could affect confidence in the judicial system. Therefore, to avoid such damage the investigation and the judicial authorities should presume while dealing with the accused that they are dealing with an innocent person<sup>15</sup>. In addition, the presumption of innocence is required in all aspects of life because if the innocence of the accused is not assumed, he will be required to prove a passive position and without the presumption of innocence the accused faces the onerous if not impossible burden of proving he did not commit the crime<sup>16</sup>.

### **The application of the presumption of innocence in the judicial system in Saudi Arabia**

In order to examine whether the judicial system in Saudi Arabia has understood and applied the presumption of innocence in a manner consistent with international human rights standards, in particular that provided by the European Court of Human Rights, a selection of judgments will be discussed. It is worth mentioning, however, that although it has been pointed out in the introduction of this thesis that the study will be limited to the main bodies of the judicial system in Saudi Arabia and thus that the administrative committees are excluded, a number of judgments delivered by the Customs Committee are referred to here, because the presumption of innocence is often a problematic issue in respect of cases tried before the Customs Committee.

It is obvious from the European Court's approach that the most important requirements of applying the presumption of innocence in the trial stage are that the burden of proof lies with the prosecution, and that any doubt should benefit the accused.

With regard to the first point, namely that the burden of proof lies with the state, the judicial system in Saudi Arabia requires that judgments should only be based on certainty and cannot be based on doubt. So the prosecutor, in order to have the accused convicted, must adduce sufficient evidence.

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<sup>15</sup> - Muhmmud Mustafa (1977) "*Al- Ithbat Fi Al- Mawad Al- Jina'i Fi Al- Qanoon Al- Mogarn*" p. 56. Cairo University Press .Hereinafter will refer to as Muhmmud Mustafa (1977).

<sup>16</sup> - Al-Salah, O (1985) "*The Right of the Individual to Personal Security in Islam*" The Islamic Criminal Justice System. P.66

For example, the Board of Grievances held *“since there is no other evidence except the testimony of the other accused which is insufficient to prove guilt, and because judgment must be based on certainty and decisiveness and cannot be based on doubt, the accused is not guilty”*<sup>17</sup>. On a different occasion the Board also ruled, *“ despite the suspicion surrounding the accused’s action it cannot be determined that the accused has committed the crime of promoting counterfeiting, because judgment should only be based on certainty and decisiveness and cannot be based on doubt”*<sup>18</sup>.

In another case the accused was charged with forgery. The prosecution supported its accusation with the following evidence: (a) two of the accused’s close relatives testified against him; (b) a forensic report confirmed that the handwriting on the license concerned was identical to the accused’s handwriting. The Board, however, held *“hearsay evidence cannot be used as evidence because the witness has not heard the testimony from the accused directly. In addition, conviction cannot be solely based on the criminal (expert) report because this report is also subject to the probability of right and wrong. Despite the suspicion which strongly surrounds the accused, the accusation has no conclusive evidence. Therefore, the accused is not convicted”*<sup>19</sup>.

Furthermore, the Board’s decision no H/1/1(1421 H) declares that a multiplicity of possibilities and lack of definite evidence supporting them make the evidence presented by the accused in his defence an outstanding possibility, against which it will be impossible to confirm validity of the charge. Accordingly, evidence presented to the effect that the accused had perpetrated the forgery is not sufficient.

Similarly, the Customs Committee has reiterated on a number of occasions *“In criminal cases conviction must be based on certainty and cannot be based on doubt or conjecture.”*<sup>20</sup>

In respect of the second requirement, namely that any doubt regarding the evidence is interpreted in favour of the accused, The Board of Grievances pointed out: *“Criminal intent is one of the bases of the crime of forgery and the circumstances surrounding the crime create doubt regarding the existence of criminal intent. This doubt must be interpreted in favour of the accused. Therefore, the accused is innocent”*<sup>21</sup>.

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<sup>17</sup> - Decision No. 142/ D G / 2 (1421 H)

<sup>18</sup> - Decision No. 18/D/G/3 (1421 H)

<sup>19</sup> - Decision No. 155/ D G/ 2 (1421 H)

<sup>20</sup> - Decision No. (67) (1415 H); & Decision No. (20) (1416 H)

<sup>21</sup> - Decision No. 162/ D/ G (1422 H)



In another case a dentist in a private clinic was charged with a forgery, after a complaint from a patient, because he signed a document and sent it to an insurance company on behalf of the patient without permission. In his defence the accused claimed that he had acted in the interest of the patient to speed up the treatment process. He added that if he had had ill- intention he could have concealed the document in question so that the patient had no access to it. In its judgment the Board declared, *“To be established, the crime of forgery requires a criminal intent. That is to say, while committing the act the accused is aware that he is changing the facts. Moreover, claims adduced by the accused in his counter defence are considered as outstanding probabilities that repudiate the existence of the criminal intent. Because the evidence is insufficient and since conviction should only be based on certainty and decisiveness, doubt is construed in favour of the accused. The accused is then not guilty.”*<sup>22</sup>

To the same effect the Customs Committee has reiterated, *“Where it is not proved with certainty that the accused has committed the crime of customs smuggling this should benefit the accused according to the general principle in criminal cases, that is to say doubt should be interpreted in favour of the accused. Therefore, the accused is not guilty.”*<sup>23</sup>

Nevertheless, since some types of offence such as smuggling drugs involve a high social risk, or because this type of crime creates difficulty in respect of proving the case against the accused, the onus of proof is exceptionally shifted from the prosecution to the accused. This exception is grounded on the principle of proportionality, which means that a balance needs to be struck between the interest of the accused in protecting his rights on the one hand, and on the other the interest of society at large in protecting its members from the danger of certain sorts of crime. Applying the presumption of innocence in smuggling offences, for instance, will result in making proof against the accused impossible. If a person receives cargo from abroad and the custom authority discovers that this cargo contains illegal goods, in this case the person will claim that he did not know about the cargo even if it has been sent under his name, or he may claim that he was expecting legal goods and did not know about the forbidden goods.

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<sup>22</sup> - Decision No. 169/ D / G/ 1 (1422 H)

<sup>23</sup> - Decision No. (2) (1410 H)

In these cases usually the only means of proof is the search minutes. These cannot be regarded in themselves as conclusive evidence. However, in view of the nature of this kind of crime the Committee may base its judgment on this evidence, though it is not conclusive, if the accused fails to adduce counter evidence refuting the credibility of the minutes or supporting his claim. In this case the burden of proof is shifted from the prosecution, and the accused has to prove that the cargo in question does not belong to him or to prove that he did not know about the illegal goods, or at least to raise a reasonable doubt regarding these two points. The Committee then weighs the evidence presented by the two parties (the prosecution and the accused) and decides on this basis. Such an approach is justified in such cases because this is the only means of proving violation of the Customs law, and more importantly this approach can be compared with the understanding provided by the European Court of Human Rights in respect of the presumption of innocence.<sup>24</sup>

However, a very significant matter in this regard is the standard of burden that the accused shall bear in order to challenge the accusation. In fact, from a number of decisions from the Customs Committee it can be seen that in balancing the evidence the element of doubt tends to weigh in favour of the accused. For example, when a private firm was charged with smuggling a container of alcohol<sup>25</sup>, the Committee ruled, *“since the cargo in question was landed at Jeddah seaport and remained for a long time and the firm concerned has not applied to get it permitted; and because this firm did not produce the importation list, thereby making its claim that it did not know about this cargo a plausible claim; and because judgment in criminal matters should be based only on certainty and cannot be based on doubt. Therefore the Committee is obliged to construe the doubt to the accused’s benefit.”*<sup>26</sup>

In another case a person was charged with smuggling counterfeit money in Riyadh Airport. In his defence the accused claimed that he did not know that the money was counterfeit.

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<sup>24</sup> - *Salabiaku v France* (1988) Para 28 (Application No. 00010519/83)

<sup>25</sup> - Alcohol is forbidden in Saudi Arabia.

<sup>26</sup> - Decision No. (9) (1414 H)



The Committee concluded that since the accused did not use illegal means to smuggle this money and did not conceal it but rather let it be clearly seen, and because doubt must be construed in favour of the accused, the guilt is not proven<sup>27</sup>.

However, these applications lack a legal tool by which members of the responsible body can evaluate whether the required proof of the accused breaches his right to be presumed innocent. Without a proper legal tool, assessment of the accused's counter-evidence may not be based on objective premises, and the outcome of the assessment may vary according to who undertakes it. To fill this gap it might be suggested that a tool that is applied by the English judicial system to resolve this problem be used. As we mentioned before, English courts make a distinction between two kinds of burden. The first is the law or persuasive burden, and the second is the evidential burden. The former requires the accused to prove, on a balance of probabilities, a fact that is essential to the determination of his guilt or innocence. It reverses the burden of proof by removing it from the prosecution and transferring it to the accused. But the latter entails the burden upon the accused of introducing evidence in support of his case. It requires only that the accused adduces sufficient evidence to raise an issue before it has to be determined as one of the fact in the case. Since the prosecution does not need to bring any evidence on this point, the accused must do so if he wishes the point to be made. Nonetheless, and this perhaps more importantly, if the point is made, the burden of proof remains with the prosecution. The accused need only raise a reasonable doubt as to his guilt.<sup>28</sup> David M. Tanovich explains the difference between the legal and evidential burdens as that "*a persuasive or legal burden requires the accused to convince the trier of fact that a certain set of facts existed in order to discharge the burden. A failure to establish or disprove a set of facts, on a balance of probabilities, means that the accused will be convicted even though the trier of fact may have a reasonable doubt. ...unlike the persuasive burden, an evidential burden does not require the accused to convince the trier of fact of anything. However, evidential burdens when accompanied by a mandatory presumption resemble a reverse onus clause as they mandate a finding if the accused fails to discharge the burden... to discharge an evidential burden, an accused need*

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<sup>27</sup> - Decision No. (74) 1415 H)

<sup>28</sup> - See the case of *R v DPP, p Kebeline*. [1999] 4 All ER 801-859; & the case of *R v Lambert* [2001] 3 All ER 577-644





- (a) A failure to achieve rules at all, as a result of which each case must be judged individually.
- (b) A failure to promulgate the rules.
- (c) A failure to apply the rules prospectively.
- (d) A failure to state the rules with sufficient clarity.
- (e) A failure to enact consistent rules.
- (f) A failure to make the rules accessible to the affected party.
- (g) A failure to avoid instability of rules by introducing frequent changes.
- (h) A failure to apply the declared rules.<sup>31</sup>

These aspects provide eight standards by which the achievement of “legality” is tested. Fuller thus stipulates that legality requires the rules to be perfectly clear, consistent with one another, known to every citizen, and non-retroactive.<sup>32</sup> However, he correctly reveals an important point in this matter. That is to say, it is never possible to achieve ultimate certainty with regard to what the law prohibits. Fuller comments: *“whether we are concerned with legal or moral duties, we are able to develop standards which designate with some precision - though it is never complete - the kind of conduct that is to be avoided”*.<sup>33</sup>

In this sense the term “legality” is used to mean the rule of law as defined by F.A. Hayek in these terms: *“stripped of all technicalities this means that government in all its actions is bound by rules fixed and announced beforehand- rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances, and to plan one’s individual affairs on the basis of this knowledge”*.<sup>34</sup>

Moreover, Joseph Raz believes that although the principle that the making of particular laws should be guided by open and relatively stable general rules is the crucial principle of the rule of law, it does not exhaust the scope of the rule of law. Thus, he states that the rule of law means, *“The law must be capable of guiding the behavior of its subjects. It is evident that this conception of the rule of law is a formal one. It says nothing about how law is to be made: by tyrants, democratic majorities*

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<sup>31</sup> - Fuller, L (1969) *“The Morality of Law”*. New Haven and London, Yale University Press. p. 39. Hereinafter will refer to as Fuller (1969)

<sup>32</sup> - Ibid, p. 41

<sup>33</sup> - Ibid, p. 42

<sup>34</sup> - Hayek, F *“The Road to Serfdom”*, (1944) p. 54. Quoted in Raz, J *“The Rule of Law and its Virtue”*. The Law Quarterly Review Volume 93. 1977 London, Steven & Sons Limited. P.195

or any other way. It says nothing about fundamental rights, about equality or justice".<sup>35</sup>

He further explains that the rule of law has three valuable aspects. Firstly, the rule of law is in most circumstances incompatible with arbitrary authority. Consistent with this doctrine is the implication that changing the law retroactively or abruptly or secretly is prohibited. Raz insists "*the one area where the rule of law excludes all forms of arbitrary power is in the law-applying function of the judiciary where the courts are required to be subject only to the law and to conform to fairly strict procedures*". Secondly, it is a virtue of the rule of law that it protects personal freedom. Thirdly, the application of the rule of law is a fundamental guarantee of respect for human dignity, inasmuch as, as Raz correctly states, "*respecting human dignity entails treating humans as persons capable of planning and plotting their future*".<sup>36</sup>

Thus, discussion must now focus on the second meaning of the term. That is to say, the principle of legality in the criminal sphere.

The principle of legality in the criminal sphere, historically speaking, was first mentioned in the French Declaration of the Rights of Man, 1789<sup>37</sup>. Although in this sense the principle of legality might be considered as "a legal transplant" to the common law from the recent civilian codes of the post-revolutionary period, it has deep roots in common law. According to the Assize of Clarendon in 1166 only those offences included in the original list of felonies could be regarded as indictable crimes. Through the ages the list was extended by adding other conducts to meet the exigencies of the day. The legality principle from the late medieval until the early modern time can be recognized in the growing specificity of indictments. The content of the principle of legality today is also seen where an accused contests an indictment on the ground that the offence is unknown.<sup>38</sup>

In Latin, the principle of legality in criminal law is termed "*Nullum crimen sine lege, nulla poena sine lege*" which means, "*There must be no crime nor punishment except*

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<sup>35</sup> - Raz, J "*The Rule of Law and its Virtue*". The Law Quarterly Review Volume 93. 1977 London, Steven & Sons Limited. P 199

<sup>36</sup> - Ibid, p 202 & 204

<sup>37</sup> - Although the principle had been mentioned earlier by some legal writers, the French Declaration is considered as its first important formulation. See Williams, G (1961) "*Criminal Law*". London. Stevens & Sons Limited P.576. hereinafter will refer to as Williams, G (1961)

<sup>38</sup> - McAuley, F and McCutcheon, J (2000) "*Criminal Liability: A Grammar*". Round Hall Sweet & Maxwell. Dublin p. 43. hereinafter will refer to as McAuley, and McCutcheon, (2000)



*in accordance with fixed predetermined law*<sup>39</sup>. It is also defined as: *“the idea that conduct should not be punished as criminal unless it has been clearly and precisely prohibited by the terms of a preexisting rule of law”*<sup>40</sup>.

This meaning of the principle of legality is often used in England under the terms of rule of law.<sup>41</sup> A.V. Dicey in his comments on de Tocqueville’s writings, which compared Switzerland and England in 1836 in terms of the spirit pervading their laws and manners, states that in common law what we mean by the term “rule of law” includes three distinct concepts:

(1) The principle of legality: the rule of law means that no person is punishable except for a clear infringement of law established in the ordinary legal manner before the ordinary courts. In this sense, he explains, the rule of law is in conflict with exercises of arbitrary discretion on the part of the government; because wherever there is discretion there is room for arbitrariness.

(2) Equal treatment: the rule of law means that every person whatever his social status is subject to the ordinary law and tribunal.

(3) Law developed by courts and not imposed centrally: here the rule of law means that the source for the general principles of the constitution in common law is the courts’ decisions (the English Constitution is unwritten Constitution), while in other countries the source is the general principle of the constitution.<sup>42</sup>

However, it should not be suggested that the conception of legality in common law was similar to the modern concept. Judges developed common law, and until the eighteenth century the court could punish wrongdoers for conduct that did not conform precisely to the definition of a recognized crime. This practice was applied until legislation became the primary source of law.<sup>43</sup>

The modern formula of the principle of legality requires that legislative rules must be clear and precise to eliminate effectively the need for creative interpretation by the courts<sup>44</sup>. The court should not be empowered to punish on the ground that the conduct conflicts, in its opinion, with moral or social values.<sup>45</sup> Accordingly, Glanville

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<sup>39</sup> - Williams, G (1961) p. 575

<sup>40</sup> - McAuley and McCutcheon, (2000) p. 42

<sup>41</sup> - Ashworth, A (1999) *“Principles of Criminal Law”*. Oxford University Press. p. 70. hereinafter will refer to as Ashworth, A (1999)

<sup>42</sup> - A.V Dicey (1959) *“An Introduction to the Study of the Law of the Constitution”*. The Macmillan Press Ltd. London and Basingstoke. P. 188 & 196.

<sup>43</sup> - McAuley and McCutcheon, J (2000) p. 43 & 44

<sup>44</sup> - Ibid, p. 45

<sup>45</sup> - Fitzgerald, P (1962) *“Criminal Law and Punishment”*. Oxford at the Clarendon Press. P. 169

Williams precisely describes the purpose of the principle of legality as: *“the citizen must be able to ascertain beforehand how he stands with regard to criminal law, otherwise to punish him for breach of that law is purposeless cruelty. Punishment in all its forms is a loss of rights or advantage consequent on a breach of law. When it loses this quality it degenerates into an arbitrary act of violence that can produce nothing but bad social effects. Opinions about what people ought morally to do are almost as numerous as human beings, but opinions about what people are obliged legally to do should be capable of being ascertained by legal research.”*<sup>46</sup>

The importance of this principle arises from the fact that individuals should know the law before it can be fair to convict them of an offence, and both the judicial and legislative authorities must exercise their function consistent with rule of law by not criminalizing behavior that was not illegal when committed.<sup>47</sup>

As far as The European Convention on Human Rights is concerned, it does not mention directly the term “legality”. Article 7 as we have stated in chapter two is primarily concerned with the principle of non-retroactivity in the criminal sphere<sup>48</sup>. However, the European Court of Human Rights has interpreted this article as to embody the principle of legality. The Court held that: *“Article 7 Para 1 of the Convention is not confined to prohibiting the retrospective application of the criminal law to an accused’s disadvantage. It also embodies, more generally, the principle that only the law can define a crime and prescribe a penalty... and the principle that the criminal law must not be extensively construed to an accused’s detriment for instance by analogy, it follows from this that an offence must be clearly defined in law. This condition is satisfied where the individual can know, from the wording of the relevant provision and, if need be, with the assistance of (the) court’s interpretation of it, what acts and omissions will make him liable.”*<sup>49</sup>

#### **Components of the principle of legality:**

The principle of legality embodies four components: (1) the criminal law should not be applied retroactively; (2) the criminal law should be formulated to maximum

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<sup>46</sup> - Williams, G (1961) p. 575 & 576

<sup>47</sup> - Ashworth, A (1999) p. 70

<sup>48</sup> - Article 7 provides: “1- 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 the criminal offence was committed. 2- this article shall not prejudice the trial and punishment of any person of any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by civilized nations”.

<sup>49</sup> - *Kokkinakis v Greece* (1993) Para 52 (Application No. 00014307/88)



certainty; (3) it should be strictly interpreted<sup>50</sup>; (4) the criminal law must be accessible.

**(1) Non-retroactivity:**

Since the non-retroactivity principle was discussed in chapter two, it is enough to remember that article 7 of the European Convention on Human Rights implies two principles: (a) the law must have existed before the act or omission in question was committed for the conviction to be based on it; (b) no heavier penalty will be imposed than was in force at the time the conduct was committed.

**(2) Maximum certainty of criminal law:**

It is argued that the law and in particular the criminal law must be certain, to the extent that: *“a man should be able to know (in advance) what conduct is and what is not criminal. Particularly when heavy penalties are involved”*. This argument goes on to state that *“unless we are certain about the criminal law one cannot tell what is criminal except by guessing what view a jury will take, and juries’ views may vary and change with passing of time”*.<sup>51</sup>

The importance of the principle of maximum certainty arises from two points. On the one hand, treating a citizen as a rational, autonomous person entails that criminal law must be precise and clear. This condition is only achieved, as Andrew Ashworth correctly suggests, if the criminal provisions *“keep close to moral distinctions that are both theoretically defensible and widely felt”*.<sup>52</sup> On the other hand, drafting vague rules might lead to empowering an executive body with undesirably wide discretion to criminalize conducts not criminalized beforehand by the legislative authority.<sup>53</sup>

The principle of maximum certainty is known in America as the “fair warning” and “void for vagueness”. There is a close connection between the principle of maximum certainty and the principle of non- retroactivity in criminal law because an unclear statute is more likely to be applied retroactively if individuals are less sure whether a given conduct is lawful or not. An important feature of the American law is that courts in the United States have the power to declare the unconstitutionality of criminal legislation if it is vague, while the English courts are empowered to declare that the legislation at hand is incompatible with the Human Rights Act but not to

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<sup>50</sup> - McAuley and McCutcheon (2000) p. 45

<sup>51</sup> - *Shaw v D.P.P.* (Director of Public Prosecutions) The Law Reports (1962) 220-294

<sup>52</sup> - Ashworth, A (1999) p. 77

<sup>53</sup> - *Ibid*, p. 77

amend the law. The European Court of Human Rights has not yet made an application to abolish a vague statute.

Yet the scope of the precision or certainty is a matter of degree. Two issues should be examined in this regard. First, whether an existing rule is deemed to be not vague if its terms can justify the punishment of a person who has failed to conform to it. In other words, whether the uncertainty or imprecision of a rule prevents the accused from being given a fair chance to adjust his behavior accordingly.<sup>54</sup> Second, whether applying the existing rules to a new offence by analogy conflicts with the second component of the principle of legality, namely that criminal law should be clear and precise. The discussion necessary to address these two issues will focus on the standard of certainty required by the European Court of Human Rights and the English law.

With regard to the first point, the application of maximum certainty is not absolute. In theory the rule of law requires complete certainty. But as Andrew Ashworth points out *“this is rarely possible in view of the varying elements which may bear on the characterization of conduct as criminal. Unless the criminal law occasionally resorts to such open-ended terms as “reasonable” and “dishonest”, it would have to rely on immensely detailed and lengthy definitions which might be extremely complicated and which might still fail to cover the ground.”*<sup>55</sup>

It might be argued that codification of the criminal law is a suitable means to meet the terms of maximum certainty. This argument can be advanced on two grounds. Firstly, codification provides clear definitions for the major offences in a single accessible document. This serves as a fair warning to the citizen. Secondly, codification would weaken the courts' power to create new forms of crimes or to extend existing crimes significantly. This claim is however not persuasive: Ashworth correctly rejects it when he states: *“changes of this kind are not inherent in all codification exercises. In practice a great deal would depend on the approach of the judiciary to the priorities with which the code is drafted. If the code still contains wide or vaguely-worded crimes ... that is hardly a great improvement in certainty”.*<sup>56</sup>

With regard to the standard of certainty required by the European Convention on Human Rights, the Court declared that Article 7 requires that no person can be

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<sup>54</sup> - McAuley and McCutcheon, J (2000) p. 46

<sup>55</sup> - Ashworth, A (1999) p.78

<sup>56</sup> - Ashworth, A (1999) p.77



convicted if he could not have known beforehand that such an act was criminal. However, the Court has noted that the wording of many statutes is sometimes imprecise. The need to avoid excessive rigidity and keep pace with changing circumstances means that some legislation is inevitably couched in terms which, to a greater or lesser extent, are vague.<sup>57</sup> The Court also held that: “*an offence must be clearly defined in law. This condition is satisfied where the individual can know, from the wording of the relevant provision and, if need be, with the assistance of (the) court’s interpretation of it, what acts and omissions will make him liable.*”<sup>58</sup>

Moreover, and more interestingly, the standard of certainty was applied flexibly in *Steel v. UK*<sup>59</sup> when the Court used the word “reasonable” to describe the required level of certainty. In this case the Court held that the offence meets the standard of certainty if it is: “*sufficiently precise to allow the citizen- if need be, with appropriate advice- to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.*”

As far as the English law is concerned, even though the claim that the principle of legality can be fully applied in statutory laws is, at least in theory, relatively persuasive, the claim of complete application of the principle in case law systems is not persuasive, either in theory or in practice. P. J. Fitzgerald states that despite the fact that many countries have adopted the legality principle, it has not yet been accepted in England as a rule of law<sup>60</sup>. He offers two reasons for this:

First: the fact that the criminal rules in common law are judge-made laws, and that judgments are often retroactive in that the verdict relates back to the facts and circumstances that led to the hearings. This fact, his argument goes, cannot be concealed by the claim that the courts do not create rules but merely apply the existing law to new facts, because any judicial extension of the criminal law will lead to punishing someone for an act which could not before the final judgment of the case have been known to be criminal.<sup>61</sup>

Second: Fitzgerald argues that English Parliament has absolute sovereignty. It is under no restriction, save the procedural requirement, to make what law it likes. Therefore, any law can easily be repealed. As a result, he argues, “*any statutory*

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<sup>57</sup> - *Kokkinakis v. Greece* (1993) Para 40 (Application No. 00014307/88)

<sup>58</sup> - *Kokkinakis v. Greece* (1993) Para 52 (Application No. 00014307/88)

<sup>59</sup> - (1998) EHRR 603

<sup>60</sup> - For example, France, Germany, Belgium, Portugal, Italy, Brazil, Chile, Colombia, Uruguay and the U.S.A.

<sup>61</sup> - Fitzgerald, P (1962) “*Criminal Law and Punishment*”. Oxford at the Clarendon Press p. 170 &171.



*formulation of the rule against retroactive legislation would have no particular legal force*".<sup>62</sup>

A famous example of this certainty in English law is the *Shaw* case<sup>63</sup>. In this case it was contended that a conspiracy to corrupt public morals is not a crime known to the common law. Parliament in the last 100 years had concerned itself with legislation on issues of morality, decency, and the like; ruling that such legislation must be taken to be in effect a comprehension code; and that there is no longer any occasion for the court to create new offences in its capacity as *custos morum*. This claim, nevertheless, was challenged on the following grounds:

(1) That a conspiracy to corrupt public morals was a common law misdemeanour. (2) That courts of criminal law are still empowered to "enforce the supreme and fundamental purposes of law to conserve not only the safety and order but also the moral welfare of the state..." (3) That the attitude towards some acts will not be regarded in all times in the same way. What was prohibited in the past can be made legal in the present and vice versa. Although Parliament has enacted legislations to cover most offences, gaps remain and will always remain because it is impossible to foresee all kinds of conduct that disrupt the order of society. (4) That certainty is a most desirable attribute of both criminal and civil law. However, there are matters which must ultimately depend on the opinion of a jury. So in the case of a charge of conspiracy to corrupt public morals the uncertainty that necessarily arises from the vagueness of general words can only be resolved by the opinion of twelve persons. Accordingly, the House of Lords ruled<sup>64</sup> that "*there was in the courts as custodes morum of the people a residual power, where no statutes had yet intervened to supersede the common law, to superintend those offences which were prejudicial to public welfare.*"

In addition, it is argued in *Knulier v. D.P.P* that: "*it was suggested and it has been suggested that there is an element of uncertainty which attaches to the offence of conspiracy to corrupt public morals. It is said that the rules of law ought to be precise*

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<sup>62</sup> - Fitzgerald, P (1962) "*Criminal Law and Punishment*". Oxford at the Clarendon Press. P.171

<sup>63</sup> - *Shaw v D.P.P.* (Director of Public Prosecutions) The Law Reports [1962] 220-294

<sup>64</sup> - The view taken in the *Show case* was challenged in *Knulier v. D.P.P.* [1973] The Law Reports; 435-397 in which it is stated that the decision in *Shaw* is in no way to be taken as affirming or lending any support to the doctrine that the courts have some general or residual power either to create new offences or so to widen existing offences as to make punishable conduct of a type hitherto not subject to punishment. However, the reason of invoking the *Shaw case* is because my aim is not to examine the English approach in respect of the principle of legality, but rather to shed some light regarding the difficulty of applying the legality principle strictly in a case law system.



*so that a person will know the exact consequences of all his actions and so that a person regulate his conduct with complete assurance. This however, is not possible under any system of law... In many cases there can be no certainty as to what the decision will be. But none of this is a reflection upon the law. Nor do I know of any procedure under which someone could be told with precision just how far he may go before he may incur some civil or some criminal liability... So when Parliament has made it an offence to publish an article which may tend to deprave and corrupt and has left it to the jury to decide whether an article may so tend it is no criticism of the law to say that a man will not be sure in advance whether he will be acquitted or convicted."*

We turn to the second issue, namely the application of existing law to new crimes by means of analogy. Here we should assume that the original relevant rule is clear and precise. The ground on which the accused's conduct will be classified under the existing rule is that his conduct is sufficiently similar to that precisely prohibited by the rule as to be morally indistinguishable from it. If the analogy is precisely applied then there is no fear of arbitrary interpretation.<sup>65</sup> The European Court of Human Rights held recently regarding Article 7 (1) of the Convention that: *"the very apotheosis of the principle of legality in modern European criminal law does not require the courts to abjure the analogical extension of existing offences; provided the resultant development is consistent with the essence of the offence and could reasonably be foreseen, the practice does not violate the non-retrospection clause in that article."*<sup>66</sup>

To the same effect, the House of Lords states in *C. v D.P.P.* that *"judges should not normally make new laws where Parliament had rejected opportunities to clear up a known difficulty or where fundamental legal principles would be set aside in the result, this is far from being an outright rejection of the doctrine that the principled extension of existing offences is some times justified on policy grounds"*.<sup>67</sup>

In the *Shaw* case reference was made to the words of Parke J. in *Mirehouse v. Rennell*: *"Our common law system consists in applying to new combinations of circumstances those rules of law which we derive from legal principles and judicial*

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<sup>65</sup> - McAuley and McCutcheon, J (2000) p. 47

<sup>66</sup> - See chapter 2

<sup>67</sup> - (1996) 1 A.C. 1 per Lord Lowry. Mentioned in McAuley and McCutcheon, J (2000) p. 49

*precedents; and for the sake of attaining uniformity, consistency and certainty, we must apply those rules, where they are not plainly unreasonable or inconvenient, to all cases which arise; and we are not at liberty to reject them, and to abandon all analogy to them, in those (cases) to which they have not yet been judicially applied, because we think that the rules are not as convenient and reasonable as we ourselves could have devised” .*

To sum up, one should understand that absolute certainty, practically speaking, cannot be achieved in any system. Judicial systems that depend on codification as the sole source for criminal law must empower the judge with certain discretion to interpret laws and to apply existing rules to new facts by means of analogy. Otherwise, many criminals could escape justice because the legislator is unable to foresee what conducts must be criminalized in future. Viscount Simonds stated in the *Shaw* case that although Parliament has enacted legislations to cover most offences, gaps remain and will always remain because it is impossible to foresee all the kinds of conduct that disrupt the order of society. It is also said that: “*Certainty is a desirable feature of any system of law. But there are some types of conduct desirably the subject-matter of legal rule which cannot be satisfactory regulated by specific statutory enactment, but are better left to the practice of juries and other tribunals of fact. They depend finally for their juridical classification not upon proof of the existence of some particular fact, but upon proof of attainment of some degree.*”<sup>68</sup> Therefore, as we have mentioned above, the European Court of Human Rights has accepted analogy as a source for criminal law. In addition, the Court has defined the standard of certainty required in criminal law as that which enables a person to know, even if with the court’s assistance, what the law is regarding particular conduct. The Court also used the word “reasonable” instead of the word “absolute” when describing the required standard of certainty<sup>69</sup>.

As to the systems depending on case law as a source for criminal law, the *Shaw case* reveals that the absolute certainty cannot be guaranteed with a considerable discretion given to English courts to consider whether or not a particular conduct can be amounted to a corruption of public morals.

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<sup>68</sup> - *Knulier v. D.P.P* (1973) The Law Reports 435-497

<sup>69</sup> - *Steel v. UK* (1998) EHRR 603



This conclusion is explicitly asserted by the European Court of Human Rights. In *S.W. v. UK*<sup>70</sup> the Court illustrates that: “*However clearly drafted a legal provision may be, in any system of law, including criminal law, there is an inevitable element of judicial interpretation. There will always be a need for elucidation of doubtful points and for adaptation to changing circumstances.... Article 7 (art.7) of the Convention cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen.*” Accordingly one might conclude that the legality principle requires the criminal law to be precisely and clearly formulated just to the extent that this certainty precludes the exercise of arbitrary power.

### **(3) The strict construction of criminal law:**

The plain meaning of this principle is that any doubt regarding the meaning and the scope of particular provisions must be interpreted in favour of the accused.<sup>71</sup> Glanville Williams says: “*if an act of Parliament is so drawn as to make it really difficult to say what was intended and what facts come within it, the benefit of that obscurity should be given to the accused person*”<sup>72</sup>

### **(4) The accessibility of criminal law:**

Williams states that criminal statutes must be “accessible and intelligible”. Any criminal justice system that consists of an excessive number of documents of law is not compatible with the accessibility requirement of laws. Substantive criminal law is not confined to legal professionals but rather it concerns all classes of the community.<sup>73</sup>

### **The source of the principle of legality in Islamic law**

The following *Qur’anic* verses are considered to be the source of this principle:

God said: {No one laden with burdens can bear another’s burden. And We never punish until We have sent a Messenger (to give warning)}<sup>74</sup>. He also said: {And never will your Lord destroy the towns (populations) until He sends to their mother

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<sup>70</sup> - A335-B (1995) (Application no. 00020166/92)

<sup>71</sup> - Ashworth, A (1999) p.81

<sup>72</sup> - Williams, G (1961) p.589

<sup>73</sup> - Williams, G (1961) p.583

<sup>74</sup> - Surah 17. Al- Isra. Verse No. 15

town a Messenger reciting to them Our Verses} <sup>75</sup>. He said in another verse: {Messengers as bearers of good news as well as of warning in order that mankind should have no plea against Allah after the (coming of) Messengers} <sup>76</sup>.

Muslim jurists extracted fundamental principles from these verses. The first principle is that “the legal status of things before revelation is the original permission”<sup>77</sup>. This means that the conduct of a legally commissioned person cannot be described as unlawful unless there is a text that makes it forbidden and this person is free to practice it or not.

The second principle is that “the original status of deeds is permission”<sup>78</sup>. This means that every act or omission is originally permitted and since it is not prohibited by any text a perpetrator cannot be held responsible <sup>79</sup>. Interestingly, this principle is comparable with the negative freedom that English lawyers have traditionally used. John Alder states that “*the common law embodies the liberal perspective that everyone is free to do whatever the law does not specifically prohibit.*”<sup>80</sup>

Abraheem Madkor and Adnan Al- Kateeb believe that these two principles mentioned by Muslim writers contain the same implication. That is, no act may be considered a crime if it has not been explicitly prohibited in Islamic law. If there is no text that makes an act illegal then there is no criminal responsibility and no punishment. From this they argue that it may therefore be stated that these two principles embody the principle of legality in crimes and punishments.<sup>81</sup>

Abdulkader Owda mentions a third principle, that is “No one shall be legally commanded, except who is capable of comprehending the legal ruling. No one shall be ordered to do something that is impossible. No one shall be ordered to do something unknowable to him. This knowledge shall have the necessary criteria to persuade a person to implement the legal ruling”. He claims that this principle reveals

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<sup>75</sup> - Surah 28. Al-Qasas. Verse No. 59

<sup>76</sup> - Surah 4 An-Nisa. Verse No. 165

<sup>77</sup> - Abdulfatah Al-SaFi (1995) “*Al-Ahkam Al-amh L Al-Nedam Al-Jaza’eeh*” King Saud University Press. P.80

<sup>78</sup> - Ibid, p.80

<sup>79</sup> - Mohammad Hashim Kamali “The Right to Personal Safety (Haqq-al-Amn) and the Principle of Legality in Islamic Shari’a”. In Muhammad Abdel Haleem, Adel Omer Sherif, and Kate Daniels (2003). “*Criminal Justice in Islam: Judicial Procedure in the Shari’a*”. I.B. Tauris. London; New York, p, 69. But, there is a disagreement among Muslim jurists regarding the application of these principles. Some apply the first one, while others apply the second.

<sup>80</sup> - John Alder (2002) “General Principles of Constitutional and Administrative Law”. Palgrave Macmillan p. 423

<sup>81</sup> - Abraheem Madkor and Adnan Al- Kateeb (1992) “*Huquq Al- Insan Fi Al- Eslam*” Dar Talass L- Drassat W Al- Targamah W Al – Nasher p. 118 & 119. Hereinafter will refer to as Abraheem Madkor and Adnan Al- Kateeb (1992).



that the act must be possible and this act should be knowable. His argument goes further to say that “a comprehensive Knowledge” that could convince a person to follow the law implies:

- 1- Knowledge of legal ruling. This knowledge cannot be achieved unless stipulated explicitly and promulgated to all people. Applying this condition to crimes indicates that no crime exists except after promulgation.
- 2- This rule must contain the necessary elements that could constrain someone to act legally. This condition implies that the individual knows or ought to know that if he violates the legal ruling he might be subject to punishment. Applying this condition to crimes means that dictating crimes must also be associated with stating punishments. He concludes by stating that this principle confirms the outcome of the foregoing two principles. That is to say they all confirm the principle of legality in Islamic criminal law.<sup>82</sup>

Accordingly, both the Basic Law in Saudi Arabia and the Cairo Declaration of Human Rights in Islam declare the legality principle. Article 38 of the Basic Law provides: “*there shall be no crime or punishment except on the basis of a Shari’ah or statutory provision, and there shall be no punishment except for deeds subsequent to the effectiveness of a statutory provision.*” Similarly, article 19(d) of the Cairo Declaration provides: “*no crime or punishment except in pursuance of Shari’ah rules.*”

### **The application of the principle of legality in Islamic law and the Saudi judicial system:**

Islamic criminal law recognizes the principle of legality although it is not explicitly stated in the *Qur’an* or the *Sunnah*. This principle as we have seen is derived from *Qur’anic* texts as mentioned above. However, the question is whether or not Islamic criminal law applies the principle in all types of crimes.

The answer to this question requires an analysis of the components of the principle of legality, in order to see if Islamic law and the judicial system in Saudi Arabia contain and apply these components. However, before proceeding, the attempts of Muslim writers to answer the question should be examined.

In respect of attempts to answer this question, Muslim writers are in agreement about the precise application of the legality principle in *Haddud* and *Qisas* crimes.

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<sup>82</sup> - Abdulkader Owda p.116 & 117

However, the application of this principle in *Ta'azir* crimes is a controversial issue. Most writers are of the opinion that Islamic law does apply the principle in *Ta'azir* crimes. Yet within this majority there is disagreement about the nature of this application. Some say that it is a "broad" application, whereas others have used the term "flexible" application. However, since there is nothing to indicate that the terms "flexible application" and "broad application" signal different meanings, one should assume that they are used interchangeably.

Moseelhy states that *Qur'anic* texts confirm the agreement of all divine legislations that there can be no command except after a message or notification, and no punishment without a message and messenger who may preach and forewarn. God, he claims, will not punish unless his message is clearly reported. Further, he points out that Islamic law has adopted two ways of declaring crimes and punishments:

- (a) Defining precisely every crime and its penalty in *Haddud* and *Qisas* crimes.
- (b) Defining *Ta'azir* crimes in general terms, and leaving their due punishments to the discretion of the Islamic state. The state usually invests the judge with considerable authority to select the appropriate penalty in every individual case, according to extenuating or aggravating circumstances.<sup>83</sup>

Similarly, Abdulfatah Kodur reveals that the principle of legality in Islamic law is applied precisely in *Haddud* as well as *Qisas* crimes, and is applied flexibly in *Ta'azir* crime. This flexibility is congruous with the nature of this kind of crime. Accordingly he suggests a new frame for the principle in respect of *Ta'azir* crimes, namely: "no crime nor punishment without evidence (clue) in *Ta'azir* crimes." He explains that by evidence (clue) in this regard he means legal ruling extracted from sources of Islamic law.<sup>84</sup>

With a slight difference of perspective Muhammad Frehat situates the principle of legality in Islamic law in the idea of equality. He states that equality is unbiased justice (objective justice). Justice is clearly required in the *Qur'an*. For God said: {And whenever you give your word (i.e. judge between men or give evidence), say the truth even if a near relative is concerned}<sup>85</sup>. Furthermore, Frehat maintains that

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<sup>83</sup> - Muhammad Moseelhy (1988) "*Huquq Al- Insan Been Al- Shari'ah Wa Al- Qanoon Al-Dolley*". Dar Al- Nahdah Al- Arabiah 1988. Cairo p.49. Similarly, see Abu- Zahra, M (1998) "*Al-Jareemh We Al-Oqubah Fi Al-Fiqh Al-Islami*" "*Al-Jareemh*". Dar Al-faker Al-Arabee. Cairo p.136

<sup>84</sup> - Abdulfatah Kodur (1985) "*Derassh Mogeza An: Saemat Al- Nedam Al- Gena'ee Be Al- Mamlakah Al- Arabiah Al- Sudiah*" Naif Academic for Security Sciences. Arabic Centre for Security Studies and Training Journal. p.16, 17.

<sup>85</sup> - Surah 6. Al-An'am. Verse. No. 152



equality in *Ta'azir* crimes must be applied proportionally, taking into consideration the person's status. By this he means that the judge when considering the appropriate punishment will take into his consideration what is the proper penalty in respect of rehabilitating the convicted person. This would lead to differences in responsibility even where acts are similar because some offenders, in the judge's view, need only lenient penalty while other need a stringent penalty to abstain from recommitting crimes. These differences, he explains, cannot be regarded as lack of equality, but rather they demonstrate that equality is not computational but is proportionally applied. From this idea, he believes, the principle of legality begins because it is linked to equality. This legality embodies the reaction of society against any direct or indirect wrong. The objective of the legality principle in general is to preserve security in society and to promote justice. From this, he claims, one can understand the significant role of the principle of *Ta'azir* which makes it fit for adaptable to different situations. He concludes by stating that the principle of legality in Islamic law is divided into two parts:

(a) Textual legality: in *Haddud* and *Qisas* crimes, Islamic law confines sources of crimes and punishments within certain and definitive provisions. (b) Delegated legality: in *Ta'azir* crimes, the Islamic ruler (Islamic state) is given discretion to decide upon crimes and their penalties according to circumstances. As this is a very dangerous legality, he therefore suggests that it should be given only to a reliable authority<sup>86</sup>.

It is very significant to point out that the term "reliable authority" mentioned above is often used by Islamic writers to indicate people who have a very good religious character. In contrast, the words "reliable authority" means within the western context strict and fair producers set up to organize the judicial process.

However, not all voices agree with the majority. Mohamed Al-Awa<sup>87</sup> argues that Islamic criminal law in *Ta'azir* crimes does not apply the legality principle. He says that: "*the jurists dealing with the subject imply that for the sake of public interest the ruler may punish any conduct he considers harmful to the public interest without declaring to the public that this conduct will be considered criminal. This is a clear exception to application of the general principle that no punishment can be inflicted*

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<sup>86</sup> - Muhammad Frahat "Sharee't Al- Tjreem Wa Al-Eqab Fi Al- Fiqh Al- Islami Wa Al- Nedam Al- Qanoony Al- Mo'asr" Journal of Arabic Centre for Security Studies; Vol. 11 (1991) p33-69

<sup>87</sup> - Mohamed S. El-Awa (1998) p 114

*except for an offence which has been so defined in advance. This exception allows the ruler or judges a very wide authority to punish harmful acts and omissions, which may threaten the public interest in the broadest sense. Some authorities have tried to deny that the granting of this discretionary power is an exception to the rule of Nulla poena sine lege. The argument for this view is that the lege exists in the general principles which command the Muslim community and the Muslim ruler to protect the public good. But the fact is that these general principles are very flexible and their interpretation controversial. Consequently, one cannot agree with the above view”*<sup>88</sup>

Two major points might be regarded as the main source of this controversy. (1) These writers started with the presumption that the application of this principle is absolute. In fact, as we have explained above, the application of this principle in any judicial system is not absolute. The European Court recently clarifies its approach regarding the issue by ruling that: *“However clearly drafted a legal provision may be, in any system of law, including criminal law, there is an inevitable element of judicial interpretation. There will always be a need for elucidation of doubtful points and for adaptation to changing circumstances. Indeed, in... the... Convention States, the progressive development of the criminal law through judicial law-making is a well entrenched and necessary part of legal tradition. Article 7 of the Convention cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen.”*<sup>89</sup> (2) None of these attempts have tried to study the principle in practice as applied in an Islamic state. Rather, they have examined the principle only in theory.

To draw a clear conclusion about the issue, thorough scrutiny of the components of this principle in Islamic law and their application in the judicial system in Saudi Arabia is essential. This is the second task necessary in order to answer our main question.

### **(1) The principle of non-retroactivity in Islamic criminal law:**

Even though this principle is not expressly mentioned in the *Qur'an*, the *Sunnah* or old Islamic jurisprudence, one should not conclude that it is alien to Islamic law.<sup>90</sup> Islamic law cannot be applied retroactively unless it is in the interest of the accused. Many

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<sup>88</sup> - Slight corrections to the English of this extract are made.

<sup>89</sup> - *Streletz, Kessler and Krenz v. Germany* (2001) para 50. (Application No. 00034044/96; 00035532/97; 00044801/98)

<sup>90</sup> - Abdulkader Owda p. 261



recorded cases can be cited in confirmation of the prospective application of Islamic law. To state all of these would be superfluous.<sup>91</sup> Nevertheless, it is useful to indicate a few: (1) The *Qur'an* declares that usury is prohibited and punishable. This prohibition was not applied to cases of usury prior to this declaration. (2) Prohibition of marrying a father's wife was also not applied retroactively.<sup>92</sup> (3) In the earliest era of Islam, adultery was a crime punishable by imprisonment in the house. Later this crime was made punishable by lashes or stoning. These two punishments, however, were not applied to any crime of adultery committed prior to the declaration of these new punishments in the *Qur'an*.<sup>93</sup> (4) The Prophet said: *"Any blood-guilt traced back to the period of ignorance (jahiliya) should be disregarded, and I begin with that of al-Harith ibn abd al- Muttalib. The usury practices during al-jahiliyya have also been erased, and I begin with that of my uncle al-Abbas ibn bd- Muttalib."*<sup>94</sup> (5) The Prophet's companions also applied this principle after the death of the Prophet. El Mawardi relates: *'Omer Ibn al Khattab (the second Ruler after the death of the Prophet) prohibited men and women from mixing around the Kaaba. Having seen a man wandering with women he struck him with a rod. The man addressed him: "By God, if I have done wrong, you have not educated me." Omer said, "Are you not aware of my decree against men and women walking together around the Kaaba?" The man said, "I have not seen such a decree". Omer handed him the rod and said, "Retaliate". But the man said, "I am not going to retaliate today". Omer then asked his forgiveness, but the man said that he would not. Then the two men separated. When they met on the next day, Omer's face grew pale. The man said to him, "O Prince of the Faithful, it seems to me that you feel as I felt before". Omer said he did. The man said, "God is my witness that I have forgiven you".'*<sup>95</sup> (6) A man admitted that he had committed adultery. But he claimed that he did not know that adultery was a crime. When the Second Islamic Ruler (Omer ibn al-

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<sup>91</sup> - For more examples see Gamil Muhammad Hussein "Basic Guarantees in the Islamic Criminal Justice System". In Muhammad Abdel Haleem, Adel Omer Sherif, and Kate Daniels (2003). *"Criminal Justice in Islam: Judicial Procedure in the Shari'a"*. I.B. Tauris. London; New York, p, 35

<sup>92</sup> -Al- Saleh, O *"The Right of the Individual to Personal Security in Islam"*. In the Islamic Criminal Justice System. Bassiouni, M. Oceana Publications, INC. London, Rome, New York. 1982. P.63

<sup>93</sup> - Abdulkader Owda. P. 262

<sup>94</sup> - Al-Awa, M (1998) P. 134

<sup>95</sup> - Quoted from Al- Saleh, O *"The Right of the Individual to Personal Security in Islam"*. In the Islamic Criminal Justice System. Bassiouni, M. Oceana Publications, INC. London, Rome, New York. 1982 P. 65



Khattab) was asked about this he said: if he knew before committing it that adultery is a crime he must be punished. But if he did not know, he cannot be punished.<sup>96</sup>

Accordingly, Judge Abu Ya'la<sup>97</sup> refers to the principle of non-retroactivity when he states that "*Denial should be advanced ... and punishment should not be imposed without warning*".

Yet, some argue that Islamic law can be applied retroactively in serious offences that disturb public order.<sup>98</sup> They support their argument by citing particular stories where the Prophet, it is said, applied Islamic law retroactively. However, this argument is widely criticized. Some challenge the credibility of the stories on which the argument is based. Others argue that the retroactive application in these events was because the new rules were to the benefit of the accused.<sup>99</sup>

With regard to the application of this principle in the judicial system in Saudi Arabia, two points need to be clarified. First: there is no question of retroactive application of offences prohibited by the *Qur'an*, the *Sunnah* or old Islamic jurisprudence after the passing of many centuries. Secondly: in the case of offences criminalized by the state, or where the state designated the due punishment for offences criminalized by Islamic law, the retroactive application of law is conceivable. Thus, the examination of the principle of non-retroactivity in the judicial system in Saudi Arabia will be limited to this latter category of crimes.

As we have pointed out above, any violation of enacted laws will be tried either in the Board of Grievances or by one of the administrative committees. Article 38 of the Basic Law in Saudi Arabia declares, "*No penalty shall be imposed except with regard to acts committed subsequent to the operation of a legal provision*". Therefore, the Scrutinizing Committee of the Board of Grievances ruled, "*Since the criminal circuit did not apply the old Combatant of Bribery Act No. 15 (1382) in which the punishment was imprisonment from one to five years and a fine from five to a hundred thousand Saudi Rials, or one of these, but rather it applied the new Combatant of Bribery Act<sup>100</sup> in which the punishment is imprisonment for a period not exceeding ten years and a fine not exceeding one million Saudi Rials, or one of these, this means that the*

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<sup>96</sup> - Alshareef, A (1987) "*Al- Mabad' Al- Shari'ah Fi Ahkam Al- Uqubat Fi Al- Fiqh Al-Islami*" Dar Al-Karb Al-Islami Lebanon.. P.177

<sup>97</sup> - He is a remarkable jurist of the Hannibal School.

<sup>98</sup> - Abdulkader Owda p. 261

<sup>99</sup> - Abu Zahra, M (1998) p. 239. See also Muhammad Al- Owa (1983) p.61.

<sup>100</sup> - Issued by the Royal Decree No. 36 in 1412.



*maximum penalty for both punishments by the new act is more severe than the punishment by the old act. Accordingly, the criminal circuit's judgment is incompatible with the law, because it must apply the old law which was valid at the time the crime was committed, save that the new act is in the accused's interest"*<sup>101</sup>.

Clearly, unlike the European Court, the judicial system in Saudi Arabia applies the criminal law retroactively if that is in the interest of the accused. This is perhaps a reflection of the humanitarian nature of the Islamic law. Interestingly this application is compatible with the ICCPR.

## **(2) Maximum certainty in Islamic criminal law:**

As we have seen in Chapter Three, crimes in Saudi Arabia are divided into *Haddud* (doctrinal), *Qisas* (retaliation) and *Ta'azir* (chastisement). The first two categories are designated precisely. Every crime is defined and its punishment is clearly designated. *Ta'azir* (chastisement) crimes can be divided into three categories in the Saudi judicial system: (1) Acts that are not originally prohibited by Islamic law. However, in the interest of society the state has enacted laws to make them illegal and punishable<sup>102</sup>. (2) Acts forbidden by Islamic law in general terms, such as forgery and bribery, without the designation of specific punishment for each crime. For this group the state has enacted laws which provide a clear and precise definition for every crime and its penalty. Courts trying these two categories are obliged to apply the laws. Therefore one can conclude that in these two kinds of *Ta'azir* crimes the principle of maximum certainty raises only problems similar to those which occur in any codified legal system.<sup>103</sup>

(3) Acts prohibited and punishable by Islamic law. But Islamic law provides only a general definition, whereby the judge is given some discretion to use analogy to punish old offences in new forms. This approach, *prima facie*, might suggest that the judge is not obliged to apply the principle of legality. Nevertheless, closer analysis of these cases might lead to a different understanding. In fact, this category is best discussed within the court's power to punish for committing a sin. This is defined as "committing a prohibited act or ignoring an obligatory act". An example of this kind

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<sup>101</sup> - Decision No. 242/T/3 (1416 H)

<sup>102</sup> - See our example in chapter 3 of this thesis.

<sup>103</sup> - Abdulfthah Kuder p. 10



of crime is giving false testimony. Even though there is no precise definition of each one, crimes of this type are clearly prohibited in the *Qur'an* or the *Sunnah*<sup>104</sup>.

This kind of *Ta'azir* is provided for in Islamic law by general texts which prohibit obscenity, debauchery, prejudice etc. These texts do not provide particular definitions for each crime. The judge is empowered to apply these general texts to the facts

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<sup>104</sup> - Abdulkader Owda cites the *Qur'anic* text criminalizing the most important *Ta'azir* crimes of this kind:

1-The prohibition of some types of food:

God said: {He has forbidden you only the *Maitah* (dead animals), and blood, and the flesh of swine, and that, which is slaughtered as a sacrifice for others than Allah (or has been slaughtered for idols, on which Allah's Name has not been mentioned while slaughtering) Surah 2. Al- Baqarah. Verse No. 173. He also said: {Forbidden to you (for food) are: *Al-Maitah* (the dead animals- cattle- beast not slaughtered), blood, the flesh of swine, and that on which Allah's Name has not been mentioned while slaughtering, (that which has been slaughtered as a sacrifice for others than Allah, or has been slaughtered for idols) and that which has been killed by strangling, or by a violent blow, or by a headlong fall, or by the goring of horns- and that which has been (partly) eaten by a wild animal- unless you are able to slaughter it ( before its death)- and that which is scarified ( slaughtered ) on *An-Nusub* ( stone-altars). Surah 5. Al-Ma'idah. Verse.No.3

2-Breach of trust:

God said: {Verily! Allah commands that you should render back the trust to those to whom they are due}. Surah 4. An-Nisah Verse. No. 58 He said: {O you who believe! Betray not Allah and His Messenger, nor betray knowingly your *Amant* (things entrusted to you, and all the duties which Allah has ordained for you)}. Surah 8. Al-Anfal. Verse No. 27

3-Imposture:

God said: {Woe to *Al-Mutaffifun* (those who give less in measure and weight). Those who, when they have to receive by measure from men, demand full measure, And when they have to give by measure or weight to (other) men, give less than due}. Surah 83. Al-Mutaffifin. Verses.No.1-3. He also said: {Give full measure, and cause no loss (to others). And weight with the true and straight balance. And defraud not people by reducing their things, nor do evil, making corruption and mischief in the lands}. Surah 26. Ash-Shura. Verses No. 181-183.

4-False testimony:

God said: {And conceal not the evidence}. Surah 2 Verse No. 283. he also said : {You who believe! Stand out firmly for justice, as witnesses to Allah, even though it be against yourselves, or your parents, or your kin, be he rich or poor}. Surah 4 An-Nisa Verse No. 135.

5-Usury:

{Allah has permitted trading and forbidden *Riba* (usury)}. Surah 2 Al-Baqarah Verse No. 275.

6- Revilement:

{Truly, Allah likes not the transgressors}. Surah 2 Verse No. 190. he also said: {Allah does not like that the evil should be uttered in public except by him who has been wronged}. Surah 4. An- Nisa. Verse No. 148

7- Bribery:

{(They like to) listen to falsehood, to devour anything forbidden}. Surah 5 Al-Ma'idah.verse No. 42. He also said: {And eat up not one another's property unjustly (in any illegal way e.g. stealing, robbing, deceiving, etc), nor give bribery to the rulers (judges before presenting your cases) that you may knowingly eat up a part of the property of others sinfully}. Surah 2 Al-Baqarah. Verse No. 188.

8- Gambling:

{O you who believe! Intoxicants (all kinds of alcoholic drinks), and gambling, and *Al-Ansab*, and *Al-Azlam* (arrows for seeking luck or decision) are an abomination of Shaitan's (Satan) handiwork. So avoid (strictly all) that (abomination) in order that you may be successful}. Surah 5 Al-Ma'idah. Verse No. 90

9- Entering houses without permission:

{O you who believe! Enter not houses other than your own, until you have asked permission and greeting in them}. Surah 24 An-Nur. Verse No. 27.

10- Spying:

{And spy not}. Surah 49. Al-Hujurat Verse No. 12



brought before him. This situation might be considered incompatible with the required standard of certainty, and could appear to imply that according to Islamic law a person can be subject to punishment without knowing that such an act is prohibited. However, the following points demonstrate the fallacy of such a conclusion:

- 1- Pursuant to Islamic law conducts are classified into (a) lawful or admissible; (b) prohibited; (c) permissible; (d) recommended; (e) unrecommended. A Muslim is allowed to exercise conducts within categories (a), (c), and (d). But he is prohibited from committing acts within categories (b) and (e). It is every Muslim's duty, as part of his religion, to know this.<sup>105</sup>
- 2- There is a crucial difference between Islamic law and positive laws in this respect. This difference is embodied in the fact that the conduct that constitutes a sin in Islamic law is unchangeable through ages and societies. Sins that were prohibited during the Prophet's era are still prohibited and will remain prohibited in all times to come. Attitudes regarding what act can constitute a sin are stable. So according to Islamic law a person will not be surprised by a sentence of punishment for an act that he did not until his prosecution know was prohibited. Sins in Islamic law differ from immorality in positive laws. Morality is always subject to change. For example, in the past homosexuality was prohibited in English law. However this conduct is no longer a crime because peoples' attitudes, and as a result jury's attitudes, have changed over time. The real difficulty that faces the principle of legality in the English law is that proprieties or rules of decorum are always subject to change through different ages. In *Kneller v. D.P.P*<sup>106</sup>, for instance, It is stated that: "*that is the great difficulty in this branch of the law, that all such cases would have to be left to the jury and therefore one has a vague and undefined branch of criminal law in which juries in different parts of the country might take different views of the same conduct.*" So what can be regarded as immoral and hence prohibited today can be made legal tomorrow and vice versa. Accordingly a court will only reflect an attitude regarding a specific conduct after a case is brought before it. The court, when exercising its power to adjudicate the case, can reflect this change in attitude either by overruling a

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<sup>105</sup> - See, Majid Khadduri (1984) "*The Islamic Conception of Justice*" Johns Hopkins University Press p. 143

<sup>106</sup> - (1973) The Law Reports. 435-497

precedent or by applying new rules, and will hence render a new decision. It follows that an accused person will be surprised to be convicted of an offence which was not established as a criminal act when committed. This difficulty, I believe, is at the core of the principle of legality. It is illustrated by Fitzgerald as follows: *"The principle of legality demands that the citizen should be ruled by law and not by the decisions of individual men. The reasons for this are obvious. In a liberal community the rules of criminal law should be written down in black and white, so that the citizen has a chance to ascertain what the rules are and to conform to them. Without this we lose any objective standard and uniformity with regard to what is to constitute criminal conduct; for what one judge today thinks unimpeachable another court tomorrow may consider ant-social and therefore criminal"*.<sup>107</sup> This difficulty does not exist in Islamic law because, as we have mentioned above, conducts that constitute sins are always the same.

Accordingly, one should conclude that since sins in Islamic law were recognised from an early Islamic age and the attitude regarding them has remained unchanged until now, the required certainty in this kind of *Ta'azir* crimes is achieved. This conclusion is supported by the fact that an ordinary person does not need to know the difference between murder and manslaughter to keep pace with rules that prohibit murder. In addition, even though it is necessary for a layman to understand that if he commits the offence of assault he will be punished, he does not, generally speaking, need to know the exact degree of severity of punishment that might be inflicted upon him.<sup>108</sup>

However, a critical point as to the legality principle in Islamic law is that Islamic jurists hold the view that punishment is administered in the public interest.<sup>109</sup> Punishment for the sake of public interest means that to protect society a judge has discretion to punish any one, although he did not commit any illegal act, if the person's status threatens the safety of society. Abdulfatah Kodur maintains that it is within Islamic law that a judge can punish according to the public interest if the person in question threatens public security. However, he treats the idea with great

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<sup>107</sup> - Fitzgerald, P. (1962) "Criminal Law and Punishment" Oxford at the Clarendon Press. P. 169

<sup>108</sup> - Williams, G (1961) p. 583

<sup>109</sup> - Muhammad Hashim Kamali "The Right to Personal Safety (Haqq-al-Amn) and the Principle of Legality in Islamic Shari'a". In Muhammad Abdel Halcem, Adel Omer Sherif, and Kate Daniels (2003). *"Criminal Justice in Islam: Judicial Procedure in the Shari'a"*. I.B. Tauris. London; New York, p, 71



caution when stating that the expression “public interest” is extremely flexible and dangerous, and might give rise to abuse of freedom.<sup>110</sup>

The main argument used for the protection of society view is a case in which the Second ruler after the death of the Prophet ordered a man (Nasser ibn Hajaj) to travel from Al-Medina City to Basra because the man was very attractive to women. The latter, it is tolled, did not commit any wrong, but the Ruler found that there was a possibility of committing a wrongdoing in Holy City (Al- Medina) so he decided to prevent this possibility by ordering him to leave the city to protect a significant value of the Muslim society. That is to say keeping holy places away from transgression. Jurists, therefore, argue that it is applicable to punish in order to protect the public interest. From this Al-Owa suggests correctly, as we have seen, that Islamic law in this kind of *Ta'azir* does not apply the principle of legality.

In order to put the point within the Islamic context, it is useful to refer to the expression “reliable authority” mentioned above. In western thought, generally speaking, this expression means establishing strict and fair procedures which ought to prevent the authority concerned from exercising their jurisdiction arbitrarily. However, within the Islamic scenario it is used to mention person(s) who show a strict obedience to the dictates of Islam. Islamic thought pays great concern to the religious conscience. A pious person is God fearing therefore when he acts he bears in mind that God supervises him. So if a person's outside character and behaviour indicate that he has such a feature he is then in Muslim's view a reliable person. It is expected from such a person to act justly and honesty. Where this view is applied to judges in Islamic society, one can find that Islamic jurisprudence requires that a person in order to be a judge, he must be pious and obedient to Islamic teaching. Whatever his practical or academic qualifications a person pursuant to Islamic law is not qualified to be a judge if lacks piousness. But, if a judge is pious, he is authorized a discretion to punish for the sake of the public interest because his religious character, it is widely believed, would prevent him from using this power arbitrarily. Majid Khadduri observes that: “*The experience of Islam in procedural justice demonstrates again the truth that man in earlier societies was more habitually inclined to trust the judge who enjoys a good reputation than to trust the judicial system.*”<sup>111</sup>

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<sup>110</sup> - Abdulfatah Kodur ( 1985) p. 16, 17

<sup>111</sup> - Majid Khadduri (1984) “*The Islamic Conception of Justice*” Johns Hopkins University Press p. 145

Evidently, an observer of the judicial system in Saudi Arabia cannot fail to recognize the importance of building the religious character of a Muslim judge as an element of the proper administration of justice, because whatever efforts are taken to set up strict and fair procedures the judge in most legal system is vested with considerable discretion.

However, relying heavily on the judge's religious character is not always a proper safeguard against a possible arbitrary use of power, especially if the aim is to establish a stable judicial system. If the judges' character currently is kept in a manner consistent with Islamic precepts there is no guarantee that this character will be maintained in, for example, a fifty years time. Commenting on the importance of procedural justice Majid Khadduri states: "*As a procedural form of justice it may not seem as significant as substantive justice, but in reality it is no less important and its processes are intricate and highly complicated. Without it, the elements of justice would become of academic value, just as hidden treasure loses its value unless it is put into use. Even if little or no elements of justice were to be found in the law, the individual could derive satisfaction if the law were applied with regularity and impartiality.*"<sup>112</sup> Therefore, the recent Saudi approach in respect of this matter is an important issue towards a proper administration of justice. That it to say a combination of both approaches i.e. strict and fair producers and religious character.

Despite the fact that Islamic law provides the ruler with power to punish for the sake of public interest as we have seen, it cannot be expected nowadays from a modern Islamic ruler to handle countless number of cases. Therefore, the ruler in Saudi Arabia delegated his judicial power to organized courts. In principle, according to Islamic law if the ruler delegates his judicial power to a judge the latter is then empowered to punish for the sake of public interest. So the question which needs to be addressed now is whether or not a judge in Saudi Arabia can punish for the sake of public interest even if a person does not commit an offence.

In fact, court's jurisdictions are governed by statutory laws. Article 1 of the Law of Criminal Procedure declares that: "*Courts shall apply Shari'ah principles...They shall also apply laws promulgated by the state... and shall comply with the procedure set forth in this Law....*" Thus, it is essential to refer to these laws in order to find an answer. Article 3 of the same Law reads: "*No penal punishment shall be imposed on*

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<sup>112</sup> - Ibid, p 144



*any person except in connection with a forbidden and punishable act, whether under Shari'ah principles or under the statutory laws, and after he has been convicted pursuant to a final judgment rendered after a trial conducted in accordance with Shari'ah principles.*” Clearly, this article requires two conditions to punish a person; (1) he must commit an act that is (a) forbidden, and (b) punishable. (2) The punishment is only imposed after a conviction pursuant to a final judgment. Therefore this article means that the judge in Saudi Arabia has no residual power to punish for the sake of public interest. If a person does not commit an offence, he cannot be then subjected to a punishment because he did not commit a forbidden act, and also because he cannot be punished except after a conviction. If it is argued that the judge in Saudi Arabia can punish for the sake of public interest, this will mean that a person is punished without a judicial conviction which is expressly in contradiction with text provided in article 3.

### **(3) The strict construction of criminal law:**

As to the judicial interpretation of provisions of laws in the judicial system in Saudi Arabia one should distinguish between two situations. First: if the case is adjudicated according to the *Qur'an*, the *Sunnah* or old Islamic *Fiqh* (jurisprudence), the judge in this case will apply the law as interpreted and expounded by the founders of the four Islamic schools and their pupils. In this case the judge does not provide a new interpretation and subsequently the principle of strict construction of criminal law is not applicable. Second: if the case is adjudicated according to enacted law the judge is empowered to interpret the law. The principle of strict construction of criminal law will thus be examined only in this second case.

As we have pointed out earlier, this component requires that any obscurity of criminal law must be interpreted in favour of the accused. The Board of Grievances in Saudi Arabia takes this requirement into consideration in its judgments. For example, Article 14 of the Combatant of Bribery Act as amended by the Royal Decree No. 35 in 1388 declares that the briber or the mediator will be discharged if he informs the authority about the crime before it is discovered. The Board interpreted this article to benefit the accused in case No. 504/1/Q in 1401. It is stated that even though article 14 declares that the discharge applies to imprisonment and fine penalties, this should not be understood to mean that the legislator's aim was to confine its application to these punishments alone. But rather it should be interpreted to mean that the legislator has left the application of this article to the general rules, which imply that seizure is a

punishment and is therefore also contained within the general text that declares the discharge<sup>113</sup>.

#### **(4) The accessibility of criminal law:**

In Saudi Arabia codified laws are clearly accessible and not subject to question, since no act is applied unless promulgated in the official newspaper<sup>114</sup> and citizens have access to it. However, the accessibility of Islamic jurisprudence is questionable. Many thousands of books constitute the Islamic *Fiqh*. These books are also written in language of such a level of refinement that a layman has difficulty in understanding them. However, several measures have been taken to ease this dilemma.

- 1- In an attempt to unify the judicial rulings, courts in Saudi Arabia generally speaking apply the Hanbali School<sup>115</sup>. Yet, provided that a judge gives his reasons, he can have recourse to the three other schools if he considers that the application of the Hanbali School could lead to hardship or conflict with public interest.<sup>116</sup> So, once this requirement is satisfied, the judge is then free to adopt an opinion provided by any other schools of thought.
- 2- Of the books of the Hanbali School only six are designated on which judgments should be based<sup>117</sup>.
- 3- The laws of both the Judiciary and the Board of Grievances require the application of the case law system. Article 14 of the Law of the Judiciary provides that: *"If one of the court's panels, while reviewing a case, deems it necessary to depart from an interpretation adopted by the same or another panel in previous judgements, the case shall be referred to the full Court. Permission for such departure shall be given by a decision of the panel adopted by majority vote of not less than two thirds of its members. If the panel does not so render its decision, it shall refer the case to the Supreme Judicial Council for a decision in accordance with paragraph 1 of Article 8"*. Similarly Article 40 of the Rules of Pleadings before the Board of Grievances declares that *" If the Scrutinizing Circuit, when hearing a case, considers abandonment of an interpretation which it had adopted or which had been*

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<sup>113</sup> - Decision No. H /2 /18 (1402 H)

<sup>114</sup> - Um Al-Qura' is the official newspaper in Saudi Arabia.

<sup>115</sup> - See chapter 3 of this thesis.

<sup>116</sup> - Al-Qada'a Fi Al-Mamlakah Al-Arabiah Al-Sudiah (1419 AH). The Ministry of justice p. 69

<sup>117</sup> - The Judicial Supervision Committee' decision in 1347. See Ahmad Belal (1990) p. 174 & 175. See also Soliman A. Solaim "Legal review: Saudi Arabia's Judicial System". Middle East Journal. 1971.Vol. 25 P.405.



*adopted by another Circuit or which had been adopted by the Scrutinizing Circuit it shall refer the matter to the President of the Board of Grievances for passing it to the Scrutinizing Board convened under the presidency of the Board of Grievances together with three Presidents of the various Circuit to be selected by the President of the Board of Grievances ; the joint circuit will decide by majority vote of two thirds of the number of members”.* However, in practice these requirements are not precisely applied because judgments in both judicial institutions have not been published.

- 4- Finally, an important point here is that the difficulty of accessibility of Islamic jurisprudence might be held to constitute a clear conflict with the legality principle, if Islamic law were viewed from a western point of view. But Islamic law is not only law<sup>118</sup>. It is part of a religion and every Muslim is obliged to read and understand Islamic law (the *Qur'an*, the *Sunnah* and also Islamic jurisprudence). Anyone who has difficulty is obliged to ask those who have knowledge.

In conclusion, Islamic criminal law, as applied by the judicial system in Saudi Arabia, contains all the four components, which constitute the legality principle. Thus, the principle of legality is protected in the judicial system in Saudi Arabia in a manner consistent with international human rights law.

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<sup>118</sup> - See our discussion in chapter 3

## CHAPTER 5

### Defence Rights of the Accused during Trial

#### Introduction:

The international human rights treaties and declarations, in general, require judicial systems to provide the accused person with the following defence rights: 1- Equality before the courts and tribunals. 2- The right to be informed promptly and in detail, in a language which he understands, of the nature and cause of the charge against him. 3- To have adequate time and facilities to prepare his defence and to communicate with his counsel. 4- To be tried without delay. 5- To be tried in his presence, and to defend himself in person. 6- To choose his own lawyer, or to have free legal assistance if he has not sufficient means to pay and where the interests of justice so require. 7- 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. 8- To have free interpreting services if he cannot speak or understand the language used in court. 9- Not to be compelled to confess guilt.<sup>1</sup>

These defence rights are multifaceted and in many cases overlap. For instance, the right to counsel is the most obvious manifestation of the right to adequate facilities to prepare a defence. To address this, however, I will follow the ECHR approach regarding these rights.

The main question underlying this chapter is whether or not the judicial system in Saudi Arabia provides the accused with the rights mentioned above in respect of their scope and meaning. My approach in this enquiry is to divide the chapter into ten separate parts dealing with each of the rights listed above. It should further be noted that in general the word "law" in Saudi Arabia is taken to refer to both Islamic law and enacted laws; of which as far as this thesis is concerned particularly the procedural laws are of interest. Thus, each part will be divided into two main sections covering Islamic law and enacted laws respectively.

In each part, one further sub-division will generally be made in the section treating Saudi Arabia Law, as the Code of Law Practice (2001) for Saudi Arabia is applicable

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<sup>1</sup> - Articles 14 and 15 of the International Covenant on Civil and Political Rights. See also Articles 6 of the European Convention on Human Rights and Fundamental Freedoms.



to both the *Shari'ah* courts and the Board of Grievances. Expect in part VIII the law in respect of the accused's rights will require separate examination for each of these two institutions.

The ten parts of this chapter deal with the rights of the accused in the following sequence:

1. Right to legal representation;
2. Right to an interpreter;
3. Right to adequate time and facilities for the preparation of defence;
4. Right to trial within a reasonable time;
5. Right to prompt information of charge;
6. Right to trial in own presence;
7. Right to defend self in person;
8. Right to equality of arms;
9. Right to call and cross-examine witnesses;
10. Right not to be compelled to confess guilt.

## **Part I                      The Right to Legal Representation**

According to the European Convention on Human Rights the right to be assisted by a lawyer is one of the fundamental principles that should be guaranteed to the accused person. The Convention states in Article 6 that: "*Everyone charged with a criminal offence has the following minimum rights...(c) to defend himself ...through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require.*"<sup>2</sup>

This part will discuss the right to be defended by a lawyer in the judicial system of Saudi Arabia. As explained above, the investigation requires two separate sections, the first devoted to Islamic law, and the second to the law in Saudi Arabia. Yet, since the Code of Law Practice for Saudi Arabia is applicable to both the *Shari'ah* courts and the Board of Grievances, the law in respect of the rights of the accused to be

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<sup>2</sup> - Similarly Article (14/3) of the ICCPR declares that: "*in the determination of any criminal charge against him, everyone shall be entitled to ... defend himself in person or through legal assistance of his own choosing....*"

assisted by a lawyer requires separate examination for each of these two institutions. Section Two will therefore be sub-divided to meet this requirement.

### **Section One Islamic law**

Early Islamic jurists neither used the term “lawyer” nor knew the phrase “practice of law”. They were familiar only with the phrase “litigation’s representative”. Discussion must therefore first focus on this term in Islamic law.

Islamic jurists did not limit their discussion of this issue to criminal cases, but rather discussed the idea of litigants’ representatives in both criminal and civil cases. For the purpose of concentrating on our main topic, our discussion will be limited to the criminal sphere.

The discussion of the idea of the litigant’s representative in the criminal sphere focused mainly on the complainant’s right in criminal cases to be represented by another person to prove the accusation against the accused.<sup>3</sup> Jurists did not discuss the right of the accused himself to be represented by another person save that some argued that the right of the private complainant (plaintiff) to be represented was also applicable to the accused<sup>4</sup>. Two main topics will thus be examined in this regard. Namely, current Islamic scholars’ opinions regarding the accused’s right to be represented by another person to refute the accusation, and the concept of the practice of law, that is the function of the “legal profession”, in Islamic law.

#### **(1) The right of the accused to have a lawyer:**

Although our topic concerns the accused’s right to defend himself by means of a lawyer, a discussion regarding the victims’ right to be assisted by a representative is very relevant, because current Islamic jurists have based their view regarding the accused’s right to be helped by a lawyer on the discussion provided by early Islamic

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<sup>3</sup> - Crimes in Islamic law are divided into (1) Rights of God ‘public rights’ (2) individual or private rights. The latter, such as the claim for retaliation in intentional murder cannot be prosecuted unless requested (claimed) by the victim’s family. Article 18 of Law of Criminal Procedure in Saudi Arabia provides: “no criminal action shall be initiated nor investigation proceedings conducted in crimes involving a private right of action, except through a complaint by the victim or his representative or heirs, filed with the competent authority, unless the Bureau of Investigation and Prosecution considers that the filing of such an action and the investigation into those crimes will serve the public interest.” However, if the victim’s family waives their right to retaliatory punishment, the public prosecution reserves the right to prosecute the accused on the basis of *Ta’azir* (chastisement) punishment. See Gamil Muhammad Hussein “Basic Guarantees in the Islamic Criminal Justice System”. In Muhammad Abdel Haleem, Adel Omer Sherif, and Kate Daniels (2003). *Criminal Justice in Islam; Judicial Procedure in the Shari’a*. p.44

<sup>4</sup> - Some touched on this issue very briefly when they said that opinions about the complainant’s right to be represented in *Haddud* and *Qisas* offences are applicable in this situation.



jurists in respect of the victim's right to be represented by another person in criminal cases.

As to the plaintiff's right to be represented in the criminal sphere, jurists' views differ as follows according to the kind of crime:

First: *Haddud* crimes

These crimes are divided into two kinds: (1) crimes that do not entail any assault on the private right (party), such as adultery and drinking alcohol. This type involves no private complainant and is thus irrelevant to our present discussion; (2) *Haddud* crimes that entail assault on a private right, such as defamation. In this type of crime, jurists disagree about the victim's right to have someone to represent him. The majority of Hanafi, Maliki, Shafi'i, and Hanbali schools argue that a defamed person may have someone to represent him to prove his right against the accused, because the *Haddud* punishment in these crimes cannot be inflicted unless requested by the private complainant. The latter thus has the right to exercise this either by himself or through another person. Jurist Abu Yusuf of the Hanafi School, however, disagrees with the majority and states that the victim is not allowed to be represented in this kind of offence.<sup>5</sup> Abu Yusuf's view is based on analogy. He argues that since the victim's right to inflict the *Hadd* punishment by himself cannot be delegated to other person then, he explains, the victim in this kind of *Haddud* offences has no right to delegate his right to lodge his case to other person.

Second: *Qisas* crimes

The majority of jurists are in agreement about the legality of representation of the complainant in this kind of crimes because it is a private right.<sup>6</sup>

Third: *Ta'azir* crimes

The majority of jurists are in agreement about the legality of representation of the complainant in this kind of crime.<sup>7</sup>

In addition, Abu Hanafi<sup>8</sup> argues that the right to representation is contingent on the other litigant's approval except in exceptional circumstances; for example if he is ill or absent from the country (on a journey), because representation without the approval of the other party breaches the equality of arms doctrine.<sup>9</sup> However, the

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<sup>5</sup> - Bada'a Al-Sana'i (1982) Part 6 P.21, Tabeen Al-Haqa'iq (1314H) Part 4 P. 255

<sup>6</sup> - Bada'a Al-Sana'i (1982) Part 6 P.21, Tabeen Al-Haqa'iq (1314H) Part 4 P. 255

<sup>7</sup> - Bada'a Al-Sana'i Part 6 P.21

<sup>8</sup> - The founder of Hanafi School. See chapter 3

<sup>9</sup> - Bada'a Al-Sana'i (1982) Part 6 P.22, Tabeen Al-Haqa'iq (314 H) Part 4 P. 255

Maliki, Shafi'i, Hanbali schools and jurists Abu Yusuf and Muhammad of the Hanafi School disagree with the above opinion, stating that representation is permitted and is not subject to the approval of the other party. They support their argument on three grounds: (1) that the right to claim is a personal right, thus a litigant can exercise it in person or through another person. (2) That not every person is capable of presenting his case efficiently, thus depriving him from being represented could be harmful to his rights. (3) That a litigant might be busy and not wish to exercise his case in person.<sup>10</sup>

Current Islamic scholars have concluded from the above discussion that pursuant to Islamic law an accused person does have the right to be defended by a representative. Taha Al Alwanee claims that early Islamic jurists did not study the right of the accused to be defended by a representative, but rather they confined their studies to the complainant's right for representation to prove the claim against the accused. He declares that neither Islamic provision nor jurists' opinions express either prohibition or permission with regard to legal representation for the accused. He argues that the right of defence is a fundamental principle which an accused person can exercise in person or through a representative.<sup>11</sup> To the same effect, Awd M. Awd<sup>12</sup> and Abdulrahman Al Homady<sup>13</sup> state that all schools of thought agree about the accused's right to be represented in court whatever the crime is. Moreover, they conclude that according to the majority of jurists such representation is not subject to the approval of the other litigant.

Similarly, Bandar Al -Swailam states that in Islamic law the accused cannot be deprived of his right to be represented by another person. This right is applicable to all types of offence because all crimes require explanation and discussion, and not every person is capable of this.<sup>14</sup> This view taken by present Islamic scholars mentioned above is compatible with international human rights standards especially the European Court of Human Rights that considers the accused's right to be assisted by a lawyer as one of the fundamental features of the fair hearing.<sup>15</sup>

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<sup>10</sup> - Bada'a Al-Sana'i (1982) Part 6 P.22; Tabeen Al-Haqa'iq (1314 H) Part 4 P. 255

<sup>11</sup> - Taha Alwanee "*Huquq Al Motahem Fi Merhalat Al Tahgeeg*". In *Al Motahem Wa Huquqh Fi Al Shari'ah Al-Islami*. Arabic Centre for Securities and Training Studies. Riyadh 1982 Part 1 P. 38&39

<sup>12</sup> - Awd M. Awd "*Hag Al Motahem Fi Al Esta'anh Be Moham Been Al Shari'ah We Al Qanoon*" *Al-Muslim Al-Muasir*. The Contemporary Muslim Journal. Vol. 49 1987 P. 79- 82.

<sup>13</sup> - Abdulrahman Al-Homady (1989) p 461-471

<sup>14</sup> - Bandar Al-Swailam (1987) "*Al Motahem Wa Huquqh Fi Al- Fiqh Al-Islami*" Part 1 Arabic Centre for Securities and Training Studies. Riyadh p. 294 & 295

<sup>15</sup> - *Proitrimol v France* (1993) Para. 34 (Application No. 00014032/88)



## (2) Concept of the "Legal profession" in Islamic law

In early Islamic states, legal practice was not originally exercised with financial gain in view, but rather was practiced to assist the litigants concerned. Thus, this practice was not fully organized even after representatives had played a considerable role, thereby achieving an initial degree of organization.

Interestingly, attitudes towards the "litigants' representatives" were not positive: representatives were described as: "*non religious people and they hold the case by which rights are waived... if litigants, however, come to court by themselves justice will be discovered quickly... therefore it is much better if people do not seek their help...*"<sup>16</sup>

Ihsan AlKelanee points out that legal practice was known in other cultures, particularly in the Roman and Greek, as an organized profession. In contrast, Islamic society did not know legal practice as an organized social practice or in terms of an independent career, but rather they knew the system of litigants' representation. AlKelanee explains that unlike other societies, Islamic societies throughout history did not value those who represented litigants; the occupation was rather seen as a degrading career, and many of those with piety had avoided playing this role. In a society that holds this view, he argues, falling standards in this occupation are to be expected. No surprise then, his argument goes, if the history of the Islamic judiciary is one of great caution towards representation.

This negative attitude continued until legal practice appeared in its purist form when the Ottoman Empire issued the Litigants' Representatives Act in 1292 H. Since then many modern legislations have been enacted in which legal practice has been organized in Islamic states. These legislations have played a major role in changing the negative attitude towards the occupation of representation in many parts of the Islamic world.<sup>17</sup>

Early Islamic jurists, as has been explained, did not discuss legal practice. As a result current Islamic scholars disagree about the profession of law. Some believe it is prohibited, while the majority agrees about its legality. In the following the views of those who deny the legality of the legal profession will be examined.

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<sup>16</sup> - Abdulrahman Al-Homady (1989) p. 474- 476

<sup>17</sup> - Ihsan Al Kelanee "*Aslamh Al Shakssah Wa Huquq Al-Defi'a Wa Door Al-Mohamat Fi Al Eslam*" Journal of Law. Published by Faculty of Law in Kuwait University. Vol. 7 No. 3 September 1983 P. 205 & 210

Abu A'lal Al Maududi<sup>18</sup>, and a recent judgment in the United Arab Emirates<sup>19</sup> state that legal practice is prohibited in Islamic law. They support their claim chiefly on the basis of six points. These points and their validity will be discussed in the following:

The first point asserts that, as legal practice was not known in any previous Islamic age, it therefore cannot be accepted<sup>20</sup>. This view cannot however be accepted as a legal source for the prohibition of representation. The general principle in Islam is that everything is permitted unless clearly prohibited.<sup>21</sup> Being unknown in the past does not mean that it is prohibited. In fact, this view may be mainly attributed to the fact that some scholars have a strong sensitivity towards any western idea, whether positive or negative. The same reasoning could lead to the prohibition of any new concept such as a traffic or airline system, on the basis that this was not known in early Islamic societies. It could reveal Islamic law as being out of date and not capable of absorbing new developments.<sup>22</sup> Gamil Muhammad Hussein illustrates the point clearly when he states that: *“Although classical Islamic Shari’a did not specifically include any express provision which oblige the court to avail the accused of the right to use a lawyer, essentials of fair and just trial under Islamic law cannot be satisfied in any modern society without ensuring the right of the accused to use a lawyer or attorney of his or her own choice. Contemporary writers on Islamic Shari’a recognize the right to use a lawyer or attorney as one of the most basic rights of the accused in any criminal proceedings.”*<sup>23</sup>

The second point argues that there is no benefit from having lawyers in courts.<sup>24</sup> This claim is not true. The fact is that the lawyer, since he understands the provisions of Islamic as well as enacted laws, can present a case clearly before the court and can highlight its crucial points. This is an important means of reaching the correct decision.

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<sup>18</sup> - Al Maududi (1975) *“Al Qanoon Al-Islami Wa Torog Tanfedeh”* Mu’sst Al Resalah .

<sup>19</sup> - A decision in *Ajman Federalist Shari’ah Court* in 19/12/1984. Quoted in Awd M.Awd *“Hag Al Motahem Fi Al Esta’anh Be Mohamee”* Al Muslim Al Mo’asr Journal. 1987 P. 68

<sup>20</sup> - Al Maududi, A (1975) *“Al Qanoon Al-Islami we Torog Tanfedeh”* Mu’sst Al Resalah. p. 74

<sup>21</sup> - Mashohor Soliman (1987) p. 115

<sup>22</sup> - See chapter three of this thesis.

<sup>23</sup> - Gamil Muhammad Hussein *“Basic Guarantees in the Islamic Criminal Justice System”*. In Muhammad Abdel Haleem, Adel Omer Sherif, and Kate Daniels (2003). *Criminal Justice in Islam; Judicial Procedure in the Shari’a*. p 50

<sup>24</sup> - Al Maududi (1975) *“Al Qanoon Al-Islami Wa Torog Tanfedeh”* Mu’sst Al Resalah p. 71-73



The third argument is that the lawyers' aim is to gain personal profit for themselves and that they are indifferent in respect of the fact.<sup>25</sup> This argument can be rejected on the basis that a Muslim lawyer has a religious and moral duty which he must follow; and despite some inevitable exceptions, such as also occur in all other professions, from farming to accounting, the rule still holds. According to this argument the professions of farming and accounting etc. should also be banned<sup>26</sup>.

The fourth claim is that by his professional experience and personal skills a lawyer is able to change the facts, which could mislead the judge.<sup>27</sup> This argument is based on an exaggeration of the role of the lawyer. Many facts show the fallacy of this claim. To begin with it is often maintained that whatever skills the lawyer presents, he cannot change the facts since the judges in most legal systems are highly qualified. This is particularly the case in Islamic states where the law requires very high qualifications from a person to be appointed as a judge. Besides this, serious criminal offences are tried in most current judicial systems by a bench consisting of three or more judges. Moreover, in most judicial systems criminal judgments are also subject to supervision by higher courts.

The fifth point contends that the participation of a lawyer might complicate the case and slow down the procedures<sup>28</sup>. The invalidity of this argument can be demonstrated by reference to three points. First, pursuant to Islamic law as we will point out later, an accused person has an important guarantee to be tried without undue delay. So a lawyer, when defending the accused, will be restricted by the right to speedy trial. Secondly, a fair decision, however relatively delayed, is much better than an unfair decision made hastily. Finally and more importantly, the judge presides over the hearing, so if he notices any unnecessary delay on the part of the lawyer he can take any necessary steps to adjudicate the case within a reasonable time.

The sixth and final point argues that representation by a lawyer might infringe the right to equality of arms. This claim can be refuted on three grounds: (1) the other party in the case, whether criminal or civil, is also entitled to a lawyer; (2) the argument is inconceivable in criminal cases where the accused faces an experienced party (litigant), that is to say the public prosecution; (3) equality between litigants,

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<sup>25</sup> - Ibid, p. 72

<sup>26</sup> - Mashohor Soliman (1987) p. 117

<sup>27</sup> - Al Maududi (1975) "*Al Qanoon Al-Islami wa Torog Tanfedeh*" Mu'ssast Al Resalah p. 72

<sup>28</sup> - Abdullah Al-Muhmmud (no year) "*Majmo't Al-Rasa'l*" . Al-maktab Al-Islami. Second edition. Part 2 p.286

generally speaking, cannot be fully achieved even in the absence of a lawyer. Some litigants are more eloquent and hence more capable of presenting their cases effectively.<sup>29</sup>

Accordingly, the great majority of Islamic scholars and writers are in agreement about the legality of legal practice provided that the lawyer does not defend his client if he knows that the latter is in the wrong.<sup>30</sup> Therefore, the judicial system in Saudi Arabia has correctly adopted the view provided by the majority, and issued, as we will see, a code of law practice to organise the legal profession. In fact, this understanding shows clear consistency with the international law of human rights especially in respect of the right of the accused to be helped by a lawyer.

## **Section Two      Saudi law**

### **1: *Shari'ah* Courts**

Until very recently (2001), the structures of legal practice in Saudi Arabia were not precisely organized, and the accused's right to be helped by a lawyer was not fully guaranteed. The Law of 1372 H<sup>31</sup> was the sole enacted law that mention the right to representation.

To understand the significance of the historical development of the legal profession in Saudi Arabia in terms of shaping the current laws, one should divide the study of this subject into two stages, namely the right of the accused to be assisted by a lawyer before and after the enactment of the Code of Law Practice<sup>32</sup>, Law of Criminal Procedure<sup>33</sup>, and the Law of Civil Procedure before *Shari'ah* Courts.

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<sup>29</sup> - Mashohor Soliman (1987) p 131

<sup>30</sup> - See the Permanent Committee for Research and Legal Opinion in Saudi Arabia. *Fatwa* "legal opinion" No. 3532. See also Fatwa of Scholar Muhammad Bin Authemeen. A previous member of the Board of Senior Religious Scholars (*Hae't Kibar Al-Aluma*). *Al musulmoon* Newspaper. First Year, Vol. 10 P. 14, Almubark, Ahmad. A previous president of the judiciary in the United Arab Emirates. "Al Mohamah" P. 177 Conference in Islamic Jurisprudence held in Imam Muhammad bin Saud Islamic University. Riyadh. 1396

<sup>31</sup> - This law is replaced by the Law of Civil Procedure before *Shari'ah* Courts

<sup>32</sup> - Issued by Royal Decree No. (M/38) 15 October 2001

<sup>33</sup> - Issued by Royal Decree No. (M/39) 16 October 2001



**(A) The right of the accused to be assisted by a lawyer prior to the current laws**

Article 59 of 1372 H Law <sup>34</sup> provided that “Every person has the right to representation without restriction”. Apparently the phrase “without restriction” was selected to confirm that the legislature expresses the opinion of the majority of Islamic jurists, who emphasize that representation in court is not contingent on approval from the other litigant. This is in fact an important issue, because leaving the door open to the judge to decide upon controversial issues could lead to differences of opinion between judges as to correct procedures. This might particularly arise where one judge favoured the majority opinion, while another judge supported Abu Hanafi’s interpretation mentioned above.

However, despite the fact that the text provided in the article is general and is not confined to civil or criminal cases, in practice an accused before *Shari’ah* courts and the investigation authority was not allowed to be represented or assisted except in exceptional circumstances. For example, where the accused lacks the ability to represent himself or where he is a minor<sup>35</sup>.

Although the judicial and investigation authorities did not offer clear justification for their reluctance in this matter, a careful scrutiny of the history might illuminate the grounds for their negative attitude. Three historical points might be relevant to our discussion:

- 1- The disagreement about representation between early Islamic jurists in the four Islamic schools of thought had created ambiguity around this issue. In particular, as we have seen, jurists did not discuss the right of the accused to be represented in trial.
- 2- Litigant representation had been viewed as a degrading career throughout different Islamic ages as we have pointed out above. It seems that this stance had continued until recently among the judiciary members and also perhaps in Saudi society. This is evident by the fact that some judges considered lawyers as a hindrance in reaching the truth in the determination of the case. It was believed that lawyers often focused on side issues that were not directly relevant to resolution of the case or engaged in tactics that detracted from the

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<sup>34</sup> - This law was repealed by the Law of Civil Procedure before *Shari’ah* Courts

<sup>35</sup> - See for instance Saud Al Hammali (1419-1418H). *Hag Al- Defi’a Fi Merhalat Al-Muhakmah Al-Jaza’eeh*. Naif Arab Academy for Security Sciences; a Master dissertation. He displays a case in which the accused was represented by a lawyer, because he was minor. p.197

achievement of justice. In addition, it was also often maintained that a direct interaction between judges and the accused was the best way of achieving the most appropriate resolution of the case.

- 3- It seems that the idea of representing an accused before the court was not familiar when the Law of 1372 H was enacted. Thus, this attitude remained until recent years. In reality, most legal professionals did not go into legal practice because there was no culture of legal representation in the society.

### **(B) The right of the accused to be assisted by a lawyer subsequent to the current laws**

In spite of many individual attempts to provide an accused with the right to be defended by a lawyer, it seems that the legislature correctly preferred to resolve the issue through clear integral laws.

According to the Law of Criminal Procedure the accused's right to be assisted by a professional lawyer is guaranteed by article 4 which explicitly declares: "*any accused person shall have the right to seek the assistance of a lawyer or a representative to defend him during the investigation and trial stages*". This article does not distinguish between kinds of crime. The accused is entitled to this right whatever crime he is accused of, whether *Qisas*, *Haddud*, or *Ta'azir*. This confirms that the legislature in Saudi Arabia has in this regard adopted the opinion that has been accepted by the majority of Muslim scholars. This approach is also in agreement with the European Court of Human Rights that considers the accused right to have a lawyer as an essential element of a fair hearing<sup>36</sup>.

Interestingly, even though the significance of the role of a professional lawyer in defending the accused is recognized, the accused's right to be assisted in the stages of trial or investigation is not confined to a qualified, licensed lawyer. The accused can choose any person to assist him. This might raise the question of how an unqualified person can help the accused. However, anyone who is familiar with Saudi society may understand. There are many qualified persons though not lawyers who are willing to defend an accused person if the latter is a relative or a friend, or just in the interests of justice as a kind of social solidarity in Islam.

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<sup>36</sup> - *Proitrimol v France* (1993) Para.34 (Application No. 00014032/88)



The right to have a lawyer begins from the moment that the accused is arrested. Article 35 provides: "*In cases other than flagrant 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 moral harm. He shall also be advised of the reasons of his detention and shall be entitled to communicate with any person of his choice to inform him of his arrest.*" The term used in the last sentence "*to inform him of his arrest*" may imply that the law permits only a single communication between the lawyer and the accused, just to report the arrest. In fact, reading this article in connection with other articles of the law such as article 4 mentioned above, and article 64 which states that: "*During the investigation, the accused shall have the right to seek the assistance of a representative or an attorney.*" should give a different understanding. Since article 35 is placed under section 3 which is titled "Arrest of the Accused", one can argue that this article is worded in such a manner just to ensure that the accused right to have a lawyer begins from the moment of his arrest. The accused right to communicate with his lawyer is not limited to a single communication. This understanding complies with the European standards of human rights in which the right to have a lawyer is regarded as a fundamental right that must be effectively exercised.

In addition, the right to have a lawyer is not obligatory. So the accused can opt to defend himself in person and not to be assisted by a lawyer, which means that the law does not consider the right to have a lawyer as part of the judicial administration, but rather it is considered as a purely private right. In serious crimes, the accused must personally appear before the court, without prejudice to his right to seek legal assistance. As to other crimes, his attendance is not obligatory provided that a representative or an attorney defends him. But the court might issue an order for the personal appearance of the accused, if the interest of justice so requires.<sup>37</sup>

It is essential to know that the application of the European human rights standards with regard to the right to have a lawyer entails that the lawyer must be given the opportunity to visit his client in person out of the hearing of officials<sup>38</sup>. However, the European Court is of the opinion that despite the importance of a relationship of confidence between a lawyer and the accused, this right is not absolute.<sup>39</sup> So, privacy

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<sup>37</sup> - Article 140 of Law of Criminal Procedure

<sup>38</sup> - *Can v Austria* (1985) Para 17 (Application No. 00009300/81)

<sup>39</sup> - *Croissant v Germany* (1992) Para 29 (Application No. 00013611/88)

between the lawyer and the accused can be subject to some restrictions.<sup>40</sup> In addition, this right can be restricted to protect public interests.<sup>41</sup> Therefore, providing the accused with the right to appoint his own lawyer does not mean that the Contracting States cannot regulate such practice. A state has the jurisdiction to set up legislations governing the required qualification and conduct of lawyers.<sup>42</sup>

A comparison between the above requirements and the law in Saudi Arabia reveals that Article 116 of the Law of Criminal Procedures is not compatible with the European Convention because it subjects the accused's communication to the supervision of the criminal investigation officer. It provides: "*Whoever is arrested or detained shall be promptly notified of the reasons for his arrest or detention, and shall be entitled to communicate with any person of his choice, to inform him (of his arrest or detention), provided that such communication is under the supervision of the criminal investigation officer.*" According to the European Court of Human Rights if the lawyer cannot receive instructions in confidence, then a risk that legal consultation might lose much of its effectiveness.<sup>43</sup> Accordingly, it is important to redraft the article concerned in the Saudi law in a way that guarantees this issue, and any restriction must be allowed only in exceptional circumstances.

As far as legal assistance in Saudi Arabia is concerned, if the accused has no means to pay for a lawyer he cannot have legal assistance. This fact is open to criticism because it simply means that a rich accused can enjoy the assistance of an experienced qualified lawyer, whereas an indigent accused cannot enjoy the same right. No one can deny that an accused who is represented by a lawyer is more likely to exercise the right of defence effectively. This would probably violate the European Convention on Human Rights which states that: "*Everyone charged with a criminal offence has the following minimum rights...(c) to defend himself ...through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require.*" Thus, in order to achieve conformity with the European Convention on Human Rights, this shortcoming needs to be addressed in order to ensure legal assistance to those who do not have sufficient means to pay the lawyer's cost.

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<sup>40</sup> - *Campbell and Fell v United Kingdom* (1984) 2 EHRR 165

<sup>41</sup> - *Ibid*

<sup>42</sup> - Harris (1995) p.259

<sup>43</sup> - *Brennan v UK* (2003) 34 EHRR 18



Moreover, in order to guarantee the right to have a free legal assistance in a manner consistent with the European standards of human rights, the Saudi court must insure that the accused in reality is assisted by a counsel. The European Court found that mere nomination does not ensure effective assistance.<sup>44</sup>

## **2: The Board of Grievances**

According to article 19 of the Rules of Pleadings before the Board of Grievances an accused person may seek help from an attorney. In contrast to cases before the *Shari'ah* courts, the personal appearance of the accused before the Board is obligatory in all criminal cases, whether serious or not.

As to the accused's right to be helped by a lay advocate, article 19 guarantees the right to be assisted by a lawyer, but does not mention a representative who is not specifically a lawyer<sup>45</sup>. However this should not be understood to mean that the accused is not allowed to be assisted by a lay advocate.

The reason for stipulating article 19 as such may be attributed to a historical cause, namely the ambiguity in respect of the right to be helped by a lawyer. So when enacting the Rules of Pleadings before the Board of Grievances the legislature took this matter into account and correctly clarified its position regarding this issue by granting the right to the accused in any crime tried before the Board.

However, a careful reading of article 19 can lead to the conclusion that the accused's right to be assisted by a lawyer is not absolute, but is conditional on his appearance before the Board. If the accused fails to attend the trial he has no right to be represented by a lawyer. Article 19 provides that: "*the accused shall appear in the hearing of a disciplinary or criminal case; he shall defend himself orally or in writing; he may seek help from an advocate... Where a person who is charged of a criminal case has been summoned but has failed to appear he shall be served with another summons to appear in another session and if he has failed to appear the Circuit may adjudge the case in default or may issue a warrant and bring him before it on a fixed date: if his arrest was impossible it will adjudge the case in default*".

This is in fact in clear contradiction to the status in the European Court of Human Rights. The Court has held that: "... *the fact that the defendant, in spite of having*

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<sup>44</sup> - *Artico v Italy* (1981) 3 EHRR 1

<sup>45</sup> - Article 19 of the Rules of Pleadings before the Board of Grievances reads: "...*he (the accused) may seek help from an advocate*"

*been properly summoned, does not appear, cannot - even in the absence of an excuse - justify depriving him of his right under article 6 Para 3 of the convention to be defended by council”<sup>46</sup>.*

As to the right to a lawyer in the appellate courts, Article 36 of the Rules of Pleadings before the Board of Grievances states: “ *Where the application for scrutiny has been granted the Scrutinizing Circuit will either confirm or reverse the judgment and in the case of reversal it may return it to the Circuit which rendered it or itself hear the case; where the judgment was returned to the Circuit which rendered it, if it has insisted on its judgment, the Scrutinizing Circuit shall itself hear the case if it is not satisfied with the point of view of the Circuit rendering the judgment.*

*In all cases where the scrutinizing Circuit decides to hear the case it will decide after having heard the statements of the litigants....”* Therefore and since the Scrutinizing Circuit reviews decisions taken by for instance circuit on file (papers) basis and no hearing is held the accused, his lawyer, and the prosecution do not participate in this stage. Accordingly, the right to be represented before the Scrutinizing Circuit is not guaranteed except if the case is heard by the Scrutinizing Circuit after the judgment of the first instance has been reversed.

Although the article does not state explicitly the accused’s right to be helped by a lawyer before the Scrutinizing Circuit, this right is connected to the rights to defence provided in article 19. The accused is thus entitled to enjoy all defence rights guaranteed before the first instance circuit. This includes, for instance, the right to defend himself personally in oral or written form, to seek help from a lawyer, and to apply for the issue of a summons to witnesses in order to hear their evidence.

As far as the standard of the European human rights law is concerned, the above rules do not contradict the European standard of human rights because the right to have a lawyer is fully guaranteed in the trial court.

In accordance with article 22, if the accused is expelled from the hearing for breaching the Circuit regulations, the circuit may carry on the hearing of the case until such time as it becomes possible to proceed with the case in the accused’s presence. Although this article does not clarify whether or not the presence of his lawyer will be permitted if the accused is expelled, the temporal nature of this exclusion might suggest that the exclusion in this is limited to the accused.

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<sup>46</sup> - *Lala v Netherlands* (1993) Para.33 (Application No. 00014861/89)



The lawyer has the right of access to the investigation minutes (record) and may obtain copies of the papers relating to his case if the interests of justice so require.<sup>47</sup>

### **3: Comments on the Code of Law Practice**

Guarantees regarding the right of the accused to be assisted by a lawyer are provided in the Law of Criminal Procedure and in the Rules of Pleadings before the Board of Grievances. The former covers the procedure before the *Shari'ah* courts, and the latter covers the procedure before the Board. However, some other guarantees regarding this issue are provided in the Code of Law Practice. This law governs both judicial institutions. Therefore, the rules provided in this discussion are applicable in both the *Shari'ah* court and the Board of Grievances. The Code of Law Practice is applicable to lawyers in the Board of Grievances, the *Shari'ah* courts and the administrative committees. Article 1 declares: "*the phrase "law practice" shall mean representation of third parties before courts of law, the Board of Grievances, and other committees....*" The discussion here will be limited to the main subject of this section. That is, the right in Saudi Arabia of the accused to have a lawyer in both institutions. According to article 13 of the Code of Law Practice a lawyer has the right to choose whatever strategy he may deem appropriate for defending the interests of the accused, and in so doing, shall not be questioned in connection with the content of his written or oral arguments. However, the lawyer is under obligation to refrain from any offensive language or accusation. He is also obliged not to refer to personal matters concerning the accused's adversary or representative,<sup>48</sup> unless, of course, these personal matters are important and necessary in defending the accused.

Since the right to be assisted by a lawyer is held to be not merely a token principle but an effective practical measure, the *Shari'ah* courts, the Board of Grievances, administrative committees, government agencies, and the investigation authorities are obliged to facilitate the lawyer's discharge of his assignment, and must enable him to attend any interrogation and peruse any relevant documents. Moreover, his request shall not be denied except for a valid reason.<sup>49</sup>

Here it should be asked whether the rights mentioned in articles 13 and 19 above are also applicable both to the lay advocate and to the accused himself if he decides to exercise his rights personally. In fact these rights are only provided in the Code of

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<sup>47</sup> - Article 17 of the Rules of Pleadings before the Board of Grievances

<sup>48</sup> - Article 12 of the Code of Law Practice.

<sup>49</sup> - Article 19 of the Code of Law Practice.

Law Practice (duties and rights of lawyers). This law aims to organize legal practice and has nothing to do with any representative if he is not a lawyer. However, since these rights are essential in order to enable the accused or his defender, whether a professional or not, to exercise the defence rights effectively, it is suggested that these articles should also be applicable to the accused and lay advocates. This view is supported by the fact that not providing the accused or a lay advocate with such rights might be regarded as a breach of the right to equality of arms, particularly if a lawyer represents the victim.

According to the Code a lawyer cannot without a legitimate cause decline to represent his client before the case has been concluded.<sup>50</sup> However, the lawyer is not prohibited from defending more than one accused in the same case provided that there is no conflict in their interests.

As to the accused's right to withdraw his lawyer, article 27 clearly stipulates that the accused shall be entitled to dismiss his lawyer. Obviously, this article does not confine this right to a particular stage of the case, which means that the accused can withdraw his lawyer at any time. The law does not, however, state whether the accused has the right to appoint a second lawyer after dismissing his first. Yet this should not be understood to mean that he is not allowed to do so, since the law guarantees this right and this guarantee must be applied even after dismissal of the first lawyer.

Naturally, the lawyer should not be allowed to act or continue to act for two or more defendants where a conflict of interests arises between those defendants. Article 15 states that: "*A lawyer shall neither personally, nor through another lawyer agree to represent an adversary of his client or otherwise provide him with any assistance, even in the form of an opinion, in connection with a case that he has previously handled or in connection with any other related matter even after expiry of his power of attorney*".

In addition, in Saudi Arabia the question cannot arise that the accused's lawyer might simultaneously function as an investigator against the same accused, because a lawyer is not allowed to work as an investigator. However, the same problem can arise if the same lawyer appears as a representative against the same accused on behalf of the victim or his heirs in another case. Article 14 of the Code of Law Practice declares

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<sup>50</sup> - Article 23 of Code of Law Practice.



that: "(1) A lawyer shall not personally, or through another lawyer, accept any case or render any advice against his present or former employer except after the expiry of a minimum period of five years from the date of termination of his relation with that employer. (2) A lawyer who acts for a client on a part-time basis pursuant to a contract shall not accept any case or render any advice against that client before the expiry of three years following termination of that contract." Obviously, this article concerns mainly civil cases where conflict between different firms is more likely to occur. However, the article should be interpreted to be applicable to criminal cases particularly since this right supports the position of the accused.

Before both the *Shari'ah* courts and the Board of Grievances the law does not mention the right to a competent and effective lawyer. Moreover, it does not provide a standard or guidance by which the competence of the lawyer will be judged. Even though the European Convention does not mention expressly that a lawyer must be competent, this right emerges from the requirement that rights provided in the Convention must be effectively enjoyed. The accused is entitled to a fair trial. His status is to a considerable degree dependent upon the skill and knowledge and experience of counsel. The discussion must now move to an examination of the situation in Saudi Arabia where the accused is assisted inadequately.

This is in fact an important matter to address in the judicial system, particularly since Judges are not likely to consider the competence of the lawyer, as: (1) seeking the assistance of a lawyer is not obligatory in Saudi Arabia and therefore it is the accused's duty to choose a qualified lawyer; (2) the training of judges essentially focuses on Islamic jurisprudence as presented in the old Islamic books, in which such matters are not detailed.

With regard to the test by which the standard of competency is judged, obviously this is very difficult task. David M Tanovich, trying to provide a test by which the competence of the lawyer may be judged, concludes: "*I began this article pondering the question of what the effective assistance of counsel truly meant. Unfortunately, I conclude without an answer.*"<sup>51</sup>

Many attempts have been made in other jurisdictions to set a test of the competence of the lawyer. Suggestions made fall into two main groups. First, there are those that

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<sup>51</sup> - Tanovich, D (1993-1994) "*Charting the Constitutional Right of Effective Assistance of Counsel in Canada*". *Journal of the Criminal Law Quarterly*. Vol.36, No 4 P. 422

argue that the court itself should establish a test<sup>52</sup>. This could for example be a test for flagrant incompetence, or a more restricted test applying the "safety approach".<sup>53</sup> However, this suggestion is not practicable in Saudi Arabia where judges are not willing to develop or set any standard in which the competence of the lawyer can be examined.

Alternatively, the second suggestion, namely that the legislative body itself should set guidelines to be observed by the defending lawyer is more suitable to the status quo in Saudi Arabia. The law in Saudi Arabia could specify standards for what we envision effective assistance to mean. Professor Klein explains that: "*Particularized standards which guide lawyers through every stage of the criminal proceedings, might actually diminish the number of inadequate representation claims. Such standards detailing the steps that ought to be taken in preparing a case would assist and guide the attorney in the preparation of the defence in a criminal trial, and would be especially useful to the novice attorney or the lawyer whose speciality is in another area of law, but who recently has taken on a criminal case.*

*Particularized requirements would also enable defendants to understand what is involved in the defence of a case and might well enable them to more actively participate in the process that so vitally affects them. Through such standards, the trial judge would be able to monitor more effectively the quality of representation the defendant was receiving. Moreover, the lack of specific standards makes it more difficult to evaluate the competency of the representation provided. This in turn diminishes the likelihood of obtaining appellate relief for a defendant who had ineffective counsel at trial*".<sup>54</sup>

Interestingly, the law prevents the lawyer from disclosing any evidence before both institutions that could be used against the accused. Article 23 of the Code of Law Practice provides: "*A lawyer shall not disclose any confidential information which has been communicated to him or of which he has become aware in the course of practicing his profession even after expiration of his power of attorney, unless such non-disclosure constitutes a violation of a Shari'ah requirement...*" Therefore, if the

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<sup>52</sup> - Samuels, A "Incompetence or ineptitude of counsel as a ground of appeal". The Criminal Lawyer Journal. No.77 November 1997 P. 1

<sup>53</sup> - This test means that it is not enough to demonstrate that there was a material irregularity, but whether any material irregularity in fact had an effect upon the judgment.

<sup>54</sup> - Professor Klein . Quoted in Tanovich, D (1993-1994) "Charting the Constitutional Right of Effective Assistance of Counsel in Canada". Journal of The Criminal Law Quarterly. Vol.36, No 4 P. 414



lawyer contravenes his obligation to keep his communication with his client secret he will be subject to disciplinary action. Article 29 Para 2 declares that: "*Without prejudice to a claim for compensation by any aggrieved party or to any other claim, any lawyer who violates the provisions of this Code or its implementing regulations, or commits a breach of his professional duties or any act as may be incompatible with the professional standards shall be subject to one of the following sanctions...*"

Nevertheless, and more significantly, the law does not require the exclusion of evidence obtained by breaching the lawyer's obligation to keep his communication with his client confidential. In other words, "*the defendant cannot be insured a fair trial without legal advice and representation, and legal privilege is guaranteed to insure its effectiveness. The accused has been induced to speak candidly to his lawyer. So, if these confidential communications are admitted in evidence, the state takes unfair advantage of him.*"<sup>55</sup> As a result it can be suggested that if conformity with European Convention on Human Rights needs to be maintained to ensure effective access to a lawyer the law must state clearly that evidence obtained from the lawyer by breaching his obligation that he must keep his communication with the accused confidential is not accepted.

## **Part II                      The Right to an Interpreter**

Article 6 Para 3 of the European Convention on Human Rights states that: "*Everyone charged with a criminal offence has the following minimum rights... (e) To have the free assistance of an interpreter if he cannot understand or speak the language used in court.*"

This part will be divided into two sections, dealing as before first with the terms of Islamic Law, and second with the law of Saudi Arabia.

### **Section One      Islamic law**

Traditional Islamic jurisprudence does not provide a separate study in respect of the accused's right to have a translator if he does not understand the language used in court. However, the early jurists had discussed the idea of a translator for any of the litigants or witnesses who could not speak or understand the language used in court,

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<sup>55</sup> - For further discussion about the right to confidential communications with a lawyer see for example, T.R.S. Allan "*Legal Privilege and the Principle of Fairness in the Criminal Trial.*" *The Criminal Law Review Journal*. 1987 Sweet and Maxwell P. 449

in either civil or criminal cases. Since these rules may also be applied to the accused in criminal cases, the jurists' views regarding this matter will be outlined.

Islamic jurists address the subject in considerable detail. For example, they discuss the validity of a translation provided by a blind or deaf person, or an interpretation made by a son to his father or visa versa. However, our discussion will concentrate exclusively on matters related to our main topic. Namely, the accused's right to have an interpreter.

Jurists are in agreement about the validity of seeking the assistance of a translator through a judge if the litigants or one of them cannot speak the language used in the court.<sup>56</sup> They cite the following evidence to support their view:

- 1- The Prophet employed Sad bin Thabit<sup>57</sup> to translate letters from Jews<sup>58</sup>.
- 2- The judge is not able to understand the case unless it is translated into a language which he understands<sup>59</sup>.

However, they disagree about the number of interpreters that must be employed to render a judicial decision. They are divided into three schools of thought:

1- Al-Shafi'i<sup>60</sup>, Al Hanbali<sup>61</sup>, some jurists of the Maliki<sup>62</sup>, and Muhammad bin Al-Hassan and Zefer from the Hanafi School<sup>63</sup> believe that a judge cannot base his judgment on the translation of one interpreter. Their view is based on the belief that a translation is a kind of testimony, and that the conditions appertaining to testimony must therefore be applied in the case of translation.

2- In contrast to this view Abu Hanafi and his pupil Abu Yusuf<sup>64</sup>, some jurists of the Maliki<sup>65</sup>, and Hanbali<sup>66</sup> Schools, do not classify the translation as testimony, but rather regard it as a statement or an item of information. So they do not require the conditions of testimony for translation. Thus, the judge can in their opinion rely on the translation of a single person.

3- Other jurists say that translation does not always have the same character. Some translations may be considered as testimony. In this case the judge cannot base his

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<sup>56</sup> - Al-Baheer Al-Ra'g (1997). Part 7. P113 & Kashaf Al-kana' (1983). Part 6 p.352

<sup>57</sup> - One of the Prophet's companions.

<sup>58</sup> - Al-Bokary, Kitab Al-Ahkam, Hadith No. 895.

<sup>59</sup> - Kashaf Al Kana' (1983) Part 6 P. 352

<sup>60</sup> - Al-Mawardi (1970/1971) *Adab Al-Qadee*. Part2 p.695-696

<sup>61</sup> - Al Ensaf (1378H) Part 11. P. 394

<sup>62</sup> - Al Hattab (1398H) *Mawaheb Al Jaleel*. Part 6 P. 116&117

<sup>63</sup> - Al-Baheer Al-Ra'g (1997). Part 7 P. 67

<sup>64</sup> - Bada'a Al Sana'i (1982) Part 7 P. 12

<sup>65</sup> - Tabsert Al Hokam (1406H). Part 1 P. 357

<sup>66</sup> - Al Ensaf (1378H). Part 11 P. 394



judgment on one interpreter. Other translations may be regarded as a statement. In this case one interpreter is acceptable<sup>67</sup>. Although the distinction between testimony and information is a difficult task, some jurists have nevertheless established a test in which the difference can be identified. They say that the translation has the function of statement or information if it is general information and does not pertain to a particular person. But it is classified as testimony if it concerns a particular person.<sup>68</sup>

Another controversial issue in this regard is whether or not the judge is permitted to do the translation himself if he speaks the language of the party concerned. Although jurists have not discussed this matter directly, their views can be deduced from their general statements. Some Hanafi and Maliki Schools state that the judge may translate if he can<sup>69</sup>, whereas Al Hanbali jurists restrict the employment of an interpreter to two situations: (1) if the judge does not understand the litigants. (2) If one litigant is Arabic and the other is not<sup>70</sup>.

From this one can conclude that the Hanafi and Maliki Schools deem it the right of the judge to translate if he knows the language of the parties or witnesses. He can thus translate himself or he can seek the help of an interpreter, even if he understands the language. But the Hanbali School's view is that the judge is obliged to translate himself if he understands the language to be translated, except in the case that one party is Arabic and the other is not. The reason for this view is that the judge's translation to one party in the presence of a second party who cannot understand the translated statements could breach conditions of equality between litigants<sup>71</sup>.

As to the cost of an interpreter it seems that Islamic jurisprudence deems the translation to be part of the court administration. As a result the state must pay the interpreting costs.<sup>72</sup>

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<sup>67</sup> - Adrar Al-Shorog (no year) Part 1 P. 9

<sup>68</sup> - Al Gorafee (no year) *Al Furuq*. Part 1 P.4 Alm Al Kotob. Beirut.

<sup>69</sup> - Sharh Al Zarkashee Ala Muktaser Al- Koragee (1412H) Part 7 P. 258,

<sup>70</sup> - Kashaf Al Kana' (1983). Part 6 P. 352

<sup>71</sup> - Al-Fatawa Al-Hendeeh (1310 H) part 3 p.322

<sup>72</sup> - Bada'a Al Sana'i (1982) Part 7 P. 12

## Section Two

## Saudi law

Article 1 of the Basic Law and article 36 of the Law of the Judiciary state that Arabic is the official language of the court. So no other languages may be used before the court. According to article 13 of the Council of Ministers' Resolution No. 66 in 1374 H the Ministry of Commerce is the authority in charge of translation licenses. The Ministerial decision No. 346 in 1397 H states the conditions required to gain a translation license. In line with our approach, however, our discussion will be limited to the accused's right to be assisted by an interpreter if he cannot speak or understand the language used in the *Shari'ah* courts and in the Board of Grievances respectively.

### 1: *Shari'ah* Courts

Rules governing the right of the accused to have an interpreter if he does not understand the language used in court in Saudi Arabia are quite similar to those required by the European Convention on Human Rights. If either a litigant or a witness does not understand Arabic, the court may seek the assistance of interpreters<sup>73</sup>. It appears, however, that like the case in the European Court, obligating the court to seek the help of interpreters is not to imply that a written translation of the judgment rendered will be provided. An oral translation is sufficient. The court is also not obligated to translate the defence memorandum (pleading) if it is provided in writing. Similarly, the court is not obliged to translate all documents provided by the accused. Such translations must be regarded as part of the defence task; the court's responsibility is confined only to enabling the accused to exercise his defence rights. In other words, if the accused submits a translation of a written document, the court should allow him to do so.

But, if the accused admits his guilt before the courts, the confession must be written by the accused in his original language and then will be accurately translated into Arabic.<sup>74</sup>

The law does not provide an explicit answer to the question of whether the court should provide the accused with an interpreter if he is assisted by a lawyer who speaks the accused's language. One can then suggest that in order to keep close to the approach applied by the European Court of Human Rights, it is the court's duty to

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<sup>73</sup> - Article 172 of the Law of Criminal Procedure.

<sup>74</sup> - Circular No. T/208/12 dated on 20/12/1404 H. *Ministry of Justice. AL- tassneef al- Maudouy Li-tameem al-Wazarah [The Classification Book for the Ministry of justice Regulation and Administrative Circulars], Vol.3 (Ministry of Justice, Riyadh, Saudi Arabia 1413 H).*



provide a translator in this case, because the accused himself should understand the proceedings against him in order to discuss any important points with his lawyer.

In addition, if the accused elects to be assisted by a lawyer who cannot speak the language of the accused, the court may not provide him with an interpreter to assist his communication with his lawyer. This is slightly different from the case in the ECHR. According to the ECHR the state is obliged to provide the accused person with a lawyer if he has not sufficient means to pay and if the interests of justice so require. So if the court in a contracting state determines to help the accused by providing a lawyer it must insure that this right is exercised effectively by either providing a lawyer who speaks the accused's language, or by providing him with an interpreter if the lawyer is not able to communicate with the accused. In contrast, courts according to the judicial system in Saudi Arabia cannot provide the accused with a lawyer if he has not sufficient means to pay for the lawyer. Thus, if the accused decides to be assisted by a lawyer at his own cost, he must either select a lawyer who can speak his language or engage a separate interpreter at his own expense.

With regard to the cost of an interpreter, the *Shari'ah* Court is responsible for the payment of these costs. This rule is applicable regardless of the final judgment. Accordingly, courts do not request the accused to pay the cost of the interpreter if he is convicted. This perspective is akin to the European Court's judgment in *Luedicke, Belkcm and Koc v Germany*.<sup>75</sup> The European Court has pointed out that the right to have an assistance of an interpreter: "*entails for any one who can not speak or understand the language used in a court, the right to receive the free assistance of an interpreter, without subsequently having claimed back from him payment of costs thereby incurred.*"

In addition, The Ministry of Justice has established a department for translation which means that most interpreters are employees in the Ministry of Justice. No one can be appointed unless he passes an exam under the supervision of the Ministry of Justice<sup>76</sup>. There are many advantages to this approach. First: interpreters can be trained to insure their competence. Second: in this way the court will use different interpreters from those used by the police or the investigation authorities. This should serve as a

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<sup>75</sup> - (1978) Para 46 (Application No. 00006210/73; 00006877/75)

<sup>76</sup> - Article 99 of the Law of the Judiciary. However, for non-popular languages the court may seek help from interpreters for every individual case separately and it shall also pay the cost. - Ministerial decision No. 8/T 29/1/1412 H. In addition, the cost of each single translation is governed by the Decision No. 1/220 in 10/5/1411 H of the Council of Civil Servant

significant guarantee against a possible infringement of the independence of the interpreter. Third: having permanent interpreters makes the interpreter more familiar with the procedures before the court. Lesley Noaks and Ian Butler explain that: *“Those with experience in training of interpreters considered that awareness of court procedures was as crucial as linguistic skills. It was generally acknowledged that the use of an interpreter in a trial was inclined to make the hearing more disjointed and cumbersome. Familiarity with legal procedures on the part of the interpreter was seen to reduce some of this difficulty”*.<sup>77</sup>

This is an important step towards the application of the European standards of human rights. In *Kamasinski v. Austria*<sup>78</sup> the European Court of Human Rights stated that in order for the right to have an interpreter to be practical and effective, the obligation of the competent authorities is not limited to the appointment of an interpreter but, if they are put on notice in the particular circumstance, may also extend to a degree of subsequent control over adequacy of the interpretation provided.

Furthermore, for the significant role of the interpreter, any intentional misinterpretation will make him subject to punishment. Article 172 of the Law of Criminal Procedure declares: *“... If any willful default or misrepresentation is established against one of the experts or interpreters, the court shall punish him”*. Moreover, it seems that the right to be assisted by an interpreter is also extended to cover deaf or dumb people.<sup>79</sup>

As far as the number of interpreters required before the court is concerned, article 172 of the Law of Criminal Procedure has used the word “interpreter” in its plural form which might be considered a modification of article 36 of the Law of the Judiciary, which uses the single form of the word. Hence ambiguity may arise as to whether or not the law requires more than one interpreter in all kinds of crime. To achieve accurate interpretation of the legislator’s objective the following points must be taken into account:

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<sup>77</sup> - Noaks, L and Butler, I (1995) *“Silence in Court? Language Interpreters in the Courts of England and Wales”* Howard Journal of Criminal Justice No. 34 P. 133 & 134

<sup>78</sup> - A 168 (1989) 13 E.H.R.R. 36

<sup>79</sup> - In a civil case before the General Court in Riyadh one litigant was deaf and the judge accepted his wife’s translation after being convinced of her ability to translate accurately. This case is mentioned in Bader Al Qamdee (1421- 1420 H) *“Huquq Al- Moda’a Aleeh”* Riyadh; Imam Muhammad bin Saud Islamic University; a master dissertation p. 258



- 1- The law of the Judiciary issued in 1975 has used the single form of the word "interpreter". Article 36 reads: "*Arabic is the official language of the court; the court may, however, hear the statements of the litigants or witnesses who do not know Arabic through a translator*".
- 2- The Law of Criminal Procedure issued in 2001 has used the plural form of the word. Article 172 reads: "... *if the litigants, witnesses or either of them do not understand Arabic, the court may seek the assistance of interpreters...*"
- 3- Article 224 of the Law of Criminal Procedure states: "*this law shall repeal any provisions inconsistent therewith*".
- 4- In a case before the *Shari'ah* court, prior to the enactment of the Law of Criminal Procedure, the Ministry of Justice was asked whether one interpreter is sufficient or not. In its decision No. 1009/B in 29/ 12/ 1400 H the Ministry states that its intention is to achieve a balance between all Islamic jurists' views on this issue. Thus, a single interpreter's translation may be sufficient as a statement, but insufficient as testimony.
- 5- Prior to the Law of Criminal Procedure, the First Committee of Court Presidents recommended that courts must in all cases rely on two interpreters except in exceptional circumstances.<sup>80</sup>
- 6- Although the law of the Judiciary has used the single form of the word interpreter as mentioned above, the Supreme Judicial Council, prior to the Law of Criminal Procedure, in its decision No. 92/5/13 in 9/4/1399 H reversed a judgment rendered by the General Court and reaffirmed by the Appellate Court, on the ground that the General Court had relied on the translation of a single interpreter. The Council ruled: "*After considering the case, the Council believes that anyone committing a crime that results in public disorder, distinguished by its atrocity and aggression, and accompanied by theft of the victim's money, shall deserve the maximum punishment. However, since every precaution must be taken when imposing the death penalty, and since the General*

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<sup>80</sup> -Quoted in Abdulrahman Al Jofan (1412 AH) "*Ahkam Altorjoman Fi Al Qada'a*" Imam Muhammad ibn Saud University, the High Judicial Institution; Riyadh; A master dissertation p. 363. Hereinafter will refer to as Abdulrahman Al Jofan (1412 AH). However, there is no exception in the case of crimes punishable by capital punishment, stoning or amputation.

*Court had relied on the translation of a single person, and the translation to be reliable must be carried out by two just men, the Council decides to reverse the judgment and commit the case for trial again in the General Court”.*<sup>81</sup>

Accordingly, it seems that the draftsmen of the Law of Criminal Procedure took heed of the Islamic jurists' opinion regarding the number of translators required in court, and correctly chose to adopt the view that judges in Saudi Arabia seem to have chosen.

In conclusion, it could be argued that the law in Saudi Arabia requires that if the accused cannot understand the language used in the *Shari'ah* court, he must be assisted by two interpreters, save in the case of minor offences where the availability of two interpreters is not possible. It is clear that *Shari'ah* Courts by adopting Islamic jurists' view go far beyond the standard that is required by the European Convention on Human Rights.

## **2: The Board of Grievances**

Article 13 of the Rules of Pleadings before the Board of Grievances provides: “*Arabic is the official language recognized in the proceedings of the case; the statement of a person who does not speak Arabic will be heard via a translator where the questions addressed to him in his language and his answers thereto will be recorded in writing and signed by the said person and the translator. A certified translation into Arabic of the instruments and documents written in a foreign language will be provided*”.

Interestingly, this article has distinguished between the statement made by the prosecution on the one hand and the accused's response or questions posed against him on the other. The law does not require the statement of the prosecution to be translated into a written form, whereas a written translation is required with regard to the questions posed to the accused and his defence thereof. Even though no clear justification is offered it could be argued that a written translation is required in respect of the questions posed to the accused and his response because judgment is more likely to be based on the accused's response to the inquiry. In addition, unlike the *Shari'ah* courts, the law of the Board requires no more than one interpreter in any case before it, whether criminal, disciplinary or administrative. This might be justified

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<sup>81</sup> - The case is mentioned in Abdulrahman Al Jofan (1412H) p. 363



by the fact that crimes adjudicated by the Board are less serious than those tried by the *Shari'ah* courts. In any event, this approach does not violate the European human rights standard, since the European Convention regards one interpreter as sufficient for all offences.

With regard to the cost of the interpreter, pursuant to the decision No.490 in 9/7/1404 H of the Council of Civil Servants the Board shall pay these costs. However, it is not stated whether the Board will pay the cost of translating all documents adduced by the accused.

Even though the law does not provide a clear answer, it might be argued that the Board is not obliged to translate any documents provided by the accused. Such translation must be regarded as part of the defence task which is entirely the responsibility of the accused. This argument might be supported by a comment made by the Vice- President of the Board<sup>82</sup> regarding article 13 of the Rules of Pleadings before the Board of Grievances which states that: *"the text requires that instruments and documents adduced before the Board must be accompanied by a credited translation into the Arabic language... and the party against whom the translated document is used can challenge the credibility of this document. In this case he must provide another credited translation; if the parties disagree about the translated text the Circuit shall send the two translations to be weighed by an expert."*

This approach does not raise any point with regard to the violation of the European Convention on Human Rights.

### **Part III: Right of the Accused to Adequate Time and Facilities**

The European Convention on Human Rights provides that: *"Everyone charged with a criminal offence has the following minimum rights... (b) To have adequate time and facilities for the preparation of his defence."* In the following the right to have an adequate time and facilities in Islamic and Saudi laws will be examined respectively.

#### **Section One Islamic law**

When treating the right to adequate time and facilities, the early Islamic jurists again did not limit their discussion only to the accused in criminal cases, but rather discussed this right in both criminal and civil cases. This means that they considered it

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<sup>82</sup> - Letter No. 5168 in 2/5/1411 H.

to be a right for both the accused and the complainant. In the following I will confine my discussion to the right of the accused only to, respectively, adequate time and adequate facilities.

### 1- Adequate time

According to Islamic law the judge is obliged to provide an accused with adequate time to defend himself if he asks for this.<sup>83</sup> Jurists based this view on the statement addressed by Omer Ibn Al Kattab (the Second Ruler after the death of the Prophet) to Abu Mosa Al Asharee when he appointed the latter as judge. In this letter Omer orders: "*grant the litigant an interval of time as this would call for less ambiguity ...*"

In his comment on Omer's letter Jurist Al Sarkasee says this is evidence that according to Islamic law the judge must give the litigants the necessary time to prepare their claims and defence.<sup>84</sup>

The accused deserves the right to adequate time if he requests it. However a few jurists argue that the accused in such a situation must reveal the reason for this request. Otherwise, the judge shall refuse the request.<sup>85</sup>

Jurists reveal that the importance of this right is embodied in the following points: (a) that if the judge refuse to give the accused adequate time to prepare his defence, the latter may accuse the judge of being unjust, but if the hearing is deferred to give the accused sufficient time to prepare his defence the accused will accept the judge's verdict as a fair judgment,<sup>86</sup> (b) that if the accused is not given adequate time, he will adduce his defence evidence after the judge's decision which might lead to a reversal of the judgment,<sup>87</sup> (c) that defence evidence adduced by the accused may be true, whereas obliging him to present his defence evidence hastily could force him to admit untrue facts.<sup>88</sup>

In his comment on jurists' views mentioned above Bandar Al -Swailam indicates that Islamic law provides the accused with the right to defer the judgment to consider his case and to bring any evidence he may feel important to rebut the accusation against him. The accused might be temporarily in a position that does not enable him to

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<sup>83</sup> - Ibn Abdulber (1398H) Al-Kafee. Part 2 p.90

<sup>84</sup> - Al-Mabsut (no year) Part 16 P. 63

<sup>85</sup> - Muntaha Al Eradat ( no year) Part 2 P. 607

<sup>86</sup> - Al-Mabsut (no year) Part 16 P. 63

<sup>87</sup> - Bada'a Al Sana'i Part 7 P. 13

<sup>88</sup> - Al Ensaf Part 11 P. 265



defend himself: in the interval created by deferral of judgment his status might change to a position where he can defend himself.<sup>89</sup>

In addition, Maliki Jurists<sup>90</sup> have extended this guarantee to imply that in the case of the accused having come to court and adduced all his counterevidence, if he is likely to be convicted the judge is under obligation before rendering his verdict to warn the accused by asking him explicitly and directly if he has any other evidence to rebut the accusation. According to this view, if the judge convicts the accused without such warning his judgment is null.<sup>91</sup> A careful consideration of the view provided by Maliki Jurists reveals that Islamic law applies this guarantee in a stricter manner than that adopted by the European Court. The latter requires that, in order to find a violation of this right the accused should prove an actual prejudice. Therefore, as we have seen, it is hard to find an infringement of the right to have adequate time under the jurisdiction of the European Court<sup>92</sup>. In contrast, Islamic law, according to Maliki Jurists, requires that to find a breach of the right in question, the court of appeal only needs to discover that the trial court fails to ask explicitly the accused before rendering its verdict, if there is any other evidence to support his position, and if so, it should repeal the judgment.

However, if the judge discovers that the aim of the accused's request for deferment is to delay the judgment, he must refuse it, because if delaying the judgment benefits the accused, the interest of the other party in criminal cases, for instance the victim's family, may be harmed.<sup>93</sup>

As to the time that might be considered adequate for the preparation of a defence response, the following areas of disagreement are found among jurists: (1) some argue in favour of designating a maximum period to be permitted by the judge, but disagree about what is an adequate time. Some claim that it should not exceed two or three days<sup>94</sup>, while others argue that it should not exceed two or three months.<sup>95</sup> (2) Other jurists argue that the judge concerned should decide on an adequate time according to

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<sup>89</sup> - Bandar Al -Swailam ( 1987 ) p. 311

<sup>90</sup> - Hasheet Al Dusuqi ( no year) Part 4 P. 148

<sup>91</sup> - However, *Al Shafi'i* jurists argue that the judge is only recommended to do so and hence if he does not warn the accused his judgment is not null. See *Shafi'i* (1324H) " Al Um" Part 6 P. 224

<sup>92</sup> - Harris (1995) p. 253

<sup>93</sup> - E'lam Al Moge'en ( no year) Part 1 P. 110

<sup>94</sup> - Muntaha Al Eradat ( no year) Part 2 P 603

<sup>95</sup> - Al Baqr, M (1408 H). "*Al Soltah Al Qad'ah Wa Shakseeet Al Qadee*" *AlZehra' Ll Ehlam Al Arabee* P. 283

the individual case, provided that the interval does not harm the interest of the victim or his family.<sup>96</sup>

The second view would seem more appropriate, in that every case has its own circumstances and that cases differ in complexity. This is particularly true in recent times where the accused faces a powerful litigant, namely, the public prosecution. This view is obviously consistent with the approach adopted by the European Court. Article 6 (3) (b) of the European Convention does not specify any period in which the adequate time will be examined, but rather the right to adequate time is examined separately in every individual case.

## **2- Adequate facilities**

Considerable attention has been given to the accused's right to adequate facilities to prepare his defence. According to Islamic jurisprudence these facilities are embodied in many aspects.

Jurists state that when delivering his defence speech the accused must not be interrupted because any interruption might weaken his ability to adduce his defence. Furthermore, his witnesses should also not be interrupted while giving their testimony and the judge must insure their protection from any conduct which might prevent them from giving their testimony in the accused's interest.<sup>97</sup>

Another aspect of adequate facilities is that the judge is forbidden to engage in any act which might cause distress to the accused and prevent him from adducing his defence. For example, he is forbidden to reprove the accused or speak harshly to him. He is also forbidden to scowl at the accused or to shout at him.<sup>98</sup>

Regardless of the fact that the above guarantees have no explicit counter-part in the European Convention, they correspond to the understanding provided by the European Court. The Court described the necessary requirement to satisfy the right to adequate facilities as that the accused is given "*the opportunity to organize his defence in an appropriate way and without restriction as to the possibility to put all relevant defence arguments before the trial court*".<sup>99</sup>

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<sup>96</sup> - Bada'a Al Sana'i (1982) Part 7 P. 13

<sup>97</sup> - Nasser Al Jofan (1416H) "*Damanat Adalet Al Qada'a Fi Al Fiqh Wa Al Nedam*" PhD Thesis. Imam Mohamed bin Saud Islamic University. The High Judicial Institution p. 529-530. Hereinafter will refer to as Nasser Al Jofan (1416H)

<sup>98</sup> - Al Mawardi (1971) "*Adab Al Qadee*". Part 2 P. 254

<sup>99</sup> - *Can v. Austria* A 96 (1958) Para 53 (Application No. 00009300/81)



In addition, and maybe more importantly, like the case-law of the European Court<sup>100</sup>, according to the Islamic law the accused must have access to all papers and documents presented against him, and should be provided with a copy of them.<sup>101</sup>

## **Section Two Saudi law**

### **1: Shari'ah Courts**

As to the right to have adequate time, the law in Saudi Arabia provides the accused before the *Shari'ah* courts with the right to have adequate time to prepare his defence. Article 137 of the Law of Criminal Procedure provides: "*Prior to holding a hearing, litigants shall be summoned with sufficient time provided for them to appear before the competent court. An accused person who is arrested in "flagrante delicto" shall be promptly, without prior notice, brought before the court. If he asks that court to grant him a grace period (sic) in order to prepare his defence, the court must grant him sufficient time*".

The term "sufficient time", like the term "adequate time" used by the European Convention, is vague. The court in question is empowered to determine what can be regarded as sufficient time. Thus, it can be suggested here that in order to be close to the European human rights, courts in Saudi Arabia can benefit from the criteria used by the European Court when determining whether the right to have adequate time is violated. They include, the complexity of the case,<sup>102</sup> the workload of the accused's lawyer, and the stage of proceedings.<sup>103</sup>

Moreover, if the prosecutor has amended the memorandum of the charges, the accused shall be notified of such amendment and be granted sufficient opportunity to prepare his defence in respect of such amendment.<sup>104</sup>

The accused's right to adequate time is not confined to the first instance courts but is extended to include the appellate court. Article 5 of the Cassation of Judgments By-law<sup>105</sup> reads: "*if a litigant asks to have the memorandum of the other litigant, the Appellate Court may enable him to do so and it must grant him sufficient time in order to prepare his response*".

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<sup>100</sup> - *Edwards v. UK* A 247B (1992) (Application No. 00013071/87)

<sup>101</sup> - Nasser Al Jofan (1416H ) p. 804

<sup>102</sup> - *Albert and Le Compte v Belgium* (1983) Para.41.(Application No. 00007299/75; 00007496/76). In this case the Court considered that more than 15 days to prepare the accused defence is reasonable, especially in view of the lack of complexity of the case

<sup>103</sup> - Harris (1995) p 253

<sup>104</sup> - Article 160 of the Law of Criminal Procedure

<sup>105</sup> - Issued by the Council of Ministers Resolution No. 60 in 1410 H

With regard to the second issue, that is, the right to have adequate facilities to prepare his defence, although the law does not provide explicit provisions to guarantee this right, it may be identified through some relevant texts.

The law provides the accused with the right to obtain a copy of the expert's written report.<sup>106</sup> Another aspect of the facilities provided for the accused is that he is the last to address the court. Article 174 states: "*The court shall first hear the prosecutor's charges, then the response of the accused or his representative or attorney. Then, the court shall hear the claimant regarding the private right of action to be followed by the response of the accused or his legal representative or attorney. Each of the parties shall be entitled to comment on the statement of the other party, and the accused shall be the last to address the court....*" Again this right is not stipulated in the European Convention, and it seems that the legislature in Saudi Arabia correctly adopted this rule in order to follow Islamic principles.

In addition to this, if the court convicts the accused, the court must upon the reading of the judgment notify the accused of his right to appeal.<sup>107</sup> This right is an important guarantee especially since the judicial system in Saudi Arabia holds the right to a lawyer to be optional. The accused may decide to defend himself in person and he might have no legal knowledge about his right to appeal and its time limits. Therefore, the legislature has rightly taken this matter into consideration.

Furthermore, the law provides the accused with a very crucial right in this regard. The court must provide the accused with a copy of any written memorandum adduced in court and must grant him an adequate time to consider it.<sup>108</sup> This rule meets the requirements of both the Islamic law and the jurisprudence of the European Court of Human Rights.

However, the right to adequate facilities implies that the prosecution is under obligation to disclose to the defence all the relevant information in the prosecution's file. In particular it is the prosecution's duty to preserve evidence. A delay before and after charges are laid down and defence arguments of prejudice caused by the delay, will often be based on the disappearance of evidence within the prosecution's control. Even though the law in Saudi Arabia provides the accused with the right to challenge

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<sup>106</sup> - Article 172 of the Law of Criminal Procedure

<sup>107</sup> - Article 193 of the Law of Criminal Procedure

<sup>108</sup> - Article 62 of the Law of Civil Procedure before the *Shari'ah* Courts



expert evidence<sup>109</sup>, it does not provide a remedy if the prosecution fails to follow its duty to preserve evidence. The reasons for this could be that: (a) the remedy that the courts are familiar with in Saudi Arabia when there is an infringement of the accused's rights is to order a new trial<sup>110</sup>. This remedy in this case is useless because all the same difficulties presented by the loss of evidence will remain. J. Marshall states: "*Whenever potentially exculpatory evidence is permanently lost, courts face the treacherous task of divining the import of materials whose contents are unknown and very often, disputed... Moreover, fashioning remedies for the illegal destruction of evidence can pose troubling choices.*"<sup>111</sup> (b) When dealing with this issue the court must decide upon the degree of importance of the lost exculpatory evidence, and the need to assess and respond appropriately to varying degrees of culpability on the part of the prosecution.

## **2: The Board of Grievances**

With regard to the accused's right to be given adequate time to prepare his defence in criminal cases before the Board, article 9 of the Rules of Pleadings before the Board of Grievances requires that the interval separating the service of summons and the date fixed for the hearing may not be less than 30 days. Clearly 30 days is the minimum period but the Circuit may increase this time when it considers that the accused needs more time to prepare his defence. It seems that like the case before the *Shari'ah* courts, the Board when considering the right in question, does not specify any period in which defence evidence must be presented. But rather, this will be considered by the court on a case-by-case basis. Equally, this approach is appropriate in respect of the consistency with European Convention.

If the Circuit changes the legal description attributed to the accused or amends the charge by adding aggravating circumstances, it must bring such alteration to the attention of the accused and upon application made by him grant a sufficient interval for him to prepare his defence in respect of the new description or amendment.<sup>112</sup>

Moreover, the Circuit may render judgment in respect of facts not contained in the

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<sup>109</sup> - Circular No. 3/2598 dated 11/8/1382 H. *Ministry of Justice. AL- tassneef al- Maudouy Li-tameem al-Wazarah [The Classification Book for the Ministry of Justice Regulation and Administrative Circulars], Vol.3 (Ministry of Justice, Riyadh, Saudi Arabia 1413 H).*

<sup>110</sup> -However, if he is illegally detained the accused is entitled to compensation.

<sup>111</sup> - Quoted in Mahoney, R (1996). "*Adequate Facilities to Prepare a Defence: Beyond Disclosure*". *The Criminal Law Quarterly* Vol.39, No. 1 P. 37

<sup>112</sup> - Article 27 of the Rules of Pleadings before the Board of Grievances

charge sheet or against fresh accusation provided that the papers of the case contain the same and provided the accused is granted adequate time to prepare his defence.<sup>113</sup>

Additionally, if the convicted person decides to appeal against the decision rendered by the circuit he is given 30 days to do so.<sup>114</sup>

As to the right to have adequate facilities to prepare his defence, article 17 of the Rules of Pleadings before the Board of Grievances stipulates explicitly that the papers and memoranda filed by a party to the case may not be considered if the accused was not enabled have access thereto. Moreover, the accused or his lawyer has a right of access to the investigation papers and may obtain copies of the papers if the President of the Circuit approves this.

The accused shall not be expelled from the hearing unless he breaches the Circuit regulations. However, if the Circuit carries on the hearing of the case in the absence of the accused he will return when it becomes possible to proceed in his presence and the Circuit must in this case brief him about the proceedings taken during his absence.<sup>115</sup>

Before the Board, as before the *Shari'ah* courts, the accused will be the last to address the Circuit.<sup>116</sup>

When the accused is convicted the Circuit must inform the accused that he has the right to scrutinize the decision within 30 days of the notification of judgment, and that if he fails to demand scrutiny of the judgment within the said time limit the judgment rendered against him is final and must be enforced.<sup>117</sup>

To sum up, rules governing the right of the accused to be given an adequate time and facilities before the Board are in line with the European human rights.

#### **Part IV: Right of the Accused to Trial within a Reasonable Time**

In fact, a speedy trial is not always in the accused's interest but rather at times can work against it. Robert L. Misner argues "*A second difference between the right to a speedy trial and the accused's other constitutional rights is that deprivation of the right may work to the accused's advantage. Delay is not an uncommon defence tactic. As the time between the commission of the crime and trial lengthens, witnesses may*

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<sup>113</sup> - Article 28 of the Rules Pleadings before the Board of Grievances

<sup>114</sup> - Article 31 of the Rules Pleadings before the Board of Grievances

<sup>115</sup> - Article 22 of the Rules Pleadings before the Board of Grievances

<sup>116</sup> - Article 22 of the Rules Pleadings before the Board of Grievances

<sup>117</sup> - Article 31 of the Rules Pleadings before the Board of Grievances



*become unavailable or their memories may fade. If the witnesses support the prosecution, its case will be weakened, sometimes seriously so. And it is the prosecution which carries the burden of proof. Thus unlike the right to counsel or the right to be free from compelled self-incrimination, deprivation of the right to speedy trial does not per se prejudice the accused's ability to defend himself.*"<sup>118</sup> However, for the sake of consistency with my approach when handling topics in this thesis the following discussion will treat the principle purely as a right of the accused.

The European Convention on Human Rights provides in Article 6 Para 1 that: "*In the determination of ...any criminal charge... every one is entitled to a hearing within a reasonable time....*" Again this right will be examined firstly in Islamic law and then in Saudi law.

### **Section One Islamic law**

Like the European Convention on Human Rights, Islamic law does not consider criminal and civil cases separately in its discussion of the right to trial within a reasonable time, but includes both criminal and civil cases as one issue. This means that the right to a speedy trial is considered as an important guarantee for both parties in civil and criminal cases. Current Islamic writers have continued to follow this approach. However, for the purpose of clarity this discussion is confined to the accused person only.

Furthermore, according to the case law of the European Court, the reasonable time in Article 6 (1) starts to run from the charge and continues until the proceedings, including appeal proceedings, are concluded,<sup>119</sup> which means that this right starts from the pre-trial stage. However, it is important to emphasize that early Islamic jurists were not familiar with the idea of dividing criminal proceedings into the stages currently identified, that is to say the inference, investigation, trial, and punishment stages. They did not discuss this right as a guarantee of the accused against lengthy proceedings in the pre-trial stage. This is attributed to the fact that cases in early Islamic societies were tried according to simple and speedy procedures. The judge undertook all procedures, even investigation or interrogation procedures. Ahmad Shalabee when describing the trial proceedings in old Islamic societies states that: "*litigants submit their papers to the clerk who collects them from parties before the arrival of the judge in the gate of the Mosque. The name of the plaintiff and his*

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<sup>118</sup> - Misner, R (1984) "*Legislatively Mandated Speedy Trial*" Criminal Law Journal. Vol.8 P.19 & 20

<sup>119</sup> - *Wemhoff v Germany* (1968) Paras 18-19 (Application No. 00002122/64)

litigant adversary are written in each paper. If the caseload is considerably more than the judge's ability to adjudicate them in the same day he postpones some of them for the second day...the litigants stand up when addressing their statements before the judge. If the case, however, needs more time they will sit down.”<sup>120</sup> Nevertheless, this should not be understood to mean that the right to trial within a reasonable time is not protected in Islamic law. Apparently, a speedy trial is guaranteed in Islamic law particularly if the accused is remanded in detention. Therefore one should examine the idea of speedy trial and the idea of custody in Islamic law respectively.

Jurists state that an Islamic judge is obliged to render his verdict immediately if he reaches a clear conclusion on the case before him, because any postponement of the judgment is considered as postponement of justice.<sup>121</sup> Jurist Abu Ya'la states: “unless he has reason, the judge may not defer the judgment”<sup>122</sup> Judges should adjudicate cases according to the litigants' presence before the judge.<sup>123</sup>

Judge Hassan Al Eshaikh states that the idea of speedy trial is one of the fundamental principles in Islamic law, for God said: {Surely, we have sent down to you (O Muhammad) the Book (this Qur'an) in truth that you might judge between men by that which Allah has shown you (i, e has taught you through Divine Revelation), so be not a pleader for the treacherous}<sup>124</sup>. He also said: {And judge (you O Muhammad) among them by what Allah has revealed and follow not their vain desires, but beware of them lest they turn you (O Muhammad) far away from some of that which Allah has sent down to you. And if they turn away, then know that Allah's Will is to punish them for some sins of theirs. And truly, most of men are *Fasiqun* (rebellious and disobedient to Allah)}<sup>125</sup>.

In his comment on these two verses Al Eshaikh argues that they are evidence of the judge's obligation to adjudicate between people. Unrestricted instruction implies prompt accomplishment of that instruction unless there is legal reason for deferment. Speedy trial is, however, contingent on understanding the case clearly.<sup>126</sup>

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<sup>120</sup> - Ahmad Shalabee (1989) “*Al Teshreea Wa Al Qada'a Fi Al Faker Al Islami*” Maktabat Al Nahdah Al Masrah, Cairo, p. 263, 264

<sup>121</sup> - Al Bahotee (no year) “*Kashaf Al Kana*” Part 6 P. 315

<sup>122</sup> - Muhammad Al Fara (1394H) “*Al Ahkam Al Soltanah*” p. 73

<sup>123</sup> - Bandar Al -Swailam (1987) p. 307

<sup>124</sup> - Surah An-Nisa. Verse No. 105

<sup>125</sup> - Surah Al-Ma'idah. Verse No. 49

<sup>126</sup> - Hesham Al Eshaikh “*Mabd'a Sor'at Al Bet Fi Al Dahoa Fi Al Qada'a Al Shara'e*” Justice Journal , Ministry of Justice Vol. 8 1421 H P. 113-116



Moreover, Salamah Al Blwee indicates that unreasonable delay of judgment could result in three undesirable effects; 1- preventing the interested party from enjoying his right; 2- continuation of the dispute; 3- the judge appearing not to desire the application of justice.<sup>127</sup>

The right to trial within a reasonable time is guaranteed under Islamic law for both the plaintiff and the defendant in civil and criminal cases. Therefore, in contemporary Islamic countries the judicial and investigation authorities must act effectively to fulfil such requirement because any delay in proceedings will harm their interests. Delay in rendering the judgment prevents the plaintiff from enjoying his right and at the same time will enable undeserving persons to enjoy another person's right.

In addition, delay may be considered as a waste of the plaintiff's time and effort and might lead the plaintiff to waive his right. Omer Ibn Al Kattab Said: "*speed up the stranger's case because if he stays longer he might give up his case and depart.*"

The defendant will also be affected because the case against him might prevent him from pursuing his life normally. This is particularly seen in criminal cases where his dignity and reputation is harmed.<sup>128</sup> The last perspective provided above regarding the aim of the right to be tried in Islamic jurisprudence can be compared with case law of the European Court of Human Rights. In *Wemhoff v Germany* the Court pointed out that the purpose of such a guarantee is to: "*ensure that the accused persons do not have to lie under a charge for too long and that the charge is determined.*"<sup>129</sup>

As to the second issue, that is the idea of custody in Islamic law: jurists disagree about the right to put the accused in custody before his guilt is proved and their views can be represented as follows: 1- some say it is legal<sup>130</sup>; 2- other jurists argue that it is illegal, because custody is a kind of punishment which may only be inflicted after guilt is proved; 3- others say that it depends on the accused's status. If he is an incorrupt and pious person, the judge cannot place him in custody; otherwise custody is permitted.<sup>131</sup>

Moreover, those who accept the idea of detention disagree about its duration. Some say it should not exceed one month, others that it should not exceed 6 months.

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<sup>127</sup> - Salamah Al Blwee (1994) "*Al Qada'a Fi Al Dowlah Al Islami*" Arabic Centre for Security Studies and Training. Riyadh Part 1 P. 122

<sup>128</sup> - Abdulrahman Al Othman (1993). p.409

<sup>129</sup> - *Wemhoff v Germany* (1968) Para 18 (Application No. 00002122/64)

<sup>130</sup> - Tabsert Al Hokam (1958) Part 2 P. 319

<sup>131</sup> - Dofeer, S (2000) "*Al Nedam Al Ejrea'ee Al Gena'ee Fi Al Shari'ah Al Islami Wa Tatbegatha Fi Al Mamlakah Al Arabiah Al Sudiah*" p. 130 . hereinafter will refer to as Dofeer, S (2000)

However others state that it should be left to the judge or the ruler, provided that the period for custody does not exceed the period designated for the punishment of the proven crime.<sup>132</sup> Accordingly, the judge must speed up the trial where the accused is in custody, because he might be not guilty.<sup>133</sup>

## **Section Two Saudi law**

### **1: *Shari'ah* Courts**

Since the European Court of Human Rights requires that the right to speedy trial starts to run from the moment the accused is charged with committing a crime<sup>134</sup>, our discussion here should not be limited to the provisions in the trial stage, but rather must be extended to cover the pre-trial stages of inference and investigation.

It is important from the outset to point out that the law in Saudi Arabia does not provide an independent article to guarantee the right to have a speedy trial. Yet, this right can be identified via other texts provided in the law.

According to article 109 of the Law of Criminal Procedure, the Investigator shall interrogate the accused promptly after his arrest. If this is not possible, he shall be kept in a detention centre pending his interrogation. The period of detention shall not exceed twenty-four hours. On expiry of that period, the detention centre officer shall notify the chairman of the relevant department which shall interrogate him promptly, or issue an order for his release.

Obviously, this article requires immediate interrogation for an arrested accused, and also provides some kind of supervision of the investigators by placing the detention centre officer under responsibility to protect the accused from illegal detention after the expiry of the twenty-four hours without interrogation. He is obliged not to adopt a passive attitude regarding the investigator's infringement of this article but to act by notifying the chairman of the relevant department.

If, following the interrogation of the accused, it appears that there is sufficient evidence against him of a major crime, or if the interest of the investigation requires his detention to prevent his fleeing or affecting the proceedings of the investigation,

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<sup>132</sup> - Omer, O (1988) p. 188. See Also Dofeer, S ( 2000) p. 131

<sup>133</sup> - Al Akeel, S "*Huquq Al Motahem Fi Al Shari'ah*" Justice Journal. The Ministry of Justice 1422 H Vol. 9 P. 70

<sup>134</sup> - *Wemhoff v Germany* (1968) Para 18- 19 (Application No. 00002122/64)



the Investigator shall issue a warrant for his detention for a period not exceeding five days from the date of his arrest.<sup>135</sup>

Moreover, if the investigator sees fit to extend the previous detention period, he must, prior to expiry of that period, refer the file to the Chairman of the relevant provincial branch of the Bureau of Investigation and Prosecution so that the latter may issue an order to extend the period of detention for a period or successive periods provided that they do not in aggregate exceed forty days from the date of arrest. Otherwise the accused must be released. In cases that require detention for a longer period, the matter shall be referred to the Director of the Bureau of Investigation and Prosecution to issue an order that the arrest be extended for a period or successive periods, none of which shall exceed thirty days and their aggregate shall not exceed six months from the date of arrest. Thereafter, the accused must be directly transferred to the competent court, or released.<sup>136</sup>

Accordingly, the Law of Criminal Procedure provides the accused with fundamental guarantees against arbitrary arrest or detention. The law designates six months as maximum period for custody. This is consistent with the opinion of some jurists in Islamic jurisprudence who say that the maximum period the judge can detain a person is six months. Needless to say, designating a maximum period within which the case must be forwarded to the court, if the investigation authority is convinced of the evidence against the accused, or releasing the accused, is seen to be an important guarantee against unduly prolonged proceedings.

It might be essential to know that the above periods are applied to all crimes and accuseds whether the crime is classified as an ordinary offence or a terrorist crime.

According to article 77 of the Law of Criminal Procedure, if the Investigator seeks the assistance of a specialized expert, the latter must submit his report in writing within the time prescribed by the Investigator. If he fails to submit his report by the deadline, or if he tries to justify a delay, the Investigator may replace him with another expert. Consequently, the investigator will also be held responsible for any delay caused by the expert; it seems that the aim of the law is to prevent the investigator from claiming an excuse in such cases.

Nevertheless, despite the fact that the law stipulates significant articles to guarantee the accused's right to be tried within a reasonable time during the investigation stage,

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<sup>135</sup> - Article 113 of The Law of Criminal Procedure

<sup>136</sup> - Article 114 of The Law of Criminal Procedure

these articles are confined to only the arrested or detained accused. The law does not mention the accused's right to speedy trial if he has been charged, but not yet arrested or detained. It seems that the legislator is mistaken to confine his protection only to an accused who has been arrested or detained. In fact, being in any position of accusation is potentially damaging. For example, if someone is charged with committing a crime but is not arrested or detained, the law does not provide a time limit within which the charge against him must be determined. Being under accusation though not arrested or detained will affect the legal status of the accused. The accused has a real interest to organize his life on a clear basis.<sup>137</sup> The European Court explains that the right to be tried within a reasonable time in criminal cases protects the accused from remaining too long in a state of uncertainty about his fate.<sup>138</sup> Moreover, according to the case-law of the European Court, the reasonable time in Article 6 (1) starts to run from the charge.<sup>139</sup> As a consequence, in order to comply with European standard of human rights, the Saudi law needs to be extended to protect every person charged with a criminal offence regardless of his arrest or detention.

Moving on to the right of speedy trial in the trial stage, article 158 of the Law of Civil Procedure before *Shari'ah* Courts obliges the court concerned to render its verdict promptly after proceedings, or to defer its verdict to another early hearing. The courts are obliged to speed up the case if the accused is detained pending trial,<sup>140</sup> or if he is a stranger (foreigner).<sup>141</sup>

However, a speedy trial depends on the case being understood. So according to article 41 of the *Shari'ah* Procedure Law the accused should submit his defense memorandum to the court at least three days prior to a hearing before the General Courts and at least one day before the Summary Courts.

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<sup>137</sup> - It is worth noting that this suggestion should not be understood to mean that after discharging the accused the investigation bureau cannot recharge him again if new facts or evidence are discovered. The aim of our suggestion is to place the accused in a clear position.

<sup>138</sup> - *Wemhoff v. FRG* A 7 (1968) (Application No. 00002122/64)

<sup>139</sup> *ibid.* Paras 18-19

<sup>140</sup> - Circulars No. 192/12/T dated 30/11/1403 H & 40/12/T dated 28/3/1402 H Ministry of Justice. *AL-tassneef al- Maudouy Li-tameem al-Wazarah [The Classification Book for the Ministry of Justice Regulation and Administrative Circulars]*, Vol.3 (Ministry of Justice, Riyadh, Saudi Arabia 1413 H).

<sup>141</sup> - Circular No. 8/T/104 dated 14/10/1411 H Ministry of Justice. *AL- tassneef al- Maudouy Li-tameem al-Wazarah [The Classification Book for the Ministry of Justice Regulation and Administrative Circulars]*, Vol.3 (Ministry of Justice, Riyadh, Saudi Arabia 1413 H).



If the representative or the lawyer of the private party intends to delay the case with the aim of procrastination, in order to safeguard the right to speedy trial the court concerned may order the original party to attend the hearing.<sup>142</sup>

If the trial court acquits the accused, its judgment cannot be challenged before the Appellate court either by the prosecution or the plaintiff after 30 days from the date of receiving the copy of the judgment, which in any case should not exceed 10 days from the date of judgment.<sup>143</sup> This means that the accused will be certain of his acquittal 40 days at most after judgment.

In addition, for the purpose of guaranteeing a speedy trial the Appellate Court can adjudicate the case after reversing the judgment of the trial court, if the judgment appealed against is complete in every aspect, and if urgent action is deemed necessary.<sup>144</sup> Complete judgment means that: 1- the hearing in trial court was not by default; 2- every party adduced his evidence; 3- the reversed judgment is recorded in Appellate court notes; 4- the legal reasons for reversing the judgment are clearly displayed.<sup>145</sup>

Similarly the expression that “urgent action is deemed necessary” means that the litigant’s interest will be damaged if the case is remanded to the trial court. The Appellate court’s discretion regarding this matter is final.<sup>146</sup>

In short, the accused right to a speedy trial is maintained in the judicial system of Saudi Arabia, and thus it could be argued that compliance with the European Convention is generally achieved. Yet, it would be much better if the law stipulates explicitly that the accused must be tried within a reasonable time. The competent court should then decide whether the accused right to a speedy trial is violated. As we suggested before, the courts in Saudi Arabia can benefit from the criteria adopted by the ECHR.

## **2: The Board of Grievances**

With regard to the accused’s right before the Board of Grievances to trial within a reasonable time, article 9 of the Rules of Pleadings before the Board of Grievances provides: “*The President of the Board or anyone delegated to act on his behalf will*

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<sup>142</sup> - Article 51 of the Law of Civil Procedure before *Shari’ah* Courts

<sup>143</sup> - Article 194 of the Law of Criminal Procedure

<sup>144</sup> - Articles 203, 204, and 205 of the Law of Criminal Procedure

<sup>145</sup> - Abraheem, M (1998) “*Nedam Al Ta’n Be Al Tameez Fi Al Mamlakah Al Arabiah Al Sudiah*” The Public Administrative Institution p. 337. hereinafter will refer to as Abraheem, M (1998)

<sup>146</sup> - Ibid, p. 337

*pass the case to the Circuit having jurisdiction; upon receipt of the case the head of the Circuit shall fix a date for hearing it which will be served on the Board of Surveillance and Investigation and on the accused who will be given also a copy of the charge sheet; the interval separating the service of the summons and the date fixed for the hearing may not be less than 30 days”.*

Accordingly, the head of the Circuit concerned will designate a certain date on which the case will be heard. The text of the article indicates that designation must be made immediately after the case is received.

If the interest of the accused is at stake, for example if he is placed in custody or barred from travelling on account of a case being heard by the Circuit, he has the right to file a complaint to the President of the Board or anyone delegated by him to act on his behalf against the decision of his detention or prohibition from travelling. This complaint should be decided within no more than seven days and if this is impossible the Circuit shall before the expiration of this time limit fix another time limit giving their supporting reasons.<sup>147</sup>

Where the Circuit considers it necessary to seek help from an expert it may fix a date for depositing the expert's report.<sup>148</sup> It seems that the aim of this requirement is to avoid any delay that might be caused by the expert. The law places the Circuit in question in a position in which it cannot derogate itself from its obligation to protect the accused's right to trial without undue delay.

Moreover, if the Circuit acquits the accused the Public Prosecution should apply for scrutiny of the judgment within 30 days from the date it receives the copy of judgment; otherwise the acquittal verdict becomes final.<sup>149</sup>

Where the judgment is reversed, the Scrutinizing Circuit may adjudicate the case itself or return it to the trial Circuit. In the latter case, if the trial Circuit insists on its point of view, the Scrutinizing Circuit will itself hear the case.<sup>150</sup>

It is obvious that if the Scrutinizing Circuit reverses the case for a first time the adjudication before the Scrutinizing Circuit is optional. However, its jurisdiction to adjudicate the case is obligatory where the case is reversed for a second time if the trial Circuit insists on its point of view. Clearly the aim of this rule is to avoid lengthy proceedings.

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<sup>147</sup> - Article 10 of the Rules of Pleadings before the Board of Grievances

<sup>148</sup> - Article 24 of the Rules of Pleadings before the Board of Grievances

<sup>149</sup> - Articles 31 & 37 of the Rules of Pleadings before the Board of Grievances

<sup>150</sup> - Article 36 of the Rules of Pleadings before the Board of Grievances



The above discussion indicates that in the Board criminal cases must be tried promptly. Although this requirement is generally speaking applied in the Board in a manner consistent with European standard of human rights, it seems that according to the current status the accused has no access to a right to prompt trial. It might therefore be better if the law explicitly stated the accused's right to speedy trial. A breach of this right by the Board would thus enable the accused to redress the damages incurred by him. The Scrutinizing Circuit should decide upon a reasonable time taking into consideration the factors that are used by the European Court. That is, the complexity of the case, the conduct of the accused, what is at stake for the accused, and the workload in the Circuit concerned, whether the increase of the workload is predictable or random.

The importance of this suggestion arises from the fact that the right to a trial within a reasonable time is one of the fundamental rights of human beings which Islamic law as well as international treaties and declarations of human rights call for. Therefore, it should be stipulated in explicit and effective terms.

#### **Part V: Right of the Accused to be informed of the Charge**

Article 6 Para 3 of the European Convention is worded as follows: "*Everyone charged with a criminal offence has the following minimum rights... (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him....*" Again, this topic will be dealt with in Islamic law firstly and in Saudi law secondly.

##### **Section One Islamic law**

Islamic jurisprudence, as we have pointed out above, does not divide criminal proceedings into the stages we currently recognize. Further, the judge is responsible for all procedures. Therefore, early Islamic jurists did not discuss the accused's right to be informed of the charge against him in a stage prior to the trial stage. The following discussion will therefore be limited to the accused's right to be informed of the accusation in the trial stage.

Islamic law requires that the accused must be informed of the charge against him<sup>151</sup>. This right is essential in order to enable the accused to defend himself. Thus, he must

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<sup>151</sup> - Bandar Al -Swailam (1987) p. 183

be informed of the facts and the evidence against him.<sup>152</sup> In support of this argument jurists cited many events narrated by the Prophet and his companions. For example, it is narrated that a man came to the Prophet and admitted that he had committed adultery with a woman. The Prophet sent someone to the woman to ask her about the accusation against her. She denied it. So the Prophet left her unpunished.<sup>153</sup>

The Prophet also advised Ali bin Abe Talb when he appointed him as a judge: “*do not judge between litigants, unless you hear them*”.

Abdulhameed Al Ansaree states that according to Islamic law the accused should be informed of the accusation in a clear form and in understandable language. If, he argues, Islamic jurists oblige the judge to inform the defendant of the claimant’s claim against him in civil cases; this obligation in criminal cases is fortiori.<sup>154</sup>

Generally speaking therefore, the idea of informing the accused of the charge against him is known in Islamic law and the accused cannot be deprived of this right. The accused has the right to defend himself and this requires that he must be informed of the charge. However, Islamic jurisprudence does not provide details as to whether this right should be provided in writing or not, and what additional information is required.

## **Section Two            Saudi law**

### **1: *Shari’ah* Courts**

In respect of the accused’s right to be informed of the accusation against him, the Law of Criminal Procedure, in principle, guarantees similar rights to those required by the European Convention. Article 6 Para 3 of the European Convention states that: “*Everyone charged with a criminal offence has the following minimum rights... (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him....*” In explaining the meaning of the words *nature* and *cause* in above context the European Court demonstrates that: “*Article 6 Para 3 (a) provides the accused with the right to be informed not only of the cause of the accusation, that is to say the acts he is alleged to have committed and on which the accusation is based, but also the legal characterization of those acts. Thus*

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<sup>152</sup> - Taha Alwane (1982) p. 51

<sup>153</sup> - Sulaiman Al-Azdee (no year). *Sunan Abee Dawud*. Part 4 P. 159. Hadith no. 4466

<sup>154</sup> - Al Ansaree, A (2000) “*Huquq Wa Damanat Al Motahem Fi Al Shari’ah Al Islami Wa Al Qanoon*” Dar Al Faker Al Arabee. Cairo p.



information should be detailed.”<sup>155</sup> So, this right implies, in general, four requirements: (a) the accused must be informed promptly ;( b) he must be informed of the nature i.e. the type of the offence; (c) he must be informed of the cause of the charge i.e. the acts; and (d) he must be informed in a language which he understands. As to points (a) (b) and (c) mentioned above the law in Saudi Arabia contain provisions that meet these requirements. Article 34 of the Law of Criminal Procedure provides that: “*The criminal investigation officer shall immediately hear the statement by the accused....*” This requires that the accused must be informed promptly of the accusation in order to listen to his statement, and he must be advised of the reasons for his detention.<sup>156</sup> When the accused appears for the first time for an investigation, the Investigator shall inform him of the offence with which he is charged.<sup>157</sup> If the accused is arrested outside the venue of the department conducting the investigation, he shall be brought to the investigation department in the area where he was arrested. This department shall inform the accused of the incident attributed to him.<sup>158</sup> If the accused is arrested or detained he must be promptly notified of the reasons for his arrest or detention.<sup>159</sup> Moreover, if the court decides to change the description of the act given in the memorandum of charges, it must advise the accused of such change,<sup>160</sup> and if the Prosecutor amends the memorandum of charges before the court, the accused will be notified of such amendment.<sup>161</sup> In addition, during the hearing, the court shall inform the accused of the offence with which he is charged and shall read and explain to him the memorandum of the charges and provide him with a copy thereof.<sup>162</sup>

In respect of point (d) that is the accused right to be informed in a language which understands. Even though it has no explicit counterpart in the law of Saudi Arabia, one can argue that since the application of the articles concerned mentioned above of the Saudi law inevitably requires that he must be informed via a language which he understands, this requirement is guaranteed.

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<sup>155</sup> - *Pelissier and Sassi v France* (1999) Para.51( Application No. 00025444/94)

<sup>156</sup> - Article 35 of the Law of Criminal Procedure.

<sup>157</sup> - Article 101 of the Law of Criminal Procedure.

<sup>158</sup> - Article 110 of the Law of Criminal Procedure.

<sup>159</sup> - Article 116 of the Law of Criminal Procedure.

<sup>160</sup> - Article 159 of the Law of Criminal Procedure.

<sup>161</sup> - Article 160 of the Law of Criminal Procedure.

<sup>162</sup> - Article 161 of the Law of Criminal Procedure.

## **2: The Board of Grievances**

Article 8 of the Rules of Pleading before the Board of Grievances states that the charge sheet must contain the names, capacities, and place of residence of the accused persons as well as the charges preferred against them, the date and place of commission of the offence, the evidence supporting the charge and the legal provisions of the law to be applied against the accused persons. Moreover, this article requires also that the complete file of the case must be attached to the charge sheet. The accused will be given a copy of the charge sheet.<sup>163</sup>

### **Part VI: Right of the Accused to be tried in his Presence**

Unlike other rights, the right of the accused to be tried in his presence has not been mentioned explicitly by the European Convention on Human Rights. But rather it emerges from the notion of a fair trial. The Court explains that: *“it flows from the notion of a fair trial that a person charged with a criminal offence should, as a general principle, be entitled to be present at the trial hearing.”*<sup>164</sup> In a manner consistent with our approach when dealing with the topic in hand, our discussion will focus on Islamic law and the Saudi law in turn.

#### **Section One Islamic law**

The concepts of presence and absence before the court are essentially different in European human rights law from their counterparts in Islamic law. In their deliberations Islamic jurists have discussed the judge's right to adjudicate the case and to render his judgment in the absence of the defendant. However, by “absent defendant” they mean the defendant who is in another country where the judge has no jurisdiction over him. This is the absent defendant who causes disagreement among jurists over proceeding with the case in his absence. If the defendant is in the same state, jurists agree that the hearing of the case should be prohibited unless he is present. The defendant in this latter case will be forced to attend the hearing in person. This clearly differs from the view upheld by the European Court of Human Rights. The European Court is of the opinion that the right to be present is waivable, provided that it is established in an unequivocal manner.<sup>165</sup> In addition, a trial in the absence of the accused is permitted provided that the state has acted, although not successfully,

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<sup>163</sup> - Article 9 of the rules of Pleading before the Board of grievances.

<sup>164</sup> - *Ekbatani v. Sweden* (1991) 13 EHRR 504

<sup>165</sup> - *Poitrinol v France* (1993) Para 31(Application No. 00008966/80)



diligently to provide the accused with the necessary notification of the trial.<sup>166</sup> Islamic law disallows the hearing *in absentia* where the presence of the accused is in the hand of the Islamic state. If he refuses to attend the hearing after being informed he must be enforced to attend the hearing, and the court is not permitted to hear the case *in absentia*. This is may be due to the fact that Islamic law does not accept confession, which is very important evidence in Islamic law, unless given by the accused himself. Further, Islamic law considers the presence of the accused as an essential means in respect of rehabilitating the accused by means of repentance.

Interestingly, since presence is important in establishing justice, the presence of both accused and defendant is considered to be not only their right but also their duty. God said: {And when they are called to Allah (i.e. His Words, the Qur'an) and His Messenger), to judge between them, Lo! A Party of them refuses (to come) and turns away}<sup>167</sup>

Accordingly, the judge must ask the accused to attend the hearing, and the accused has a religious duty to attend the hearing, but if he refuses to attend and does not appoint a representative on his behalf and has no acceptable reason, the judge will ask him for a second time to attend. If he persists in refusing, the judge will force him to attend.<sup>168</sup>

On the contrary, the European Court allows the hearing even in *absentia* if the accused waives his right or if he fails to appear before the court after being properly notified. Thus, according to the case law jurisprudence of the European Court the state concerned is relieved from its duty to insure a hearing in the presence of the accused, if the state has acted, although not successfully, diligently to notify the accused,<sup>169</sup> whereas Islamic law requires a strict application of this guarantee. However, according to both the European Court,<sup>170</sup> and to Islamic law, if the accused has an excuse such as illness, he will be ordered to appoint a representative.<sup>171</sup>

Therefore, the discussion here is confined to cases where the accused lives outside the Islamic state, for example if he flees to another country. Jurists have differed in their opinion in respect of this issue.

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<sup>166</sup> - *Goddi v Italy* (1984) Para 29

<sup>167</sup> - Surah 24 An-Nur. Verse No. 48

<sup>168</sup> - Al Mawardi (1971) "*Adab Al Qadee*" Part 2 P. 319&320

<sup>169</sup> - *Goddi v Italy* A76 (1984) Para 29; Application No. 00008966/80

<sup>170</sup> - Harris (1995) p 206

<sup>171</sup> - Tabert Al Hokam (1378) Part 1 P. 135

- (1) Al Hanafi,<sup>172</sup> some of the Maliki<sup>173</sup> and Hanbali<sup>174</sup> Schools argue that the judge is forbidden to adjudicate the case by default except in exceptional circumstances, because the judge is obliged to hear the statement of both parties. And since this requirement cannot be fulfilled if the accused is absent, and because the latter might have evidence which could refute the claim against him the judge cannot render his judgment by default.
- (2) The majority of Maliki,<sup>175</sup> Shafi'i<sup>176</sup>, and Hanbali' <sup>177</sup>schools believe that the judge can render his judgment by default; because God orders us to apply justice and He did not confine this to present or absent persons. Moreover, their argument goes, not adjudicating by default might lead to rights being lost, and might open the gate for procrastinators to elude their duties.

This is of course if it is a crime in connection with a private right, but if it is a crime in connection with God's rights, such as adultery or drinking, then according to the majority's view the judge is forbidden to adjudicate by default, because Islamic law in this kind of crime favours forgiveness and immunity, and because the absent accused might have defence evidence.<sup>178</sup>

Similar to the case-law of the European jurisprudence,<sup>179</sup> Islamic law states that if the accused comes to the court during the hearing, the judge must enable him to attend the hearing, and if he attends after the judgment is delivered he has the right to contest the judgment and the judge must allow him to adduce his evidence.

## **Section Two Saudi law**

### **1: Shari'ah Courts**

Article 20 of the Law of Criminal Procedure declares: *"If it appears to the court in any case pending before it that such a case involves accused persons other than those being prosecuted or facts related to the charge in question, it shall notify the*

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<sup>172</sup> - Tabeen Al Haqa'iq Part 4 P. 191

<sup>173</sup> - Bedaet Al Mujtahid (1405H) Part 2 P. 352

<sup>174</sup> - AL Muqhni (1348) Part 9 P.109

<sup>175</sup> - Tabsert Al Hokam (1378H) Part 1.P. 108

<sup>176</sup> - Al Mohatheb(1379H) Part 2 P. 302

<sup>177</sup> - Al Muqhni (1348H) Part 9 P. 109

<sup>178</sup> - Al Muqhni (1348H) Part 9 P. 110

<sup>179</sup> - *Colozza and Rubinat v. Italy* A 89 Para 29 (1985) (Application No. 00009024/80)



*complainant accordingly in order to complete what is required for the proper consideration and adjudication of the case in a manner compatible with Shari'ah principles. This procedure shall apply to the Appellate Court whenever appropriate."*

This article means that if other accused persons have not been informed and asked to be present at court, the prosecution or the complainant of private right must be instructed to notify them.

The presence of the accused is not restricted to the hearing: he also has the right to attend all the investigation proceedings. The Investigator may, however, conduct the investigation in the absence of the accused whenever this is deemed necessary for determining the truth, provided that he allows the accused to review the investigation immediately after the necessity has ended.<sup>180</sup>

If the Investigator is of the opinion, following completion of the investigation, that there is sufficient evidence against the accused, the case shall be referred to the competent court, and a summons shall be served on the accused to appear before it.<sup>181</sup>

In addition, if an action is initiated before a court, the accused shall be summoned to appear before that court. But no such summons shall be necessary where the accused appears for the hearing and a charge has been issued against him.<sup>182</sup>

The summons shall be served to the accused personally, or at his place of residence, and if he is in detention or in prison he shall be summoned through the detention officer or prison warden, or their deputies.<sup>183</sup> This, it can be said, is in agreement with the European human rights.<sup>184</sup>

The legal nature of the presence of the accused depends on the offence committed. If he is accused of committing one of the serious crimes designated in the law, his attendance is generally compulsory. But, if he is accused of committing a non-serious crime his presence is optional. The reason for this distinction is that punishments in serious crimes are much severe than those in other crimes. Therefore, the law requires that a hearing with regard to a serious crime must be undertaken in the presence of the accused in order to enable him to practice his defence rights. Article 140 provides: "*In major crimes, the accused shall personally appear before the court, without prejudice to his right to seek legal assistance. As to other crimes, he may be represented by a*

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<sup>180</sup> - Article 69 of the Law of Criminal Procedure.

<sup>181</sup> - Article 126 of the Law of Criminal Procedure.

<sup>182</sup> - Article 136 of the Law of Criminal Procedure

<sup>183</sup> - Articles 138&139 of the Law of Criminal Procedure

<sup>184</sup> - *Goddi v Italy*. (1984) Para 29 (Application No. 0008966/80)

*representative or attorney for his defence. In all cases, the court may issue an order for the personal appearance of the accused.”* Moreover, Article 141 provides: *“If the accused who has been duly summoned fails to appear on the day specified in the summons document and has not sent a representative where such representation is permissible, the judge shall proceed to hear the plaintiff’s pleadings and evidence and enter them in the case record. The judge shall not render a judgment except in the presence of the accused. If the accused fails to appear without an acceptable excuse, the judge may issue a warrant for his detention”*.

Obviously, this article requires that any criminal judgment must only be rendered in the presence of the accused, even if he fails to appear before the court in spite of being summoned. The court cannot adjudicate the case unless the accused or his representative is present where representation is permissible. This article is stipulated in a manner consistent with Islamic law regarding this issue.

Consequently, it can be argued that the law in Saudi Arabia by providing a stricter guarantee with regard to the accused’s right to be tried in his presence; goes far beyond the European human rights standard.

Furthermore, if an action is initiated against several persons with respect to one incident, and some of them fail to appear in spite of being summoned, the judge shall proceed to the plaintiff’s pleadings and evidence against all of them, and shall enter the same in the case record. He shall not render a judgment against the absentees until they appear before the court.<sup>185</sup>

Since the objective of the presence of the accused is to enable him to supervise the proceedings and effectively exercise his right to defence, the law states that no physical restraints shall be placed on the accused during court hearings, and that he shall not be dismissed from any hearing during deliberation of the case unless he gives cause therefore. In that case, the proceeding shall continue and the accused may be admitted to the hearing whenever such cause for his removal ceases to exist. However, the court must keep him informed of any action that has been taken during his absence.<sup>186</sup>

Nevertheless, the presence of the accused is not guaranteed before the appellate court unless it considers his presence is important to clarify some relevant points. Article 199 provides: *“The Appellate Court shall dispose of the subject matter of the appeal*

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<sup>185</sup> - Article 142 of the Law of Criminal Procedure.

<sup>186</sup> - Article 158 of the Law of Criminal Procedure.



on the basis of the evidence included in the file of the case. Litigants shall not appear before the court, unless it decides otherwise". Yet, if the Appellate Court is satisfied with the responses furnished by the trial court with respect to the comments it raised, it shall affirm the judgment. If not, it shall reverse the appeal in whole or in part, as the case may be, and shall state the grounds for doing so. It shall then remand the case to another court for rendering a judgment in accordance with the law. If the judgment appealed against is complete in every respect, and if urgent action is deemed necessary, the Appellate Court may render judgment on the subject matter. Whenever the Appellate Court renders a judgment, such judgment shall be rendered in the presence of the litigant.<sup>187</sup>

## **2: The Board of Grievances**

According to article 9 of the Rules of Pleadings before the Board of Grievances, upon receipt of the case the Circuit trial shall fix a date for the hearing and serve a summons to the accused.

Unlike cases before the *Shari'ah* courts, the presence of the accused before the Board is obligatory in all crimes. Article 19 provides: "*The accused shall appear in the hearing*". In addition, where a person who is charged with a criminal case has been summoned but has failed to appear he shall be served with another summons to appear in another session and if he again fails to appear, the Circuit may adjudge the case in default or may issue a warrant and bring him before it on a fixed date; if his arrest was impossible it will adjudge the case in default.<sup>188</sup> This is clearly different than the case in *Shari'ah* courts, as we have pointed out.

Moreover, the judgment is deemed as having been rendered in the accused's presence where the accused has attended the hearing and adduced his defence, even where the hearing in which the judgment has been rendered was adjourned and has defaulted from the adjourned hearing<sup>189</sup>

Similar to cases before the *Shari'ah* courts the accused will appear before the Circuit without being handcuffed. He must not be expelled from the hearing unless he has committed a breach of its regulations; the Circuit may carry on the hearing of the case

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<sup>187</sup> - Article 205 of the Law of Criminal Procedure.

<sup>188</sup> - Article 19 of the Rules of Pleadings before the Board of Grievances.

<sup>189</sup> - Article 20 of the Rules of Pleadings before the Board of Grievances.

until such time when it becomes possible to proceed with the case in his presence provided it briefs the accused about the proceedings taken during his absence.<sup>190</sup>

In all cases where the Scrutinizing Circuit decides to hear the case it will decide after having heard the statements of the litigants.<sup>191</sup>

If the accused was convicted in default he may apply within 30 days, to run from the date of service of the judgment on him, for reconsideration of the judgment rendered against him. The President of the Board of Grievances or whoever he has delegated will refer the application to the Circuit which rendered the judgment for retrial in the presence of the accused.<sup>192</sup>

Accordingly, one can conclude that the accused right to be tried in his presence before the Board of Grievances is required by the Board law in a manner consistent to the case law of the European Court of Human Rights.

## **Part VII: Right of the Accused to defend himself in Person**

The European Convention in article 6 provides: *“Everyone charged with a criminal offence has the following rights...(c) to defend himself in person....”* The discussion below is devoted to Islamic law and the Saudi law respectively.

### **Section One Islamic law**

According to Islamic jurisprudence the judge is obliged to hear the accused since he hears the Prosecution and he is forbidden from rendering his judgment before enabling the accused to present his defence. A judgment rendered without hearing the accused’s defence must be reversed even though the accused has a previous criminal record. The judge is obliged to apply justice and no justice can be achieved without hearing the defence of the accused.<sup>193</sup>

Al Turkmani states that it is unjust to provide the complainant or the prosecution with the right to adduce their claim, while at the same time denying the accused his right to reject and refute the accusation against him. The interest of the right to defence is not limited to the accused person but must rather also be considered as a right of society.

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<sup>190</sup> - Article 22 of the Rules of Pleadings before the Board of Grievances.

<sup>191</sup> - Article 36 of the Rules Pleadings before the Board of Grievances.

<sup>192</sup> - Article 41 of the Rules Pleadings before the Board of Grievances.

<sup>193</sup> - Omer, O ( 1988 ) p. 212



The accused has a personal interest to be assumed innocent and society has a real interest in confining the conviction and punishment to the criminal.<sup>194</sup>

The accused can defend himself in person provided that he is capable of doing so. If he is unable to defend himself effectively the judge cannot convict him. Therefore, some jurists argue that if the accused is dumb, the *Haddud* punishment cannot be imposed against him even if guilt is proved against him, because if he is able to speak he may raise doubt regarding the evidence or his legal liability.<sup>195</sup>

As we have seen in chapter (2) of this thesis there is little jurisprudence in the European Court of Human Rights regarding the right of the accused to defend himself in person. Generally speaking, according to the European Court the accused should be given the opportunity to defend himself in person if he wishes. This right cannot be sustained (deprived) except if the accused is unable to do so. These requirements are in agreement with their counterpart in Islamic law. Nonetheless, it could be maintained that since some Islamic scholars state that the judge cannot convict the accused in *Haddud* crimes if he is disabled even if he is legally represented, Islamic law in this regard pays greater attention to the protection of this right than European human right law does.

## **Section Two                      Saudi law**

### **1: *Shari'ah* Courts**

Article 4 of the Law of Criminal Procedure provides: "*Any accused person shall have the right to seek the assistance of a lawyer or a representative to defend him during the investigation and trial stages*". The phrase "have the right" indicates that the accused is not obliged to be defended by a lawyer; rather this article clearly enables the accused, if he wishes, to exercise the defence right in person. This understanding is confirmed by article 140, which states: "*in major crimes, the accused shall personally appear before the court, without prejudice to his right to seek legal assistance. As to other crimes, he may be represented by a representative or an attorney for his defence. In all cases, the court may issue an order for the personal appearance of the accused.*"

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<sup>194</sup> - Al Turkmani, A (1999) "*AL Ijra'at AL Jina'i Al Islami*" Riyadh. Naif Arab Academy for Security Sciences p. 84, 85

<sup>195</sup> - Al Mabsut (no year) Part 18 P. 172

However, the law does not provide an answer to the question that arises if the accused is unable to defend himself in person, for example, if he is a minor, or if he lacks intellectual ability. So when dealing with criminal matter in which the accused has opted to defend himself in person, the judge will apply Islamic rules regarding this issue. So if the judge realizes that the accused is not capable of representing himself, he should advise him to be represented by a lawyer.

## **2: The Board of Grievances**

According to article 19 of the Rules of Pleading before the Board of Grievances the accused must personally attend the hearing, and is allowed to defend himself in either oral or written form. This article uses similar language to that used in article 4 of the Law of Criminal Procedure. The accused is thus not obliged to defend himself through a lawyer but rather may defend himself in person.

Moreover, as in the *Shari'ah* court, laws governing the Board do not mention the question of the accused who lacks intellectual ability. Therefore, the same suggested answer is applicable, namely that the judge in the Board will advise such an accused to seek the help of a lawyer.

To sum up, it is said that laws in both the *Shari'ah* courts and the Board of Grievances raise no difficulty as to compliance with the European Convention on Human Rights in respect of the right of the accused to defend himself in person.

## **Part VIII: Right to Equality of Arms**

Like the right of the accused to be tried in his presence, the right to equality of arms is not articulated in the European Convention on Human Rights. But rather it emerges from the notion of a fair trial as has been stated in chapter two of this thesis. In the following right to equality of arms will be examined in Islamic law and Saudi law respectively.

### **Section One Islamic law**

Islamic law gives considerable attention to the principle of equality in all aspects of life. God said: *{O mankind! We have created you from a male and a female, and made you into nations and tribes, that you may know one another. Verily, the most honourable of you with Allah is that (believer) who has At-Taqwa [i.e. he is one of the*



*Muttaqun (the pious)*.<sup>196</sup> God also said: *{O Dawud (David! Verily! We have placed you as a successor on the earth; so judge you between men in truth (and justice) and follow not your desire- for it will mislead you from the Path of Allah. Verily, those who wander astray from the Path of Allah (shall) have a severe torment, because they forgot the Day of Reckoning}*<sup>197</sup>.

He also said: *{O you who believe! Stand out firmly for justice, as witnesses to Allah; even though it be against yourselves, or your parents, or your kin, be he rich or poor, Allah is a Better Protector to both (than you). So follow not the lusts (of your hearts), lest you avoid justice; and if you distort your witness or refuse to give it, verily, Allah is Ever Well-Acquainted with what you do}*<sup>198</sup>.

Equality in Islam is also applied to non-Muslims. The story is told that Omer (The Second ruler after the death of the Prophet) saw an old blind Jewish man asking for help. Omer asked him what drove him to this situation. The man answered: ask my age, my status (blind), and the capitation (poll tax). Omer led him home by the hand and ordered the treasurer to pay for this man and all like him. Omer said: *"I swear by God we did not deal with him justly if we benefit from him in his springtime and disappoint him in his decrepitude"*.

Another story is that when the King of Gassan circumambulated the Kaaba in the Holy Mosque in Mecca, a Bedouin (nomad) accidentally trod on his apron hem. The King struck him in the face. The nomad complained to the Ruler Omer bin Al Kattab, who called the King and told him: *"either you make your peace with him or he will strike you as you have struck him"*. The King said: *"do not you differentiate between the King and the layman?"* Omer replied: *"No, Islam has made you equal."*<sup>199</sup>

Yet equality among litigants is one of the most important guarantees that should be provided during the trial. Therefore, Islamic law is keen to emphasize such equality before the court. The Prophet said, *"Those who lived before you have been destroyed because they used to release the noble if he steals, and inflict punishment on the weak if he steals. By God if Fatima, daughter of the Prophet, steals I will cut off her hand"*.

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<sup>196</sup> - Surah 49 Al\_ Hujurat. Verse No. 13

<sup>197</sup> - Surah 38 Sad. Verse No. 26

<sup>198</sup> - Surah 4 An-Nisa. Verse No. 135

<sup>199</sup> -Madkor, A & Al Kattab, A (1992) *"Huquq Al Insan Fi Al Eslam"* Dar Talas Ldrassat Wa Al Targamah Wa Al Nasher p. 113

The History of Islam is rife with examples of an application of this equality. It is narrated that Ali bin Abe Taleb<sup>200</sup> was brought to suit by a Jew before the second ruler (Omer bin Al Kattab). Ali was sitting next to the Ruler. The Judge (Omer) said to him *“abu Al Hassan [Ali’s nickname] sit next to the other litigant. Then Omer adjudicated the case. Omer noticed that there was an anger in Ali’s face. So he asked him: “Are you angry because I asked you to sit next to your litigant?” Ali replied: “No, but I wish you did not call me by my nickname in which the right to equality might be breached”*.<sup>201</sup>

Moreover, in a message to one of his administrative managers Omar Ibn Al- Khattab the second Caliph said: *“Make sure you give equal attention to people when you hear them, and this should be reflected in your looks, justice and in the place where you sit, so that no man of honour may hope to take advantage of your vacillation, and the weak will despair of your justice”*.<sup>202</sup>

Therefore, Jurist ibn Al Keem states in his comment on Omer’s statement, *“if a judge applies equality and justice in accordance with this manner, this is an indication of his just judgment in the case before him. Whenever, however, he favours (distinguishes) one party by permitting him alone to have access to the judge, or by standing for him, or seating him in the front part of the court, or by giving him more attention, or gaiety in his glance, this is considered as an indication of his injustice.”*<sup>203</sup>

Muslim jurists are concerned to apply the principle of equality between parties before the court. They articulate clearly the requirement of equality before the judge in these terms: *“If the litigant parties appear before a judge he should treat them equally in glance and tone. His attendance should be addressed to both as well as his turning away. He should not attend one and ignore the other. When he speaks, he should address both and when he refrains, he should abstain from both. He should never speak to one party and disregard the other. He should equalize between the noble and the poor and between the ruler and the ruled. All of them should be treated on equal footing and terms while appearing before him”*.<sup>204</sup>

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<sup>200</sup> - The Fourth Ruler after the death of the Prophet.

<sup>201</sup> - Ahmad Shalabee (1989) *“Al Teshrea Wa Al Qada’a Fi Al Faker Al Islami”* Dar Al Nehdah Al Masreah. Cairo p. 262

<sup>202</sup> - E’lam Al Moge’en (no year) part 1 p.85

<sup>203</sup> - E’lam Al Moge’en Part 1 P. 89

<sup>204</sup> - Nasser Al Jofan (1416 AH) p. 715



In general, equality should be preserved throughout the trial stage starting from the admission of litigants before the court until completion of the trial. Equality will include all aspects in which impartiality of the court can be achieved. Consequently, Article 19 Para (a) of the Cairo Declaration on Human Right in Islam states that: *“People, whether they are the ruled or the rulers, are equal before the law.”*

A comparison between the right to equality of arms in Islamic law, and the European human rights law leads to the conclusion that: (1) unlike the case-law of the European Court, Islamic scholars did not confine their discussion to criminal matters. Thus, rules provided in Islamic jurisprudence are, as a general principle, applicable to civil cases as well. (2) The European Court has restricted the scope of this right to some technicalities, while jurisprudence of Islamic law does not limit the scope to these technicalities, but rather the scope is widened to the degree that the accused's feeling of this equality is assured. The idea in Islamic jurisprudence is that unless the accused feels that he is treated on equal footing with the prosecution, his right to defence is infringed.

## **Section Two        Saudi law**

The right to equality of arms has not been particularly mentioned in any article of laws governing trial before the *Shari'ah* courts and the Board of Grievance. It could be argued that the legislature felt no need to stipulate particular articles for such rights, because the body of Islamic rules regarding equality is enormous, and an attempt to include them in one or more articles is both an awkward and a useless task, particularly since judges in Saudi Arabia, both in *Shari'ah* courts and in the Board, should seek reference to Islamic law. Article 8 of the Basic Law of Saudi Arabia states that *“Ruling in Saudi Arabia stands on Justice, Consultations and Equality according to the Islamic law.”*

Nabeel Omer states that equality before the court in Saudi Arabia is embodied in many aspects: 1- everyone is entitled to recourse to the court in any civil or criminal case; 2- the hearing of cases as a general principle is organized according to their registrations; 3- the judiciary is free; 4- the law, whether *Shari'ah* or enacted law, is applicable to every level of society.<sup>205</sup>

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<sup>205</sup> - Omer, N (1993) *“Usul Al Morafa't Al Shar'aeeh”* Monsha't Al Ma'rf Be Al Eskandarrah p. 27&28

However, to ascertain whether, though no particular articles are provided, the law in Saudi Arabia recognizes the same understanding of equality as that required by the ECHR, one should emphasize that according to the ECHR, the principle of equality of arms in criminal cases means that the accused must be given a reasonable opportunity to present his case before the court under the same conditions provided to the prosecutor.<sup>206</sup> The European Court on Human Rights has decided that the right to equality of arms will be violated if, for example, (1) the prosecutor before the appellate court is provided with more rights than those provided for the accused, and (2) if the accused's expert witnesses are not treated equally to those appointed by the court.<sup>207</sup>

As to the first point, namely lack of equality between the prosecution and the appellate before the Court of Appeal, this infringement might occur if the prosecution alone is allowed to attend the hearing. The accused in Saudi Arabia is provided with the right to present his case before the Appellate court under the same conditions provided to the prosecution. This fact can be identified through a number of aspects. For example, both the accused and the prosecution are entitled to appeal against any judgment whether it relates to conviction, acquittal, or lack of jurisdiction.<sup>208</sup> Moreover, neither the prosecution, the claimant of the private right of action, nor the accused are permitted to attend at the court of Appeal<sup>209</sup>. So the prosecution has no particular privilege in this regard. In addition, both the accused and the prosecution are permitted to submit new evidence to support the grounds of their appeal.<sup>210</sup> If the Appellate court decides to render the judgment after reversing the judgment of the trial court, such judgment must be rendered in the presence of both the prosecutor and the accused.<sup>211</sup> Moreover, the scales sometimes tend in the accused's favour. The right to reconsider the final judgment is mainly provided for the accused in certain circumstances prescribed in the law.<sup>212</sup> Furthermore, in major crimes, the law requires that if the decision is against the accused, that is to say he is convicted; such judgment must be appealed against even if the accused does not request it. However, if the court

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<sup>206</sup> - *Borgres v Belgium* (1991) Paras 27, 28, 29 (Application No. 00012005/86)

<sup>207</sup> - *Ibid*

<sup>208</sup> - Article 193 of the Law of Criminal Procedure. Similarly article 9 of the same law provides that: "sentences shall be appealable by either the convicted person or the Prosecutor"

<sup>209</sup> - Article 199 of the Law of Criminal Procedure.

<sup>210</sup> - Article 200 of the Law of Criminal Procedure.

<sup>211</sup> - Article 205 of the Law of Criminal Procedure.

<sup>212</sup> - Article 206 of the Law of Criminal Procedure.



acquits the accused this judgment is only appealed against if requested within the time limit.<sup>213</sup>

Interestingly, in contrast to the European Court of Human Rights where it was unjustifiably held that granting the prosecution a longer time to lodge an appeal than that provided to the accused is not considered a breach of the right to equality of arms<sup>214</sup>, the law in Saudi Arabia prescribes the same time limit within which both the accused and the prosecution should lodge their appeal.<sup>215</sup>

As far as the second point is concerned, that is, equal treatment of the accused's expert witnesses to those appointed by the court, although the investigator is entitled to seek the assistance of a specialized expert, pursuant to article 77 the accused may submit a report prepared by another expert retained by him in an advisory capacity. He can also, provided that there is sufficient cause, object to the appointment of the expert. When an objection has been filed, the expert shall not continue in his assignment until the investigator issues his decision within the three days of the submission, except in case of urgency in which case the investigator shall order the expert to continue.<sup>216</sup> If the prosecution lodges the appeal, the court may confirm, cancel or amend the judgment. Where however the application emanated only from the person condemned the court may only confirm or amend the judgment in his favour.<sup>217</sup>

### **Part IX: Right of the Accused to Call and Cross-examine Witnesses against him**

Article 6 (3) of the European Convention on Human Rights provides that: "*Everyone charged with a criminal offence has the following minimum rights...(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him...*" Again, our discussion will address the topic in Islamic law firstly and in Saudi law secondly.

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<sup>213</sup> - Articles 11 & 195 of the Law of Criminal Procedure.

<sup>214</sup> - *Kremzow v Austria* (1993) Para 75 (Application No. 000123501/86)

<sup>215</sup> - Article 194 of the Law of Criminal Procedure provides that: "*An appeal against a judgment shall be within thirty days from the date of receipt of a copy of the judgment...*" See also articles 31 & 37 of the Rules of Pleading before the Board of Grievances.

<sup>216</sup> - Article 78 of the Law of Criminal Procedure

<sup>217</sup> - Article 37 of the Rules of Pleading before the Board of Grievances.

## Section One Islamic law

Three issues offer illustration of this subject in Islamic law. The first two are the right of the accused to examine witnesses against him, and his right to challenge the credibility of the witnesses. The difference between these two rights is that in the first case what the accused challenges is the facts presented against him by the witnesses, whereas in the second case the challenge will focus on the witnesses' character. Islamic law is distinguished by the fact that the testimony to be accepted must only be given by just persons.<sup>218</sup> "A just person" means a person who shows obedience to Islamic teachings. A person who strictly fulfils God's orders, and abstains from any prohibited act. A person, for example, cannot be just if he does not pray, or if he gambles, drinks alcohol, dishonest etc. Therefore, not everyone can be accepted as a witness. Islamic law cannot impose punishment based on testimony unless the judge is certain of the credibility of witnesses; thus the accused is provided with the right to challenge witness credibility. The third issue to be studied here is the right of the accused to call his witnesses.

In respect of the first matter, that is the accused's right to examine witnesses against him, similar to the human rights in Europe<sup>219</sup>, the witnesses, pursuant to Islamic law, must give their testimony in the court and before the accused to enable him to examine the witnesses.<sup>220</sup> The judge cannot base his judgment on testimony which the accused has not been given the chance to examine and discuss with the witnesses<sup>221</sup>.

Moreover, to be sure of their testimony the judge must examine the witnesses by questioning them about how they saw the accused committing the crime and what they heard; and if he has any doubt about their testimony he must question them separately.<sup>222</sup>

As to the second matter, Islamic law provides the accused with an important guarantee regarding this issue. That is to say, the testimony cannot be accepted in the court unless given by unbiased persons. God said: {And take as witness two just persons}<sup>223</sup>

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<sup>218</sup> - J.N.D. Anderson "Muslim Procedure and Evidence" Journal of African Administration. Vol. 1 No.3 July 1949 p123-183

<sup>219</sup> - *A.M.v Italy* (1999) Paras 26,27,28 (Application No. 00037019/97)

<sup>220</sup> - Al Awa, M "Fi Usul Al Nedam Al Gena'ee Al Islami" P. 302

<sup>221</sup> - Al Turkmani, A (1999) p. 161

<sup>222</sup> - Al Muqhni (no year) Part 9 P. 87

<sup>223</sup> - Surah 65 At- Talaq. Verse No. 2



Accordingly, if the judge is certain of the character of the witness he can base his judgment on his testimony; otherwise he must reject the testimony.

Jurists confirm that the accused has the right to challenge the character of the witnesses against him on grounds of bias, as well as the right to contest the credibility of biased witnesses in respect of the fact or the crime in question.<sup>224</sup> In addition, jurists argue that after the testimony is given, the judge must ask the accused if he has any claim against their character.<sup>225</sup>

Jurists state many grounds on which the personal characteristics of the witness can be challenged. For example:

- 1- If the witness is accused of being a debauched person, because the testimony will not be accepted if given by a biased person (rebellious and disobedient to Allah).
- 2- If the witness is said to be an opponent of the accused. If this is proved the witness's testimony cannot be accepted.<sup>226</sup>
- 3- If it is claimed that by giving his testimony, the witness will either gain personal benefit or prevent personal damage.<sup>227</sup>
- 4- If it is claimed that the witness has a bad memory, and is therefore unreliable.<sup>228</sup>
- 5- If the witness is a kinsman of the interested party.<sup>229</sup>
- 6- If it is shown that the witness has been punished for committing the crime of defamation, because the testimony of a defamer cannot be accepted unless the convicted has repented.<sup>230</sup>
- 7- If it is claimed that the witness has given his testimony with the purpose of erasing his previous bad reputation by demonstrating to the public that his testimony is now accepted. For example, if his testimony was rejected in a previous case because he was debauched. So he is testifying in the present case merely to show people that he is now a just person. In this latter case his testimony will be rejected.

However, the burden to prove these claims is upon the accused.<sup>231</sup>

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<sup>224</sup> - Nasser Al Jofan (1416 AH) p. 591&592

<sup>225</sup> - Al Muqhni (1348H) Part 9 P. 87

<sup>226</sup> - Ibid, part 9 P. 158

<sup>227</sup> - Ibid, part 9 P. 186

<sup>228</sup> - Ibid, part 9 P.188

<sup>229</sup> - Ibid, part 9 p.191

<sup>230</sup> - Ibid, part 9 P.179

In fact, this requirement causes dissimilarities between Islamic law on the one hand, and the case-law of the European Court of Human Rights on the other. To begin with the European Court has accepted that in some circumstances evidence can be given by an unidentified witness, provided the accused has ample opportunity to challenge the evidence.<sup>232</sup> Moreover, it has also accepted the use of anonymous police officer.<sup>233</sup>

In contracts, strictly speaking, these exceptions cannot be admitted within Islamic jurisprudence. As we have pointed out above the personal character of the witness is a relevant matter, and thus he must be identified in order to provide the accused with the opportunity to challenge his personal credibility.

As far as the third issue is concerned, jurists discuss the accused's right to hear his witnesses under the same conditions as witnesses against him in terms of the idea of counter testimony. If witnesses testify before the court that the accused has committed a crime in a particular city at a certain time, the accused can bring other witnesses to testify that during that date and time the accused was seen in a different place.<sup>234</sup> This shows conformity with European Court of Human Rights. According to the latter the general rule is that the national courts are free to assess whether the justice needs to call the accused's witness or not. The Convention does not require the attendance and examination of every witness on the accused's behalf: its essential aim is, as indicated by the words "under the same conditions", full equality of arms in the matter.<sup>235</sup>

In conclusion, a careful analysis of the above reveals that Islamic law not only requires similar guarantees to be provided to the accused, but also Islamic law gives the accused further guarantees to challenge the credibility of the witness. Such safeguard is not provided by the case-law of the European Court.

## **Section Two          Saudi law**

### **1: Shari'ah Courts**

The Law of Criminal Procedure mentions only two rights in this regard, namely, the accused's right to examination of witnesses against him, and his right to call his witnesses to be heard under the same conditions as witnesses against him. The accused's right to challenge the personal character of the accused against him is not

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<sup>231</sup> - Bandar Al -Swailam (1987) p. 358

<sup>232</sup> - *Doorson v The Netherlands* (1996) 22 EHRR 330

<sup>233</sup> - *Van Meahelen and others v The Netherlands* (1997) 25 EHRR 647

<sup>234</sup> - Bandar Al -Swailam, (1987) p. 365

<sup>235</sup> - *Vidal v Belgium* (1992) Para 33 (Application No. 00012351/86)



mentioned. But this should not be understood to mean that before the *Shari'ah* court the accused would not be provided with such guarantee, because in these circumstances judges will refer to Islamic law within which the accused is provided with this right. The following case illustrates the point.

In 28/5/1410H a person before the General Court in Riyadh was accused of committing apostasy. During the trial he stated, "*There is hatred between the first witness and me. We are both married to two sisters, and he always created disputes between my wife and me, he is also in debt to me, and recently I have called upon him to pay this money through the Yemeni Ambassador*". With regard to the second witness the accused stated, "*He became angry and gave his testimony after he knew that I am a creditor of his uncle. As to other witnesses they are all relatives*". The General Court stated that: "*After considering the case and what has been stated by the accused and since the accused has denied the prosecution against him and because of the challenge stated against the witnesses and since their testimonies contradicted each other, and because their testimonies differ in times and places in respect of the crime which means that they are not in agreement which creates doubt about their testimony, the crime of apostasy is not proved.*"<sup>236</sup>

However, the following discussion will be limited to the first two issues mentioned above.

As to the accused's right to examination of witnesses against him, article 98 of the Law of Criminal Procedure provides: "*The Investigator shall hear each witness separately, and he may hear the witnesses in the presence of other witnesses and litigants*". This is to enable the accused to contest the content of the testimony in the stage prior to the trial stage. Accordingly, following the hearing of the witness, the accused may comment on the testimony.<sup>237</sup>

With regard to the trial stage, article 163 provides the accused with the right to cross-examine the witnesses called by the other party. Moreover, to insure the practice of this right the law requires that testimony shall be given at the court session. Furthermore, the law also requires the judge to take the necessary steps to examine the credibility of the testimony. Therefore, each witness shall be heard separately, and where necessary, witnesses may be kept apart and confronted with each other.<sup>238</sup>

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<sup>236</sup> - This case is mentioned in Saud Al Hammali (1419-1418 H) p. 190&191

<sup>237</sup> - Article 99 of the Law of Criminal Procedure.

<sup>238</sup> - Article 169 of the Law of Criminal Procedure

In a case before the General Court in 13/ 6 / 1416 H a representative of the private party claimed that the accused had murdered the victim intentionally and requested the infliction of the death penalty upon the accused. The accused, who was defending himself in person, stated that the investigation report was based on the testimony of witnesses whom he had not been allowed to cross-examine in the investigation stage, and who apparently did not give their testimonies before the trial court. Therefore, the General Court correctly rejected the request for the death penalty.<sup>239</sup> This judgment shows clear consistency with case-law of the European human rights jurisprudence. For instance, In *Said v France*<sup>240</sup> the applicant to the European Court, who was convicted for drug offences, claimed that since the judicial bodies refused to organize a confrontation between him and the prosecution witnesses, his right to a fair trial is breached. The European Court pointed out that neither at the stage of investigation nor during the trial was the applicant able to examine or have examined the witnesses. Thus, the lack of any opportunity to confront the prosecution witnesses violates Art 6. Despite the difficulties involved in securing evidence in relation to offences of drug trafficking, these considerations, according to the European Court, did not restrict the right of the defence guaranteed by Article 6. Consequently, the European Court stated that Article 6 (1) and 3(b) is violated.

Furthermore, if in exceptional circumstances the court in Saudi Arabia decided to move to hear a witness who is unable to appear before the court, the accused shall be permitted to appear at the other place.<sup>241</sup> Thus, if the court decided to hear the testimony of, for instance, a person ill in hospital, the judges concerned should hear the testimony in the presence of the accused. Needless to say the accused will be allowed to examine the witness in this case, otherwise his attendance is pointless.

In respect of the right to call his witnesses, Article 95 provides: "*The Investigator shall hear the statement of the witnesses called by the litigants unless he considers that their testimony would be useless. He may also hear statements from others whom he deems necessary with respect to the facts that may lead to the proof of the crime, its circumstances, and its attribution to the accused or his innocence*". Therefore, the right of the accused to call his witnesses is guaranteed in the investigation stage. Before the General Court in Saudi Arabia in 27/11/ 1411 H the victims' representative

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<sup>239</sup> - This case is found in Saud Al Hammali (1419-1418 H) p. 174 & 175

<sup>240</sup> - (1994) 17 EHRR 251

<sup>241</sup> - Article 170 of the Law of Criminal Procedure



claimed that the accused had murdered the victim intentionally and asked for application of the death penalty on the accused. In his defence the accused stated that he killed the victim by mistake, not with intent. In order to prove that he did not murder the victim intentionally the court allowed the accused to bring two witnesses to support his defence. They testified that both the victim and the accused were very close friends in the same workplace and there was no hatred or dispute between them. Therefore, in its judgment the court ruled that the killing was not intentional. This judgment became final after being ratified by the Appellate Court.<sup>242</sup>

In addition, before the court the accused may request to call any witnesses.<sup>243</sup> The court is under obligation to protect the witnesses and must refuse to direct any question intended to influence the witness, or any leading question. The court shall not allow any indecent question, unless it relates to material facts, leading to decision in the case and shall protect the witnesses against any attempted intimidation or confusion during the testimony.<sup>244</sup> This is, generally speaking, similar to the standard required by the European Court.

## **2: The Board of Grievances**

Only two articles deal with the subject. Article 19 provides: “...*he (the accused) may apply for a summons to be issued to witnesses for hearing their evidence...*” Thus, before the Board the accused has the right to call his witnesses.

Article 23 provides: “... *circuit may of its own accord or upon application being made by the representative of the Attorney General or the accused issue summonses to such witnesses whose statements (evidence) it deems necessary to be heard; the circuit shall bar the posing to witnesses of questions which are not relevant to the subject matter of the case or will intimidate or confuse the witness*”.

Although the accused's right to cross-examine witnesses against him is not stipulated in the law, one should not conclude that this right is not guaranteed before the Board because reference will be made to the Islamic law, as pointed out above. Article (48) of the Basic Law of Saudi Arabia declares: “*The court shall apply, to matters brought before them, the provisions of Islamic Shari'ah, in accordance with the precepts of the Book of God and the Sunnah ...*”

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<sup>242</sup> - This case is mentioned in Saud Al Hammali (1419-1418H) p. 193&194

<sup>243</sup> - Article 164 of the Law of Criminal Procedure

<sup>244</sup> - Article 169 of the Law of Criminal Procedure

## Part X: Right of the Accused not to be compelled to confess Guilt

### Section One Islamic law

Confession is the most important source of evidence in Islamic law. After hearing the prosecution or the complainant in a private right of action, the judge usually asks the accused for his response to such accusation. If he admits guilt the judge will render his judgment. The confession is considered as sufficient means to prove the case provided that it has been given in an unequivocal manner.<sup>245</sup>

However, if the accused admits his guilt, this confession is invalid if he has done so under compulsion. The justification offered for this is that justice requires that no confession should be accepted if a person is compelled to admit his crime.<sup>246</sup> God said: { *Whoever disbelieved in Allah after his belief [after being believer], except him who is forced thereto and whose heart is at rest with Faith; but such as open their breasts to disbelief, on them is wrath from Allah, and theirs will be a great torment* }<sup>247</sup>.

Jurists state that if in this verse God forgives those who commit the crime of apostasy which is considered to be the most serious crime of all, because they spoke under compulsion, it is fortiori not to punish for other crimes if a person is compelled to confess his guilt.<sup>248</sup>

Omer ibn Al-Kattab states that: *“a man is not true to himself if he is in pain, bound, beaten, or scourge”*<sup>249</sup>

Moreover, jurists maintain that the accused cannot be coerced to confess guilt. A confession which is to be taken as evidence of committing a crime must be given in the court by the accused by his free will and without any coercion. Jurists support their view by stating that if a person admits his guilt freely he is more likely to be telling the truth, because no rational person will admit something that could cause harm to him unless for a specific reason. But if a person is forced to confess guilt he is unlikely to be telling the truth; rather he more probably admits guilt in order to avoid the current tort imposed against him.<sup>250</sup>

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<sup>245</sup> - Bandar Al-Swailam (1987) p.176

<sup>246</sup> - Salim Ali Farrar (1999), p 199

<sup>247</sup> - Surah 16 An-Nahl. Verse No. 106

<sup>248</sup> - Salah Al Heedan (1986) *“Wesa’l Tahgeeg Al Adelah”* in Al Motahem Wa Huquqh Fi Al Shari’ah Al Islami. Part 1 P. 176

<sup>249</sup> - Mosanf Abdulrazaq (1392 H) part 10, p. 193

<sup>250</sup> - Salim Ali Farrar (1999), p217



Accordingly, the majority of Muslim jurists believe that if the accused is coerced, his guilt is void and not valid.<sup>251</sup>

Therefore, it could be argued that both the European Court of Human Rights and Islamic law requires that confession must be given without force. Confession obtained by force has no legal validity in both jurisprudences.

Yet some Islamic jurists say that if the accused is, for instance, known for his corruption and lewdness or has previous convictions for theft, the authority concerned can obtain confession by force. However, they confine their view regarding this matter to civil, not criminal liability. That is to say that they accept the exercise of force upon the accused to refund the stolen money to the interested person. But the confession is not a valid ground for imposing punishment for theft upon him.<sup>252</sup> This matter should be distinguished from the rules against self-incrimination that are mentioned by the European Court. Using a force in the above example in Islamic jurisprudence has nothing to do with evidence. The presumption of the example is that the offence is proved and accordingly the person is judicially convicted for the crime of theft. But jurists accept the use of force in this case if the convicted person still possesses the stolen money and refuses to submit it back to the owner. So jurists accept the use of force in order to get the money back.

Interestingly, a significant guarantee that is provided in Islamic law in this regard is that a person accused of one of the *Haddud* crimes, those that are regarded as crimes in connection with God's rights, can withdraw his confession. This might be exercised explicitly or implicitly. And more importantly, if the accused admits without coercion to committing one of the *Haddud* offences, the judge is obliged according to the view of some jurists to encourage the accused to withdraw his confession. Their argument is legitimately founded in stories that were narrated to the Prophet or his companions. For example, when a person called Ma'az came to the Prophet and admitted that he had committed adultery, the Prophet said to him: "*you might just have kissed here, looked at here, or touched here*". The man said: "*no, but I committed adultery*". Then he was punished. Another story that could be cited in this regard is that when a man who was accused of committing a theft was brought to

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<sup>251</sup> - Dofeer (2000)p.95

<sup>252</sup> - Ibid, p.95 & see also Awed M. Awed, "*The Rights of the Accused under Islamic Criminal Procedure*", in M. Cherif Bassiouni, (1982). *The Islamic Criminal Justice System*. Oceana Publications, London p.106

the ruler Omer ibn Al Kattab, Omer said to him did you steal? Say no. The accused said no. So, Omer left him unpunished.<sup>253</sup>

The accused's right to withdraw his confession is not limited to one stage, but rather it can be exercised at any stage of proceedings even after the final judgment is rendered. For example, if a person admits that he committed the crime of adultery and insists on his confession until the guilt is proved against him and then withdraws his confession, the punishment for the crime of adultery cannot be inflicted against him.<sup>254</sup>

As to the crime of *Ta'azir* if the accused withdraws his confession, the court is given discretion to accept the withdrawal. This is distinguishable than the case in *Haddud* offences. Unlike the *Ta'azir* offences, the judge in *Haddud* offences is bound to accept the withdrawal and he has no discretion in this regard.

However, in respect of the crime of *Qisas*, since these crimes involve individuals' rights the withdrawal cannot be accepted provided that the court is satisfied the confession has been given without force.

## **Section Two          Saudi law**

### **1: Shari'ah Courts**

The law in Saudi Arabia is very cautious in respect of confession as a means of proof of crime. The legislator's aim when enacting the Law of Criminal Procedure seems to have been to insure that confession is made without force. Article 102 provides: "*The interrogation shall be conducted in a manner that does not affect the will of the accused in making his statements. The accused shall not be asked to take an 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.*"

In addition, Article 162 provides: "*If the accused at any time confesses to the offence 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*".

This article provides two crucial guarantees in this matter. First: the confession will not be accepted unless it is made before the court. Second: the court must insure that

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<sup>253</sup> - Mosanf Abdulrazaq (1403H) Part 1 P. 224

<sup>254</sup> - Al-Shafi'i (1324H) Al-Om. Part 6 p.153



the confession matches the facts concerned. So, the confession will not be accepted unless the court in question is convinced of its credibility.

The Royal Decree No. 27/8 in 22/2/1405 H states that: *"torture must not be practiced in the investigation because the accused will plead guilty even if he is not guilty"* <sup>255</sup>

As to the right to withdraw confession, in a case before the General Court in Riyadh a woman was accused of committing adultery. In this case during the investigation stage she admitted that after she discovered her unlawful pregnancy, she took a medicine for abortion which caused internal bleeding, and she was taken to hospital. The confession was ratified by a judge. However, during the trial she withdrew her previous confession by stating that she was raped. She insisted that her intercourse and pregnancy were not her wish.

The General Court stated that: *"because the accused has withdrawn her confession which was legally ratified before a judge and because she claimed that she was raped, this claim creates doubt about the fact and because Haddud punishment cannot be inflicted in the presence of doubt even though the case papers indicate clearly that she committed the crime by her free will, her withdrawal is accepted because adultery is a Hadd crime in which immunity and forgiveness are strongly recommended."* <sup>256</sup>

In another case a person was charged of committing buggery. During the investigation he admitted his guilt and a judge ratified this confession. But before the trial court, after reading the accusation memorandum, he pleaded not guilty and claimed that he confessed because he was forced by the investigator to admit guilt. Accordingly the court decided that: *"since the accused claimed that he was compelled to confess guilt, his withdrawal has been accepted."* <sup>257</sup>

As to other crimes, namely *Ta'azir* and *Qisas* crimes, confession must also be made without coercion. The trial court has discretion according to the circumstances of the case to decide whether the confession was obtained by coercion. In practice if the accused admits guilt, he will be asked to confirm his confession. For instance, in crimes of theft by presenting the stolen money, or in a case of murder by presenting the means by which the crime was carried out. He is then taken to the court to ratify his guilt before the president of the court and a single judge. This means that as a

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<sup>255</sup> - Quoted in Emad Al Najar ( 1997 ) p. 298, 299

<sup>256</sup> - This case is mentioned in Bader Al Qamdee (1420-1421 H) p. 258

<sup>257</sup> - Ibid, p 266

general rule confession must be rendered before two judges.<sup>258</sup> The judges will question him about his confession and ask whether or not he was compelled to make it. If he admits guilt this confession will be considered as evidence against him unless he proves before the trial court that it was achieved by force. This is a matter of discretion which is left to the trial court.

## 2: The Board of Grievances

The Rules of Pleadings before the Board of Grievances do not specify any articles concerning evidence, which means that it is left to be decided according to Islamic law. As we have stated above confession is regarded as an important means to prove guilt in Islamic law.

Nevertheless, it should be emphasized that the Board of Grievances has jurisdiction over only *Ta'azir* crimes and is not empowered to deal with *Haddud* crimes. Thus, if the accused admits guilt during the investigation and two judges in the *Shari'ah* courts have ratified this confession, he has no right to withdraw his confession. Therefore, the only way provided to challenge his previous confession is to claim that he was compelled to confess guilt. This is in fact a subjective matter. In the decision No. H/1/59 in 1400 H the Board of Grievances ruled that: "*the accused's claim that his confession was a result of intimidation and beating, and that his confession was ratified by the judge in the Shari'ah court despite his denial, has in fact no evidence, therefore his claim is not acceptable*".<sup>259</sup>

However, in another case a person was charged of committing forgery. The prosecution was based on the accused's confession that he added new information to an official copy of the document, and presented it to the agent concerned. Before the Board the accused denied the prosecution charge. He claimed that he added the new information to the official copy of the document by mistake while casually checking through his papers, one of which was the document in question. He also said that he did not present the amended copy to the agent concerned, but rather he had produced a non-amended copy; however, the agent in question had asked him to present the original copy of the document whereupon the difference between these two copies was discovered. The Board ruled that: "*the case papers may support the accused's*

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<sup>258</sup> - Circular No. T/12/154 dated on 20/12/1400 H. *Ministry of Justice. AL- tassneef al- Maudouy Li-tameem al-Wazarah [The Classification Book for the Ministry of Justice Regulation and Administrative Circulars], Vol.3 (Ministry of Justice, Riyadh, Saudi Arabia 1413 H).*

<sup>259</sup> - Quoted in Emad Al Najar ( 1997 ) p. 298, 299. See also the Board decision No. H/2/2/1400 H.



*defence. On the copy of the document produced by the accused, on which the accusation is based, with the application to the agent concerned, no addition was made. This claim is supported by two persons' testimonies. The Board clarified that in accordance with the above, the accused's defence is proved by both evidence and logic, because the accused produced a non-amended copy to the agent, and produced the amended copy only after it was requested by the agent. It cannot be conceived logically that the accused will adduce evidence against himself by presenting a correct copy followed by a forged copy. The crime of forgery is not completed because the criminal intention is absent. The Board therefore concludes that the accused was innocent.”<sup>260</sup>*

In brief, rules governing the confession in both *Shari'ah* courts and the Board of Grievances are, as general principle, in agreement with their counterpart in the European Court of Human Rights.

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<sup>260</sup> - The Board of Grievances. Decision No. 18/1/3/D/G/2/76 in 1415H

## CHAPTER 6

### Independence of the Judiciary and the Rights of the Accused

#### Introduction:

An important feature distinguishing between the judicial bodies on the one hand, and the executive and legislative bodies on the other, is that the viability of the judicial body depends entirely on public confidence in the impartiality and independence of the judiciary. Justice is the ultimate objective in every society, and in order to achieve this goal, nations of differing backgrounds all strive to establish confidence in their judicial system by means of their court organization.

This chapter is divided into four parts, dealing respectively with the accused's rights to an independent court, to an impartial court, to public hearing, and to reasoned judgment. As in chapter 5 each part will be treated under the two separate headings of Islamic Law and Saudi Arabian Law. However, whereas in the previous chapter each discussion of Saudi Arabian law is sub-divided into two areas, (i) *Shari'ah* Courts and (ii) the Board of Grievances, in each part of this chapter Saudi Arabian law will be treated in a single discussion. The reason for this is that most relevant conditions are applicable to both institutions, as illustrated in the following.

Article 16 of the Board of Grievances Statute provides: "*notwithstanding the requirements hereof, the Board members shall have the same rights and guarantees and be under the same obligations as those enjoyed or undertaken by the judges [of the Shari'ah courts]*" Moreover, Article 17 provides: "*appointments and promotions of the Board members shall be effected in accordance with the procedures and formalities prescribed for appointments and promotions of the law of the Judiciary; the Administrative Affairs of the Board shall in general have with respect to its members the same powers as those conferred upon the Supreme Judicial Council in regard to members of the judicial system [ Shari'ah Courts].*" In addition, article 18 provides: "*in regard to salary, allowances, rewards and benefits, a board member shall be treated in the same way as an equivalent member of the judicial system [Shari'ah Courts].*" Accordingly, the Law of the Judiciary, which was originally enacted to cover the *Shari'ah* courts, governs many of the topics relevant to this



chapter. Furthermore, the law of the Board of Grievances makes few provisions in respect of these topics. Therefore, there is no need to treat the two institutions in separate sub-divisions, and the discussion provided here must be understood to cover both institutions unless otherwise stated.

## **Part I                      The Right to an Independent Court**

Article 6 (1) of the European Convention on Human Rights provides: *“In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing ...by an independent ...tribunal....”* The right to an independent court in Islamic law and Saudi law will be dealt with in turn.

### **Section One              Islamic law**

Early Islamic jurisprudence does not seem to have provided a legal theory in respect of the independence of the judicial system; instead different aspects of the judge's independence are discussed in a variety of separate studies. Even though there is considerable variation among existing studies, both ancient and contemporary, as to the elements which constitute the independence of the judiciary, the following elements have been widely recognized as forming the cornerstone of independence:

- 1- The appointment of judges;
- 2- The relationship between on one side the ruler and governor, and on the other the judges;
- 3- Depositing (dismissing) judges;
- 4- The protection of judges from litigants.

In order to examine the doctrine of independence in Islamic law one should thus consider each of these in turn.

As to the first element, namely the appointment of judges, the basic idea in Islamic law is that the ruler alone is responsible for judging between people, because the judiciary is one of his duties towards his citizens<sup>1</sup>. In Islamic law rules are divided into two categories: (1) Those of personal obligation (individual duty); (2) Those of collective obligation. The former are those whereby the individual in question must

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<sup>1</sup> - Obeed, M (1991) *“Istiqlal Al Qada’a”* p. 49

undertake (perform) the conduct in person. For instance, prayer or fasting must be practised in person, which is to say that every person in Islam is under obligation to pray and fast himself. On the other hand, collective obligation means that the community of Muslims in a particular place is obliged to exercise the conduct, but if some Muslims undertake the conduct in question, other Muslims are not then obliged to do so. In the case of funeral prayers for instance, the prayers must be fulfilled by some Muslims, but other Muslims may then be exempted from the duty.

The ruler's duty to adjudicate between citizens is classified as a personal obligation. So he must perform it in person. However, since the fulfilment of this duty is impossible due to the increasing spread of Islam, the ruler has the right, by way of exception, to appoint other persons to adjudicate on his behalf.<sup>2</sup>

As a consequence this appointment is also classified as a personal obligation, which means that the ruler must exercise it in person, because it is one of the ruler's duties and responsibilities towards his citizens pursuant to the ruling contract between the public and the ruler.<sup>3</sup> Muslim jurists state that the ruler must appoint judges unless there are exceptional circumstances, for example, if there is no ruler or if a minority of Muslims lives under a non-Muslim government. In this case election is permissible as a method of appointing the judge. However, the word "election" here has a different meaning from that employed in some modern legal systems<sup>4</sup>. The word "election" here means a procedure undertaken by jurists and scholars and not by ordinary persons who have no knowledge of judges' conditions and requirements.

The appointment of judges in Islamic jurisprudence is assigned to the ruler himself because adjudication is the responsibility of the rulers. No one has power to exercise it save the ruler himself or his deputy. It is considered an important task, thus the ruler himself must exercise it in person. In his era, the Prophet himself judged between people, and also appointed judges. After his death his companions continued to follow this approach. Accordingly, the only means to appoint judges in Islam is through the ruler himself, and if a judge is appointed without the ruler's permission his appointment becomes invalid.<sup>5</sup>

However, it should be emphasized that the ruler's discretion to appoint judges is limited by the conditions which a judge must fulfil. There are certain conditions with

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<sup>2</sup> - Obeed, M (1991) "*Istiqlal Al Qada'a*" p. 49

<sup>3</sup> - Bada'a Al Sana'i (1986) Part 7 P. 2

<sup>4</sup> - Al Kelanee, F (1977) "*Istiqlal Al Qada'a*" p. 126 & 127

<sup>5</sup> - Bada'a Al Sana'i (1986). Part 7 P.



regard to the judge's qualifications: (1) he must be a Muslim; (2) he must be a person of sound mind which means he is not an insane person; (3) he must have reached the age of discretion; (4) he must be a free person, that is to say, not a slave. This condition no longer applies because the era of slavery has ended; (5) he must be a just person. This means that he does not commit any act that could be considered detrimental to his honour (damage of chivalry); (6) he must have the faculties of sight, speech and hearing; (7) he must be male; (8) he must have no previous criminal record; and finally (9) he must be a scholar in Islamic law<sup>6</sup>. This last condition means that he must be a specialist in Islamic law, particularly in Islamic jurisprudence, and in the Arabic language.

Moreover, Islamic law requires particular characteristics in the judge's personality. Abdur Rahman I. Doi states: "*Those who perform the function of the Qadis (judges) or Qadi al- Qudat (Chief Justice) must be not only men of deep insight, profound knowledge of the Shari'ah, but they must also be Allah-fearing, forthright, honest, sincere men of integrity.*"<sup>7</sup> The Prophet said: "*The Qadis are of three types. One type will go to paradise and the remaining two will end up in the fire of hell. The person who will get to paradise is one who understood the truth and judged accordingly. Those who judged unjustly after understanding the truth, they will go to hell. Likewise, Qadi who judged in ignorance will also go to hell.*"

In his comments on the above *Hadith* Abdur Rahman explains: "*The above Hadith shows how delicate and responsible the job of Qadi is in Islam. His knowledge of Qur'an and Shari'ah must be very deep and (sic) that he judges justly. Otherwise, it can really ruin a man's spiritual future in the next world. The life in this world is only for a limited period, while the life in the next world is forever. Then why should one really undertake to be a judge when he does not have the required qualifications and character to be a judge? .... Naturally, a man who is appointed as a Qadi or a judge does not have an easy job to perform. If he becomes slightly irresponsible and unjust, he will be caught on the Day of Judgment. On the other hand, when he is just and administers justice according to the Book of Allah and the Sunnah of the Prophet (S. A. W.) he is taken (as) an enemy of highly influential people in society. The*

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<sup>6</sup> - Al Qassim, A (1982) "*Al Qada'a Wa Al Taqadee Wa Al Tanfeeth*" p.47- 49. However, some of these conditions are controversial.

<sup>7</sup> - Doi, A (1997) p. 11

*responsibility of a Qadi is like a double-edged sword, and one has to be extraordinarily careful in fulfilling it.*"<sup>8</sup>

Generally speaking, when appointing a judge the ruler is responsible for the following matters:

- 1- As to the number of judges, he has the duty of appointing the necessary number in each district.
- 2- He must select the best of his citizens in terms of knowledge, religiosity, chastity and impartiality.
- 3- He must refuse to appoint any person who requests appointment as a judge.<sup>9</sup>

Some current Islamic writers consider this approach to be an important guarantee towards the independence of the judiciary. They support their argument on the following grounds: (1) Confining the appointment of a judge to the ruler himself could serve as a protection from any influential power that could be practiced against the judge by any high ranking employee. (2) The appointment of the judge by the ruler is contingent on his being confident of the judge's capacity to fulfil the requirement of this position. Otherwise the appointment is invalid.

However, throughout the ages Islam spread across different continents in such significant proportions that it became impossible for the rulers to undertake this obligation themselves. The role of appointment was therefore delegated to senior judges.<sup>10</sup> During the Abbasid era after extensive proliferation of the Islamic state a new office was created for (Qadi al Qudat) the Chief Justice. The person who was appointed to this position was the reference for all judges, responsible for their appointment, dismissal, supervision of their affairs, and scrutiny of their judgments. The Chief Justice was argued to hold the function of selecting judges and sending their names to the ruler. In most cases the ruler would appoint those chosen by the Chief Justice. This practice has been extended to the establishment of supreme judicial councils to replace the office of Chief Justice.<sup>11</sup>

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<sup>8</sup> - Ibid, p 11&12

<sup>9</sup> - Kashaf Al Kana' (1982). Part 6 p. 186 &187.

<sup>10</sup> - Ali Al Mawardi (1971). *Adab Al Qadee*. part 1 p. 138

<sup>11</sup> - Salah, A (1421 AH) "*Hasanat Wa Istiqalal AL Qada'a Fi Al Fiqh Al Islami Wa Tatbegatha Fi Andamat Al Gomhoreeh Al Islami Al Moreetaneeh*". Naif Arabic Academy for Security Studies. A Master Dissertation p. 126



With regard to the second element of the independence of the judiciary in Islamic law, that is to say the relationship between the judges on the one hand, and the ruler and governors on the other, Islamic principles prevent rulers and governors from interfering in the judiciary. God said: {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. Verily, how excellent is the teaching which He (Allah) gives you! Truly, Allah is Ever All-Hearer, All-Seer}.<sup>12</sup> He also said: {O you who believe! Stand out firmly for Allah as just witnesses; and let not the enmity and hatred of others make you avoid justice. Be just: that is nearer to piety; and fear Allah. Verily, Allah is Well-Acquainted with what you do}.<sup>13</sup>

A judge called Shoreeh sentenced a man to imprisonment. When the governor of Al Basrah and AlKofah heard of it, he asked the judge to release the prisoner. The judge replied by stating that: *"the jail is yours, and the guardian is yours, but I am convinced that he deserved it"*. The judge refused to release him.<sup>14</sup>

In addition, if a judge receives a letter from the ruler he will not read it until the hearing has started. One ruler wrote a letter to a judge called Ibn Abee Lela. When the messenger brought it to the judge outside the court, the judge refused to take it. The messenger told him that the letter had no bearing on the case concerned. The judge said *"I will not receive it except during trial."*<sup>15</sup>

Jurists state that if a case is brought before a judge and then the ruler interferes to prevent the judge from continuing to adjudicate the case, the judge should ignore the interference and must adjudicate the case and render his verdict.

Once the judge is appointed, the ruler can only advise him in any difficulty that the judge might face, without interfering in the judge's job. This means that the judge can seek advice from the ruler on the matter if he wishes to, without obligation to apply the advice.<sup>16</sup>

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<sup>12</sup> - Surah 4 An-Nisa Verse No. 58

<sup>13</sup> - Surah 5. Al-Ma'idah Verse No. 8

<sup>14</sup> - Wakee'a bin Hean (no year). Akbar AL Qudat. Part 2 P. 279

<sup>15</sup> - Wakee'a bin Hean (no year) Akbar AL Qudat. Part 3 P. 310. Similarly, the ruler Abu Ja'fer Al Monsor sent a letter to the judge Abe Kazamah in Egypt. When the messenger handed it to the judge, the latter did not open it, and when the messenger asked him to open it the judge refused that and he said it is part of the case and there is a place for judiciary. Muhammad Al Kanadee (no year) . AL Wolat Wa AL Qudat. P. 336

<sup>16</sup> -It should be noted here that according to Islamic law the ruler must be a scholar in Islamic law and has the same qualification as judges.

Interestingly, rulers and governors are subject to the judges' powers. The ruler himself is subject to the judiciary power in both criminal and civil cases. The ruler in the Islamic state has no privilege or immunity in respect of the judiciary, but is rather deemed to be only an ordinary person<sup>17</sup>. To support this view many stories of Islamic history have been cited. For example, it was narrated that Ali bin Abe Talb (the fourth Ruler after the death of the Prophet) had sued a Jewish person before a judge and claimed that the Jew had stolen his breastplate. The judge asked Ali to present evidence to support his claim. Ali brought his son Al Hassan as a witness. The judge refused to accept his son's testimony and decided the case in the Jew's favour, because the ruler (Ali) had not brought acceptable evidence. The Jew was astonished at the ruler's respect for the independence of the judiciary, and said, "*I certify now that the breastplate is not mine, but belongs to the ruler.*" He then converted to Islam.<sup>18</sup> Recent examples can be found in the judicial system in Saudi Arabia. A member of the Royal Family was charged of committing the crime of murder, and he was convicted and sentenced to a capital punishment by the *Shari'ah* Court's judgement no 209/16 in 11/7/1420 H (1999-2000). This judgement was upheld by both the Court of Appeal,<sup>19</sup> and the Supreme Judicial Council.<sup>20</sup>

In fact great power is in the hands of judges in Islamic countries, because they have the crucial power to decide whether the ruler himself is consistent with Islamic law in his administrative practice, whereupon people's obedience to him becomes obligatory, or whether the ruler's practice is incompatible with Islamic law, whereupon he loses his legitimacy<sup>21</sup>.

As far as the dismissal of the judge is concerned, the majority of jurists state that the ruler is prohibited from dismissing the judge if the latter is still qualified. This should not however be understood to mean that the judge will stay in office even if he acts without diligence. If he commits serious errors he must be removed from his post.

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<sup>17</sup> - Ateeh, J "*The Right to Fair Trail*". Al- Muslim AL – Muasir. The Contemporary Muslim Journal. Vol.21 No. 84 May, June, July 1997. P. 103

<sup>18</sup> - Wakee'a bin Hean (no year). Akbar AL Qudat. Part 2 P. 200

<sup>19</sup> - Decision No 535/M1/A in 6/8/1420 H

<sup>20</sup> - Decision No 483/4 in 29/8/1420H

<sup>21</sup> - Ateeh, J "*The Right to Fair Trail*". Al- Muslim AL – Muasir. The Contemporary Muslim Journal. Vol.21 No. 84 May, June, July 1997. P. 103



If the judge's status changes and he becomes unqualified to handle cases because he no longer meets the conditions required of a judge, or if he becomes ill, jurists are in agreement about the need for dismissal in these cases. Jurist Ibn Qodamah says: "*if the judge's status has changed because he has become an unjust person (disobedience to Allah), or if he has a mental disability, or an illness which prevents him from exercising the judiciary function, or if he ceases to meet part of the judge's conditions he shall be removed*"<sup>22</sup>

According to Islamic law the judge will be deposed in the following circumstances:

(a) If he becomes *Fisg* (disobedient to God's instructions). In general this means that he has committed a prohibited act. (b) If he intentionally renders a prejudiced (unjust) judgment. (c) If he loses a required qualification such as his vision, hearing, or reason.<sup>23</sup> Designating certain rules governing the removal of judges is, generally speaking, in line with the European Court of Human Rights. Not only that but also the European Court actually requires less standards when it decided that: "*it is true that the irremovability of judges by the executive during their term of office must in general be considered as a corollary of their independence and thus included in the guarantee of Article 6 para.1 ...However, the absence of a formal recognition of this irremovability in law does not in itself imply lack of independence provided that it is recognized in fact.*"<sup>24</sup>

However, the question remains as to whether the ruler may dismiss the judge even if the judge continues to meet the prescribed conditions required for judges.

Jurists disagree on the issue. The reason for this disagreement is a lack of consensus about the judges' status. That is, whether judges are representatives of the ruler, or of the Muslim citizens. Those who say they are representatives of the ruler accept their dismissal by the ruler, whereas those who hold judges to be representatives of the Muslim community deny the ruler's right to dismiss them.<sup>25</sup> Their discussion can be illustrated as follows:

First: the majority of Maliki<sup>26</sup>, Al Shafi'i<sup>27</sup> and Al Hanbali<sup>28</sup> schools argue that the ruler cannot remove the judge from his office if the judge still possesses the required

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<sup>22</sup> - Al Muqzni (1981) Part 9 P. 104

<sup>23</sup> - Obeed. M (1988) "*Istiqlal AL Qada'a*" p. 209 - 217

<sup>24</sup> - *Campbell and Fell v UK* (1984) 2 E.H.R.R.165

<sup>25</sup> - Ibn Rajeb AL Hanbalee (no year). *Al Goud*. P. 114

<sup>26</sup> - Az Adeen Abdulaziz ibn Abdulsalam Al Salmee (no year). *Goud Al Ahkam Fi Masalah Al Anam*. Part 1 P. 68.

qualifications. The ground offered for this argument is that the ruler's appointment of a judge is made for the public interest; therefore if the judge is still qualified the ruler cannot dismiss him.

Second: Al- Hanafi<sup>29</sup>, and some jurists of Shafi'i<sup>30</sup>, and Hanbali<sup>31</sup> believe that the ruler has the right to dismiss the judge even if the judge still possesses the judiciary qualifications, if the interest of society requires this. They reach their conclusion by analogy. If the judiciary is analogous to representation, they argue, then since the principal has the right to dismiss his representative, the ruler can also dismiss his representative, that is to say, the judge.

As to the judge's protection from litigants, it is argued that since the judge handles disputation, he might be subject to aggressive acts on the part of some litigants. Therefore, the state is under obligation to protect him. Therefore, Muslim jurists say that citizens must not be allowed to sue their judges in connection with their judicial functions. The judge's verdicts should be assumed correct unless the opposite is proved because if a judge resigns or dies, litigants will challenge his judgments with the aim of revenge. Thus, the ruler should protect the judge by prohibiting this.<sup>32</sup> In fact immunity from suit is an important guarantee in terms of independence of court members. In *Millar v Dickson*<sup>33</sup> it is argued that the security of tenure and immunity from suit are the most important ways of ensuring that judges perform their duties impartially and without fear of the consequences.

However, this should not be understood to mean that the judge is immune from punishment if he commits a punishable act: rather the aim is to provide the judge with necessary guarantees to be precise about the accusation made against him and to take all the necessary steps to prevent all false accusation against him which might be exercised to put the judge under pressure. The aim is then to ensure the independence of the judiciary, because complaints against judges could be harmful to the reputation of the judiciary, diminishing the judges' dignity and casting doubt on their impartiality.

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<sup>27</sup> - Yaha Al-Nawawi (1386 H). *Muqnhni AL Muhtaj Ala Ma'refat Ma'nee Alfad Almenhaj*. part 4 p. 381

<sup>28</sup> - Al Muqnhni (1981).Part 9 P. 103

<sup>29</sup> - Al Kasani (1986). *Bada'a Al Sana'i*. part 7 p 16

<sup>30</sup> - Ali Al Mawardi (1990). *Al Ahkam Al Soltanah Fi Al Welayeet Al Denah*. p .37

<sup>31</sup> - Al Muqnhni (1981) Part 9 P. 103

<sup>32</sup> - Al Tarablsee (1306 H). *Mo'en Al Hokam* p. 34.

<sup>33</sup> - (2001) UKPC D4 [2002] 3 All ER 1041-1073



## Section Two      Saudi law

In spite of the fact that independence is the most valuable aspect of the judiciary, there is no clear unified definition of the independence of the judiciary which permits analysis of the independence of a particular judicial system. The notion of independence can be easily confused with the term impartiality. Martin L. Friedland, for instance, states that: "*reasonable apprehension of lack of independence in a criminal case would surely go along with reasonable apprehension of lack of impartiality*".<sup>34</sup> As Chief Justice Lamer states: "*Judicial independence is critical to the public's perception of impartiality. Independence is the cornerstone, a necessary prerequisite, for judicial impartiality*". Moreover, some argue, "*A lack of independence could be considered a good indication of lack of impartiality*".<sup>35</sup>

Article 46 of the Basic Law of Saudi Arabia puts further emphasis on the independence of the judiciary. It declares: "*The judiciary is an independent authority; there is no authority to impose on them, when adjudicating, other than that of the Islamic Shari'ah*". In very similar language, article 1 of the Law of the Judiciary provides: "*Judges are independent and, in the administration of justice, they shall be subject to no authority other than the provisions of Shari'ah and laws in force. No one may interfere with the judiciary*".<sup>36</sup> Yet neither the *Shari'ah* courts nor the Board of Grievances in Saudi Arabia has tried to set criteria to examine the independence of the judiciary. Therefore, since the European Court of Human Rights has established criteria by which the independence of the judiciary may be examined, one should apply these criteria to examine the independence of the judiciary in Saudi Arabia.

The European Court has used four main criteria by which the independence of a particular tribunal can be examined. These are: (1) the manner of appointment of its members; (2) the duration of their term of office; (3) the existence of guarantees against outside pressure; and (4) the question whether the body presents an appearance of independence.<sup>37</sup> In the following discussion I will examine these points respectively as applied to the judicial system in Saudi Arabia.

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<sup>34</sup> - Friedland, M (1996) "*Judicial Independence and Accountability: A Canadian Perspective*" Criminal Law Forum. Volume 7 Number 1 p. 617.

<sup>35</sup> - Quoted on Friedland, M (1996) "*Judicial Independence and Accountability: A Canadian Perspective*". Criminal Law Forum. Volume 7 Number 1 p. 617.

<sup>36</sup> - Article 1 of the Board Grievances Statue provides: "*The Board of Grievances is an autonomous body for administrative justice which is directly connected to HM the King...*"

<sup>37</sup> - See for instance, *Findlay v. United Kingdom* (1997) 24 E.H.R.R. p221-249 & *Campbell and Fell v. UK* (1984) E.H.R.R 165. See also *Lauko v Slovakia*, 19998-VI (1998) (Application no. 00026138/95) Paras 63-64

As far as the first point is concerned, the Basic Law states: “*The appointment and termination of service of the judge shall be by a royal order, made upon the proposal of the Supreme Judicial Council as provided for the law*”<sup>38</sup>. In addition, the Law of the Judiciary requires that to appoint a judge a Royal Order will be made upon a decision taken by the Supreme Judiciary Council.<sup>39</sup> The President of the Supreme Judiciary Council will be appointed by a Royal Order.<sup>40</sup>

It is argued that the appointing of the above process may be considered to be an important guarantee of the judges’ independence. Firstly, restricting the appointment of judges to a Royal Order could guarantee that no one can be appointed as a judge unless the requirements of both *Shari’ah* and the law are fulfilled. Secondly, although the law requires a Royal Order for the appointment of judges, their appointment depends overall on nomination by the Supreme Judiciary Council. The Council is a judicial body consisting of five full-time members, to be appointed by a Royal Order, who constitute the Permanent Panel of the Council, and five part-time members. The latter include the Chief of the Appellate Court or his Deputy, the Deputy Minister of Justice, and three from among those having the longest service as Chief Judges of the General Courts. Together with the full time members, they constitute the General Panel of the Council.<sup>41</sup>

As to the question of whether an appointment by the king (Royal Order) breaches the individual’s right to be tried before an independent court, the European Court of Human Rights is of the opinion that appointing tribunal members by the executive body is not, in itself, incompatible with the Convention, and does not breach the right to be tried before an independent tribunal<sup>42</sup>. In fact, the Supreme Judicial Council ultimately has sole responsibility for appointing judges. Even though the Law of the Judiciary requires a Royal Order to appoint a judge, the requirement is only a formality.<sup>43</sup> Consequently it may be concluded that the appointment of judiciary members by the King does not contradict the right to be tried before an independent court, but rather has a particular justification in Saudi Arabia since this approach is a requirement of Islamic law as illustrated by the following:

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<sup>38</sup> - Article 52

<sup>39</sup> -Article 53 of the Law of the Judiciary.

<sup>40</sup> -Article 49of the Law of the Judiciary (added by Royal Decree No. M/76 of AH)

<sup>41</sup> - Article 6 of the Law of the Judiciary

<sup>42</sup> - *Campbell and Fell v. UK* (1984) 2 E.H.R.R. 165

<sup>43</sup> - Obeed. M ( 1988) p. 164



The principle of separation of powers is not applied in Saudi Arabia. The King is the reference for all authorities. Article 44 of the Basic Law reads: "*The authorities of the state shall be made up of the following: the judicial Authority; the Executive Authority; the Administrative Authority. These authorities shall carry out their functions through cooperation and harmony in accordance with the provisions of this and other laws; their ultimate authority is the King*". This is in fact consistent with Islamic law as we have pointed out above. In Islamic law the ruler is the sole figure responsible for guaranteeing the application of Islamic principles in respect of the function of all these authorities. Article 55 of the Basic Law provides: "*The King shall abide by the precepts of the Islamic Shari'ah in administering the nation; he shall ensure that the Islamic Shari'ah, as well as the laws and general policy of the State....*" The legitimacy of the king is derived from his application and obedience to Islamic law. Accordingly, in order to preserve his legitimacy the king will keep such power for himself. An ordinary person in Saudi Arabia is allowed to lodge his complaint, whether against the judiciary, executive or even against the legislative authorities, in person directly to the king. In such a case it is the king's duty to investigate the complaint, either himself or by delegating such discretion to another to perform the requirement under the direct supervision of the king. Article 43 of the Basic Law states: "*The audiences of both the King and Crown Prince are open to every national or to anyone having a complaint or who has been wronged; every individual has a right to address the public authorities regarding any need that may arise*". Consequently, the king shall have power of direct intervention with all these authorities in order to supervise their functions. This is clearly the reason for granting the King such power to appoint judges, but it should be explained that the King's discretion in respect of appointing judges is not unlimited. To be valid, the appointment must adhere to the conditions required in both Islamic law and enacted law<sup>44</sup>. This can be clearly seen from the fact that the king's power in this matter is

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<sup>44</sup> - Article 37 of the Law of the Judiciary provides: " To be appointed as a judge, a candidate shall fulfil the following requirements:

- a. He shall be of Saudi nationality.
- b. He shall be of good character and conduct.
- c. He shall be fully qualified to hold position of judge in accordance with the Shari'ah provisions.
- d. He shall hold the degree of one of the Shari'ah colleges in the Kingdom of Saudi Arabia or any equivalent certificate, provided that, in latter case, he shall pass a special examination to be prepared by the Ministry of Justice. In case of necessity, persons well-known for their learning and knowledge who do not hold the required degree may be appointed as judges.



restricted to approving the proposal presented by the Supreme Judicial Council. The appointment of judges depends mainly on the recommendation of this latter body. The practice of selection to the Council depends on committees established in *Shari'ah* Colleges to supervise the most distinguished students during their studies at the university and to scrutinize their conduct, in particular their obedience to Islamic instructions. These Committees interview candidates and examine their understanding of and ability to apply Islamic law. The committees then report to the Supreme Judiciary Council, who selects the best from the list of candidates. Jeffrey K. Walker writes: *"In order to serve as a qadi (judge) in Saudi Arabia, a man must first become a scholar in his own right. While at a university, the man would need to demonstrate exceptional knowledge of the Koran, the Sunna, other sources of Islamic knowledge, and Arabic. Additionally, his social and academic interaction with others must be exemplary. If the man meets these requirements, the university faculty may recommend him to the Ministry of Justice, who will then send a delegation of sitting judges to investigate the nominee. If the candidate is deemed acceptable at all levels, he serves as apprentice to an experienced qadi (judge) for an indefinite period, usually two to four years, in which time he is instructed and observed in judicial method. In addition to these other requirements, a qadi (judge) must remain throughout his career a great follower of Islam; his example as a true believer must never be called into question."*<sup>45</sup>

With regard to duration of their term of office, judges in both the *Shari'ah* courts and in the Board of Grievances are subject to a long-term appointment. Their appointments stand until they reach the age of retirement, that is the age of 70 years.<sup>46</sup> Clearly appointing judges for a long period of time is an important factor in ensuring that their appointment by the executive does not contradict their independence. In *Millar v Dickson*<sup>47</sup> it is argued that appointment by the executive is consistent with

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- e. He shall not be less than forty years of age if he is to be appointed to the rank of an appellate judge, and not less than twenty-two if he is to be appointed to any other rank in the judiciary.
  - f. He shall not have been sentenced to a *Hadd* ('*Qur'anic* prescribed punishment') or a *Ta'azir* ('discretionary punishment') or for a crime affecting honor, or punished by disciplinary action dismissing him from a public office, even though he may have been rehabilitated". In addition, article 39 of the same law states: "To hold the rank of Assistance Judge, a candidate shall in addition to the requirements listed in Article 37, be holder of a B.A. degree with a general rating not lower than "Good" and with a rating of at least "Very Good" in both Islamic jurisprudence (*Fiqh*) and the Principles of Islamic Jurisprudence (*Usul al- Fiqh*)".

<sup>45</sup> - Walker, J (1993) *"The Rights of the Accused in Saudi Criminal Procedure"*. International & Comparative Law Journal. Vol. 15 P. 869



independence only if it is supported by an adequate guarantees that the appointed judge enjoys security of tenure.

As to the application of the third and fourth criteria, namely the guarantees against outside pressures, and the appearance of independence, these will be dealt with jointly because their link is clearly established. These factors contain two components: (a) Members of the judiciary must not be removed during their term of office<sup>48</sup>. (b) Members must not receive orders or instructions from the executive<sup>49</sup>.

As to component (a), removal of judges here should be understood to mean either dismissal or transferral of judges to other jobs. With regard to the first meaning, pursuant to article 2 of the Law of the Judiciary members of the judiciary are not subject to removal (dismissal) from office except in the cases set forth in the law. The Saudi law designates the following reasons for terminating the judge's service:

- 1: acceptance of his resignation.
- 2: acceptance of his request that he be placed on retirement in accordance with Retirement Law.
- 3: death.
- 4: a judge shall initially be appointed on probation for a period of one year. Following the expiration period and after the appointee's competence has been proven; the Supreme Judicial Council shall issue a decision confirming him. Before the issuance of the decision, he may be dismissed by decision of the Supreme Judicial Council.
- 5: if he reaches the age of 70.
- 6: if he lost the confidence and respect required by the office.
- 7: if it appears that for health reasons a judge cannot perform his work in the proper manner.
- 8: if the judge receives a below average rating in three consecutive proficiency reports.<sup>50</sup>

Furthermore, as to the legal tool by which the judges' determination in the above circumstances will be taken, Article 86 states: "*In cases other than death and placement on retirement for having reached the statutory age, the service of a*

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<sup>46</sup> - Article 51 of the Law of the Judiciary

<sup>47</sup> - (2001) UKPC D4 (2002) 3 All ER 1041-1073

<sup>48</sup> - *Campbell and Fell v. UK* (1984) 2 E.H.R.R. 165

<sup>49</sup> - Ibid.

<sup>50</sup> - Articles: 50, 51, 57, 69, and 85 of the Law of the Judiciary.

*member of the judiciary shall be terminated by a Royal Order based on a decision by the Supreme Judicial Council.”*

Obviously, designating certain grounds for termination of the judge’s service, and confining their termination to a Royal Order based on a decision by a judicial body shows clear compliance with the European standards of human rights in respect of guarantees provided for the judge against an outside pressure.

Regarding the second meaning of the word removal, namely transferral of judges to other jobs, article 3 of the Law of the Judiciary guarantees that judges will not be transferred to other jobs unless by their consent or by reason of promotion. Moreover, article 55 of the Law of the Judiciary provides: *“Members of the judiciary may not be transferred or assigned [to another position] within the judiciary except by decision of the Supreme Judiciary Council. Similarly, they may not be transferred, assigned or seconded outside the judiciary except by a Royal Order based on a decision of the Supreme Judiciary Council, in which the remuneration due to the assigned or seconded judge shall be specified. The period of assignment or secondment shall be one year renewable for another year. However, the Minister of Justice may, in exceptional cases, assign a member of the judiciary to another position within the judiciary or outside the judiciary for a period not exceeding three months per year.”*

In view of the fact that transferring the judge to exercise another task was not considered by the European Court as a violation of the guarantees against outside pressure<sup>51</sup>, one can argue that the Saudi law in respect of the rules governing transferring of judges is consistent with the law of human rights in Europe.

As to component (b) of the third and fourth criteria, that is to say, that members of the judiciary must not receive orders or instructions from the executive, and the appearance of independence, here we should distinguish between two areas of independence. The first is the personal independence of the judge when handling the case in question. In other words, independence in respect of any pressure that could be exercised against the judge when the case comes under his jurisdiction. The second is the independence of the juridical body from the executive.<sup>52</sup> As to the former, this type of independence is clearly guaranteed in the judicial system of Saudi Arabia. No one, whatever his position, may interfere in the judge’s job. This area of

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<sup>51</sup> - Harris (1995) p.233

<sup>52</sup> - Obeed, M (1988)p. 21



independence is guaranteed by two elements. (1) Islamic law differs in nature from secular law in that it is a part of religion. When handling a case, the judge feels that he is under the supervision of God. Although from a western point of view this attitude might be seen as "toothless", anyone who is familiar with Saudi experience knows otherwise. In practice the religious dimension of the judge's function serves as an important guarantee towards the independence of judges. Parker T. Hart concludes his article on Saudi Arabia by stating: "*Several factors have caused the system to work more satisfactorily than might be expected. The first is the absolute incorruptibility and independence of the Shari'ah courts, and the exceptional moral caliber of the Shari'ah judges with their ability to see through the complexities of machine-age behavior to the essentials of right and wrong.*"<sup>53</sup> (2) The Law of the Judiciary guarantees various aspects of the judge's personal independence. No one can force him to act or not to act in a certain way. His only constraint is the requirement to apply Islamic law as well as enacted laws. Furthermore, if a case is formally filed with a court, this case shall not be transferred to another court except after the trial court has rendered a judgment, or has decided that it has no jurisdiction, whereupon the case shall be transferred to the competent authority<sup>54</sup>. This is in fact an important guarantee because allowing the executive body to withdraw a case from the jurisdiction of the court would subjugate the judiciary to the will of the executive members. Whatever reasons are provided the executive authority is not permitted to withdraw a case from the jurisdiction of the court. The President of the Council of Ministers in resolution No. 13002 in 4/5/1395 H declares: "*The High Bureau of Judiciary has noted that some government's agents withdraw some cases before a final judgment is concluded on the basis that the case should be reconsidered or sent to an administrative committee to investigate it. Since such practice clearly infringes the law, the following points must be clarified: First: after being filed to the court, the case is under the court's jurisdiction. No one is permitted to withdraw the case even if the court has no jurisdiction to handle it. In such circumstances the court must decide the case, or declare its lack of jurisdiction to adjudicate the case, whereupon it should forward the case to the authority concerned.... Third: withdrawing the case*"

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<sup>53</sup> - Hart, P (1953) "*Application of Hanbalite and Decree Law to Foreigners in Saudi Arabia*". George Washington Law Review. Vol. 22 P. 172

<sup>54</sup> - Article 5 the Law of Criminal Procedure. Likewise, article 11 of the Law of Procedure before Shari'ah Courts declares: "*no case properly filed with a competent court may be transferred to another court or agency before judgment is rendered.*"

*from the judge before his adjudication will delay the proceeding, whereby the interest of the litigants will be prejudiced.... Fifth: the existence of an ongoing case in one of the government agencies, which is related to a case before a court, cannot be considered as a proper justification for transferring the latter case from the competent court. However, the correct action in such situation is to commit the case in the government agency to the court.”*

Now we should turn to the second area of meaning of independence, that is the relationship between the judicial authority and the executive authority. The Saudi law gives special concern to insure the independence of the judiciary. This can be seen from more than one event. To begin with, the law established a judicial body to supervise judiciary affairs, that is to say the Supreme Judicial Council. The President of the Council was originally the Minister of Justice. This arrangement was subject to criticism since the Minister of Justice is a member not of the judicial authority, but of the executive authority. Therefore, according to the Royal Decree No. M/67 in 14/10/1395 H the Minister of Justice is no longer eligible to become President of the Supreme Council of Judiciary. Moreover, to insure independence from outside pressure the Law of Impeachment of Ministers<sup>55</sup> prohibits ministers and anyone in the same grade from interfering in the judiciary.<sup>56</sup>

In addition, Article 73 of the Law of the Judiciary states: “*Disciplinary action against judges shall be the responsibility of the Supreme Judiciary Council...*” Confining disciplinary action against the judge to a judicial body is a significant guarantee against outside pressure. Pursuant to article 84 the judge, except in a case of a *flagrante delicto*, may not be arrested or subject to any investigation, nor may criminal proceedings be commenced against him except with the permission of the Supreme Judiciary Council. Moreover, the imprisonment of judges and implementation of the penalties restricting judges will take place in a separate location from that applying to ordinary prisoners. In fact judges are usually imprisoned either in the building of the Ministry of Justice or in the court building<sup>57</sup>.

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<sup>55</sup> - Enacted by a Royal Decree No. 88 on 22/9/1380 H (1960)

<sup>56</sup> - Article 5

<sup>57</sup> - Jeerah, A (1988) P. 352&353.



Further, Article 4 requires certain conditions to sue judges. It provides: "A judge may not be sued except in accordance with the conditions and rules pertaining to the disciplining of judges."<sup>58</sup>

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<sup>58</sup> - Chapter V of the Law of the Judiciary specifies the following rules to take disciplinary actions against judges. Article (73) provides: "The disciplinary actions against judges shall be the responsibility of the Supreme Judicial Council convening in a General Panel in its capacity as a disciplinary board. If the judge brought to trial is a member of the Supreme Judicial Council the Minister of Justice shall assign one of the Judges of the Appellate Court to replace him on the board. A judge who had previously participated in requesting that the accused be placed on retirement or who has requested the institution of the disciplinary action against him should not be barred from sitting on the disciplinary board." Article (74) states: "The disciplinary action shall be instituted at the demand of the Minister of Justice, acting on his own or on the recommendation of the Chief of the Court to which the judge belongs. Such request shall be submitted only on the basis of a criminal or administrative investigation conducted by one of the Judges of the Appellate Court assigned by the Minister of Justice." Article (75) provides: "The disciplinary action shall be instituted by a memorandum including the allegation and supporting evidence, and shall be brought before the disciplinary board which shall decide on summoning the accused to appear before the board." Article (76) states: "The board may conduct such investigations as it may deem necessary, and it may assign any of its members to carry out such investigation." Article (77) provides: "If the disciplinary board find justification to initiate trial proceedings for all or some of the allegations, it shall summon the accused to appear at a suitable time. The writ of summons must include a sufficient statement of the subject matter of the action, and the evidence of the allegation." Article (78) states: "When the disciplinary board decides on the initiation of trial proceedings, it may suspend the accused from performing the duties of his position. The board may at any time reconsider the suspension order." Article (79) provides: "The disciplinary action shall come to end by the resignation of the judge. The disciplinary action shall have no effect on the criminal or civil suit arising from the incident itself." Article (80) states: "The hearings of the disciplinary board shall be in closed session. The disciplinary board shall render its judgment after it has heard the defense of the defendant judge, who may submit his defense in writing or entrust a member of the judiciary to defend him. The board shall always have the right to summon the accused to appear in person. If the accused does not appear in person, or empower somebody on his behalf, a judgment by default may be rendered after ascertaining the validity of the case." Article (81) provides: "The judgment rendered in the disciplinary action must include the grounds on which it is based, and such grounds must be closed session. The judgment of the disciplinary board shall be final and unappealable". Article (82) states: "The disciplinary penalties which may be imposed on the judge shall be reprimand and retirement." Article (83) provides: "Decision of the disciplinary board shall be conveyed to the Minister of Justice. A royal Order shall be issued for the implementation of the retirement, and a decision of the Minister of Justice shall be issued for the implementation of the reprimand." Article (84) states: "In cases where the judge is caught in a criminal act, the matter shall, upon arrest and imprisonment of the judge, be reported to the Supreme Judicial Council convening in its Permanent Panel within the following twenty four hours. The Council may decide whether he shall continue to be imprisoned or whether he shall be released on or without bail. The judge may request that his statements be heard before the Council, upon bringing the case before it. The Council shall specify the term of imprisonment in the decision ordering either imprisonment or continuation thereof. The aforementioned procedure shall be followed whenever the continuation of protective custody is deemed necessary after the expiration of the term fixed by the Council. Except in the forgoing cases, the judge may not be arrested nor may investigation proceedings be instituted against him, not may he be criminally prosecuted except with the permission of the Council. Imprisonment of judges and punishments restraining their freedom shall be implemented in separate places."



Furthermore, the Supreme Judicial Council is given discretion to participate in the regulation of the administrative and financial affairs of the judiciary members. Article 8 of the Law of the Judiciary provides: "*In addition to the function set forth in this law, the Supreme Judicial Council shall... (c) Provide opinions on issues related to the judiciary ...*" Moreover, the salaries of the members of the judiciary in all ranks shall be in accordance with the salary scale for judges, issued by Royal Decree No. M/38 dated 19 May 1975.

Consequently, as an outside observer, Abdullmon'em Jeerah states that: "*the independence of the judiciary in Saudi Arabia is clearly settled historically, factually, and lawfully. An examiner of the history of the judiciary since the unification of Saudi Arabia will recognize the high post the judges possess. This respect has successfully achieved its goal. No one can deny the success of this approach in making Saudi Arabia a very safe place. This success is achieved only by the application of Islamic law. If the judiciary is weak and does not enjoy full independence no one can protect his rights, which will lead to riot and disorder in society.*"<sup>59</sup>

Nevertheless, two areas of deficiencies can be identified in respect of the independence of courts in Saudi Arabia. The first is the relationship between the Minister of Justice and the judiciary, and the second is the link between the King and the judiciary.

As to the first point the law in Saudi Arabia contains texts that render the relationship between the Ministry of Justice and the judicial body questionable. For example, Article 9 of the Law of the Judiciary provides: "*The Supreme Judicial Council shall convene as a Permanent Panel composed of its full-time members, presided over by its Chief or by a designee from amongst the senior most member in the judiciary, to look into the issue and sentences mentioned in paragraphs 2,3,and4 of Article 8, except those which the Minister of Justice decides that they be looked into by the Council's General panel .The Council's General Panel consisting of all members*

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<sup>59</sup> -Jeerah, A (1988) P. 64



*shall convene, presided over by the chairman of the Supreme Judicial Council to look into other issue. The convening of the Council's Permanent Panel shall be valid if attended by a majority of its members, except in reviewing the sentences involving death, amputation, or stoning, in which case all its members shall be in attendance. In case of the absence of one of the members, he shall be replaced by someone nominated by the Minister of Justice from among the Council's non-full time members. The Council's General Panel meeting shall be valid only if attended by all members. In case of the absence of one the members, or if the Council looks into a case relating to that member or in which he has a direct interest, he shall be replaced by someone nominated by the Minister of Justice from among the members of the Appellate court. Decisions of the Council convening, either as a Permanent or a General panel, shall be made by vote of the absolute majority of the panel member."*

Moreover, article 129 of the Law of the Criminal Procedure states: *"The General Court shall have jurisdiction over cases that fall outside the jurisdiction of the Summery Court provided for under Article 128 hereof, or any other case that law falls within the subject matter jurisdiction of this court. In particular, this court, convening as three judges, shall have jurisdiction over cases wherein the sentence claimed is the death penalty, rajm (stoning), amputation or qisas (retaliatory punishment) in cases other than death. This court shall not be entitled to issue a death sentence by way of Ta'azir, except pursuant to a unanimous vote. Should such unanimity be impossible, the Minister of Justice shall assign two other judges in addition to the three judges who shall together be entitled, either unanimously or by majority vote, to issue a death sentence by way of Ta'azir."*

The above articles especially the second one might raise a considerable concern because this appears to allow direct interference in the judicial process. If a unanimous decision cannot be reached by three judges to impose the death sentence, as is required by law, the sentence cannot be imposed.

In addition, pursuant to the Law of the Judiciary a technical department for research was established at the Ministry of Justice to fulfil various functions, among them to answer enquiries from judges. Generally speaking, judges sometimes seek clarifications from the Ministry of Justice with regard to the application of a particular enacted law or some general principles and rules of Islamic Law. It seems that such practice in Saudi Arabia is a continuation of what was established in Islamic societies a long time ago. In Islamic law the judge is under obligation to consult jurists and

scholars if he has any difficulty in respect of understanding the rules governing a case. As we have mentioned, in early Islamic states these jurists attended most cases because most cases were tried before a single judge. Apparently, this custom no longer exists owing to the change of life-style in a modern Islamic state whereby scholars and jurists are no longer willing to attend every case due to the increase of the number of cases and courts. Thus the legislature has apparently established a research department to fill gaps created by the recent changes in modern life. However, the legislature had failed to take into account the difference between jurists on the one hand and a department in the Ministry of Justice on the other. Here one should realize that early jurists were ordinary persons and not employees in the government. So their independence is not in question. But the scholars who constitute the department are in fact employees in an executive body; therefore a judge's consultation of such a department may raise the question of independence. Nevertheless, as to the question whether such practice violates the standards of independence required by the European Court, it is important to reiterate that the European Court's approach when assessing the relationship between the members of the tribunal in question and the executive is to distinguish between instructions and mere guidelines. The executive may issue guidelines to members of the court about the performance of their functions, as long as any such guidelines are not, in reality, instructions.<sup>60</sup> Directions by the executive that amount to instructions, however, infringe the Convention, because by doing so the court surrenders its judicial function to the executive. In addition, in a different case,<sup>61</sup> the European Court found that accepting an opinion from a Foreign Minister as binding for a judge is regarded as infringement of the independency of the tribunal. So, it seems that, the crucial point in this regard is how judges view the opinion provided by the executive. If executive's views are taken by judges as binding this violates the independence of the judiciary. But if executive's opinions are taken as mere guidelines or consultations then there is no violation of the independence of the courts. Consequently, since the judge in Saudi Arabia is not obliged to accept and follow such consultation, the right to be tried before an independent tribunal in Saudi Arabia is not breached according to the standards of the European Court of Human Rights

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<sup>60</sup> - *Campbell and Fell v. UK* (1984) 2E.H.R.R.165

<sup>61</sup> - *Beaumartin v France* (1994) Paras. 38-39 (Application no. 00015287/89)



As to the relationship between the judiciary and the King (Presidency of the Council of Ministers), article 8 of the Law of the Judiciary provides: "*in addition to the function set forth in this law, the Supreme Judicial Council shall... (b) Look into issues which, in the opinion of the King, require that they be reviewed by the Council... (d) Review death, amputation, or stoning sentences*". This means that, except judgment entailing the above punishments, all criminal judgments rendered from the Court of Appeal will be considered final. Nevertheless, other Appellate judgments might be subject to a review by the Supreme Judicial Council if the King orders the Council to do so. Even though we have argued when discussing the appointment of judges that Saudi Arabia does not apply the principle of separation of powers and that the King is the sole reference for all authorities and must therefore have access to all of them, this cannot justify the above legal deficiency. In recent times the King has had to deal with matters more important than scrutinizing individual cases. This has led to the King's involvement in such cases being a formality only. In practice his decision whether the Supreme Judicial Council will review the case concerned depends entirely on the opinion of the King's consultants. Although consultants are very highly qualified in *Shari'ah* as well as Law and most of them have judicial experience, and despite the fact that the religious character of these consultants plays a significant role in guaranteeing the independency of their work, they are in fact still part of the executive body. Needless to say, providing such members with indirect power to decide whether the Council should review a particular case is regarded as an infringement of the independence of the judiciary. What makes the problem worse is the fact that these consultants have not in fact yet established precise grounds on which the decision to order the Supreme Judicial Council to review a particular case will be based, but rather every case is decided individually. This opens the possibility that the Council's decisions on these issues are not objectively assessed. Here the links between the Presidency of the Council of Ministers and the Supreme Judicial Council cannot enhance the latter's reputation for independence, and the judicial body is thus exposed to criticisms that could be avoided if the system was organized differently.

Therefore, one can suggest that in order to achieve the standard of independency required by the European Court of Human rights, the Saudi law should be reformed in a way that insures the independence of the judiciary. The relationship between the Ministry of Justice and the judicial body needs to be reconsidered, and the power of

the Presidency of the Council of Ministers to commit cases to the Supreme judicial Council has to be abolished. Put it differently, even though the personal independence of judges in Saudi Arabia is no doubtly, guaranteed, the structural independence need to be addressed. This suggestion is based on the general requirement mentioned by the European Court<sup>62</sup> that restrictions on human rights must be prescribed by law. It is also grounded on the argument that judicial independence can be threatened not only by interference by the executive, but also by a judge's being influenced, consciously or unconsciously, by his hopes and fears as to his possible treatment by the executive. It is for that reason that a judge must not be dependent on the Executive, however well the Executive may behave: "independence" connotes the absence of dependence. Here it should be emphasized that judge's personal integrity and independence of mind in Saudi Arabia are not in doubt and that it is not suggested that there was any conscious or unconscious bias or any subjective partiality felt or displayed in their work. However, the appearance of independence is just as important as the question whether this quality exists in fact. Justice not only be done, it must be seen to be done. The function of the European Convention on Human Rights is not only to secure that the judges are free from any actual personal bias or prejudice. It requires this matter to be seen objectively. The aim is to exclude any legitimate doubt as to the court's independence.<sup>63</sup>

## **Part II                      The Right to an Impartial Court**

Article 6 (1) of the European Convention on Human Rights provides: "*In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing ...by an independent and impartial ...tribunal....*" The impartiality of the court is examined firstly in Islamic law and secondly in the Saudi law.

### **Section One              Islamic law**

Unlike their approach in respect of other subjects, Islamic jurists study the judge's impartiality in great detail. In general, they prohibit the judge from exercising certain conducts that could be detrimental to his impartiality. They have also established

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<sup>62</sup> - See for example, *Kruslin v. France* (1990) (Application no. 00011801/85)

<sup>63</sup> - More discussion regarding the importance of the appearance of independence is provided in the *Millar v Dickson* (2001) UKPC D4 [2002] 3 All ER. 1041-1073



particular circumstances in which the judge must withdraw from handling the case. Under the heading "judge's impartiality", they have discussed the following subjects: (1) the right of the judge to accept a gift or present, (2) the right of the judge to accept a private invitation, (3) the right of the judge to involve himself in business or commercial activities, (4) the right of the judge to render a legal opinion on subjects that could be raised before the judge as a legal case, (5) the right of the judge to host one of the case parties, (6) the right of the judge to instruct one party in giving his evidence (dictate evidence), (7) the judge's right to judge himself, (8) the right of the judge to judge cases pertaining to his antagonists, relatives or those who are legally under his trustee- or guardianship. In the following discussion I will deal with each of these subjects in turn. However, before approaching these matters, it might be helpful to state that there is a disagreement between Islamic scholars with regard to each of the above issues, and the Saudi law in order to ease the function of judges in respect of the right to be tried before an impartial court, designates certain circumstances in which the judge must recuse from hearing the case. Thus, to avoid repetition, the comparison with the European standards of human rights will only be undertaken in the section concerns the law of Saudi Arabia.

As to giving presents, it should be emphasised that this is different from bribery. A present is not given conditionally in order to bring about a particular conduct. Needless to say bribery is forbidden whether offered to a judge or another person, and it is irrelevant to our subject.

In Islam as perhaps in other cultures, a present is always welcomed since it gives happiness and pleasure to the recipient and thus enhances the relationship between citizens. Many *Hadith* (prophet traditions) encourage people to send gifts to friends, neighbours, relatives etc. However, these *Hadith* are confined to ordinary persons. But for those who are in charge of public affairs such as judges, governors and others the case may be different. Since our topic concerns the impartiality of the judge the discussion provided here will be limited to judges.

Jurists disagree about the judge's acceptance of a gift. Their controversy can be outlined as follows:

- 1- According to the Al Hanafi School, the judge's acceptance depends on circumstances defining the sender's status. Central is whether the sender was already in the habit of sending gifts before the judge's appointment. If the sender did not send gifts to the judge before his appointment, it must be asked

whether he is related to the judge or not. If the sender is a relative, it must then be asked whether he has a case before the judge or not. If he has a case, the judge must not accept his gift because doing so could create doubt in respect of his impartiality. But if the sender who is a relative to the judge does not have a current case the judge can accept the gift because in this case there is no suspicion with regard to his impartiality; and because accepting the gift from a relative is a kind of kinship which is an obligatory principle in Islamic law.

If a stranger gives the present, the judge cannot accept it whether the sender has a current case or not. The reason for this is that if he has a current case the gift will be considered as bribery, and if he has no current case he might have in the near future. Therefore, the judge should not accept it. If he receives it he must send it back, and if this is impossible the judge must send the gift to the public treasury.

However, if the gift is given by a person who already has an established custom of giving to this particular judge, one should distinguish between two situations: (i) if the sender has a current case the judge must not accept his present. (ii) If he has no current case one should consider whether the gift itself is similar to his previous gifts or not. If his current gift is similar to, or less substantial than, his previous gifts (before the judge was appointed), the judge can accept it. But if the gift is greater (superior) in quality and quantity, the judge should accept only to the same value as the previous ones.<sup>64</sup>

- 2- According to the Al Maliki School, the judge is not allowed to accept a gift because this could affect his impartiality. But in cases where the giver was already in the habit of sending gifts, Maliki jurists are of two opinions. First: the judge is prohibited from accepting the present. Second: it is not forbidden but it is not recommended.<sup>65</sup>
- 3- According to the Al Shafi'i School, if the giver is currently involved in a suit or if he is likely to have a case in the near future the judge is forbidden to accept it whether or not the giver had established the custom before the appointment of the judge.

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<sup>64</sup> - Al Kasani (1986) *Bada'a Al Sana'i* .Part 7 P. 1029.

<sup>65</sup> - Al Karshi (no year). *Al-Karshi Ala Moktaser Kaleel* Part 7 P. 151



If the gift is given by a person who had established the custom before the appointment of the judge and he has no current suit, the judge is permitted to accept his gift provided that it is similar to the previous ones.<sup>66</sup>

- 4- According to the Al Hanbali School, the judge is not permitted to accept a gift from a person who had not established the custom before the appointment of the judge. But he is permitted to accept the gift if the person had previously given him similar gifts, provided that the giver has no current suit; otherwise he is not permitted to accept the gift, because it will be regarded as bribery.<sup>67</sup>

The second matter is the right of the judge to accept a private invitation. Jurists are in agreement about the prohibition of accepting a private invitation from one party, because this might create doubt as to the judge's impartiality and because it breaches the equality between litigants.<sup>68</sup> However, jurists disagree about the judge's acceptance of a private invitation if the inviter is not involved in a suit. Some argue that the judge is forbidden from attending a private invitation.<sup>69</sup> Other jurists claim that the judge is permitted to accept a private invitation if the inviter has no suit. But if the number of private invitations has significantly increased the judge should not accept them all. He must not accept some invitations and refuse others because this might infringe the equality between people, unless of course he has a legitimate reason.<sup>70</sup>

With regard to the third subject, the right of the judge to participate in commercial activities, there are two main views:

(1) The majority of Hanafi<sup>71</sup>, Maliki<sup>72</sup>, Shafi'i,<sup>73</sup> and Hanbali<sup>74</sup> schools state that a judge is not recommended to involve himself in commercial activities; however, he is permitted participation in commercial activities through anonymous representative. They base their view on the following grounds: (a) The Prophet said: "*A ruler will not be just if he involves himself in business activities*". (b) The companions of the

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<sup>66</sup> - Ali Al Mawardi (Al Shafi'i) (1971). *Adab Al Qadee*. part 2 p. 264, 265, 266

<sup>67</sup> - Al-Muqni (1981) part 9 p 7, 78

<sup>68</sup> - *Bada'a Al Sana'i* (1986). Part 7 p. 10

<sup>69</sup> - Ibid, part 7 p. 10.

<sup>70</sup> - Muhammad Bin Meflah (1967). *Al Froot*. part 6 p. 451

<sup>71</sup> - Al Sarkasee (no year) *Al Mabsut*. part 16 p. 77

<sup>72</sup> - Abraheem bin Ali Al Malekee (1986). *Tabser Al Hokam* Part 1 P. 34

<sup>73</sup> - Al Nawawi (1386 H). *Muqni Al Muhtaj* part 4 p. 391

<sup>74</sup> - Muhammad Bin Meflah (1967). *Al Froot*. Part 6 P. 451

Prophet after his death condemned the involvement of Abu Baker (the First Ruler after the Prophet's death) in commercial activities. (c) When he appointed his judge Shoreeh, Omer ordered him not to involve himself in commercial activities. (d) If the judge practises commercial activities himself his concern will focus on his business. Moreover, merchants might flatter the judge in their business. So the judge will lack impartiality when one of the merchants has a case before the judge.

In general, these jurists say that it is not recommended but it is not prohibited.

(2) Some jurists of the Hanafi<sup>75</sup>, Maliki<sup>76</sup>, and Hanbali<sup>77</sup> schools argue that the judge is forbidden to engage in commercial activities. They support their argument with the same evidence as that cited by the first group; however they reach a different conclusion. They conclude that the judge is forbidden to engage in commercial activities, because people usually flatter the judge in their business.

With regard to the fourth matter, that is the judge's right to render a legal opinion on subjects that could come before the judge as a legal case, it is first necessary to clarify the meaning of this matter. In Islamic society Muslims constantly ask those who have knowledge of Islamic rules about matters related to their lives, in order to gain an appropriate Islamic perspective on particular subjects. Since judges in an Islamic state must be specialists in Islamic religion, people sometimes seek their legal opinion in respect of particular matters. Because some of these matters could be raised as a case before the judge who has rendered the legal opinion, jurists discuss the right of the judge to render a religious legal opinion. They disagree on the subject, but before outlining their views it is worth mentioning here that they all agree upon the judge's right to render a legal opinion with regard to religious matters such Praying, Zakat (alms tax) and other forms of worship, which clearly will not be subject to adjudication between people.

As to the main question in this discussion, namely the judge's right to deliver a legal opinion on matters that could become a judicial question, jurists disagree about this matter as follows: (a) the majority of jurists of Hanafi<sup>78</sup>, Maliki<sup>79</sup>, Shafi'i<sup>80</sup>, and

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<sup>75</sup> - Abdulrahman bin Muhammad Bin Suleiman (1310H). *Mojam' Al Anhar Fi Sharh Moltaga Al Abhor*. Part 2 p. 125

<sup>76</sup> - Muhammad bin Arafh Al Dusuqi (no year). *Hasheet Al- Dusuqi Ala Al Sharh Al Kabeer*. part 4 p. 124

<sup>77</sup> - Muhammad Bin Meflah (1967). *Al Froot*. Part 6 P. 451

<sup>78</sup> - Abdulrahman bin Muhammad bin Suleiman (1310H). *Mojam' Al Anhar Fi Sharh Moltaga Al Abhor*. Part 2 p. 125



Hanbali<sup>81</sup> say that for two reasons the judge is not forbidden to render a legal opinion: (i) the four Islamic rulers after the death of the Prophet did render legal opinions and at the same time they also adjudicated between litigants. (ii) The judge is qualified to do this. (b) However there are some jurists of Hanafi<sup>82</sup>, Maliki<sup>83</sup>, Shafi'i<sup>84</sup>, and Hanbali<sup>85</sup> schools who believe that the judge is forbidden to render legal opinions related to judiciary matters. They offer as reason for their argument that by consulting the judge on his opinions, litigants will know in advance his view in respect of particular matters. This might be regarded as an indication of his judgment should the case be lodged before him, so if the judge's opinion supports the interest of the party, he will raise the case before this judge, but if the judge's opinion is against the party's interest the party will raise the case before another judge.

The fifth matter is that of the judge's right to host one of the case parties. This issue requires careful explanation, because it seems that such a custom is not common in western societies, particularly modern ones. Islamic societies and particularly Arabs are familiar with hosting (accommodating) travellers, even strangers, in their homes for at least three days. The traveller usually introduces himself to the first person he meets in the town. Upon learning that the person is a traveller the latter is under a social obligation to host him in his home and offer him every possible assistance. Although this custom is nowadays less common in modern Islamic cities, because the life style has considerably changed, it is still practised by some people in towns and villages. As a judge might thus become host to a traveller, jurists have discussed what the judge should do if the traveller has a case before the judge.

Generally speaking, judges are obliged to apply justice; therefore it is their duty to avoid any act that could jeopardise this principle. Thus, jurists state that the judge must not accommodate a single litigant<sup>86</sup>. They support their claim with the following:

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<sup>79</sup> - Hasheet Al-Dusuqi (no year) part 4 p.124

<sup>80</sup> - Muhammad bin Al Monther (1408 H). *Al Eгна'*. Part 2 P. 514

<sup>81</sup> - Ali Al Mawardi (1958). *Al Ensaf* part 11 p. 187

<sup>82</sup> - Al Fatawa Al Hendeeh (1310 H) Part 3 P. 266.

<sup>83</sup> - Hasheet Al-Dusuqi (no year)part4 p.124

<sup>84</sup> - Muhammad Al Moptee'ee (no year). *Al Majmoo' Sharh Al Mohatheeb*. Part 1 P. 42

<sup>85</sup> - Ali Al Mawardi (1958). *Al Ensaf* part 11 p. 187

<sup>86</sup> - Al Fatawa Al Hendeeh (1310 H) Part 3 P. 262.

- (a) It is narrated that a traveller came to Ali bin Abee Taleb (the Fourth Ruler after the death of the Prophet). So Ali asked him: “do you have a case against another litigant?” The man said yes. Ali asked him to go somewhere else and he said: “I heard the Prophet said: “Do not accommodate (host) one party unless you also host the other party.”<sup>87</sup>
- (b) Accommodating one party could be harmful to the judge’s impartiality.<sup>88</sup>

The sixth matter is the judge’s right to instruct one litigant in his evidence (dictating evidence). The issue here is whether the judge should take a passive role with regard to the proceedings and the evidence adduced by all parties, or whether he should be proactive in investigating the truth, even to the extent of instructing one party in giving his evidence and of notifying him of any weakness in the other party’s speech which he could benefit from. Jurists’ opinions on the issue differ as follows:

First: the majority of Hanafi<sup>89</sup>, Maliki<sup>90</sup>, Shafi’i<sup>91</sup>, and Hanbali<sup>92</sup> schools argue that the judge is not allowed to instruct the parties in giving their evidence because this might breach the impartiality of the judge. If he instructs one party, that means that he supports him against the other party. Second: on the other hand, some jurists of the Hanafi School argue that the judge is permitted to give instruction.<sup>93</sup> Third: some jurists of the Maliki state that the judge can instruct the litigant in giving his evidence if the latter is unable to adduce it for any reason, provided that he does the same with both parties. But they stipulate that the judge should not instruct them to speak falsely.

Now we move to the seventh matter, the right of the judge to handle his own case. Jurists from all schools of thought state that the judge is not permitted to judge himself or participate in any judgment pertaining to him. They cite the following arguments to support their view:

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<sup>87</sup> - Al Behagee (no year). *Al Sonan Al Kobra*. Part 10 P. 137

<sup>88</sup> -, Ali Al Mawardi (1971). *Adab Al Qadee* Part 2 P. 264

<sup>89</sup> - Faker Al Deen Othman Al Zeela’ee (1314 H). *Tabeen Al Haga’iq, Sharh Kanz Al Daga’g*. part 4; p 179

<sup>90</sup> - Borhan Al Deen Abraheem Bin Ali Al Malekee (1986). *Tabert Al Hokam*. Part 1 P. 47

<sup>91</sup> - Ali Al Mawardi (1971). *Adab Al Qadee*. Part 2 P. 255&256

<sup>92</sup> - Al Muqzni. (1981).Part 9 P. 82

<sup>93</sup> - Al-Jofan (1416 H) p. 464



- (a) By the principle of analogy, since a person cannot testify for himself, so the judge cannot judge himself.
- (b) The companions of the prophet did not judge themselves, but rather they presented their cases before different judges.<sup>94</sup>

In respect of the final matter, that is the judge's right to handle a case pertaining to a personal opponent, the judge is forbidden to adjudicate the case of his antagonist. If he has rendered a verdict his judgment must be reversed.<sup>95</sup> Similarly, according to the majority of jurists the judge is forbidden to handle a case pertaining to one of his relatives. Thus he is not allowed to judge his father, mother, sister, brother, and his wife etc. for the reason that the judge's impartiality cannot be guaranteed when handling such cases.<sup>96</sup> Further, jurists have discussed the judge's right to handle the case of any person under his guardianship. Some believe that the judge should not adjudicate any case pertaining to a person under his guardianship, while other jurists state that he is allowed to do so.<sup>97</sup>

## **Section Two Saudi Law**

Before examining the case in Saudi Arabia it is worth mentioning here that laws governing the Board of Grievances provide only a single general article. Article 25 of the Rules of Pleadings of the Board of Grievances states: "*The accused or any interested party may apply to disqualify any of the members of the Circuit if there is ground for such rejection; subsequent to filing the application and until it has been decided the hearing will be suspended; the President of the Board of Grievances will decide the application, and his decision is final. Where there are reasons necessitating the retirement of a member of the Circuit from the case he (the judge) shall refer the matter to the President of the Board of Grievances who will make a decision in respect thereof*". Clearly the draftsmen of the law prefer not to designate specific circumstances on which the disqualification of a judge will be based. They only articulate the principle, leaving the disqualification of a judge to the discretion of the President of the Board of Grievances, according to Islamic law. As a result our discussion here will be limited to the *Shari'ah* courts.

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<sup>94</sup> - Al Muqzni (1981).Part 9 P. 107

<sup>95</sup> - This is the majority' opinion. They analogize testimony to the judiciary. See for example, Ali Al Mawardi (1971). *Adab Al Qadee*. part 2 p. 417

<sup>96</sup> - Shams Al Deen Al Makdasee, Muhammad Bin Meflah (1967). *Al Froot*. Part 6 P. 451

<sup>97</sup> - Abraheem Bin Ali Al Malekee (1986). *Tabser Al Hokam*, part 1 p. 92

In order to find out whether the judicial system in Saudi Arabia protects the right to be tried before an impartial court in a manner consistent with the standards of the European human Rights law, one should explain, at this stage, the standards required by the European Court of Human Rights. But, since the scope of the tests provided by the European Court might be better illustrated by reference to English jurisprudence in this issue, five English cases will be referred to also. The objective here is to reveal the difficulties that English courts have engaged with in their attempt to achieve an appropriate principle to test the impartiality of a member of judiciary. It might be helpful to point out at this stage that the comparison between the judicial system in Saudi Arabia, and the English or the European Court jurisprudence is undertaken broadly. In other words, it will focus on the main aspects of each system. This is because both systems have applied different approach to handle the issue of impartiality. While the Saudi law designates certain circumstances for the automatic disqualification of the judge, thereby appears more cautious than the European standards as exemplified by the English experience that prefers to set up a test which will be applied separately in every individual case.

As to the European Court, it specifies that impartiality could be tested by a distinction between a subjective approach, that is endeavouring to ascertain the personal conviction of a given judge in a given case, and an objective approach, that is determining whether he offered guarantees sufficient to exclude any legitimate doubt in this respect. As to the subjective approach, the Court explains, the personal impartiality of a judge is to be presumed until there is proof to the contrary. However, it is not possible for the Court to confine itself to a purely subjective test; account must also be taken of considerations relating to the functions exercised and to internal organisation (the objective test). In this regard, even appearance may be important; in the words of the English maxim that "justice must not only be done: it must also be seen to be done." The Court continues to point out that what is at stake is the confidence which the courts in a democratic society must inspire in the public and above all, as far as criminal proceedings are concerned, in the accused.<sup>98</sup>

In respect of the English cases, they will be dealt with in considerable details, and in a historical order to clarify the development of the tests. In *R v Gough*<sup>99</sup> the appellant

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<sup>98</sup> - *De Cubber v. Belgium* (1984) 7 E. H. R. R. 236. & *Pfeifer and Plankl v. Austria* (1992) 14 E.H.R.R. 693. See also *Oberschlick v. Austria* (1991) 19 E. H. R. R. 389.

<sup>99</sup> - [1993] 2 All ER 724 - 740



and his brother were charged with robbery. At the committal proceedings the brother was discharged and the appellant was indicted on a single count that he had conspired with his brother to commit robbery. One of the jurors was a next-door neighbour of the brother but she did not recognize him or connect him with the man referred to in court until he started shouting in court after the appellant had been convicted and sentenced to 15 years imprisonment. The House of Lords held that *“except where a person acting in a judicial capacity had a direct pecuniary interest in the outcome of the proceedings, when the court would assume bias and automatically disqualify him from adjudication, the test to be applied in all cases of apparent bias, whether concerned with justices, members of other inferior tribunals, jurors or arbitrators, was whether, having regard to the relevant circumstances, there was a real danger of bias on the part of the relevant member of the tribunal in question, in the sense that he might unfairly regard or have unfairly regarded with favour or disfavour the case of a party to the issue under consideration by him. Where the case was concerned with bias on the part of the justice’s clerk, the court should go on to consider whether the clerk had been invited to give the justices advice and, if so, whether it should infer that there was a real danger that the clerk’s bias infected the views of the justices adversely to the applicant.”*

In the second case<sup>100</sup>, the applicant was the former head of state of Chile. His extradition was sought by Spain so that he could be tried for various crimes against humanity allegedly committed whilst he was head of state. Two provisional warrants for his arrest were issued. The applicant successfully applied to the Divisional Court to quash those warrants, but the quashing of the second warrant was stayed to enable an appeal to the House of Lords on the question of the proper interpretation and scope of the immunity of a former head of state from arrest and extradition proceedings in the UK with regard to acts committed while he was head of state. Amnesty International (AI) was granted leave to intervene in the proceedings. The appeal was allowed by a majority of three to two and the second warrant was restored. Subsequently, the applicant discovered that one of the Law Lords in the majority was a director and chairperson of Amnesty International Charity Ltd, which had been incorporated to carry out AI’s charitable purposes and petitioned the House to set aside the order to appeal. The House of Lords decides: *“The principle that a judge*

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<sup>100</sup> - *Ex p v Pinochet Ugarte (No 2)* [1999] 1 All ER 577- 599



*was automatically disqualified from hearing a matter in his own cause was not restricted to cases in which he had a pecuniary interest in the outcome, but also applied to cases where the judge's decision would lead to the promotion of a cause in which the judge was involved together with one of the parties. That did not mean that judges could not sit on cases concerning charities in whose work they were involved, and judges would normally be concerned to recuse themselves or disclose the position to the parties only where they had an active role as trustee or director of a charity which was closely allied to and acting with a party to the litigation."*

The third case is *Locabail Ltd v Bayfield Properties*<sup>101</sup> in which the Court of Appeal considered five applications concerning disqualification of judges on ground of bias. The Court ruled that: "...*(3) A judge must recuse himself from a case before any objection is made if the circumstances give rise to automatic disqualification or he feels personally embarrassed in hearing the case. If, in any other case, the judge becomes aware of any matter which can arguably be said to give rise to a real danger of bias, it is generally desirable that disclosure should be made to the parties in advance of the hearing. Where objection is then made, it will be as wrong for the judge to yield to a tenuous or frivolous objection, as it will be to ignore an objection of substance. However, if there is real ground for doubt, that doubt must be resolved in favour of recusal. (4) In considering whether there is a real danger of bias on the part of a judge, everything depends on the facts, which may include the nature of the issue to be decided. However, a judge's religion, ethnic or national origin, gender, age, class, means or sexual orientation cannot form a sound basis of an objection. Nor, ordinarily, can an objection be soundly based on the judge's social, educational, service or employment background or that of his family; his previous political associations; his membership of social, sporting or charitable bodies; his Masonic associations; his previous judicial decisions; his extra-curricular utterances; his previous receipt of instructions to act for or against any party, solicitor or advocate engaged in a case before him ;or his membership of the same Inn, circuit, local Law Society or chambers . (5) In contrast, a real danger of bias may well be thought to arise if there is personal friendship or animosity between the judge and any member of the public involved in the case, if the judge is closely acquainted with any members of the public involved in the case, particularly if that person's credibility may be*

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<sup>101</sup> - [2000] 1 All ER 65- 96



significant in the outcome of the case; if, in a case where the judge has to determine an individual's credibility, he has rejected that person's evidence in a previous case in terms so outspoken that they throw doubt on his ability to approach that person's evidence with an open mind on a later occasion; if the judge expressed views, particularly in the course of the hearing, on any question at issue in such extreme and unbalanced terms that they cast doubt on his ability to try the issue with an objective judicial mind; or if, for any other reason, there is real ground for doubting the judge's ability to ignore extraneous considerations; prejudices and predilection; and his ability to bring an objective judgment to bear on the issues. However, no sustainable objection can arise merely because, in the same case or previous case. The judge has commented adversely on a party or witness, or found their evidence to be unreliable. Furthermore, other things being equal, the objection will become progressively weaker with the passage of time between the event which allegedly gives rise to a danger of bias and the case in which the objection is made. (6) Where, following appropriate disclosure by the judge, a party raises no objection to the judge hearing or continuing to hear a case, that party cannot subsequently complain that the matter disclosed gives rise to a real danger of bias. The level of disclosure appropriate depends in large measure on the stage that that matter has reached. Thus if, before a hearing has begun, the judge is alerted to some matter which, depending on the full facts, may throw doubt on his fitness to sit, he should inquire into the full facts, so far as they are ascertainable, in order to make disclosure in light of those facts. In contrast, where a judge has embarked on a hearing in ignorance of matter which emerges during the hearing, it is sufficient for the judge to disclose what he then knows. If he does make further inquiry and learns additional facts, he must also disclose those facts. However, it is generally undesirable to abort hearings unless that is required by the reality or the appearance of justice."

The Court of Appeal in a different case<sup>102</sup> held that: "Giving effect to article 6 of the Convention for Protection of Human Rights and Fundamental Freedoms and taking into account the approach of the European Court of Human Rights in accordance with Human Rights Act 1998, the court had first to ascertain all the circumstances which had a bearing on the suggestion that the judge was biased and then ask whether those circumstances would lead a fair-minded and informed observer to

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<sup>102</sup> - *In re Medicaments and Related Classes of Goods (No 2)* (CA)[2001] 1 WLR 700 - 729 (The Weekly Law Reports)

*conclude that there was a real possibility, or a real danger, the two being the same, that the judge was biased; that the material circumstances included any explanation given by the impugned judges as to his knowledge or appreciation of those circumstances and where any such explanation was disputed the reviewing court did not have to rule whether the explanation should be accepted or rejected but rather had to decide whether the fair-minded observer would consider that there was a real danger of bias notwithstanding the explanation advanced; that instead of determining whether the R's (a member of the court) statement was truthful the court should have considered what impression her conduct, including her explanation for it, would have had on a fair-minded observer."*

In a response to the two judgments mentioned above by the Court of Appeal, the House of Lords determined in *Porter v Magill*<sup>103</sup> to amend its previous decision in *R v Gough*<sup>104</sup> regarding the test by which the judge impartiality is assessed. In its words the House held: *"In determining whether there had been apparent bias on the part of the tribunal, the court should no longer simply ask itself whether, having regard to all relevant circumstances, there was a real danger of bias. Rather, the test was whether the relevant circumstances, as ascertained by the court, would lead to a fair-minded and informed observer to conclude that there was a real possibility that the tribunal had been biased."*

Moving now to the question of the impartiality of judges in Saudi Arabia, the Law of Procedure before *Shari'ah* Courts devotes part eight to recusal and disqualification of judges. In particular circumstances the judge is prohibited from hearing the case and thus he must disqualify himself automatically, whereas in other circumstances the disqualification of a judge is not an automatic but rather will depend on all facts before the court concerned. In the following I will deal with these two issues respectively.

Pursuant to article 90 of the Law of Procedure before *Shari'ah* Courts, a judge shall be prohibited from considering and hearing a case, even if no litigant makes such a request, in the following circumstances:

- A- If he is the spouse, relative, or in-law up to the fourth degree of a litigant.

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<sup>103</sup> - [2002] 1 All ER 465 -523

<sup>104</sup> - [1993] 2 All ER 724-740



- B- If he, or his wife, has an existing dispute with a litigant in the case or with the latter's wife.
- C- If he is an attorney-in-fact, guardian, trustee, or presumptive heir of a litigant or if he is the spouse of a litigant or if he is a relative or an in-law up to the fourth degree of such guardian or trustee.
- D- If he, his wife, a relative, or an in-law in the ancestral line, or a person for whom he is trustee or guardian, has an interest in the existing case.
- E- If he had issued a *fatwa* (religious legal opinion), litigated for one of the litigants in the case, or written about it, even if it were before he joined the judiciary, or if he had earlier considered the case in the capacity of judge, expert, or arbitrator, or had been a witness in the case or had engaged in any investigative action therein.

Therefore, an action or decision taken by a judge in any of the foregoing circumstances is null and void even if it was with the agreement of the litigants. This is perhaps because impartiality is a structural matter of general public interest. Moreover, if such nullification occurs with respect to a judgment upheld by the Appellate Court, a litigant may request the said court to nullify the decision and assign another judge to reconsider the appeal<sup>105</sup>. In addition, consistent with *Shari'ah* principles in which a judge is not allowed to adjudge his case, a judge shall be precluded from trying the case if the crime has been committed against the judge himself outside the time of court hearings.<sup>106</sup>

It could be argued that designating certain circumstances in which the judge must automatically disqualify himself from hearing the case can ease the complexity that courts might engage with in order to determine the question of impartiality. Needless to say that, a court when considering the impartiality of a given judge faces a very difficult task. As Lord Goff in *R v Gough* puts it: "*there are difficulties about exploring the actual state of mind of a justice or jurymen. In the case of both, such an inquiry has been thought to be undesirable; and, in the case of the jurymen in particular, there has long been an inhibition against, so to speak, entering the jury room and finding out what any particular jurymen actually thought at the time of decision. But there is also the simple fact that bias is such an insidious thing that, even though a person may in good faith believe that he was acting impartially, his*

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<sup>105</sup> - Article 91 of the Law of Procedure Before *Shari'ah* Courts

<sup>106</sup> - Article 147 of the Law of Criminal Procedure

*mind may unconsciously be affected by bias.*” Subsequently, he urged the House of Lords to examine the question of impartiality in the hope of being able to establish some readily understandable and easily applicable principles. English courts, for example, had struggled to find the appropriate test to determine the court’s impartiality. Until 1993 there had been some divergence in the English authorities. Some had expressed the test in terms of a reasonable suspicion or apprehension of bias, whilst other had expressed the test in terms of a real danger or likelihood of bias. This diversity was permanently settled in England and Wales by the House of Lords’ decision in *R v Gough* 1993 in which the real danger test was favoured.<sup>107</sup> This test, nevertheless, has not commanded universal approval. Scotland, Austria, Canada, New Zealand and South Africa have adhered to the reasonable suspicion or reasonable apprehension test, which may be more closely in harmony with the European Court of Human Rights’ approach.<sup>108</sup> Therefore, in the light of the above and for the sake of the consistency with jurisprudence of the European Court, the Court of Appeal<sup>109</sup> took the opportunity to call for reconsidering the appropriate test when determining the court’s impartiality. Finally, the House of Lords in *Porter v Magill* decided to shift the test from the real danger test into whether the relevant circumstances, as ascertained by the court, would lead a fair-minded and informed observer to conclude that there was a real possibility that the tribunal had been biased. In addition, even though English courts have recently chosen the test that is more consistent with European Court’ approach; the future application of this test may raise practical difficulties. In fact, the distinction between tests discussed by the English courts; real danger test, and an outsider observer test is not certainly established. This led Lord Hope in *Porter v Magill*<sup>110</sup> to say that: “*Although the tests ... were described differently, their application was likely in practice to lead to results that were so similar as to be indistinguishable... The Court of Appeal, having examined the question whether the real danger test might lead to a different result from that which the informed observer would reach on the same facts, concluded ... that in the overwhelming majority of cases the application of the two tests would lead to the same outcome.*”

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<sup>107</sup> - See *Locabail Ltd v Bayfield Properties* [2000] 1 All ER 65- 96

<sup>108</sup> - See *Locabail Ltd v Bayfield Properties* [2000] 1 All ER 65-96 & see also *Ex p Pinochet Ugarte* (No 2) [1999] 1 All ER 577-599

<sup>109</sup> - *In re Medicaments and Related Classes of Goods* (No 2) (CA)[2001] 1 WLR 700- 729 (The Weekly Law Reports

<sup>110</sup> - [2002] 1 All ER 465- 523



Now we will turn to the second issue here that is those circumstances that make the disqualification of a judge optional. According to article 92 of the Law of Procedure before *Shari'ah* Courts a judge may be disqualified for any of the following reasons:

- A- If either he or his wife is pursuing a suit similar to the case before him.
- B- If he, or his wife, enters a dispute with a litigant or his wife after the lawsuit was filed and pending with this judge, unless the said lawsuit was filed with the intention of disqualifying him from considering the case before him.
- C- If his divorced wife with whom he has a child or one of his relatives or in-laws up to the fourth degree has a dispute before the judiciary with a litigant in the case, or with his wife, unless the case was brought with the intention of disqualifying him.
- D- If a litigant is his servant or the judge had habitually dined or lived with him, or if he had received a gift from him shortly before the lawsuit was filed or thereafter.
- E- If enmity or friendship exists between him and a litigant such that it is likely he would not be able to judge impartially.

Obviously, this article leaves such discretion to the judge himself, which means that the judge must reach a decision in accordance with his character. If he knows that in such circumstances he will lose the required impartiality he should withdraw. Some judges will feel confident with respect to their impartiality even if one of the above circumstances is involved in the case. Nevertheless, and more importantly, if there is cause for a judge to recuse himself and he fails to do so, a litigant may request his disqualification. If the reason for disqualification is not one of the above circumstances, a request for disqualification must be made before any defence or plea is presented in the case; otherwise such a right is forfeited. However, such a request may be made if the reasons for it occur afterwards or if the petitioner proves that he had no knowledge of them.<sup>111</sup>

Clearly, from a legal point of view the difference between the two circumstances mentioned above is that the first circumstances are considered as a structural matter of general public interest. Hence, the law must be applied and is not subject to any waiver. Even the litigants concerned have no power to agree that the judge may handle their case. However, the second set of circumstances is considered only as a

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<sup>111</sup> - Article 94 of the Law of Procedure Before *Shari'ah* Courts

litigant or a private right. Therefore, if the interested party fails to request the disqualification of a judge the court should proceed to adjudicate the case.

Although such approach does not raise any contradiction with the European standards of human rights, it might be said that requiring a judge to disclose to the parties any information that could raise questions in respect of his impartiality, is more consistent with European standards of human rights. Furthermore, in order to bring the practice of the judicial system in Saudi Arabia to a closer harmony with that of the European Court of Human Rights, the Saudi courts when assessing the impartiality of a given judge in respect of the second set of circumstances could use the same tests that are applied by the ECHR. Namely, the subjective and objective tests. Alternatively, they could apply the test that is recently settled in the English jurisprudence i.e. whether the relevant circumstances, as ascertain by the court, would lead a fair-minded and informed observer to conclude that there was a real possibility that the tribunal had been biased.<sup>112</sup>

In respect of procedures required to disqualify judges, disqualification is effected by a declaration to the court administration, signed by the petitioner personally or by his attorney-in-fact under special power of attorney, to be attached to the declaration. A declaration for disqualification must include reasons and enclose whatever supporting papers are available.<sup>113</sup> In this situation the court administration must immediately show the declaration for disqualification to the judge, who must within the following four days of reviewing the declaration write to the Chief Judge of the court or the Chief Judge of the Provincial courts, as the case may be, about the facts and causes of disqualification. If he does not write within the prescribed time, or if he writes in support of the reasons for disqualification, or if he writes a denial but proof is established, the Chief Judge of the court or the Chief Judge of the provincial courts must declare him disqualified from considering the case<sup>114</sup>.

Another aspect of protecting the appearance of the court's impartiality is that no judge, public prosecutor, or court employee may be the attorney-in-fact for a litigant in a case, even if filed with a court other than their own. They are allowed to do so, however, on behalf of their spouses, other generations of their family, and persons

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<sup>112</sup> - See *Porter v Magill* [2002]1 All ER 465-523

<sup>113</sup> - Article 95 of the Law of Procedure Before *Shari'ah* Courts

<sup>114</sup> - Article 96 of the Law of Procedure Before *Shari'ah* Courts



legally under their guardianship<sup>115</sup>. Even though an exclusion of those persons from the rule of the article might appear at prima facie to be a strange rule, the reason for this exclusion is that as we have seen before, the judge is not allowed to adjudge their cases. There is thus no fear of the judge losing his impartiality simply because he will not be allowed to be a judge in their cases.

In conclusion, it is clear that the Saudi law applies a higher standard in respect of the court's impartiality than that required by the European human rights law. This is evident by the following comparisons. Jurisprudence of both the European Court of Human Rights and English courts allows a judge to hold other careers simultaneously. For example besides being a judge he can be at the same time a lawyer<sup>116</sup>, a member of the education committee, a governor of schools,<sup>117</sup> or director of international organization.<sup>118</sup> A judge according to the European jurisprudence is disqualified from hearing a given case only if he plays an active role in respect of the case at hand.

This altogether differs than the case in Saudi Arabia in which a judge cannot have another career or job or be involved in commercial activity. Article 58 of the Law of the Judiciary provides: "*A person may not hold the position of a judge and simultaneously engage in commerce or in any position or work which is not consistent with the independence and dignity of the judiciary. The Supreme Judicial Council may enjoin a judge from engaging in any work which, in its opinion, conflicts with the duties of the position and the proper performance of such duties.*" Therefore and may be more interestingly, if the judge has another job or engage in commerce, he is then not only disqualified from hearing a particular case, but he will cease to be a qualified judge at all. The rationale of this idea in the Saudi law is that there is a conflict of interest between the functions of the judge on the one hand, and the functions of a lawyer, for example, on the other hand. According to Islamic law the judge must not engage in social activities especially with those who have an interest in the judiciary.

In addition, English courts accepted the standards that where the case was concerned with bias on the part of the justice' clerk, the court should go on to consider whether it should infer that there was a real danger that the clerk's bias infected the views of the

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<sup>115</sup> - Article 52 of the Law of Procedure Before *Shari'ah* Courts

<sup>116</sup> - *Locabail Ltd v Bayfield Properties* [2000] 1 All ER 65-96

<sup>117</sup> - *R v Gough* [1993] 2 All ER 724- 740

<sup>118</sup> - *Ex p Pinochet Ugarte* (No 2) [1999] 1 All ER 577-599

justices adversely to the applicant.<sup>119</sup> In contrast, article 8 of the Law of Procedure before *Shari'ah* Courts provides: "*Process servers, clerks, and such other judicial assistants may not perform any work that lies within the scope of their jobs in cases involving them or their spouses, relatives, and in-laws up to the fourth degree and any such work shall be null and void.*"

Another area of comparison, is that according to the law of Saudi Arabia the judge is automatically disqualified from hearing a case, and if he does, his judgment is void and null if he, his wife, a relative, or an in-law in the ancestral line, or a person for whom he is trustee or guardian, has an interest in the existing case or if he had issued a *fatwa* (religious legal opinion), litigated for one of the litigants in the case, or written about it, even if it were before he joined the judiciary, or if he had earlier considered the case in the capacity of judge, expert, or arbitrator, or had been a witness in the case or had engaged in any investigative action therein. This standard is wider than that applied by the ECHR and the English law.

The idea in the Saudi law is that it is very difficult to prove the actual bias of the judge especially since bias is such an insidious thing that even though a person may in a good faith believe that he was acting impartially, his mind may unconsciously be affected by bias. And applying general tests for determining the court's impartiality could lead to practical difficulties that could result in undesirable uncertainty when handling the issue of impartiality. More importantly, the appearance of the judge's impartiality cannot be safeguarded if the judge engages even slightly with, for instance, the accused investigation. There is an overriding public interest that there should be confidence in the integrity of the administration of justice.

A final point that supports our conclusion is that, Islamic jurists have discussed in great details the impartiality of the judge. As a general rule, they restrict the judge from, for instance, accepting a gift, private invitation, or to host one of the case parties. The aim is to avoid any act that might cast doubt with regard to the judge impartiality.

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<sup>119</sup> - *R v Gough* [1993] 2 All ER 722-740



### Part III

### The Right to Public Hearing

Article 6 (1) of the European Convention on human Rights declares: *"In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing..."*

#### Section One Islamic law

Even though jurists did not explicitly stipulate that the right to public hearing is obligatory, the factual application of the judiciary throughout Islamic societies indicates that Islamic law requires the hearing to be held in public<sup>120</sup>. The right to an open court can be identified through the following six points:

First: the Prophet and his companions after his death judged between litigants in the mosque. The mosque is a public place and most Muslims worship Allah in the mosque. No one is entitled to prevent a Muslim from visiting it at any time. Therefore, the public are permitted to hear any case until the final judgment is rendered. The majority of jurists are in agreement about using the mosque as a court to adjudicate cases because all Muslims have access to mosques and in their view a judiciary is a form of worship, thus the mosque is the best place for adjudications.<sup>121</sup>

They support their view by citing the following verses spoken by God: {And has the news of litigants reached you? When they climbed over the wall into (his) Mihrab (a praying place or a private room). When they entered in upon Dawud (David), he was terrified of them. They said: Fear not! (We are) two litigants, one of whom has wronged the other, therefore judge between us with truth, and treat us not with injustice, and guide us to the Right Way}.<sup>122</sup>

Consequently, they argue that these verses indicate that the Prophet David judged between litigants in the mosque and accordingly, judiciary in the mosque is recommended.

Second: there is no doubt that the chosen place of the judiciary is an important aspect in its power to affect the proceedings. Jurists have always recommended that judgment should be held in a spacious place. They also have recommended that the judge should sit in a high and accessible place.<sup>123</sup> Furthermore, judges throughout the Islamic state are familiar with such practice, as they have taken the most popular and

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<sup>120</sup> -Jeerah, A (1988) p. 122

<sup>121</sup> - Al Kadery, A "Al Qada'a Fi Al Masjed" Al Adl Journal Third Issue. First Year. (1420 H). Ministry Of Justice. Kingdom of Saudi Arabia P. 56

<sup>122</sup> - Surah 38 Sad. Verses No 21&22

<sup>123</sup> - Al Muqhni (1981).Part 9 P. 45.

public places to adjudicate between people. Ali ibn Abee Taleb (the fourth ruler after the death of the prophet) for example, judged between litigants in the public market.<sup>124</sup>

Al Shafi'i (the founder of the Shafi'i School of thought) stated: "*No ruling shall be valid unless in public*". He also said: "*I like the court to adjudicate in a distinctive place*"<sup>125</sup>

The reason for recommending the hearing to be held in public and open places is in the view of Islamic jurists because judgment is more likely to be fair if it is held in a public place.<sup>126</sup>

Third: the majority of jurists argue that the judge is not allowed to use his home as a place of judiciary, because such practice might create doubt with regard to his judgment. It is told that Omer ibn Al Kattab (the second ruler after the death of the Prophet) prevented Sa'ad ibn Wakas and Abu Mosa Al Ash'aree from using their houses as places for judgments.<sup>127</sup>

If the judge uses his home as a place for judgments his house must be made accessible to everyone, because if he handles cases in camera he will be accused of favouring one of the litigants.<sup>128</sup> A man came to the ruler's (al ma'mon) house and complained against him before the judge Yah bin Aktham. The ruler said to the judge: "*you judge between us.*" The judge said he would not. The ruler asked why. The judge replied: "*because your house has not been made a place for judgment.*" The ruler said: "*from now on it is a place for judiciary*". The judge said: "*I will call the public to make it a judiciary place.*" The ruler said: "*call them.*" The judge opened the door and the caller started to call people to attend the hearing in the ruler's house. When people were attending, the judge started to judge between the ruler and his litigants.

Fourth: considerable attention is given to the attendance of jurists at the hearing. The judge is recommended to call jurists to hear the case and to seek consultation with them in respect of the case before him. They supervise his treatment of the parties, his understanding of the case, and his application of Islamic rules.<sup>129</sup>

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<sup>124</sup> - Ahmad Al Askalane (1987). *Fateh Al Baree Be Sharh Sahih Al Bokary*. part 13 p. 141

<sup>125</sup> - Ali Al-Mawardi (1971 ). *Adab Al-Qadee*. Part1 p.196

<sup>126</sup> - Monsor Al Bahotee (1982) *Kashaf Al Kana' Ala Motten Al Egna'*. Part 6 P.312

<sup>127</sup> - Abraheem bin Ali Al Malekee (1986). *Tabser Al Hokam*. part 2 p. 143

<sup>128</sup> - Abdulrahman bin Muhammad bin Suleiman (1310H). *Mojam' Al Anhar Fi Sharh Moltaga Al Abhor*. part 2 p. 157

<sup>129</sup> - Abraheem bin Ali Al Malekee (1986). *Tabser Al Hokam*. part 2 p. 42



It is told that Othman Ibn Afan (the third ruler after the death of the Prophet) did not hear cases before the attendance of Ali Ibn Bee Taleb, Talahah, Al Zobeer and other of the Prophet companions. He started by asking the litigants to address their claims and after that he consulted the companions about the case and then he rendered his verdict.<sup>130</sup> Jurist Al Kamal Ibn Al Homam states that “*the judge must stay while handling the case with those who usually stay with him otherwise he will be accused of taking a bribe or he might be accused of being unjust in his verdict.*”<sup>131</sup> Moreover, jurist ibn Farhoon explains that: “*the judge must not adjudicate the case unless in the presence of scholars with whom he can consult.*”<sup>132</sup> Likewise, it is stated that: “*the judge is recommended to seek the attendance and consultation of jurists.*”<sup>133</sup>

Fifth: some jurists argue that the judge should seek the attendance of just witnesses to hear the trial.<sup>134</sup> They state that the judge must not hear the case except in the presence of witnesses. In fact the object of this requirement is not to achieve open and public hearing, but rather to enable the witnesses to hear the trial, because through such attendance, the jurists’ argument goes, it can be ensured that the judge will decide the case on the basis not of his knowledge, but rather of the witnesses’ testimony. However, this requirement in itself supports the right to public hearing, because frequent attendances on the part of just witnesses make them more experienced in judiciary matters.

Sixth: according to the majority’s view the judge is not permitted to bring a guard into court unless with good reason. The reason for preventing the judge from bringing in a guard is that the judge might by this means prevent anyone who has a complaint, or he might be not equal in his treatment of the litigants.<sup>135</sup>

To sum up, the hearing of trials in Islamic societies has always been held in public. The public is entitled to hear the proceedings in all its stages. The justification offered in this regard is that justice is more likely to be guaranteed if the case is heard in an open court. Yet, the right to an open court is not guaranteed if the interest of justice so requires. According to Islamic law the judge has the right to hear the case in camera. Jurists argue that the judge handles different kinds of cases, some of which

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<sup>130</sup> - Wakee’a bin Hean. *Akbar AL Qudat*. part 1 p. 110

<sup>131</sup> - Kamal Al Deen Muhammad bin Abdulwahed.(no year) *Sharh Fattah Al kader*. part 6 p. 370

<sup>132</sup> - Abraheem bin Ali Al Malekee (1986). *Tabser Al Hokam* part 1p. 42

<sup>133</sup> - Al Muqni ( 1981) Part 9 P. 52

<sup>134</sup> - Ali Al Mawardi (1971). *Adab Al Qadee*. part 2 P. 245,246 & 247

<sup>135</sup> - Abraheem Al Sherazee (no year) *Al Mohatheb Fi Fiqh Al Imam Al Shafi’i*. part2 p. 295

are of criminal, civil, commercial, and personal or family nature. Some of these cases are very personal and the interest of the parties requires them to be held in camera<sup>136</sup>. Therefore, it can be said that the attitude of Islamic law in respect of an open court, is similar to that of the European Court of Human Rights. Both require the court to be open, nevertheless, Islamic law differs in that it does not designate certain circumstances in which the hearing can be exceptionally held in a closed session, but rather it articulates the principle and leaves it to the judge concerned with a somewhat wide discretion to determine whether the case should be heard in public. On the contrary, the European Convention on Human Rights strictly limits the exceptions of the right to an open court to certain circumstances, as is pointed out later.

## Section Two Saudi Law

Harris and others in their comments on the right to fair trial provided in the European Convention on Human Rights state that the aim of a public hearing in criminal cases is to (a) maintain public confidence in the administration of justice and to (b) protect the accused from the dangers of handling his case in camera.<sup>137</sup> Islamic scholars implicitly provide the same reasons for requiring the publicity of the hearing. As we have pointed out above most jurists argue that the judge should not be allowed to use his home as a place of judiciary, because there he will be concealed from people, which might cast doubts on his judgment. They also say that if the judge uses his home as a place for judgment, his house must be located in the centre of the city so that everyone may have access to it, and he must permit everyone to enter his house, because if he remains alone he will be accused of favouring or prejudicing one of the litigants.<sup>138</sup> Jurist Al Kamal Ibn Al Homam states: "*the judge must stay while handling the case with those who usually stay with him otherwise he will be accused of taking a bribe or he might be accused of being unjust in his verdict*".<sup>139</sup> Accordingly, both Islamic jurists and western writers provide arguably the same reason for requiring the hearing to be held in public. However, the means over which

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<sup>136</sup> - Nasser Al Jofan "Alaneet Galasat Al Taqadee" Al Adl Journal. Fifth Issue. Second Year. 1421 AH p. 36. The Ministry of justice; Saudi Arabia.

<sup>137</sup> - Harris (1995) p. 218

<sup>138</sup> - Abdulrahman bin Muhammad bin Suleiman. (1310H). *Mojam'a Anhar Fi Sharh Moltaga Al Abhor*. Part 2 P. 157

<sup>139</sup> - Kamal Al Deen Muhammad bin Abdulwahed. *Sharh Fattah Al Kader*. Part 6 P. 370



they dispose to achieve this goal may differ. Here we will focus on the Saudi Arabian experience as to the scope and application of the right to an open court.

Like the European Convention on Human Rights which states in article 6 (1) that *“Every one is entitled to a... public hearing.”* the judicial system in Saudi Arabia emphasizes public hearing in the following articles. Article 33 of the Law of the Judiciary provides: *“Court hearings shall be public.”* Similarly, article 155 of the Law of Criminal Procedure states that: *“Court hearings shall be public.”* Likewise, article 15 of the Rules of Pleadings before the Board of Grievances stipulates that: *“...the session shall be public.”*

### **Exceptions to the principle**

However, since the interest of society as a whole or of individuals might be harmed by publicising the case, the law in both the *Shari'ah* courts and the Board of Grievances provides exceptional circumstances in which the right to an open court will be not applied. Article 33 of the Law of the Judiciary provides: *“Court hearings shall be public unless the court decides that they be held in a closed session in deference to morals or the sanctity of the family, or for the maintenance of public order. In all cases, judgments shall be pronounced in a public hearing”*. Equally, article 155 of the Law of Criminal Procedure states: *“Court hearings shall be public. The court may exceptionally consider the action or any part thereof in closed hearings, or may prohibit certain classes of people from attending those hearings for security reasons, or maintenance of public morality, if it is deemed necessary for determining the truth”*. Similarly, article 15 of the Rules of Pleadings before the Board of Grievances stipulates that: *“... the sessions (shall) be held in camera in the interest of public morality and public order; in all cases the pronouncement of a judgment must be in open court”*. Clearly, the Law of the Board has not mentioned family reasons as an exception from a public hearing. The reason for this is that the Board is an administrative court; family matters are not under its jurisdiction.

Consequently, the judicial system in Saudi Arabia restricts the exceptions of the principle of a public hearing to the following circumstances: (a) morality reasons, (b) the protection of Juveniles, or family (private) life, (c) security reasons, (d) and if it is deemed necessary for determining the truth. The European Convention is stipulated in a manner to limit these exceptions to three grounds. Namely; (1) morality reasons, (2) for the interest of juveniles or protection of private life (family life), (3) and to the

extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interest of justice.

As to (a) and (b) of the Saudi law these are absolutely similar to (1) and (2) of the European Convention. With regard to (c) security reasons provided in the Saudi law, although it has no explicit counterpart in the European Convention, the European Court in *Campbell and Fell v UK*<sup>140</sup> found no violation of Article 6 (1) when prison disciplinary proceedings were held in secret for reasons of public order and security. In respect of (d) of the Saudi law i.e. if it is deemed necessary for determining the truth, and (3) of the European Convention that is, to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interest of justice, they are provided to some extent in a broad terms to enable the judge concerned to avoid circumstances where prejudice of justice could occur as a result of the publicity. Thus, it could be argued that exceptional circumstances are provided equally in both systems.

In addition, if the court in Saudi Arabia decides to hear the case in camera it is not obliged to prove reasons for such an exception because it is not a judicial judgment. Moreover, the court may decide to hear the whole case in closed hearings, or may confine the closed hearing to a particular session. Yet these exceptions should not mean that the litigant may present evidence secretly. On the contrary, all arguments and evidence must be recorded in the session minutes<sup>141</sup>.

However, in the context of the European Convention on Human Rights the notion of a public hearing has a slightly different meaning than its counterpart in Saudi Arabia. In the European context it means that the public and the press must be allowed to hear the trial.<sup>142</sup> These aspects should therefore be examined in the law of Saudi Arabia. Namely, the right of the press to attend and publish details of the proceedings, and the public right to attend the hearing.

First, in respect of the right of the press to attend the trial and publish whatever they deem suitable, this right raises a clear difference between the judicial system in Saudi Arabia and the European Convention, and maybe also most western countries. The European court regards the press as an important means to build public confidence in

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<sup>140</sup> - (1984) 2 E.H.R.R.165

<sup>141</sup> - Abdullmon'em Jeerah (1988) p. 122

<sup>142</sup> - Article 6 (1) of the European Convention on Human Rights provides: "... *The press and public may be excluded from all or part of the trial...* "



respect of justice. It is argued that the press allows citizens to scrutinize the function of the court. The European Court held that: "*The courts could not operate in a vacuum: while they were the forum for settling disputes, this did not mean that there could be no prior discussion of disputes elsewhere. It was incumbent on the mass media to impart information and ideas concerning matters that come before the courts just as in other areas of public interest.*"<sup>143</sup> In contrast to this view, many Islamic writers argue that press involvement cannot in any circumstances enhance public confidence in the judicial system because those who present the media are not specialists in Islamic or codified law. Moreover and more significantly, providing the media with the right to engage in cases, and particularly criminal cases, will promote sinning and evil; and Islamic societies are obliged not to promote sinning. The idea of broadcasting procedures of inquiry and trial through the media, therefore, is not in line with some Islamic principles, hence it is undesirable. For the sake of clarity these principles should be illustrated and explained.

First: Islamic law aims to form the idea of righteous work that displays no evil and makes good deeds very clear. Article 17 (a) of the Cairo Declaration on Human Rights in Islam declares that: "*Every person has the right to live in a clean environment free of mischief and moral vices in such a manner that will enable him to develop himself morally. The state and the community are responsible for providing this right.*" Therefore, the *Shari'ah* commands the doing of good deeds and forbids evil. Muhammad Abu Zahra comments on this concept saying that, to make sure that the public opinion is clean and pure and that things harmful to eyes as well as embarrassing sins are not shown, Islam forbids the declaration of crimes. Islam considers the declared crime as two crimes; the crime of the deed and the crime of declaring it. Therefore the Prophet said "*Oh people, any one who committed any one of these dirt and concealed himself he will be concealed by God, and he who declares his sin will be punished*". He also said: "*The furthest people from God are those who are open*". He was asked who are those? He said: "*those who do something by night, covered by God, but when awake say I did so and so and unveil what God has covered*".

Abu Zahra continues to argue that concealing crimes can make the sin hide and not appear. This may be a reason to purify the sinner's heart and civility of soul. Fear of

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<sup>143</sup> - *The Sunday Times v The United Kingdom* [1979] 2 E.H.R.R. 245

declaration weakens the tendency to be evil. In the end this may lead to the sinner's repenting. In contrast, declaration reduces purity and civility of heart and may lead to absolute violation and loss of morality. Those who declare their crime eagerly ask for this. God counts these people as spreaders of bad deeds.<sup>144</sup>

Abdul Salam Alshareef makes similar comments on the Prophet's encouragement of Ma'az to withdraw his confession of adultery. This indicates affection and mercy for the criminal, leaving it a matter between him and God to repent and ask pardon for his sins. The Prophet hated the spreading of news about crime: he did not want believers to hear it or society to talk about it.<sup>145</sup> Newscasts which broadcast news about crimes unveil the hidden. The exaggeration of this news may provoke young people to commit crimes, but Islam's way is to fight crimes by righteous public opinion. Anyone who looks deep into the verses of the Holy *Qur'an* and the Prophet's sayings on the subject of crime finds that they treat the social situation effectively and look at society as a single unit. They do not distinguish one section of society at the expense of another. They try to promote good deeds in society through social and personal conviction, and to use various means by which to avoid crimes, including inner processes of reason and Filing etc.<sup>146</sup>

Along the same lines, Abdel Fattah Kuder says: *"In most cases the spreading of crime news in newspapers as soon as the crime occurs serves the particular agenda of the media, causing excitement and distracting from the reality. All this affects the purity and cleanness of society and its life and security. Therefore it is good for Islamic society not to announce crimes as soon as they are committed, but to wait until the authorities catch the criminal and control the evidence and pronounce fair judgment."*<sup>147</sup>

Liberalism in western contexts holds the view that freedom of press, openness, and public discussion of public affairs including judiciary, leads to good and informed citizens.<sup>148</sup> Truth, according to their view, is only discoverable by subjecting opinions

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<sup>144</sup> - Abu Zahra, M (1988 ) p. 27&28

<sup>145</sup> - Alshareef, A (1988) "*Al Mabad' Al Shar'aeeh Fi Ahkam Al Uqubat Fi Al Fiqh Al Islami*" p. 322

<sup>146</sup> - Dofeer, S (2000) Part 1 p. 57.

<sup>147</sup> - Kuder, A (1982) "*Al Nedam Al Gena'ee*" Part 1 the Institution of Public Administration p. 53 & 54

<sup>148</sup> - John Stuart Mill "*Liberty of the Press*" [182-?] Reprinted from the Supplement of the Encyclopaedia Britannica. Special Collection of Robinson Library at the University of Newcastle upon



to free examination and discussion by those who are in favour of or against them. John Stuart Mill wrote the most significant and most influential statement of the irreducible value of human individuality "On Liberty" which was first published in 1859. In this work he wrote that: *"There is a class of persons... who think it enough if a person assents undoubtingly to what they think true, though he has no knowledge whatever of the grounds of the opinion, and could not make a tenable defence of it against the most superficial objections. Such persons, if they can once get their creeds taught from authority, naturally think that no good, and some harm, comes of its being allowed to be questioned. Where the influence prevails, they make it nearly impossible for the received opinion to be rejected wisely and considerately, though it may still be rejected rashly and ignorantly; for to shut out discussion entirely is seldom possible, and when it once gets in, beliefs not grounded on conviction are apt to give way before the slightest semblance of an argument. Waiving, however, this possibility- assuming that the true opinion abides in the mind, but abides as a prejudice, a belief independent of, and proof against argument- this is not the way in which truth ought to be held by a rational being. This is not knowing the truth. Truth, thus held, is but one superstition the more, accidentally clinging to the words which enunciate a truth."*<sup>149</sup>

Regardless of the fact that this may appear to be in a sharp contrast with Islamic law's point of view, it must be clear that openness, free discussion, and the right of all citizens in a Muslim society to be informed and participate in public affairs, thought not put in actual practice in most Islamic countries, do not contradict Islamic law. The principle mentioned above in Islamic law regarding the declaration of criminal cases is the only exception which must not be interpreted widely.

Second: Islamic law calls for cover for criminals according to good public criteria.<sup>150</sup> Covering here means not to notify of crimes. If somebody knows that a person has committed a crime that does not threaten the rights of others, such as drinking alcohol, then in this case this person is recommended not to inform the authority concerned

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Tyne. See also A.T.H. Smith "The Press, The Courts, and The Constitution". Current Legal Problems (1999) Vol.52, p126

<sup>149</sup> - John Stuart Mill "On Liberty and Other Writings" Edited by Stefan Collini Cambridge University Press 1991. p 37

<sup>150</sup> - J.N.D. Anderson "Muslim Procedure and Evidence". Journal of African Administration. Vol. 1 No. 3 July 1949.

about the crime and the person who did it. It is always preferred if that person try to advise the criminal kindly to give up such habit. In addition, rulers of Islamic states have the right to forgive accused persons if they believe that there is benefit in this, especially if the criminal has no previous criminal record. Applying the concept of Veil or cover, the judge may also see that in some cases forgiveness may be better.

The wisdom of this concept is that any person may err. The law wants to give the erring individual a chance, since the crime is not made known and this "covering" may help the criminal to repent.

This principle has applications in the Kingdom of Saudi Arabia. A circular from the Ministry of Interior on veiling or covering suggests that such simple cases as pestering (importuning) women and others be veiled.<sup>151</sup> Moreover, Article 54 of the draft of the by-law of the Investigation and Public Prosecution Bureau provides: "*it is allowed, upon approval from the Committee of the Administration Bureau, to refrain from enquiring in Ta'azir (chastisement) crimes where the following applies, even when the crime is confirmed:*

- a) *If the damage or the danger of the matter is not significant.*
- b) *If the follow-up to the crime may cause scandal that exceeds the benefit of punishment and greater damage than the damage of the crime itself.*
- c) *If the trial is going to increase the risk of danger and aggression and antagonism in such a way that new crimes may be committed.*
- d) *If the governing body believes that there is nothing to be gained in pursuing one of its criminals.*
- e) *If the crime is a result of negligence or carelessness of parents or children and no one except family members were harmed.*
- f) *If the aggrieved withdraw his/her case.*
- g) *In cases of private financial crimes when the criminal makes recompense for his crime as soon as this has been asked for.*

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<sup>151</sup> - Circulation No. 16/C/ 39 dated on 14/ 1/ 1415 H



h) *If the consequences of arresting and investigation are thought to be some sort of satisfactory punishment.*

i) *If there is fear that youth may mix with criminals in the prison or detention centres”.*

In these circumstances members of the Investigation and Public Prosecution Bureau can rule out some cases on the principle of Veil or cover. However, the application of the Veil concept should in general follow the following criteria: 1- The crime should not be major. 2- The criminal should not commit his crime publicly. 3- The crime should not concern a private right. 4- The criminal should not be famous for his crime or the habit of this crime.<sup>152</sup>

Third: some Muslim authors argue that publicising crimes and the names of criminals during the period of investigation and trial and before the final ruling, is a violation according to the principle of the presumption that the accused is innocent until proved otherwise, as stated in Islamic law. It is argued that the presumption of innocence in Islamic law will be violated if the media publicises any criminal case under the court's jurisdiction<sup>153</sup>. The view is justified by the claim that prejudice will no doubt attach to the accused, and his reputation will be harmed, should his name be published during the criminal proceedings as a suspected person. Such damage is not limited to the accused himself but also to his family. This damage, the argument goes, will not be resolved by a judicial decision reflecting his innocence. My personal observations with regard to publicising the details of cases support this view. If we take the case of the murdered Cambridgeshire schoolgirls Holly Wells and Jessica Chapman as an example, it was clear that when reporting the case the media suggested, albeit not explicitly, that the accuseds were in fact guilty. When one of the accuseds (Maxine Carr) was taken to the court, the media had already convinced people that she was a criminal. Spectators threw different items at her and assaulted her verbally. Yet the presumption of innocence should have entailed that until a final judicial decision is rendered, she be presumed innocent. After the outcry against her it is hard to claim

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<sup>152</sup> - Al Qamdee, A "Al Setter Fi Al Qada'ee Al Jina'i" 11<sup>th</sup> issue, Third Year. 1422 H. Al Adl Journal. Ministry of Justice; Saudi Arabia; P. 68- 96

<sup>153</sup> - Omer, O (1988) p. 235& 236

that society deemed her innocent. Moreover, it casts doubt on whether her right to be presumed innocent until a final judgment proves her guilty is being protected.

Fourth: Muhammad Elhalaby criticizes the publicising of trial procedures by the media in these terms: *“Permission to publicise sessions of the courts of justice in radio and TV, and reporting all events makes them some sort of entertainment rather than a pursuit of the truth. This affects the gravity of the court and diminishes the status of judges in people’s minds. This contradicts the purpose of publicity, which is to guarantee the people’s rights and respect their freedom. Therefore I think that publicising court sessions on radio and TV, contradicts the aims of publicity.”*<sup>154</sup>

Now we will deal with the second aspect of the right to an open court, that is, the citizens’ right to attend sessions of the hearing. Obviously the Saudi judicial system requires the court to be open which means that as a general rule any person is permitted to attend any case. This means the right is not confined to a certain class of people, whether citizens, foreigners, laymen, specialists or scholars, relatives or non-relatives. In practice however it does not seem that people of any of the above classes desire attendance at the hearings. Scholars for instance, who have a longstanding tradition in Islamic societies to hear cases, have recently been less willing to do so because it is impossible for them to attend an increasingly high number of cases. Not only that, but also the accused or even the litigant in a civil case prefers the case to be held in camera. The word *“reputation”* in Islamic societies and in particularly in Saudi society has acquired an autonomous meaning. If a person is accused before the court, such accusation whether confirmed by a conviction or not will have a direct social effect not only on the accused himself or his immediate family, but also on relatives who share the same family name. This may be the reason that makes judges careless with regard to the application of the right to an open court.

Strangely, if the judge decides to hold the case in a secret session the accused can only challenge such decision before the judgment is concluded. Research into the judicial system in Saudi Arabia reveals hardly a single appeal against a judgment on the ground that the case was decided in camera. This may be because: (1) Islamic law, although recommending the open court as we have seen above<sup>155</sup>, does not entail the annulment of the judgment if it is decided in camera. (2) Although the law in

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<sup>154</sup> - Elhalaby, M (1996) *“Al Wassatt Fi Sharh Qanoon Usul Al Muhakmat Al Jaza’eeh”* Part 3 p. 14

<sup>155</sup> - See our discussion in chapter 3 of this thesis.



Saudi Arabia stipulates in an unequivocal manner that all cases as a common rule will be handled in public, it does not provide a remedy if the judge violates this right. (3) Neither the law in Saudi Arabia nor actual practice requires the judge to mention whether a case is held in public or in camera.

Since as we have mentioned above, scholars in recent times have been unable to attend trials, and since the history of Islamic societies indicates that Islamic jurisprudence requires the hearing to be held in public, the law in Saudi Arabia needs reform with regard to the right to public hearing in order to be consistent with the ECHR's approach, which regard the right at hand as a fundamental one that should be effectively safeguarded.

Although the right to have an open court is clearly stipulated in many articles as we have pointed out above, these articles fail to provide a remedy in case of the violation of this right. The law should decide what remedy might be applied whenever such right is infringed. Moreover, the law should oblige the judge to state clearly whether the hearing is to be held in public or in a secret session, and to provide reasons in the latter instance. My justification for this suggestion is that holding the hearing publicly is an important matter. First: it provides a guarantee in respect of the accused's defence rights, because it means that the accused will not be denied these. Second: it builds public confidence in the administration of justice. Third: it protects the accused from the dangers of holding his case in camera.<sup>156</sup> This danger was described by Shoket Al Tonee when he mentioned prejudices that had occurred in Egypt during the revolution era in 1952. He writes: *"since the revolution in 1952 the principle of public hearing had no longer applied. This was an indication of the fact that those who were in power knew that they misled the public deliberately and they did not want people to know this scandal. They only announced the accusation and people were deprived of their right to supervise trials.... Our fear in this era was due to the fact that they would accuse the Egyptians of spying or having committed the crime of high treason. The accusation would be made public but the trial would be held in secret sessions until the sentence was rendered. Those who were accused of such crimes called for a public hearing to protect themselves by publicity. However, those who were in charge of public affairs had a magic wand to achieve their goals. That is*

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<sup>156</sup> -Harris (1995) p. 218

to say the claim that the case contained secret information and hence the interest of the state required it to be decided in camera".<sup>157</sup>

However, the right to an open court in Saudi Arabia is only confined to the court of first instance. Article 199 of the Law of Criminal Procedure states: "*The Appellate Court shall dispose of the subject matter of the appeal on the basis of the evidence included in the file of the case. Litigants shall not appear before the court, unless it decides otherwise*". Aljofan criticizes the status when he writes: "*This exception contradicts the fundamental principles of the judiciary procedures, and breaches the principle of fairness and the principle of justice in judiciary to which the public hearing was decided. The text provided requires that the hearing will be held in a secret session even for litigants in the case.... It would have been better for the legislator not to exempt the Appellate Court from the principle of publicity when he declared public hearing to be the general rule because the same justification for its existence in the court for first instance exists in the Court of Appeal. Not only that but also the benefit from establishing this principle cannot be fully achieved unless the same principle is applied in the appellate court. This is because most cases are subject to appeal, and most condemned persons desire their cases to be reconsidered before the court of appeal.*"<sup>158</sup>

Finally, the pronouncement of judgments must always be rendered in a public manner even if the case itself is tried in a secret session. The above-mentioned articles have explicitly declared this rule.

#### **Part IV: The Right to A Reasoned Judgment**

The right to a reasoned judgment is not explicitly provided for in the European Convention on Human Rights. However, it emerges from the notion of fair trial as has been explained in chapter two of this thesis.

##### **Section One Islamic law**

Two aspects of reasoned judgment may be distinguished: (i) legal reasons; and (ii) factual reasons<sup>159</sup>. The former aspect denotes illustration of *Shari'ah* ruling with its cited evidence from the *Qur'an*, the *Sunnah*, and jurists' statements with regard to the

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<sup>157</sup> -Quoted in Ahmad Shalabee (1989). *AL Teshrea Wa Qada'a Fi Al Faker Al Islami*. p. 261

<sup>158</sup> - Nasser Aljofan (1416 AH) p. 509

<sup>159</sup> - Ateeh, J (1997). *Al-Hag Fi Muhakmah Adelah*. Al Muslim Al Muasir. The Contemporary Muslim. May, June, July Vol. 21 No. 84 P. 105



facts concerned. When the judge renders his judgment he shall explain to the condemned person the rule of the Islamic law and the cited evidence in respect of the fact.<sup>160</sup> The aspect of factual reasoning indicates the explanation of fact that is considered to provide the grounds for the judgment and the methods of proof. Jurists argue that the judge should reveal to the condemned person the claims adduced by him and his litigant; what facts are proved before him; their impact on the judgment; and whether they are proved by testimony, confession or other means of evidence.<sup>161</sup> In the view of the jurists the legality of reasoned judgment is based on the following: In the *Qur'an*, God provides reasons for his rulings. For instance God said: {What Allah gave you as booty to His Messenger (Muhammad) from the people of the townships it is for Allah, His Messenger (Muhammad) the kindred (of Messenger Muhammad), the orphans, the poor and the wayfarer, in order that it may not become a fortune used by the rich among you.}<sup>162</sup> It is clear from this verse that God reveals the principle of reasoned rulings and its interest. The last sentence of the verse “*in order that it may not become a fortune used by the rich among you*” clearly states the reasons for legislating the rules.

Judge Ibn Koneen argues that if the *Qur'an* successfully justifies its rulings to those who apply them, judges' application of such approach is fortiori. They are required to provide cited evidence for their judgments and to explain how the facts have been proved.<sup>163</sup>

There is no disagreement among jurists with regard to the legality of reasoned judgment. However, they differ in respect of the legal ruling vis-à-vis reasoned judgment: in other words whether it is obligatory or recommended.

(a) Some say that a reasoned judgment is obligatory, thus the judge must reveal his reasoning in all cases whether criminal or civil<sup>164</sup>. (b) Other jurists argue that a reasoned judgment is recommended but not obligatory.<sup>165</sup>

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<sup>160</sup> - Yusuf bin Abdullah Al Kortbee (1398 H). *Al Kafee Fi Fiqh Ahl Al Madianh*. Part 2 P. 958

<sup>161</sup> - Shams Al Deen Al Sarkasee (1416 H). *Al Mabsut*. part 16 p. 108

<sup>162</sup> - Surah 59 Al Hashr Verse No. 7

<sup>163</sup> - Abdullah Al Koneen (1420 AH) “*Tassbeeb Al Ahkam al Qad'ah Fi Al Shari'ah Al Islami*” p. 28. Hereinafter will refer to as Al Koneen (1420 AH)

<sup>164</sup> - Ali Al Tarablsee (1393 H). *Mo'en Al Hokam Fema Yatrded Been Al Kasmeeen Men Al Ahkam*. p. 30.

<sup>165</sup> - Shams Al Deen Al Sarkasee. (1406 H). *Al Mabsut* Part 16. P. 108

The importance of reasoned judgment in Islamic law is that: (1) rendering judgment without reasons could lead to suspicion that the judge has judged the case in accordance with his whim or ignorance, without proof or cited evidence from the *Qur'an* or the *Sunnah*. (2) The requirement of reasoned judgment encourages the judge to make efforts to establish the legal and factual ruling for his judgment. (3) It reassures the condemned person and it also enables the condemned person to appeal against the judgment if he is not satisfied. (4) It makes the interpretation of the judgment easier and clarifies the authority of the judgment.<sup>166</sup>

As to the consequence of the judge's failure to provide reasons for his judgment, there are three opinions. (a) Some claim that such judgment must be reversed whether the lack of reasons concerns legal or factual matters and whether the judge is *Mujtahid* or non-*Mujtahid*.<sup>167</sup> (b) Other jurists differ between the *Mujtahid* and non-*Mujtahid* judge. They say that if the judge is a *Mujtahid* his judgment must be reversed if factual reasons are absent. If the judge is not *Mujtahid* his judgment must be reversed if he does not reveal the evidence that is considered as the ground for the judgment. But if he later provides reasons for his judgment when asked, his judgment should not be reversed. However, they state that reversal of judgment is not called for where legal reasons are absent<sup>168</sup>. (c) The judgment must be reversed if the judge does not mention the witnesses' names, if the judge is not commonly known as a just judge<sup>169</sup>. Moreover, if the court of the first instance fails to provide reasons for judgment, pursuant to the view of the jurists the court of appeal has the right to provide the reason for the judgment and hence the judgment will not be cancelled.<sup>170</sup> If there are no legal reasons for the judgment but it is correct with regard to its result, the court of appeal can provide the reason for the judgment and accept it. It also has the right, where reasons are inadequate, to make up the inadequacy and permit the decision. Judge Ibn Koneen states that this rule is also applicable in the case of inadequate factual reasons. If the judgment is subject to reversal as a consequence of lack of

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<sup>166</sup> - Muhammad Al Buker (1408 AH) "*Al Soltah Al Qud'ah Wa Shakseet Al Qadee Fi Al Nedam Al Islami*" p.266

<sup>167</sup> - Judges in Islamic law are divided into two kinds: *Mujtahid* and non-*Mujtahid* (*mogled*). The former means that he has the qualification to extract new rules and apply them to new cases from the existing principles. The latter simply means a judge who does not have such qualification. Most current judges are within the second type.

<sup>168</sup> - Muhammad bin Abee Al Abas Ahmad Al Ramlee (1413H). *Nehaet AL Muhtaj Ala Sharh Al Manhaj* Part 8 P. 259

<sup>169</sup> - Abraheem bin Ali Al Malekee (1986). *Tabseet Al Hokam* Part 1P. 97&98

<sup>170</sup> - Ali bin Abdulkafee Al Sobkee (1356 H). *Fatawa Al Sobkee*. part 2 p. 78



reasons the judgment can be reasoned and permitted provided that the outcome of the judgment is correct.<sup>171</sup>

In addition there is the question of whether, if the appellate court decides to reverse the judgment of the court of first instance, it is under obligation to provide reasons for its reversal or not. Jurists disagree about the issue. (1) The Al Hanafi School states that the judge is not obliged to state his reason if he reverses a judgment rendered by another person, because the decision of the reversal judge must be assumed correct<sup>172</sup>. (2) The Al Maliki School argues that the reversal judge must provide reasons for his decision. The judge who reversed the judgment must reveal the reason for his decision: whether for example because it contradicts Islamic law or because the facts have not been exclusively proved. If he reverses the judgment without stating the reason for such reversal and if he refuses to give reasons, his decision will be void.<sup>173</sup> (3) The Al Shafi'i and Al Hanbali schools state that the judge should provide reasons if he reverses the decision of another judge. If he does not reason his judgment and if he refuses to do so his reversal will not be accepted.<sup>174</sup>

## Section Two Saudi law

Before examining the accused's right to a reasoned judgment it is important to remember that the European Court of Human Rights is of the opinion that the national courts have the ultimate discretion to organize the content and form of the judicial judgment. However, they must state precisely the grounds for their judgment to enable the accused to establish his appeal according to the reasons given.<sup>175</sup> A court is obliged to provide a detailed answer only to fundamental questions.<sup>176</sup>

In Saudi Arabia similarly the aim of requiring the judgment to be reasoned is to enable parties to scrutinize the outcome of the judgment, and to enable them to contest the judgment before the court of appeal. Moreover, it enables the court of appeal to exercise its function when considering the appeal<sup>177</sup>.

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<sup>171</sup> - Al Koneen (1420 AH) p. 116,117&118

<sup>172</sup> - Al-Koneen (1420H). p130

<sup>173</sup> - Abraheem Bin Ali Al Malekee (1986). *Tabserat Al Hokam*; part 1p. 81

<sup>174</sup> - Abdulwhab Al Sobkee (1411 H). *Al Ashbah Wa Al Neda'er*. p. 495

<sup>175</sup> - *Hadjianastassiou v Greece* (1992) 16 E.H.R.R.219 Para 33

<sup>176</sup> - *Helle v. Finland* [1997] 26 E.H.R.R. 159 Para. 55

<sup>177</sup> - Ahmad Belal (1990) p.1062

In his comment on the importance of reasoned judgment the President of the Board of Grievances notes that by stating the reasons, the judge will clarify any ambiguity in the case and accordingly protect himself from suspicion of being arbitrary.<sup>178</sup>

Generally speaking, a judgment rendered by both the *Shari'ah* Courts and the Board of Grievances must contain the reasons upon which the judgment is based. In the following I will deal with reasoned judgment in each institution respectively. Article 35 of the Law of Judiciary provides that: "*Judgments shall include the grounds on which they were based and the legal authority thereof.*" As far as criminal cases are concerned, this article implies that the judgment must provide the grounds on which the judgment is based, that is the prohibited act, and the legal authority, namely the text which prohibits the act in question.

With regard to the content of the judgment, it must indicate the name of the rendering court, its date, names of the judges, names of litigants, the nature of the crime, a summary of claims or defences submitted by litigants and the supporting evidence and arguments, the stages of the action, the text of the judgment, reasons and legal bases therefore, and whether it was rendered unanimously or by majority vote.<sup>179</sup> Nevertheless, a dissenting judge must explain his dissent and the reasons for this in the case record, and the majority must explain its opinion by addressing the dissenter's opinion in the case record<sup>180</sup>. Accordingly, dissenting discussion will not be provided in the judgment itself but will rather appear only in the case record.

Even though the law does not provide precise criteria and conditions for reasoned judgment the judiciary before the *Shari'ah* courts has established the following criteria which courts are obliged to apply:

- 1- Reasoned judgment must be based only on the facts adduced before the court and recorded in its minutes. The factual reasons for judgment shall be derived from claims, responses and arguments adduced by litigants and recorded in the case file. Thus the judge cannot provide reasons that have not been adduced and discussed during the hearing. If one party invokes evidence that is recorded elsewhere, and if the judge sees it as significant evidence in the present case, the evidence invoked in this case must be written in the present case file. The judge may then use it as basis for his reasons.

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<sup>178</sup> - His letter No. 11 dated 1402 H. Mentioned in Belal, A P1062

<sup>179</sup> - Article 182 of the Law of Criminal Procedure

<sup>180</sup> - Article 34 of the Law of the Judiciary



- 2- The judge shall provide sufficient reasons for his judgment. This means that he must provide whatever factual and legal reasons he deems necessary to convince parties and others of its correctness. Jurist (*Shake*) Muhammad bin Abraham (the previous Chief Justice) reversed a judgment on the ground that the reasons provided were not sufficient. He states: "*The judge has convicted the driver, and he ruled that the driver was liable for payment of the blood money of the death person. However, he did not provide sufficient reasons for his judgment*".<sup>181</sup>
- 3- The reasons shall be consistent with each other and must not contradict either each other or the judgment. Consequently, it is the judge's duty when pronouncing judgment to clarify among his reasons what facts have been proved before him, and to refute any claim which contradicts them. He must also reply to and clarify any confusion.
- 4- The reasoning should be provided according to a logical sequence. His deduction (inference) shall lead from its premises to its conclusion (outcome), deriving the unknown facts from the known facts.
- 5- The reasoning should not be exaggerated. It should be presented in a balanced manner, which means that in his reasoning the judge may not focus on particular reasons and ignore others. For instance, the judge should not insist on the reasons for incrimination in *Ta'azir* punishment and at the same time ignore the aggravating or extenuating circumstances.
- 6- The reasoning shall be provided concisely, and in clear and precise Arabic language. The judge should also avoid using complicated or strange terminology.<sup>182</sup>

Even though the law does not provide a precise remedy if the court fails to provide reasons for its judgment, it seems that the court of appeal will reverse the judgment on the grounds of major deficiency in the reasoning of the judgment. For example, the judgment will be reversed if: (a) there is an error in the classification of the facts or if there is a failure in providing the right description of the prohibited act. (b) If there are no reasons at all. (c) If the judge fails to mention the conducts that constitute the

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<sup>181</sup> - Muhammad bin Qassim (1399 H) "*Fatwa Wa Rasa'il Eshaikh Muhammad bin Abraheem Al - Eshaikh*" Mecca, Saudi Arabia 8/ 158, 11/ 306

<sup>182</sup> - The discussion above is provided by a judge in General Court in Riyadh, Al Konan (1420 AH) p. 65- 76

crime in question. (d) If the reasons provided are vague. (e) If there is contradiction between the judgment and facts proved before the court during trial.<sup>183</sup>

Yet the obligation to provide reasons is limited to judicial judgments only. In other words, the judge is not obliged to provide reasons for other judicial functions. In practice, before the *Shari'ah* courts judges do not provide reasons for other decisions or orders because they are not deemed to be judicial judgments in which disputes are resolved. For example, judges do not provide reasons for the following decisions:

- (A) Cases concerning the proof or documentation (notarization) of particular facts such as issuing title deeds, registration of endowment, recording of marriage, probate, divorce, divorce at the instigation of the wife, death and determination of heirs. In such cases the court is not required to provide reasons because the reasons for such decisions are usually clearly provided in the case record.
- (B) Preventive judicial measures taken by the judge during the hearing such as banning the accused from travelling. Such an order does not need to be reasoned because such discretion is left entirely to the judge concerned. Abdullah Al Konan criticizes the above status, arguing that it is very important to provide grounds for such orders because they significantly affect the litigants' interest.<sup>184</sup>
- (C) Evidence procedures during the proceeding. During the trial the judge may order the litigants to prove their claims or he may appoint an expert such as an accountant. In this case the judge will not, as a general rule, provide the reason for such an order.
- (D) Administrative functions relevant to the case proceedings. An example might be one party's request for deferral of judgment; or if the court were asked to include in the case whoever would rightly have been a litigant when the case was filed. If the judge accepts or refuses such requests he is not obliged immediately to provide reasons for his decision, provided that such reasons are provided in the judgment.<sup>185</sup>

This approach applied by the *Shari'ah* Courts shows, speaking generally, a compliance with European standards of human rights. Pursuant to the European Court

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<sup>183</sup> - Dofeer, S (2000) p. 245

<sup>184</sup> - Al Konan (1420 AH) p. 62

<sup>185</sup> - Ibid, p. 61-64



of Human Rights a state enjoys a considerable freedom in the choice of appropriate means to ensure that its judicial system comply with right to fair trial. National courts are only required to indicate with sufficient clarity the grounds on which their decisions are based.<sup>186</sup>

As to the Board of Grievances, the law governing the Board generally speaking provides similar rules to those provided in the *Shari'ah* courts. The judgment must contain the reasons on which it was based and the legal basis for these.<sup>187</sup> In other words, criminal judgment must specify the prohibited act and provide the article which declares the illegality of the conduct in question. If judgment is issued by majority vote, the dissenting member must explain and give reasons for his dissent in the minutes of the proceedings, and the majority of the members must also explain their point of view in response to the dissent in the minutes of the proceedings.<sup>188</sup>

The form of the Board's decisions includes accurate reasons for its judgments. The form of judgment contains firstly the facts in respect of the case, secondly the legal and factual reasons, and thirdly the pronouncement of judgment. However, the law does not mention the deficiencies that might arise regarding the reasons for the judgment; therefore it does not provide a remedy if there is a deficiency. Yet the practice of the Board requires consistency between the judgment and reasons provided. The Board decided that: "*it is sufficient for a judgment to be based on reasons consistent with it.*"<sup>189</sup> In another case the Board has distinguished between major reasons and non-major reasons. The judge is not required to mention all reasons, but rather he has the right to answer only the crucial questions. This approach is consistent with case law that is established in the European Court of Human Rights. According the ECHR a court is obliged to provide a detailed answer only to fundamental questions. In *Helle v Finland*<sup>190</sup> the applicant in his second submission has contended that the fairness of the domestic proceedings was vitiated on account of the failure of the Cathedral Chapter and Supreme Administrative Court to articulate clearly the reasons which led them to reject his interpretation of the 1966 decision and the evidence which he had adduced to that end. The European Court notes in this context that while Article 6(1) obliges the courts to give reasons for their judgments,

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<sup>186</sup> - See for example, *Hadjianastassiou v. Greece* [1992] 16 E.H.R.R 219

<sup>187</sup> - Article 31 of Rules of Pleadings before the Board of Grievances

<sup>188</sup> - Article 30 of Rules of Pleadings before the Board of Grievances

<sup>189</sup> - Mentioned in Al Sobeel, O (1422 AH) "*Tassbeeb Al Ahkam Al Qada'eeh Fi Al Fiqh Wa Al Nedam*". Imam Muhammad bin Saud Islamic University. Riyadh. A master dissertation. p. 76

<sup>190</sup> - [1997] 26 E.H.R.R 159

it cannot be understood as requiring a detailed answer to every argument adduced by a litigant. The extent to which reasons must be given depends on the nature of the case.

In addition, the Circuit can summarize its reasons. The Board concluded that: *“even though the Circuit’s judgment is somehow summarized, it established its judgment for proper and adequate reasons. Therefore, the circuit judgment does not contain fundamental violation nor formal or procedural deficiencies that could result in its nullification.”*<sup>191</sup>

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<sup>191</sup> - Mentioned on Al Sobeel, O (1422 AH) p. 76&77



## CHAPTER 7

### The Accused's Rights after Criminal Judgment

#### Introduction:

Although judicial decisions should carry considerable weight, and must each be regarded as examples of justice, it is imperative to note that the deliberation of a judgment may be subject to errors. To guard against this possible contradiction, the accused must be provided with certain rights operative after the delivery of judgment. This chapter focuses on the rights of the accused after delivery of a criminal judgment. Topics included in this chapter are:

- 1- The right to appeal.
- 2- The right to compensation for miscarriage of justice.
- 3- The right not to be tried twice for the same offence.
- 4- The right to a pardon.
- 5- The right to stay of execution of punishment.
- 6- The right to repent.

Rights encompassed by items 1, 2, and 3 are mentioned in protocol no. 7 of the European Convention on Human Rights. However, the rights mentioned in items 4, 5, and 6, are not mentioned in the European Convention on Human Rights and possibly are similarly absent from all international instruments regarding human rights. Their presence here expresses the special properties of Islamic law.

This thesis concerns the rights of the accused during the trial stage. Some of the rights mentioned above appear to be more relevant to the convicted person than to the accused person, and may thus be thought not relevant to the trial stage. However, the fact is that these rights are also applicable to trial and investigation stages, because they are exercisable throughout the trial, during which the accused may enjoy them.

It should be mentioned here that my approach in treating each topic will vary. Those rights whereby Saudi Arabian law relies heavily on Islamic law will be dealt with in a single discussion, namely one confined to Islamic law. Where the law of Saudi Arabia needs separate discussion, other rights are handled in two separate sections.

Article 2 of Protocol No. 7 to the European Convention on Human Rights lays down that: "1- *Everyone convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal. The exercise of this right, including the grounds on which it may be exercised, shall be governed by law.* 2-*This right may be subject to exceptions in regard to offences of a minor character, as prescribed by law, or in cases in which the person concerned was tried in the first instance by the highest tribunal or was convicted following an appeal against acquittal.*"

Prior to protocol No. 7 the right to appeal is not mentioned in Art.6 as freestanding right, but is a way of putting right defects in the lower courts. In the following the right to appeal in Islamic law and the Saudi law are illustrated in turn.

### Section One Islamic law

The right to appeal in Islamic law is considered among contemporary writers to be the most controversial issue. Some argue that Islamic law prohibits the right to reverse a judgment, and hence that the Islamic state is unable to establish a system for appeal. It is often maintained that: "*The prevailing wisdom among Islamicists has maintained that there are no appellate structures in Islamic law, that the decision of a qadi is final and irrevocable, that a judge may not change his mind once he has rendered his decision, and that a judgment may not be reversed under any circumstances.*"<sup>1</sup> In the same vein Joseph Schacht states: "*The Kadi (judge) has the duty of giving just judgment, a duty which is enjoining in the Koran, but there is no means of reversing an unjust judgment because strict Islamic law does not recognize a stage of appeal; only the tribunal of mazalim can, in a way, be regarded as an appellate court.*"<sup>2</sup> Similarly Martin Shapiro in his article "*Islam and Appeal*" concludes that appeal is absent in Islamic law.<sup>3</sup>

However, David S. Powers responds to Shapiro's argument mentioned above by stating that: "*Shapiro has been poorly served by Islamicists scholarship on the nature and organization of the qadi's court and that quasi-appellate structures were more*

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<sup>1</sup> - David S. Powers "On Judicial Review in Islamic Law" *Law & Society Review*. Volume 25, number 2 (1992) 315

<sup>2</sup> -Schacht, J "*An Introduction to Islamic Law*" Clarendon Press. Oxford 1991. P. 189

<sup>3</sup> - Martin Shapiro "*Islam and Appeal*". *California Law Review*. Vol.68. March 1980. no. p. 350-381



*common in Muslim societies than he has thought.” He continues to explain that: “the decisions of qadis were in fact reversible, albeit under precisely defined conditions, and that Islamic legal theory provides for a distinctive, nonhierarchical form of appeal...My analysis suggests that hierarchical organization was a regular feature of Muslim polities and these polities appear to have developed a rudimentary, informal appellate structure in which the court of the chief qadi of the capital city served as a court of review for the decisions of local and provincial judges.”<sup>4</sup>*

Despite the fact that Islamic law does not divide courts into courts of first instance and courts of second or third instance as modern law does, and even though Islamic law does not distinguish between an appeal and judicial review, this cannot be understood to mean that Islamic law has no means to review and reverse a judicial decision. The idea of reversing a wrong judgment was applied clearly during and after the Prophet's era. Moreover, Islamic jurists provide detailed explanations to illustrate the concept.

The best way to show the fallacy of the above claim is by examining jurists' discussions in respect of the right to reverse a judgment. But before doing this I will explain the reasons why some writers mistakenly believe that the right to appeal is not permitted in Islamic law.

(a) Islamic law, as we have pointed out above, does not divide courts into courts of first instance and courts of second or third instance. This, however, cannot be regarded as a proper reason for concluding that Islamic law does not accept the right to appeal. In the past, cases were straightforward and tried before a single judge whose judgments were in most circumstances considered final. However, if one party did not accept the judgment he had the right to have the judgment reviewed either by the ruler himself or by a supreme judge. This view is supported by the fact that Saudi Arabia, though applying Islamic law very strictly, had since the enactment of the first judicial law established a High Judicial Authority to review judgments.

(b) Generally speaking, in Islamic law judicial judgments carry considerable weight. A just judgment is seen as God's judgment of the case, because it is assumed that the judge implements God's

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<sup>4</sup> - David S. Powers "On Judicial Review in Islamic Law" *Law & Society Review*. Volume 25, number 2 (1992) 315

instructions provided in the *Qur'an* and the *Sunnah*. Nevertheless, this understanding does not contradict the fact that the judge can commit errors in his judgment. So if it is revealed that his judgment is wrong, it must be reversed.

(c) In this regard Islamic law applies the rule that “*reasoning cannot be reversed by reasoning.*” Or judgment that is formed by an independent judgment cannot be reversed by another independent judgment.

This rule means that if the judge fails to find a text applicable to the case before him, he is entitled to derive his judgment from the general principles provided in the *Qur'an* or the *Sunnah*. If the judge reaches his judgment by this means his judgment cannot, according to this rule, be reversed, provided that it does not breach divine texts or general Islamic principles. The reasons provided for this rule are: (1) the judge has based his decision on human reasoning and everyone's views have equal status, no individual being able to claim the superiority of his opinion. (2) If a judgment can be reversed by a personal view, this could create instability. The reversed judgment can also be reversed by further human reasoning.

Yet, this rule should not be considered as a proper reason for claiming that Islamic law does not permit the right to appeal. Firstly, the rule mentioned above is excluded to judgment based on judicial reasoning. In fact the wrongness of the judgment might be due to its contradiction of the *Qur'an*, the *Sunnah*, Consensus, or Islamic jurisprudential principles, in which case it must be overturned. Secondly, the majority of jurists argue that this rule applies only to a *Mujtahid* judge. A judgment that is rendered by a judge, who does not have the qualification of a *Mujtahid* judge, will be reversed even if based on judicial reasoning. The *Mujtahid* judge has the right to follow his own reasoning to evaluate between different opinions and find a point of balance, whereas the non-*Mujtahid* judge must apply the teaching of his school.<sup>5</sup> Thirdly; most current judges, in fact, do not have the qualification of a *Mujtahid*, therefore, if the judge in Saudi Arabia, for instance, reaches his verdict by way of

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<sup>5</sup> - Abdullah Al Sodees (1407/1408). Naqd Al-Ahkam Al-Qada'eeh. Master Dissertation. Imam Muhammad bin Saud Islamic University. The High Judicial Institution. Riyadh, p. 111. Hereinafter will refer to as Al-Sodees (1407/1408)



reasoning, his finding shall be subject to review if its judgment is irrational, unreasonable<sup>6</sup> or on the ground of procedural impropriety<sup>7</sup>.

After this outline of the reasons that have led some writers to claim that Islamic law does not accept the idea of appeal, the right to reverse judgment in Islamic law will now be examined in the following sequence:

- 1- The legality of reversal of judgment
- 2- The legal status of reversal of judgment
- 3- Who has the right to reverse judgment
- 4- Grounds for reversing judgment.

Nonetheless, it is worth mentioning here that scholars of Islamic law have discussed the right to review a judgment without distinction between criminal and civil cases. Thus, discussion provided here covers both cases.

### **(1) The legality of reversing judgment**

The right to reverse a judicial decision in Islamic law is based on the *Qur'an*, the *Sunnah*, the conduct of the Prophet's companions, consensus, and analogy, as follows:

A- God said: "And (remember) Dawud (David) and Sulaiman (Solomon), when they gave judgment in the case of the field in which the sheep of certain people had pastured at night; and We were witness to their judgment. And We made Sulaiman (Solomon) to understand (the case); and to each of them We gave Hukm (right judgment of the affairs and Prophethood) and knowledge. And We subjected the mountains and the birds to glorify Our Praises along with Dawud (David). And it was We Who were the doer (of all these things)."<sup>8</sup>

In these two verses God reveals that the Prophets Dawud (David) and Sulaiman (Solomon) judged a single case in two stages. At first it was adjudicated by David but his judgment was wrong, therefore the Prophet Solomon reversed it and rendered a new decision.<sup>9</sup>

B- The Prophet says: "*There were two women, each of whom had a child with her. A wolf came and snatched away the child of one of them, and the other said, 'It snatched your child.' The first said, 'It snatched your child.' So they both carried the*

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<sup>6</sup> - In a number of cases before *Shari'ah* Courts judgments were reversed by the Appellate court on the ground that the punishments, though within the trial court discretion, are disproportionate. See for example the decision of the General Court in Riyadh No. Q/ 17/ 246 in 23/9/1419 H.

<sup>7</sup> - For example, if he does not provide reasoning to his judgment.

<sup>8</sup> - Surah 21. Al-Anbiya. Verses No. 78&79

<sup>9</sup> - Al Sodees (1407/1408) p. 81

case before Dawud who judged that the living child be given to the older lady. So both of them went to Sulaiman the son of Dawud and informed him (of the case). He said, 'bring me a knife to cut the child into two pieces and distribute it between them.' The younger lady said, 'May Allah be Merciful to you! Don't do that, for it is hers (i.e., the other woman's).' So he gave the child to the younger lady."<sup>10</sup>

It is claimed that the Prophet Muhammad told his companions the story without declaring an objection to the reversal provided in the story. Jurists therefore state that the Prophet accepted the idea of reversing a judicial decision.

(C) It is narrated that two tribes litigated before the judge Ali bin Abee Talap in a case known as Al Zebeeh. Ali told the litigants that he would decide the case, but if they did not accept the judgment they could review the case before the Prophet. When he rendered his judgment the litigants did not accept it, so they went to the Prophet. The Prophet upheld Ali's judgment.

In his comment on this story Ahmad Al Bahee argues that this is evidence that the judge's decision is subject to review. If it is correct it will be ratified but if it is wrong it will be reversed and the case will be reheard.<sup>11</sup>

(D) Omer (The Second Ruler after the death of the Prophet) prevented the implementation of any judgment rendered in serious crimes unless ratified by him.

(E) By consensus: All jurists agree on reversal of judgment if the latter contradicts the *Qur'an*, the *Sunnah* and Consensus.

(F) By analogy: As a general rule, if a representative breaks the agreement made between him and the principal, his act becomes illegal and null. Similarly the judge is a representative of the ruler and people, who delegate to him the power to deliver a just judgment. If he violates this power his judgment is void.

To sum up, it may be concluded that the right to appeal is permitted and was applied in early Islamic societies. The rulers established committees consisting of scholars to review judicial decisions.<sup>12</sup>

## **(2) The legal status of reversal of judgment**

The reversing of a judgment can be obligatory, prohibited, or permitted.

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<sup>10</sup> - The Translation of the Meanings of Summarized Sahih Muslim. Arabic- English. Volume 1. No. 1057

<sup>11</sup> - Ahmad Abdullmon'em Al Bahee (1965) "*Tareek Al Qada'a Fi Al Eslam*" p. 71

<sup>12</sup> -Wakee'a Muhammad bin Hean (1306 H) *Akbar Al Qada'a*. part 2 p. 96



- (a) Obligatory status: If the judgment contradicts the *Qur'an*, the *Sunnah*, or the consensus it must be reversed because such a decision is clearly wrong.<sup>13</sup>
- (b) Prohibited status: since the original status is that the judgment is not reversible without reasons, it is thus prohibited to quash a judgment if it is consistent with Islamic law.<sup>14</sup>
- (c) Permitted status: the reversing of a judgment will be permitted if the decision is correct with regard to Islamic law, but breaches the judge's jurisdiction. If the judge renders a judgment in respect of a case outside his power in terms of place, time, or type etc. this decision can be reversed or can be accepted by the ruler. If a judge is authorized to judge only civil cases or if he is authorized to handle cases only in one city, but breaches this by adjudicating criminal cases or crimes committed in another city, the ruler who limits the judge's power has the right to accept these judgments.<sup>15</sup>

### **(3) Who has the right to reverse judgment?**

The right to reverse judgment in Islamic law is confined to those who have jurisdiction to conduct a judicial function.

#### 1: The Ruler

The ruler of the Islamic state has the right to judge between people himself, and hence he also has the right to reverse a wrong judgment. It is assumed that the ruler should possess the qualifications and personal character required for a judge.<sup>16</sup> This right is conditional upon the ruler's fulfilling all conditions required for a judge. If he ceases to fulfil one of them, he becomes unqualified to reverse a judgment.

#### 2: Representatives of the Ruler:

If the ruler fails to fulfil one or more of the conditions required for judiciary function, or to conduct the judicial function himself owing to his other commitments, he will delegate such jurisdiction to one or more scholars who may review judicial decisions.<sup>17</sup>

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<sup>13</sup> - Al Muqhni (no year). Part 9 P. 56

<sup>14</sup> - Muhammad bin Abee Baker (no year) *E'lam Al Moge'en*. Part 4 P.224

<sup>15</sup> - Abdullah bin Omer Al Dabosee (no year). *Tasses Al Neda'er*. P 84

<sup>16</sup> - Ali Muhammad Al Samnanee (1404H). *Rodat Al Qudat Wa Tareek Al Najat*. part 1 p. 61

<sup>17</sup> - Al Sodees (1407/1408) p. 93

A post of Chief Justice was created during the Abbasid era and was authorized to review judgments.<sup>18</sup>

### 3: The Judge

The judge who renders the decision has the right to reverse his judgment if it appears to him later that his judgment was wrong, provided that he has a proper reason for doing so.<sup>19</sup>

However, his right to reverse his judgment is limited to decisions that are in contradiction with Islamic provisions. If however, he decides a case according to his judicial reasonings where there is no text to cover the case, he cannot reverse his own judgment in this later case. His new view will be applied only to new cases before him.<sup>20</sup>

It seems that the idea of reversal of judgment by the same judge who renders it is not familiar in secular law; however in Islamic society the judge will not hesitate to reverse his judgment if he discovers the wrongness of his judgment.<sup>21</sup>

#### **(4) Grounds for reversing the judgment**

The reasons for reversing a judgment can be divided into two categories as follows:

(a) Reasons related to the judge himself; and (b) reasons related to the judgment.

##### (a) Reasons related to the judge himself

Three factors may lead to reversal of the judgment:

1: unqualified status of the judge:

If the judge no longer fulfils one of the requirements, his judgments become null and subject to reversal. But the question that is asked is whether all judgments rendered by this judge must be reversed, or whether reversal is limited to his wrong judgments alone.

Jurists hold two views. Some argue that all his judgments must be reversed whether correct or not. However, others say that only his wrong decisions must be reversed, because justice is done by the correct judgments and there is no benefit from reversing them.<sup>22</sup>

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<sup>18</sup> - Hader Ahmad Daff Allah (1989) "*Darajat Al Taqadee Fi Al Fiqh Al Islami*" PhD Thesis Cairo University p. 101- 112. hereinafter will refer to as Hader Ahmad Daff Allah (1989)

<sup>19</sup> - Muhammad bin Abee Baker (no year). *E'lam Al Moge'en*. Part 1 P. 86

<sup>20</sup> - Ibid, p.111

<sup>21</sup> - Hader Ahmad Daff Allah ( 1989) p. 101- 112

<sup>22</sup> - Al Muqhni (no year) Part 9, P.58



## 2: Lack of Jurisdiction:

If the judge decides a case outside his jurisdiction his judgment is subject to reversal because a judge is restricted to exercising his function within the jurisdiction that is empowered to him by the state. If he breaches this with regard to place, time, or type his judgment is then subject to nullification.<sup>23</sup>

## 3: the existence of an impediment (obstruction)

For example if the judge is a relative of one party. This discussion appears in the chapter dealing with the right to an impartial court, and need not be repeated here.<sup>24</sup>

### (b) Reasons related to the judgment itself:

Four factors are suggested here as reasons for reversing the judgment:

First: if one of the conditions for passing the judgment is absent, it becomes subject to reversal.<sup>25</sup> For example, some cases require a complaint from the aggrieved party before starting the hearing; otherwise the case cannot be tried. For instance in the crime of murder, if the victim's family does not demand capital punishment, the judge cannot apply it. If he does so his judgment is null.

Second: if the judge misapprehends the facts, his judgment must be quashed. If the judge concludes his judgment by rendering the death penalty upon a person who has not killed, such judgment is null.<sup>26</sup> If the same judge or another judge discovers a critical fact after the decision is made he must reverse the judgment. For example, if his decision is based on testimony and after the judgment is delivered the witnesses withdraw their testimony. In this and similar circumstances the judgment must be reversed.

Third: if it is discovered after the judgment that it was based on the testimony of persons who lack the conditions required for giving testimony, for example if they are not just persons then the judgment must be quashed.<sup>27</sup>

Fourth: if the judge fails to apply the correct rule to the case before him. For instance, if he decides to apply the sentence of capital punishment to a person who commits the crime of defamation, the judgment must be quashed.<sup>28</sup>

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<sup>23</sup> - Muhammad bin Muhammad Al Garss (no year) "*Al Fawakh Al Badreeh*" P. 75

<sup>24</sup> - See chapter 6 of this thesis.

<sup>25</sup> - Al Muqhni (no year) Part 9 P. 50

<sup>26</sup> - Ahmad Al Gorafee (1347 H). "*Al Furuq*" Part 4 P.41

<sup>27</sup> - "Al Muqhni" (1981) Part 9 P 257

<sup>28</sup> - <sup>28</sup> - Al Sodees (1407-1408H) p. 132

In summary, grounds for reviewing judgments in Islamic jurisprudence, though formulated differently, are in a broad sense comparable to those provided in the English jurisprudence. Namely, illegality, irrationality, and procedural impropriety.<sup>29</sup>

## **Section Two Saudi law**

It may be essential for the comparison between the judicial system in Saudi Arabia and the European Convention on Human Rights in respect of the right to appeal, to reiterate at this stage the general scope of this right in the European Court of Human Rights.

In accordance with the Explanatory Report of Protocol No. 7, some Contracting States restrict the right to appeal to questions of law, while in other States parties it is allowed against facts as well as law. The Explanatory Report states "*Different rules govern review by a higher tribunal in the various member States of the Council of Europe. In some countries, such review is in certain cases limited to questions of law.... In others, there is a right to appeal against findings of facts as well as on the questions of law. The article leaves the modalities for the exercise of the right and the grounds on which it may be exercised to be determined by domestic law.*"

Article 6, generally speaking, requires a high level of review in relation to matters of law.<sup>30</sup> As to the fact article 6 requires a right to challenge findings of fact, but not necessary a full re-investigation of the facts, as an aspect of the right to a fair trial.<sup>31</sup>

It seems that the general scope of the right to appeal in civil cases, provided above, is also applicable to criminal cases. Provided that the trial court complies fully with article 6, the appellate court might not fully comply with these requirements. For example, the right to public hearing, or the right to present at hearing in criminal cases, can be restricted before the court of appeal if these rights are provided in the trial court. In *Kamasinski v Austria*<sup>32</sup> the applicant complained that he did not have a fair trial in criminal proceedings in Austria, and in particular the non-attendance of the defendant at the hearing on appeal against sentence and compensation order. The Court observes, "*Personal attendance of the defendant does not take on the same*

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<sup>29</sup> - John Alder (2002) p. 368

<sup>30</sup> - *Bryan v. The United Kingdom*. (1995) para. (Application No. 00019178/91);

<sup>31</sup> - See, *Bryan v. The United Kingdom*. (1995) para.40 (Application No. 00019178/91); and also *Chapman v. UK* (2001) (Application No. 00027238/95)

<sup>32</sup> - [1989] 13 E.H.R.R 36



*crucial significance in an appeal hearing as it does for the trial hearing. This is an area where the national authorities enjoy a margin of appreciation.”*

### **1: Shari’ah Courts:**

In 1927 the Saudi government established the first integral judicial law.<sup>33</sup> This law contained for the first time the idea of reversing a judicial decision. Article 5 of this law stated that a Committee for judicial Review would be established to supervise all courts and to review and if necessary reverses their judgments.

However, after 28 years a Royal Order was issued in 1374 H to cancel the right to review and reverse the judgment. This Order considered any judgment to be final and required it to be implemented immediately.

Although the Royal Order did not provide reasons for the cancellation of the idea of appeal, it seems to have been based on the jurisprudential rule mentioned above, namely “*reasoning cannot be reversed by reasoning*”<sup>34</sup>

But this status did not last for long. After only 6 years the right to appeal was reinstated by the establishment of a Committee to review judicial decisions consisting of senior scholars presided over by the Chief Justice.<sup>35</sup>

As to the current status the Law of Criminal Procedure clearly confirms the right to appeal in criminal cases. Article 9 declares: “*Criminal judgments shall be appealable by either the convicted person or the prosecutor.*”<sup>36</sup> Thus, a convicted person is entitled to challenge both his conviction as well as sentence before the court of appeal. This may differ from the European standards where the right of a convicted person to appeal may be restricted to a review of his sentence.<sup>37</sup> Interestingly, the Saudi law allows the accused to have his conviction reviewed by the Appellate Court even if he freely admitted his guilt before the trial court.

Before the issue of the Law of Criminal Procedure the right to appeal was not guaranteed for all offences. Minor offences were not appealable. This status was subject to serious criticism, because a conviction whether related to a serious or non-serious crime causes damage to the convicted person.<sup>38</sup> Therefore Article 9, whereby

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<sup>33</sup> - The law was published in the Official News paper “Om Al Kora” issue No. 140 date 19/8/1927

<sup>34</sup> - Muhammad Abraheem (1998) p.18

<sup>35</sup> - Abdulaziz Abdullah Al Eshaikh ( 1990) p.130 & 131

<sup>36</sup> - The Official Translation Division has used the term “sentences”. But I prefer to use the terms “Criminal Judgments” instead, because the word sentence might imply in legal sense that an appeal is only limited to sentences and not permitted to convictions.

<sup>37</sup> - Explanatory Report of Protocol No 7

<sup>38</sup> - Muhammad Abraheem ( 1998) p. 117

all crimes are now subject to appeal, seems to be a response to the above criticism. As a result, unlike the standard before the European Court, the right to appeal in criminal cases before the *Shari'ah* courts has no exceptions at all. Pursuant to Art.2 of Protocol No 7 to the European Convention the right to appeal in criminal cases can be restricted on the following grounds:

(a) Offences of a minor character. (b) In cases in which the person concerned has been tried in the first instance by the highest tribunal.<sup>39</sup> (c) Where the accused was convicted following an appeal against acquittal.<sup>40</sup>

A careful speculation of the last two exceptions shows them as groundless exceptions. Adjudicating the accused for the first time before the highest court will be resulted in losing the opportunity to examine his case before two or more judicial bodies. Put differently, if the accused is tried before a court of first instance, he is then given two probabilities. Either he will be convicted or acquitted. If he is convicted he has another chance to be acquitted before the court of appeal. So he is given in reality two opportunities to challenge his conviction. However, if he is tried for the first time before the court of appeal, he will be given only one chance to challenge the accusation against him. By this way the appeal runs counter to its original objective. Studying a case before two independent judicial bodies wakens the possibility of having a wrong judgment. The same criticism could be said to the third exception.

As to the number of judges in the Appellate Courts, the criminal panels consist of five judges to review sentences of death, stoning, amputation or *Qisas* (retaliatory punishment) in cases other than death. For other cases, the criminal panels will consist of three judges.<sup>41</sup>

Most criminal cases will be considered final after being ratified by the Appellate Court. However, sentences of death, stoning, amputation, or *Qisas* in cases other than death that have been affirmed by the Appellate court, are not final unless confirmed by the Permanent Panel of the Supreme Judicial Council.<sup>42</sup> If the Council does not confirm judgment in this case, it should be reversed and the case will be remanded for reconsideration by other judges.<sup>43</sup>

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<sup>39</sup> - For example, by virtue of his status as a Minister, judge or because of the nature of the offence.

<sup>40</sup> - Explanatory Report.

<sup>41</sup> - Article 10 of the Law of Criminal Procedure.

<sup>42</sup> - Article 11 of the Law of Criminal Procedure.

<sup>43</sup> - Article 12 of the Law of Criminal Procedure.



According to the Law of Criminal Procedure there are two ways to object to judgment, namely appeal and reconsideration. The latter was only recently introduced for the first time in the history of the judicial system in Saudi Arabia. The Appellate Court was familiar only with appeal.

The main difference between the two options is that the Appellate Court has the jurisdiction to review the appeal, whereas the trial court is empowered to handle reconsideration.

In the following these two approaches will be explained, but before doing so an attempt must be made to answer the question whether the Appellate Court deals with matters of law and fact or with matters of law only.

The majority argues that the Appellate Court in Saudi Arabia can only handle matters of law. They offer the following grounds for their view. (a) The Court of Appeal does not rehear cases comprehensively. (b) It does not call parties to attend before it, but rather it decides the case according to papers (case-file). (c) It considers the case in camera.<sup>44</sup>

(d) This view can be also advanced by reference to articles 201 and 202 of the Law of Criminal Procedures. Article 201 provides: "*A judgment shall be reversed if it contradicts the text of the Qur'an or Sunnah or the consensus of Muslim jurists*" and article 202 states that: "*A judgment shall be reversed if it violates the laws concerning the competence of the court with respect to its composition or jurisdiction to review the case. The Appellate Court shall designate the competent court and refer the case to it.*" All circumstances mentioned above concern matters of law.

A careful study of the case in Saudi Arabia, however, can confirm that the Court of Appeal has the power to deal with matters of both law and fact. The following points support the view:

1- Although articles 201 and 202 mentioned above are articulated as such, this does not mean that the legislature's intention was to confine the appeal to the above grounds, but rather the purpose was to mention circumstances where the decision is invalid by law, and to place the court of Appeal under no discretion to determine otherwise.

2- As some writes put it correctly, the law does not confine the Appellate Court to matters of law, but rather gives it the right to review judgment generally. Article 199

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<sup>44</sup> - Muhammad. M. Abraheem (1998) p. 28 & 217-218

of the same law states: “*The Appellate Court shall dispose of the subject matter of the appeal on the basis of the evidence included in the file of the case....*” This article does not exclude matters of fact. An appeal is an inherent part of the judiciary, and unless limited by statute an appeal court has general jurisdiction.<sup>45</sup> This interpretation is similar to the common law approach which states that a court of appeal has general jurisdiction unless restricted by law.

3- Pursuant to article 200 of the same law, the Appellate Court may permit the litigants to submit new evidence to support the grounds of their appeal. Consequently allowing parties to adduce new evidence before the Appellate Court is a crucial point in respect of the controversy between writers. Considering evidence is no doubt a matter of fact.

4- Finally and more significantly, the actual practice of the Court of Appeal confirms that it interprets the law in a way that support our view. Examining its approaches when handling cases reveals that it deals with both matters. Two cases are sufficient examples in this regard. The first case<sup>46</sup> was that a person was accused of shooting with an official (governmental) pistol but he did not cause any physical harm. Before the Summary Court in Riyadh he was convicted and sentenced to imprisonment of 9 months, and 300 hundreds lashes. The Court of Appeal quashed the judgment on the ground that the punishment, though within the trial court discretion, is disproportionate with the offence committed.

Now to understand this one should know that the trial court in this kind of crimes (*Ta'azir*) has, in principle, unlimited discretion to decide the appropriate punishment. In the above case the trial court did not violate any of the grounds provided in the law. Namely the *Qur'an*, the *Sunnah*, or Consensus nor did it violate the laws concerning the competence of the court with respect to its composition or jurisdiction to review the case. And yet, as has been seen the Court of appeal reversed the judgment.

In the second case,<sup>47</sup> the accused was prosecuted for committing robbery under arms, but the Summary Court in Riyadh in its decision No 164/15 in 12/7/1421 H ruled that the accusation is not proved due to lack of sufficient evidence. The Court of Appeal after reassessing the sufficiency of the evidence decided to quash the judgment.

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<sup>45</sup> - Amad Al Najar (1997) p. 427 & 434

<sup>46</sup> - decision no. Q/17/267 dated on 15/11/1419 H. mentioned in Muhammad Al Shammary (2001) “*Naqd Al Ahkam Al Jina'i Fi Al Shari'ah Al Islami Wa Tatbegatha Fi Al Qada'a Al Saudi*”. Master Dissertation. Naif Arab Academic for Security Sciences. P.217

<sup>47</sup> - Mentioned in Muhammad Al Shammary (2001) p..229



Again, in this case the court of appeal reconsidered the evidence and replaced its own view against the trial court's view.

Therefore, one can conclude that Court of Appeal in Saudi Arabia deals with matters of both fact and law.

With respect to the period within which the appeal must be made, an appeal against a judgment should be within thirty days from the date of receipt of a copy of the judgment. Following the reading of the judgment, the court will designate a date for the receipt of a copy of the judgment, within a maximum period of ten days from the date of reading the judgment, and enter the same in the case record.<sup>48</sup>

In addition, the appellant is required to sign an acknowledgement of receipt. If he fails to appear on the date appointed for receiving a copy of judgment, the copy will, on the same date, be deposited in the file of the case, and a note to that effect is entered into the record pursuant to a judge's order. The thirty-day period specified for the appeal starts running on the deposit date.

If the convicted person is in prison, the authorities in charge of the prisoner are under obligation to bring him at the prescribed time to receive a copy of the judgment, and he must be allowed to submit his appeal within the designated time.<sup>49</sup>

If the appellant fails to file his memorandum of appeal within the period mentioned above, the trial court will, within forty-five days from the date of pronouncing the judgment, file that judgment with the Appellate Court.

By way of exception, if the judgment involves a death sentence, stoning, amputation or *Qisas* (not involving death), it must be appealed against even if no litigant so requests, and the court will file its judgment with the Appellate Court within the above-mentioned period.<sup>50</sup>

These punishments are severe, therefore the law correctly insists on reviewing them regardless of the accused's attitude. The aim is to minimize the possibility of rendering a wrong judgment in these punishments.

With regard to procedures for appeal, the appeal memorandum should be filed with the trial court, stating the judgment appealed against, its date, and the grounds for that

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<sup>48</sup> - Article 194 of the Law Of Criminal Procedure

<sup>49</sup> - Article 194 of the Law Of Criminal Procedure

<sup>50</sup> -Article 195 of the Law Of Criminal Procedure

judgment, the appellant's requests, and reasons supporting his appeal.<sup>51</sup> This is a matter of public interest, thus it cannot be violated even by the agreement of the litigants.<sup>52</sup>

The purpose of requiring the appeal to be filed to the trial court rather than to the Appellate Court is to apply the principle of offering the judge who rendered the judgment a chance to reverse it, if the appeal memorandum reveals to him that there has been an error in his judgment. This principle finds its basis in Islamic jurisprudence, as mentioned above.<sup>53</sup>

In contrast to the hearing before the trial court where the case can be lodged orally, the appeal must be provided in a written form.

Moreover, pursuant to article 197 of the Law of Criminal Procedure, it is the duty of the court rendering the judgment appealed against to review the memorandum of appeal with respect to grounds for the appeal without further hearings, unless otherwise necessary. An examination of the judgment must be limited to the grounds and reasons provided for the objection. The jurisdiction to reverse a judgment is not unlimited, but rather it is restricted to grounds provided in the memorandum. Consequently, if the grounds contained in the memorandum are rejected, the trial judge has no right to reverse the judgment on other grounds that are not provided in the memorandum, as this could be regarded as a violation of the right to an impartial court.<sup>54</sup>

It should be emphasised here that the judge in the trial court, in this case, is obliged to review the memorandum adduced by the convicted person. This entails that he should discuss and examine the reasons provided in the appeal, and that his responses to these must be recorded in the judgment.<sup>55</sup>

If the Appellate Court discovers that the judge in the trial court did not review the memorandum and has forwarded it without a review, the Appellate Court should send the case back to the trial court to make good the omission. In its decision No. 956 in 1412 H the Appellate Court states: "*it is decided that the case file No. (13504) will be sent back to the judge of the trial court to review the appeal memorandum*".

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<sup>51</sup> - Article 196 of the Law Of Criminal Procedure

<sup>52</sup> - Muhammad Abraheem (1998) p. 200&201

<sup>53</sup> - Ibid, p. 23

<sup>54</sup> - Ibid, p. 205&206

<sup>55</sup> - Ibid, p. 197



Furthermore, if it appears to the court that there is reason for amending that judgment, it must be amended accordingly. Otherwise, the court will uphold its judgment and refer it with all the documents to the Appellate Court. If the judgment is amended, this should be communicated to the appellant and to the other litigants and, in that case, will be subject to the applicable rules of procedure.<sup>56</sup>

If the judge in the trial court amends his judgment and renders a new decision, he must record it in the case in the litigant's absence. He should then designate a session for a public hearing. The litigants will be called to be informed of the new decision. If one party at the hearing objects to the new judgment, the judge of the case cannot amend his new judgment. He must send it to the Appellate Court. In that case, the new judgment will be subject to the applicable rules of procedure. That is, the contesting party will receive the judgment, and his memorandum of objection will be adduced to the same judge; however, the judgment will be recorded with the words "*this is a second objection*". The aim of these words is to prevent the judge from reviewing the memorandum for a second time. Needless to say, if litigants accept the new judgment it becomes final.<sup>57</sup>

Prior to reviewing the subject matter, the Appellate Court will first consider the formalities of the appeal, and whether the appellant is entitled to file an appeal, and then decides whether to accept or reject the appeal on formal grounds. If the form of the appeal is rejected the court will issue a separate decision to that effect.<sup>58</sup>

As to the right to public hearing before the court of appeal, Article 199 of the Law of Criminal Procedure provides: "*The Appellate court shall dispose of the subject matter of the appeal on the basis of the evidence included in the file case. Litigants shall not appear before the court, unless it decides otherwise*".

If the Appellate Court accepts the form and substance of the appeal, it must remand the judgment to the trial court for reconsideration on the basis of the comments supporting the decision of the Appellate Court. If the trial court is satisfied with those comments, it will amend the judgment accordingly. But, if the trial court is not satisfied and maintains its previous judgment, it should answer the comments raised by the Appellate Court.<sup>59</sup>

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<sup>56</sup> - Article 197 of the Law Of Criminal Procedure

<sup>57</sup> - Muhammad Abraheem ( 1998) p. 210- 212

<sup>58</sup> - Article 198 of the Law Of Criminal Procedure

<sup>59</sup> - Article 203 of the Law Of Criminal Procedure

The Appellate Court is obliged to give its comments on the judgment referred to it with or without an appeal.<sup>60</sup>

If the Appellate Court is satisfied with the trial court's responses to the comments it has made, it will confirm the judgment. If not, it will reverse the appeal in whole or in part, as the case may be. Moreover, it should state the grounds for its decision. It must then remand the case to another court for the rendering of judgment in accordance with the law. If the appeal judgment is complete in every respect, and if urgent action is deemed necessary, the Appellate Court may render judgment on the subject matter. Whenever the Appellate Court renders a judgment, such judgment will be rendered in the presence of the litigants and its judgment must be final, unless it is a death sentence, stoning, amputation or *Qisas* (other than death), in which case it must be referred to the Supreme Judicial Council.<sup>61</sup>

We turn now to the second method provided for the challenging of a judgment, namely reconsidering the judgment before the same trial court.

The law designates particular circumstances as grounds for objecting to the judicial decision; the application of this approach therefore strictly excludes all but the designated circumstances.

Article 206 of the Law of Criminal Procedure provides: "*Any of the litigants may apply for reconsideration of any final judgment imposing punishment, in the following circumstances:*

- a. *If an accused has been convicted of murder, but the person alleged to have been murdered turns out to be alive.*
- b. *If one person has been convicted of having committed a certain act, but another person has also been convicted of having committed the same act, thus resulting in contradiction leading to the conclusion that one of the two persons should be acquitted.*
- c. *If the judgment has been based on evidence that turns out to be forged, or on testimony that turns out to be perjurious.*

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<sup>60</sup> - Article 204 of the Law Of Criminal Procedure

<sup>61</sup> - Article 205 of the Law Of Criminal Procedure



- d. *If the judgment has been based on a previous judgment that was nullified.*
- e. *If after judgment, new evidence or facts that were unknown at the time of the trial appeared, which could have led to the acquittal of the accused or the mitigation of punishment.”*

Despite the fact that the above article uses the word “litigants”, this method of challenging judgment is designated only to the interest of the convicted person. This interpretation is clearly supported by the special circumstances provided. It seems that the law uses the term “litigants” instead of the term “convicted person” in order to give the prosecution the right to prove that the previous prosecution and conviction were wrong, and to suggest the correction of this mistake.

As to the procedure for requesting reconsideration, a petition must be submitted to the trial court which will specify the judgment to be reconsidered and the grounds for the request. The Court of Appeal thus has nothing to do with the reconsideration.<sup>62</sup>

The trial court considers the petition for reconsideration and will first decide whether the petition is satisfactory in formal terms. If the petition is accepted, the court will designate a date for considering its substance, and will notify the parties accordingly.<sup>63</sup>

Nevertheless, the court’s acceptance of the formal aspect of a petition for reconsideration of a decision should not lead to the stay of execution of the judgment, unless the court orders otherwise. But if the judgment involves a corporal punishment, the execution must be stayed.<sup>64</sup>

In addition, if a petition for the reconsideration of a decision is rejected, any new petition based on the same facts will not be filed.<sup>65</sup>

Furthermore, objections to judgments rendered on the subject matter, pursuant to a petition for the reconsideration, can be made before the Appellate Court, unless of course, this judgment was rendered by the Appellate Court.<sup>66</sup>

In conclusion, as far as compliance with European standards of human rights in respect of the right to appeal in criminal case is concerned, it might be argued that

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<sup>62</sup> - Article 207 of the Law Of Criminal Procedure

<sup>63</sup> - Article 208 of the Law of Criminal Procedure

<sup>64</sup> - Article 209 of the Law of Criminal Procedure

<sup>65</sup> - Article 211 of the Law of Criminal Procedure

<sup>66</sup> - Article 212 of the Law of Criminal Procedure

regardless of the fact that it is not held in public, and parties are not allowed to attend the hearing save if it is necessary, the Appellate Court in Saudi Arabia complies with the standards required by the European Court because the ordinary trial courts in Saudi Arabia, generally speaking, satisfy the requirement of a fair trial as required by art 6 of the European Convention. When assessing whether a contracting State complies with Convention requirements, the European Court considers the overall proceedings of the case at hand. Deficiencies in one stage may be compensated in another. Provided that the trial court complies fully with article 6, the appellate court, according to the ECHR, might not fully comply with these requirements. For example, the right to public hearing, or the right to be present at hearing in criminal cases, can be restricted before the court of appeal if these rights are provided in the trial court. In *Kamasinski v Austria*<sup>67</sup> the applicant complained that he did not have a fair trial in criminal proceedings in Austria, and in particular the non-attendance of the defendant at the hearing on appeal against sentence and compensation order. The European Court observes, "*Personal attendance of the defendant does not take on the same crucial significance in an appeal hearing as it does for the trial hearing. This is an area where the national authorities enjoy a margin of appreciation.*" The Court also ruled in a different case that: "*The public character of judicial proceedings protects litigants against the administration of justice in secret with no public scrutiny and maintains confidence in the courts. Nevertheless, in applying the publicity requirements of Article 6 (1) account must be taken of the entirety of the proceedings conducted in the domestic legal order. In the present case the Federal Court of Justice, which solely determines issues of law, was empowered by German law to proceed without a hearing only if it dismissed the appeal and made final the order of the lower court of appeal. The proceedings of the lower court complied fully with publicity requirements of Article 6.*"<sup>68</sup>

## **2: The Board of Grievances**

Article 6 of the Board of Grievances Statute states: "*The Board shall exercise its power through Circuits. Their Numbers, formation and jurisdiction shall be designated by a decision of the President of the Board.*"

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<sup>67</sup> - [1989] 13 E.H.R.R. 36

<sup>68</sup> - *Axen v. Germany* (1984) 6 EHRR 195



Pursuant to the above article the President of the Board issued a number of administrative decisions. Decision no. 8 in 11/8/ 1403 H established the Scrutinizing Committee in Riyadh. This Committee is empowered to review the decisions rendered by the Circuits. It consists of three judges.<sup>69</sup>

There are two methods of objection to judgment rendered by the Circuits in the Board. Namely: (a) an appeal, and (b) reconsideration.

As to an appeal, again the Scrutinizing Circuit deals with matters of both facts and law. There is nothing in the law that limits its jurisdiction to matters of law. In addition, the actual practice of the Board confirms that it has power to handle both matters.

After rendering the judgment the criminal circuit should inform the convicted person of his right to demand scrutiny of the judgment within 30 days, to run from the date of delivery of the judgment. If he fails to demand scrutiny of the judgment within the said time limit, the judgment is final.<sup>70</sup>

However, the criminal circuit may be convinced that the accused's failure to submit his objection within the time limit is due to *force majeure*. In this case an exception may be made and the late request can be accepted. The Board decides that: "*the reason submitted by the accused, as an excuse for his failure to object to the judgment within the time limit, is well-founded, and acceptable. Therefore, his late objection will be formally accepted*".<sup>71</sup>

The Scrutinizing Committee must either confirm or reverse the judgment. If the judgment is reversed the Scrutinizing Committee has two alternatives. It may return the case to the Criminal Circuit, or hear the case itself. If the judgment is returned to the criminal circuit, this body might insist on its view. So if the Scrutinizing Committee is not satisfied with the point of view provided by the circuit, it will hear the case.<sup>72</sup>

Where the Scrutinizing Committee decides to hear the case, it must allow the attendance of litigants. Judgments rendered by the Scrutinizing Committee are final.<sup>73</sup>

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<sup>69</sup> - Article 1 of the Decision No. 11 in 1406 H

<sup>70</sup> - Article 31 of the Rules of Pleadings before the Board of Grievances

<sup>71</sup> - Decision No. 453/T/1414 H. The Scrutinizing Committee.

<sup>72</sup> - Article 36 of the Rules of Pleadings before the Board of Grievances

<sup>73</sup> - Article 36 of the Rules of Pleadings before the Board of Grievances

Moreover, if the scrutiny is requested by the public prosecution, the Scrutinizing Committee will confirm, cancel or amend the judgment. However, if the decision is not in favour of the accused, the Committee must hear his statements prior to deciding the amendment of the judgment. If the application emanated from the convicted person only, the Scrutinizing Committee must only confirm or amend the judgment in his favour.<sup>74</sup>

The second method of objection to a judgment is, as mentioned, reconsideration. If, after a final decision has been made, fresh facts have been revealed or persons not known at the time of the trial have been produced, either of which may tend to acquit the convicted person, either the latter or the prosecution has the right to apply to the President of the Board to reconsider the final judgments.

In a case before the Board, the accused was finally convicted. Nevertheless, he submitted a petition requiring a reconsideration of his conviction because the person who informed the police about the crime withdrew his statement and admitted that his previous accusation was false. This new fact was supported by testimonies. Thus, the Board decided that the convicted person was not guilty.<sup>75</sup>

As to the application for reconsideration, it must comprise the judgment and the causes for reconsideration,<sup>76</sup> and should be filed within 30 days of the date of becoming aware of the new facts.

Similar to the case before the *Shari'ah* Court, the right of a convicted person to have his conviction and sentence reviewed by a higher tribunal is provided in the Board in a manner consistent, in general, with European Court approach.

## **Part II                      The Right to Compensation for Miscarriage of Justice**

This right is guaranteed by Article 3 of Protocol No. 7 to the European Convention on Human Rights which provides: "*When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed, or he has been pardoned, on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to*

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<sup>74</sup> - Article 37 of the Rules of Pleadings before the Board of Grievances

<sup>75</sup> - Decision No. 105/T/3 1416 H The Scrutinizing Committee

<sup>76</sup> - Article 42 of the Rules of Pleadings before the Board of Grievances



*the law or the practice of the state concerned, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him."*

According to the Explanatory Report this article requires three conditions: (1) the person concerned must be convicted of a criminal offence by a final decision, (2) the ground for reversing the conviction should be based on new facts that show conclusively that there has been a miscarriage of justice, and (3) the non-disclosure of facts were not attributable totally or partially to the convicted person.

In the following an analysis of the subject-matter is undertaken in Islamic law and the Saudi law respectively. However, before approaching this task it is important to mention that Article 3 of Protocol No. 7 of the European Convention applies this right where the damage is caused by a final judgment. Thus, it does not redress damages that could occur during the investigation. Nonetheless, discussion demonstrated in the following includes damages caused during both investigation as well as trial stages, for Islamic law does not make distinction between these stages.

### **Section One Islamic law**

Early Islamic jurists discussed the idea of compensation in general. They also discussed the idea of compensation where a judge commits a mistake in his judgment. This discussion encompasses both criminal and civil cases; therefore it is applicable to right of the accused to be compensated for any damage occurring to him during the investigation or the trial stages.

Two main topics will be examined here. First: the idea of compensation in Islamic law. Second: the idea of compensation if the judge commits a mistake in his judgment.

#### **(A) Compensation in Islamic law**

It should be noted here that this subject is manifold, and for full examination would require more than a single thesis. The present discussion must therefore be restricted to the main aspects of the topic.

Early Islamic jurists had discussed compensation under the heading (*Al-Daman*): warranty against different instances, such as destruction of or damage to money, human life, and parts of the body.

In general jurists are in agreement about the legality of compensation to protect people's money and life. They base their view on the rule of "*Al Darrer Yuzal*". This rule is composed of two words. The first is "*Al Darrer*" meaning 'damage', and the

second word "*Yuzal*" means 'be removed'. In combination, the words mean that any damage must be removed. The instigator of the damage must remove or cancel the damage he caused. The only means of removing the damage is to compensate the damaged person. The victim has no right to cause similar damage to the instigator, as a kind of retaliation. If he does, both the instigator and the damaged person become responsible for compensating each other according to the damage that each has caused the other.<sup>77</sup>

The accused might be adversely affected during the investigation and the trial. In the jurists' view, damage occurring to the accused is of three types: (1) incorporeal (moral) damage, (2) corporal damage, and (3) financial damage. In the following discussion, these subjects are approached respectively.

(1) Incorporeal (moral) damage: it goes without saying that directing an accusation towards a person is very harmful to his reputation and his status in society. If the accusation is not proved this damage should be "removed". Many stories have been told in which the Prophet declared the discovery of an accused's innocence to the public, and asked the accused's forgiveness.<sup>78</sup>

Yet the right to financial compensation for moral damage is a matter of controversy among jurists. Some argue that there is no financial compensation under Islamic law for moral damage, because the latter cannot be evaluated financially.<sup>79</sup> Others, however, disagree with this argument, because the Prophet's companions compensated for moral damage.<sup>80</sup>

(2) Corporal damage: if the accused is tortured, he is entitled to financial compensation.<sup>81</sup> If the accused needs medical treatment owing to his torture he will be compensated. Jurists say if the corporal torture leads to the death of the accused, the victim's family must be compensated. If the accused, while attempting to escape torture, falls from a high position and dies as a result, his family will be compensated.<sup>82</sup>

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<sup>77</sup> - Ahmad Suleiman Ahmad (1985) "*Daman Al Motlafat Fi Al Fiqh Al Islami*". PhD Thesis. Al Zhar University. Egypt p. 38 & Al Sa'ad Kamal (1986) "*Gaza't Al Togeef Geer Al Muberer*" The First Scientific Symposium in the Arabic Centre for security and Training Studies. 22-24 September

<sup>78</sup> - Bandar Al Swailam (1987) p. 380&381

<sup>79</sup> - Mustafa Ahmad Al Zarka (1988) "*Al Fa'l Al Dar Wa Al Daman Fih*" p. 124

<sup>80</sup> - Muhammad R'fat Sa'ad (1983) "*Al Motahem Wa Huquqh Fi Al Shari'ah Al Islami*" p. 51

<sup>81</sup> - Bandar Al Swailam(1987) p. 382

<sup>82</sup> - Abdulrahman Abdulaziz Al Othman (1993) Part 2 p. 497



(3) Financial damage: the accusation might damage the accused financially; for example, detention will prevent him from exercising his commercial activities. It might also result in loss of employment opportunities.

Early Islamic jurists illustrated this kind of damage by stating that if the judge should prevent a person from exercising his business by detaining him, whereby his goods were spoiled (impaired), the accused must be compensated. They also said that if the judge detained a shepherd, the latter would be compensated if the sheep died.<sup>83</sup>

Al Swailam argues that in such situations Islamic law entitles the accused to compensation, because after compensation an innocent accused feels that the damage that was inflicted upon him is removed.<sup>84</sup>

#### **(B) The right to compensation owing to judge's error**

The idea of compensating the accused for damages caused to him by the judge's mistake was covered by jurists during their discussion of the judge's responsibility for his mistakes.

Jurists agree that the judge is not liable to make compensation for his non-intentional mistakes, but he will be liable if he deliberately delivers an unjust judgment. It is argued that in this latter case he deserves a criminal penalty, disciplinary action, and to make civil compensation.

As to his non-intentional mistakes, jurists distinguished between two situations:

First: if the judge renders his wrong judgment in respect of a case classified as a crime against God (society), such as drinking alcohol or adultery, the judgment should be reversed. However, if this wrong judgment is already implemented, the convicted person must be compensated by the state "public treasury". The judge is not responsible for compensation, because he is appointed by the ruler. The citizens of the Islamic state agreed to appoint the ruler, therefore the whole of society, not the judge himself, should bear the cost of compensation.

Second: if the judgment related to an offence that is classified as a crime against the individual (pertaining to a private right) such as a murder (*Qisas*), the judgment must be reversed if the mistake is discovered before implementation. However, if the punishment has already been inflicted, the judge is similarly not responsible for

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<sup>83</sup> - Jom'ah Muhammad Soraj (1986) "*Ta'weed Al Motahem Ama YlhagoHo Besbab Al Da'we Al Kadabah*". In "*Al Motahem Wa Huquq Fi Al Shari'ah Al Islami*" Part 2 Arabic Centre for Security and Training Studies. Riyadh 1986. P. 302

<sup>84</sup> - Bandar Al Swailam (1987) p. 382&383

compensation. In such cases the private accuser in the criminal case will be responsible for compensation, if it is proved that he distorted the information against the convicted person.

Yet it should be noted that if the crime is murder and the punishment that is inflicted is capital punishment, the private accuser will not be executed, but should pay blood money.<sup>85</sup>

In respect of the judge's intentional mistakes, if the judge renders unjust judgment intentionally, his judgment must be reversed. But if the judgment is implemented, the judge must be subject to a criminal penalty, disciplinary action, and as far as this discussion is concerned, civil compensation. That is to say, the judge, not the state, is responsible for compensating the convicted person or his family.

On the whole, it is said that jurisprudence illustrated by Islamic scholars in respect of the right to compensation for miscarriage of justice, is in line with standards required by European Convention on Human Rights.

## **Section Two Saudi law**

The above discussion confirms that Islamic law provides the accused with the right to compensation for miscarriage of justice, whether this occurs during the investigation or trial stages. Thus, the law in Saudi Arabia places considerable emphasis on protecting the accused from any harm that could occur to him during a criminal action. Article 36 of the Basic Law provides: *"The State shall provide security for all its nationals and aliens living on its territory; no person's liberty may be restricted nor may he be arrested or imprisoned (detained) except in accordance with the provisions of the law"*. Moreover, article 2 of the Law of Criminal Procedure 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"*.

The rights of the accused may be breached during the investigation whether by subjecting him to torture or by detaining him illegally, which can be deemed as an

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<sup>85</sup> - Al Muqhnī (1367 H) Part 9 P. 332. He is also subject to a *Ta'azir* punishment.



infringement to his liberty and freedom. He can also be subject to miscarriage of justice during the trial stage, by for example convicting him unjustly.

As to the jurisdiction to deal with cases of compensation, the judicial system in Saudi Arabia differentiates between two situations. If the harm is caused during the investigation stage, the accused can claim his right to compensation before the Board of Grievances, but if the accused's rights are breached during the trial stage he can lodge his claim with *Shari'ah* Courts. These situations will be discussed in turn.

As to the first situation, the Board of Grievances has the power to deal with claims for compensation adduced by accused persons with respect to their rights during the investigation. The Board's jurisdiction to deal with such matters is based on article 8/c of the Board Statute.<sup>86</sup> This article declares: "*(1) The Board of Grievances shall have power to adjudge the following...(c) compensation claims addressed by interested persons to the Government or public persons, which are caused by its Workers*".

The Board decides that to deprive a person of his personal freedom without a decision from the competent court, and in contradiction with the law, is deemed a mistake by the investigation authority. Thus, it is its responsibility (obligation) to compensate such harm. Further, the body concerned (the investigation authority) has in turn the right to refer (reclaim) the sum of compensation to the person in charge, that is to say the investigator.

In such cases the accused will receive compensation from the investigation authority. The latter will claim a refund of the amount of the compensation from the person responsible for the violation, provided that conditions for the refund are satisfied.<sup>87</sup>

Obviously, the method mentioned above provides the accused with an important guarantee of his rights. First, he is entitled to compensation, and second, the person in charge of the investigation will be responsible if he violates the law. This latter penalty makes the investigator more careful with regard to the application of the law. Accordingly, an investigator who carries out the investigation arbitrarily is subject to a compensation payment as well as to disciplinary and criminal actions.

In the Board judgments concerning compensation are based on the Islamic rule mentioned above, which states that damage must be removed. The only way to remove the damage is by compensating the person who suffers.<sup>88</sup>

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<sup>86</sup> - Decision No. 8/D/ F/35 in 1419H. & Decision No. 3/D/F/ 39 in 1422H. This jurisdiction is also confirmed by the Royal Order No. 1407/M in 16/12/1420H.

<sup>87</sup> - Decision No. 8/D/F/ 35 in 1419H.

With regard to the compensation sum arising from detaining the accused illegally, the Board decides that: *“the harm caused by illegal detention varies according to people’s social status. Therefore, the compensation to make good this harm will also vary accordingly.”*<sup>89</sup>

In one case it was decided that since the illegally detained claimant worked as a Pentair for a monthly wage of 1800 Saudi Riyal (approximately £380), the investigation authority must make him compensation of 120 Saudi Riyal (approximately £22) for every day he spent in detention.<sup>90</sup> In another case, since the plaintiff, who was illegally detained, was a businessman and was illegally deprived from exercising and supervising his commercial activities, the Board decided that he must be compensated by 1000 Saudi Riyal (approximately £175) for every day he spent in detention.<sup>91</sup>

Pursuant to the case law of the Board, the judge who handles the compensation claim has the ultimate discretion to assess the compensation.<sup>92</sup> His evaluation is final. Therefore the Scrutinizing Committee cannot interfere to re-assess the compensation, except if the circuit judge commits a material mistake in his calculation.<sup>93</sup>

The accused’s right to compensation is considered to be a personal (private) right, which means that if he does not claim for compensation, the court will not grant it spontaneously. If the accused claims for compensation, he has the right to waive it at any stage. He can waive some of his claim and claim the rest.<sup>94</sup>

According to the case law before the Board, the investigation authority’s responsibility is based on the omissive responsibility (liability). That is to say it commits a fault by breaching the law. Therefore, as a general rule, if the investigation authority does not infringe the law no compensation can be granted because it has not committed a fault.<sup>95</sup> This approach provides similar standards to that of the European Convention. The Explanatory Report of Protocol No. 7 illustrates that in order to apply this right there should be some serious failure in the judicial process involving grave prejudice to the convicted person.

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<sup>88</sup> - Decision No. 8/D/F/ 35 in 1419H.

<sup>89</sup> - Decision no. 6/D/A/18 in 1422 H

<sup>90</sup> - Decision No. 3/D/ F/ 39 in 1422H

<sup>91</sup> - Decision No. 6/D/A/18 in 1422H

<sup>92</sup> - Decision no. 6/D/A/18 in 1422H

<sup>93</sup> - Decision No. 8/D/F/ 35 in 1419H.

<sup>94</sup> - Decision No. 8/D/F/ 35 in 1419H.

<sup>95</sup> - Decision No. 3/D/F/ 39 in 1422H



Nevertheless, the accused's interests might be prejudiced even though the authority concerned has not committed any fault. In this case too the accused in Saudi Arabia is entitled to compensation. The compensation here is based on liability on the basis of risk. To grant compensation it is sufficient to prove the harm caused by a particular conduct practiced by the administration, although there is no fault in the part of the investigation authority.

This kind of liability is based on the idea of collective solidarity. This means that if the administration causes any harm, though no fault is committed, the community (state) will bear the liability of the administration's conduct, if this conduct causes harm to persons.

This rule is an exception to the original rule of liability, in which the establishing of fault is a crucial factor. Therefore, the Board does not apply this exceptional rule unless two conditions are satisfied. (1) The harm must be inflicted on a person or a group of persons. If it is inflicted on the whole population, the exceptional rule cannot grant compensation. (2) The harm must be unusual, that is serious (flagrant) harm.<sup>96</sup>

This rule was first adopted in 20/5/1400 H (1979-1980), when the Board decided that: *"...it has been established jurisprudentially and judicially that a person who is harmed by an act that is conducted legally deserves compensation. This compensation is not based on fault because the conduct in question is legally permitted and serves the interest of society. There is no fault in practising it. However, the compensation is based on another legal principle more inclusive than the fault liability principle. This is the idea that citizens are equal in terms of public obligation (responsibility). This implies that if the administrative body adopts legal conduct which unexpectedly causes harm to someone, it is unjust for this person alone to bear this harm, since that is deemed to be an infringement of equality in terms of public duty. Thus, the state must compensate the damaged person."*<sup>97</sup>

Obviously, such high standard goes well beyond any human rights requirements. In contrast to the European standards of human rights, compensation pursuant to the above approach does not require a failure on the part of the administration. It seems

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<sup>96</sup> - Abdullimon'em Jeerah (1988) p. 470

<sup>97</sup> - "*Majmu't Al Mabadee Al Shar'eeh Wa Al Nedameeh*" 1400 AH p. 220. The Board has reiterated this rule in a number of his judgments. For example, decision. No. 15/T in 30/6/1401H. *Majmu't Al Mabadee Al Shar'eeh Wa Al Nedameeh*" 1401H P. 92& decision No. 37/T in 19/9/1401 *Majmu't Al Mabadee Al Shar'eeh Wa Al Nedameeh*" 1401 H P. 279

that courts in Saudi Arabia refer to the general principles of justices that are inherent in the religion of Islam.

With regard to the second situation, namely if the damage is caused during the trial stage, which means that the court convicted the accused wrongly, the Board of Grievances is not empowered to handle such cases. If the accused is convicted wrongly and later it is discovered that he was innocent, he has the right to compensation.

The Law of Criminal Procedure clearly provides an accused person with the right to compensation in the case of miscarriage of justice. The subject is covered in two articles.

Article 210 declares: *“Any acquittal judgment pursuant to a petition for reconsideration must, if the convicted person so requests, include moral and material compensation to mitigate the damage suffered by him.”*

If the accused is wrongly convicted of committing a crime, but later by means of reconsidering the case the accused was found not guilty, the second judgment that declares his innocence must contain compensation.

It should be noted that this article considers compensation to be the accused's right if his innocence is proved. According to this article compensation will not be based on proving the presence of harm, but rather the fact of rendering a judgment that declares a fault in the previous conviction will indicate damage. It seems that the law presumes that any wrong conviction will cause harm.

Interestingly, the law specifies that compensation must be both financial and moral.

As to the financial compensation, even though the law uses the word “material compensation”, it only can mean “financial compensation”.

Yet the term “moral compensation” is vague. It could mean asking the convicted person for forgiveness according to what has been established in Islamic law as we have pointed out above. It can also mean removing his name from the previous records or publishing his acquittal in the media.

As to Article 217 of the Law of Criminal Procedure, it provides: *“...an accused person, who has been harmed as a result of malicious accusation or as a result of being detained or imprisoned for a period exceeding the term prescribed for such detention or imprisonment, shall be entitled to compensation”*.

This article demonstrates two issues:



- (a) The accused is entitled to compensation if he is harmed as a result of malicious accusation. Malicious accusation can only occur if the accusation is the outcome of a private complaint. The law does not mention whether such compensation will be paid by the investigation authority or by the complainant. So it seems that the damaged person has the right to claim compensation from the private complainant directly, or he could claim it from the investigation authority. In this latter case the investigation authority can claim a refund from the private complainant provided that the conditions are satisfied.
- (b) The accused is also entitled to compensation if he is illegally detained during the investigation, or imprisoned in accordance with a judgment for a period exceeding the term prescribed. However, this compensation is conditional on proof of the damage. This is different from the case in article 210 mentioned above. According to article 210 the damage is already presumed, while in article 217 the damage is not presumed and needs to be proved in order to deserve the compensation.

Nevertheless, the text provided in this article unjustifiably restricts the damage the accused might suffer due to detention or imprisonment longer than he legally deserves. The law does not mention the damage the accused might suffer from, for instance, physical torture. It would be better if the law stated the principle of compensation for the damage an accused might suffer, without limiting it to a particular action.

In short, it goes without saying that not only the judicial system in Saudi Arabia guarantees the right to compensation for wrongful conviction, but also, as is evident from the above analysis, it applies a higher standard than that required by the European law of human rights.

### **Part III      The Right not to be tried twice for the Same Offence**

The right not to be tried again for the same offence is provided for by Article 4 of Protocol No.7 of the European Convention on Human Rights. It states: "*1-No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State. 2-The provisions of the preceding paragraph shall not prevent the re-opening of the*

*case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case.”*

Searching on early Islamic jurisprudence reveals that there is no such discussion of the right not to be tried or punished twice for the same offence. This can be attributed to the fact that old Islamic societies did not know other than an ordinary *Shari'ah* courts.

Nonetheless, in principle, the rule against double jeopardy is in complete harmony with the Islamic principles of justice. Commenting on this rule Mashood A. Baderin<sup>98</sup> argues that: *“Retrying a previously tried and convicted or acquitted person on the same facts is tantamount to injustice and perhaps witch-hunting.”* In the Resolution adopted after the First International Conference on the Protection of Human Rights in Islamic Criminal Justice System held in Syracuse, Italy in 1979, the Conference resolved that *“The letter and spirit of Islamic Law on the subject of the protection of the rights of the criminally accused are in complete harmony with the fundamental principles of human rights under international law.”*<sup>99</sup>

As a result the legislative authority in Saudi Arabia did not find it difficult to guarantee such right even though it has not been discussed or demonstrated by early Islamic jurisprudence. This is in fact an area where Islamic state by adopting the principle of public interest as a source for legislation, can reveal the capability of Islamic law to accommodate new human rights norms essential to the proper administration of justice. By stipulating this right in terms to a great extent similar to those provided in the international human rights law, the Saudi legislature shows Islamic law as being up to date. This is the proper understanding which does not limit Islamic law to jurisprudence existing within Islamic context, but rather it shows Islamic law to be capable of absorbing novel human rights principles regardless of their origin in order to enhance the protection and observance of the dignity of human being. The Law of Criminal Procedure states in Article 187 that: *“If an accused is convicted, or acquitted, pursuant to a judgment on the subject matter of the criminal action, no other criminal action shall be initiated against this accused in respect of the same acts and facts upon which the judgment has been rendered. If another*

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<sup>98</sup> - (2003) p. 110

<sup>99</sup> - See Mashood Baderin (2003) p. 110



*criminal action is initiated, the previous judgment shall be maintained at any time of this action, even if the case is being considered by the Appellate Court. The court shall have due regard of the previous judgment, even if the issue has not been maintained by the litigants. Any previous ruling shall be established by submitting an official copy thereof, or a certificate issued by the court with respect thereto.”*

In fact, the approach of the Saudi judicial jurisprudence in respect of rule of no double jeopardy, may demonstrate that the Saudi law applies this rule strictly as compared with the European Court's approach. The European Court has interpreted this article to permit the state concerned to retry the accused under different classification of the offence before different judicial bodies, on the ground that “*that is typical example of a single act constituting various offences.*”<sup>100</sup> This interpretation is not accepted by the judicial system in Saudi Arabia. If a person is convicted or acquitted by a final decision, he is no longer liable to whatsoever kind of proceedings even if the single act constitutes various offences.<sup>101</sup> For example in one case a Nigerian national was convicted and sentenced for a term of imprisonment by the *Shari'ah* court in Mecca for possessing a personal identity belonging to a Saudi person in order to escape his illegal stay in the country. Consequently, he was persecuted before the Board of Grievances for committing the crime of false impersonation of another person. The Board after considering the case decided that since the *Shari'ah* court's judgment is final, and because subjecting the accused for a trial twice for the same act is unlawful, the case was dismissed.<sup>102</sup>

However, according to the by-law of the Law of criminal Procedure if one offence causes damage to more than one victim, a judgment concerning the accused, against one of the victims, does not prevent other victims from taking a fresh criminal action against the accused in respect of the same offence. The presumption here is that actions in these circumstances are private rights and are initiated by the victims themselves, not the Public Prosecution. So the state has no right to prevent victims from exercising their right to have access to courts even if the Public Prosecution is not satisfied in respect of the evidence.

Although, this might be regarded as an exception to the rule in question, articulating the right not to be tried twice for the same offence in the law of Saudi Arabia has

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<sup>100</sup> - *Gradinger v Austria* (1995) Para 53 (Application No. 00011932/90)

<sup>101</sup> - See Decision no. 19/D/G/3 1421 H

<sup>102</sup> - Decision No H/2/1401 H





However, as an exception to the above rule, jurists disagree about the crime of defamation. They disagree about the nature of this crime: whether it is deemed to be against God or against the individual.

Al Hanafi jurists argue that defamation is considered to violate the rights of society; thus pardon cannot be accepted after the judgment. In contrast to this view Al Shafi'i and Al Hanbali jurists believe that defamation is a violation of a private right, therefore the victim has the right to pardon the perpetrator before and after the delivery of a judgment.<sup>105</sup>

The judicial system in Saudi Arabia seems to have adopted the second view. Article 29 of the Law of Criminal Procedure provides: "*The complaint filed by the person harmed because of a crime shall be considered as a claim of private right of action, unless he expressly waives such right before the Investigator. The Investigator shall enter any such waiver into the record and shall have it witnessed. In case of defamation and qisas, such waiver shall be certified by the competent court*".

Moreover, jurists state that in the crime of theft the victim's pardon can be accepted before the commencement of criminal action. The prophet's companions encouraged mediation with the victim to pardon the culprit before undertaking criminal action. God said: "*Show forgiveness, enjoin what is good, and turn away from the foolish (i.e. don't punish them)*"<sup>106</sup>.

However, if the victim of a theft pardons the culprit after the judgment, the pardon is not acceptable.<sup>107</sup>

Other issues related to the crime of theft are also discussed by jurists. They argue that if the accused is convicted of committing theft and is sentenced by a *Hadd* punishment, this punishment will be dropped (cancelled) if the victim states that the stolen money in fact belongs to the perpetrator. Two reasons are offered for this:

- (1) The criminal action is based on the victim's claim that he is the owner of the stolen money. To render a judgment containing a *Hadd* punishment, the criminal action must be based on a complaint of the victim. This complaint stands until the implementation of the *Hadd* punishment. If the victim admits that the stolen money belongs to the accused, the basis for the criminal action is dropped. Accordingly, the *Hadd* punishment is also dropped.

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<sup>105</sup> - Ibid, p. 74,75&76

<sup>106</sup> - Surah 7. Al-A'raf. Verse No. 199

<sup>107</sup> - Muhammad Abu Zahra (1998 ) p. 74,75&76

(2) A confession of this kind creates doubt, and *Hadd* punishment cannot be inflicted with doubt.<sup>108</sup>

Another issue that was discussed by early Islamic jurists is whether it should influence the infliction of the *Hadd* punishment if the person convicted of theft is allowed to keep the stolen money after judgment is rendered. The majority of jurists claim that to drop the *Hadd* punishment on these grounds is unacceptable, because the crime of theft has been proved and all conditions for the imposition of *Hadd* punishment have been satisfied; therefore there is no justification for cancelling the *Hadd* punishment. They support their opinion with the following story:

It is told that a man stole clothes. The victim complained to the Prophet. The thief admitted guilt, and was sentenced by the Prophet. The victim felt mercy for the criminal and told the Prophet that he did not want him to be punished, and that he would like to give him the clothes as a kind of charity. The Prophet refused to accept his belated pardon and asked “*why did not you pardon him before you made your complaint?*”

Yet other jurists state that in this case the *Hadd* punishment must be dropped. Their argument rests on two points:

- 1- The victim's complaint in a crime of theft is one of the conditions for imposing the *Hadd* punishment. This complaint must stand until the punishment is inflicted. To grant the stolen money to the thief terminates the complaint. Through this step the victim is no longer the owner of the money, thus one condition to impose the *Hadd* punishment is absent.
- 2- Such a step creates doubt and no *Hadd* punishment can be imposed with doubt.<sup>109</sup>

### **Two: *Qisas* crimes<sup>110</sup>**

*Qisas* crimes are considered as crimes against the individual, therefore the victim or his heirs have the right to pardon the culprit. They can waive their right to punish the criminal, either in the form of an agreement with the culprit to pay a certain amount, or without payment for the sake of God.

In this kind of crime the ruler has no right to pardon the culprit, because the crime concerns a private right, thus only the victim or his heirs have the right of pardon.

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<sup>108</sup> - Ibid, p. 321

<sup>109</sup> - Ibid, p. 322

<sup>110</sup> - *Qisas* crimes are two: 1- murder (homicide). 2- Retaliatory punishment in cases other than death. For instance, breaking an arm or nose.



Islamic law calls for forgiveness and pardon even when the sin is a homicide. Islam describes those who forgive and pardon as of good moral and human character. In the view of Islam, pardon can encourage the criminal to abstain from future crime when the one who pardons is the one who is capable of imposing the punishment upon them. This might lead the wrong-doer to rehabilitation in the community who forgives him.<sup>111</sup>

God said: "Whether you (mankind) disclose (by good words of thanks) a good deed (done to you in the form of a favour by someone), or conceal it, or pardon an evil... Verily, Allah is Ever Oft-Pardoning, All-Powerful"<sup>112</sup>. He also said: "The good deed and the evil deed cannot be equal. Repel (the evil) with one which is better (i.e. Allah orders the faithful believers to be patient at the time of anger, and to excuse those who treat them badly) then verily he, between whom and you there was enmity, (will become) as though he was a close friend."<sup>113</sup> He also said: "The recompense for an evil is an evil like thereof; but whoever forgives and makes reconciliation, his reward is with Allah. Verily, He likes not the Zalimun (oppressors, polytheists, and wrong-doers)".<sup>114</sup>

In the case of the crime of murder, if there is more than one heir of the victim, the pardon of one is sufficient to cancel the death penalty, according to the Al Hanafi, Al Shafi'i and Hanbali schools, even if the majority of the heirs disagree and insist on the application of the death penalty. Two points support their view: (a) to inflict the death penalty in the crime of murder, all the victim's heirs must request it. (b) The right to grant pardon is given to each of the victim's heirs.

The judicial system in Saudi Arabia adopts this view, therefore if any one of the victim's heirs pardons the culprit, the death penalty will then become null.

Al Maliki jurists agree that a pardon from one of the heirs will cancel the death penalty, provided that the relationship of each heir to the victim was of equal status. However, they argue that if there is an heir who stood in a closer relationship to the victim than the waiver, this waiver will not be accepted.<sup>115</sup>

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<sup>111</sup> - "Al Shari'ah Wa Al Qanoon" (1989) Unpublished students texts in Naif Academic for Security and Training Science p. 94 & 95

<sup>112</sup> - Surah 4. An-Nisa Verse No. 149

<sup>113</sup> - Surah 41 Fussilat Verse No. 34

<sup>114</sup> - Surah 42 Ash-Shura Verse No. 40.

<sup>115</sup> - Muhammad Abu Zahra (1998) p. 538

If the victim is partially wounded, he alone has the right to pardon the culprit. And if one person stabs another, who pardons the perpetrator before dying, in this case the death penalty will be cancelled.<sup>116</sup>

If a person commits a murder, and he is found guilty and sentenced to the death penalty, the victims can in this case waive their right to inflict the punishment and decide to take compensation (blood money) instead. Jurists dispute whether the convicted person should have the choice of offering to pay blood money, or whether it is the victim's right to be compensated by the blood money whether the convicted person agrees or not. There are two views:

- 1- The Al Hanafi and Al Maliki schools argue that the convicted person is not obliged to pay blood money, unless he agrees to do so. The victim's waiver in this case must be deemed an agreement in which the full acceptance of all parties concerned is required.
- 2- The Al Hanbali and Al Shafi'i schools disagree, stating that it is the victim's right to choose equally between the death penalty and the blood money. If he decides to waive his first right, the death penalty, then his second right still stands. The convicted person has no choice in this regard.<sup>117</sup>

In practice in Saudi Arabia, if the pardon occurs during the execution of the death penalty, the execution will be stopped and the killer will be sent back to prison. Then the case will be sent to the court to ratify the pardon.<sup>118</sup>

However, it should be emphasised that in Islamic law, although a crime of *Qisas* directly violates the victim's rights (a private right), so that the latter is given the right to pardon the accused, society as a whole is also harmed by a *Qisas* crime, because it breaches the security of society. Thus, the state is empowered to defend its interest by punishing the criminal (the murderer). Consequently, if the victim's heirs waive their right to punish the murderer, the private criminal action will be dropped, but the society's right to punish the perpetrator still stands. In such a case the public

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<sup>116</sup> - Ibid, p. 540

<sup>117</sup> - Ibid, p. 531

<sup>118</sup> - Royal Order No. 17155 in 17/3/1393 H. mentioned in Ahmad Belal. P. 1182



prosecution will commence public criminal action against the accused to punish the latter with a *Ta'azir* punishment.<sup>119</sup>

Accordingly, in the crime of murder, if the victim's heirs pardon the convicted person, this pardon has consequences with regard to the private and public domains.

As to the private domain, the killer is obliged to implement whatever has been agreed between him and the victim's heirs. This might be blood money, or less or more than blood money. He is also under obligation to satisfy any condition that might be suggested by the victim's heirs provided that the court accepts this condition.

With regard to the public domain, if the death penalty is waived, the murderer must be sentenced for five years according to the law in Saudi Arabia.<sup>120</sup>

### **Three: *Ta'azir* crimes**

Generally speaking, *Ta'azir* crimes are considered as crimes against the interest of society. Therefore, society has alone the right to pardon the culprit. Since the ruler represents the whole community this right is granted to him. His pardon can save the criminal from all, or a part, of his punishment. He can grant this pardon before the commencement of the criminal action or during the investigation or trial stages. The ruler also has the right to grant the pardon after the conviction and before the execution of the punishment, or even during the execution.

Nevertheless, the ruler must only exercise his power if the interest of society requires such a decision. For example, if one person commits a *Ta'azir* crime, and the judge sentences him, the ruler can, according to the circumstances surrounding the crime or the criminal, forgive the criminal provided that such a decision is taken as being in the public interest; for instance if he sees that the criminal is a first time offender and the pardon may help him to rehabilitate himself again in society.<sup>121</sup>

Nevertheless, it is essential to understand that the pardon granted by the ruler in *Ta'azir* crimes is limited to the protection of society's interest, and has no bearing on private rights, namely the victim's rights. Even though some *Ta'azir* crimes are considered as a violation of public rights, they also in some cases cause harm to the victim. To illustrate: one person may beat another without causing him injury, or express verbal insults which do not constitute the crime of defamation (a *Hadd*

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<sup>119</sup> - Abdulkader Owda ( no year ) p. 777

<sup>120</sup> - Ahmad Belal (1990) p. 1182

<sup>121</sup> - In order to grant a pardon to a convicted person the authority concerned in Saudi Arabia applies, though with some flexibility, certain factors. For example whether he has a previous criminal record; and whether the offence is or is not one of the serious crimes provided for in the law.

crime); in these circumstances the perpetrator commits the crime of *Ta'azir*. Although such crimes cause harm to the victim, they also cause damage to the public order of society. If the ruler waives the right of society to punish the criminal, the victim's right to punish the criminal still holds.<sup>122</sup>

To conclude, the right to pardon mirrors the humanitarian approach of Islamic law. In the views of Islam an offender is not regarded outside the society, and members of the society should not reject him, but rather the society, as a whole, should bear the burden of rehabilitating the accused, and support him to re-engage properly in the community. The basic idea behind the pardon principle is that, Muslim society has to strike a balance between the advantages and disadvantages of punishing the criminal. Needless to say that such humanitarian nature of the right to pardon, though not provided expressly in the European Convention, is clearly consistent with, generally speaking, the notion of human rights which calls for an enhancement of the dignity of human beings.

#### **Part V                      The Right to Stay the Execution of Punishment**

Again the right to stay the execution of punishment for humanitarian reasons is unknown to the European Convention on Human Rights. Searching on the provisions of the Convention or in the Court's jurisprudence does not provide similar guarantee. This part will be dealt with in two sections. The first will be devoted to Islamic law and the *Shari'ah* courts in Saudi Arabia. The second concerns the Board of Grievances. But before embarking on the discussion, the meaning of the concept of stay of execution must be clarified.

After convicting the accused the judge might, depending on the convicted person's status or according to the circumstances in which the criminal committed his crime, consider that the accused is not an experienced criminal, and that putting him in prison might cause him harm rather than benefit in terms of the principle of rehabilitation. If he is a first time offender, imprisonment among people with previous criminal records, and separation from his normal life with his children and family will have a negative effect on both himself and his family. It is therefore argued that after conviction he should be given another chance, by being placed on

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<sup>122</sup> - Abdulkader Owdeh (no year ) p. 777



probation for a particular period. If he does not commit any crime during the prescribed time, the conviction will lose its effect. However, if he commits another crime during this time he will be subject to punishment for both crimes.

### **One: Islamic law and Saudi *Shari'ah* Courts**

The concept of staying the execution of punishment is not known in Islamic law. However, Islamic law and hence the *Shari'ah* Courts in Saudi Arabia are familiar with a similar idea. Islamic jurists accept the idea of releasing the offender without punishment but with the warning that he will be punished, probably with a harsher punishment, if he commits another crime similar to the current one. According to Islamic law the judge has the right to stay the punishment after convicting the defender, if he considers that it is more suitable to rehabilitate the defender.<sup>123</sup>

Nonetheless, such discretion is limited to *Ta'azir* crimes, thus according to Islamic law and hence the *Shari'ah* Courts in Saudi Arabia the judge cannot stay the execution of punishment in *Haddud* or *Qisas* crimes.<sup>124</sup>

Another important point here is that Islamic law and law governing the *Shari'ah* courts do not designate a time during which the staying of punishment will be examined. If the defendant is released without punishment, this should have immediate effect. This means that the judgment will be considered null immediately after rendering the stay of punishment. However, if the defendant commits a second similar crime even after a considerable lapse of time, the judge will take into account the previous conviction when deciding the due punishment.

### **Two: The Board of Grievances**

The Royal Order No. 7/H/3517 in 18/10/1410 H states that the Circuit concerned in the Board of Grievances can suggest the staying of execution of punishment in cases of bribery and forgery if the Circuit believes from the accused's character, his personal status, the circumstances in which he committed the crime, and his motivation in committing the crime, that he will not commit the crime again.

Clearly, the idea of staying the punishment implies that the Board renders a final judgment to convict and punish the defendant. Its effect is limited to suspending the person sentence for a period of time.<sup>125</sup>

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<sup>123</sup> - Abdulfatah Al Safee (1995) "*Al Ahkam Al Amah Le A-Nedam Al Jaza'ee*" King Saud University Riyadh. Saudi Arabia p. 534. hereinafter will refer to as Abdulfatah Al Safee (1995)

<sup>124</sup> - Ibid, p. 535

<sup>125</sup> - Ibid, p. 533

The objective of staying of execution is to avoid the negative impact of imprisonment for a short time, in particular for the first time offender. The application of the concept requires a careful study of the accused's personality (character) to evaluate whether he deserves to enjoy this privilege.<sup>126</sup>

The Board rules that: *"The general rule is that judgments must be implemented. This is to achieve the public interest for which these rules are legislated. Imposing punishment has a deterrent effect on those who break the law.*

*Having said that, however, an exemption from this general rule is permitted in particular circumstances, by staying the execution of the punishment whenever a reasonable cause exists."*<sup>127</sup>

Interestingly, the purpose of staying the execution of punishment cannot be achieved unless the execution is fully stayed. The execution of punishment cannot in any way be applied partially. This is because this would contradict the aim of staying the punishment. The Board rules that: *"staying of execution must include the whole punishment because the goal of this principle cannot be satisfied if it is applied partially."*<sup>128</sup>

Obviously the Royal order mentioned above confines the application of this principle to two crimes: 1- bribery and 2- forgery. Therefore, punishments imposed in respect of other crimes cannot be stayed.

However, Fattoh Al Shadlee and Abdulfatah Al Safee claim that in the Board of Grievances the Circuit concerned may stay the execution of punishment with regard to crimes other than bribery and forgery by reference to Islamic law. They justify this view by pointing out that judges on the Board are required to refer to Islamic law whenever the statute of the Board is silent.<sup>129</sup>

In addition, it is argued that the term "personal status" mentioned in the Royal Order is limited to the defendant's personal circumstances, for example if he voluntarily admits guilt, or if he is responsible for a big family. However, the term does not refer to the social status arising from his family or career.<sup>130</sup> One of the Board's rulings reads: *"Since the accused is at an early age and studying at the university, and it*

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<sup>126</sup> - Abdulfatah Kuder (1404 AH) *"Wekef Tanfeed Al Uqubat Fi Al Mamlakah Al Arabiah Al Sudiah"* The Institute of Public Administration. Riyadh. Saudi Arabia p. 64. Hereinafter will refer to as Abdulfatah Kuder (1404 AH)

<sup>127</sup> - Decision No. 219/T/ 3 1415

<sup>128</sup> - Decision No. 219/T/ 3 1415

<sup>129</sup> - Abdulfatah Al Safee (1995) p.535

<sup>130</sup> - Abdulfatah Kuder ( 1404 AH) p. 17



*seems that when he committed the crime he was not an experienced criminal, but rather committed a misdemeanour whose impact he did not evaluate; and because the execution of the prison sentence might serve counter to the objective of the punishment; and since the Circuit considers the damage he suffered during the investigation and trial is sufficient to deter him; therefore, the Circuit decides that the punishment will be stayed.*"<sup>131</sup> In another case the accused (Pakistani) who was working in a private company in 'Jeddah city' counterfeited a certificate to permit his wife and children to stay in the country for a period longer than what they were officially granted. He was convicted and sentenced pursuant to articles 5 and 6 of the Forgery Act before the Board of Grievances. However, the Board decided to stay the execution of the punishment on the ground that the accused committed the crime in order to keep his wife and children close to him. His motivation when committing the offence was to make his family life more stable by gathering them in one place.<sup>132</sup> Other ground for staying the execution of punishment is old age.<sup>133</sup>

Nonetheless, the criminal circuit must provide a clear ground for its decision to stay the execution of punishment. It follows that if the criminal circuit decides to stay the punishment without providing grounds for this decision, the decision will be reversed.<sup>134</sup>

As to the sequences of staying the execution of punishment before the Board of Grievance, the execution will be stayed for five years. If this period elapses without the committing of a new crime, the judgment is null and void and has no legal effect. But, if during these five years the defendant commits a new crime, whether under the Board's jurisdiction or not, he will be remanded to the Board to decide upon the execution of the stayed punishment as well as the punishment rendered in respect of the new crime.<sup>135</sup>

The right to stay the execution of punishment which has no counterpart in the European contexts of human right demonstrates the spirit of Mercy that is required by the religion of Islam. In the Resolution adopted after the First International Conference on the Protection of Human Rights in Islamic Criminal Justice System held in Syracuse, Italy in 1979, the Resolution states that the accused under Islamic

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<sup>131</sup> - Decision No. 18/D/G/3 in 1421 H

<sup>132</sup> - Decision No. H/2/149 in 1401 H

<sup>133</sup> - Decision No. H/1/20 in 1401 H

<sup>134</sup> - Decision No. 259/T/ 3 1416 H

<sup>135</sup> - Abdulfatah Al Safee (1995) p. 537





your Lord will absolve you from your sins”<sup>138</sup>. He also said: “And those who, when they have committed *Fahishah* (illegal sexual intercourse) or wronged themselves with evil, remember Allah and ask forgiveness for their sins”.<sup>139</sup> In other verses God said: “Except those who repent and believe (in Islamic Monotheism), and do righteous deeds; for those, Allah will change their sins into good deeds, and Allah is Oft-Forgiving, Most Merciful. And whosoever repents and does righteous deeds; then verily, he repents towards Allah with true repentance.”<sup>140</sup>

The Prophet also calls for repentance. He said: “*O people repent to Allah. I do repent to Allah one hundred times a day.*”<sup>141</sup>

The prophet forbade his companions to disgrace a criminal, because this could hinder his repentance. The story is told that after punishing a person who had committed the crime of drinking alcohol, some of the Prophet’s companions said to him “*may Allah humiliate you.*” The Prophet was angry and instructed them not to say this.

Abdulfatah Kuder in his comment on the above story explains that if the criminal feels that he is refused and disgraced, he will take revenge by not accepting rules accepted by society.<sup>142</sup>

## **(2) The consequences of repenting**

### **One: *Qisas* crimes**

*Qisas* crimes are deemed as an assault against private rights, that is the rights of the victim or his family; therefore repenting of this crime does not bring about the dropping of the punishment. This is because repentance cannot be exercised, unless the criminal fulfils all people’s rights.

### **Two: *Ta’azir* crimes**

If the crime in this category is an assault against society’s rights, the ruler has the discretion to accept the repentance if he sees it to be in the public interest. But if the crime is an assault against a private right, the repentance does not bring about the dropping of the punishment.

### **Three: *Haddud* crimes**

Jurists agree about the *Hadd* of defamation. They argue that the repentance should not lead to the dropping of punishment because defamation is an assault against a

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<sup>138</sup> - Surah 66 At- Tahrim. Verse No. 8

<sup>139</sup> - Surah 3. Al- Imran. Verse. No. 135.

<sup>140</sup> - Surah 25 Al- Furqan Verses No. 70&71

<sup>141</sup> - Summarized Sahih Muslim. Arabic- English. Volume 2 P. 1013 No. 1916

<sup>142</sup> - Abdulfatah Kuder (1982) “*Al Nedam Al Gena’ee*” Part 1. The Institute of Public Administration p. 35

private right. Therefore, the punishment for defamation will be dropped if the victim pardons the perpetrator.

With regard to the crime of highway robbery jurists are in agreement about dropping the punishment if the criminals in this type of crime repent before it is too late. That is to say, before the authority concerned arrests them. This position is founded on the saying of God after designating punishments for the crime of highway robbery. God said: "Except for those who (having fled away and then) came back (as Muslim) with repentance before they fall into your power; in that case, know that Allah is Oft-Forgiving, Most Merciful".<sup>143</sup>

### **(3) How repentance can be achieved**

Three conditions are required for repentance. Two of them are mental and the third is a material condition.<sup>144</sup> The mental conditions are 1- the culprit must admit that he committed a sin and feels sorry for this. 2- He must intend not to commit the crime again. The material condition is that he must abstain from committing crimes.

In applying these conditions to the crime of highway robbery, jurists do not discuss the mental conditions, because these are left to God. However, they discuss the material condition that might provide an indication of whether or not the mental requirements are satisfied.

Two points can satisfy the material condition:

- 1- The criminal must satisfy the citizens that he will not commit the crime again, and leave the place where he committed his crime.
- 2- He should hand over his weapons and declare his obedience to the authority's instructions.

Jurists disagree on whether these conditions must be applied jointly or alternatively.

There are two opinions:

- (a) Repentance can be achieved by either of the above requirements.
- (b) Repentance can only be achieved by the fulfilment of both the two conditions mentioned above.<sup>145</sup>

As to other *Haddud* crimes there are three opinions<sup>146</sup>:

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<sup>143</sup> - Surah 5. Al-Maidah. Verse No. 34

<sup>144</sup> - See for example "Commentary on the Riyad-us-Saliheen" compiled by Al-Imam Abu Zakariya Yahya An-Nawawi Admiashqi. Darussalam Publisher & Distributors. Riyadh , Saudi Arabia Volume One.(1999).P. 25

<sup>145</sup> - Muhammad Abu Zahra ( ) p. 159-162

<sup>146</sup> - Ibid, p. 282-285 & Abdulkader Owdeh (no year ) p. 353-355



(A) Some jurists in the Shafi'i and Hanbali schools believe that repentance should bring about the dropping of punishment. They quote two points in support of their view:

1: God said with regard to the *Hadd* of theft: "And (as for) the male thief and female thief, cut off (from the wrist joint) their (right) hands as a recompense for that which they committed, a punishment by way of example from Allah. And Allah is All-Powerful, All Wise. But whoever repents after his crime and does righteous good deeds (by obeying Allah), then verily, Allah will pardon him (accept his repentance). Verily, Allah is Oft-Forgiving, Most Merciful".<sup>147</sup>

In addition, the story is told of a man called Ma'az who admitted his guilt of committing the crime of adultery. When the Prophet's companions started to punish him, he tried to escape. But the companions prevented him and continued the punishment. The Prophet, disagreeing, said, "*Why did not you left him escape and repent? So may Allah accept his repentance.*"

It is claimed that these texts indicate that repentance is considered as expiation for *Haddud* crimes. Since repentance is regarded as a punishment in this life and as expiation in the hereafter, by fortiori it expiates crimes in this life. God said: "Except for those who (having fled away and then) came back (as Muslims) with repentance before they fall into your power; in that case, know that Allah is Oft-Forgiving, Most Merciful".<sup>148</sup>

2: both a *Hadd* punishment and repentance purify the human soul. If the criminal soul is purified by repentance the *Hadd* punishment is superfluous.

(B) Others argue that repentance does not warrant the dropping of punishment in *Haddud* crimes except in the crime of highway robbery. Al Maliki and Al Hanafi adopt this view with some jurists of the Shafi'i, and Hanbali Schools. The view is based on the following points:

1: *Haddud* crimes are only purified by their punishment. Therefore, those who committed crimes during the Prophet's era came to the Prophet to admit their guilt and to purify their soul by receiving punishment, and they were punished. If repentance, the argument goes, is sufficient to drop the *Hadd* punishment, no *Hadd*

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<sup>147</sup> - Surah 5 Al-Ma'idah. Verses No. 38 & 39

<sup>148</sup> - Surah 5 Al- Ma'idah. Verse No. 34

punishment would be inflicted upon a repentant person, because confession particularly if there is no prosecution, is sufficient proof of the repentance.

2: *Haddud* punishment is a public deterrent. Every criminal will claim the repentance. Repentance under the threat of punishment is not what is meant by repentance, which is called for by God. God said: "Allah accepts only the repentance of those who do evil in ignorance and foolishness and repent soon afterwards; it is they whom Allah will forgive and Allah is Ever All-Knower, All-Wise. And of no effect is the repentance of those who continue to do evil deeds until one of them confronts death and says: 'now I repent'".<sup>149</sup>

(C) Jurists Abin Tammah and his pupil Abin Al Keem from the Hanbali School suggest that both repentance and punishment purify the human soul. Therefore, punishment will be dropped except if the criminal himself prefers to be punished to purify his soul from his bad deeds.

Now as to the application before courts in Saudi Arabia, it could be claimed that since the judicial system as has been pointed out in chapter three applies as, a general rule, the Hanbali School, the last view suggested by Jurists Abin Tammah and Abin Al Keem is more likely to be adopted.

It is evident from the above analyses that similar to the right to pardon and the right to stay the execution of the punishment, the right of the accused to repent is clearly founded mainly on the thought of rehabilitating the offender. This is a manifestation of the significant role of the Islamic religion in respect of the criminal justice system in Saudi Arabia. The system is observably influenced by the spirit of Mercy, forgiveness, and tolerance even with those who breach the interest of the society.

Interestingly, the influence of the spirit of religion is not completely alien to the European Community and hence as far as this thesis is concerned the European human rights law. In fact there is an appreciation among members of the EC of the importance of religion as an aspect of culture heritage. Ian Leigh argues that: "*Plainly the EC is neither Erastian nor a Theocracy. Religion is neither subordinated and enlisted in the service of the EC, nor vice versa. This is not surprising-none of the member states, current and prospective, are at these extremes.*"<sup>150</sup>

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<sup>149</sup> - Surah 4 An-Nisa. Verses No. 17 &18

<sup>150</sup> - Unpublished paper "*Alternative Models of Faith/State Relations in the EC*". In a conference at Newcastle Law school. 29 October 2002. Under the title: "Structured Pluralism: A Practical Legal Framework for Faith in the European Union?"



## CHAPTER 8

### Conclusion

#### Introduction:

The study examines a single aspect of human rights i.e. the rights of the accused during trial. It takes the European Convention on Human Rights as a model for the international standards of human rights. It compares rights called for in the European Convention with rights provided to the accused during trial in Saudi Arabia.

The term "human rights" is a relatively recent one, dating from the eighteenth century, but the modern concept is seen as an outcome of western philosophical thought during the last millennium. A new era for the human rights movement began with the establishment of the United Nations. From this time human rights were no longer confined to a local domain, but gained an international status via international and regional declarations, treaties, conferences etc. Thus an international standard of human rights has been created.

Irrespective of its origin, the concept of human rights is today acknowledged by all nations and states around the globe. No individual country would nowadays accept the designation of violator of human rights; such a designation would be regarded as a stigma in a country's political history. This is clear evidence of the universality of the concept. Article one of the World Conference on Human Rights held in Vienna (1993) states: ". . . *The universal nature of these rights and freedoms is beyond question.*" Further, the operative part of the Resolution (III) reads: ". . . *the General Assembly proclaims this Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations . . .*"

However, this universality of the concept should be distinguished from the universalism of human rights. The latter concept emerged when an attempt was undertaken to define the norms of human rights in the terms of only the Western liberal tradition. From this moment a conflict began to take place between advocates of universalism and of relativism. There are indeed two clearly opposed positions in this debate.<sup>1</sup>

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<sup>1</sup> - For example, article 8 of the Bangkok Declaration adopted by Asian States in 1993 prior to the Vienna Conference provides: "*while human rights are universal in nature, they must be considered in the context of a dynamic and evolving process of international norm-setting, bearing in mind the significance of national and regional particularities and various historical, cultural and religious backgrounds.*" See also Charter of Fundamental Rights of the European Union. (Charter 4487/1100 Rev.1.)

During the Cold War, the argument of relativism versus universalism proceeded mainly between the Communist regimes and the democratic west. Today, after the collapse of the Soviet Union, the debate takes place between developed and less developed countries, or in a religious (Islam-West) scenario.

Since the engagement of Islamic law and Muslim practice in this debate is today clearer than ever before, and since the subject of this thesis is aspects of human rights in an Islamic state (Saudi Arabia), it is hoped that the contribution of the thesis is to offer guidelines for assessing the case in Islamic societies and to put forward a proposal geared towards alleviating the conflict.

### **Reflective Equilibrium**

The source of this proposal is found in the work of the contemporary American political philosopher John Rawls. Central is Rawls' concept of "reflective equilibrium". The term 'reflective' refers to the requirement that a society stands back in imagination from its subjective ground, to view and test its values from the hypothetical perspective of an objective outsider. The term 'equilibrium' denotes the desired result, when the influence of this perspective enables a society to place its received values of 'justice' in a balance with alternative modes.

From the position of reflective equilibrium, a society would recognise which of its considered judgments followed essential guiding principles, and where there might be latitude for reappraisal in an international context. The model thus offers a possible means of reconciliation between western human rights provisions currently held up as 'universal' and the problems of conflicting cultural norms.

In Rawls' philosophy, equal status is accorded to the received values of a society and to the guiding principles formed from a neutral perspective. Both have instrumental value, in the role they can play in defining a society's norms. However, for practical purposes a procedure is required. Thus, in the case of conflict between international human rights standards (the 'neutral outsider' principles) and the considered judgments of an Islamic state, the latter would first make every attempt to bring its practices into line with international requirements. However, where Islamic law explicitly precludes such modification, the international bodies of human rights must allow the state in question to resolve the conflict within its own cultural parameters. The exercise of this latitude is denoted by the European Court of Human Rights as the principle of 'margin of appreciation'.



The proposal of this thesis is that it is feasible to apply this model to an Islamic society on the grounds of the flexibility of the Islamic law. Guidance granted through God's revelation in the Holy Sources, namely the *Qur'an* and the *Sunnah*, is of an eternal nature. As a consequence it is not subject to change. But what is important here is that these two sources have revealed deliberately broad principles and individuals are free to adopt any rules suitable to the circumstances.<sup>2</sup>

When the command of Allah or the Prophet is explicitly given, no one is capable of making, or qualified to make the least alteration to it.<sup>3</sup> Nevertheless, if the *Shari'ah* is silent or does not speak explicitly, the Islamic state has the right, or may be obliged, to provide an answer to new circumstances.

Empowering the legislative authority in the Islamic state with the right to enact laws might appear to be in contradiction with the idea that God alone has this right. However, this conclusion would be inaccurate. God exercised His legislative discretion in the *Qur'an* and the *Sunnah*. These sources do not provide detailed laws to deal with every aspect of life. In fact except in some exceptional cases the *Qur'an* and the *Sunnah* give only general principles. Therefore, the Islamic community or state has the discretion to respond to new circumstances, provided that their decision does not breach general Islamic principles.

This approach to legislation demonstrates the flexibility of Islamic law, which makes it applicable in all times and places. Without such an approach Islamic law would certainly have been inadequate after the cessation of divine revelation.

In short, although the *Qur'an* and the *Sunnah* are sovereign over all other laws and cannot be amended, the Islamic *Shari'ah* is not out of date, but can adequately deal with new issues and meet evolving needs that have not been explicitly addressed in the two sources mentioned previously. The legislative approach of the *Qur'an* and the *Sunnah* makes the *Shari'ah* applicable to all times and circumstances, when enacting new rules concerning issues that both the *Qur'an* and the *Sunnah* are silent about or about which they do not speak comprehensively.

Generally speaking, the thesis demonstrates that all rights required by the European standards of human rights are clearly recognized by the judicial system in Saudi Arabia, and further, that early Islamic jurisprudence discussed these rights even though sometimes using different terminology. Only the right of the accused not to be tried again for the same offence is

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<sup>2</sup> - Khurshid Ahmad ( 1992) p.43

<sup>3</sup> - Abdur Rahman I. Doi (1997) p. 5

apparently not mentioned in early Islamic discussion. But in spite of this fact, and since providing such a guarantee does not violate Islamic principles but rather is consistent with its humanitarian nature, the judicial system in Saudi Arabia stipulates this right in the Law of Criminal Procedures.

This approach is the core of our call in this thesis. When enacting laws the legislative body in Saudi Arabia should take into consideration the international standards of human rights, and should try to adopt norms that are not provided in the Saudi law, provided that this norm is not inconsistent with Islamic principles.

On the other hand this study shows that in some circumstances Islamic law and hence the Saudi law provides the accused with guarantees that are not provided by the European Convention or probably by any other instruments of human rights. The accused's rights to a pardon, to repentance, and to stay of execution of punishment on humanitarian grounds, are not known to the European Convention on Human Rights.

In other areas the study demonstrates that the courts in Saudi Arabia, although providing the accused with similar rights to those called for by the European Convention, apply these to a higher standard.

Aside from the fact that all the rights of the accused relevant to the criminal trial stage that are treated by the European Convention are, strictly speaking, provided by the judicial system in Saudi Arabia, there are deficiencies that need to be addressed in order to conform fully with European standards of human rights.

In this conclusion only the most important findings are illustrated. These findings relate, respectively, to certain deficiencies in the Saudi judicial system; to points concerning presumption of innocence; to the European concept of legality; and to three groups of rights of the accused, namely defence rights, rights connected with judicial independence, and rights after delivery of criminal judgment.

### **The Saudi Judicial System**

An accused person can be tried in Saudi Arabia before the *Shari'ah* courts, the Board of Grievances or one of the administrative committees (tribunals). As to the latter the study illustrates that these tribunals, generally speaking, do not satisfy the standard of the right to fair trial, and in particular they lack independency and impartiality. Closer analysis of the background to the situation reveals that the establishment of the committees may be traced mainly to the passive attitude of the *Shari'ah* courts towards enacted laws.



The thesis provides two alternative means to tackle the problem. The first is to subject decisions taken by these committees to an appeal before an independent judicial body that satisfies the right to fair trial. As some writers correctly suggest this can be achieved by subjecting all decisions taken by any of these committees to an appeal before the Board of Grievances. But it should be noted here that in order to be consistent with human rights in Europe these decisions must be made appealable before the Criminal Circuit in the Board and not before the Scrutinizing Committee. This is because deficiencies before the tribunals can only be compensated if the system provides a person convicted by one of these committees with the right to challenge this decision before a court that satisfies the requirements set out in article 6 of the European Convention. Now since the Scrutinizing Committee does not guarantee the right to public hearing, and parties are not allowed to attend the consideration of the case, it therefore falls short of the right to have a fair trial. Since the original circuits in the Board, in general, guarantee the rights required by article 6 of the European Convention, it is suggested that decisions rendered by the tribunals should be made appealable before the Criminal Circuit in the Board of Grievances.

Even though this solution redresses deficiencies caused by these committees, and brings the practice of the judicial system into a complete harmony with European standards of human rights, it does not root out the main problem in this regard i.e. the ideology that causes the passive attitude of judges in the *Shari'ah* courts towards codified laws. Thus an alternative solution is also proposed. Three steps need to be taken: (1) Asking the Board of Senior Ulama (jurists) to study the whole case. The Board should answer the question whether enacting laws that are considered to be in the interest of the state should be permitted or forbidden if they contain no provision contradicting the *Shari'ah* law; (2) all drafted laws must be examined by the Board of Senior Ulama before being enacted. However, this study must focus only on whether or not the law in question contains provisions that contradict *Shari'ah* law. In other words, suitability or properness should be left to the legislative authority. (3) The training of judges should be extended to include legal theories and principles.

### **The Presumption of Innocence**

As to the presumption of innocence, even though Islamic law does not use an equivalent expression, it applies similar principles that result in the same consequences. Strictly speaking, Islamic law requires that (a) the accused is originally innocent, (b) his innocence must be presumed till guilt is proved, (c) his guilt is only proved by conclusive evidence and any doubt will be interpreted in the accused's interest, and (d) the burden of proof is on the prosecution. Obviously, this requirement is consistent with international human rights



requirements in respect of the presumption of innocence. As is evident from a number of judgments the judicial system in Saudi Arabia applies the principle of presumption of innocence in a manner consistent with European human rights law.

In exceptional circumstances, such as the crime of smuggling drugs, the burden of proof is shifted from the prosecution to the accused. This is because this type of offence involves a high social risk, or creates difficulty in respect of proving the case against the accused. However, a crucial issue in this regard is the standard of burden that the accused shall bear in order to challenge the accusation. In fact, from a number of decisions made by the Customs Committee in Saudi Arabia it can be seen that in balancing the evidence the element of doubt tends to weigh in favour of the accused. But, these applications lack a legal tool by which members of the responsible body can evaluate whether the proof required of the accused breaches his right to be presumed innocent. Without a proper legal tool, assessment of the accused's counter-evidence may not be based on objective premises, and the outcome of the assessment may vary according to who undertakes it. To correct this discrepancy the use of a tool that is applied by the English judicial system to resolve this problem may be suggested. English courts make a distinction between two kinds of burden. The first is the law or persuasive burden, and the second is the evidential burden. The former requires the accused to prove, on a balance of probabilities, a fact that is essential to the determination of his guilt or innocence. It reverses the burden of proof by removing it from the prosecution and transferring it to the accused. But the latter entails upon the accused the burden of introducing evidence in support of his case. It requires only that the accused adduces sufficient evidence to raise an issue for the issue to become an obligatory aspect of the case. Since the prosecution does not need to bring any evidence on this point, the accused must do so if he wishes the point to be included. Nonetheless, and this perhaps more importantly, once the issue is raised, the burden of proof remains with the prosecution. The accused need only raise a reasonable doubt as to his guilt.<sup>4</sup> Accordingly, once the onus of proof is shifted the court concerned can only impose the evidential burden upon the accused, because imposing a legal or persuasive onus violates the presumption of innocence.

This is a very helpful tool that the judicial system in Saudi Arabia could benefit from in order to make their consideration as to the presumption of innocence compatible with the international standard of human rights.

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<sup>4</sup> - See the case of *R v DPP, p Kebeline* [1999] 4 All ER 801-859; & *R v Lambert*. [2001] 3 All ER 577-644



### The Principle of Legality

Again the expression 'legality' is not found in the *Qur'an*, the *Sunnah*, or old Islamic jurisprudence, and the concept was first introduced in Europe. However, in order to find out whether or not the same principle is also applied in and throughout Islamic law, our approach is to identify components of the principle of legality and to see whether Islamic law as applied by the Saudi judicial system has the same components. The principle of legality embodies four components: (1) criminal law should not be applied retroactively; (2) it should be formulated to maximum certainty; (3) it should be strictly interpreted; (4) it must be accessible.

As to component (1), Islamic law cannot be applied retroactively. Yet, unlike the European Court, the judicial system in Saudi Arabia applies the criminal law retroactively if this is in the interest of the accused. This is perhaps a reflection of the humanitarian nature of Islamic law. Interestingly, this application is compatible with the ICCPR.

Regarding point (2), that is, criminal law should be formulated to maximum certainty, this component does not raise any question in respect of the crimes of *Haddud* and *Qisas* since every crime in these two categories is defined and its punishment is clearly designated. In *Ta'azir* offences a judge is given considerable discretion to use analogy to punish old offences in new forms. The original texts do not provide particular definitions for each crime. The judge is empowered to apply these general texts to the facts brought before him. This situation might be considered incompatible with the required standard of certainty. First, it could appear to imply that according to Islamic law a person can be subject to punishment without knowing that such an act is prohibited. Second, another area which puts the certainty of Islamic law in question is where the judge is empowered to punish in the public interest, even if the person concerned does not commit any prohibited act.

In respect of the first problem this thesis rejects the criticism on two grounds:

- 1- Pursuant to Islamic law conducts are classified into (a) lawful or admissible; (b) prohibited; (c) permissible; (d) recommended; (e) unrecommended. A Muslim is allowed to exercise conducts within categories (a), (c), and (d). But he is prohibited from committing acts within categories (b) and (e). It is every Muslim's duty, as part of his religion, to know this.
- 2- There is a crucial difference between Islamic law and positive laws in this respect. This difference is embodied in the fact that unlike man-made law the conduct that constitutes a sin in Islamic law is unchangeable through ages and societies.



As to the second problem, it is also within Islamic law to limit the judge's power where the interest of society requires this. Therefore, article 3 of the Law of Criminal Procedures restricts in a clear and precise language the power of the judge to punish if the person in question has not committed a forbidden and punishable act. The judge in Saudi Arabia cannot punish for the sake of the public interest if a person has not committed an illegal act.

When writers deal with the principle of legality in *Ta'azir* crimes in Islamic law, they often mistakenly presume that this principle requires absolute certainty. In fact, absolute certainty, practically speaking, cannot be achieved in any legal system. Judicial systems that depend on codification as the sole source for criminal law must empower the judge with certain discretion to interpret laws and to apply existing rules to new facts by means of analogy. Otherwise, many criminals could escape justice because the legislature is unable to foresee what conducts will need to be criminalized in future. As to the systems depending on case law as a source for criminal law, the *Shaw*<sup>5</sup> case reveals that absolute certainty cannot be guaranteed, with a considerable discretion given to English courts to consider whether or not a particular conduct can be deemed to amount to a corruption of public morals.

This finding is confirmed by the European Court of Human Rights. It states: "*However, clearly drafted a legal provision may be, in any system of law, including criminal law, there is an inevitable element of judicial interpretation. There will always be a need for elucidation of doubtful points and for adaptation to changing circumstances.*"<sup>6</sup> Therefore, one can argue that the legality principle requires the criminal law to be precisely and clearly formulated just to the extent that this certainty precludes the exercise of arbitrary power.

With regard to the third component of the principle of legality, which requires that any obscurity of the criminal law must be interpreted in the favour of the accused, this study shows that the judicial system in Saudi Arabia applies this guarantee in a strict manner. The fourth and final component is the accessibility of criminal law. The accessibility of Islamic jurisprudence is questionable due to the considerable number of its books, which are also written in language of such a level of refinement that a layman has difficulty in understanding them. However, several measures have been taken to ease the dilemma. (a) In an attempt to unify the judicial rulings, courts in Saudi Arabia generally speaking apply the Hanbali School<sup>7</sup>. (b) Of the books of the Hanbali school only six are designated on which judgments

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<sup>5</sup> - See discussion in chapter 4 of this thesis.

<sup>6</sup> - *S. W. v. UK* A335-B (1995) (Application No. 00020166/92)

<sup>7</sup> - See chapter 3 of this thesis.



should be based<sup>8</sup>. (c) The laws of both the Judiciary and the Board of Grievances require the application of the case law system. (d) Finally, an important point here is that the difficulty of accessibility of Islamic jurisprudence might be held to constitute a clear conflict with the legality principle, if Islamic law were viewed from a western point of view. But Islamic law is not only law<sup>9</sup>. It is part of a religion and every Muslim is obliged to read and understand Islamic law (the *Qur'an*, the *Sunnah* and also Islamic jurisprudence). Anyone who has difficulties is obliged to ask scholars.

Therefore, it can be argued that the principle of legality is applied in the judicial system in Saudi Arabia in a manner consistent with European human rights standards.

### **Defence Rights**

Other rights are classified in this study as defence rights. These are:

1. Right to legal representation;
2. Right to an interpreter;
3. Right to adequate time and facilities for the preparation of defence;
4. Right to trial within a reasonable time;
5. Right to prompt information of charge;
6. Right to trial in own presence;
7. Right to defend self in person;
8. Right to equality of arms;
9. Right to call and cross-examine witnesses;
10. Right not to be compelled to confess guilt.

Generally speaking, these defence rights are guaranteed by the judicial system in Saudi Arabia. The study demonstrates that all these rights are provided in the judicial system in Saudi Arabia and their application does not raise any question in respect to the conformity with European standards of human rights, rather the application of these rights complies with the European human rights law. However, the following matters may be worth mentioning:

As to the right to have a lawyer two points need to be reconsidered. First, Article 116 of the Saudi law of the Criminal Procedures is not compatible with the European Convention on Human Rights because it subjects the accused's communication with his lawyer to the supervision of the criminal investigation officer. According to the European Court of Human

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<sup>8</sup>- The Judicial Supervision Committee's decision in (1347 AH). See Ahmad Belal (1990) p.174 & 175. See also Soliman A. Solaim "Legal review: Saudi Arabia's Judicial System" Middle East Journal. 1971.Vol. 25 P.405.

<sup>9</sup> - See our discussion in chapter 3

Rights, if the lawyer cannot receive instructions in confidence, then there is a risk that legal consultation might lose much of its effectiveness.<sup>10</sup>

The second point is that the Saudi judicial system does not provide an indigent accused with free legal assistance. This is in a clear contravention of the European Convention, and needs to be addressed.

With regard to the right of the accused to be assisted by an interpreter if he does not understand the language used in court, this thesis establishes that as a general rule the Saudi judicial system requires two interpreters, save in the case of minor offences where the availability of two interpreters is not possible. This fact may lead to the conclusion that by adopting Islamic jurists' view in respect of the number of interpreters, the law in Saudi Arabia goes far beyond the standard required by the European Convention.

### **Judicial Independence**

The rights to a court that is independent, impartial, and open, and to a reasoned judgment have been discussed in this study under independence of the judiciary and the rights of the accused. In respect of the independency of the court the thesis uses criteria employed by the European Court to investigate the independency of a judicial body. These criteria are: (1) the manner of appointment of the judiciary members; (2) the duration of their term of office; (3) the existence of guarantees against outside pressure; and (4) the question whether the body presents an appearance of independence.<sup>11</sup>

In respect of points (1) and (2) laws governing both *Shari'ah* courts and the Board of Grievances demonstrate a complete compliance with European Court standards. As to factors (3) and (4) the thesis distinguishes between two areas of independence. The first is the personal independence of the judge when handling the case in hand. In other words, independence in respect of any pressure that could be exercised against the judge when the case comes under his discretion. This type of independence is clearly guaranteed in the judicial system. The second area of independence is the independence of the judicial body from the executive. Even though the law confirms the independence of the judiciary the relationship between the latter and the executive is open to question. Therefore, one can suggest that in order to achieve the standard of independency required by the European Court of Human rights, the Saudi law should be reformed in a way that insures the independence of the judiciary. The relationship between the Ministry of Justice and the judicial body needs to

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<sup>10</sup> - *Brennan v UK* (2003) 34 EHRR 18

<sup>11</sup> - See for instance, *Findlay v. United Kingdom* (1997) (Application No. 00022107/93) & *Campbell and Fell v. UK* (1984) 2 E.H.R.R 165. See also *Lauko v Slovakia*, (1998) Paras 63-64 (Application No. 00026138/95)



be reconsidered, and the power of the Presidency of the Council of Ministers to commit cases to the Supreme Judicial Council must be abolished. Put differently, even though the personal independence of judges in Saudi Arabia is, no doubt, guaranteed, the structural independence need to be addressed. This suggestion is based on the general requirement mentioned by the European Court<sup>12</sup> that restrictions on human rights must be prescribed by law. It also rests on the argument that judicial independence can be threatened not only by interference from the executive, but also by a judge's being influenced, consciously or unconsciously, by his hopes and fears as to his possible treatment by the executive. It is for this reason that a judge must not be dependent on the Executive, however well the Executive may behave: "independence" connotes the absence of dependence. Here it should be emphasized that judge's personal integrity and independence of mind in Saudi Arabia are not in doubt, and that it is not suggested that there has been any conscious or unconscious bias or any subjective partiality felt or displayed in their work. However, the appearance of independence is just as important as the question whether this quality exists in practice. Justice must not only be done, it must be seen to be done. The function of the European Convention on Human Rights is not only to ensure that the judges are free from any actual personal bias or prejudice. It requires this fact to be seen objectively. The aim is to exclude any legitimate doubt as to the court's independence.<sup>13</sup>

As to the impartiality of the court, as one might expect since Islamic jurists study the judge's impartiality in great detail the judicial system in Saudi Arabia places special emphasis on the court's impartiality. This is obvious from the fact that rules regarding the impartiality of the court are drafted in very strict terms. Thus, comparing the standard of impartiality required by the European human rights law with the required level of impartiality in the Saudi law, it is found that the Saudi law clearly applies a higher standard in respect of the court's impartiality than that required by the European human rights law. The following comparisons demonstrate this:

First, the jurisprudence of both the European Court of Human Rights and English courts allows a judge to hold other careers simultaneously. For example besides being a judge he can be at the same time a lawyer<sup>14</sup>, a member of the education committee, a governor of

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<sup>12</sup> - See for example, *Kruslin v. France* (1990) (Application No. 00011801/85)

<sup>13</sup> - More discussion regarding the importance of the appearance of independence is provided in the *Millar v Dickson* (2001) UKPC D4 [2002] 3 All ER. P 10411-1073

<sup>14</sup> - *Locabail Ltd v Bayfield Properties* [2000] 1 All ER 65-96



schools,<sup>15</sup> or director of an international organization.<sup>16</sup> According to European jurisprudence a judge is disqualified from hearing a given case only if he plays an active role in respect of the case at hand.

This altogether differs from the case in Saudi Arabia, where a judge cannot have another career or job or involvement in a commercial activity. Article 58 of the Law of the Judiciary provides: "*A person may not hold the position of a judge and simultaneously engage in commerce or in any position or work which is not consistent with the independence and dignity of the judiciary. The Supreme Judicial Council may enjoin a judge from engaging in any work which, in its opinion, conflicts with the duties of the position and the proper performance of such duties.*" Therefore and maybe more interestingly, if the judge has another job or engages in commerce, he is then not only disqualified from hearing a particular case, but he will cease to be a qualified judge at all. The rationale of this idea in the Saudi law is that there is a conflict of interest between the functions of the judge on the one hand, and the functions of a lawyer, for example, on the other hand. According to Islamic law the judge must not engage in social activities especially with those who have an interest in the judiciary.

Second, there is also a contrast in the positions adapted towards courts' personnel. English courts accept the standard that where the case was concerned with bias on the part of the justice' clerk, the court should consider whether it should infer that there was a real danger that the clerk's bias infected the views of the justices adversely to the applicant.<sup>17</sup> In contrast, article 8 of the Law of Procedure before *Shari'ah* Courts provides: "*Process servers, clerks, and such other judicial assistants may not perform any work that lies within the scope of their jobs in cases involving them or their spouses, relatives, and in-laws up to the fourth degree, and any such work shall be null and void.*"

A third area of comparison is that according to the law of Saudi Arabia, the judge is automatically disqualified from hearing a case, and if he does, his judgment is void and null if he, his wife, a relative, or an in-law in the ancestral line, or a person for whom he is trustee or guardian, has an interest in the existing case or if he had issued a *fatwa* (religious legal opinion), litigated for one of the litigants in the case, or written about it, even if it were before he joined the judiciary, or if he had earlier considered the case in the capacity of judge,

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<sup>15</sup> - *R v Gough* [1993] 2 All ER 724-740

<sup>16</sup> - *Ex p Pinochet Ugarte* (No 2) [1999] 1 All ER 577-599

<sup>17</sup> - *R v Gough* [1993] 2 All ER 724-740



expert, or arbitrator, or had been a witness in the case or had engaged in any investigative action therein. This standard is wider than that applied by the ECHR or the English court. The idea in the Saudi law is that it is very difficult to prove the actual bias of the judge, especially since bias is such an insidious thing that even though a person may in good faith believe that he was acting impartially, his mind may unconsciously be affected by bias. And applying general tests for determining the court's impartiality could lead to practical difficulties resulting in undesirable uncertainty when handling the issue of impartiality. More importantly, the appearance of the judge's impartiality cannot be safeguarded if the judge engages even slightly with, for instance, the accused's investigation. There is an overriding public interest that there should be confidence in the integrity of the administration of justice. It could be argued that designating certain circumstances in which the judge must automatically disqualify himself from hearing the case can ease the complexity that courts might engage with in order to determine the question of impartiality. Needless to say that, a court when considering the impartiality of a given judge faces a very difficult task. English courts, for example, had struggled to find the appropriate test to determine the court's impartiality. Until 1993 there had been some divergence in the English authorities. Some had expressed the test in terms of a reasonable suspicion or apprehension of bias, whilst other had expressed the test in terms of a real danger or likelihood of bias. This diversity was permanently settled in England and Wales by the House of Lords' decision in *R v Gough* 1993 in which the real danger test was favoured.<sup>18</sup> This test, nevertheless, has not commanded universal approval. Scotland, Austria, Canada, New Zealand and South Africa have adhered to the reasonable suspicion or reasonable apprehension test, which may be more closely in harmony with the European Court of Human Rights' approach.<sup>19</sup> Therefore, in the light of the above and for the sake of the consistency with jurisprudence of the European Court, the Court of Appeal<sup>20</sup> took the opportunity to call for reconsidering the appropriate test when determining the court's impartiality. Finally, the House of Lords in *Porter v Magill* decided to shift the test from the real danger test into whether the relevant circumstances, as ascertained by the court, would lead a fair-minded and informed observer to conclude that there was a real possibility that the tribunal had been biased. In addition, even though English courts have recently chosen the test that is more consistent with European Court' approach;

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<sup>18</sup> - See *Locabail Ltd v Bayfield Properties* [2000] 1 All ER 65-96

<sup>19</sup> - See *Locabail Ltd v Bayfield Properties* [2000] 1 All ER 65-96 & see also *Ex p Pinochet Ugarte* (No 2) [1999] 1 All ER 577-599

<sup>20</sup> - *In re Medicaments and Related Classes of Goods* (No 2) (CA)[2001] 1 WLR 700-729 (The Weekly Law Reports



the future application of this test may raise practical difficulties. In fact, the distinction between tests discussed by the English courts; real danger test, and an outsider observer test is not certainly established. This led Lord Hope in *Porter v Magill*<sup>21</sup> to say that: “*Although the tests ... were described differently, their application was likely in practice to lead to results that were so similar as to be indistinguishable... The Court of Appeal, having examined the question whether the real danger test might lead to a different result from that which the informed observer would reach on the same facts, concluded ... that in the overwhelming majority of cases the application of the two tests would lead to the same outcome.*”

A final point that supports our conclusion is that Islamic jurists have discussed in great detail the impartiality of the judge. As a general rule, they restrict the judge from, for instance, accepting a gift, private invitation, or hosting one of the case parties. The aim is to avoid any act that might cast doubt with regard to the judge’s impartiality.

With regard to the right to an open court, the study shows that even though Islamic jurists did not explicitly stipulate that the right to public hearing is obligatory, the practical application of the judiciary throughout Islamic societies indicates that Islamic law requires the hearing to be held in public.<sup>22</sup> Therefore, it can be said that the attitude of Islamic law in respect of an open court, is similar to that of the European Court of Human Rights. Both require the court to be open; nevertheless, Islamic law differs in that it does not designate certain circumstances in which the hearing can be exceptionally held in a closed session, but rather it articulates the principle and leaves the judge concerned with somewhat wide discretion to determine whether the case should be heard in public. In contrast, the European Convention on Human Rights expressly restricts the exceptions to the right to an open court to specific circumstances.

Like the European Convention the law in Saudi Arabia requires the hearing to be held in public. This right can be restricted in both systems on similar grounds. However, in the context of the European Convention on Human Rights the notion of a public hearing has a slightly different meaning than its counterpart in Saudi Arabia. In the European context the term means that not only the public but also the press must be allowed to hear the trial.<sup>23</sup> In respect of the right of the press to attend the trial and publish whatever they deem suitable,

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<sup>21</sup> - [2002] 1 All ER [2002]1 All ER465-523

<sup>22</sup> -Jeerah, A ( 1988 ) p. 122

<sup>23</sup> - Article 6 (1) of the European Convention on Human Rights provides: “.... *The press and public may be excluded from all or part of the trial...*”



this right raises a clear difference between the judicial system in Saudi Arabia and the European Convention, and maybe also most western countries. The European court regards the press as an important means to build public confidence in respect of justice. It is argued that the press allows citizens to scrutinize the function of the court. The European Court held that: "*The courts could not operate in a vacuum: while they were the forum for settling disputes, this did not mean that there could be no prior discussion of disputes elsewhere. It was incumbent on the mass media to impart information and ideas concerning matters that come before the courts just as in other areas of public interest.*"<sup>24</sup> In contrast to this view, many Islamic writers argue that press involvement cannot in any circumstances enhance public confidence in the judicial system because those who present the media are not specialists in Islamic or codified law. Moreover and more significantly, providing the media with the right to engage in cases, and particularly criminal cases, will promote sinning and evil; and Islamic societies are obliged not to promote sinning. The idea of broadcasting procedures of inquiry and trial through the media, therefore, is not in line with some Islamic principles, hence it is undesirable.

In respect of the accused's right to receive reasoned judgment the study illustrates that the application of this right by both *Shari'ah* court and the Board of Grievances shows, generally speaking, a compliance with European standards of human rights.

### **Rights after the delivery of Judgment**

Chapter 7 of this thesis concerns rights guaranteed after the delivery of criminal judgment. These rights are: the right to appeal, the right to compensation for miscarriage of justice, the right not to be tried twice for the same offence, the right to a pardon, the right to stay of execution of punishment, and the right to repent.

Regarding the right of the accused to appeal against his sentence and conviction, an examination of scholars' jurisprudence reveals that contrary to ideas held by some writers and in spite of the fact that Islamic law does not divide courts into courts of first instance and courts of second or third instance as modern law does, and even though Islamic law does not distinguish between an appeal and judicial review, this cannot be understood to mean that Islamic law has no means to review and reverse a judicial decision. The idea of reversing a wrong judgment was applied clearly during and after the Prophet's era. Moreover, Islamic jurists provide detailed explanations to illustrate the concept.

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<sup>24</sup> - *The Sunday Times v The United Kingdom* [1979] 2 E.H.R.R. 245

The majority argue that the Appellate Court in Saudi Arabia can only handle matters of law. A careful study of the case in Saudi Arabia, however, may confirm that the Court of Appeal has the power to deal with matters of both law and fact. (a) The law does not exclude matters of fact. An appeal is an inherent part of the judiciary, and unless limited by statute surely an appeal court has general jurisdiction.<sup>25</sup> (b) Pursuant to article 200 of the law of Criminal Procedures, the Appellate Court may permit the litigants to submit new evidence to support the grounds of their appeal. Consequently allowing parties to adduce new evidence before the Appellate Court is a crucial point in respect of the controversy between writers. Considering evidence is no doubt a matter of fact. (c) The actual practice of the Court of Appeal confirms that it interprets the law in a way that supports our view. Examining its approach in handling cases reveals that it deals with both matters.

In general, the right of the accused to have his conviction and sentence reviewed by a higher tribunal is provided in the judicial system of Saudi Arabia in a manner consistent with European Court standards.

The accused's right to compensation for miscarriage of justice is fully guaranteed under Islamic law whether this occurs during the investigation or trial stages. Thus, the law in Saudi Arabia places considerable emphasis on protecting the accused from any harm that could occur to him during a criminal action. According to the case law before the Board of Grievances, the investigation authority's responsibility is based on the omissive responsibility (liability). That is to say it commits a fault by breaching the law. Therefore, as a general rule, if the investigation authority does not infringe the law no compensation can be granted because it has not committed a fault.<sup>26</sup> This approach provides similar standards to that of the European Convention. The Explanatory Report of Protocol No. 7 illustrates that in order to apply this right there should be some serious failure in the judicial process involving grave prejudice to the convicted person. Nevertheless, the accused's interests might be prejudiced even though the authority concerned has not committed any fault. In this case too the accused in Saudi Arabia is entitled to compensation. The compensation here is based on liability on the basis of risk. To grant compensation it is sufficient to prove the harm caused by a particular conduct practiced by the administration, even where there is no fault on the part of the investigation authority.

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<sup>25</sup> - Amad Al Najar (1997) p. 427 & 434

<sup>26</sup> - Decision No. 3/D/F/ 39 in 1422H



This kind of liability is based on the idea of collective solidarity. This means that if the administration causes any harm, though no fault is committed, the community (state) will bear the liability of the administration's conduct, if this conduct causes harm to persons.

This rule is an exception to the original rule of liability, in which the establishing of fault is a crucial factor.<sup>27</sup>

Obviously, this high standard goes well beyond any human rights requirements. In contrast to the European standards of human rights, compensation pursuant to the above approach does not require a failure on the part of the administration. It seems that courts in Saudi Arabia should refer to the general principles of justices that are inherent in the religion of Islam.

In short, it goes without saying not only that the judicial system in Saudi Arabia guarantees the right to compensation for wrongful conviction, but also, as is evident from the above analysis, it applies a higher standard than that required by the European law of human rights.

As to the right not to be tried again for the same offence, a search of early Islamic jurisprudence reveals that it contains no discussion of such a right.

Nonetheless, in principle, the rule against double jeopardy is in complete harmony with the Islamic principles of justice. Commenting on this rule Mashood A. Baderin<sup>28</sup> argues that: *"Retrying a previously tried and convicted or acquitted person on the same facts is tantamount to injustice and perhaps witch-hunting."* In the Resolution adopted after the First International Conference on the Protection of Human Rights in Islamic Criminal Justice System held in Syracuse, Italy in 1979, the Conference resolved that *"The letter and spirit of Islamic Law on the subject of the protection of the rights of the criminally accused are in complete harmony with the fundamental principles of human rights under international law."*<sup>29</sup>

As a result the legislative authority in Saudi Arabia did not find it difficult to guarantee this right even though it was not discussed or demonstrated by early Islamic jurisprudence. This is in fact an area where the Islamic state by adopting the principle of public interest as a source for legislation, can reveal the capability of Islamic law to accommodate new human rights norms essential to the proper administration of justice. By stipulating this right in terms to a great extent similar to those provided in the international human rights law, the Saudi legislature shows Islamic law to be up-to-date law. This is the proper understanding which

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<sup>27</sup> - The Board has reiterated this rule in a number of his judgments. For example, decision. No. 15/T in 30/6/1401H & decision No. 37/T in 19/9/1401

<sup>28</sup> - (2003) p. 110

<sup>29</sup> - See, Mashood Baderin ( 2003) p. 110



does not limit Islamic law to jurisprudence existing within Islamic contexts. Rather, as has been argued in chapter three, Islamic law is capable of absorbing new human rights principles regardless of their origin as long as they enhance the protection and observance of the dignity of human beings.

The rights to a pardon, to stay of execution of punishment for humanitarian reasons, and the right to repent are not mentioned in the European Convention and possibly are similarly absent from all international instruments regarding human rights. Their presence in the Saudi judicial system expresses the special properties of this system, which is fundamentally based on Islamic law. The right to a pardon reflects the humanitarian approach of Islamic law. In the view of Islam an offender is not regarded as outside society, and members of society should not reject him, but rather society, as a whole, should bear the burden of rehabilitating the accused, and support him to re-engage properly in the community. The basic idea behind the pardon principle is that Muslim society has to strike a balance between the advantages and disadvantages of punishing the criminal. It goes without saying that this humanitarian nature of the right to pardon, though not provided expressly in the European Convention, is clearly consistent with, generally speaking, the notion of human rights which calls for an enhancement of the dignity of human beings.

The right to stay of execution of punishment, which has no counterpart in the European contexts of human rights, demonstrates the spirit of Mercy that is required by the religion of Islam. In the Resolution adopted after the First International Conference on the Protection of Human Rights in Islamic Criminal Justice System held in Syracuse, Italy in 1979, the Resolution states that under Islamic law the accused must enjoy "*the right to benefit from the spirit of Mercy and the goals of rehabilitation and remobilization in the consideration of the penalty to be imposed.*"<sup>30</sup>

Similar to the right to a pardon and the right to stay of execution of punishment, the right of the accused to repent is clearly founded mainly on the principle of rehabilitation. This is a manifestation of the significant role of the Islamic religion in respect of the criminal justice system in Saudi Arabia. The system is observably influenced by the spirit of Mercy, forgiveness, and tolerance even with those who breach the interest of the society.

Interestingly, the influence of the spirit of religion is not completely alien to the European Community and hence, as far as this thesis is concerned, to European human rights law. In

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<sup>30</sup> - Ibid, p. 111



fact there is an appreciation among members of the EC of the importance of religion as an aspect of cultural heritage. In contrast to Islam, however, religion never exerts a direct influence on EC legislation. Ian Leigh argues that: "*Plainly the EC is neither Erastian nor a Theocracy. Religion is neither subordinated and enlisted in the service of the EC, nor vice versa. This is not surprising - none of the member states, current and prospective, are at these extremes.*"<sup>31</sup>

Finally, what distinguishes our findings is that all these suggested reforms do not breach Islamic law and can be easily adapted to the judicial system in Saudi Arabia. It is the function of this study to demonstrate that they may be accommodated within the Saudi judicial system without contravening the law of Islam.

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<sup>31</sup> - Unpublished paper "*Alternative Models of Faith/State Relations in the EC*". In a conference at Newcastle Law School, 29 October 2002. Under the title: "Structured Pluralism: A Practical Legal Framework for Faith in the European Union?"

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