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# The Rights of the Accused in Saudi Criminal Procedure

JEFFREY K. WALKER\*

## I. INTRODUCTION

In Islam, the only law is the law of God, and the law of God is the *Shari'a*.<sup>1</sup> Literally "the way" or "the straight path," *Shari'a* is the civil and criminal law of Saudi Arabia<sup>2</sup> and the Koran is the Saudi constitution.<sup>3</sup> "In Saudi Arabia, as in other Muslim countries, religion and law are inseparable. Ethics, faith, jurisprudence, and practicality are so interdependent that it is impossible to study *only* Islamic religion or *only* Islamic law."<sup>4</sup> Indeed, Islamic law is intended to serve as the expression of God's will. The term Islam means "submission" and the *Shari'a* is meant to regulate "daily life, religious activity, social behavior, financial transactions, and family affairs . . . and provides punishment for crimes and civil offenses."<sup>5</sup>

Saudi Arabia is the only major Arab country that still adheres to a more or less unamended form of the *Shari'a*. There are many reasons for this, not the least of which is Saudi Arabia's peculiarly important position in Islam as the keeper of the two holy places of Mecca and Medina.<sup>6</sup>

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1. Nearly all Islamic states subscribe to parts of the *Shari'a*, particularly in the areas of family law and personal status. Islamic criminal law, as embodied in the *Shari'a*, is applied in Pakistan, Iran, the Sudan, Saudi Arabia, Afghanistan, Oman, Yemen, and other Gulf states. SAYED H. AMIN, *ISLAMIC LAW IN THE CONTEMPORARY WORLD* 21 (1985). However, only two modern Arab jurisdictions still subscribe to a more or less pure form of Islamic law, unmixed with statutory codification and Western (mostly civil law) influences: Yemen and Saudi Arabia. For ease of analysis, therefore, this Article is limited to a general consideration of Saudi criminal law.

2. Because Saudi Arabia is a monarchy, Saudi law also includes a fair number of royal decrees, mostly in "modern" areas such as trade and commercial law. See *infra* note 23 and accompanying text.

3. Richter H. Moore, Jr., *Courts, Law, Justice, and Criminal Trials in Saudi Arabia*, 11 INT'L J. COMP. & APPLIED CRIM. JUST. 61, 61-62 (1987).

4. Gali Hagel, Note, *A Practitioner's Introduction to Saudi Arabian Law*, 16 VAND. J. TRANSNAT'L L. 113, 115 (1983).

5. Joseph L. Brand, *Aspects of Saudi Arabian Law and Practice*, 19 B.C. INT'L & COMP. L. REV. 1, 6 (1986).

6. King Fahd, the monarch of Saudi Arabia, prefers to be called the "Servant of the

## II. THE SOURCES AND APPLICATION OF ISLAM IN CRIMINAL LAW

The first and foremost tenet of Islamic law is simply that "every true Muslim obeys the Commandments of God and feels pleasure in the very act of obedience. Obedience to the word of God comes from within, spontaneously, and without external compulsion."<sup>7</sup> Therefore, civil or criminal law is not seen primarily as a means of deterrence, but as a method of correcting those who have strayed from the proper path.

This view of law as supplementary to obedience to God is reinforced by the overtly communal nature of Islam. To the Muslim mind, it is conceptually impossible to speak of the "rights" of an individual without also considering the "obligations" of that individual to the community. "To speak only of the 'rights of man' without simultaneously bringing into relief his duties would be transforming him into a rapacious beast, a wolf, or a devil."<sup>8</sup> In many respects, this attitude is quite different from the Western view of individual liberty.

Western civilization emerged as a result of the urge favoring the individual against the society, and it has been built upon an exaggerated notion of the rights of the individual . . . . When they see the individual, as in a particular case, being severely dealt with, they feel outraged at the sight of his suffering. But they do not seem to comprehend the far-reaching effects of the damage that is done to the society and the coming generations, too.<sup>9</sup>

In contrast, Islam sees the punishment of an individual offender as an act of mercy for both the offender and the community, regard-

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Two Holy Places." Lecture by Saad al-Fishawy, Professor, Georgetown University Law Center (Spring 1991) [hereinafter Lecture]. One commentator has pointed out that:

[it] is privately appreciated by the Saudi community, but is seldom mentioned in the company of foreigners [that there] is the popular view . . . that the present oil prosperity has been a reward from God for their long dedication to piety and to Shariah teachings. Should the nation relent . . . God will pull back his generous hand, and the vast depositories of oil in the land will dry up.

Sam S. Souryal, *The Role of Shariah Law in Deterring Criminality in Saudi-Arabia*, 12 INT'L J. COMP. & APPLIED CRIM. JUST. 1, 22 (1985).

7. AFZALUR RAHMAN, *ISLAM: IDEOLOGY AND THE WAY OF LIFE* 357 (1980).

8. MUHAMMAD HAMIDULLAH, *INTRODUCTION TO ISLAM* 109 (3d ed. 1969). For example, although all persons have the right to be secure in their possessions from theft, under Islamic law the "theft" of a copy of the Koran or of money from the public treasury is theoretically not actionable because the word of God can belong to no man, God ordained that the public treasury belongs to all, and presumably a man would only take from it if he were truly in need. AHMAD A. GALWASH, *THE RELIGION OF ISLAM* 103 (2d ed. 1961).

9. M. SIDDIQUI, *THE PENAL LAW OF ISLAM* 36 (1988).

less of the severity of the punishment. The transgressor atones for his sin before God, the injustice to the victim is redressed, and the community is protected against future crimes by the accused or others so inclined.<sup>10</sup>

Islam recognizes four distinct rights under the *Shari'a*. First, there are those things that are rights of God, including prayer, obedience, alms-giving, and fasting.<sup>11</sup> Second, there are those duties which one owes to one's self, including cleanliness and freedom from unhealthy practices and acts.<sup>12</sup> Third, each person has the right to be free from the harmful acts of others—freedom from negligent or criminal injury.<sup>13</sup> Finally, all the creatures created by God have a right to good stewardship at the hands of man.<sup>14</sup> The place of criminal law, therefore, is intertwined with the rights and duties of men to God, to themselves, to each other, and to all creatures.

Thus the law deals with [the] needs of man, be it spiritual or material, legal or social, and leaves no area of his life outside the scope of its regulation. In other words, it is all-comprehensive, and treats man as a whole, and gives instructions governing every field of his activities. It provides a complete code of life for man from the cradle to the grave. It meets the needs of his body as well as his soul and issues directions for the welfare of both, in private as well as in public.<sup>15</sup>

The sources of Islamic law are few. First and foremost, the Ko-

10. Interview with Bandar al-Suwailam, Professor of *Shari'a* at Islamic University of the Imam Mohamed ben Saud, Riyadh, Saudi Arabia and resident scholar at the Institute for Islamic and Arabic Studies in America (IIASA) in Fairfax, Virginia (Mar. 30 & Apr. 2, 1991) [hereinafter Interview]. [The author wishes to express his sincere gratitude to Prof. al-Suwailam and Mamdouh N. Mohamed who translated during the interview. Their patience, hospitality, and willingness to share the wisdom of Islam make them both worthy stewards of the Arab scholarly tradition]. In Islam, every crime is also a sin. *Id.*

11. Together with the performance of the *hajj*, or pilgrimage to the holy places, these constitute the "Five Pillars" of Islam." ISLAMIC AFFAIRS DEP'T, EMBASSY OF SAUDI ARABIA (WASHINGTON, D.C.), UNDERSTANDING ISLAM AND THE MUSLIMS (1989) [hereinafter UNDERSTANDING ISLAM]. Discussions of the "Five Pillars" were central to the works of early Muslim jurists. NOEL J. COULSON, CONFLICTS AND TENSIONS IN ISLAMIC JURISPRUDENCE 81 (1969). In later studies, these topics always occupy "pride of place in . . . manuals of *Shari'a* doctrine, where the first chapters are devoted to them." *Id.*

12. SAYYID A. MAUDUDI, TOWARDS UNDERSTANDING ISLAM 160-61 (Khurshid Ahmad ed. & trans., 1960).

13. *Id.* at 162-63.

14. *Id.* at 174-75. When asked, "are we rewarded for kindness towards animals?" the Prophet answered "there is a reward for kindness to every living thing." UNDERSTANDING ISLAM, *supra* note 11.

15. RAHMAN, *supra* note 7, at 351-52.

ran, the word of God as revealed to the Prophet, is the primary document of Islam, legal or otherwise.<sup>16</sup> Second, and of nearly equal importance, is the *sunna*.<sup>17</sup> The *sunna* is the collected words and acts of the Prophet as related by his companions.<sup>18</sup> Together, the Koran and the *sunna* constitute the most important authoritative sources of Islamic law.<sup>19</sup> The third source of law is known as *ijma*, which is public consensus concerning legal issues not addressed by the Prophet in his time.<sup>20</sup> In Saudi Arabia, which officially subscribes to the Hanbali school of jurisprudence, consensus may arise only through universal agreement of the Prophet's contemporaries.<sup>21</sup> Unlike the other schools, the Hanbali school does not recognize the modern use of analogy to extend the law, allowing the exercise of judgement, or *ijtihad*, only when confronted with apparently conflicting law.<sup>22</sup> The *Shari'a* as applied in Saudi Arabia, therefore, is "confined to the undoubted principles of the [Koran], to what is true and valid of the *sunna*, and the consensus [*ijma*] of the community represented by its scholars and learned men during a certain period and regarding a particular problem, provided there was such a consensus."<sup>23</sup>

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16. Brand, *supra* note 5, at 2-3.

17. *Id.* at 4.

18. The words and acts attributed to the Prophet are known as *hadith*. Hagel, *supra* note 4, at 121. There is an ancient and vast scholarship of *hadith* engaged in the investigation of the veracity of various reported statements and acts of the Prophet centering on analysis of the reliability of the witnesses. *Id.* at 121-22. The *sunna* also contains any pre-Islamic Arab customary law left undisturbed by the Prophet in his lifetime. *Id.* In fact, the *sunna* has been called the "common law of Islam." *Id.* at 121.

19. RAHMAN, *supra* note 7, at 349. There is a teaching of the Prophet which states: "Accept anything the [Prophet] may give you, and keep away from anything he forbids you to do. Heed God (alone); God is severe in punishment." *Id.* at 349.

20. Brand, *supra* note 5, at 4.

21. *Id.* Islamic jurisprudence is divided into four primary schools of thought. The Hanbali school is the officially recognized school of jurisprudence in Saudi Arabia. The Hanafi school is the most widely accepted, followed in Egypt and North Africa, Syria, and other areas. The Shafi'i and Maliki schools are followed in much smaller geographic areas. Lecture, *supra* note 6. Because the focus of this Article is Saudi Arabian criminal law, this Article will concentrate on the Hanbali school.

The Imam Ibn Hanbal (164-241 A.H. or 778-855 A.D.) was a disciple of Shafi'i. He lived as an ascetic for seventeen years, during which he narrated over one million *hadith* from over seven hundred companions of the Prophet. He was known to his contemporaries as a man of great piety and uncompromising opinion. It is said that on the day of his funeral, over 20,000 Christians and Jews were converted to Islam. MUHAMMAD AZIZULLAH, GLIMPSES OF THE HADITH 40 (1965).

22. Hagel, *supra* note 4, at 122-24.

23. Ahmed Z. Yamani, *The Eternal Shari'a*, 12 N.Y.U. J. INT'L L. & POL. 205, 206 (1979). Saudi Arabian law is also composed of a corpus of administrative law in the form of royal decrees. In 1926, the fundamental law of the Saudi judicial system stated that the sover-

One should always keep in mind that, in Islam, there is no distinction between church and state, as is commonly taken for granted in modern Western nations.<sup>24</sup> The Koran is perceived "literally as a total guide for the total life in this world and the hereafter."<sup>25</sup>

### III. THE DEFINITION OF CRIME UNDER THE SHARI'A

Under the *Shari'a*, there are three types of crimes: *hadd*, which means "that which is defined"; *qisas*, which means "retaliation"; and *ta'zir*, which are discretionary crimes.<sup>26</sup>

The *hadd* crimes are specifically denounced and the punishment set out in the Koran.<sup>27</sup> *Hadd* crimes are specifically detailed as to elements, witnesses, and punishments in the Koran and the *sunna*.<sup>28</sup> If the requirements for proving guilt are met, a court has no discretion in punishing *hadd* crimes.<sup>29</sup> The seven *hadd* crimes include:

1. adultery, for which the punishment is stoning;
2. fornication, for which the punishment is 100 lashes;
3. false accusation of adultery, for which the punishment is 80 lashes;
4. apostasy (renouncing Islam), for which the punishment is death;
5. drinking alcohol, for which the punishment is 80 lashes;
6. theft, for which the punishment for the first offense is the amputation of the right hand;
7. highway robbery, for which the punishment is the amputation of the hands and feet or, if a murder was also involved, death by sword or crucifixion.<sup>30</sup>

A *qisas* crime is one which gives the victim or the victim's family

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eign would have "exclusive competence . . . [to make] administrative regulations [which may] supplement the rules of Islamic law, but they must never contradict it." Enid Hill, *Comparative and Historical Study of Modern Middle Eastern Law*, 26 AM. J. COMP. L. 279, 294 (1978).

24. See Souryal, *supra* note 6, at 4.

25. *Id.* at 21.

26. GALWASH, *supra* note 8, at 105. In Saudi Arabia, there is actually a fourth kind of crime that is not covered by the *Shari'a*. This fourth type of crimes, such as traffic offenses, is governed by royal decree. *Id.* The Saudis allow administrative tribunals to enforce the royal decrees with a maximum penal authority of 300 riyals or ten days in jail. *Id.* An administrative Board of Grievances provides a level of appeal. *Id.*

27. *Id.* at 63.

28. *Id.*

29. *Id.*

30. *Id.* at 105.

the right of retaliation.<sup>31</sup> *Qisas* crimes are murder, whether intentional, quasi intentional, or accidental, and intentional amputation of a part of the body of another.<sup>32</sup> *Qisas* offenses take five forms: premeditated murder, seemingly premeditated murder, erroneous murder, intended injury, and unintended injury.<sup>33</sup> Because of the private nature of the injury, the prosecution of a *qisas* crime must be initiated by the victim or the victim's family and the punishment is at their discretion.<sup>34</sup> *Qisas* is specifically provided for in the Koran and *sunna*.<sup>35</sup>

*Ta'zir* crimes are those for which the punishment is not specified and over which the judge or *qadi* may exercise wide discretion, limited only by the confines of the teachings of the *Shari'a*.<sup>36</sup> The *qadi* "may simply admonish the offender or give him a warning or bound him over or even give him a disapproving look." *Ta'zir* would include such crimes as false testimony other than for adultery, bribery, or petty theft which does not rise to the level of *hadd*.<sup>37</sup> The primary purpose of *ta'zir* punishment is to correct the offender and serve as a deterrent to others, whereas *qisas* and *hadd* punishments encompass retribution as well as deterrence.<sup>38</sup>

#### IV. THE COURT SYSTEM IN SAUDI ARABIA

"Legal rules and a commitment to procedural justice are not absent from the Islamic legal tradition. To the contrary, Islamic law is

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31. Moore, *supra* note 3, at 63.

32. *Id.*

33. AMIN, *supra* note 1, at 28-29.

34. *Id.* at 28. The victim may choose to exercise a right of retribution or, alternatively, to accept blood money known as *diyah*. Moore, *supra* note 3, at 63.

35. Some comparative Islamic scholars view *qisas* more as a form of tort. See, e.g., ALI M. KHOJA, ELEMENTS OF ISLAMIC JURISPRUDENCE 125-31 (1977). Many aspects of *qisas* resemble Anglo-American tort law such as permitting an action to be brought by the victim or his family and the victim's choice of monetary damages in the form of *diyah*. See *supra* notes 33-34 and accompanying text. However, *qisas* encompasses more than a mere civil tort because punishments may accrue to one who commits a *qisas* crime, rather than simple monetary damages. Regardless of artificial line-drawing, common law torts straddle the divide between civil wrongs and criminal acts. Simply because practitioners of the common law choose to draw fine gradations in negligence such as "simple" versus "culpable" in order to force an action under the facially objective headings of "tort" or "crime," this does not require an analysis of Saudi law to engage in similarly artificial boundary-drawing. Indeed, many books on Islamic law include crimes and torts in the same chapter. See, e.g., *id.* at 125-35.

36. AMIN, *supra* note 1, at 29.

37. GALWASH, *supra* note 8, at 106-10.

38. Noel J. Coulson, *The State and the Individual in Islamic Law*, 6 INT'L COMP. L.Q. 49, 53 (1957).

marked by a multitude of rules, a desire to apply them uniformly, and a strong antipathy to arbitrary judgment."<sup>39</sup>

At the heart of judicial procedure in Saudi Arabia is the sometimes enigmatic figure of the Islamic law judge, the *qadi*.<sup>40</sup> Although much maligned as a symbol of arbitrary judgment in European and American jurisprudence,<sup>41</sup> the Saudi *qadi* is, just as his English counterpart, a representative of the sovereign who serves at the sovereign's discretion and exercises the jurisdiction authorized by the sovereign.<sup>42</sup>

In order to serve as a *qadi* in Saudi Arabia, a man must first become a scholar in his own right.<sup>43</sup> While at a university, the man would need to demonstrate exceptional knowledge of the Koran, the *sunna*, other sources of Islamic knowledge, and Arabic.<sup>44</sup> Additionally, his social and academic interaction with others must be exemplary.<sup>45</sup> 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.<sup>46</sup> If the candidate is deemed acceptable at all levels, he serves as an apprentice to an experienced *qadi* for an indefinite period, usually two to four years, in which time he is instructed and observed in judicial method.<sup>47</sup> In addition to these other requirements, a *qadi* must remain throughout his career a great follower of Islam; his example as a true believer must never be called into question.<sup>48</sup>

39. Martin Shapiro, *Islam and Appeal*, 68 CAL. L. REV. 350, 381 (1980).

40. See Brand, *supra* note 5, at 13.

41. For example, Max Weber referred to the *qadi* sitting under a tree dispensing summary justice as the antithesis of a civilized system of due process. See LAWRENCE ROSEN, *THE ANTHROPOLOGY OF JUSTICE: LAW AS CULTURE IN ISLAMIC SOCIETY* 59-60 (1989). In reviewing a case wherein a lower-court judge, in his discretion, might have chosen either of two diametrically opposed courses of action, Lord Justice Goddard, of the English Court of Appeals, stated that "the court . . . is really put very much in the position of a *qadi* under the palm tree. There are no principles on which he is directed to act, having no rules of law to guide him." *Id.* at 58.

Justice Felix Frankfurter once said of the United States Supreme Court: "We do not sit like a kadi under a tree dispensing justice according to considerations of individual expediency." *Id.*

42. Coulson, *supra* note 38, at 57-58.

43. Interview, *supra* note 10. Only a man may serve as a *qadi*. *Id.*

44. *Id.*

45. *Id.*

46. *Id.* The reviewing faculty are generally the faculty of *Shari'a*. *Id.*

47. *Id.*

48. *Id.* Although the *qadi* serves as an instrument of the sovereign, the process of selection is bottom-up. The executive never nominates a candidate or appoints a *qadi* without proof that the individual is indeed a wise and impartial man. *Id.* Professor al-Suwailam stated that



The Saudi courts are *Shari'a* courts of general jurisdiction without formal division between civil and criminal matters.<sup>49</sup> The courts are divided into three levels, based on jurisdiction. The ordinary courts, the *musta'jalah* courts, are courts of first instance and are located in nearly every city and village.<sup>50</sup> These local courts have jurisdiction over small claims and misdemeanors.<sup>51</sup> The criminal jurisdiction includes all *taz'ir* crimes, but not any crimes which could result in a punishment of either mutilation or death.<sup>52</sup> The criminal jurisdiction further includes the *hadd* crimes of defamation and intoxication.<sup>53</sup> The court consists of a single *qadi* whose own judgment of the oral testimony is the overriding factor in deciding the case.<sup>54</sup> "To the extent the [*qadi*] seeks binding precepts, he is bound only by the Quran and the Sunna . . . ."<sup>55</sup>

The second level of Saudi courts are the High Courts of *Shari'a* Law, the *kubra* courts, which are located in Mecca, Medina, and Jeddah.<sup>56</sup> These courts have original and exclusive jurisdiction over *hadd* crimes and all *qisas* crimes.<sup>57</sup> The court consists of a single *qadi*, unless the crime would result in punishments of execution, stoning, or amputation, in which case the court would consist of a panel of three judges.<sup>58</sup>

Appeal from the *musta'jalah* and *kubra* courts is to one of the two appellate courts of cassation.<sup>59</sup> A defendant sentenced to death, stoning, or amputation has an absolute right of appeal to the court of cassation; other appeals are discretionary.<sup>60</sup> The cassation court sits as a five-judge panel in the cases involving the severest punishments, but may sit *en banc* for a particularly serious or notorious case.<sup>61</sup> All

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to his personal knowledge the normal process of selection described above has never been disregarded. *Id.*

49. Moore, *supra* note 3, at 62. King Abdul Aziz established the court system by a royal decree in 1928. *Id.*

50. Brand, *supra* note 5, at 17.

51. Moore, *supra* note 3, at 62.

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. Brand, *supra* note 5, at 17.

57. Moore, *supra* note 3, at 63.

58. *Id.*

59. Brand, *supra* note 5, at 17. The Court of Cassation for the Eastern Province sits in Riyadh, while the Court for the Western Province sits in Mecca. *Id.*

60. Moore, *supra* note 3, at 64.

61. *Id.*

other appeals are heard by a three-judge panel.<sup>62</sup> Appellate review is generally limited to a review of the record or any transcripts from courts below.<sup>63</sup> However, the court of cassation has the discretionary authority to summon the parties or call witnesses.<sup>64</sup>

The highest level of Saudi courts is the Supreme Judicial Council which is appointed by the King.<sup>65</sup> The Supreme Judicial Council serves as the final level of appeal, reviewing the decisions of the courts of cassation.<sup>66</sup> Additionally, the Supreme Judicial Council supervises the entire Saudi judicial system and issues legal and religious opinions requested by the King or the Minister of Justice.<sup>67</sup>

## V. THE RIGHTS OF THE ACCUSED IN SAUDI CRIMINAL LAW

Procedurally, the Saudi courts recognize two types of actions: private right and public right.<sup>68</sup> Private right actions must be brought by a private claimant with an actionable injury.<sup>69</sup> In the criminal context, private right actions include *qisas* crimes or the *hadd* crimes of theft and false accusation.<sup>70</sup> With the exception of labor cases, private right actions have no statute of limitations.<sup>71</sup> Public right actions may be brought by anyone.<sup>72</sup> *Taz'ir* crimes are generally public right actions, as are the *hadd* crimes of adultery, apostasy, intoxication, fornication, and highway robbery.<sup>73</sup> The venue for all actions is always the

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62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.* However, the *en banc* decisions of the courts of cassation are not subject to review by the Supreme Judicial Council. *Id.*

67. Hagel, *supra* note 4, at 132. The Council's power to issue advisory opinions is intended to "adapt . . . the law as traditionally accepted to the changing needs of contemporary life." *Id.*

68. Moore, *supra* note 3, at 64.

69. *Id.*

70. *Id.*

71. Brand, *supra* note 5, at 11. *Hadd* crimes carry an implicit limitation period, since the failure of witnesses to immediately come forward with their evidence would likely introduce enough doubt to prevent conviction.

72. Moore, *supra* note 3, at 64. Islam imposes an affirmative duty upon individuals to come forward and correct illegal or immoral conduct by others. Interview, *supra* note 10. Indeed, Westerners who have travelled or lived in Saudi Arabia are aware of the so-called "religious police." *Id.* These are voluntary groups of private individuals who act as a kind of neighborhood watch not only for crime, but for any sort of "corruption." *Id.* This might include bad morals, illicit consumption of liquor, or even unfair dealing in the marketplace. *Id.* However, these "religious police" are not generally allowed to enter a private home or search an individual. *Id.*

73. Moore, *supra* note 3, at 64.

residence of the defendant.<sup>74</sup>

## VI. INTAKE RIGHTS: TREATMENT OF THE ACCUSED BEFORE TRIAL

There is no particular format for commencing a criminal action in Saudi courts. A charge of criminal conduct<sup>75</sup> can be brought by an injured party or an individual from the general public to the local court clerk, either orally or in writing.<sup>76</sup> Once the clerk receives the charge, the court must notify the accused personally.<sup>77</sup> There is no requirement that the accused reply; if he does not appear in court on the appropriate day, a second notice is sent for a hearing date within three days of the first date.<sup>78</sup> If the accused still fails to appear, a judgment *ex parte* will be entered.<sup>79</sup> If a person is arrested by the police, the notice requirements do not apply and the suspect may be held indefinitely pending trial.<sup>80</sup> However, while not mandating anything resembling *habeas corpus*, the *Shari'a* discourages penal detention in most cases and petty offenders are often released on bail.<sup>81</sup> Additionally, a person may never be detained upon mere suspicion of a *taz'ir* offense, although he may be detained upon suspicion of a *hadd* or *qisas* crime.<sup>82</sup>

Saudi criminal procedure places limitations on searching a suspect. For example, the police may not search the person of a suspect unless they have probable cause to believe that he may have committed a crime or the suspect has been habitually involved in prior crimi-

74. Brand, *supra* note 5, at 11.

75. An accused may not be charged with an offense created *post facto*. C.G. WEERAMANTRY, *ISLAMIC JURISPRUDENCE* 77 (1988). "Criminal justice [is] administered to all impartially according to the Islamic rules . . . . No special offences could be created after the event to try particular persons." *Id.* at 77.

76. Moore, *supra* note 3, at 64. See *supra* notes 68-74 and accompanying text.

77. Moore, *supra* note 3, at 64. If the accused is illiterate, notification must be given orally and witnessed by two persons. *Id.* at 64-65.

78. *Id.* at 65.

79. *Id.* If the accused is convicted *ex parte* and later appears, he has an absolute right to have a *taz'ir* conviction retried. Since *hadd* and *qisas* crimes require a high degree of certainty for conviction, it is extremely unlikely that an absent accused would be convicted because the requisite certainty is unlikely without the accused present to answer the charge. See ABDUR RAHIM, *THE PRINCIPLES OF MUHAMMADAN JURISPRUDENCE* 369 (1911). If an action is tried *ex parte*, the court can appoint someone to look after the accused's interests at trial. *Id.*

80. Moore, *supra* note 3, at 66.

81. James Dudley, Note, *Human Rights Practices in the Arab States: The Modern Impact of Shari'a Values*, 12 GA. J. INT'L & COMP. L. 55, 76 (1982).

82. GALWASH, *supra* note 8, at 109.

nal conduct.<sup>83</sup> There are also limitations upon the search of a home. The home is considered a place of particular importance in Islam.<sup>84</sup> Since "corrupt" worldly pleasures are not allowed, Muslims are expected to spend a good deal of time in their homes with their families or privately reflecting upon the Koran and the teachings of the Prophet.<sup>85</sup> Therefore, the private home is considered "inviolable," a "safe haven."<sup>86</sup> In Saudi Arabia, only the state police are allowed to search homes.<sup>87</sup> Additionally, the police must have a warrant,<sup>88</sup> a tip from a reliable informant of good personal character, or compelling circumstantial evidence of ongoing criminal activity to search a home.<sup>89</sup>

In the pretrial context, an accused cannot be compelled to confess to a crime.<sup>90</sup> Further, refusal to speak to a criminal charge does not constitute an admission.<sup>91</sup> Coerced confessions are void and inadmissible.<sup>92</sup> Although an accused cannot be forced to incriminate himself, the *Shari'a* indirectly encourages self-incrimination by allowing complete forbearance of punishment if an offender comes forward and repents the crime before he is apprehended by the state or formally accused.<sup>93</sup>

In contrast to Western criminal law, plea bargaining does not exist in Saudi criminal procedure.<sup>94</sup> One reason is that *hadd* crimes are crimes against God and therefore cannot be "pleaded down" by humans.<sup>95</sup> Another reason is that under *Shari'a*, there are no degrees of felonies or classes of misdemeanors; either the accused is guilty of

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83. Interview, *supra* note 10.

84. See Dudley, *supra* note 81, at 80-81.

85. Interview, *supra* note 10.

86. Dudley, *supra* note 81, at 80.

87. Interview, *supra* note 10.

88. Dudley, *supra* note 81, at 80-81. However, the Saudis have been known to search foreigners' homes for drugs, alcohol, or obscene publications without a warrant. Interview, *supra* note 10.

89. Interview, *supra* note 10. These standards are somewhat looser if the suspect is a notorious criminal or has been previously involved in repeated criminal activity. *Id.*

90. Moore, *supra* note 3, at 66.

91. *Id.*

92. *Id.* Flogging and prolonged detention, however, have been used in the past to coerce confessions from recalcitrants. *Id.* Despite its prevalence in some countries, torture is not a common accusation against "traditional-conservative" Islamic states like Saudi Arabia. Dudley, *supra* note 81, at 73.

93. Souryal, *supra* note 6, at 5.

94. *Id.* at 15.

95. *Id.*

the charged offense or he is not.<sup>96</sup> Finally, since *Shari'a* strictly categorizes crimes as *hadd*, *qisas*, or *ta'zir*, it would be difficult to accomplish the requisite "shopping around" between crimes.<sup>97</sup>

### VII. RIGHTS OF THE ACCUSED AT TRIAL

Once an accused has been charged and has appeared for trial, a complex system of rights and obligations attach, directed at a fair determination of guilt or innocence. In theory, all trials are public.<sup>98</sup> Courts may, however, close trials to protect public "morals."<sup>99</sup> Consequently, most Saudi criminal trials are closed to the general public.<sup>100</sup> The *musta'jalah* courtroom is generally little more than a tiny office, purposely kept small so that the *qadi* can carefully scrutinize the demeanor of the parties and witnesses.<sup>101</sup>

The *qadi* must be entirely impartial in space, word, and regard to all disputants.<sup>102</sup> In practice, this means that all parties to a trial should be seated in exactly the same relative position to the *qadi*, should be addressed in an identical manner, and should be gazed upon at equal intervals by the *qadi*.<sup>103</sup> The *Shari'a* requires equal treatment regardless of the comparative social status of the parties; the Prophet stated that even if his own daughter Fatima stole, her kinship would not save her from *hadd*.<sup>104</sup>

### VIII. EVIDENTIARY SAFEGUARDS

The single greatest evidentiary safeguard, particularly in the case of *hadd* crimes, is the *Shari'a* requirement of proof of clear criminal intent to commit the offense in question.<sup>105</sup> This safeguard is derived from statements of the Prophet. For example, the Prophet said,

96. *Id.*

97. *Id.*

98. Moore, *supra* note 3, at 66.

99. *Id.*

100. *Id.*

101. *Id.*

102. Brinkley Messick, *Kissing Hands and Knees: Hegemony and Hierarchy in Shari'a Discourse*, 22 LAW & SOC'Y REV. 637, 653 (1988).

103. *Id.* However, when a *dhimmi*, a non-Muslim "person of the Book" is a party, the manuals which *qadis* use sanction placing the interests of a Muslim party above that of a *dhimmi*.

104. Souryal, *supra* note 6, at 16. A more timely example is the celebrated case which was made into the movie *Death of a Princess* in 1981 wherein a Saudi princess was executed with her lover for adultery. *Id.*

105. See RAHIM, *supra* note 79, at 362.

“Acts are not to be judged except by motives.”<sup>106</sup> Quoted in an *hadith* related by Umar, a close and reliable companion of the Prophet, the Prophet said, “Actions are but by intentions and every man shall have only that which he intended.”<sup>107</sup> Indeed, any doubt as to intent would be sufficient to prevent the imposition of *hadd*.<sup>108</sup> Moreover, the major schools of Islamic jurisprudence are in absolute agreement: “a guilty mind is a necessary ingredient of a criminal offense so that a person is not liable for punishment unless he intended to commit the guilty act.”<sup>109</sup>

Illustrating the intent requirement, Saudi Arabia recognizes mental incapacity as an affirmative defense to an accusation. For example, in an *hadith* transmitted from Ali to Umar,<sup>110</sup> the Prophet stated that some persons would not be held criminally responsible for their actions: insane persons, pre-pubescent children, and sleeping persons.<sup>111</sup>

In Saudi criminal procedure, there are two kinds of doubt sufficient to prevent the execution of *hadd* punishment.<sup>112</sup> The first type of doubt occurs if there is any question as to the application of the *law* to the act, such as unclear or contradictory authority on a particular point.<sup>113</sup> The second type of doubt occurs if there is a question as to the *act* itself, such as whether the accused actually knew the act was *hadd*.<sup>114</sup>

As in the Anglo-American tradition, hearsay is treated with great skepticism by Saudi courts. The general rule is that a person,

106. RAHMAN, *supra* note 7, at 352.

107. *Id.*

108. RAHIM, *supra* note 79, at 362; KHOJA, *supra* note 35, at 131.

109. COULSON, *supra* note 11, at 85.

Beyond these basic issues, however, the schools have two distinct approaches. One approach is that the legal effect of an act or transaction must depend upon the motive or intent which inspired it. This is the moralist attitude, of which perhaps the Hanbalis are the most consistent advocates. The other approach is that it is not for the law to attempt to burrow inside the mind of the parties; it must accept and regulate their actions at their face value. This is the legally formalist attitude, which is a general characteristic of Hanafi law.

*Id.* at 86. As mentioned *supra* note 21, Saudi Arabia follows the jurisprudence of the Hanbali school.

110. This would be an *hadith* of great reliability, since Ali was the Prophet's cousin, son-in-law, and childhood housemate.

111. MUSHIN KHAN, *THE TRANSLATION OF THE MEANING OF SAHIH AL-BUKHARI* 527-28 (1975).

112. RAHIM, *supra* note 79, at 362.

113. *Id.*

114. *Id.* This is not to say his act could not be punished as a *taz'ir* crime.

whether a party or a witness, cannot testify on any matter he himself did not personally witness.<sup>115</sup> Also parallel to Anglo-American practice, there are some major exceptions to this general exclusion.<sup>116</sup> Matters of public record such as births, deaths, and marriages are not considered hearsay.<sup>117</sup> Any matter concerning a "notorious fact" is likewise admissible.<sup>118</sup> Finally, testimony concerning the statements of a dead or missing witness will be allowed if necessary.<sup>119</sup>

### IX. ASSISTANCE OF COUNSEL

The place of counsel in Saudi criminal procedure is rather nebulous. The fundamental premise in *Shari'a* is that "a criminal defendant is not permitted to transfer the responsibility for his defense to an attorney."<sup>120</sup> In Saudi Arabia, under Hanbali practice, the *Shari'a* courts generally refuse to allow counsel, particularly in "public right" actions.<sup>121</sup> An accused may request a court-appointed adviser to help in preparing his case, but the adviser is not considered an advocate in the common or civil law sense.<sup>122</sup> If permitted by the court, the adviser must be a Saudi and accredited by the Ministry of Justice.<sup>123</sup> Discretionary appointment is unlikely because the *Shari'a* courts do not approve of legal representation and prefer that the accused speak for himself.<sup>124</sup> There is no right to counsel in any pre-trial proceedings.<sup>125</sup> If an accused does not speak Arabic, he will receive a court appointed interpreter.<sup>126</sup>

### X. RIGHT TO SILENCE AT TRIAL

For *hadd* crimes, the general rule is that an accused can confess to the offense, but he must offer the confession the same number of times as the number of witnesses which would otherwise be needed to

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115. SIDDIQUI, *supra* note 9, at 46.

116. RAHIM, *supra* note 79, at 378-79.

117. *Id.* at 378.

118. *Id.* For this exception to apply, the witness must be able to state he did not *see* it, but he *knows* it. *Id.*

119. *Id.* at 379.

120. Hagel, *supra* note 4, at 135.

121. Moore, *supra* note 3, at 66.

122. Dudley, *supra* note 81, at 78 n.147.

123. Moore, *supra* note 3, at 66.

124. *Id.*

125. *Id.*

126. Dudley, *supra* note 81, at 78.

convict him absent a confession.<sup>127</sup> For example, for the crime of adultery, an accused would need to freely offer a confession four times, since a conviction for adultery requires four witnesses to the act.<sup>128</sup> This is more than stylized ritual; it is another indication of the high level of assurance required to convict for a *hadd* crime.<sup>129</sup> A confession for any type of crime may be retracted at any time until final punishment.<sup>130</sup> A retraction returns the burden of proof to the accuser and the state, and a full trial would thereafter be necessary.<sup>131</sup>

Though *Shari'a* considers an accused innocent until proven guilty, the accused is required to answer the charges after the accuser makes his case.<sup>132</sup> If the accused denies the charges, the accuser must offer evidence in refutation.<sup>133</sup> Generally, two witnesses are required to speak to each material fact.<sup>134</sup> Alternatively, the accuser may ask the accused to take an oath; the accused's failure to swear his innocence is considered to be proof of his guilt.<sup>135</sup>

#### XI. WITNESSES AND THE ACCUSED'S RIGHT TO CONFRONTATION

An accused must be given adequate time to prepare his defense.<sup>136</sup> The accused must be afforded the opportunity to obtain evidence, examine documents, and interview witnesses.<sup>137</sup> This right applies up to and including the time of trial; an accused may even be allowed to leave the courtroom to obtain documents or evidence.<sup>138</sup>

Documents cannot be introduced without some sort of founda-

127. See Moore, *supra* note 3, at 63.

128. *Id.*

129. See *supra* notes 26-30 and accompanying text.

130. See RAHIM, *supra* note 79, at 382.

131. Moore, *supra* note 3, at 65.

132. *Id.*

133. *Id.*

134. Hagel, *supra* note 4, at 136. The Koran states, "And take for witness Two persons from among you, Endued with justice, And establish the evidence (As) before God." ABDULAH YUSUF ALI, THE HOLY QUR-AN: TEXT, TRANSLATION AND COMMENTARY § 65:2 (1946).

135. Hagel, *supra* note 4, at 136. Muslims view the process of oath-taking quite seriously; it is generally unthinkable that someone would willingly lie under oath. *Id.*

If an action involves Christians or Jews, oaths may still be administered. *Id.* For example, the prescribed oath for Christians is: "In the name of God, who gave Jesus, son of Mary, the Holy Bible and made him cure the sick, the leper, and the deaf, I swear." *Id.*

136. Moore, *supra* note 3, at 66.

137. *Id.*

138. *Id.*



tion being laid as to their reliability.<sup>139</sup> Generally, official documents, court records, books kept in the normal course of business, or documents executed in the presence of two witnesses can be admitted as self-authenticating.<sup>140</sup> Just as in the common or civil law, courts will accept and act upon circumstantial evidence if it is of a "conclusive nature."<sup>141</sup>

Although there is no formal system of compulsory process as in the Anglo-American tradition, witnesses are exhorted to come forward by the Koran: "The witnesses should not refuse when they are called on [for evidence]."<sup>142</sup> An *hadith* teaches that "[t]he excellent witness is he who produces his evidence before he is asked for it."<sup>143</sup> In fact, any delay in coming forward casts doubt upon a witness's veracity, and such doubt would generally be considered sufficient to stay the imposition of *hadd*.<sup>144</sup>

The general requirements for offering testimony as a witness are that the person be a man,<sup>145</sup> sane, past puberty, a Muslim,<sup>146</sup> and of good character.<sup>147</sup> Affinity to a party or the accused can disqualify a witness.<sup>148</sup> As to character, each local court maintains records of the "conduct and habits" of local citizens in order to know, when necessary, whether a particular person would be a trustworthy witness.<sup>149</sup>

Regardless of the type of crime involved, *Shari'a* places a pre-

139. *See id.*

140. RAHIM, *supra* note 79, at 382. The Koran states that any contract for a debt should be witnessed: "get two witnesses, out of your own men . . . So that if one of them errors, The other can remind him." ALI, *supra* note 134, § 2:282.

141. RAHIM, *supra* note 79, at 381-82.

142. ALI, *supra* note 134, § 2:282. This requirement apparently does not extend to cases where corporal punishment may be involved because a witness could find himself torn between two laudable motivations: the communal interest in punishing transgressions and the personal welfare of the accused. SIDDIQUI, *supra* note 9, at 43-44.

143. RAM SWARUP, UNDERSTANDING ISLAM THROUGH HADIS: RELIGIOUS FAITH OR FANATICISM? 96 (1983).

144. RAHIM, *supra* note 79, at 363.

145. Women are not competent witnesses in Saudi Arabia. Moore, *supra* note 3, at 65. However, a woman may testify at the discretion of the court if her testimony is indispensable. *Id.*

146. Non-Muslims are incompetent to testify against Muslims, but may testify in an action against another non-Muslim. *Id.*

147. *Id.*

148. Fathers, sons, grandfathers, and grandsons are specifically barred from testifying for one another. SIDDIQUI, *supra* note 9, at 47-48. This exclusion extends to wives and husbands, as well as employers and employees. *Id.*

149. HAMIDULLAH, *supra* note 8, at 114. This process is known as the "purification of witnesses." *Id.*

mium on the accuracy of a witness's testimony.<sup>150</sup> For example, in an adultery case, each of the four required witnesses would have to convince the court that he actually saw the act of adultery with his own eyes.<sup>151</sup> If a witness is wrong, he is not only vile in the eyes of God, he can be subjected to eighty lashes for his false testimony.<sup>152</sup>

An accused must be present at trial and must be allowed to view all the witnesses who are testifying against him.<sup>153</sup> As to cross-examination, the *Shari'a* presumes that a witness is telling the truth.<sup>154</sup> If an accused attacks the testimony of a witness, he must produce two other witnesses to support this attack, since the accused has made the witness's veracity a material fact of the case.<sup>155</sup> In practice, a *qadi* usually denies cross-examination, and, when he allows it, the *qadi* himself asks the questions suggested by the examining party.<sup>156</sup>

## XII. POST-TRIAL: PUNISHMENT AND APPEAL

If there is one single aspect of Saudi criminal law that both confuses and horrifies Western observers, it is criminal punishment. "The penalties imposed for violations of the *Shari'a*'s law by Western standards might be considered cruel and unusual. Amputation, stoning, lashing, flogging, and capital punishment are a regular part of *Shari'a* justice."<sup>157</sup> That said, one should not exaggerate the frequency of these unarguably severe forms of punishment. "Nevertheless, and perhaps surprisingly, these harsh penalties are rarely imposed due to a strict law of evidence that serves as a human rights delimitation in the rigors of seemingly unalterable law."<sup>158</sup> Another commentator concurred with this view as long as eighty years ago: "[*Shari'a*] has laid down conditions of a stringent nature under which

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150. See RAHIM, *supra* note 79, at 375-76.

151. GALWASH, *supra* note 8, at 100. Roughly translated, the standard to which a witness must testify in an adultery case is that he actually "saw the brush in the mascara bottle." Lecture, *supra* note 6. One Western scholar has wryly noted that under English law, the requirement for four male witnesses to the actual act of fornication would probably constitute the crime of public indecency as well. COULSON, *supra* note 11, at 78.

152. Eighty lashes applies to the *hadd* crime of false accusation of adultery. GALWASH, *supra* note 8, at 101. False accusation of another crime is a *taz'ir* crime and the punishment is significantly less severe. *Id.* at 108.

153. Moore, *supra* note 3, at 66. But see *supra* note 79 and accompanying text for an explanation of *ex parte* proceedings.

154. Moore, *supra* note 3, at 65.

155. *Id.*

156. Brand, *supra* note 5, at 12 n.62.

157. Moore, *supra* note 3, at 67.

158. Souryal, *supra* note 6, at 5.

. . . punishments may be inflicted. These rules are so strict and inflexible that it must be only in rare cases that the infliction of *hadd* as of retaliation would be possible . . . ."<sup>159</sup>

As in any other system of criminal justice, there are several justifications for punishing criminal behavior under *Shari'a*. Punishments varying in type and severity are considered just retribution to various types and degrees of crimes.<sup>160</sup> Corporal or capital punishment serves as a specific deterrent by preventing recidivism.<sup>161</sup> Public execution of punishments serves as a general deterrent.<sup>162</sup> Finally, particularly in the context of the "in kind" punishment of *qisas* crimes, the punishment serves to institutionalize the desire to revenge a wrong done to one's self or one's family.<sup>163</sup> However, it should always be kept in mind that the inseparability of religion and society in Saudi Arabia implies that trial and punishment are a last resort; they represent a failure of the religious, moral, and social regulation interwoven throughout day-to-day Saudi life in the form of the *Shari'a*.<sup>164</sup> Consequently, a criminal is as much a disgrace to the community as he is to himself.<sup>165</sup> Punishment not only corrects the criminal individually, it corrects an imbalance in social harmony as well.<sup>166</sup> Punishment is considered "merciful" both for the victim whose wrong is thereby redressed before God and for the whole community because future social cohesion is encouraged.<sup>167</sup>

The punishments for *hadd* are prescribed by the Koran and the *sunna* and are therefore considered immutable.<sup>168</sup> The "safety valve" is provided by the high standard of proof required for conviction of a *hadd* crime.<sup>169</sup> Since the punishments for *hadd* crimes are divinely

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159. RAHIM, *supra* note 79, at 361.

160. For example, the punishment for *hadd* theft is the severing of the fingers of the right hand. GALWASH, *supra* note 8, at 105. The hand is viewed as the instrument of the theft and therefore the part of the body most offensive to God. Interview, *supra* note 10. Stoning is the punishment for adultery, based on the notion that sexual intercourse is pleasurable to the entire body. The entire body, therefore, should be punished. *Id.*

161. Interview, *supra* note 10.

162. *Id.*

163. SIDDIQUI, *supra* note 9, at 10.

164. *Id.* at 13-25.

165. Interview, *supra* note 10.

166. *Id.*

167. *Id.*

168. Moore, *supra* note 3, at 2-4.

169. Interview, *supra* note 10. For example, it is difficult to imagine frequent convictions for adultery based on the level of accuracy required from four male witnesses to the act.

ordained, there is no option of imprisonment.<sup>170</sup> For *hadd* theft, however, there are provisions made for recidivists.<sup>171</sup> Even for *hadd* crimes, however, an offender may be spared if he repents before apprehension, restores any stolen property in the case of highway robbery or theft, and pays the *diyah* to the family of anyone killed in the course of the crime.<sup>172</sup>

For *qisas* manslaughter or mutilation, the key element in determining allowable punishments is the defendant's intent. If a murder or mutilation was intentional, then the accused may be killed or forgiven and ordered to pay the *diyah*<sup>173</sup> to the victim's family.<sup>174</sup> In the case of mutilation, the loss to the victim may be replicated upon the person of the accused.<sup>175</sup> The choice of punishment is left strictly to the victim or, in the case of manslaughter, to his family.<sup>176</sup>

The punishments for *ta'zir* crimes are much more flexible than those for *hadd* or *qisas* crimes. The *qadi* has discretion to impose any punishment he deems appropriate under the circumstances.<sup>177</sup> Constrained only by the broad guidelines of the *Shari'a*, the *qadi* may consider intent, actual harm, and the socio-religious status of both the

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170. Moore, *supra* note 3, at 63.

171. For the first offense, the four fingers of the right hand are severed. For the second offense, the left foot is severed from the ankle. The third offense results in life imprisonment. The fourth offense, committed presumably while in prison, results in death. AMIN, *supra* note 1, at 23-24.

In order to prevent exaggerated accusations of theft, certain special circumstances must exist: the theft victim must bring a specific accusation against the defendant; the investigation of the theft must be conducted in the victim's presence; and the amputation itself must generally be witnessed by the victim. David F. Forte, *Islamic Law and the Crime of Theft: An Introduction*, 34 CLEV. ST. L. REV. 47, 52-53 (1985). The punishment for theft, therefore, contains a fair amount of revenge gratification, as well as the ordinary reasons for criminal punishment. *Id.*

Amputation can be avoided if the court chooses to entertain any doubts. This is usually the case except when the accused is a recidivist or the crime involved armed robbery resulting in harm to another person. Moore, *supra* note 3, at 65.

172. GALWASH, *supra* note 8, at 102.

173. Traditionally, the *diyah*, or "blood money," is set at 100 camels. Moore, *supra* note 3, at 63. For the purpose of the *diyah*, the value of 100 camels is established by royal decree in Saudi Arabia, and amounted to 140,000 Saudi riyals (about \$38,000) for the homicide of a Muslim man in 1987. *Id.* For an unintentional death, the value was 120,000 riyals (about \$33,000). *Id.* The *Shari'a* dictates that the *diyah* for a Muslim woman or a foreign man is one-half the full *diyah* (70,000 riyals or about \$19,000), and the *diyah* for a non-Muslim woman is one-fourth that of a Muslim man (35,000 riyals or about \$9500). *Id.*

174. GALWASH, *supra* note 8, at 98.

175. Moore, *supra* note 3, at 63.

176. AMIN, *supra* note 1, at 28.

177. *Id.* at 29.

accused and the victim.<sup>178</sup> The *ta'zir* punishment should be tailored to both correct the offender and satisfy the indignation of the victim and the community.<sup>179</sup> The theory behind *taz'ir* punishment is that it is more a communal condemnation than a specific, institutionalized form of retribution like *qisas*.<sup>180</sup> Referring to *taz'ir*, the Prophet said, "Whoever among you see the evil, let him remedy it with his own hands; but if he be unable so to do, let him forbid it by his tongue."<sup>181</sup> Another *hadith* of the highest quality relates how the Prophet himself chastised a perjurer.<sup>182</sup> The form of a particular *taz'ir* punishment may take the form of scourging, imprisonment, fines, or public denunciation of the offender for his crime.<sup>183</sup>

The negative Western view of Saudi criminal punishment turns on the harshness of corporal punishments such as flogging, stoning, or amputation. In modern Anglo-American and European political jurisprudence, these punishments would be considered cruel and unusual. Unfortunately, there is no real way to reconcile the Western and the Islamic views. For example, the *Shari'a* views amputation as a merciful act for both the community and the offender in the eyes of God.<sup>184</sup> Modern Western criminal law consciously seeks to disconnect overtly religious requirements and efficient deterrence.<sup>185</sup> In contrast, Saudi criminal punishment is designed just as much to fulfill obligations to God as to deter crime for the community. Therefore, the comparison of punishment in Saudi Arabia, where the religious connection is actively pursued and nurtured, to punishment in Western countries is perilously close to comparing the axiomatic apples and oranges.

The Islamic *Shari'a* is, in our terminology, both a code of law and a code of morals. It is a comprehensive scheme of human behavior which derives from the one ultimate authority of the will of Allah;

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178. Interview, *supra* note 10.

179. RAHIM, *supra* note 79, at 363.

180. Interview, *supra* note 10.

181. GALWASH, *supra* note 8, at 104.

182. *Id.*

183. *Id.* at 106-10. The *Shari'a* specifically provides for dividing offenders into four orders for the purpose of *taz'ir* punishment: most noble of the noble, nobles, middle order, and the lowest order. *Id.* at 106-07. Punishment becomes more direct and physically severe as one descends through the orders. *Id.* Apparently, the *Shari'a* has regularized what is a *de facto* reality in American criminal law. An American jailhouse adage holds that "if you want to do the least time, steal the most money," referring to the light sentences generally received by white-collar criminals.

184. Interview, *supra* note 10.

185. COULSON, *supra* note 11, at 79.

so that the dividing line between law and morality is by no means so clearly drawn as it is in Western societies generally.<sup>186</sup>

Criminal appeals present a difficult question under the *Shari'a*. The usual justifications for a systematized appeal process do not really dovetail with a strictly Islamic view of criminal law. Unlike the common law, there is no compulsion for appellate courts to formulate uniform rules, since only the Koran, the *sunna*, and the *ijma* are authorized sources of general legal rules.<sup>187</sup> Additionally, the *Shari'a* eschews broad rules, opting for specific scrutiny of the facts and circumstances of each individual case.<sup>188</sup> Therefore, there is no obvious reason why an appellate court's application of *Shari'a* would be any more "just" than that of the individual *qadi* exercising original jurisdiction.<sup>189</sup> Finally, *Shari'a* courts are as much religious as legal, and, since Islam as a religion is not hierarchical, the incentive for a strong system of hierarchical appeal is not great.<sup>190</sup>

Saudi Arabia does, however, utilize a limited system of appeal, focused more on removing doubt when a *hadd* punishment is contemplated rather than on any sort of control from above.<sup>191</sup> Just as *qadis* emerge from the ranks of the faithful, criminal justice is viewed as primarily a local affair best left to individual communities.<sup>192</sup>

### XIII. CONCLUSION

Virtually unique in the modern world, Saudi Arabia maintains a system of traditional Islamic criminal justice. The preceding analysis has attempted to detail the particulars of Saudi criminal procedure, as well as provide some insight into the procedural safeguards aimed at protecting the accused individual before, during, and after his journey through the criminal justice system. Before dismissing Saudi criminal justice as an anachronistic and oppressive system, Western observers should attempt to understand the procedural realities and the social milieu within which it operates.

When asked for a brief description of *Shari'a*, one Saudi scholar, after a puzzled look at the questioner, replied: "*Shari'a* is the constitu-

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186. *Id.*

187. Shapiro, *supra* note 39, at 350.

188. *See id.* at 361.

189. *Id.* The wide divergence of interpretation on particular legal issues between the four schools of Islamic jurisprudence illustrates the Islamic tolerance for diversity of law. *Id.*

190. *Id.* at 381.

191. *See supra* notes 59-66 and accompanying text.

192. Interview, *supra* note 10.

tion of God in life. It is the way of behaving, living, eating . . . it is the way of all things.”<sup>193</sup>

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193. *Id.*