The Saudi Pre-Trial Criminal Procedure and Human Rights

A Comparative and Evaluative Study

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Abstract

This study examines the extent to which Saudi pre-trial criminal procedural law and practice comply with international human rights standards, and provides suggestions that need to be made to the Saudi criminal justice system in order to make it fully consistent with these standards in areas in which it is deemed defective from the standpoint of international human rights law. The study cites the Islamic *Shari'ah*, the supreme law of Saudi Arabia, as the basis for the adopting international human rights standards applicable to the pre-trial stage in Muslim states, in general, and Saudi Arabia, in particular, in its attempt to overcome the challenge of cultural relativism, which represents the main obstacle to the advancement of human rights in the Muslim world.

The issues discussed in this study include the constitutional status of the *Shari'ah* in Saudi Arabia, the development of the *Shari'ah* as a body of law, its sources, and the power of the state to legislate under it. The extent to which the *Shari'ah* recognises the international human rights standards applicable to the pre-trial stage is examined. The status of human rights under Saudi law, and the position of the Saudi Government on international human rights instruments are also examined. The historical and philosophical origins of human rights, the development and sources of international human rights law are discussed. The controversy regarding the universality/relativity of human rights is examined, with a view to formulating an approach that takes into account both the need for universality and the reality of cultural diversity

In part two of this study, international human rights standards applicable to the pre-trial stage of the criminal process, which constitute the evaluative criteria adopted by this thesis, are identified in detail. In addition, the rights of the accused in the pre-trial stage under the Canadian and the Saudi Arabian criminal justice systems within the framework of international human rights standards are comparatively analysed. A critical evaluation of the findings made by the process of comparison with the aim of determining the extent to which the Saudi criminal justice system complies with

international human rights standards regarding the rights of the accused in the pre-trial stage is provided.

The conclusion of this study summarises its findings and highlights the changes required to be made to the Saudi criminal justice system in order to make it fully consistent with international human rights standards.

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List of Abbreviations

ICCPR	International Covenant on Civil and Political Rights 1966
ECHR	European Convention on Human Rights 1952
ACHR	American Convention on Human Rights 1969
CAT	Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984
Committee or HRC	U.N Human Rights Committee
European Court	European Court of Human Rights
Basic Law	Saudi Basic Law of Government 1992
CCP	Code of Criminal Procedure 2001
CIPPC	Code of the Investigation and Public Prosecution Commission 1989
IPPC	Investigation and Public Prosecution Commission
Charter	Canadian Charter of Rights and Freedoms 1982

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Introduction

The need to promote and protect international human rights at the national level is an issue representing an axis of a continuing international debate.[1] The aim of this debate is to establish ways by which internationally guaranteed human rights can be adequately protected at the national level. Although the debate focuses upon a wide range of issues, the treatment of individuals suspected or accused of committing crimes is at its epicentre because of the severe consequences that may result from not respecting these individuals' rights. This thesis, therefore, will examine the issue of human rights in the context of Saudi criminal procedural law and practice.

Saudi Arabia's position towards major international human rights instruments, which constitute the main source of international human rights law, has been controversial, to say the least. In 1948, Saudi Arabia abstained from voting on the widely adopted Universal Declaration of Human Rights (UDHR).[2] The basis for this abstention, as stated by Al-Barudi, the Saudi Ambassador to the United Nations at the time, was that the UDHR reflected aspects of Western culture that were frequently incompatible with the values of the Eastern States. The Saudi Arabian Government persisted with this argument throughout the debates held in 1954 and 1960, for the International Covenant on Civil and Political Rights 1966 (ICCPR),[3] and consequently refused to sign up to it.

However, in recent years and by way of a compromise, the Saudi Government has relaxed its opposition to abiding by international human rights standards by declaring its commitment to observe these standards where they do not explicitly conflict with the Islamic *Shari'ah*, which remains the supreme law of Saudi Arabia. This approach, however, which seeks to preserve the cultural values of Saudi Arabia, and simultaneously conform, where possible, to international human rights standards, remains controversial. This is because international human rights law does not permit the departure from its norms on the basis of cultural distinctiveness alone. Nevertheless, the recent Saudi approach is recognised as being far more pragmatic

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[1] *See, e.g.*, Vienna Declaration and Programme of Action, adopted by The World Conference on Human Rights, 2 June 1993, U.N. Doc. A/Conf.157/24 (Part I), at 29 (1993).
[2] Universal Declaration of Human Rights, adopted 10 Dec. 1948, G.A. Res. 217A (III), U.N. GAOR, 3rd Sess. (Resolutions, part 1), at 71, U.N. Doc. A/810 (1948) [hereinafter UDHR].
[3] International Covenant on Civil and Political Rights, adopted 16 Dec. 1996, entered into force 23 Mar. 1976, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess, Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966) [hereinafter ICCPR].

and sincere than its earlier position. This stems from the fact that although the modern concept of human rights originated in the West, it does not automatically follow that *all* international human rights standards are based exclusively upon Western values only. Therefore, some of these standards can be applied to non-Western countries as well, including Muslim countries, without prejudice to their cultural values.

The area of criminal justice has been designated by the Saudi government as one of the areas that it seeks to reform in order to meet the requirements of international human rights law. The criminal justice system was neglected for a long time by the government, media, and legal researchers because, *inter alia*, the low crime rate made the system look fair and workable without the need for further adjustments. However, with the growing number of foreigners coming to live and work in Saudi Arabia, and the increasing interest of the outside world in the stability of the country due to its strategic importance as the world's largest oil producer and the heart of the Muslim world, as in Mecca and al-Medina it has the two most sacred places for Muslims around the globe, the Saudi criminal justice system started to come under constant scrutiny, particularly from non-governmental human rights organisations. These organisations pointed out several shortcomings in the criminal justice system, in particular, the lack of statutory rules to protect persons who were suspected, or accused of committing crimes. These criticisms were heightened by a number of cases documented over the years in which persons suspected or accused of committing crimes were denied the basic rights granted under international human rights law. This, to a certain extent, made the outcome of these cases look suspicious. These findings undermined the reputation of the Saudi criminal justice system, particularly in the eyes of the outside world.[4]

These harsh criticisms, over the decades, alerted the Saudi Arabian Government to the need to reform the criminal justice system in order to guarantee fair and dignified treatment to those individuals caught up in the criminal process. In response to this need, the Code of Criminal Procedure (CCP)[5] was issued in 2001 with the aim of adjusting the law and practice to the extent required in order to comply with

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[4] *See, e.g.,* Amnesty International, *Saudi Arabia: A Justice System without Justice* (May 2000); Saudi Arabia: State of Denial (BBC Two television broadcast, 24 November 2002).

[5] Issued by Royal Decree No. M/39 (16 October 2001). Published on *Umm al-Qura* (the Saudi official Gazette) No. 3867 on 3 November 2001 [hereinafter CCP].

international human rights standards.[6] While this step apparently aims to improve human rights conditions in the criminal justice system, the question as to whether or not the CCP can fully achieve its intended aim is a matter that requires in-depth evaluation and scrutiny.

In response to this need, this thesis seeks to examine, among other relevant legislations, the CCP and its implementation in practice to determine the extent to which it complies with international human rights standards, and to provide suggestions to make the law and practice consistent with these standards in areas in which they are deemed defective from the standpoint of international human rights law. Since the CCP is extensive and covers all stages of the criminal process, this thesis will concentrate only on the issues concerning the rights of the accused during the pre-trial stage, and hence it will not extend to the trial itself, or the appeal (where made). These warrant other studies in their own right.

The study is divided into two parts. Part one, which includes chapters one, two and three, examines some preliminary issues that are highly relevant to the theme of this thesis.

Chapter one provides a historical background of the evolution and development of the Saudi legal system. In addition, it will provide an analysis of the constitutional provisions concerning the status of the Islamic *Shari'ah* within the framework of the constitution, and the sources of law. It will also introduce key Islamic concepts that are relevant to the theme of this thesis.

Chapter two concerns human rights under the international human rights law and the Saudi legal system. Here, a discussion of the philosophical and historical origins of human rights and the sources of international human rights law will be provided. In addition, it examines the obstacle facing the advancement of international human rights in Muslim countries, namely the relativity of human rights, and the ways by which this obstacle can be overcome. The status of human rights within the framework of the Saudi constitution, and the Saudi Government's position on international human rights instruments will also be examined.

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[6] Special Rapporteur, Dato' Param Cumaraswamy, on the Independence of Judges and Lawyers: Report on the Mission to the Kingdom of Saudi Arabia, Submitted Pursuant to Commission on Human Rights Resolution 2002/43, U.N. ESCOR, Comm'n on Hum. Rts., 59th Sess, Item 11(d) of the provisional agenda U.N. Doc. E/CN.4/2003/65/Add.3, para. 106.

The third chapter focuses on the rights of the accused under the Islamic *Shari'ah* rules. The chapter examines the status under the Islamic *Shari'ah* rules of those rights to which the accused is entitled under international human rights law. It seeks to demonstrate that there is nothing in the Islamic *Shari'ah* that precludes Saudi Arabia from complying with international human rights standards applicable to the pre-trial stage of the criminal process. To this end, the *Shari'ah* general principles, jurisprudential rules, and juristic opinions relevant to the rights of the accused in the pre-trial stage will be analysed and examined in the light of international human rights standards. The chapter attempts to go beyond demonstrating that there is no conflict between the *Shari'ah* and international human rights law in respect of the issues under consideration. It attempts to give international human rights standards a cultural legitimacy by showing that if the *Shari'ah* is interpreted in the light of modern circumstances, as dictated by the *Shari'ah* itself, the adoption of these standards in a Muslim state is not just permissible, but in fact, obligatory.

In the second part of this thesis, the focus will be on the evaluation of the rights of the accused in the pre-trial stage under the recent reforms, and on what is needed to make the Saudi criminal procedural law and practice fully compliant with the requirements of international human rights law. This part examines major international and regional human rights instruments in order to identify in detail the international human rights standards (which constitute the evaluative criteria adopted by this thesis) applicable to the pre-trial stage of the criminal process. The examination is not confined to the texts of these documents, but extends to the jurisprudence of the international or regional human rights courts where they are established under the instrument concerned to determine the exact scope of the rights under examination. In addition, a comparison of the rights of the accused in the pre-trial stage under the Canadian and the Saudi criminal justice systems within the framework of international human rights standards will be carried out.

The basis for selecting the Canadian system for this comparative task is dictated by the objective of this comparison, which is, firstly, to determine the extent to which Saudi law and practice comply with international human rights law, and, secondly, to determine the nature of the changes that need to be made for better compliance with these standards. The Canadian Charter of Rights and Freedoms 1982 recognises the rights of the accused in a manner comparable to that adopted by international human rights law. In addition, Canada is internationally considered to be a neutral country,

whose attitude towards Muslim countries is not perceived by Muslims, governments or people, as unfair or unbalanced, thus avoiding anything that could undercut the purpose of this comparative task of reforming the Saudi Arabian criminal justice system by drawing from the Canadian experience, where it is appropriate, with regard to the issues under examination.[7]

The rights under comparison are, namely, the right to an effective protection, the right against self-incrimination, the right to humane treatment, the right to liberty, the right to legal assistance and the right to privacy. These rights are comparatively analysed in chapters four, five, six, seven, eight and nine respectively. Part two will conclude by critically evaluating the discoveries made by the process of comparison with the aim of determining where the Saudi criminal justice system currently stands regarding the rights of the accused in the pre-trial stage, as far as international human rights standards are concerned.

The conclusion of this thesis will summarise its findings and highlight the changes required to be made to the Saudi criminal justice system in order to make it fully consistent with international human rights standards.

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[7] The choice of the Canadian system is also dictated by the accessibility of source materials and the researcher's language skills, and by the fact that, with regard to the issues under examination, the Canadian system has reached a very advanced stage of development.

Part One

Preliminary Issues

Chapter One

The Saudi Legal System

In 1902, Abdulaziz, a descendant of the Al Saud family, (who, for two interrupted periods over the last two centuries had ruled substantial parts of the Arabian Peninsula), came out of exile in Kuwait to assert the rule of his family over the territories known now as Saudi Arabia. His campaign to reunite the country under his rule was successfully completed in 1926 and in 1932 he was declared the King of Saudi Arabia.[1] Although King Abdulaziz did not adopt a written constitution, in all his speeches regarding this issue he clearly emphasised that the Holy *Qu'ran* and the *Sunnah* of Prophet Mohammed were to be used as the principal sources of adjudication by the judiciary and legislation by the state.[2] In essence, therefore, the ruling family did not object to the adoption of a written constitution *per se*, but saw no need for it, as they persistently argued that the *Qur'an* and the *Sunnah* of the Prophet (the principal sources of the *Shari'ah)*, provided such a constitution. As Crown Prince Faisal, as he then was, put it '[a] constitution: What for? The *Qur'an* is the oldest and most efficient constitution in the world.'[3]

However, when Crown Prince Faisal went on to assume the role of Prime Minister in 1962, he declared his intention to adopt a constitution based on the fundamental principles of Islamic *Shari'ah* in his ten-point programme. And then in 1964, when he succeeded his older brother King Saud, to the throne, he did indeed appoint a committee for the purpose of drafting the said constitution. However, as this pledge was provoked by the political instability of the time which was caused by a short-lived power struggle amongst the ruling family, once that was settled there, the pledge went unfulfilled. Although, every time there was a real threat to the power of the

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[1] For a detailed discussion of the history of Saudi Arabia from 1744 when an agreement was made between the Al Saud family and Imam Muhammad bin Abdul Wahhab (the founder of the Wahhabi movement) which resulted in the establishment of the first Saudi state, until the country was unified for a third time by King Abdulaziz, *see* Al-Authemeen, S, *Tari'q al-Mamlaka al-Arabiyyah al-Saudiyyah (The History of the Kingdom of Saudi Arabia)*, 10th edn (Riyadh, 2001).

[2] *See* Al-Autibi, I, *Tanzimat al-Dwalh fi Ahid al-Malik Abdulaziz (The Regulations of the State during King Abdulaziz's Period)* (Riyadh: Al-Obekan Bookshop & Publishers, 1993), pp. 218-225.

[3] As quoted in Salameh, G, 'Political Power and the Saudi State', *Merip Reports*, 91 (1980), 5, p.7, n.1.

ruling family, the pledge to enact constitutional reforms re-emerged, it was not until 1992 when the constitutional reforms finally saw the light of the day.[4]

The package of constitutional reforms composed of three separate documents, most important of which are the Basic Law of Government (*al-Nizam al-Assasy ll-Hukum*)[5] and the Consultative Council Law *(Nizam Majlis al-Shura*).[6] In addition, a year later the Council of Ministers Law was promulgated.[7] The Basic Law is mainly concerned with constitutional matters including, *inter alia*, the sources of law, the role and powers of the king, and the power divisions within the state authorities. The Consultative Council Law is concerned with the newly established Consultative Council including, *inter alia*, definition of its powers, the appointment of its members, and its status *vis-à-vis* the Council of Ministers (*i.e.,* the executive branch). The Council of Ministers Law 1993, which replaced the Council of Ministers Law 1958, deals, *inter alia*, with the regulatory and executive powers assigned to the Council of Ministers in light of the recently adopted reforms. As these Laws deal with very important constitutional and legal matters, the provisions of these Laws, and other relevant laws, will be subject to detailed analysis regarding the sources of law, the structure of the judicial and regulatory (legislative) authorities and their sphere/role in the legislative process. In addition, as the *Shari'ah* constitutes an important and essential component of the Saudi constitution, a discussion of the status of the *Shari'ah* within the Saudi constitution, its legal theory, sources and development will be provided.

Since that the aim of this thesis is to examine the extent to which the Saudi pre-trial criminal procedural law and practice conform with international human rights standards, the discussion in this chapter will be constructed with the aim of providing

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[4] Tarazi, A, 'Saudi Arabia's New Basic Laws: The Struggle for Participatory Islamic Government', *Harv. Int'l L.J.,* 34 (1993), 258, pp. 259-264. For a discussion of the reasons that had led to the adoption of the constitutional reforms, *see* Aba-Namay, R, 'The Recent Constitutional Reforms in Saudi Arabia', *Int'l & Comp. L.Q.,* 42 (1993), 295, pp. 296-303.

[5] Issued by Royal Order No. A/90 (1 March 1992). Published on *Umm al-Qura* (the Saudi official Gazette) No. 3397 on 6 March 1992 [hereinafter Basic Law]. An English translation of the Basic Law can be found in, 'Saudi Arabia: The New Constitution', *ALQ,* 8 (1993), pp. 258-270.

[6] Issued by Royal Order No. A/91 (1 March 1992). Published on *Umm al-Qura* (the Saudi official Gazette) No. 3397 on 6 March 1992. Concurrently, the Provincial Administrative Law (*Nizam al-Muqata'at al-Idaryyah*), issued by Royal Order No A/92 (1 March 1992). Published on *Umm al-Qura* (the Saudi official Gazette) No. 3397 on 6 March 1992. As the Provincial Administrative Law deals mainly with administrative powers assigned to provincial authorities, this Law falls outside the scope of this chapter and, therefore, is not included in the discussion.

[7] Issued by Royal Order No A/13 (21 August 1993). Published on *Umm al-Qura* (the Saudi official Gazette) No. 3468 on 28 August 1993.

an introduction to the fundamental concepts and the distinguishing features of the Saudi legal system, the understanding of which is essential in allowing an understanding of the discussions provided in the following chapters.

1.1 The supreme law of Saudi Arabia

As indicated above, the promulgation of the Basic Law of Government was intended to give effect to long-awaited constitutional reforms that had been promised since the early 1960s. However, the essential question to be asked in the context of the Basic Law is whether this, arguably, constitutional document, is a substitute for the unwritten constitution (*i.e.,* the Islamic *Shari'ah*) that pre-existed before the introduction of the Basic Law, or is it a mere subordinate to that unwritten constitution? In other words, does the Basic Law represent the Constitution of Saudi Arabia?

Firstly, it is worth pointing out that when the government introduced the package of reforms, it deliberately avoided the use of the term 'Constitution' (*Dustur*) in reference to the Basic Law. Instead, the government used the term 'The Basic Law of Government' (*al-Nizam al-Assasy ll-Hukum*) to refer to this document. The reason for this, as pointed out by Aba-Namay, was partly because '[t]he term "constitution", *Dustur,* is not commonly used among the Saudi population since the Saudis believe that only the Muslim holy book of the *Koran* can be called a constitution, and the government has always maintained that the constitution of Saudi Arabia is the *Koran*.'[8] However, this on its own is not the sole or even the main reason for not using the term constitution to refer to the Basic Law. Only a piece of legislation that represents the supreme law of the land in the sense that all other legislations have to conform with it, can be properly called a constitution. In scrutinising the Basic Law, one finds that this is not the case.[9] To start with, Article 1 of the Basic Law states that '[t]he Kingdom of Saudi Arabia is a sovereign Arab Islamic State with Islam as its religion; God's Book [*i.e.,* the Holy *Qur'an*] and the *Sunnah* of His Prophet, God's prayers and peace be upon him, are its Constitution (*Dustur*)....' In the same vein, Article 7 of the Basic Law stipulates that '[t]he regime derives its power from the

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[8] Aba-Namay, *supra* note 4, p. 295.

[9] *See* Al-Marzuqi, M, *al-Sultah al-Tanzimiah fi al-Mamlaka al-Arabiyyah al-Saudiyyah (The Regulatory Authority in the Kingdom of Saudi Arabia)* (Riyadh: Al-Obekan Bookshop & Publishers, 2004), pp. 74-76.

Holy *Qur'an* and the Prophet's *Sunnah*. They are sovereign over this Law and other State Laws.' Furthermore, Article 23 states that '[t]he State protects Islam; it implements its *Shari'ah*....'[10]

It is therefore clear from the above quoted Articles that, despite the introduction of the Basic Law, it is the Islamic *Shari'ah* that remains the supreme law of Saudi Arabia. It follows that if Saudi Arabia is to introduce any law it can only do so if it is consistent with the *Shari'ah*. This principle is explicitly stated in Article 67 of the Basic Law, which provides that '[t]he regulatory authority shall have the jurisdiction to enact regulations and bye-laws in order to attain welfare and avoid harm in the affairs of the state, in accordance with the general rules of Islamic *Shari'ah*.' Thus, if such laws do not conform with the principles of Islamic *Shari'ah*, they will have no force or effect, and consequently will not be applied by the judiciary in cases brought before them. Article 48 reinforces this by stating that '[t]he courts shall apply the rules of the Islamic *Shari'ah* in the cases that are brought before them, in accordance with what is indicated in the Book and the *Sunnah,* and laws decreed by the Ruler which do not contradict the Book or the *Sunnah*.'[11]

The above mentioned Articles suggest, in addition to the fact that the *Shari'ah* is the law of the land, that the state has the right to enact regulations to advance the welfare of the society on the condition that the *Shari'ah* is not violated thereby. It follows that in order to be able to determine the constitutionality of a given law, a proper understanding of the *Shari'ah* law and the powers of the state under it is essential. To provide such understanding to the reader there follows a brief discussion of Islamic legal theory from which the *Shari'ah* rules have stemmed and acquired their authority, the sources of *Shari'ah* and its development as a body of law. In addition, the concept of *siyasa shar'iyya*, which empowers the ruler to enact regulations to supplement the *Shari'ah*, under Islamic jurisprudence, the Saudi law and practice will be examined.

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[10] In the same vien, Article 1 of the Consultative Council Law states that 'following [the tradition of] the Prophet of God, may God prayers and blessings be upon Him, in consulting his companions, and in exhorting *al-Ummah* (nation) to engage in consultations, the *Shura* (Consultative) Council is created, and it exercises the tasks entrusted to it in accordance with this Law and the Basic Law of Government, with adherence to the Book of God and the tradition of His Prophet.' In addition, Article 2 of the Consultative Council Law states '[t]he *Shura* (Consultative) Council is founded on adherence to God's bonds, and commitment to the sources of Islamic jurisprudence.'

[11] *See also* the Basic Law, Arts. 8, 17, 26, 46 and 55.

1.2 Islamic legal theory

Shari'ah is considered by those of the Islamic faith to be the expression of God's will. Man, in Islam, does not possess the authority to create the law. This privilege under the *Shari'ah* belongs exclusively to God Almighty.[12] His law, furthermore, is, according to Islamic legal theory, immutable and valid for all time and for all human beings. It is stated in the *Qur'an* that '[t]hen We put thee on the [right] way of religion: so follow thou that [way], and follow not the desires of those who have no knowledge.'[13] Thus, the role of Muslims is strictly confined to the application of *Shari'ah*. As an inherent and binding part of the application of God's law, Muslims are allowed, in fact are required, to apprehend and discover God's law.[14] However, such an important role can only be undertaken by a qualified Muslim jurist, or what is known under the *Shari'ah,* as a *mujtahid* (plural *mujtihdeen*). *Ijtihad* translates from Arabic as 'endeavour' and in legal usage means 'the endeavour of a jurist to formulate a rule of law on the basis of evidence *(dalil)* found in the sources.'[15]

In exercising the faculty of *ijtihad*, a Muslim jurist is not left to his own reasoning in apprehending and discovering the law of God, but his exercise is governed by *usul al-fiqh* (the roots of jurisprudence) to ensure that the law is properly inferred from the sources. *Usul al-fiqh*, thus, could be defined as the science that is 'concerned with laying down procedural rules and principles in accordance with which the deduction of detailed substantive Islamic law would be regularised, standardised and freed from possible fallibilities.'[16]

According to *usul al-fiqh*, *Shari'ah* is mainly derived from four sources. Namely, these are: the *Qur'an* (the Holy Book), which is believed by Muslims to be the very words of God himself, as revealed upon the Prophet Muhammad (peace and blessings be upon him), over his lifetime; then there is *Sunnah*, the tradition of the Prophet Muhammad, which details the actions and sayings of the Prophet during his lifetime.

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[12] Khadduri, M, 'Nature and Sources of Islamic Law', *Geo. Wash. L. Rev,* 22 (1953) 5, pp. 6-10. *See also* Abu Zahra, M, *Usul al-Fiqh (The Roots of Jurisprudence)* (Cairo: Dar al-Fikr al-Arabi, 1997), p. 63.

[13] The Holy *Qur'an,* verse 45:18.

[14] Weiss, B, 'Interpretation in Islamic Law: The Theory of *Ijtihad*', *Am. J. Comp. L,* 26 (1978), 199, p. 199. *See also* Al-Zuhili, W, 'Tajdeed al-Fiqh al-Islami (Renewing Islamic Jurisprudence)', in *Tajdeed al-Fiqh al-Islami (Renewing Islamic Jurisprudence)*, ed. by Dar al-Fikr, (Damascus: Dar al-Fikr, 2000), p. 163.

[15] *Ibid.* p. 200.

[16] Zahraa, M, 'Characteristic Features of Islamic Law: Perceptions and Misconceptions', *ALQ,* 15 (2000), 168, p. 171.

Thirdly there is *ijma*, or consensus of opinion, which could be defined as the agreement of Muslim jurists in any particular age on a legal ruling, and lastly there is *qiyas*, which translates from Arabic as analogy. In legal usage this means the method by which the jurist extends the application of a certain law of one case to another because they share a common nature (*illa*).[17] In addition to these main sources, there is *muslaha mursala* (public utility), which is considered to be the fifth source of the *Shari'ah*. *Muslaha mursala* is the only source, (whether within the classical sources of *fiqh*, or under the concept of *siyasa shar'iyya*, which empowers the ruler to act to advance the public interest), that is designed to provide practical answers to contemporary social and legal problems for which there is no revealed text, *ijma* or a valid *qiyas* to deal with, including a majority of the issues covered in the thesis. For this reason *muslaha mursala* as a source of law will be discussed in detail in due course.[18]

The sphere within which the jurist can practice *ijtihad* is limited to the areas where the texts are equivocal and ambiguous (*dalil zanni*), or where there are no texts at all. However, if the text is clear and unequivocal (*dalil qat'i*, or *muhkam*), the jurist's role is restricted to declaring the ruling, but not being able to formulate it.[19] The body of knowledge resulting from the practice of *ijtihad* is called *fiqh* (jurisprudence).[20]

It is apparent from the foregoing that the *Shari'ah* is not formulated by, neither can it be altered by secular institutions to meet the desires and aspirations of a given society, but it can be comprehended and formulated by a qualified Muslim jurist, in accordance with what is likely to constitute God's will.[21]

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[17] For an extensive discussion of the sources of the *Shari'ah, see* Vogel, F, *Islamic Law and Legal System: Studies of Saudi Arabia* (Boston: Brill, 2000), pp.34-56; Ibrahim, M, *Sources and Development of Muslim Law* (Singapore: Malayan Law Journal, 1965), pp. 9-25; Abu Zahra, *supra* note 12, pp. 63-213.

[18] *See infra* para. 1.2.2.

[19] *See* Al-Dura'n, A, *Al-Tashri'a wa al-Ijtihad fi al-Islam: al-Tarik wa al-Manhuj (Legislation and Ijtihad in Islam: History and Methodology)* (Riyadh: al-Tuba Bookshop, 2001), pp. 295-301; Zahraa, *supra* note 16, p. 180; Al-Zuhili, *supra* note 14, pp.189-192.

[20] Vogel, *supra* note 17, pp. 4-5.

[21] Al-Muhairi, B, 'Conflict and Continuity: Islamization and Modernization within the U.A.E. Penal Law' (unpublished PhD Thesis, University of Kent (on file with Kent University Library), 1994), p. 12.

1.2.1 Development of jurisprudence and the authority of juristic rulings

By the end of the third century of *Hijra* (900 A.D.) four orthodox *Sunni* schools of jurisprudence were established.[22] Namely, these were: *Maliki*, *Hanifi*, *Shafi'i* and *Hanbali* schools. Each of these schools was named after the founding jurist who laid down the principles and doctrines applicable to legal matters, and the methodological rules by which *ijtihad* is governed (*usul al-fiqh*).[23] The legal methodology used by these four schools was the same, in particular with regard to their classification of the sources of law. However, due to geographical, social and economic conditions in which these schools were formed and developed, differences in the details of legal matters were soon forthcoming. These differences were mainly related to matters of selecting a certain tradition, or to showing a preference to one particular tradition over another etc.[24]

The students of these four distinguished masters of jurisprudence collected, and documented the principles and doctrines stated by each of them, and by the turn of the fifth century of Islam (1000 A.D), the doctrine of *ijtihad* was replaced by a new doctrine called *taqleed* (imitation), on the basis of alleged *ijma*. The application of this new doctrine meant that every qualified Muslim jurist lost the right to direct recourse to the original sources, and became obligated instead to imitate one of the four *Sunni* schools in applying the rules of the *Shari'ah*. The adoption of *taqleed* was based largely upon the belief that the four orthodox *Sunni* schools had established sufficient legal rules, as set out in their authoritative orthodox treatises, capable of dealing with any future developments.[25] In addition, the jurists of the first three generations of Islam, from the beginning of the Prophet's mission in 610 A.D., until the mid 9th century, are considered by subsequent Muslim jurists to be more skilled and knowledgeable about the *Shari'ah* than those jurists who emerged later, and consequently the opinions of those early jurists are considered to be more authoritative and weighty.[26] In effect this has resulted in a closing of the door of

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[22] The discussion here is confined to these four *Sunni* schools, as Saudi Arabia is a follower of the *Sunni* tradition.

[23] For a discussion of the life of the founding jurists, *see* Doi, A, *Shari'ah: The Islamic Law* (London: Ta Ha Publishers, 1984); pp. 88-111; Ibrahim, *supra* note 17, pp. 58-67.

[24] Al-Dura'n, *supra* note 19, pp. 200, 205; Amin, S, *Islamic Law in Contemporary World* (Glasgow: Royston, 1985), p. 7.

[25] Regarding the implications of the closure of the door of *ijtihad* for subsequent jurists, *see* Coulson, N.J, *A History of Islamic Law* (Edinburgh: Edinburgh U.P., 1964), (photo. reprint 1997), pp. 80-85.

[26] Vogel, *supra* note 17, at 57.

ijtihad and recourse, in practice, only to what is included in the four orthodox treatises of the four schools.

It is noteworthy that some Muslim scholars doubt the validity or wisdom of closing the door of *ijtihad*.[27] However, there does seem to be a general consensus amongst traditional Muslim jurists who claim the right to *ijtihad,* that although a Muslim jurist could reject the opinions expressed in the four treatises, and exercise his own *ijtihad*, he is still obliged to adhere to the legal methodology formulated by the four *Sunni* schools in formulating his opinion.[28]

It is worth emphasising that the opinions expressed by the founding masters or their students, or by any Muslim jurist for that matter, are not definitive statements of God's will, but are only, in essence, the jurist's opinion of what is likely to constitute the law of God. Hence, difference in opinion among Muslim scholars is tolerated, and each opinion is considered equally authoritative as long as it is established by a qualified jurist, and that he adheres to the proper methods of jurisprudence (*usul al-fiqh*).[29]

1.2.2 *Muslaha mursala*

Muslaha (plural *musalih*), can be approximately translated as public utility or public interest, and *mursala* means freed or unrestricted (by text). Thus, *muslaha mursala* means unrestricted *muslaha* (by text). *Muslaha mursala* should be distinguished from those *musalih* which are directly endorsed by text, such as the prohibition of alcohol. This latter type of *muslaha* is unanimously considered as a valid source of legislation by Muslim scholars, not by virtue of being *muslaha per se*, but because of the revealed text that gives it such definition. As such, such *muslaha* could be relied upon as *illa* (the shared nature) for analogy (*qiyas*), such as the extension of the prohibition of alcohol, which came through revelation (*Qur'anic* text), to marijuana, with regard

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[27] In fact there are some Muslim jurists who prohibit blind *taqleed* on anyone including lay Muslims, by asserting that everyone has the right, in fact, is obliged, to practice *ijtihad,* and examine the proofs of given opinions and follow the one which his/her conscience favours. This is the dominant opinion in the *Hanbali* school, which explains why Saudi scholars reject unanimously the proposition that the door of *ijtihad* was closed. *See ibid.* pp. 67-81. *See also* the opinion of the distinguished and well-known Egyptian scholar Muhammad Abu Zahra in his book *Usul al-Fiqh*, *supra* note 12, pp. 341-347.
[28] *Ibid.*
[29] *Ibid.* p. 8. *See also* Zahraa, *supra* note 16, pp. 185-186.

to which there is no textual revelation, as they both share the same *illa*, which is causing the person using them to lose control over his mind.[30]

However, the former type of *musalih*, that is *musalih mursala*, which is the subject under discussion here, is claimed to be subject to controversy among scholars. This controversy has been caused by allegations that considering *muslaha mursala* as a source of law could introduce laws that are alien to the *Shari'ah*, as *musalih mursala*, which could be relied upon for legislation under both *fiqh* and *siyasa*, are not supported directly by revealed texts. Before commenting on this alleged controversy and the merits of the arguments of those who are seemingly opposed to *musalih mursala* as a source of legislation, it is important first to define *musalih mursala* and, then, discuss the conditions for its application. This will reveal the validity of the merits of such arguments.

Scholars define *muslaha mursala* as 'formulating a ruling based upon utility, which is neither specifically rejected nor endorsed by a text or *ijma*, and is consistent with *maqaasid al-shari'ah*.'[31] This definition of *muslaha mursala* reveals two of the five main conditions for using it as a source of legislation. The first condition, which can be described as the restriction-condition, is that legislating on the basis of *muslaha mursala* must not contradict a revealed text or *ijma*. As pointed out earlier, it is a subsidiary source to them. Thus, for example, legalising alcohol on the basis of the alleged *muslaha* that it gives pleasure to people who drink it, is invalid as the *muslaha* relied upon contradicts a revealed text that prohibits the drinking of alcohol.

The second condition, which can be described as the inspiration-condition, is that *muslaha* must be consistent with *maqaasid al-shari'ah*. *Muqssid* (plural *maqaasid*) means the objective or the goal, and, thus, *maqaasid al-shari'ah* means the objectives and goals of the *Shari'ah*. As such, these *maqaasid* are inferred from the textual sources. Therefore, the provision of *maqaasid al-shari'ah* makes the textual sources not only a restriction on legislating on the basis of *muslaha mursala*, as it is required by the first condition, but also a source of inspiration for such legislation. While scholars disagree as to the details of what constitutes *maqaasid al-shari'ah*, they are all in agreement that the ultimate goal of the *Shari'ah* is the securing of benefits for,

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[30] *Ibid.* p. 343. *See also* Al-Zurqa, M, *Istislah wa al-Musalih al-Mursala fi al-Shari'ah al-Islamiah wa Usul Fiqhiha (Public Utility in Islamic Shari'ah and Its Jurisprudential Sources)* (Damascus: Dar al-Qulem, 1988), pp. 87-88.
[31] Al-Zurqa, *supra* note 30, p.37.

and the prevention of harm to the Muslim community (*julb al-masalih wa dur'a al-mufasid*), under which all other subsidiary *maqaasid* fall.[32]

The third condition is that it must be shown that any legislation, which is based upon *muslaha mursala*, will certainly, or at least very likely secure benefit for, or prevent harm (*mufisdah*, plural *mufasid*) to the community. The fourth condition is that legislating on the basis of *muslaha mursala* must aim to secure benefit, or prevent harm to the community at large. It is not to be used to serve the interest of a single individual or a small group of people at the expense of the larger community. The fifth and final condition is that legislating on the basis of *maslaha mursala* must take into consideration all *masalih* involved in a given situation, and if they cannot all be accommodated, the legislation, after balancing all the conflicting *musalih,* must be constructed to secure the overriding *muslaha*.[33]

In light of the forgoing discussion it is apparent that legislating on the basis of *muslaha mursala* must not be seen as a goal in itself, but as a means to secure the general objectives of the *Shari'ah* in light of the current circumstances.[34] Thus, if a given ruling, which has been based upon *muslaha mursala*, fails to achieve its objective, because of a change of circumstances due to, *inter alia*, the change of time, or place, the ruling must be updated to reflect these new realities. This requirement is explicitly expressed by scholars in the jurisprudential rule, which states that 'rulings which are based upon public utility change according to change of time and place' (*la yunker taquer al-ahkam al-mbniah ala al-muslaha bi taquer al-azminah wa al-amkunah*).[35] In this respect, Imam Ibn Burhan (a Shafi'i scholar, d. 518 H) stated that

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[32] In this respect, *see ibid.* pp. 43-45; Al-Jawziyya, M, (known as Ibn Al-Qayyim) *A'lam al-Muwak'eeen (Notable Signers)*, 3 (Beirut: Dar al-Kutob al-Elmiah, 1996), p. 11 [hereinafter *A'lam*]; Vogel, *supra* note 17, p. 343; Al-Yuabi, M, *Maqaasid al-Shari'ah wa A'laqtuha bi al-Adilh al-Sharaiah (The Objectives of the Shari'ah and its Relation to the Sources of Law)* (Riyadh: Dar Al-Hijrah For Publishing & Distributing, 2002), p. 391-392; Abdulraheem, W, *al-Musalih al-Mursala wa Iktlaf Ulama Fiha (Unrestricted Utilities and the Disagreement of Scholars Over It)* (Jidda: Dar al-Mujtm'a for Publishing & Distributing, 2000), p. 37-39; Al-Rabieah, A, *A'elm Maqaasid al-Shr'a (The Science of the Objectives of Legislation)* (Riyadh, 2002), p. 149; Umar, U, *Maqaasid al-Shari'ah a'nd al-Imam al-Iz Ibn Abduslam (The Objectives of the Shari'ah According to the Imam al-Iz Ibn Abduslam)* (Amman: Dar al-Nfais for Publishing & Distributing, 2003), pp. 76-78, 87-89.

[33] For an extensive discussion of the conditions of *muslaha mursala*, *see* Al-Buati, M., *Thuabit al-Muslaha fi al-Shari'ah al-Islamiah (The Restrictions on Utility in the Islamic Shari'ah)*, 5th edn (Beirut: Muasist al-Risaleh, 1986), pp. 119-328; Al-Rabieah, A., *Adulit al-Tashri'a al-Muktulf fi al-Ihtijaj Biha (The Sources of Law which are Subject to Disagreement)* (Riyadh, 1986), pp. 227-228 [hereinafter *Sources*]; Abdulraheem, *supra* note 32, pp. 148-149; Al-Yuabi, *supra* note 32, p. 393-400; Al-Zuhili, *supra* note 14, pp. 204-207; Umar, *supra* note 32, pp. 102-109, 211-256.

[34] *See* Abdulraheem, *supra* note 32, p. 39; Umar, *supra* note 32, p. 276.

[35] *See* Al-Jawziyya., *A'lam*, *supra* note 32, Vol. 3, pp. 11-38; Al-Jawziyya, M, (known as Ibn Al-Qayyim) *al-Turuq al-Hukmiyya fi al-Siyasa al- Shar'iyya (The Wise Ways to Legitimate Policy)*

'[n]ot every *muslaha* that is considered to be as such in a given time, [necessarily] constitutes *muslaha* in another time. An action can be said to constitute *muslaha* in one time, but constitutes *mufisdah* (harm) in another. Not all times are equal.'[36]

That is to say any legislation, which is based on *maslaha muslaha*, whether it is a *fiqh* ruling or a *siyasa* law, must be subjected to constant evaluation to ensure that it meets the *maqaasid* that the legislation was formulated to achieve. If it fails to do so, for whatever reason, the legislation must be overruled and a new legislation must be formulated to ensure that, in the light of the current circumstances, *maqaasid al-shari'ah* are properly secured.[37]

Regarding the alleged controversy surrounding *muslaha mursala* as a source of law, the main argument against *muslaha mursala* is that to consider it as a source of law would introduce laws that are foreign to the *Shari'ah* as there is no direct text or *ijma* in support of such *musalih*. The rebuttal of this argument is that the conditions of the application of *muslaha mursala* (in particular the fact that the revealed texts constitute a restriction on and source of inspiration for what can be considered as a *muslaha mursala*, which provides the basis for legislation), would prevent the introduction of any laws that are contrary to the textual sources, *ijma* or a valid *qiyas*. In fact, those scholars who are opposed to *muslaha mursala*, including Imam al-Shafi'i, who described it as a man-made law, relied on *muslaha mursala* in formulating their rulings in areas where there is no revealed text, *ijma* or a valid *qiyas*.[38] This suggests, therefore, that those who are opposed to *muslaha mursala* are not opposed to it *per se*, but are opposed to its application without restriction, as it would clearly make the *Shari'ah* subject to the will of people, not the contrary as it is dictated by Islamic legal theory and the methods of jurisprudence (*usul al-fiqh*), as discussed above.[39] This fact has led recent scholars who have examined the arguments of both sides as to the authority of *muslaha mursala* as a source of law to

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(Beirut: Dar al-Kutob al-Elmiah, 1995), pp.14-15 [hereinafter *al-Siyasa*]; Al-Zuhili, *supra* note 14, pp. 179-181; Al-Sadlan, S, *al-Quad al-Fiqhih wa ma Tafria Minha (The Major Jurisprudential Rules and the Rules which are Derived from them)*, 2nd edn (Riyadh: Bansliyah for Publishing & Distribution, 1999), pp. 426-449; Al-Zurqa, *supra* note 30, pp. 44-45.

[36] As quoted in Umar, *supra* note 32, p. 394.

[37] *See also* Bulmahdi, Y, *al-Bua'd al-Zamani wa al-Makani wa Athruhma fi al-Fatwa (The Impact of the Dimension of Time and Place on Legal Rulings)* (Damascus: Dar al-Al-Shihab, 2000), pp. 160-162; Al-Qassem, A, *al-Islam wa Taqnin al-Ahkam fi al-Bilad al-Saudiyyah (Islam and Codification of Rulings in the Saudi State)* (Cairo: al-Madni Press, 1966), pp.147-151 [hereinafter *al-Islam*]; Umar, *supra* note 32, pp. 282-285; Al-Dura'n, *supra* note 19, p. 326.

[38] Al-Zurqa, *supra* note 30, pp. 65-73.

[39] *See supra* para. 1.2.

conclude that such disagreement is in fact inexistent. In this connection, Dr. Al-Buati stated:

> To sum up: *al-musalih al-mursala* is unanimously accepted [as a source of law] ...by the companions [of the Prophet] and their followers and the four founding jurists.
> There is nothing in the writings of the scholars of jurisprudence that contradict this unanimity, and the disagreement between scholars on this matter is in name rather in substance.[40]

To put the above discussion of *muslaha mursala* into context, it can be concluded safely that where there is no revealed text, *ijma* or a valid *qiyas* that can be applied to a given issue, *qadis* (*i.e.*, judges, singular *qadi*) in Saudi Arabia, by exercising *ijtihad* can formulate a ruling based on *muslaha mursala* to deal with such an issue. However, this does not mean that the King of Saudi Arabia or any body authorised by him are precluded from exercising the same function to advance the public interest. As discussed below, *muslaha mursala* is not only the fifth source of *fiqh* but also the basis for law-making by the ruler under the concept *siyasa shar'iyya*.[41]

Given that Saudi *ulama* (*i.e.*, the scholars who are specialised in *Shari'ah* law) are unanimously opposed to the concept of the closure of the door of *ijtihad*, one would assume that *ijtihad* is widely practiced in Saudi Arabia at least with regard to issues which have no ruling from the four main sources of the *Shari'ah*. To examine the validity of this assumption, attention will be focused next on the Saudi *qadi's* practice of *ijtihad*. However, before doing so, it is appropriate first to provide an overview of the independence of the judiciary in Saudi Arabia, its organisation and jurisdiction and conclude by discussing its practice of *ijtihad*.

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[40] Al-Buati, *supra* note 33, at 407. *Sheikh* Kalaf similarly concluded that '[b]ased on the writings of scholars with regard to *muslaha mursala*, there is no disagreement among them on the permissibility of legislating on the basis of it, and no scholar has contended that only *muslaha* that is specifically endorsed by text can constitute a valid basis for legislation, because ... the needs and necessities of one era may require new *musalih* (utilities), that did not exist at the era of legislation [*i.e.*, the time of the Prophet], which need to be legislated for.' Kalaf, A, *Masader al-Tashri'a al-Islami fima la Nass Fiah (The Sources of Islamic Legislation Where There is no Text)* (Beirut: Dar Al-Qulem, 1972), at 175. The same conclusion has been reached by other scholars. *See* Al-Rabieah, *Sources, supra* note 33, pp. 257-271; Abdulraheem, *supra* note 32, pp. 102-103, 210-211; Al-Yuabi, *supra* note 32, pp. 530-536.

[41] See *infra* para. 1.4.

1.3 The judiciary

The courts system in Saudi Arabia consists mainly of the *Shari'ah* Courts (*al-Mahakem al-Shar'iyya*), and the Board of Grievances (*Diwan al-Mazalim*).[42] While the *Shari'ah* Courts enjoy a general jurisdiction to try all cases, except those exempted by law, the Board of Grievances deals mainly with administrative cases, although the Law of Board of Grievances[43] also allows its jurisdiction to be extended to other cases, if prescribed by law, even if they are not administrative in nature.[44] Article 49 of the Basic Law states that '[w]ithout prejudice to Article 53 [concerning the Board of Grievances] the [*Shari'ah*] Courts shall have the jurisdiction to decide all disputes and crimes.' Similarly, Article 26 of the Judicial Act 1975[45] reads '[t]he [*Shari'ah*] Courts shall have jurisdiction to decide with respect to all disputes and crimes, except those exempted by law....' Given the *Shari'ah* Courts have such a jurisdiction, which includes the majority of the issues relating to the subject-matter of this thesis, the following discussion will focus solely on the *Shari'ah* Courts.

1.3.1 Independence

Classical Islamic political theory does not recognise the principle of the separation of powers. The judicial power is originally vested in the ruler. However, if the ruler is unqualified to practice such a function, or prefers it to be practiced by someone else, he can delegate his judicial power to any person who is qualified to perform such a job. While it is recognised that the ruler, if he chooses to delegate his judicial power, retains the power to restrict the judicial competence of a *qadi* or a court to certain cases, the fact that the *qadi* performs his job on the basis of the ruler's delegation,

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[42] It should be noted that "other tribunals" also exist within the Saudi judicial system which were specifically established to deal with specific cases, which are governed wholly by *siyasa* laws, in which the *Shari'ah* Courts have refused to apply their law and instead adjudicated them according to *fiqh*. However, because the Basic Law does not recognise these tribunals, as they are considered to be a temporary solution until their jurisdiction is transferred to the *Shari'ah* Courts, when they agree to apply their laws, and as their jurisdiction covers cases which are irrelevant to the subject matter of this thesis, they are not included in the discussion. For a discussion of these tribunals, *see* Vogel, *supra* note 17, pp. 292-295, 302-308; Al-Dureeb, S, *al-Tanzeem al-Qudai fi al-Mamlaka al-Arabiyyah al-Saudiyyah (The Organisation of the Judiciary in the Kingdom of Saudi Arabia)* (Riyadh: Imam Muhammad bin Saud Islamic University Press, 1999), pp. 449-506; Al-Marzuqi, *supra* note 9, pp. 174-175.

[43] Issued by Royal Decree No. M/51 (11 May 1982). Published in *Umm al-Qura* (the Saudi official Gazette) No. 2918 (22 May 1982).

[44] *Ibid.* Art. 8(2).

[45] Issued by Royal Decree No. M/64, 23 July 1975. Published on *Umm al-Qura* (the Saudi official Gazette) No. 2592 on 5 September 1975. An official translation of the Judicial Act is *available at* <http://www.moj.gov.sa/layout/Showpage.asp?art_id=32> (last visited Jan. 2, 2006).

does not mean that the ruler can interfere with the *qadi's* job in deciding the cases brought before him. *Qadis* are only subject to the provisions of the *Shari'ah*, and therefore, if their judgments comply with these provisions, they will not be subject to reversal, either by the ruler or a higher *qadi*. If *qadis* deviate, intentionally or by ignorance from this obligation, their judgments are subject to reversal; in addition to the religious responsibility they will bear in the hereafter. In this respect, the Prophetic report states that '[o]ne *qadi* is in Paradise and two *qadis* in the Hellfire. As for the one in Paradise, he is a man who knew what is right and adjudicates accordingly. A man who knew what is right but deviates from it is in the Hellfire. A man who adjudicates between people based on ignorance is [also] in the Hellfire.'[46] Therefore, the *qadi's* function is to apply what he believes is the *Shari'ah* ruling in a given case with the aim of pleasing no one except God. This latter requirement is what is meant by judicial independence from the political authority under classical Islamic political theory.[47]

The Saudi (written) law with regard to the independence of the judiciary is a reflection of this theory. With regard to the relationship between the King and the judiciary, Article 44 of the Basic Law states that '[t]he authorities of the state consist of the following: the judicial authority, the executive authority and the regulatory authority. These authorities co-operate with each other in the performance of their duties, in accordance with this and other laws. The King shall be the point of reference for all these authorities.' While this Article apparently gives a supervisory role to the King over the judiciary, the law has restricted this function to an absolute minimum. In fact, the Basic Law itself, in a seemingly contradictory manner, states in Article 46 that '[t]he judicial authority is an independent power. In discharging their duties, *qadis* are subject to no authority other than that of Islamic *Shari'ah*.' Similarly, Article 1 of the Judicial Act 1975 reads '[*q*]*adis* 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.'

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[46] Reported in Al-Rubi'ai, M (known as Imam Ibn Majah, d. 273 H) *Sunin Ibn Majah*, Report No. 2306; also reported in Al-Sujustani, S, (known as Imam Abi Dawad, d. 275 H) *Sunin Abi Dawad,* Report No. 3102; also reported with the same meaning although with different wording in Al-Turmthi, M (known as Imam al-Turmthi, d. 279 H), *Sunin al-Turmthi*, Report No.1244.

[47] *See* Coulson, N. J., 'The State and the Individual in Islamic Law', *Int'l & Comp. L.Q,* 6 (1957), 49, pp. 57-58; Al-Qamadi, N, *Al-Iktsas al-Qadai fi al-Fiqh al-Islami (Judicial Jurisdiction in Islamic Jurisprudence)* (Riyadh: Al-Rushd Bookshop, 2000), 79-109, 487-502.

Therefore, it can be concluded that Saudi *qadis,* in deciding cases are independent from the political authority (*i.e.,* the king), and only subject to the *Shari'ah* provisions and laws promulgated by the regulatory authority which do not contradict the *Shari'ah* precepts.

1.3.2 Organisation and jurisdiction

The *Shari'ah* courts system is comprised of the Summary Court, the General Court, the Court of Appeal (*Mahkamat al-Tamyiz*), and the Supreme Judicial Council (SJC).[48] The Summary and the General Courts constitute the courts of the first instance. The jurisdiction over criminal cases, save those which fall into the jurisdiction of the Board of Grievances,[49] are divided between these two Courts. However, before highlighting the jurisdiction of these two Courts, it is appropriate first to shed light on the classification of crimes under the *Shari'ah*. Crimes under Islamic law fall into three categories:[50]

1) Crimes of *al-Qisas* and *Diyat* (Crimes of Retaliation and Blood Money):

This category includes all crimes, whether intentional or unintentional, which are committed against the person. If the crime is intentional the victim, or her/his heirs, in the case that the victim is deceased, are entitled to apply to the *qadi* for *qisas* (retaliation), which means, literally, 'an eye for an eye'. However, if the victim or his/her heirs waive the right to retaliation, the application of retaliation is impossible, or the crime is unintentional, the victim or his/her heirs are entitled to *diya* (blood money). In addition, the ruler, or anyone who is delegated by him to exercise such power, is entitled to impose on the person convicted of the intentional *qisas* offence a *ta'zir* punishment if the victim or his/her heirs wavie the right to retaliation (*qisas*), or the application of retaliation is impossible and the imposition of such punishment is seen as necessary for the sake of the public interest. The requirement of proof for this category is two male witnesses or a confession.

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[48] Judicial Act 1975, *supra* note 45, Art. 5.

[49] For a detailed discussion of the criminal jurisdiction of the Board of Grievances, *see* Al-Shadli, F, *Juraim al-Ta'zir al-Munzmah fi al-Mamlaka al-Arabiyyah al-Saudiyyah (Regulated Ta'zir Offences in the Kingdom of Saudi Arabia)* (Riyadh: King Saud University Press, 1989).

[50] The discussion of the categories of crimes under Islamic law draws on Abu Zahra, M, *Al-Jeremah wa al-Awqubah (The Crime and Punishment)* (Cairo: Dar al-Fikr al-Arabi, 1998); Awdah, A, *al-Tashri'a al-Jenaei al-Islami Muqaran be al-Qanun al-Wadei (The Islamic Penal Legislation Compared with Positive Law)*, 14th (Beirut: Resalah Publishers, 2000); Bhnasie, A, *Nthreat al-Ithbat fi al-Fiqh al-Jenaei al-Islami (The Theory of Proof in the Islamic Criminal Jurisprudence)* (Cairo: Dar al-Shoruq, 1989).

2) Crimes of *al-Hudud*:

The category of crimes of *al-hudud* (singular *hadd*) is concerned with those crimes to which the punishment is predetermined and considered as a right of God as they are designed to preserve God's limits from being crossed. These predetermined punishments distinguish this category of crimes from the crimes of *ta'zir*, whereby the punishments here are unspecified and left to the discretion of the ruler. The fact that the punishment for a crime of *al-hudud* is considered as a right of Allah means that the punishment cannot be waived by anyone, as opposed to the punishment of a crime of *al-qisas*, in which it is possible for the victim or his/her heirs to waive the punishment, as discussed above. Crimes of *al-hudud* include: (1) adultery, (2) slander or defamation (*qudif*), (3) drinking alcohol (4) theft (5) brigandage or highway robbery (*heraba*) (6) apostasy and (7) rebellion against a legitimate Muslim ruler (*bagi*).

As the punishments of *al-hudud* offences are very severe, such as the punishment of amputation for theft, or the punishment of stoning for adultery committed by a married person, the standard of proof for these offences is correspondingly very high. For instance, to prove an adultery offence four witnesses, all of whom have to have witnessed the act of sexual intercourse taking place, are required. Suffice to say that the application of *al-hudud* punishment is often dependent on the accused confessing to committing the alleged offence. However, even if the accused does confess to the crime, the *qadi* should encourage him/her to retract his confession, and if there is any doubt, whether reasonable or unreasonable, in the *qadi*'s mind about the reliability or voluntariness of such a confession, he should not convict the accused of the *al-hadd* offence.[51] It should be noted though that even if the accused is not convicted of the *al-hadd* offence he is accused of, this does not necessarily mean that he cannot be punished on the basis of the same evidence, by a way of *ta'zir*, as discussed below.

(3) Crimes of *al-Ta'zir*

All crimes which do not fall into the previous two categories, fall within the *ta'zir* category. This includes any act that is considered sinful, or declared by the ruler to be punishable because it is contrary to the public interest. The standard of proof in this category is lower and more flexible than is required for the offences of *al-hudud*, as two witnesses or a voluntary confession is sufficient to sustain a conviction. However,

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[51] Vogel, *supra* note 17, pp. 243-244.

the application of a *ta'zir* punishment is not restricted to proven crimes of *al-ta'zir*, but it also extends to those crimes, whether they are *qisas*, *hudud* or *ta'zir*, in which the *qadi*, based upon the evidence presented before him, is convinced that the accused has committed the alleged offence but the evidence for which does not meet the requirements of proof for such an offence.[52] Although in this case the *qadi* is empowered to punish the accused for 'the strong accusation' (*al-tuhmah al-queah*), the punishment must not exceed or reach, in severity, the punishment to be applied if the crime is fully proven. The flexibility offered by 'punishment of accusation', in terms of the standard of proof, relieves the *qadi* from the burden of seeking out two male witnesses or a voluntary confession, which is the minimum requirement of proof under *Shari'ah* law, and very difficult to obtain in practice. This flexibility allows the *qadi* to punish the defendant, on the basis of other types of evidence which are readily available and which, from the *qadi's* standpoint, are equally reliable.

In order to illustrate the difference between the application of *ta'zir* punishments for fully proven crimes and those for accusations, the record of a particular case obtained from the records of the Summary Court in Riyadh will be summarised here. This case was brought against a defendant, who had been charged with drug-trafficking, which is a *ta'zir* offence. The defendant was arrested after he had sold eight pills of the illegal substance (captagon) to an informer, whose testimony was considered as inadmissible. The evidence against the defendant was the testimony of the arresting officer, who arranged the undercover operation. The officer testified that although he did not see the actual exchange of the pills for money, the informer had been searched before he went to see the defendant and did not have any pills on him, and after he met with the defendant, came back carrying 8 pills. As the witness did not actually see the exchange, and as the other arresting officers, for various irrelevant reasons, did not testify, the only evidence against the defendant was that of the arresting officer. Although the *qadi* ruled that the charge of drug-trafficking had not

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[52] For a discussion of the *qadi's* power to impose a *ta'zir* punishment on the basis of accusation, *see* Al-Jawziyya, *al-Siyasa*, *supra* note 35, p. 12; Ibn Taymiyya, A, (d. 728 H) *Majmu'a al-Fatawa (Collection of Legal Opinions) (Compiled by AL-Qaseem, A)*, 34 (Riyadh, 1983), pp. 236-238; Al-Malki, B (known as Ibn Farhoun, d. 799 H), *Tubsirat al-Hukam fi Usul al-Qutheah wa Mnahij al-Ahkam (Enlightening Rulers with regard to Cases and Legal Rulings)*, 2 (Beirut: Dar Alum Al-Kutob, 2003), pp. 129-131; Mohammad, A (Known as Ibn Khaldoun, d. 808 H), *al-Muqaddimah (The Introduction)* (Beirut: Dar al-Qulem, 1984), p. 222; Al-Mawardi, A (d. 450 H), *al-Ahkam al-Sultaniyya wa al-Walayat al-Diniyya (The Sultanic Judgments & Religious Authorities)* (Beirut: Dar al-Kutub al-Ilmiyya, 1973), pp. 273-275; Vogel, F, 'The Trial of Terrorists under Classical Islamic Law', *Harv. Int'l L.J.*, 43.1 (2002), 53, pp. 57-58.

been proven, he still decided to sentence the defendant to a *ta'zir* punishment (seven months imprisonment and 100 lashes) because the accusation was strengthened by the testimony of the arresting officer, and by the accused's previous criminal record, which included four convictions, three of which were possession of drugs and one of trafficking.[53]

Regarding the jurisdiction of the *Shari'ah* Courts over criminal offences, the Summary Court has jurisdiction over *ta'zir* offences cases, (except those exempted by law), crimes of *al-hudud*, (except those crimes which are punished by death, stoning or amputation), and compensation for bodily injury, which does not exceed one-third of the blood money (*diya*) for death.[54] On the other hand, the General Court has a general jurisdiction over all cases except those cases which are exempted by law (*i.e.*, cases which fall into the jurisdiction of either the Summary Court or the Board of Grievances).[55]

Sitting above these two Courts is the Court of Appeal. It consists of three divisions: the Criminal Division, the Personal Status Division, and the Other Cases Division. Any appeal must be submitted to and reviewed by the trial court *qadi* first. If the trial *qadi* believes, on the basis of the appeal, that his judgment should be amended, he is empowered to do so. If, however, he does not believe that the appeal is justified, he has to refer the appeal to the Court of Appeal.[56] The Court of Appeal has the right to affirm the trial *qadi's* decision or to overturn it. However, the Court of Appeal is not permitted to overturn a judgment without first engaging in a dialogue with the *qadi* who issued the judgment under question. If the Court of Appeal disagrees with a *qadi's* judgment, it has to note its views and refer them to the trial *qadi* to consider. If the trial *qadi* then agrees with the views of the Court of Appeal, he

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[53] Summary Court in Riyadh, *Qadi* Monsour al-Hamzani, court record (criminal) No. 12 (1424 H, 2004 A.D) (Dec. 2, 2003).

[54] The Code of Criminal Procedure, issued by Royal Decree No. M/39 (16 October 2001). Published on *Umm al-Qura* (the Saudi official Gazette) No. 3867 on 3 November 2001 [hereinafter CCP].

[55] Regarding criminal cases, according to Art. 129 of the CCP, *supra* note 54, its jurisdiction extends, *inter alia,* over:

> [C]ases wherein the sentence claimed is the death penalty, stoning, amputation or *qisas* in cases other than death. This court shall not be entitled to issue a death sentence by way of *ta'zir*, except pursuant to an unanimous vote. Should such unanimity be impossible, the Minister of Justice shall assign two other *qadis* in addition to the three *qadis* who shall together be entitled, either unanimously or by majority vote, to issue a death sentence by way of *ta'zir*.

[56] CCP, *supra* note 54, Arts. 196-197; the Code of Civil Procedure, issue by Royal Decree No. M/21, (19 August 2000). Published on *Umm al-Qura* (the Saudi official Gazette) No. 3811 on 15 September 2000, Arts. 180-181.

will amend his judgment accordingly. If, however, he disagrees with the views of the Court of Appeal, he has to inform them of his opinion. If the Court of Appeal is satisfied by the trial *qadi's* response, it will affirm the judgment. If, however, it disagrees with his response, it will set aside his judgment and order the case to be heard by a different *qadi*. The Court of Appeal in the latter case is also empowered to decide on the case if it believes there are urgent circumstances for doing so, and that the case is ready for judgment. If the Court of Appeal does decide on the case, its judgment is final unless it involves the imposition of the death sentence, stoning, amputation or *qisas*, in which the case shall be referred onto the SJC. [57]

At the top of the judicial hierarchy is the SJC, which is considered to be the final Court of Appeal. The SJC has various functions, but here the focus will be upon its appellate function. The SJC reviews all cases which involve the imposition of death, amputation or stoning sentences, and cases which are referred by the King to the SJC for extraordinary reviews.[58] The process of reviewing a judgment by the SJC is the same as the one followed by the Court of Appeal, as shown above.[59]

1.3.3 Binding precedents *vs.* Freedom of *ijtihad*

While the Judicial Act 1975 attempts to enshrine a system of binding precedents in the judicial practice, in which the precedents adopted by the Court of Appeal or the SJC become binding on the lower courts and on the Court of Appeal, in practice there has been little done to transform this ideal into a reality. The discussion here will start by highlighting the Judicial Act 1975 provisions which are designed to unify the judgments of the *Shari'ah* Courts via a system of binding precedents before turning to consider the obstacles to and the arguments for opposing it, namely the freedom of *qadis* to practice *ijtihad*.

According to the Judicial Act 1975, the Court of Appeal is bound by its previous *ijtihad* (*i.e.,* a ruling), and cannot depart from it unless such a departure is approved by a majority vote of two-thirds of the General Assembly of the Court of Appeal, which includes all appellate *qadis*. However, if the departure does not achieve the

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[57] *Ibid.* Arts. 203-205. Code of Civil Procedure, *supra* note 56, Arts. 185, 187-188.
[58] Judicial Act 1975, *supra* note 45, Art. 8 (2), (4); CCP, *supra* note 54, Art 11.
[59] Special Rapporteur, Dato' Param Cumaraswamy, on the Independence of Judges and Lawyers: Report on the Mission to the Kingdom of Saudi Arabia, Submitted Pursuant to Commission on Human Rights Resolution 2002/43, U.N. ESCOR, Comm'n on Hum. Rts., 59th Sess, Item 11(d) of the provisional agenda U.N. Doc. E/CN.4/2003/65/Add.3, para. 23 [hereinafter Commission on Human Rights Report]

majority vote required, or indeed it is approved by a majority vote, but the Minister of Justice is opposed to such a departure, the matter shall be referred to the SJC.[60] In addition, the SJC is entitled to declare binding general *Shari'ah* principles on matters which are considered by the Minister of Justice to be necessary.[61] In order to strengthen the system of binding precedents, the Judicial Act 1975 established, within the Ministry of Justice, a technical department for research. Members of the mentioned department are selected from among *Shari'ah* Courts *qadis* or *Shari'ah* college graduates. Their function is to deduce principles from the judgments of the Court of Appeal, classify, and index, those principles and the principles which are established by the SJC for easy reference.[62] The technical department is also entrusted, *inter alia*, with selecting collections of judgments for publication, and reviewing judgments in order to give their opinions on the legal principles on which they are based as to their consistency with justice in the light of the changing circumstances and conditions, which are then referred to the Minister of Justice. The Minister of Justice is, in turn, entitled, if he believes it is necessary, to refer the opinions of the technical department to the SJC for establishing general principles on the referred matters, as explained earlier.[63]

If the system of binding precedents as envisaged by the Judicial Act 1975 had been adopted by the judiciary, many of the problems currently facing the judicial system regarding the need to unify judgments and to systematically develop the law, would have been solved. Unfortunately this has faced fierce resistance from the majority of *ulama* and senior *qadis*, which explains why, to date, such a system only exists in the statute book. In their opposition and refusal to implement the system of binding precedents, neither the SJC nor the Court of Appeal has sought to repeal the provisions concerning the system of binding precedent. They simply chose to ignore them.[64] The main argument for opposing such a system is that to do so would interfere with the *qadi's* right to *ijtihad*.

However, such an argument does not stand up to much scrutiny. *Ijtihad* in the strict sense means deriving a ruling from the sources.[65] Saudi *qadis* who have

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[60] Judicial Act 1975, *supra* note 45, Arts. 14-15, 20.
[61] *Ibid.* Art. 8 (1).
[62] *Ibid.* Art. 89 (a).
[63] *Ibid.* Art. 89 (b), (f).
[64] *See* Vogel, *supra* note 17, pp. 107-114.
[65] *See supra* note 15 and accompanying text.

graduated from the judicial institutes are, by their own admission, not qualified to practice *ijtihad* in the mentioned sense, but are mere *muqaldeen* (imitators, singular *muqalid*).[66] Therefore, their practice of "*ijtihad*" is restricted to either examining the proofs on which *fiqh* rulings are based, and apply the one, which has the most strength, on the case before them. Or to select from amongst various *fiqh* rulings the one the *qadi* believes to best serve the *muslaha* in the light of the circumstances of the case before him, as all the four schools of jurisprudence historically derive from the same sources.[67] However, it is worth pointing out two facts in this connection. Firstly, none of the *Shari'ah* Court judgments have ever been published, which also undermines any system of binding precedents.[68] Secondly, *qadis,* in their judgments, tend to only mention the opinion that they have applied in the case under examination, without explaining why they have adopted one opinion over another.[69] Thus it can be argued that these judgments are more influenced by the *qadi's* allegiance to a particular school of jurisprudence, or a particular jurist, rather than by the strength of the proofs on which the ruling is based or the likelihood of achieving *muslaha*.

In addition, such practice creates other problems. *Qadis* in similar cases reach different conclusions. This is not restricted to the lower courts but also applies to the Courts of Appeal, as there are two separate appellate courts in Saudi Arabia, one in Riyadh and the other in Mecca, which further undermines any potential system of binding precedents.[70] Furthermore, as the Judicial Act 1975 rightly states there are

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[66] Interview with *Sheik* Tameem Al-Aunizan, *Qadi* of the Summery Court in Riyadh, (July. 11, 2004); interview with *Sheik* Suleiman Al-Hudiathi, *Qadi* of the General Court in Riyadh, (July. 18, 2004); interview with *Sheik* Mohammed Al Jaarallah, *Qadi* of the General Court in Riyadh, (Aug. 2-3, 2004); interview with *Sheik* Saleh Al-Aujri, *Qadi* of the General Court in Riyadh, (Aug. 4, 2004).

[67] Vogel, *supra* note 17, pp, 130-135

[68] This happened despite the fact that the Judicial Act 1975 suggested that the 'selected collection of judgments' would be published. Recently, however, the Council of Ministers has issued an order for publishing 'selected judgments'. Whether this decision faces the same fate as the provisions of the Judicial Act 1975 remains to be seen. *See supra* note 63 and accompanying text; Commission on Human Rights Report, *supra* note 59, para. 18.

[69] In the limited number of judgments that the present researcher has been able to see during his fieldwork period, he has found little explanation for the rulings the *qadis* choose to apply to each case brought before them. In some cases, they mention the name of the scholar, whose opinion they chose, without citing the basis for it, whether it was textual or *muslaha*. Neither do they discuss alternative opinions applicable to the case under consideration. The same observation has been made by Professor Vogel, who has carried out extensive and insightful research on the practice of *ijtihad* by Saudi *qadis*. *See* Vogel, *supra* note 17, p. 120.

[70] *See* the minority's opinion of the Council of Senior Islamic Scholars, (the highest religious authority in Saudi Arabia) in '*Fatwa*' No. 8 (legal opinion), published in Lajnat al-Buhuth al-Llmiyya (the Commission of Scientific Research), al-Riyasa al-Amma li-Idarat al-Buhuth al-Llmiyya wa al-Ifta, (The General Department of Scientific Research and Guidance), 'Tadween al-Rajih min Aqwal al-

rulings based upon *muslaha* that need to be critically evaluated before being applied. There are also novel matters for which there are no *fiqh* rulings at all to deal with.[71] In both cases, a systematic legislative intervention by the judiciary via *ijtihad* and a system of binding precedents is required to ensure that the law is applied in a uniform and consistent manner, and in consistency with the public interest.

Finally, and more importantly, even if one assumes, for the purposes of argument, that Saudi *qadis* are qualified *mujtihdeen* and do practice *ijtihad*, in my view, there is nothing, in principle, in a system of binding precedents that could be held as precluding *qadis* from *ijtihad*. In fact, if anything, it is the contrary. A system of binding precedents would require the lower courts to follow the precedents reached by the superior courts. However, the *qadis* of the lower courts are entitled, through the practice of *ijtihad*, if they believe that a given precedent should not be applied to a given case, to decide it in accordance with what they believe to be just by distinguishing the facts of the case from those of the precedent, or by pointing out what they believe to be shortcomings in the precedent. It would be up to the superior court to reverse the *qadi's* decision, if it believes that the departure from the precedent is unjustified, or uphold it; by accepting that the facts of the case are distinguishable from that of the precedent, or by amending or overruling the precedent if it appears that continuing with it is unjust.[72] Therefore, it can be argued that the system of binding precedents could encourage the *qadis* to be creative (*i.e.*, real *mujtihdeen*), albeit through a strictly regulated system, as opposed to precluding them from *ijtihad* as it is alleged by Saudi *ulama* who are opposed to such a system.

As a consequence of the *ulama's* negative response, which is based partly on ignorance and partly on idealism that is totally divorced from reality, many scholars, including a minority of *ulama*, have demanded that the ruler ought to intervene to codify the *Shari'ah* and make extensive use of *siyasa* laws. However, if the conservative *ulama* refused to use the legislative tool which the Judicial Act 1975 has

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Fuqaha (Codifying the Persuasive Opinions of Jurists) (Part 3)', *Islamic Research Journal,* 33 (1412 (H) 1992), 19, pp. 33-35 [hereinafter *Fatwa*].

[71] *See* Atiah, J, 'al-Tajdeed al-Fiqhi al-Manshowd (The Desired Jurisprudential Renewal)', in *Tajdeed al-Fiqh al-Islami (Renewing Islamic Jurisprudence)*, ed. by Dar al-Fikr, (Damascus: Dar al-Fikr, 2000), pp. 22-23; Al-Zuhili, *supra* note 14, pp. 167-168.

[72] For a comparative perspective on how the system of binding precedents fares under the English legal system, *see generally* Bailey, S. H. & Gunn, M. J, *Smith & Bailey on the Modern English Legal System*, 3rd edn (London: Sweet & Maxwell, 1996), pp. 413-454.

provided them with, would they accept that the ruler performs a role that they have denied themselves? What follows is a discussion that attempts to answer this question.

1.4 Siyasa shar'iyya

While *siyasa* could be translated as the rules of governance, *siyasa shar'iyya* means legitimate *siyasa* or *siyasa* according to the *Shari'ah*. Under this doctrine, the ruler is vested with the power to act to advance the public interest (*muslaha*), provided that the *Shari'ah* is not violated thereby. While the first provision of this doctrine is not disputed, the latter is understood and applied very differently and is subject to much dispute in Saudi Arabia.[73] In order to determine the scope of the power which the ruler is entitled to under this doctrine, this section examines first the scholarship on this subject, which is to be found mainly in the writings of medieval jurists, before examining the provisions of the Saudi (written) law concerning this power and how they are applied in practice by exploring the *Shari'ah* Courts *qadis'* position on this issue.

According to Imam Ibn Taymiyya (a Hanbali scholar, d. 728 H), who is considered to be one of the leading scholars on this subject, the doctrine of *siyasa shar'iyya* is based on the *Qur'anic* verses which state that:

> Allah commands you to render back your trusts to those to whom they are due; and when ye judge between people that ye judge with [a sense] of justice * Obey Allah, and obey the Messenger, and those who are entrusted with authority among you; and if you are at variance over any matter, refer it to Allah and the Messenger, if you [truly] believe in Allah and the Last Day ....[74]

According to Imam Ibn Taymiyya's writings, two groups of people are mentioned in the above-quoted verses: the rulers and the citizens. While the rulers are obliged to govern in accordance with justice (*i.e.*, the precepts of the *Shari'ah*), the citizens are obliged, as long as they are not ordered to do something that is prohibited by the *Shari'ah*, to obey the orders of their rulers. If there is a disagreement between the ruler and the citizens regarding the legality of the orders, or the policy of the ruler, their disagreement must be reviewed in the light of the *Shari'ah* to ensure that neither the

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[73] Vogel, *supra* note 17, pp. 173-176.
[74] The Holy *Qur'an*, verses 4: 58-59.

ruler nor the citizens have violated their respective obligations.[75] He also adds that the aim of the ruler's power is to advance the public good and protect it from any harm.[76] In short, Imam Ibn Taymiyya set two conditions to be met in order for the practice of *siyasa* to be legitimate: firstly, that it must not violate the *Shari'ah;* and secondly, that its aim must be to secure the public good and protect it from any harm.[77]

Imam Ibn Al-Qayyim, (a Hanbali scholar, d. 751 H) another leading jurist on this subject, defines *siyasa shar'iyya* as 'the actions that lead the people to virtue and distance them from evil, even if it is not legislated for by the Prophet, or sanctioned through revelation.'[78] This suggests that Imam Ibn Al-Qayyim, in essence, adopts the same view as Imam Ibn Taymiyya mentioned above. Imam Ibn Al-Qayyim goes further to support his argument by citing ancient precedents from the time of the Prophet, in which He practiced *siyasa* in his capacity as a ruler, and his successors (*Khalifahs*) in which their actions were taken without being, directly, sanctioned through revelation. These examples include, *inter alia*, the detention of a person suspected of committing a crime where there was circumstantial evidence against him or her (as it was done by the Prophet himself). Another is the collection of *Qur'an* in one book at the time of the *Khalifah* Autuman (the third successor to the Prophet). These actions were aimed at ensuring that crimes are properly investigated in the former example, and at protecting the religion from distortion in the latter. Both actions are considered, from the *Shari'ah* point of view, as legitimate as their aim is to secure a legitimate public interest. Finally, Imam Ibn Al-Qayyim concludes that the practice of *siyasa*, given that it meets the above-stated conditions, 'cannot ... be said to be contrary to the *Shari'ah*, but is compatible with its precepts, in fact it is part of it, and we only call it *siyasa* as a matter of terminology, but it is the justice of God and His Prophet.'[79]

From the above mentioned opinions it can be concluded that a Muslim ruler has the power to act to advance the public interest, provided that the *Shari'ah* is not infringed thereby. Now attention will be focused on the Saudi law and practice to

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[75] Ibn Taymiyya, A, *al-Siyasa al-Shar'iyya fi Islah al-Rraiy wa al-Rraiya (The Legitimate Policy for Reforming the Leader and the Nation)* (Beriut: Dar al-Jeeal, 1993), pp. 11-12.
[76] *Ibid.* p. 67.
[77] *See* Vogel, *supra* note 17, p. 205.
[78] Al-Jawziyya, *al-Siyasa*, *supra* note 35, p. 3.
[79] *Ibid.* p. 11-12. For further discussion, *see ibid.* pp. 10-19; Al-Jawziyya, *A'lam, supra* note 32, vol. 4, pp. 283-288.

determine the scope of such a power. There are three Articles in the Basic Law that deal with this issue. Articles 48, 55, and 67, state respectively that:

> The courts shall apply the rules of the Islamic *Shari'ah* in the cases that are brought before them, in accordance with what is indicated in the Book and the *Sunnah,* and laws decreed by the Ruler which do not contradict the Book or the *Sunnah*.
> The King shall carry out the governing (*siyasa*) of the nation in accordance with *siyasa shar'iyya* in fulfilment of the rules of Islam....
> The regulatory authority [*i.e.,* the King at the suggestion of either or both the Council of Ministers or the Consultative Council] shall have the jurisdiction to enact regulations and bye-laws in order to attain welfare and avoid harm in the affairs of the state, in accordance with the general rules of Islamic *Shari'ah*.

These Articles suggest that the King, or anybody authorised by him to regulate the law, can enact regulations that are necessary for securing the public interest, provided that they are inspired by the general principles of the *Shari'ah* and do not conflict with explicit texts from the *Qur'an* or the *Sunnah.* If these regulations conform with the above-mentioned requisites, they have a binding force on the judiciary, as Article 48, quoted above, clearly indicates. This fact is also supported by Article 1 of the Judicial Act 1975, which states that '[*q*]*adis* 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.' Similarly, Article 1 of Code of Civil Procedure[80] states that '[c]ourts shall apply to cases brought before them the provisions of *Shari'ah* law, in accordance with the *Qur'an* and *Sunnah* of the Prophet (peace be upon him), and laws promulgated by the state that do not conflict with the *Qur'an* and *Sunnah*....'

To this extent, it can be argued that the Saudi (written) law is nothing but a codification of the provisions of the doctrine of *siyasa shar'iyya* as expressed by medieval jurists. Given this fact one would expect the *Shari'ah* Court *qadis* in Saudi Arabia to apply *siyasa* laws without any hesitation, since as long as they meet the conditions of *siyasa shar'iyya*, they are not just legitimate laws but they also, as Imam Ibn Al-Qayyim put it '[are] part of [the *Shari'ah*]'.[81]

However, the majority of Saudi *ulama* and senior *qadis* remain uneasy about the ruler's power to regulate. They argue that this power should be restricted to two

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[80] *Supra* note 56.
[81] *See supra* note 79 and accompanying text.

spheres: crimes of *al-ta'zir*, and administration.[82] To better explain the *ulama's* opposition to *siyasa* laws, it is necessary to distinguish between those issues which are governed by equivocal texts, in which the opinions of scholars have varied depending on their understanding of these texts, and those issues where there are no texts to refer to. As explained earlier, these two areas fall within the realm of *ijtihad*, in which scholars exercise their *ijtihad* to arrive at what they believe is what God would have ruled. Thus, allowing the ruler to regulate in these areas would, according to those *ulama* who are opposed to such authority, constitute, just as binding precedents would do, an invasion on the right of *qadis* to decide cases according to their own *ijtihad*.[83]

This argument is solely based on the premise that Saudi *qadis* are qualified *mujtihdeen* practicing *ijtihad*, who believe that to allow the ruler to enact regulations, outside the spheres of crimes of *al-ta'zir* and administration would interfere with the authority assigned to them, by God, to comprehend His law. However, as discussed earlier, this premise is false as Saudi *qadis* are not qualified *mujtihdeen,* nor do they practice *ijtihad* in the strict sense of the word.[84] Thus the argument that to allow the ruler to enact regulations in areas where the opinion of the scholars are variable by exclusively selecting appropriate views from them based upon *muslaha* (*i.e.*, to codify the *fiqh*), will affect the right of a *qadi* to *ijtihad* is at the very best, a weak one when one considers that such a right only exists in a hypothetical fashion. This is especially true, when one bears in mind the advantages that codification could bring to the judicial system as a whole including: *inter alia*, the uniformity of judgments, the *Shari'ah* being accessible to lay citizens who lack the skill and knowledge to consult the *Shari'ah* in its classical form, in order to know the applicable law to their cases, and the preservation of the integrity of the judiciary by eliminating suspicion or doubt that *qadis* apply the *Shari'ah* in an arbitrary or unfair manner.[85]

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[82] *See* Vogel, *supra* note 17, pp. 175-176.

[83] *Ibid.* p. 337-338. *See also* the majority's opinion of the Council of Senior Islamic Scholars, (the highest religious authority in Saudi Arabia) in *Fatwa* No. 8 (legal opinion), published in Lajnat al-Buhuth al-Llmiyya (the Commission of Scientific Research), al-Riyasa al-Amma li-Idarat al-Buhuth al-Llmiyya wa al-Ifta, (The General Department of Scientific Research and Guidance), 'Tadween al-Rajih min Aqwal al-Fuqaha (Codifying the Persuasive Rulings of Jurists) (Part 1)', *Islamic Research Journal,* 31 (1411 (H) 1991); Abu Zayd, B, *al-Taqnin wa al-Ilzam (Codification and Compulsion)* (Riyadh: Dar Al-Hilal ll-Aufist, 1982), pp. 55-81.

[84] *See supra* para. 1.3.3.

[85] For further discussion of the arguments justifying the codification of *fiqh* and its advantages, *see* the minority's opinion of the Council of Senior Islamic Scholars, (the highest religious authority in Saudi Arabia), *Fatwa*, *supra* note 70, pp. 26-52; Abudlbur, M, *Taqnin al-Fiqh al-Islami: al-Mabid'a, al-*

In addition, in areas where there are no texts, *ijma* or a valid *qiyas* to deal with a given issue, such issue will be governed by a *fiqh* ruling based upon *muslaha mursala* and it is very likely that was formulated in the medieval era. With regard to novel matters, there are not even *fiqh* rulings to deal with them. Thus, in light of the judicial authority's inability or unwillingness to practice *ijtihad* and refusal to adopt the system of binding precedents, depriving the ruler, in the Saudi context, from the power to regulate in these areas would mean that there would legal problems that are left without being addressed adequately, or not being addressed at all. To elaborate further, rulings based upon *muslaha* need to change according to time and place in order to ensure that *maqaasid al-shari'ah* (the overall objectives of the *Shari'ah*), which these rulings are designed to achieve, are properly secured in the light of the changing circumstances. Thus, if these rulings are not constantly critically evaluated before being applied to current circumstances, their application could be contrary to *maqaasid al-shari'ah*, which these rulings were designed to achieve in the first place.[86] The magnitude of the problem is even greater where there is no *fiqh* ruling to deal with a given issue, as this situation would require *qadis* to practice *ijtihad*. However, given Saudi *qadis* do not practice *ijtihad*, it would seem that the only way to deal with these issues in an adequate and uniform manner, is to allow the ruler to enact regulations for them.

Finally, there is nothing in the writings of either Imams Ibn Taymiyya or Ibn Al-Qayyim, whose opinions are widely respected and followed by Saudi *ulama*, that suggests that the ruler is precluded from acting, at least, in areas where there are no texts, *ijma* or a valid *qiyas* to deal with pressing social problems. In fact the writings of these scholars can only be understood as legitimising the actions of the ruler in such areas.[87] In this respect, Professor Vogel made the following remarks:

> Notice ... [*ulama's*] position-both as to the content of the laws and as to the jurisdictions to enforce them - take a far more niggardly view of the king's legislative powers than is justified by the *fiqh* doctrine that ostensibly govern the issue, the doctrine of *siyasa shar'iyya*, can the *'ulama'* really claim that these laws, drafted with solicitude for *fiqh* and usually in consultation with the *'ulama'*, offend fundamental rules of

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Manhgyyiah wa al-Tadpeeq (The Codification of Islamic Jurisprudence: Principle, Methodology and Practice), 2nd edn (Doha: The Department for Renewing Islamic Heritage, 1986), pp. 35-75; Al-Qassem, *al-Islam*, *supra* note 37, pp. 41-166; Vogel, *supra* note 17, pp. 338-353; Al-Zuhili, *supra* note 14, p. 262.

[86] *See supra* para. 1.2.2.

[87] *See* Kalaf, A, *al-Siyasa al-Shar'iyya (The Legitimate Policy)* (Cairo: Dar al-Ansaar, 1977), pp. 4-24.

shari'a to the degree that they must be ignored wholesale? Similarly, while the *shari'a* courts' refusal to enforce the *nizams* [*i.e., siyasa* laws] is very real, the rest of their position is somewhat unreal. It seems insincere for the *'ulama'* to oppose most of the content of these laws and most of the adjudication enforcing them when they offer as yet nothing to put in their place. Do they really intend the repeal of [, for example,] traffic laws? If they were serious about deciding *nizam* cases by *fiqh*, then they have to perform a major effort of *ijtihad* to draft *fiqh* rules to replace the *nizams*, this is not occurring ....[88]

That is to say, the power of the ruler to enact regulations, even in areas which are governed by equivocal texts, is, in my view, not only supported by doctrinal considerations but also, and equally compellingly, by practical ones. As *siyasa* laws would be redundant if they were, either directly or indirectly, not respected by the judiciary, and as the subject matter of this thesis is the rights of the accused in the pre-trial stage in Saudi Arabia, mostly of which regulated through *siyasa* laws, the effect of this controversial position on the implementation of these laws and the best way to deal with them, will be discussed in-depth later.[89]

1.4.1 The regulatory authority (*al-sultah al-tanzimiyya*)

As pointed out above, the ruler under the concept of *siyasa shar'iyya* has the power to issue laws to supplement, but not contradict, the *Shari'ah* for the purposes of advancing public interest. This section discusses the authorities entrusted with and the mechanisms for issuing *siyasa* laws. It is interesting to note the non-use by the Saudi government of the terms 'legislation' and 'legislature' when referring to *siyasa* laws, and the body who issues them. As discussed above, under Islamic legal theory, God is the sovereign in the sense that His law is the supreme law and that only He has the power to legislate. Therefore, out of respect for this belief, the Saudi government has replaced the term legislation (*tashri'a*) with 'regulation' (*nizam*, plural *anzimah*). Likewise, the authority that makes *siyasa* laws is referred to as the 'regulatory authority' (*al-sultah al-tanzimiyya*).[90] To avoid any confusion resulting form the translation of Saudi legal terms regarding the various types of laws issued by the regulatory and executive authorities, in the remainder of this section, the term 'statute'

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[88] Vogel, *supra* note 17, pp. 176-177. *See also*, Al-Qassem, A & Al-Nasri, A. 'al-Buniah al-Tashri'aiah wa al-Qudaiah fi al-Mamlaka (The Legislative and Judicial Infrastructure in the Kingdom).' *Riyadh Economic Forum*, ed. (Riyadh, 2003), pp. 47-51.
[89] *See infra* pp. 285-287, 296-299.
[90] Al-Marzuqi, *supra* note 9, pp. 23-25; Aba-Namay, *supra* note 4, pp. 209-210.

will be used to refer to '*nizam*, or regulation' in the strict sense, as explained below, the term 'regulation' will be used to refer to bye-laws (*laiha*, plural *luaih*), and the term 'law' will be used to refer to both types of *nizams* (*i.e.*, statutes and regulations).

As already mentioned, the regulatory authority has the power to issues laws, as long as they advance public interest and do not contradict the Islamic *Shari'ah*. Article 67 of the Basic Law clearly states that '[t]he regulatory authority shall have the jurisdiction to enact statutes and regulations in order to attain welfare and avoid harm in the affairs of the state, in accordance with the general rules of Islamic *Shari'ah*.' What the Basic Law fails to define, however, is who exactly the regulatory authority is. This is exacerbated further by the constitutional reforms of 1992 that created more than one body with the right to regulate. Currently, both the Council of Ministers and the Consultative Council share the task and right to propose and draft new laws.

The Council of Ministers Law entitles every Council Minister to propose a statute or regulation, which pertains to his Ministry's field of work.[91] The process begins with a prepared draft developed by the relevant department at the Council of Ministers (*i.e.*, the Bureau of Experts, which is composed of a number people who are highly specialised in modern law),[92] in consultation with the relevant Ministry. This is then sent for consideration and approval by the Council of Ministers and the Consultative Council.[93] As long as the two Councils have agreed on the formulation and content of the proposed draft, and it gained the King's approval, it will be issued as a law. However, if the two Councils differ on the proposed law, the draft will be referred back to the Consultative Council for further consideration and then it is referred to the King to decide what he 'deems fit'.[94]

The Consultative Council, in addition to its role as outlined above, was also entrusted with the right to propose laws, and amend existing laws, on the suggestion of ten of its members. However, from when it was first established until very recently, it had not been able to exercise this right effectively. The reason for this was that the Consultative Council Law required that any proposal must first be approved by the King before the Council could prepare any draft. However, in practice, this approval

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[91] Council of Ministers Law, *supra* note 7, Art. 22.
[92] *Ibid.* Art. 30. For a discussion of the role of the Bureau of Experts in drafting laws, *see* Al-Marzuqi, *supra* note 9, pp. 323-328.
[93] Consultative Council Law, *supra* note 7, Art. 15 (c).
[94] *Ibid.* Art. 17 as amended by Royal Decree No. A/198 (26 November 2003).

had never been given.[95] In acknowledgment of this defect, the King, as recently as 2003, amended the Consultative Council Law by allowing the Council to propose and study any law draft, or seek to amend an existing law on the suggestion of ten of its members and the approval of its Chairman. It remains that on the completion of the study and drafting of a law or the suggested amendment of an existing law by the Council, the proposal shall still be submitted to the King by the Council Chairman.[96]

The Council also has the authority to interpret laws.[97] The decision of the Council on the proposed interpretation is then reviewed by the Council of Ministers. If both Councils agree on the proposed interpretation, and it is granted the King's approval, a Royal Decree is then issued providing the interpretation with a legally binding effect if it concerns a statute, or a Council of Minister Order if it concerns a regulation. If, however, the two councils adopt different views on the interpretation of a given law, the draft will be referred back to the Consultative Council for further consideration. After it has been reconsidered by the Consultative Council, its decision is referred to the King, who has the right to decide what he 'deems fit'.[98] It should be noted though, that to the best of this writer's knowledge, this function has never been exercised by the Consultative Council.

It is therefore clear, that even after the establishment of the Consultative Council, it is the Council of Ministers who actually has the upper hand in the regulatory process.[99] Needless to say that it is the King who has the ultimate power over the regulatory process, as members of both Councils are appointed and dismissed by him,[100] and there is no proposed law, amendment to an existing law, or interpretation of a law, even if approved by both Councils, that can have any legal effect without the King's approval.[101]

1.4.2 The hierarchy of laws

There is no formal hierarchical classification of *siyasa* laws in Saudi Arabia, but there is an unsystematic emerging hierarchy based on western legal concepts, particularly

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[95] Al-Saud, F, *al-Tutuer al-Siyasi fi al-Mamlaka al-Arabiyyah al-Saudiyyah wa Taqeem Majlis al-Shura (The Political Development in the Kingdom of Saudi Arabia and an Evaluation of the Consultative Council)* (Riyadh: Al-Obekan Bookshop & Publishers, 2002), p.281.
[96] Consultative Council Law, *supra* note 6, Art. 23 as amended by Royal Decree No. A/198 (26 November 2003).
[97] *Ibid*. Art. 15 (c).
[98] *See supra* note 94.
[99] *See* Al-Saud, *supra* note 95, p. 207.
[100] Council of Ministers Law, Art. 8; Consultative Council Law, Art. 3.
[101] *See* Aba-Namay, *supra* note 4, pp. 305-306, 314.

those of France.[102] Based on the primacy of law, the *siyasa* laws in descending order are the basic statutes, the ordinary statutes, and regulations.[103] The following is a brief description of these three types of laws.

1.4.2.1 Basic statutes (al-anzimah al-asassiah)

This category of basic statutes includes: the Basic Law of Government, the Consultative Council Law, and the Council of Ministers Law. There are a number of considerations that suggest these statutes have a superior status over other laws. First, the extraordinary way by which these laws were drafted and promulgated. As mentioned above, ordinary statutes are drafted by the Consultative Council and the Council of Ministers and, on the King's approval, they are promulgated by a Royal Decree, whereas the basic statutes were drafted by a special committee, whose members were appointed by the King especially for the purposes of drafting the basic statutes. This was done away from both the Consultative Council, which did not exist at the time, and the Council of Ministers which had, and still has, a significant regulatory role.[104]

Secondly, as already mentioned, ordinarily all statutes are reviewed and amended by the Council of Ministers, in consultation with the Consultative Council, and amendments to laws are issued by a Royal Decree.[105] However, according to Royal Decree M/23 issued on 26/8/1412 H (1993), the basic statutes are exempted from being reviewed or amended by the ordinary mechanism, and according to specific clauses attached to each of these statutes, they may only be amended in the same way as they were promulgated, *i.e.,* Royal Orders as opposed to Royal Decrees.[106] Finally, the Royal Orders, by which the basic statutes were promulgated, include specific provision requiring that other laws should be amended to conform to these statutes.[107] All these considerations suggest that these statutes have a superior status over other State laws.[108]

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[102] *See* Hanson, M, 'The Influence of French Law on the Legal Development of Saudi Arabia', *ALQ,* 2 (1987), 272; Vogel, *supra* note 17, p. 290.
[103] It should be noted that all state laws are subordinate to the Islamic *Shari'ah* under the Saudi constitution. *See supra* para. 1.1.
[104] Al-Marzuqi, *supra* note 9, pp. 64-66.
[105] *See supra* para. 1.4.1.
[106] *See* the Basic Law, Art. 83; the Consultative Council Law, Art. 30; Council of Ministers Law, Art. 32.
[107] *See supra* notes 5-7.
[108] *See* al-Marzuqi, *supra* note 9, pp. 84-85

1.4.2.2 Ordinary statutes (anzimah adiah)

This category includes all statutes which follow the ordinary procedure in drafting laws and which are promulgated by Royal Decrees.[109] While these statutes have a superior status over regulations, they have, at least in theory, as discussed above, a subordinate status to the basic statutes.

It should be noted, however, as there is no constitutional court within the Saudi judicial system entrusted with reviewing the constitutionality of any given law, the significance of the distinction between the basic statutes and ordinary statutes only has effect when ordinary statutes are being drafted. However, if a subordinate law (*i.e.,* an ordinary statute) is, allegedly, incompatible with a superior law (*i.e.,* a basic statute), there is no mechanism by which such alleged incompatibility is reviewed and, if indeed exists, eliminated in order to preserve the hierarchy of laws.[110]

1.4.2.3 Regulations (luaih)

The main difference between regulations and ordinary statutes is that a regulation can be promulgated either by a Council of Ministers Order or by a Ministerial Order by a Council Minister (as long as there is a specific statute that gives a Council Minister such an authority), and the publication of it is not required before it becomes effective. Whereas ordinary statutes, as discussed above, can only be promulgated by a Royal decree and must be published in the official gazette, to take effect on the date of publication unless another date is specified.[111] The main type of regulation that has come about is implementing regulations, which are enacted for the purpose of implementing existing statutes.[112] As such, implementing regulations are subordinate to statutes, and must not, therefore, contradict them.

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[109] *See supra* para. 1.4.1.

[110] *See* Al-Qassem, *supra* note 88, p. 74. This is equally applicable to *siyasa* laws which are, allegedly, incompatible with the Islamic *Shari'ah*. It should be noted, however, that the practice of the *Shari'ah* Courts is to ignore any laws, which are believed by *qadis* to be incompatible with the *Shari'ah* law, and apply the applicable *Shari'ah* provision on the case under consideration, without expressly declaring such law as unconstitutional. *See* Vogel, *supra* note 17, p. 111.

[111] The Basic Law, Art. 71. Under French law the same distinction regarding the requirement of publication exists between statutes (*loi*) and `regulation (*reglement*). In this respect, *see generally* Dickson, B, *Introduction to French Law* (London: Pitman Publishing, 1994), pp. 7-8.

[112] This type of regulation is known under the French law as *reglement d'application* (implementing regulations) or *decrets d'application* (implementing decrees), which are enacted in order to implement Acts of Parliament. In this respect, *see generally* West, A, *et al*, *The French Legal System*, 2nd edn (London: Butterworths, 1998), pp. 28-29, 33.

As regulations are enacted by the executive authority, as opposed to statutes, which are issued by the regulatory authority,[113] regulations are, in essence, considered to be administrative decisions which, if their legality is challenged by the relevant persons, are reviewable by the administrative court (*i.e.,* the Board of Grievances). If they are found to, *inter alia*, contradict a superior law they are subject to annulment.[114]

1.5 Conclusion

The *Shari'ah* holds the dominant place in the constitution and practice in Saudi Arabia. The introduction of the Basic Law has not lessened the *Shari'ah's* status, in fact, if anything, it has enhanced it. The most striking feature of the Saudi legal system has been the existence of two distinct and yet, supposedly, complementary types of laws: *fiqh* and *siyasa*. The former is the product of the exercise of *ijtihad* by *ulama*, while the latter is the product of the King's power to regulate under the concept of *siyasa shar'iyya*. However, the stalemate is created by each legislative parties (*i.e.,* the *ulama* and the King) assuming to have a wider scope of legislative power than the other party is willing to concede. Given that the conservative *ulama* have a firm hand on the judiciary, which has the ultimate responsibility for applying the law, and that *siyasa* laws, which deals with matters outside the spheres of *al-ta'zir* offences and administration, are viewed by *ulama* as an invasion of what they consider the *qadi's* right to *ijtihad*, although this right is not exercised in practice, many *siyasa* laws exist in the statute book but not in practice.

On the other hand, the problem regarding the legitimacy of *siyasa* laws is not only created by the judiciary's ideological and impractical stance on the issue of the scope of the ruler power's to regulate, but the government has made its own contribution to complicating the problem further. Many of the *siyasa* laws, including

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[113] Although this distinction might be obscure due to the fact that the Council of Ministers is the supreme regulatory and executive authority.

[114] Hekel, A, *al-Qanun al-Idari al-Saudi (The Saudi Administrative Law)* (Riyadh: King Saud University Press, 1994), pp. 212-216. According to Article 8 of the Law of Board of Grievances, *supra* note 43:

> 1- The Board of Grievances shall have the jurisdiction over:
>
> ...
>
> (b) Lawsuits which are submitted by relevant persons contesting an administrative order when the reason is due to ... its incompatibility with statutes....

those which govern the issues examined in this thesis, have been transplanted from other jurisdictions, namely from Egypt. It will be shown that this has occurred on the unexamined assumption that they fulfil *muslaha* and do not contradict the textual sources and are therefore justified by the doctrines of *siyasa shar'iyya* and *muslaha mursala*.

As a consequence of these problems, the legal system has been unable to transform itself to meet current needs. As the aim of this thesis is to examine the extent to which the Saudi pre-trial criminal procedural and practice comply with international human rights standards, the effect of these problems on the Saudi system's ability to provide effective protection to human rights, and the best way to deal with these problems in relations to the issues examined in this thesis will be discussed in depth in due course.

Chapter Two

International Human Rights Law

As discussed in the previous chapter, the *Shari'ah* is the supreme law of Saudi Arabia. Since the aim of this thesis is to examine the extent to which the Saudi pre-trial criminal procedural law and practice comply with international human rights standards, this chapter focuses upon international human rights law.

Throughout the history of international law until recently, the matter of a government's treatment of its own citizens was considered to be wholly a domestic affair. International law was solely concerned with regulating the relationship between states as sovereign entities. Hence, if a country refrained from providing its citizens with any rights or mistreated them, it could not be criticised or compelled to do otherwise. If another state decided to interfere in such a matter, the interfering country could be accused of violating the sovereignty of another state and subsequently being in violation of international law.[1]

However, after the Second World War in which crimes against humanity were committed by governments against their own citizens - particularly those crimes committed by the Nazi government against the Jews during World War II - there was a growing realisation on the part of the post-War powers of the need to establish an effective system for protecting individual rights, to prevent the atrocities of the War from ever happening again. The idea was that all states should be obliged to comply with minimum standards of human rights in the treatment of their citizens.[2] When the United Nations was established in 1945, the ambitious idea of creating an international system for protecting human rights topped its agenda. The unanimous adoption of the Universal Declaration of Human Rights in 1948 by the United Nations General Assembly paved the way for the development of an international human rights system. Almost sixty years on, a large number of human rights treaties have been adopted by the United Nations which include enforcement machinery for ensuring the practical implementation of the recognised rights. In addition, the

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[1] *See* Sohn, L, 'The New International Law: Protection of the Rights of the Individuals Rather than States', *Am. U.L. Rev.*, 32 (1982), 1, pp. 9-11 [hereinafter International Law]; Bilder, R, 'An Overview of International Human Rights Law', in *Guide to International Human Rights Practice*, 2nd edn, ed. by H Hannum, (Philadelphia: University of Pennsylvania Press, 1992), p. 4.

[2] *See* Buergenthal, T, 'The Human Rights Revolution', *St. Mary's L.J.*, 23.1 (1991-1992), 3.

concern over human rights has been a preoccupation at the regional level, resulting in the establishment of regional human rights systems, with the aim of enhancing the protection of the individual's universal rights.

Despite this impressive development in the field of human rights, in practice massive human rights violations are still commonplace. Hence, the purpose of this chapter is twofold: firstly, to highlight the development of international human rights law and the concepts upon which it is based; secondly, to discuss what is considered to be the major conceptual problems hindering the practical implementation of human rights, particularly in Muslim countries. The claim that human rights are based on Western concepts, which arguably makes them unsuitable for other cultures, is a serious threat to the progress of the human rights movement. Thus a careful consideration of the debate surrounding the universality of human rights with the aim of providing a satisfactory answer to the question of the relativity/universality of human rights is essential, before proceeding to evaluate the Saudi Arabian system on the basis of international human rights standards with regard to the theme of this thesis.

In order to do so, the chapter is divided into four parts. Part one explores the philosophical and historical roots of the modern human rights concept on which the international human rights system is based. Part two discusses the sources of international human rights, and the existing enforcement methods for implementing human rights at the international and regional levels. In the third part, attention will be focused on the relativity/universality debate of human rights. The final part considers the question of the universality of human rights in relation to Saudi Arabia's laws and policies.

2.1 Historical and philosophical origins of human rights

The question regarding the philosophical and historical origins of the modern concept of human rights is not an academic one; as will be discussed, it has influenced and still greatly influences human rights discourse.[3] The modern concept of human rights, which considers human rights as entitlements which one has merely because he/she is

[3] *See infra* para. 2.3.

a human being,[4] is a relatively recent development. Although some attempts have been made to trace the modern concept of human rights back to the rise of Islamic civilisation fourteen centuries ago,[5] its historical and philosophical grounds are rooted in the philosophical and political revolutions of the seventeenth and eighteenth centuries.[6] John Locke and the philosophers of the Age of Enlightenment, building upon the theory of natural law, perceived human beings to be possessed of certain inalienable rights in the state of nature before they entered into society. As all human beings have equally the same basic nature, natural rights which are based on that nature are considered to be universally and equally held by all. To avoid the inconveniences and dangers of the state of nature, individuals entered into 'a social contract' by which they mutually agreed to establish the civil society and government. The sole aim of establishing the government is to protect individuals' natural rights.[7]

These revolutionary ideas shaped the political landscape of their time. 'Natural rights' and 'the rights of man', another term for natural rights, become the moral justification and tool by which the people fought their struggle against injustices committed by colonising and authoritarian governments.[8] The Americans in their revolt against colonisation by the British protested their 'natural rights' and declared in the Virginia Declaration of Rights 1776 that 'all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of

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[4] *See* Donnelly, J, 'Human Rights as Natural Rights', *Hum. Rts. Q.*, 4.3 (1982), 391 [hereinafter Natural Rights]; Donnelly, J, *The Concept of Human Rights* (London; Sydney: Croom Helm, 1985), p. 8 [hereinafter *Human Rights*].

[5] *See e.g.*, Chaudhry, M, *Human Rights in Islam* (Lahore: Impact Publications, 1993), pp.13-16; Berween, M, 'The Fundamental Human Rights: An Islamic Perspective', *Int'l.J.Hum.Rts.*, 6.1 (2002), pp. 62-63. That is not to say, however, that the Islamic *Shari'ah* does not recognise the concept of human rights, but merely to note that its approach to the issue of human rights is different from that of natural rights theory on which the modern concept of human rights is based. The concept of human rights under Islamic law is discussed *infra* para. 2.4.1.

[6] *See* Marks, S, 'From the "Single Confused Page" to the "Decalogue for Six Billion Persons": The Roots of the Universal Declaration of Human Rights in the French Revolution', *Hum. Rts. Q.*, 20.3 (1998), 459, pp. 463, 467, 469, 473, 511; Henkin, L, *The Age of Rights* (New York: Columbia University Press, 1990), pp. 1-6.

[7] For an extensive discussion of natural rights theory, *see* Shestack, J, 'The Philosophic Foundations of Human Rights', *Hum. Rts. Q.*, 20.2 (1998), 201, p. 206-208; Donnelly, J, *Universal Human Rights in Theory and Practice* (Ithaca & London: Cornell University Press, 1989), pp. 89-90 [hereinafter *Theory and Practice*]; Macdonald, M, 'Natural Rights', in *Theories of Rights*, ed. by J Waldron, (Oxford: Oxford University Press, 1984), pp. 26-27; Lauren, P, *The Evolution of International Human Rights: Visions Seen*, 2nd edn (Philadelphia: University of Pennsylvania Press, 2003), pp. 15-16; Davidson, S, *Human Rights* (Buckingham: Open University Press, 1993), pp. 27-29; Donnelly, *Human Rights*, *supra* note 4, pp. 8-9, 27. For a discussion of other human rights theories, *see generally* Shestack, *ibid.* pp. 208-227.

[8] Luard, E, 'The Origins of International Concern over Human Rights', in *The International Protection of Human Rights*, ed. by E Luard, (London: Thames & Hudson, 1967), pp. 7-8.

society, they cannot by any compact deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.'[9] Again, on 4 July 1776 the Americans in the American Declaration of Independence proclaimed that '[w]e hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain inalienable Rights, that among these are Life, Liberty and the pursuit of Happiness... to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed....'[10]

Closer to home, the French revolutionaries, having disposed of their King and the privileged elite, and inspired by their philosophers and the American Declaration of Independence, decided to adopt a declaration of 'universal rights'.[11] On 26 August 1789 the National Assembly of France, which adopted the Declaration of the Rights of Man and Citizen, declared, *inter alia*, that:

> I. Men are born, and always continue to be, free and equal in respect of their rights. ...
> II. The end of all political associations is the preservation of the natural and imprescriptible rights of man; and these rights are liberty, property, security, and resistance of oppression.
> III. The nation is essentially the source of sovereignty; nor can any individual, or any body of men, be entitled to any authority which is not expressly derived from it.[12]

Although natural rights theory entered the political national stage in the eighteenth century, it was not until the 20th century that natural rights became 'universal rights' as the issue of human rights entered the international stage. After the atrocities of the Second World War, the victors, having established the United Nations, were determined to provide international protection for human rights, in order to prevent these atrocities recurring. In 1947, the United Nations Educational, Scientific and Cultural Organisation Committee (UNESCO Committee) carried out an inquiry into the theoretical foundations of international human rights declaration. The inquiry was conducted in the hope that it would be 'useful to the Commission on Human Rights

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[9] 'The Virginia Declaration of Rights' in *Human Rights: Meaning and History*, ed. by M Palumbo, (Malabar, Florida: R.E. Krieger, 1982), pp. 142-144.
[10] 'The Declaration of Independence in Congress' in Palumbo, *supra* note 9, pp. 145-146.
[11] *See* Lauren, *supra* note 7, pp.17-18; Hunt, L, 'Introduction', in *The French Revolution and Human Rights: A Brief Documentary History*, ed. & trans by L Hunt, (Boston: Bedford Books of St. Martin's Press, 1996), pp. 13-15.
[12] 'The Declaration of the Rights of Man and the Citizen' in Palumbo, *supra* note 9, pp. 119-121.

of the Economic and Social Council [charged with drafting the Universal Declaration of Human Rights (UDHR)] both in suggesting common grounds for agreement and in explaining possible sources of differences.'[13] With regard to the nature of human rights, the UNESCO Committee concluded that human rights 'may be seen to be implicit in *man's nature* as an individual and as a member of society'[14] and '[a]ll rights derive, on the one hand, from the *nature of man* as such and, on the other, since man depends on man, the stage of development achieved by the social and political groups in which he participates.'[15]

Although the Commission on Human Rights in drafting the UDHR did not draw directly on the UNESCO Committee's document,[16] and when the UDHR was adopted in 1948 it did not include any explicit reference to any theory of human rights, its various provisions suggest that the framers of UDHR, as the members of UNESCO Committee, were greatly influenced by the natural rights theory. The UDHR, as observed by Hunt:

> [P]roclaimed that "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundations of freedom, justice and the peace in the world."[[17]]
> This broad claim summarises the essence of the concept of human rights as it has developed since the seventeenth century. To declare the existence and political relevance of human rights in this fashion implies that (1) all human beings have certain inherent rights simply be virtue of being human being, not by virtue of their status in society; (2) these rights are consequently imagined as "natural", as stemming from human nature itself, and they have in the past often been called "natural rights"....[18]
> ...
> The framers of the UN declaration of 1948 closely followed the model established by the French Declaration of the Rights of Man and Citizen of 1789, while substituting "human" for the more ambiguous "man" throughout.[19]

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[13] United Nations Educational, Scientific and Cultural Organisation, *The Grounds of an International Declaration of Human Rights, Report of the UNESCO Committee on the Philosophic Principles of the Rights of Man to the Commission of Human Rights of the United Nations* (Paris, July 31, 1947), p. 1, *available at* <http://unesdoc.unesco.org> (last visited Jan. 2, 2006).
[14] *Ibid.* p. 8.
[15] *Ibid.*
[16] Waltz, S, 'Universal Human Rights: The Contribution of Muslim States', *Hum. Rts. Q.*, 26.4 (2004), 799, p. 800.
[17] Similarly, the International Covenant on Civil and Political Rights 1966, in its first and second preambular paragraphs similarly states that 'recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world, [and that human] rights derive from the inherent dignity of the human person'.
[18] Hunt, *supra* note 11, pp.1-2.
[19] *Ibid.* p. 3. *See also* Sohn, L, International Law, *supra* note 1, pp. 17-18.

From this it can be safely concluded that the origins of the modern concept of human rights is essentially of Western origin.[20] The critical question which logically arises from this conclusion is, as Pollis and Schwab put it, 'whether there is a universal consensus regarding the Western definition of human rights based on natural right'.[21] Before discussing this question, it is appropriate first to highlight the sources of international human rights law and its means of implementation.

2.2 Sources of international human rights law

There are two main sources for international human rights law, namely treaties and international custom.

2.2.1 Treaties

International and regional treaties are the main source of creating binding international obligations, including those of respecting human rights. As with all treaties, joining human rights treaties is voluntary, and, hence, State Parties to such treaties ought to fulfil their obligations under these treaties without the need for a monitoring body. However, experience has shown that what ought to happen does not always occur. Therefore, it has been recognised that in order to give a meaningful protection to human rights recognised by human rights treaties, such treaties should include an effective method of enforcing these treaties within the jurisdiction of the States Parties.[22] What follows is a discussion of international and regional human rights instruments and the enforcement machinery which they adopt for enforcing the recognised rights.

2.2.1.1 International instruments

The United Nations (U.N) since its establishment in 1945 has played an instrumental role in providing human rights with international protection. Over the last sixty years,

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[20] The same conclusion has been reached by other scholars. In this respect, see *supra* note 6; Pollis, A & Schwab, P, 'Human Rights: A Western Construct with Limited Applicability', in *Human Rights: Cultural and Ideological Perspectives*, ed. by A Pollis & P Schwab, (London: Praeger, 1979), pp. 3-4, 8; Tibi, B, 'Islamic Law/Shari'a, Human Rights, Universal Morality and International Relations', *Hum. Rts. Q.,* 16.2 (1994), 277, p. 280-281; Davidson, *supra* note 7, pp. 2, 7; Donnelly, *Theory and Practice*, *supra* note 7, pp. 28-29, 64.

[21] Pollis, *supra* note 20, p. 4.

[22] *See* Buergenthal, T, *International Human Rights in A Nutshell* (Saint Paul, Minnesota: West Publishing Company, 1995), (photo. reprint 1996), p. 20; Sohn, L, 'Human Rights: Their Implementation and Supervision by the United Nations', in *Human Rights in International Law: Legal and Policy Issues*, ed. by T Meron, (Oxford: Oxford University Press, 1984), p. 369 [hereinafter Human Rights].

the U.N has gone through various stages to finally come up with a coherent system for the protection of human rights. It started its mission on human rights by initially expressing the international concern over human rights under the United Nations Charter 1945, to declaring a list of universal rights in the Universal Declaration of Human Rights 1948, to the elaboration of the internationally protected rights and providing enforcement mechanisms to ensure the practical implementation of these rights at the national level in the International Covenant of Civil and Political Rights 1966, and the International Covenant of on Economic, Social and Cultural Rights 1966.[23] The Declaration and the two Covenants represent the U.N Bill of Rights.

2.2.1.1.1 U.N Charter

The United Nations Charter 1945[24] was the first international treaty to recognise human rights as a matter of international concern. The main effect of the U.N Charter on human rights is that it has transformed it from an issue that fell exclusively within the domestic jurisdiction of states, into a matter of concern to the wider international community.[25] The U.N Charter in various articles expresses its Member States' concern over human rights.[26] Article 1 (3) states that one of the purposes of the U.N is '[t]o achieve international cooperation ... in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion'. In addition, members to the United Nations 'pledge themselves to take joint and separate action in cooperation'[27] with the U.N to promote 'universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.'[28]

Yet although the Charter prohibits discrimination with regard to the enjoyment of 'human rights and fundamental freedoms', it left these human rights and fundamental

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[23] *See* Sohn, International Law, *supra* note 1, pp.11-12. It should be noted that there are human rights conventions dealing with issues of special concern to the world community, such as torture and inhuman treatment or punishment and discrimination against women. As these conventions only deal with specific issues, they fall outside the scope of this chapter and, therefore, are not included in the discussion here.

[24] United Nations Charter, signed June 26, 1945, 59 Stat. 1031, T.S. No. 993, 3 Bevans 1153 (entered into force Oct. 24, 1945) [hereinafter UN Charter], *available at* <http://www.ohchr.org/english/> (last visited Jan. 2, 2006).

[25] Sohn, International Law, *supra* note 1, p. 14; Buergenthal, *supra* note 22, pp. 24-25.

[26] Although originally only 50 States were Members of the U.N when it was founded in 1945, by 2002 its membership is enjoyed by 191 States.

[27] UN Charter, Art. 56.

[28] *Ibid.* Art. 55 (c).

freedoms undefined, which led to the second stage of human rights development under the U.N., as discussed next.

2.2.1.1.2 Universal Declaration of Human Rights

Soon after the U.N Charter came into force in October 1945, the Commission on Human Rights was established by the Economic and Social Council of the U.N in June 1946.[29] The main task of the Commission was to draft an International Bill of Rights. However, soon after the Commission had started its work, it became apparent that it would be difficult to reach an agreement among the Member States on the nature and wording of the rights, and the machinery enforcing them. Therefore, the Commission decided that it would be easier to draft, as a first step, a declaration of principles in the form of a non-binding resolution of the U.N General Assembly instead of drafting a detailed, comprehensive and binding treaty.[30] This solution were proved to be fruitful, as the Universal Declaration of Human Rights (UDHR or Declaration) was adopted unanimously by the General Assembly in 1948.[31] It should be noted, however, that six States abstained from voting on the Declaration, including Saudi Arabia.[32] The Declaration in its final form included civil, political, economic, social, and cultural rights.

Given the fact that the Declaration was not intended to be a binding treaty, it is not surprising to note that it did not contain any enforcement mechanism to secure the enjoyment of the rights recognised by the Declaration.[33] Hence, it was the subsequent mission of the Commission on Human Rights to draft a binding human rights treaty to give effect to the principles embodied in the UDHR, as discussed next.

2.2.1.1.3 The two Covenants

After the General Assembly adopted the UDHR, the Commission on Human Rights' next task was to draft an international binding treaty to give effect to, and elaborate on the principles recognised by UDHR. The aim was not confined to turning the

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[29] Morsink, J, *The Universal Declaration of Human Rights: Origins, Drafting, and Intent* (Philadelphia: University of Pennsylvania Press, 1999), p. 12.
[30] For an extensive discussion of the process which led to this result, see *ibid*. pp. 12-20.
[31] Universal Declaration of Human Rights, adopted Dec. 10, 1948, G.A. Res. 217A (III), U.N. GAOR, 3rd Sess. (Resolutions, part 1), at 71, U.N. Doc. A/810 (1948) [hereinafter UDHR], *available at* < http://www.ohchr.org/english/> (last visited Jan. 2, 2006).
[32] Other states which abstained from the voting on the UDHR include the USSR, the Ukrainian Soviet Socialist Republic (UKSSR), the BSSR, Yugoslavia, Poland, and South Africa. Saudi Arabia's position on the issue of international human rights in general and on UDHR in particular is discussed *infra* para. 2.4.2.
[33] Davidson, *supra* note 7, p. 13.

principles of UDHR into positive law, but also to providing enforcement mechanisms to ensure that these principles are respected, in practice, by the states parties. However, soon after the Commission have resumed its work, controversy regarding the appropriate methods of enforcement for the different categories of human rights (*i.e.,* civil and political rights favoured by the West on the one hand, and economic, social and cultural rights, favoured by the Communist camp, on the other) arose between the members of the Commission. Eventually, by way of a compromise, it was agreed to draft two separate documents each dealing with a different category of human rights and including different methods of enforcement.[34]

After 18 years of negotiations, this process produced the International Covenant on Civil and Political Rights 1966 (ICCPR),[35] and International Covenant on Economic, Social, and Cultural Rights 1966 (ICESCR).[36] It took a decade further before they came into force in 1976, after receiving the required number of ratifications in accordance with Article 49 of the ICCPR and Article 27 of ICESCR. As the accused's legal rights, which form the theme of this thesis, fall within ICCPR, the ICESCR falls outside the scope of this thesis and is thus not included in the discussion.

As of June 2004, the ICCPR had been ratified by 152 States.[37] The Human Rights Committee (the Committee or HRC), has been established in accordance with Article 28 (1) of the ICCPR, for monitoring the States Parties' compliance with the ICCPR. The HRC consists of 18 members who must be nationals of the State Parties to the Covenant. The members must be elected from persons of high moral character and recognised competence in the field of human rights. These members serve in their personal capacity and not as representatives of their countries.[38] Since the HRC

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[34] *Ibid.* pp. 13-14, 75.
[35] International Covenant on Civil and Political Rights, adopted Dec. 16, 1966, entered into force Mar. 23, 1976, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess, Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966) [hereinafter ICCPR], *available at* <http://www.ohchr.org/english/> (last visited Jan. 2, 2006).
[36] International Covenant on Economic, Social and Cultural Rights, adopted Dec. 16, 1966, entered into force Jan. 3, 1976, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess. Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966) [Hereinafter ICESCR], *available at* <http://www.ohchr.org/english/> (last visited Jan. 2, 2006).
[37] Office of the United Nations High Commissioner for Human Rights, *Report on the Status of Ratifications of the Principal International Human Rights Treaties*, June 9, 2004 [hereinafter *Statue of Ratifications*], *available at* <http://www.unhchr.ch/pdf/report.pdf> (last visited Jan. 2, 2006).
[38] ICCPR, Art. 28 (2), (3).

started its activities in 1977, it has exercised its supervisory role through two main procedures.[39]

Firstly, the ICCPR requires States Parties to submit an initial report to the Committee within one year of the entry of the Covenant into force, and whenever the Committee requests it, thereby establishing what has become known as the reporting system.[40] In practice, the Committee established a five-year reporting system, and in exceptional circumstances the Committee may request supplementary or emergency reports.[41] It should be noted, however, that although submitting the report on time is mandatory, experience has shown that some parties do not submit their report on time and some do not submit their reports at all.[42] The Committee, having received and considered the State's reports, adopts its concluding comments on the specific report by consensus. The adopted comments are not legally binding, thus their impact is dependent upon the state itself.[43]

In addition to the concluding comments, which are specific to the report under consideration, the Committee adopts what is called 'General Comments', as required by Article 40 (4) of the ICCPR. The General Comments, unlike the concluding comments, are directed to all States Parties. The significance of these Comments is that, notwithstanding their non-binding nature, they represent an authoritative source of interpretation, as they are adopted by consensus after an extensive discussion between the members of the Committee, who are experts in the human rights field and elected by the States Parties to represent universal views on the meaning of the rights protected under the Covenant.[44]

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[39] In addition to these two main procedures, there is the inter-state procedure, which has been established under Article 41 of the ICCPR. However due its apparent ineffectiveness as a monitoring procedure as no state has yet resorted to it, it is not included in the discussion. For a discussion of the inter-state system, *see generally* Nowak, M, 'The International Covenant on Civil and Political Rights', in *An Introduction to the International Protection of Human Rights*, ed. by R Hanski & M Suksi, (Turku/Åbo: Institute for Human Rights, Åbo Akademi University, 1999), pp. 94-95.

[40] ICCPR, Art. 40 (1).

[41] Nowak, *supra* note 39, p. 92.

[42] Harris, D, 'The International Covenant on Civil and Political Rights and the United Kingdom: An Introduction', in *The International Covenant on Civil and Political Rights and the United Kingdom Law*, ed. by D Harris and S Joseph, (Oxford: Clarendon Press, 1995), p. 23.

[43] *Ibid.* p. 26.

[44] *See* Nowak, *supra* note 39, p. 94; Harris, *supra* note 42, p. 27, Buergenthal, *supra* note 22, p. 46; McGoldrick, D, *The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights* (Oxford: Clarendon Press, 1991), pp. 92-96.

Secondly, the HRC also exercises its supervisory role under the individual communications system established under the First Optional Protocol to the ICCPR.[45] Ratifying the Optional Protocol by a given State Party to the ICCPR, which is voluntary, authorises the HRC to receive communications from individuals subject to the jurisdiction of that State. As of June 2004, 104 State Parties to the ICCPR have recognised the competence of the HRC to receive communications from individuals alleging violations of their ICCPR's rights.[46] The system of individual communications under the Optional Protocol shares many similarities with individual petition system under the European Convention of Human Rights, discussed below, not least with regard to their admissibility requirements.[47] However, there are also very striking and significant differences between the two, in particular with regard to the nature of the supervisory body and the power it possesses over the states parties. As acknowledged by the HRC:

> The two systems [adopted by the ICCPR and the European Convention] differ ... in that the Committee has no power to hand down binding decision as does the European Court of Human Rights. States Parties to the Optional Protocol (OP1) endeavour to observe the Committee's views, but in case of non-compliance the Optional Protocol does not provide for an enforcement mechanism for sanctions.[48]

Thus, complying with the 'views' of the Committee is sadly up to the State concerned. While there are some States which have complied with the Committee's views, there are some States which have completely ignored them. In an attempt to activate the Committee's views, the Committee in 1990 adopted a 'follow-up' procedure. Defendant states are requested to report to the Committee on the measures that have been taken to give effect to the Committee's views. While there are positive replies, there are some replies which reject the Committee's findings for various reasons. The Committee responded by adopting the policy of 'naming and shaming' of non-

[45] The First Optional Protocol. Optional Protocol to the International Covenant on Civil and Political Rights, adopted Dec. 16, 1966, 999 U.N.T.S. 302 (entered into force Mar. 23, 1976), G.A. Res. 2200 (XXI), 21 U.N. GAOR, Supp. (No. 16) 59, U.N. Doc. A/6316 (1966) [hereinafter Optional Protocol].
[46] *See Status of Ratifications*, *supra* note 37.
[47] For a comprehensive comparative analysis between the two systems, *see* Heffernan, L, 'A Comparative View of Individual Petition Procedures under the European Convention on Human Rights and the International Covenant on Civil and Political Rights', *Hum. Rts. Q.*, 19.1 (1997), 78. It should be noted, however, that Heffernan's article does not cover the changes brought to the European petition system by virtue of the Eleventh Protocol, which came into force in 1998, as discussed below. *See infra* para. 2.2.1.2.1.
[48] As quoted in Harris, *supra* note 42, p. 53.

complying states by publishing the details of the result of its follow-up activities in its annual report.[49]

2.2.1.2 Regional instruments

Regional human rights systems are adopted, ideally, to enhance universal standards.[50] Currently, there are three human rights systems which operate at the regional level. These are the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950, the American Convention on Human Rights 1969, and the African Charter on Human and People's Rights 1981. In addition, efforts have been made to adopt Islamic declaration on human rights by Islamic counties and a regional human rights treaty for Arab countries. These efforts have not materialised, as they either resulted in the adoption of non-binding declaration,[51] or a binding treaty; but neither has the treaty come into force because it has not been ratified by a sufficient number of states, nor does it include an enforcement machinery for ensuring the rights recognised are respected by the States Parties.[52] That is to say that these documents are without significance in terms of impact on promoting and protecting human rights of individuals in the Arab or Muslim world, and hence will not be included in the discussion.

2.2.1.2.1 The European system

The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR or the Convention) adopted by the Council of Europe in Rome on 4 November 1950 and entered into force on 3 September 1953, which makes the ECHR

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[49] *Ibid.* pp. 38-39. For further discussion of the communications system, *see ibid.* 30-38; Davidson, *supra* note 7, 79-88; Lewis-Anthony, S, 'Treaty-Based Procedure For Making Human Rights Complaints Within the UN System', in *Guide to International Human Rights Practice*, 2nd edn, ed. by H Hannum, (Philadelphia: University of Pennsylvania Press, 1992); pp. 41-49; McGoldrick, *supra* note 44, ch. 4. For a critical evaluation of the communications system, *see* Steiner, H, 'Individual claims in a world of massive violations: What role for the Human Rights Committee', in *The Future of UN Human Rights Treaty Monitoring*, ed. by P Alston & J Crawford, (Cambridge; New York: Cambridge University Press, 2000).

[50] Higgins, R, 'The European Convention on Human Rights', in *International Law: Legal and Policy Issues*, ed. by T Meron, (Oxford: Oxford University Press, 1984), pp. 498-499.

[51] *See e.g.*, the Cairo Declaration on Human Rights in Islam 1990, adopted by the Foreign Ministers of the Organisation of Islamic Conference, Aug. 5, 1990, 19th Sess (Session of Peace, Interdependence and Development), Cairo, Arab Republic of Egypt. For a critical evaluation of the Declaration, in addition to other so-called "Islamic" human rights documents, *see* Mayer, E, *Islam and Human Rights: Tradition and Politics*, 3rd edn (Colorado: Westview Press, 1999).

[52] *See e.g.*, Arab Charter on Human Rights 1994, adopted by the League of Arab States, Sept. 15, 1994, Sess 102, Res. 5437. According to Article 42 (b) of the Charter, the Charter will come into force when it has been ratified by seven Arab League States. However, to date the Charter has been only ratified by two states, Tunisia and Palestine. For a discussion of the Arab Charter, *see generally* Rishmawi, M, 'The Arab Charter on Human Rights: A Comment', *Interights Bulletin*, 10 (1996), 8.

the oldest human rights treaty in existence.[53] The main intention behind adopting the ECHR, to use the words of the Convention's preamble, was 'to take the first steps for the collective enforcement of certain of the Rights stated in the Universal Declaration' in Europe.[54] It is noteworthy that the ECHR is based on earlier draft of what is now the ICCPR, as it became apparent at the time to the States of the Council of Europe that it would take a long time before members of the U.N would agree on the content of a legally binding human rights instrument.[55] By 2004, 45 Member States of the Council of Europe, out of its 46 Member States, have ratified the ECHR.[56] The ECHR, like its international counterpart (*i.e.,* ICCPR), is primarily concerned with civil and political rights.

Yet what distinguishes the ECHR from other human rights instruments is not just its longevity, but more importantly the effectiveness of its supervisory bodies.[57] Over the last five decades since it became effective, the ECHR in terms of the content of its rights, and its enforcement machinery, has gone through progressive transformation by means of adopting supplementary Protocols. The main enforcement machinery adopted under the ECHR is the individual petition system, which is administered by the European Court of Human Rights (European Court), whose role is 'to ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto ....'[58]

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[53] European Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature Nov. 4, 1950, Eur. T.S. No. 5, 213 U.N.T.S. 221 (entered into force Sept. 3, 1953). For a historical background to ECHR, *see* Robertson, A, *Human rights in Europe* (Manchester: Manchester University Press, 1963), ch. 1; Beddard, R, *Human rights and Europe*, 3rd edn (Cambridge: Grotius, 1993), ch. 2.

[54] For a discussion ECHR in relation to UDHR, *see* Higgins, *supra* note 50, pp. 495-498.

[55] *See* Buergenthal, *supra* note 22, pp. 106-107; Drzemczewski, A, *European Human Rights Convention in Domestic Law: A Comparative Study* (Oxford: Clarendon Press, 1983), pp. 7-8.

[56] Namely, Albania, Andorra, Armenia, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Netherlands, Norway, Poland, Portugal, Romania, Russia, San Marino, Serbia and Montenegro, Slovakia, Slovenia, Spain, Sweden, Switzerland, the former Yugoslav Republic of Macedonia, Turkey, Ukraine, United Kingdom. The status of accessions to the ECHR is *available at*, <http://conventions.coe.int/> (last visited Jan. 2, 2006).

[57] There are other factors which distinguish the ECHR from other human treaties including, *inter alia*, the quantity of its jurisprudence, its impact on the domestic law of the States Parties, and the considerable literature arising from it. In this respect, *see* Harris, D, *et al*, *Law of the European Convention on Human Rights* (London: Butterworths, 1995), pp. 28-34; Davidson, *supra* note 7, pp. 17-18; Drzemczewski, *supra* note 55, pp. 3-4.

[58] ECHR, Art. 19.

The individual petition system has been completely restructured by virtue of Protocol 11, which has become an integral part of the ECHR.[59] As of November 1, 1998, the date in which the Eleventh Protocol came into force, individuals belonging to any State Party to the Convention can apply directly to the European Court, for a redress for any alleged violation of his/her ECHR's rights. In addition, Protocol 11 has transformed the optional jurisdiction of the European Court to receive individual complaints into a mandatory one.[60] Once the European Court has delivered its verdict, the State concerned must, according to Article 46 (1) of the ECHR, 'abide by the final judgment of the Court ....' The Committee of Ministers, which is composed of the Foreign Ministers of the Member States of the Council of Europe, is entrusted with supervising and ensuring the execution of the European Court's final judgments.[61] Finally, it is worth noting that the States Parties' attitude towards the Court judgments has been a positive one.[62]

Given this fact, it is not surprising to note that the European system has been characterised as the most effective and advanced system for the protection of human rights in existence today, compared to other regional or international human rights systems.[63] However, the secret behind the success of ECHR cannot be solely attributed to the effectiveness of its supervisory bodies; it is due - in addition to the political will of the European States to promote and protect human rights in the European continent - as Beddard noted, to 'the fact that the European states make up a culturally identifiable unit and their like-mindedness has meant easier agreement on what are considered to be basic human rights.'[64]

2.2.1.2.2 The inter-American system

The American Convention on Human Rights (ACHR) was signed in Costa Rica in 1969 by Member States of the Organization of American States (OAS) and entered

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[59] Protocol No. 11 (ETS No. 155), adopted July 11, 1994 (entered into force Nov. 1, 1998).

[60] ECHR, Art. 34. For a comparison between the 'old' and the 'new' individual petition system, *see* Rowe, N & Schlette, V, 'The Protection of Human Rights in Europe After the Eleventh Protocol to The ECHR', *E.L. Rev.*, 1 (1998), 23; Ovey, C & White, R, *The European Convention on Human Rights*, 3rd (Oxford: Oxford University Press, 2002), pp. 6-9. It should be noted though, that the unanimous ratification of Protocol 11 was required before it could come into force.

[61] *Ibid.* Art. 46 (2). For an extensive discussion of other aspects of the European enforcement mechanism, which have not been considered here, *see* Clements, L, *et al*, *European Human Rights: Taking a Case under the Convention*, 2nd edn (London: Sweet & Maxwell, 1999).

[62] *See ibid.* pp. 105-106; Harris, *supra* note 57, p. 26.

[63] *See supra* note 57.

[64] Beddard, *supra* note 53, p. 1. This line of reasoning is also expressed in the preambular paragraph of the ECHR, which states that 'the Governments of European countries ... are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law ....'

into force in 1978.[65] To date, twenty-five of the OAS 35 Member States have ratified the American Convention.[66] The American Convention has been modelled on the ECHR, and, hence it is mainly concerned with civil and political rights.[67] To ensure the 'fulfilment of the commitments made by the States Parties to [the] Convention', the Inter-American Commission on Human Rights (the Commission), and the Inter-American Court of Human Rights (the Court), were established by virtue of Article 33 of the ACHR. The ACHR, like the ECHR, entitles those who are allegedly victims of violations of the ACHR's provisions to submit a petition. However, the mechanism adopted by the American system differs from that adopted by the European system, in that complaints are addressed to the Commission rather than the Court.

Once the Commission has received the complaint, examination of its admissibility is carried out. If the complaint is ruled admissible, the Commission will examine the allegation, seek information from the government concerned and investigate the facts.[68] The Commission should concentrate its effort first in reaching a friendly settlement of the matter between the complainant and the State concerned.[69] If the Commission succeeds in its efforts, a report describing the facts of the case and the settlement is prepared and transmitted to the States Parties to the Convention.[70]

If, on the other hand, a friendly settlement is not reached, the Commission shall prepare a report which includes the facts of the case, the conclusions that have been reached and any recommendations that the Commission wish to make. Once the report is completed, it is forwarded to the State concerned.[71] If, after three months from the date of transmitting the Commission's report to the State concerned, the case has not been settled or referred to the Court, the Commission may, by a vote of absolute majority, decide on the question under consideration and make any necessary recommendations. If the Commission is of the opinion that the Convention has been violated, it should include in its report, which is to be transmitted to the State

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[65] American Convention on Human Rights, opened for signature Nov. 22, 1969, O.A.S.T.S. No. 36 (entered into force July 18, 1978), *available at* <http://www.oas.org> (last visited Jan. 2, 2006).
[66] Namely, Argentina, Barbados, Bolivia, Brazil, Colombia, Costa Rica, Chile, Dominica, Ecuador, El Salvador, Granada, Guatemala, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Dominican Republic, Suriname, Trinidad and Tobago, Uruguay and Venezuela. It should be noted, however, that the Government of Trinidad and Tobago has denounced ACHR in 1998. The status of accessions to the ACHR is *available at* <http://www.cidh.oas.org> (last visited Jan. 2, 2006).
[67] Davidson, *supra* note 7, p. 19.
[68] ACHR, Art 48 (1).
[69] *Ibid.* Art 48 (1) (f).
[70] *Ibid.* Art 49.
[71] *Ibid.* Art 50.

concerned, the measures required to rectify the violation and any time period within which its recommendations to be executed. If a period is prescribed for remedying the violation, the Commission shall, after the expiry of that period, decide, by a vote of absolute majority, whether the State concerned has complied with its recommendations or not.[72] However, the ACHR does not state that parties to a case brought before the Commission are bound by its opinion. This suggests, therefore, that although the Commission's opinion may be considered as an authoritative ruling as to whether the State Party has violated its obligations under the ACHR or not, it has, nonetheless, no binding effect on the States Parties to the ACHR.[73]

In addition to the above outlined procedure, the complaint could be referred to the Court, by a State Party, which is a party to a given case, or the Commission, to decide on the matter, which is known as the contentious procedure.[74] The decision of the Court is final and is not subject to appeal.[75] Non-compliance with the Court's decision would constitute, on itself, a violation to the specific obligation required by Article 68 (1) of the ACHR.[76] The Convention does not contain any specific mechanism to ensure the enforcement of the Court's judgment or sanctions on the non-complying state. It does, however, provides that '[t]o each regular session of the General Assembly of the Organization of American States the Court shall submit, for the Assembly's consideration, a report on its work during the previous year. It shall specify, in particular the cases in which a state has not complied with its judgment, making any pertinent recommendations'.[77] Once the Assembly receives the report, it will discuss its content with regard to the non-complying State and take the appropriate measures. However, this power is limited by the fact that the Assembly does not have the authority to adopt any resolutions that are legally binding on the Member States.[78]

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[72] *Ibid.* Art. 51. *See also* Rules Procedure of the Inter-American Commission on Human Rights Approved by the Commission at its 109th special session held from December 4 to 8, 2000, amended at its 116th regular period of sessions, held from October 7 to 25, 2002 and at its 118th regular period of sessions, held from October 7 to 24, 2003, art. 45, *available at* <http://www.cidh.oas.org> (last visited Jan. 2, 2006).

[73] Buergenthal, *supra* note 22, p. 205.

[74] *Ibid.* Art. 61 (1) in conjunction with Art. 62 (3).

[75] *Ibid.* Art. (67)

[76] It states that '[t]he States Parties to the Convention undertake to comply with the judgment of the Court in any case to which they are parties.'

[77] ACHR. Art. (65).

[78] Buergenthal, *supra* note 22, p. 214.

Furthermore, it is noteworthy that, in practice, cases are rarely referred to the Court due to several reasons. Firstly, the Court may only hear cases where the State concerned has accepted the Court's optional jurisdiction,[79] the Commission has completed its lengthy investigation, which has been outlined above, and the case has been referred to the Court either by the Commission or the State concerned within three months of the release of the Commission's report, as individuals do not have direct access to the Court.[80] Secondly, the Commission has discretionary power as to whether to refer the case to the Court or not. Unfortunately, and for unknown reasons, the Commission have preferred not to refer most of the cases to the Court even if they fit the criteria set by the Court as guidance for the Commission on deciding on the matter of referral.[81]

Experience has shown that the non-binding effect of the Commission's opinion combined with the fact that individuals do not have a direct access to the Court, have hindered the Commission and the Court's ability to fulfil their role as a guardian of human rights in the Western Hemisphere. In this respect, Wilt and Krsticevic observed that:

> In practice, this distinction proved to be relevant since most decisions of the Commission are not complied with, in spite of the fact that the State concerned is a party to ACHR. However, those same States Parties which have not complied with the final decisions of the Commission ... have for the most part respected the decisions of the Court.[82]

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[79] ACHR. Art. 62. It should be noted, however, that the number of States recognising the jurisdiction of the Court has steadily increased over the last decade, as it grew from 13 States in 1992 to 23 States to date. The status of ratifications of the jurisdiction of the Court is *available at* <http://www.cidh.oas.org> (last visited Jan. 2, 2006)

[80] *Ibid.* Art. 61.

[81] Former Judge Maximo Cisneros of the Inter-American Court of Human Rights, in his concurring opinion in the Compulsory Membership Case, expressed his frustration over this fact in the following terms:

> Now, whereas in signing this Advisory Opinion I am performing my last act as a judge of the Inter-American Court of Human Rights, I wish to say that the "love" that we have put into our work has not been sufficient to avoid the sense of frustration that I feel in leaving the Court before it has had the opportunity to hear a single case of a violation of human rights, in spite of the sad reality of our America in this field.

Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 of the American Convention on Human Rights), Advisory Opinion OC-5/85, November 13, 1985, Inter-Am. Ct. H.R. (Ser. A) No. 5 (1985). *See also*, Farer, T, 'The Rise of the Inter-American Human Rights Regime: No Longer a Unicorn Not Yet an Ox', *Hum. Rts. Q.*, 19.3 (1997), 510, p. 544; Wilt, H & Krsticevic, V, 'The OAS System for the Protection of Human Rights', in *An Introduction to the International Protection of Human Rights*, ed. by R Hanski & M Suksi, (Turku/Åbo: Institute for Human Rights, Åbo Akademi University, 1999), p. 337, p. 337 n. 12; Davidson, *supra* note 7, pp. 149-150.

[82] Wilt, *supra* note 81, p. 373.

Therefore, it is can be concluded that ensuring the respect of human rights recognised in the ACHR, is mainly dependent on the States Parties, and the role of the Commission and the Court is primarily either that of a promoter of or an advisor on human rights issues, but not that of enforcement.[83]

2.2.1.2.3 The African system

The Organization of African Unity (OAU) was established in 1963 and it has a membership of 53 states. The OAU adopted the African Charter on Human and Peoples' Rights (the Charter) in 1981, and it entered into force in 1986.[84] Currently, the Charter has been ratified by all OAU Member States.[85] Although the OAU was replaced by a new African body, the African Union (AU) in 2001, by virtue of the Constitutive Act (2000),[86] the African Charter remains the principal human rights treaty in the African continent.[87]

The African Charter differs from ECHR and ACHR in a number of respects. Firstly, the Charter is not just concerned with political and civil rights, but it also covers economic, social and cultural rights (second generation rights),[88] and collective rights of the people (group rights).[89] Secondly, the Charter is not just confined to conferring rights on individuals and peoples, but, with equal measure, it imposes duties upon them.[90] Thirdly, although the Charter does not include a derogation clause, it provides the States Parties with a very wide power to restrict and limit the rights recognised in the Charter, which have become known as 'clawback clauses'. With regard to certain rights, the Charter is formulated in a way that is designed to

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[83] This is supported by the fact that the Court's advisory opinions under Article 64 of ACHR, which have no legally binding effect, considerably, outnumber its judicial judgments which are binding. In this respect, *see* Buergenthal, *supra* note 22, pp. 217-227.

[84] African Charter on Human and Peoples' Rights, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force Oct. 21, 1986 [hereinafter the Charter], *available at* <http://www.africa-union.org> (last visited Jan. 2, 2006).

[85] The status of accessions to the Charter is *available at* <http://www.africa-union.org> (last visited Jan. 2, 2006).

[86] Constitutive Act of the African Union, OAU Doc. CAB/LEG/23.15, entered into force May 26, 2001, *available at* <http://www.africa-union.org> (last visited Jan. 2, 2006)

[87] For a historical background to the Charter, *see* Gittleman, R, 'The African Charter on Human and Peoples' Rights: A Legal Analysis', *Va. J. Int'l L.*, 22.4 (1981-1982), 667, pp. 667-673.

[88] Including *e.g.*, the right to work, the right to health, and the right education. *See* Charter, arts. 15-18.

[89] Including *e.g.*, the right to peace and security; healthy environment; and to economic, social and cultural development. *See* Charter, Arts. 20-40.

[90] *See* Flinterman, C & Henderson, C, 'The African Charter on Human and People's Rights', in *An Introduction to the International Protection of Human Rights*, ed. by R Hanski & M Suksi, (Turku/Åbo: Institute for Human Rights, Åbo Akademi University, 1999), p. 388-390.

give each State Party a full discretionary power to restrict the exercise of those rights by individuals to the extent that these rights could be deprived of much meaning. The right to liberty and security of person, for example, which is enshrined in Article 6 of the Charter, is a case in point. Article 6 reads:

> Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained.

This Article, although it prohibits arbitrary deprivations of the right to liberty, it leaves the situations in which the right to liberty can be interfered with undefined, and does not provide any safeguards to ensure its protection. Therefore, Article 6, in essence, does not impose any restrictions on the state's power to limit the right to liberty, except that the interference with the right to liberty is permitted under the national law. The danger inherent in such an approach, as Flinterman and Henderson have noted, is that 'Governments are traditionally the most frequent violators of human rights, and they also have the power to create and change the law, the Charter makes human rights especially vulnerable to the very institution which attacks them very often.'[91]

The final and the most striking difference is that the Charter did not require the establishment of a court in which allegations made by individuals against their states could be reviewed. To rectify this deficiency, a resolution for establishing the African Court was adopted by the Assembly of the Heads of State and Government of OAU in 1998.[92] It came into force in January 2004, after it had received the required number of ratifications. However, to date the Court has not yet been established, and hence it would be premature to attempt here to evaluate its prospects.

Until the Court is fully functional, the principal body entrusted with 'promot[ing] human and peoples' rights and ensur[ing] their protection in Africa'[93] remains to be the African Commission on Human and People's Rights (the Commission). The main enforcement machinery adopted by the African system is the individual communications system, which is currently administered by the Commission. If an

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[91] *Ibid.* p. 319. For an excellent and comprehensive discussion of the clawback clauses of the Charter, *see* Gittleman, *supra* note 87, pp. 691-709.

[92] Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and People's Rights, June 9, 1998, OAU Doc. OAU/LEG/EXP/AFCHPR/PROT (III), entered into force Jan. 25, 2004, *available at* <http://www.achpr.org> (last visited Jan. 2, 2006).

[93] The Aferican Charter, Art. 30.

individual complaint is considered admissible, the complaint needs the approval of a simple majority of the Commission members, in order for the merits of the complaint to be considered by the Commission.[94] If the complaint 'reveals the existence of a series of serious or massive violations of human or peoples' rights'[95] the Commission, before it can investigate the case under consideration, is required to notify the Assembly of Heads of State and Government of the complaint.[96] It is within the discretionary power of the Assembly to decide whether the Commission should act on such complaint or not, irrespective of the seriousness of the situation.[97] If the Commission is permitted to review the complaint, a factual report accompanied by its findings and recommendations is made and submitted to the Assembly. The report prepared by the Commission cannot be published without the permission of the Assembly and it has to remain confidential until such permission is granted.[98] Finally, the Charter does not include a provision for ensuring that the recommendations of the Commission are complied with.[99]

It is apparent from the forgoing that the Commission responsible for protecting the rights recognised by the Charter is not provided with sufficient powers in order to fulfil its role effectively. The Commission acts under the mercy of the Assembly, 'which is a political body that is not likely to be an enthusiastic guardian of human rights as currently constituted.'[100]

2.2.2 International custom

The main deficiency of human rights treaty-based systems is that these treaties are only binding on the states that ratify them. Thus, without finding another binding source for international human rights law, non-State parties to human rights treaties would be left free to violate human rights without being accused of being in violation of international human rights law.[101] However, a majority of scholars contend that

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[94] *Ibid.* Art. 55.
[95] *Ibid.* Art. 58 (1).
[96] *Ibid.* Art. 58 (2).
[97] With the exception of cases of emergency, in which a request to carry an in-depth study into the situation can be directly made to the Chairman of the Assembly, in accordance with Article 58 (3) of the Charter. However, even then there is no guarantee that a permission to investigate the case by the Commission will be granted.
[98] The Charter, Art. 59 (1).
[99] Flinterman, *supra* note 90, p. 394.
[100] Buergenthal, *supra* note 22, p. 247.
[101] *See* Simma, B & Alston, P, 'The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles', *Aust. YBIL,* 12 (1988-1989), 82, pp. 82-83; Schachter, O, *International Law in Theory and Practice* (Dordrecht; London: Nijhoff, 1991), p. 335.

international human rights norms, as embodied in the U.N Bill of Rights and in particular those of the UDHR, have become part of customary international law, and thus binding on all states.[102] The advantage of this view is that all states, whether they have ratified international human rights documents or not, are bound by its norms as part of customary international law.

It should be noted though that this view is disputed on the basis that states' practices, which involve wide disregard for and violations of international human rights norms, mean that states, in practice, still do not feel obliged to follow international human rights norms, which is a prerequisite for a norm to be considered as a customary rule.[103] This inescapable reality, it is argued, denies international human rights norms the status of customary international rules.[104] However, even if these norms are not considered as binding customary international norms, the charge that a state is in violation of international human rights norms is a grave one, which explains, for instance, some states' rhetorical but not actual commitment to human rights.[105] Thus even if these documents are not legally binding on states which have not ratified them, they are at least considered in general to be politically and morally binding on all states.[106]

2.2.3 Concluding remarks

The above presented discussion of the sources of human rights law shows that however lofty the international human rights norms are, or effective the enforcement machinery adopted by international or regional treaties, the implementation of human rights in the final analysis is subject to the national rather than the international will. Therefore, even if one assumes, for the purposes of argument, that all international human rights norms as embodied in the UN Bill of Rights are binding on all states by virtue of being rules of customary international law, the essential question in this context remains; who could force non-complying states, whether they are Parties to

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[102] *See e.g., ibid.* p. 84; Sohn, International Law, *supra* note 1, pp. 12-13, 16-17; Buergenthal, *supra* note 22, pp. 33-38.
[103] For a discussion of customary international law, *see generally* Brownlie, I, *Principles of Public International Law*, 6th edn (Oxford: Oxford University Press, 2003), pp. 6-12; Thirlway, H, 'The Sources of International Law', in *International Law*, ed. by M Evans, (Oxford: Oxford University Press, 2003), pp. 124-130.
[104] *See, e.g.*, Simma, *supra* note 101, pp. 88-100; Schachter, *supra* note 101, p. 336-337.
[105] Donnelly, *Theory and Practice, supra* note 7, p. 1.
[106] *See* Bilder, *supra* note 1, p. 10-11; Davidson, *supra* note 7, 66-67.

international or regional human rights instruments or not, to comply with these human rights treaties and the decisions of its supervisory organs?

Or, to pose the question differently, even if one assumes, for the purposes of argument, that States either individually or collectively under the auspices of the U.N, can legally force non-complying States to respect human rights within their territories, can the former States be trusted to act at the international level consistently with the aim of protecting human rights?[107] Experience suggests that the answer to this question is, unfortunately, in the negative. States' foreign policies are always interest-led; thus where the goal of protecting human rights conflicts with what is considered to be a national interest (whether military, economic, social or ideological), the goal of human rights is sacrificed.[108] In fact, States' attitude - particularly of those States which claim that human rights are number one on their list of foreign policy agenda - towards human rights violators could be argued to be an impediment to the promotion of human rights in states with poor human rights records, as their attitude over human rights violations is tainted by hypocrisy and double standards.[109] As Douzinas put it:

> [H]uman rights, like arms sales, aid to the developing world and trade preferences or sanctions, are tools of international politics used, according to the classical Greek saying, to help friends and harm enemies. ...

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[107] For a discussion of the legality of using force for humanitarian reasons, *see generally* Chinkin, C, 'International Law and Human Rights', in *Human Rights Fifty Years On: A Reappraisal*, ed. by T Evans, (Manchester: Manchester University Press, 1998).

[108] *See* Schachter, *supra* note 101, pp.345-346; Donnelly, *Theory and Practice*, *supra* note 7, p. 183.

[109] Amnesty International with regard to the United State Government's policy on human rights abroad, which is claimed to be aimed at "spreading freedom around the world", remarked in its 2005 Annual Report that:

> The blatant disregard for international human rights and humanitarian law in the "war on terror" continued to make a mockery of President George Bush's claims that the USA was the global champion of human rights.
>
> ...
>
> The USA, as the unrivalled political, military and economic hyper-power, sets the tone for governmental behaviour worldwide. When the most powerful country in the world thumbs its nose at the rule of law and human rights, it grants a licence to others to commit abuse with impunity and audacity.

Amnesty International, *Annual Report* (London, Amnesty International, 2005), *available at*, <http://www.amnesty.org> (last visited Jan. 2, 2006). That is not to say, however, that hypocrisy is exclusively exercised by U.S Government, but merely to say even those governments, which claim to be interested in protecting human rights at the global level, are, based on their record of double standards, for reasons related to what they consider as their national interests, incapable and unfit for doing so. For a discussion of examples which are perceived by Muslims as well as by objective observers as Western hypocrisy over human rights issues in Muslim countries, *see* Falk, R, *Human Rights Horizons: The Pursuit of Justice in a Globalizing World* (New York; London: Routledge, 2000), ch. 8; Mayer, *supra* note 51, pp. 4-6.

> The criticism of hypocrisy is valid, therefore, only in relation to governmental claims that foreign affairs can be guided by ethics or human rights. The foreign policy of governments is interest-led and as alien to ethical consideration as the investment choices of multinational corporations.[110]

Thus, it is justified to conclude, despite the considerable development of international human rights law, the only way to protect human rights effectively is through domestic law. In fact, international and regional human rights treaties give priority to domestic means of implementation over international ones. Article 2 of the ICCPR, for example, requires States Parties, where it is not already provided for, 'to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognised in the ... Covenant'.[111] Hence, international means of enforcing human rights are considered to be supplemental to the national ones, and cannot be resorted to unless the latter fails to provide the required protection or remedy.[112]

However, this proposition presupposes the existence of agreed-upon international human rights standards, which domestic laws and practices of all states have to be amended in order to comply with. In the remainder of this chapter, attention will be focused on examining this issue and its implications for the question that this thesis seeks to answer, in particular, and for the promotion and protection of international human rights in Muslim states, including Saudi Arabia, in general.

2.3 Universalism vs. Relativism

The human rights discourse has been dominated by the issue of whether 'universal' human rights as embodied in the U.N Bill of Rights are in fact universal. The UDHR, which is the principal document upon which the human rights system has been subsequently built, in its preambular paragraph was proclaimed by the U.N General Assembly as 'a common standard of achievement for all peoples and all nations'. However, as pointed out earlier, the concept of human rights upon which the UDHR

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[110] Douzinas, C, *The End of Human Rights: Critical Legal Thought at the Turn of the Century* (Oxford: Hart, 2000), p. 128.
[111] *See* Sohn, Human Rights, *supra* note 22, pp. 369-372.
[112] *See* Donnelly, *Theory and Practice*, *supra* note 7, ch. 13.

is based is a Western one.[113] Thus the question which arises here, as indicated earlier, is whether or not there is a consensus among the U.N Member States on the Western definition of human rights?[114]

First of all it is worth pointing out as a matter of historical fact that the foundations of the international human rights project were laid down when most of the Third World countries, including many Muslim countries, were under colonial regimes. Thus, when these countries gained their independence in the 1950s, they participated in the formulation of the subsequent documents within a philosophical framework that was established in their absence.[115] In addition, the West and the United States in particular played a dominant role in the negotiation process of the UDHR.[116] Due to this, the Western civilization was unduly represented in the process of formulating universal human rights norms at the expense of other civilisations. In this respect, Douzinas noted that:

> The ideological colours of the Universal Declaration were evidently Western and liberal. The members of preparatory committee were Mrs Eleanor Roosevelt, a Lebanese Christian and a Chinese. John Humphrey, the Canadian Director of the UN Division of Human Rights,... was asked by the committee to prepare a first draft [of the Declaration] ... which was substantially adopted by the committee. ...
>
> The *travaux preparatoires* he used to prepare his draft came, with only two exceptions, from Western English language sources with the American Law Institute submission a main influence. Only one of the seven principal drafters was not Christian....[117]

Although this process resulted in the proclamation of 'universal' rights, the central issue remains, how can they be considered universal rights when they are perceived as reflecting Western values rather than universal ones? The universalists and the cultural relativists provide strikingly contrasting answers to this question.

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[113] *See supra* para. 2.1.
[114] *See supra* note 21 and accompanying text.
[115] An-Na'im, A, 'Human Rights in the Muslim World: Socio-Political Conditions and Scriptural Imperatives - A Preliminary Inquiry', *Harv. Hum. Rts. J.*, 3 (1990), 13, p. 15 [hereinafter Human Rights].
[116] Renteln, A, *International Human Rights: Universalism Versus Relativism* (Newbury Park: Sage, 1990), pp. 30-32 [hereinafter *Human Rights*].
[117] Douzinas, *supra* note 110, p. 123. In addition to the dominant role played by Western Governments in the Declaration drafting process, Western civil society was also actively engaged in the process through a number of non-governmental organisations. In this respect, *see* Humphrey, J, *Human Rights & The United Nations: A Great Adventure* (Dobbs Ferry; New York: Transnational, 1984), pp. 30-31; Waltz, *supra* note 16, pp. 842-843.

Universalists, on the one hand, argue that although human rights are Western in origin, given that human rights are possessed by human beings merely because they are human beings, human rights are, by definition, universal. Hence, human beings everywhere are entitled to them, regardless of their cultural background.[118] In addition, they argue that culture is used by repressive regimes to rationalise violations of international human rights.[119] Furthermore, the universalists cite international human rights instruments in support of their position as these instruments adopt universal terms such as 'everyone has ...', 'every human being has ...', 'all human beings have...' and 'no one shall ...' etc.[120]

Cultural relativists, on the other hand, argue that different cultures have different moral codes, and thus, what is considered to be a right in a given culture can be considered anti-social in another culture. Since there is no universal moral code, one cannot judge which culture is, morally, 'right or wrong'.[121] Given that the relativists view the international human rights system as a product of Western culture, they consider using it as a standard of judgment is a form of Western ethnocentricity, as it assumes that Western values are superior to other cultures' values.[122]

The universalists' response to this argument is that there is a widespread endorsement of the UDHR and ratifications of the U.N Covenants. This fact, it is argued, suggests that there is an international consensus on the universality of human rights.[123] However, the rebuttal has been that 'countries endorse or ratify human rights standards because they wish to uphold national culture (the West) or because they wish to impress the outsiders (the rest).'[124] Hence, verbal acceptance of human rights or ratification of a given human rights document does not necessarily reflect a genuine commitment to uphold them nationally, but could be used to serve political interests, including, *inter alia*, conferring international legitimacy on unelected and

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[118] *See e.g.*, Donnelly, *Theory and Practice*, *supra* note 7, pp. 12-19, 23-25, 60-65; Henkin, *supra* note 6, pp. 1-10.
[119] *See* Shestack, *supra* note 7, pp. 231-232.
[120] *See* Steiner, H & Alston, P, *International Human Rights in Context: Law, Politics, Morals*, 2nd edn (New York: Oxford University Press, 2000), pp. 366; Donnelly, J, 'Post-Cold War Reflections on the Study of International Human Rights', *Ethics & Int'l Aff,* 8 (1994), 97, p. 110.
[121] *See* American Anthropological Association, 'Statement on Human Rights', *American Anthropologist,* 49.4 (1947), pp.542-543; Renteln, *Human Rights*, *supra* note 116, pp. 65-69.
[122] Renteln, *Human Rights*, *supra* note 116, p.12, 51-53; Pollis, *supra* note 20, pp, 11, 13-14.
[123] Donnelly, *Theory and Practice*, *supra* note 7, pp. 23-25.
[124] Waltz, *supra* note 16, p. 841.

unpopular governments.[125] Finally, some states, which adopt practices clearly at variance with international human rights standards, justify their actions precisely on the basis that these standards are actually not universal but rather Western, and therefore they are not bound by them.[126]

The two strikingly contrasting positions taken by universalists and relativists mark the difference between theory (universalism) and reality (relativism) of human rights. The heated debate between the two sides, which is underlined by the fact that 'the [relativists] see as Western what the [universalists] see as universal',[127] has hindered the emergence of a middle-ground approach capable of reconciling between the need of universality and the reality of cultural diversity. Hence, there has been a growing realisation in the human rights discourse that neither of the two positions is valid on its own. As Bauman put it:

> [W]hile universal values offer a reasonable medicine against the oppressive obtrusiveness of parochial backwaters, and communal autonomy offers an emotionally gratifying tonic against the stand-offish callousness of the universalists, each drug when taken regularly turns into poison. Indeed, as long as the choice is merely between the two medicines, the chance of health must be meagre and remote.[128]

2.3.1 A pragmatic approach

The relativists/universalists debate, summarised above, reflects a number of concerns that have to be taken into account in formulating an appropriate approach for establishing truly universal human rights. Firstly, without acknowledging the

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[125] *See* Renteln, A, 'The Unanswered Challenge of Relativism and the Consequences for Human Rights', *Hum. Rts. Q.*, 7.4 (1985), 514, p. 519 [hereinafter Relativism]. Iraq's practices on human rights under the former regime of Sadam Hussein, which endorsed the UDHR and is a Member Party to ICCPR since 1971, provides an illustration of the fact that ratifications of human rights instruments do not signify a genuine commitment to abide by them. For a review of Iraq's record on human rights under the former regime, *see e.g.*, Report of the Special Rapporteur, Max Van Der Stoel on the Situation of Human Rights in Iraq, Submitted Pursuant to Commission on Human Rights Resolution 1996/72, U.N. ESCOR, Comm'n on Hum. Rts., 53rd Sess, Item 10 of the provisional agenda U.N. Doc. E/CN.4/1997/57; Report of the Special Rapporteur, Max Van Der Stoel on the Situation of Human Rights in Iraq, Submitted Pursuant to Commission on Human Rights Resolution 1997/60, U.N. ESCOR, Comm'n on Hum. Rts., 54th Sess, Item 10 of the provisional agenda U.N. Doc. E/CN.4/1998/67.

[126] An-Na'im, Human Rights, *supra* note 115, p. 15. This argument is often advanced by the Government of Saudi Arabia whenever its practices are criticised as violating international human rights standards. The Saudi Government's position on human rights standards is discussed *infra* para. 2.4.2.

[127] Huntington, S, *The Clash of Civilizations and the Remaking of the World Order* (New York: Simon & Schuster, 1996), p. 66.

[128] Bauman, Z, *Postmodern Ethics* (Oxford, Blackwell, 1993), p. 239. *See also* Douzinas, *supra* note 110, pp. 136-139.

existence of universal standards, the world would be paralysed in face of gross human rights violations. In fact, without first agreeing on universal standards, one's judgments on what constitute human rights violations would be characterised as relative to his/her own culture. Secondly, what one considers to be a universal truth is not necessarily so. Therefore, in order to be able to have truly universal standards, they can not be asserted as self-evident truths, but rather there is need to advance appropriate justifications for them. In addition, concluding that the international human rights system is based upon a Western concept, does not necessarily mean that international human rights standards are automatically inapplicable to non-Western cultures. In fact, human rights standards as embodied in international and regional human rights documents provide, in my view, an appropriate framework within which one can examine which standards are truly universal and which are not.

Furthermore, any claim of cultural distinctiveness must be approached cautiously, and, in assessing such a claim, it must be determined who is claiming to be speaking on behalf of that culture. It is no doubt that some repressive governments portray their violations of international human rights standards as keeping with local traditions and values, when they are in fact violating the traditions and values that they are claiming to protect. Thus, while due respect must be accorded to local cultures, when they are in conflict with international norms, unless one is prepared to force international norms against the local people's will, which is unthinkable, claims of cultural distinctiveness must not be taken at face value.

Finally, generalisations on the issue of the compatibility or clash of a given culture with human rights system must be avoided. Therefore, in order to construct an accurate picture of the extent to which a given culture is compatible with the human rights system, which is a prerequisite for establishing truly universal human rights standards, there is a need to identify which aspects of that culture are [in]compatible with the human rights system. However, it is not sufficient for promoting and protecting universal human rights, particularly in cultures in which the conception of human rights is thought not to exist, to identify the areas where there is no conflict between that culture and the human rights system. If human rights are to take root in that culture, there is a need to justify them strictly from the local culture standpoint. Thus local people, who in the final analysis will enjoy and implement these rights, can view them as their own, not enforced upon them by outsiders.

I believe an approach which takes into account the above mentioned elements, is capable of establishing genuinely universal standards.[129] It might be argued that this approach may result in establishing fewer universal standards, compared to what is currently considered as 'universal' standards.[130] However, the past sixty years has shown that the claim of the universality of human rights as they currently stand has not advanced the cause of human rights. Only values which are universally shared can be universally protected. If the charge of cultural imperialism, which is the main criticism to the current human rights system, is to be defused, support for universal standards must come from all cultures of the world, not just from one of them.

In order to contextualise the above discussion within the theme of this thesis, the concept of the universality of human rights in relation to Saudi Arabia' laws and policies is examined next.

2.4 Saudi Arabia and human rights

The relationship between international human rights standards and Saudi Arabia is quite complex, and a major source of controversy. To appreciate this complex relationship, and hopefully resolve it, two aspects of it will be examined here. Firstly, the extent to which the Saudi Arabian law recognises international human rights standards; secondly, the position that is taken by the Saudi Arabian Government on international human rights documents and standards.

2.4.1 Human rights under the Basic Law

As discussed in Chapter one, the *Shari'ah*, according to the Basic Law, is the supreme law of Saudi Arabia.[131] Therefore any legal issue, including issues of human rights, must be regulated in accordance with the *Shari'ah*. Unsurprisingly, this fact is embodied in the Basic Law itself, which, without a precedent, was the first codified

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[129] This approach draws principally upon Renteln, *Human Rights, supra* note 116; Renteln, Relativism, *supra* note 125; An-Na'im, A, 'Toward a Cross-Cultural Approach to Defining International Standards of Human Rights', in *Human Rights in Cross-Cultural Perspectives: A Quest for Consensus*, ed. by A An-Na'im, (Philadelphia: University of Pennsylvania Press, 1992); An-Na'im, A, 'Conclusion', in *Human Rights in Cross-Cultural Perspectives: A Quest for Consensus*, ed. by A An-Na'im, (Philadelphia: University of Pennsylvania Press, 1992). Also relevant Pollis, A, 'Cultural Relativism Revisited: Through a State Prism', *Hum. Rts. Q.*, 18.2 (1996), 316; Donnelly, *Theory and Practice*, *supra* note 7, Falk, *supra* note 109; Caney, S, 'Human Rights, Compatibility and Divers Cultures', in *Human Rights and Global Diversity*, ed. by S Caney & P Jones, (London: Frank Cass Publishers, 2001).

[130] *See* Jones, P, 'Human Rights and Diverse Cultures: Continuity or Discontinuity', in *Human Rights and Global Diversity*, ed. by S Caney & P Jones, (London: Frank Cass Publishers, 2001), pp. 34-37.

[131] *See infra* para. 1.1.

law in the Saudi legal history to recognise the concept of 'human rights'. Article 26 of the Basic Law states that '[t]he State protects human rights in accordance with the Islamic *Shari'ah*.'

However, as the aim of the approach outlined above is to examine the universality of human rights in the eyes of people in a given society, the question to be asked in this context is whether the provisions of the Basic Law regarding the constitutional status of the *Shari'ah* under the Saudi law reflect the will of the Saudi populace or not? If the provisions of the *Shari'ah* were imposed upon the Saudis against their will, it would be meaningless to consider the *Shari'ah* in this context, as the Saudi people, given the chance to decide freely, would not choose to be governed by it. Thus, if the question were answered in the negative, the right course would be to repeal those provisions, determine what the cultural beliefs of the Saudi people are, and then examine them comparatively with human rights standards to determine the extent to which the two converge and diverge, as it is the people who will, in the end, determine the law by which they want to be governed.

Given that the Saudi political regime is not of a democratic nature, in which the people can express their will freely through general elections or referendums on policy issues, one needs to find other ways of providing an accurate answer to this critical question. The answer to this question is, in my view, in the affirmative for two main reasons. Firstly, every major reformative movement has declared the implementation of the *Shari'ah* provisions as its supreme objective.[132] Although these movements differ in the details of their proposals, the fact that the *Shari'ah* is cited as the law to be implemented in any reform signifies, apart from the ideological beliefs of these movements, the fact that the *Shari'ah* is a major source of legitimacy and acceptability of these movements and their proposals in the eyes of the Saudi populace.

Secondly, and, perhaps, more tellingly, Saudis in the municipal elections held in 2005, although indirectly, but clearly, have expressed a popular support for a system based on the *Shari'ah* law. The municipal elections, in which candidates competed for half of the municipal Council seats, as the other half are filled by appointments, was the first time in three decades in which Saudis were allowed to choose their

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[132] *See* Tarazi, A, 'Saudi Arabia's New Basic Laws: The Struggle for Participatory Islamic Government', *Harv. Int'l L.J.*, 34 (1993), 258, pp. 261-263.

representatives for public offices. The results of this election reflect, in my view, a good measurement of the public opinion on the issue regarding the nature of the system that they want to be governed by. The results of the elections show that those candidates, who are characterised as Islamists, either because they are considered as religious people, and/or because they had been endorsed by religious scholars, scored an impressive victory against their rivals, who include liberals, businessmen and tribesmen.[133] The landslide victory of the Islamists underscores the fact that the Saudi people, generally speaking, in terms of appropriateness, legitimacy, or morality, use Islam as the basis for their judgments. These two considerations suggest that the constitutional status that the *Shari'ah* enjoys under the Basic Law, far from being imposed on the Saudi people, is a reflection of their will.

Thus, given the fact the *Shari'ah* is central to both the Saudi Arabian constitution and the Saudis' way of life, the critical question that arises here is whether there are conceptual differences between the Islamic definition of human rights and the Western concept of human rights, upon which the international human rights system is based, which could hamper the implementation of international human rights standards in Saudi Arabia. As pointed out earlier, the Western concept of human rights conceives human rights as entitlements which individuals have merely because they are human beings. In addition, the exercise of these rights is regulated under 'the social contract', which reflects the will of people, or what is, currently, known as 'the popular sovereignty'. This, in turn, entitles the people to change an existing law or create a new one, to respond to social changes in a given society and in a given time. On the other hand, under Islamic *Shari'ah,* God, and God alone is the sovereign, and therefore Muslims must regulate their actions to comply with His law, *i.e.*, the *Shari'ah* at all times.[134] As the Divine will is the source of all laws, including those relating to human rights, human rights can be seen as entitlements from God, which individuals have, not by virtue of their nature as human beings, but merely by virtue of the Divine will.

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[133] *See* Steve Coll, *Islamic Activists Sweep Saudi Council Elections*, Washington Post (Apr. 24, 2005), at A 17; Salah Nasrawi, *Islamists Dominate Saudi Arabia Elections*, Associated Press (Apr. 24, 2005).
[134] *See infra* para. 1.2. *See also* Chaudhry, *supra* note 5, pp. 14-16; Al-Hageel, S, *Human Rights in Islam and Their Application in the Kingdom of Saudi Arabia*, trans. by O Atari (Riyadh: Al-Humadie Press, 2001), p. 34-36; Coulson, N. J., 'The State and the Individual in Islamic Law', *Int'l & Comp. L.Q,* 6 (1957), 49, p. 50.

The implication of this conclusion for human rights under the *Shari'ah* law, and by implication the Saudi law, is that human beings are only entitled to those rights granted them by the *Shari'ah*. Thus, the question that arises here is that; does the existence of the above-mentioned conceptual differences between the *Shari'ah* law and the international human rights system mean that they do not share common values? In order to determine whether they do share common values or not, and to determine what these are if this is the case, each aspect of the two systems must be comparatively analysed. This task is undertaken in the following chapter with regard to the rights which form the focus of this thesis.

2.4.2 The Saudi Government and human rights

The Saudi Government's position on international human rights standards and documents has been, to say the least, controversial over the years. Their position was initially demonstrated when Saudi Arabia abstained from voting on the UDHR in 1948. The Government's objection - voiced through Al-Barudi, the Saudi Ambassador to the U.N at the time - was that the UDHR reflected aspects of Western culture that did not sit comfortably with the cultural values of Eastern States.[135] Saudi Arabia's particular objection was against Article 18 of the UDHR. This Article gives individuals the right to change their religious faith, which, as stated by the Saudi Ambassador, is incompatible with the teachings of the Islamic *Shari'ah,* which specifically forbids Muslims from ever changing their religion.[136] Saudi Arabia persisted with their incompatibility argument throughout the debates for the ICCPR held in 1954 and 1960. The proffered objection to joining ICCPR was based similarly on that of Article 18 of the Declaration mentioned above, as the ICCPR also guarantees freedom of religion including the freedom to change one's faith.[137]

However, while the Saudi Government's position on the UDHR and ICCPR seems to suggest that its non-endorsement and non-ratification of international human rights

[135] Yearbook of the United Nations (1948-1949), p. 528.
[136] For a discussion, *see* Arzt, D, 'The Application of Human Rights Law in Islamic States', *Hum. Rts. Q.*, 12.2 (1990), 202, pp. 216-217; Waltz, *supra* note 16, pp. 813-822; Morsink, *supra* note 29, pp. 24-26.
[137] *Ibid.* p. 217. It should be added here that Saudi Arabia also objected to the International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR), on the basis that Article 9, which guarantees social security including social insurance, is a Western concept, which the *Shari'ah*, allegedly, adopts better methods for improving the conditions of the needy. However, since this thesis is only concerned with legal rights, Saudi Arabia's position on the ICESCR falls outside of the scope of this thesis, and therefore it is not included in the discussion. For a discussion of the Saudi Arabian position on the ICESCR, *see generally ibid.* p. 218.

instruments is due solely to their incompatibility with the *Shari'ah*, it is undeniable that there are also political elements to this position. This is evident from the Saudi Government's position on the ICCPR and the norms it embodies. The non-ratification of the ICCPR by the Saudi Government can be explained with reference to the fact that it cannot ratify and honour the ICCPR without violating the *Shari'ah,* or to modify its obligations under the ICCPR without violating the object and the purpose of the Covenant, as I have discussed elsewhere.[138] However, this fact does not explain why Saudi Arabia does not incorporate the provisions of the ICCPR which are compatible with *Shari'ah* into its domestic law and implement them in practice, given that its opposition to ratifying the ICCPR is based on the non-compatibility of some the ICCPR provisions with Islamic law. Since international human rights standards are meant to be domestically protected, as discussed above, the fact that Saudi Arabia cannot for whatever reason ratify international human rights instruments, does not give it the right, morally or legally, to disregard those rights which are compatible with the *Shari'ah.*

In addition, the Government of Saudi Arabia, when accused of violating human rights, has always contended that its policy has been guided by the *Shari'ah*, even when it is in fact contrary to it. For example, former King Fahd in 1992, in response to external calls for holding general elections in Saudi Arabia said that:

> The prevailing democratic system in the world is not suitable for us in this region; our peoples' composition and traits are different from the traits of that world. We cannot import the way other peoples deal [with their own affairs] in order to apply it to our people; we have our own Muslim faith which is a complete system.... Free elections are not suitable for our country, the Kingdom of Saudi Arabia ....[139]

However, this statement is misleading, to say the least. Elections, although they may take a different form than in the West, are considered the legitimate way of choosing an *Imam* or *Khalifah* (*i.e.,* governor or president) under Islamic law.[140] Currently, Saudis do not have any say in choosing the person who governs them as, under the Basic Law, the '[r]ule passes to the sons of the founding King, Abdulaziz Bin

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[138] *See* Al-Hargan, A, 'Saudi Arabia and the International Covenant on Civil and Political Rights 1966: A Stalemate Situation', *Int'l.J.Hum.Rts.*, 9.4 (2005), 419.
[139] As quoted in Tarazi, *supra* note 132, p. 259, n. 8.
[140] *See* Wafi, A, *Human Rights in Islam*, trans. by D Derar (Riyadh: Naif Arab Academy for Security Sciences Press, 1998), pp. 263-268.

Abdurrahman al-Faysal Al Saud, and to their children's children'.[141] That is to say denying the Saudi people the right to vote, which is enshrined in Article 25 (b) of the ICCPR, has no Islamic rationale, as the King attempted to portray. Nor does restricting the rule to King Abdulaziz's sons and grandchildren have any Islamic justification. Hence, the laws and practices of the Saudi Government, or any Muslim government for that matter, which are claimed to be based on Islamic principles, must be tested against these principles to determine whether they do in fact conform with them.[142]

Furthermore, the argument that Saudi Arabia should not recognise and implement a given right because it (allegedly or actually) originated in the West is at best, from an Islamic point of view, invalid. Under the *Shari'ah* the legitimacy of a given issue is not determined by its origins but rather by its compatibility with Islamic principles and its appropriateness for advancing *maqaasid al-shari'ah* (the overall goals of the *Shari'ah*).[143] The Prophet himself did not reject anything that had existed before Islam was revealed upon him, but determined its legitimacy solely on the principles of the *Shari'ah*. This is evident from what the Prophet said with regard to an alliance known as *helf al-fodooal*, which members of Qurish tribe in Mecca had formed. Members of the mentioned alliance vowed to fight oppression in Mecca and to help the oppressed to recover what was rightfully theirs.[144] The Prophet, after Islam had been revealed upon him, did not prohibit this sort of alliance because its roots were in the period before Islam, which Islam considers as the Era of Ignorance (*Aser al-Jahliah*). He rather said:

> I have witnessed, before Islam, an alliance being concluded at the house of Ibn Jud'an, which I would not exchange for a herd of red camels. If it were called for, now that we have Islam, I would readily participate in it.[145]

Thus, refusing to recognise human rights solely on the pretext that they originated in the West is, from a strictly Islamic viewpoint, invalid. If the Government of Saudi

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[141] Basic law, Art. 5 (b).
[142] *See* Zahraa, M, 'Characteristic Features of Islamic Law: Perceptions and Misconceptions', *ALQ*, 15 (2000), 168, pp. 172-175.
[143] *See infra* para 1.2.2. *See also* Haleem, M, 'Human Rights in Islam and the United Nations Instruments', in *Democracy, the Rule of Law and Islam*, ed. by C Eugene & A Sherif, (London; Boston: Kluwer Law International, 1999), pp. 444-445.
[144] *See* Al-Suhaili, A (known as Abu al-Qassem, d. 591 H), *al-Rawd al-Anaif fi Shurh al-Sirah al-Nabawiyah li Ibn Hisham (The Lofty Garden Interpreting the Prophetic Biography by Ibn Hisham)*, 1 (Beirut: Dar al-Kutob Al-Ilmiyah, 1998), pp. 424-428.
[145] Reported in *ibid.* p. 242. The translation is from Haleem, *supra* note 143, p. 435.

Arabia is sincere about its commitment to protect human rights in accordance with the *Shari'ah*, as dictated by the Basic Law, then the sole criterion for examining the suitability and compatibility of international human rights norms with Saudi law, must be those which the Islamic *Shari'ah* adopts. In recent years and by way of a compromise the Saudi Government seems, at least rhetorically, to adopt this position by declaring its commitment to abide by international human rights standards where they do not explicitly conflict with the Islamic *Shari'ah*.[146] In the following chapters, this commitment with regard to the accused's pre-trial rights is subjected to scrutiny.

2.5 Conclusion

The international human rights revolution forged by the adoption of the UDHR in 1948 changed the status of the individual *vis-à-vis* the state. Individuals are no longer considered subjects of a given state, which can treat them as it sees fit, but rather as autonomous human beings with inalienable rights. To ensure the protection of these inalienable rights, international and regional human rights systems have been established.

However, as the human rights movement was solely concerned with promoting and protecting what they consider 'universal' rights, it ignored the conceptual differences that exist between the various cultures of the world on the nature of human rights. This attitude has not lead to the disappearance of these conceptual differences, as the human rights movement seemed to think. It rather delayed its emergence until the question of the practical implementation of 'universal' rights has arose with regard to cultures, whose definition of human rights differ from that of the West, upon which international human rights system is based. In order to accommodate these conceptual differences, establish truly universal human rights, and thereby provide better chances for ensuring the practical implementation of these rights universally, a pragmatic approach, whose main elements have been drawn from various studies conducted in this field, has been suggested. The essence of this

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[146] *See* the speech delivered by Prince Torki Al-Kabeer on behalf of the Saudi Government to the 56th Session of the Commission on Human Rights in Geneva (Apr. 6, 2000). *See also* Reservations of the Saudi Arabian Government on the International Convention on the Elimination of All Forms of Racial Discrimination, adopted Dec. 21 1965, 660 U.N.T.S. 195 (entered into force Jan. 4, 1969), *available at* <http://www.unhchr.ch> (last visited Jan. 2, 2006).

approach places emphasis on the values that all cultures of the world have in common, which have been lost in debate of the universality/relativity of human rights.

By employing this approach in the following chapter with regard to the rights of the accused under Islamic law, which is considered to be lacking a conception of human rights, it is hoped that it will show that by focusing on the commonly shared values, human rights will gain in legitimacy, which is currently lacking human rights in Muslim societies. Admittedly, this approach might not lead to resolve all the conflicts between the Islamic law and international human rights law. Nonetheless, I believe it will provide the first step in that direction. Differences can be only negotiated and hopefully resolved, when the common grounds have been clearly identified, and willingly implemented.

Chapter Three

The Status of the Accused under the Islamic Shari'ah

As argued in the previous chapter only universally shared values can be universally implemented. As discussed in Chapters one and two, the *Shari'ah* is the law of the land in Saudi Arabia, and represents a moral code for the Saudi people. Hence, this chapter seeks to demonstrate that the *Shari'ah* does not represent a constitutional or cultural obstacle to the promotion and protection of international human rights standards applicable to the pre-trial stage of the criminal process in Saudi Arabia.[1] The aim of this chapter, however, is not confined to establishing that there is no conflict between the *Shari'ah* law and human rights standards, but rather to show that, given the Islamic *Shari'ah* is interpreted and understood in light of current circumstances, as required by the *Shari'ah* itself, the adoption of human rights standards in Saudi Arabia is not just permissible, but in fact, obligatory.

The importance of this task cannot be overstated for two main reasons. Firstly, without providing human rights standards with Islamic legitimacy, the whole task of evaluating the Saudi criminal procedure, which is allegedly an authentic product of the Islamic culture, on the basis of human rights standards would be open to objection. This would be on the basis that the evaluative criteria employed would be seen as representative of Western values, rather than of common values shared by the two cultures. Thus, such evaluation would violate the principle of cultural relativism.[2] Secondly, providing human rights standards with cultural legitimacy is essential to encourage Saudis, both people and institutions, to promote and protect these standards in Saudi Arabia, instead of having international institutions or Western non-governmental human rights organisations as the sole guardian of the application of these standards in their homeland.[3] The lack of cultural legitimacy, therefore, would severely undermine the objective and findings of this thesis and render the whole project of little practical importance.

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[1] The term 'international human rights standards' refers to those standards which are identified in the second part of this thesis as constituting the minimum standards required by international human rights law to protect the interests of those persons who are suspected or accused of committing a criminal offence at the pre-trial stage of the criminal process.

[2] *See supra* para. 2.3.

[3] To use Tibi's words 'to make [Saudis] speak the language of human rights in their own tongue'. Tibi, B, 'Islamic Law/*Shari'a*, Human Rights, Universal Morality and International Relations', *Hum. Rts. Q.*, 16.2 (1994), 277, p. 293.

In carrying out the task outlined above, the underlying principles of the Islamic criminal justice system in light of international human rights standards will be examined, to determine whether the two converge or diverge in terms of the values they adopt with regard to the treatment of the accused in the pre-trial stage. The analysis of the rights of the accused under the *Shari'ah* is confined to the writings of classical jurists and how it was implemented by the Prophet and his companions. As pointed out in the previous chapter, practices of current Muslim government do not necessarily reflect the ideals of the *Shari'ah*.[4] Hence, these practices are not considered in this chapter.

Juristic opinions regarding criminal procedure will be examined and, where these rulings are based upon public utility (*muslaha murslah),* as opposed to opinions based upon explicit texts, they are subjected to critical evaluation, as the *Shari'ah* jurisprudential rule states that 'rulings which are based upon public utility change according to change of time and place' *(la yunker taquer al-ahkam al-mbniah ala muslaha bi tqueer al-azminah wa al-amkunah).*[5] It is noteworthy that most rulings regarding the criminal procedure are not based upon explicit texts but rather upon individual opinions guided by public utility.[6] Since what was considered to serve public utility, for example ten centuries ago, does not necessarily serve public utility in modern times, these rulings must be assessed in the light of their suitability to serve public utility in modern times. In order to do so, one cannot study these rulings in the abstract, without considering the context in which they are meant to be applied. Hence, juristic rulings, where necessary, will be assessed on the basis of applying them in Saudi Arabia.

Where the *Shari'ah* does not provide any rules for a given situation, the rule will be derived from the general principles governing the Islamic criminal justice system and the dictates of public utility. It is worth mentioning that the *Shari'ah* is a duty-based system rather than a right-based system in the sense that *Shari'ah* does not state explicitly that a given individual has certain rights, but instead it imposes a duty on citizens or on the state to adhere to certain obligations in dealing with a given individual or a given situation. However, this fact does not mean that these duties

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[4] *See supra* para. 4.2.2.
[5] *See supra* para. 1.2.2.
[6] Al-Ageel, S, 'Huquq Al-Muta'lhm fi al-Shari'ah Al-Islamiah (The Rights of the Accused in the Islamic *Shari'ah*)', *Al Adl Journal,* 9 (2001), 53, pp. 65-68.

cannot be constructed in the form of rights as the duty on X to respect B, entitles B to the right to be respected by X.[7]

The chapter is divided into seven parts. Each part considers, in the context of the pre-trial stage of the criminal process, each of the following issues: limitations on individual rights, the right to dignity, the right against self-incrimination, the right to liberty, the right to privacy, the right to justice and the right to an effective remedy.

3.1 Limitations on individual rights

Under the *Shari'ah* rules individual rights could be restricted on the basis of specific texts authorising such restrictions. In addition to that there is a jurisprudential rule which states that 'necessity makes forbidden things permissible' *(al-darurat tubeeah al-mahthurat).*[8] Thus, the rule permits the state to interfere with individual rights when it is necessary.[9] Taking the rule at face value one might be led to believe that the rule basically allows the state to impose whatever limits it deems necessary even where these limits could not be objectively justified as necessary to achieve the underlying objective of the interference with an individual right. In fact, this is a very premature judgment, when one considers the conditions governing the application of this rule.

Before discussing these requirements, two preliminary remarks appear necessary. Firstly, interference with individual rights, as a general rule, is forbidden. Secondly, investigating and resolving crimes is a necessity which justifies the interference with individual rights.[10] It may seem that both observations are common sense, and applicable to any criminal justice system, although with different emphasis, but for the sake of a proper understanding of this rule a restatement of these common sense rules is essential.

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[7] For a discussion of duty-based systems in relation to international human rights law, *see generally* Renteln, A, *International Human Rights: Universalism Versus Relativism* (Newbury Park: Sage, 1990), pp. 41-44.

[8] Al-Ageel, *supra* note 6, pp. 70-72.

[9] The rule does not just permit the state to violate individual rights on the basis of necessity, but also allows ordinary citizens to violate their fellow citizen's rights when necessity exists. This could be illustrated by the killing of a person, which is according to the general rule is forbidden by the *Shari'ah*, in the form of self defence, as it is necessary to preserve one's life against unlawful attempt to take it away.

[10] Awad, A, 'The Rights of the Accused under the Islamic Criminal Procedure', in *The Islamic Criminal Justice System*, ed. by C Bassiouni, (London; New York: Oceana Publications, 1982), p. 100.

Muslim jurists have developed certain conditions in order for a limit on an individual right to be justified on the basis of necessity, and therefore to be compatible with the *Shari'ah* rules. These conditions are, firstly, acting on the basis of necessity must aim to protect a legitimate and substantial interest. Secondly, there must be good reasons to believe that necessity actually exists. Thirdly, there is no other legitimate and less restrictive means by which the harm, which will result from not acting in accordance with the necessity, can be adequately dealt with. Fourthly, the measures that are taken on the basis of necessity must not exceed what is absolutely necessary to achieve the objective of acting on the basis of necessity.[11]

Since most of the restrictions on individual rights are justified on the basis of this jurisprudential rule rather than on the basis of specific texts, those restrictions are discussed in the relevant sections. However, it is instructive here to provide an illustration of how the rule of necessity is designed to strike an appropriate balance between, on the one hand, the public interest in investigating and solving crimes, and, on the other hand, the individual interest of the accused to be protected from unjustifiable interference with his rights. For instance, there is no explicit text which gives the state the right to search private homes, and the general rule is that private homes are protected against state's interference.

Suppose, therefore, that an individual is caught with drugs on his person, and the amount appears to be more than might be used for personal consumption, which raises the suspicion that he/she has committed a drug trafficking offence. In applying the above stated conditions one could determine whether or not it is justifiable to interfere with the accused's right to privacy, by searching his home. The first condition is met in this case, as searching the accused's home aims to protect the public interest in investigating crimes, which is a legitimate and substantial interest. The second condition is also met as the quantity of drugs that the accused caught with provides a good reason to believe that the accused has committed a drug trafficking offence. Since the public interest in investigating an alleged drug trafficking offence cannot be secured without violating the accused's right to privacy by searching his home, the third condition is also satisfied. The fourth condition in this case is not applicable to

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[11] For an extensive discussion of the rule of necessity, *see* Al-Zuhili, W, Nudert al-Dururah al-Shari'aih Muqaraneten m'a al-Qanun al-Wadei (The Theory of Necessity under the *Shari'ah* Compared with Positive Law), 4th edn (Beirut: Dar El-Fikr al-Muaser, 1997), pp. 182-289; Al-Sadlan, S, *al-Quad al-Fiqhih wa ma Tafria Minha (The Major Jurisprudential Rules and the Rules which are Derived from them)*, 2nd edn (Riyadh: Bansliyah Publication & Distribution House, 1999), pp. 247-309.

the actual search but rather to the manner in which the search is conducted. Therefore, if the search is carried out in an abusive fashion, the measures taken on the basis of necessity would be considered illegal as they exceeded what is necessary for investigating the alleged offence. However, if the search is carried out strictly in a manner that seeks to find out whether or not there are drugs concealed in the house, the fourth condition is certainly met.

From the discussion of the accused's rights under the *Shari'ah* rules in the following sections, the issue of how this fundamental tenet of the *Shari'ah* law operates to strike an appropriate balance between the public interest in effective law enforcement and the individual interest of the accused in being protected from unjustifiable interference with his rights will become evident.

3.2 Right to dignity

The right to dignity under the *Shari'ah* is based upon on the rule of 'the five protected essentials' (*al-darurat al-kums*). These essentials namely are: the preservation of one's religion, the preservation of one's reputation, the preservation of one's mind, the preservation of oneself and the preservation of one's property. These essentials constitute the five fundamental interests which the *Shari'ah* seeks to protect, because, according to the *Shari'ah*, individuals cannot enjoy this life and fulfil their aspirations if these interests are not adequately protected. What this discussion is concerned with is the essential of preserving oneself. The preservation of oneself does not just encompass the right to life, but also, and equally important, the right to live with dignity.[12] Since the preservation of oneself is a fundamental right, in the sense that it is inviolable, it could be concluded safely that any conduct which is contrary to human dignity is contrary to this fundamental right and therefore is illegal.

In addition, human dignity is considered under the *Shari'ah* rules as an entitlement from God, as He states in the *Qur'an* that '[i]ndeed We have honoured the Children of Adam....'[13] Therefore, the right to dignity cannot be violated by a fellow man, as what is given by God can only be taken by Him. The following authority is a case in point. Muhammad ibn Al-Ass, who is a son of the Governor of Egypt, hit an

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[12] *See* Abu Zahra, M, *Usul al-Fiqh (The Roots of Jurisprudence)* (Cairo: Dar al-Fikr al-Arabi, 1997), pp. 244-245 & 319-321 [hereinafter *Usul*].

[13] Verse, 17:70. *See also* verses, 2:30 & 33:72; Chaudhry, M, *Human Rights in Islam* (Lahore: Impact Publications, 1993), p.11.

Egyptian man. The man complained to the *Khalifah* Umar ibn Al-Khattab, the second successor to the Prophet, about the governor's son's action. The *Khalifah* summoned the Governor of Egypt and his son Muhammad. When they came, the *Khalifah* told the Egyptian man to hit Muhammad in the same way that he was hit. Then the *Khalifah* said to the Governor: 'When did you enslave people, since they are born free?'[14]

The *Shari'ah* does not include detailed rules with regard to what could amount to a violation of human dignity, and therefore what is considered to be forbidden. However, the *Shari'ah* does provide some examples from which a rule could be inferred for determining whether or not an action, or words for that matter, to be contrary to human dignity. The *Qur'an* states that '[o] ye who believe! Let not one people deride another people...nor call one another by nick-names. Giving bad names is evil after belief, and those who do not repent, they are the wrongdoers.'[15] In this verse, the *Qur'an* declares, *inter alia*, the mere use of nicknames as evil because it could make a person feels embarrassed or inferior.[16] If this is so, any words or indeed actions that are considered to cause embarrassment or to be harmful to individual dignity are equally forbidden as the verse clearly indicates.

This is just a brief account of the right to dignity under the *Shari'ah* rules, as the discussion here is only concerned with the right to dignity in relation to criminal procedure. Hence, the right to dignity will be expanded upon under the right against self-incrimination next.

3.3 Right against self-incrimination

The right against self-incrimination is not explicitly recognised by the *Shari'ah* rules. However, this right can be inferred from two *Shari'ah* principles: the principle of innocence and the prohibition of subjecting the accused to coercion in order to make him confess.

The principle of innocence is a central one in the Islamic criminal justice system. Muslim jurists have inferred the principle of innocence from two jurisprudential rules,

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[14] As quoted in Al-Tantawy, A & Al-Tantawy, N, *Akbar Umar and Akbar Abdullah bin Umar (The News of Umar and the News of Abdullah bin Umar)*, 12th edn (Jiddah: Dar Al-Munar, 2001), pp. 143-145.

[15] Verse, 49:11.

[16] *See* Ibn Kutheer, H (d. 774 H), *Tafseer Al-Qur'an Al-Adeem (The Interpretation of the Holy Qur'an)*, 4 (Beirut: Dar al-Muarifah, 1991), p. 227.

the essence of which is that a man is born free from obligations and wrongdoings. This original status is a certainty which can be only negated by a similar certainty, but not by doubt (*al-yaqeen la yasoul bi al-shk wa al-asul brait al-dhimmh)*. Therefore, the original status of the accused as innocent is a certainty. Since the innocence of the accused is a certainty this certainty, as the jurisprudential rule dictates, cannot be negated by doubt (*e.g.*, suspicion or circumstantial evidence), but can only be negated by a similar certainty (*i.e.*, full proof in accordance with the *Shari'ah* rules of proof). Hence, doubt under the *Shari'ah* rules is interpreted in favour of the accused.[17] The implication of the principle of innocence is that any one who disputes this certainty bears the burden of establishing the contrary. In other words, if the accused is faced with an accusation of committing an offence, he is not required to provide any evidence in his/her defence because his innocence is a certainty. It is the accuser who bears the burden of supporting his allegation with evidence, as required by the Prophetic report which states that '[i]f people were given what they claim [without providing proof], the life and the property of the nation would be lost, but the accuser bears the burden of proof.'[18]

Thus, the principle of innocence provides a strong legal basis for the right to silence as this principle dictates that it is the duty of the accuser to establish the truthfulness of his allegations, and in the absence of such proof, the accused must be acquitted. As observed by Professor Vogel:

> As to the standard and burden of proof [under the *Shari'ah* rules of proof], the presumption of innocence is fundamental, and the state must prove its case. The defendant has no obligation to respond to the accusation against him, and he may do so by simple denial.[19]

If this is the case, the accused is entitled to remain silent in the face of the charges presented against him, as his innocence is a certainty that does not need further proof.

In addition, under the *Shari'ah* law the accused has the right to silence because there is no obligation upon him to speak. The omission of mentioning this right in the

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[17] *See* Awad, *supra* note 10, p. 94; Al-Suwalim, B, *Al-Muta'hm: Muamaltu'h wa Huquqh fi Al-Fiqh al-Islami (The Treatment and Rights of the Accused in Islamic Jurisprudence)* (Riyadh: Naief Academy for Security Sciences Press, 1987), pp. 383-386; Al-Sadlan, *supra* note 11, pp. 108-125; Al-Aua, S, 'al-Asul Brait al-Muta'hm (The Presumption of Innocence)', in *al-Muta'hm wa Huquqh fi al-Shari'ah al-Islamiah (The Accused's Rights in Islamic Shari'ah)*, ed. by Naief Academy for Security Sciences, 1 (Riyadh: Naief Academy for Security Sciences Press, 1986), pp. 343-347.

[18] Reported by Al-Nisbouri, M (known as Imam Muslim, d. 261 H), *Sahih Muslim*, Report No. 3228.

[19] Vogel, F, 'The Trial of Terrorists under Classical Islamic Law', *Harv. Int'l L.J.*, 43.1 (2002), 53, p.56.

work of classical Muslim jurists, which may have led some writers to mistakenly conclude that such right does not exist, is because the trial was seen as an opportunity, in fact a right for the accused to speak and to clarify his position, as he is in the best position to refute the case against him. Defendants were encouraged to speak - not for the reason that confessions could be obtained from them, but in order for them to present their case and to refute the allegations presented against them. The emphasis was upon the right of the defendant to speak rather than on his right to silence, as silence could lead the defendant to be convicted if the evidence of the accuser is left unchallenged.[20]

Finally, the right to silence can also be inferred from the *Shari'ah* jurisprudential rule which prohibits inferring guilt from silence. This rule states that 'silence cannot be interpreted' *(la yunsab lisaket gool)*. The essence of this rule in this context is that silence cannot be held as evidence of guilt.[21] The combination of the two rules (*i.e.*, the principle of innocence and the prohibition of inferring guilt from silence), and the fact that there is no explicate texts that oblige the accused to speak, means that if the accused, in the face of the police or the judge questioning, refuses to provide any answers, his silence cannot be held as the sole basis for a conviction. Nor can his silence be held as supportive evidence, where there is *prima facie* evidence already that does not meet the standard of proof required by the *Shari'ah*, because the accused is not obliged to provide evidence in the first place.[22]

Regarding the prohibition of coercing the accused to confess, a minority of Muslim scholars, including the Imams Ibn Taymiyya (d. 728 H) and Ibn Al-Qayyim (d. 751 H), argue that torture could be used to force the defendant to confess, because it is contrary to the public interest to release the accused in every case where the

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[20] This is evident from the fact that according to the right to defence the judge is required to hear what the accused has to say in his defence before he can rule in the case before him. *See infra* para. 3.6.1

[21] *See* Al-Sadlan, *supra* note 11, pp. 186-187; Ibn Dhufair, S, *al-Nudaam al-Iijurai al-Jenaei fi al-Shari'ah al-Islamiah wa Tadbigat'h fi al-Mamlaka al-Arabiyyah al-Saudiyyah (Criminal Procedure System in the Islamic Shari'ah and its Application in the Kingdom of Saudi Arabia)*, 2nd edn (Riyadh, 2000), p. 124.

[22] *See also* Al-Fadlie, J, 'al-Asul Brait al-Muta'hm fi al-Shari'ah al-Islamiah (The Principle of the Innocence of the Accused in Islamic *Shari'ah*)', in *al-Muta'hm wa Huquqh fi al-Shari'ah al-Islamiah (The Accused's Rights in Islamic Shari'ah)*, ed. by Naief Academy for Security Sciences, 1 (Riyadh: Naief Academy for Security Sciences Press, 1986), pp. 195-199; Matloub, A, 'al-Asul Brait al-Thumah (The Principle of Innocence)', in *al-Muta'hm wa Huquqh fi al-Shari'ah al-Islamiah (The Accused's Rights in Islamic Shari'ah)*, ed. by Naief Academy for Security Sciences, 1 (Riyadh: Naief Academy for Security Sciences Press, 1986), pp. 231-238.

standard of proof is not fully met.[23] According to them, in cases of theft where there is *prima facie* evidence against the defendant, and the defendant is a persistent offender, torture could be used to make him/her confess.[24]

This minority base their opinion primarily on one incident in which a man from the Jewish community, who lived in the Islamic state and had already violated a treaty with the Prophet of not supporting the enemy of the Sate, was suspected of violating another treaty. The second treaty dictated that the lives of the Jewish community would be spared if they left the Islamic State and took with them anything that they could carry, but not to hide anything, and anything left, would go to the State Treasury. However, the man accused of violating the second treaty had received a large quantity of musk just before he was ordered to leave, which he neither took with him, nor gave to the State Treasury. The man claimed that he had already consumed the musk, but the Prophet did not accept the excuse and ordered one of his companions to subject the accused to torture. Shortly after that, the Prophet was

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[23] The use of torture on the basis of circumstantial evidence, or what was known under the Roman-Canon law of proof as 'half proof', was adopted by Western European legal systems during the 13th century until the mid of the 18th century, for the same reason that the minority justify inflicting torture on accused persons, *i.e.*, the inability of judges to convict what they perceive as criminals. For an extensive discussion of judicial torture under those systems, *see* Langbein, J, *Torture and the Law of Proof* (Chicago: University of Chicago Press, 1977), ch.1; Langbein, J, *The Origins of Adversary Criminal Trial* (Oxford; New York: Oxford University Press, 2003), pp. 338-343 [hereinafter *Adversary*].

[24] *See* Al-Jawziyya, M, *al-Turuq al-Hukmiyya fi al-Siyasa al- Shar'iyya (The Wise Ways to Legitimate Policy)* (Beirut: Dar al-Kutob al-Elmiah, 1995), pp.79-80 [hereinafter *al-Siyasa*]; Al-Malki, B (known as Imam Ibn Farhoun, d. 799 H), *Tubsirat al-Hukam fi Usul al-Qutheah wa Mnahij al-Ahkam (Enlightening Rulers with regard to Cases and Legal Rulings)*, 2 (Beirut: Dar Alum Al-Kutob, 2003), pp. 116-130. This view is not confined to some classical Muslim scholars, but also adopted by some contemporary Muslim scholars, most notably the President of the Saudi Supreme Judicial Council (SJC), *Sheikh* Saleh Al-Luhaydan, and well-known retired appellate *Qadi*, *Sheikh* Suleiman Al-Munia, who consider the use of torture to be consistent with the public interest in solving crimes. *See* Al-Lahaydan, S, 'Turuq al-Ithbt al-Sharai (The Rules of Proof under the *Shari'ah*)', in *al-Naduah al-Ilmiah li Dirast Tadpeeq al-Tashria al-Jenaei al-Islami wa Athrh fi Mukafhet al-Jeremiah fi al-Mamlaka al-Arabiyyah al-Saudiyyah (Scientific Conference for Studying the Application of the Islamic Criminal Law and its Impact in Reducing Crimes in The Kingdom of Saudi Arabia)*, 1 (Riyadh: The Ministry of Interior, 1976), pp. 113, 135-136; Al-Munia, S, 'Nadari'at Brait al-Muta'hm Hta Tathbut Idanth (The Theory of the Innocence of the Accused until he is Found Guilty)', in *al-Muta'hm wa Huquqh fi al-Shari'ah al-Islamiah (The Accused's Rights in Islamic Shari'ah)*, ed. by Naief Academy for Security Sciences, 1 (Riyadh: Naief Academy for Security Sciences Press, 1986), 267-282. It is noteworthy also that some contemporary Saudi scholars who are in favour of the use of torture argue that its use is not restricted to cases of theft, but extend to any case where the accused is a persistent offender and there is a *prima facie* evidence against him. *See, e.g.,* Al-Suwalim, *supra* note 17, pp. 180-183; Al-Faysal, F, 'Intz'a al-I'atiraf min al-Muta'hm bi al-Tadeeb: Al-Athar al-Mutratbh alih wa Tadpeeqath al-Amliah (Extracting Confession from the Accused by Tourture: Its Impact and Judicial Practice)' (unpublished Master's Thesis, Imam Muhammad bin Saud Islamic University, Riyadh (on file with the Higher Institute of the Judiciary Library), 2002), pp. 132-175. The position of the Saudi *qadis* on the issue of the use of torture for the purposes of extracting confessions is examined *infra* para. 5.3.1.1.

informed that the accused man was seen to be hiding something in the ruins, which had been searched and the musk had been found.[25]

However, this incident does not provide a legal justification for subjecting the accused to torture. This is because the incident, cited by the minority, concerned a man in a state of war, in which he violated a treaty, and when he signed another, he did not honour either.[26] It is also worth pointing out that even the minority do not consider the coerced confession as admissible evidence *per se*. However, when the information in the accused's confession reveals that he is the actual perpetrator (*e.g.*, when the confession reveals the place in which the stolen goods are hidden), the independent evidence resulting from the confession could constitute the basis for a conviction.[27]

Finally, and more importantly, the essence of the story cited by the minority as well as their opinion is that torture can be only used against the accused if it is in the public interest to do so, as the power to torture falls under the *siyasa shar'iyya* power, the exercise of which must be guided by the public good.[28] Therefore, even if one accepts for the purposes of the argument the validity of the opinion of the minority, their opinion only applicable where it is in the public interest to torture the accused. Hence, if it is demonstrated that it is not in the public interest to torture the accused, the story mentioned by the minority as well as their opinion can be cited as the basis for prohibiting the torture of the accused.

On the other hand, the majority of Muslim scholars are of the opinion that any confession obtained under physical coercion is inadmissible, even if the evidence is reliable.[29] The arguments of the majority are based, on the one hand, on the principle that torturing the accused is against the *Shari'ah* rules, and, on the other, that allowing the torture of the accused is contrary to the public interest. With regard to the former,

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[25] Reported by Al-Jawziyya, *al-Siyasa*, *supra* note 24, pp.6-7.
[26] Al-'Alwani, T, 'The Right of the Accused in Islam (Part One)', *ALQ*, 10 (1995), 238, pp. 243-244.
[27] *Ibid.* pp. 244-245.
[28] In respect of the concept of *siyasa shar'iyya*, *see supra* para. 1.4.
[29] For classical writings advancing this position, *see e.g.*, Al-Shafi'i, M (known as Imam Shafi'i, d. 204), *Al-Aum (The Mother)*, 3 (Beirut: Dar El Fikr, 1990), pp. 240-241; Al-Ghazali, M, (Known as Abi Hamed Al-Ghazali, d. 505), *Shefa'a al-Gallil (Cure)* (Baghdad: Mutbat al-Irshad, 1971), pp. 228-234; Al-Andalusi, A (Known as Ibn Hazm, d. 456 H), *Al-Muhla (The Embellished)*, 11 (Beirut: Dar al-Afaq al-Judidah, 1935) pp. 140-145. For contemporary writings, *see e.g.*, Abu Zahra, *Usul*, *supra* note 12, 309-312; Abu al-Layl, M, 'Al-Muaqabh ala al-Tuhmah fi al-Fiqh al-Islami (The Punishment on the Basis of Accusation in the Islamic Jurisprudence)', in *al-Muta'hm wa Huquqh fi al-Shari'ah al-Islamiah (The Accused's Rights in Islamic Shari'ah)*, ed. by Naief Academy for Security Sciences, 2 (Riyadh: Naief Academy for Security Sciences Press, 1986), pp. 51-58; Al-'Alwani, *supra* note 26, p. 245.

the majority cite the *Qur'an,* the *Sunnah* of the Prophet and the actions of His companions and followers as the basis for the position that coercion in any shape or form is forbidden under the *Shari'ah*, and renders any subsequent action by the person subjected to it of carrying no legal effects.

It is stated in the *Qur'an* that '[a]ny one who disbelieves in Allah after he had believed, excepting the case of one who is forced to make a declaration of disbelief while his heart rests securely in faith, but one who opens his mind wide to disbelief, on him is Allah's wrath and shall have a grievous punishment.'[30] In this verse the *Qur'an* states clearly that a person who is subjected to coercion in order to force him to change his religion, which is a criminal offence punishable by death penalty, is not legally responsible for his actions because he does not possess a free will and, therefore, cannot be convicted of apostasy on the basis of the coerced confession. By analogy, if the accused under coercion confesses to any criminal offence, his confession cannot be legally accepted as evidence of guilt, as the free will, which is a precondition for a valid confession as the quoted verse clearly requires, is absent.[31]

The Prophet was reported to have said '[v]erily, your blood, your wealth, your reputation and your skin are sacred to you.'[32] As has been stated earlier, the right to life, which is implied by the term blood, encompasses the right to dignity. The Prophetic report also recognises the sanctity of the human body, which is implied in the term skin. Thus, to allow the accused to be tortured or even subjected to a degrading or inhuman treatment, contradicts both the right to dignity and the sanctity of the human body.[33]

In addition, it was reported that the Prophet said '[t]he responsibility for mistakes, forgetfulness, and coercion has been lifted from my *ummah* (nation).'[34] Also Ibn Msaud, a companion of the Prophet and a legal jurist stated that '[i] would speak of any words that would prevent me from being beaten before a ruler.'[35] In addition, Umar bin Abdulaziz was reported to have said '[b]y God, it is better that they [those accused of committing criminal offences] should face God with their offences than I

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[30] Verse 16:106.
[31] *See* Al-Suwalim, *supra* note 17, pp. 180-184.
[32] Reported by Al-Bukhari, M (d. 256 H), *Sahih Al-Bukhari*, Report. No. 6551.
[33] *See* Al-Andalusi, *supra* note 29, vol. 11, p. 141; Al-'Alwani, *supra* note 26, p. 241.
[34] Reported by Al-Rubi'ai, M (Known as Imam Ibn Majah, d. 273 H) *Sunin Ibn Majah*, Report No. 2053.
[35] Reported by Al-Andalusi, *supra* note 29, vol. 11, p. 142.

should have to meet God for torturing them.'[36] What these authorities clearly indicate is that anyone subjected to coercion is not legally responsible for his actions. Therefore, any confession obtained under coercion cannot be held as evidence of guilt against the confessor. In fact, these authorities criminalise the action of subjecting anyone to physical coercion, and any person who does so is guilty of a criminal offence, which is also evident from what the Prophet reported to have said 'God shall torture on the Day of Recompense those who inflict torture on people in [this] life.'[37]

In this respect, Imam Ibn Hazm (d. 456 H) stated the following:

> In a case, if there is no more [evidence] than a confession obtained under physical coercion then it will amount to nothing, for such a confession is condoned by nothing in the *Qur'an*, the *Sunnah,* or *ijma*. Moreover, the sacredness of a person's flesh and blood is a certainty. Thus, nothing of that may be made lawful save by virtue of a text or *ijma*.... The person who has been subjected to physical coercion is also entitled to retaliate against the person who had subjected him to torture, whether it was the ruler or anyone else, as subjecting the accused to physical coercion constitutes a transgression, and Allah says: "Whoso transgress against you, punish him for his transgression to the extent to which he has transgressed against you, and fear Allah and know that Allah is with those who fear Him [*Qur'an*, verse, 2:194]".[38]

Furthermore, the majority argue that it is contrary to the public interest to use torture against accused persons for the purposes of forcing them to confess. They argue allowing coercion to be used as an investigative technique could lead to catastrophic outcomes, as it is difficult in practice to control its use. This will undoubtedly lead to innocent people being convicted on the basis of confessions obtained through coercion. Since, according to the jurisprudential rule, that 'preventing harms overrides bringing benefits' (*dra' al-mafasid mugadam ala julb al-musalh)*, it is more important to protect innocent persons from being tortured or convicted on the basis of a confession obtained through coercion than convicting guilty persons on the basis of a coerced confession, which is in fact genuine and reliable.[39]

In addition, the adoption of coercion as a legitimate investigative technique could have adverse and damaging effects on the administration of justice. A person who is

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[36] Reported by Al-Juazi, A (d. 501 H), *Seurt Umar bin Abdulaziz (The Biography of Umar bin Abdulaziz)* (1985), pp. 68-69.
[37] Reported by Ibn Hanbal, A (d. 241 H), *Al-Musned*, Report No.15285.
[38] Al-Andalusi, *supra* note 29, vol. 11, p. 142.
[39] *See* Ahmed, A, *al-Murkas al-Qanuni llmutahm fi Murahlt al-Tahqeeq al-Ibtdai (The Accused Legal Status in The Preliminary Stage of Investigation)* (Cairo: Al-Nahdah Arabic House Press, 1989), pp. 350-351; Al-Sadlan, *supra* note 11, pp. 514-562; Abu al-Layl, *supra* note 29, pp. 68-69.

subjected to physical coercion is likely to confess to the offence accused of, not necessarily because he is guilty of the offence, but in order that the physical coercion ceases. If this is case, non-voluntary confession is unreliable, and therefore, it is contrary to the public interest as well as to the principles of the *Shari'ah* to allow unreliable evidence to be used as the basis for conviction. Finally, what if the accused who had been subjected to torture refused to confess, or the real culprit was caught after the accused had been subjected to torture? The only remedy that the accused could resort to under the *Shari'ah* rules, as pointed out by Imam Ibn Hazm, quoted above, is retaliation against the person who ordered the torture (*i.e.*, the judge).[40] I do not suppose those who want to apply the opinion of the minority in our time consider this approach as an effective way of running the criminal justice system.

Therefore, it seems that the opinion of the majority is more consistent with the underlying principles of the *Shari'ah*, as they forbid convicting innocent persons on unreliable evidence, give the human body and dignity a special sanctity, and forbid any action that is considered to be contrary to the public interest.

Since it has been concluded that coercion renders any subsequent confession inadmissible, it is important here to determine what could amount to coercion in this context. Muslim jurists do not provide clear cut criteria by which an action could be determined to amount to coercion or not. They do, however, provide some examples that in their view amount to coercion. According to *Qadi* Shurayh (d. 78 H) '[c]onfinement is coercion, a threat is coercion, prison is coercion, and beating is coercion.'[41] The *Khalifah* Umar stated that '[a] man would not be secure and would incriminate himself if you starved, frightened or imprisoned him.'[42] In addition, Imam Ibn Malik considers promises as a form of coercion, as the accused confesses in order to obtain what he has been promised, rather than voluntarily supplying the truth.[43] From these examples one can safely conclude that any physical coercion, in the form of torture or beating, or psychological coercion in the form of promises or threats, could amount to coercion, which would render any subsequent evidence obtained through these methods inadmissible in evidence.[44]

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[40] *See supra* note 38 and accompanying texy.
[41] Reported by Al-Andalusi, *supra* note 29, vol.11, p. 143.
[42] As quoted in Al-Tantawy, *supra* note 14, p. 109.
[43] Al-Malki, *supra* note 24, vol. 2, p. 122.
[44] *See* also Abu Zahra, *Usul*, *supra* note 12, pp. 309-312; Bhnasie, A, 'Ikrah al-Muta'hm ala al-I'atraf: Hukmah fi al-Shari'ah al-Islamiah (The Position of the *Shari'ah* with Regard to Forcing the Accused to

3.4 Right to liberty

The term liberty does not appear in the *Qur'an*, the *Sunnah* or in the writings of classical Muslim jurists. However, the essence of the right in the criminal law sphere which is that individuals are entitled to move as they please is recognised by the *Qur'an*, which states that 'He who has made the earth submissive to you, so traverse along its sides, and eat of His provisions.'[45] The prohibition of imposing arbitrary restrictions on the right to liberty under the *Shari'ah* could be inferred from the prohibition, on individuals as well as on public officials, to level accusations against someone on the basis of mere suspicion. The *Qur'an* states that:

> Why did not the believers, men and women, when they heard of the affair [the accusation of adultery without evidence] thought well of their people and say, "this is clearly a manifest lie? Why did not they bring four witnesses to prove it?" [The standard of proof required in adultery cases]. Since they have not brought the required witnesses, they are indeed liars in the sight of Allah....When you received it and then talked about it with your tongues, and you uttered with your mouths that of which you had no knowledge, and you thought it would be a light matter, while it was a grievous thing in the sight of Allah.[46]

In these verses, Allah condemned those who made allegations without supporting the allegations with evidence, which means that making unsubstantiated allegations is forbidden by law. Therefore, restricting the right of individuals to liberty on the basis of mere suspicion is, by analogy, forbidden, as arresting or detaining a suspect is more harmful to him than just levelling allegations against him without restricting his liberty. While the story emphasises the need to meet the standard of proof required by the *Shari'ah*, before bringing charges against the accused, the essence of the story is that accusations or mere suspicion cannot form a valid ground for restricting the rights of the accused. In fact such a restriction is forbidden, and is punishable in this life and the hereafter.[47]

Confess)', *Public Security Journal,* 17 (1962), 45; Farrar, S, 'Islamic Jurisprudence and the Role of the Accused: A Re-examination', *Legal Studies,* 23.4 (2003), 587, pp. 597-599.

[45] Verse, 67:15. In this respect, *see* Al-Andalusi, *supra* note 29, vol. 11, p. 141; Awad, *supra* note 10, pp. 102-104.

[46] Verses, 24: 12-13 & 15.

[47] Under the of *al-hudud* offences category, there is an offence known as *qudif* (defamation), which criminalises the action of levelling accusation of adultery without proof. However, the punishment of defamation is not restricted to unsubstantiated allegations of adultery, but extends to any allegations made without proof, but they are instead dealt with under *al-tazeer* offences category. In this respect, *see* Awdah, A, *al-Tashria al-Jenaei al-Islami Muqaran be al-Qanun al-Wadei (The Islamic Penal*

The *Qur'an* also states in another verse that '[o] ye who believe avoid most suspicions; for suspicion in some cases is a sin.'[48] In the same vein, the Prophet was reported to have said '[a]void suspicion as suspicion is [in essence] a mere lie.'[49] These texts require individuals not to be suspicious of each other if there are no plausible grounds for such suspicion, and consider those suspicions which are not justified by plausible reasons as a sin as the *Qur'anic* verse clearly indicates.[50] If this is the case, public officials, who are entrusted with the protection of the public and individual rights, should be mindful of their obligation not to act on the basis of mere suspicion. If this obligation is not honoured by public officials, the use of their coercive powers is considered contrary to the instructions of the *Qur'an* and the Prophet, and therefore, is illegal. From the foregoing it can be concluded that arbitrary restriction on the accused's right to liberty, or on any right for that matter, is forbidden by law.

Therefore, the question which arises here is when can an arrest or detention be legally made? The followings sections will explore this issue.

3.4.1 Arrest

There are two opinions with regard to the circumstances in which the arrest could be legally made. On the one hand, according to the first opinion, the existence of good reasons to believe that the accused has committed an offence is not required, but it is sufficient that allegations have been made against someone to authorise the judge to summon him. If the "accused" refuses to appear before the judge, the judge is empowered to issue an arrest warrant.[51] However, this opinion is in conflict with the

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Legislation Compared with the Positive Law), 2, 14th edn (Beirut: Resalah Publishers, 2000), pp. 455-495.

[48] Verse, 49:12. In the same vein, the *Qur'anic* verse, 53:28, states that '[c]onjecture avails nothing against the truth'. As discussed above, the innocence of the accused under the *Shari'ah* rules is a certainty, and therefore the essence of the this verse in this context is that the rights of the accused, whose innocence is a certainty, cannot be restricted on the basis of mere suspicion. *See supra* para. 3.3.

[49] Reported by Al-Bukhari, *supra* note 32, Report No. 6229. In this respect, *see* Ahmed, *supra* note 39, p.823; Al-Suwalim, *supra* note 17, pp. 95-100.

[50] *See* Ibn Kutheer, *supra* note 16, vol. 4, pp. 227-232.

[51] *See* Ibn Dhufair, *supra* note 21, pp. 74-81. Farrar argues that a Muslim sinner or a non-Muslim could be interrogated (which would require summoning him and if it does not appear voluntarily, brought by force) even without a good reason on the basis of a mere accusation. He cites the authority in which a Muslim girl's head was crushed by a stone, and the girl before dying told the Prophet that a Jewish man was the offender. On the basis of what the girl said, the Prophet interrogated the Jewish man. Farrar comments on this authority by stating that '[t]here is no mention of any evidence in the reports other than this accusation. In relation to the Muslim sinner and non-Muslim, therefore, interrogation of the accused could occur on the basis of accusation alone.' However, there is nothing in the authority which is relied upon by Farrar to suggest that a Muslim sinner or a non-Muslim could be interrogated

principle of innocence and the burden of proof under the *Shari'ah* rules, since if there are no, at least, good reasons to link the accused to the alleged offence, what is the purpose of requiring the accused to appear before the judge, as there is no evidence against him to be rebutted, and his innocence is a certainty that does not need further proof?[52]

On the other hand, the second opinion, which seems to be more consistent with the underlying principles of Islamic criminal justice, states that a judge, who has been informed that someone has committed an offence, and the allegations contain reasonable grounds upon which the judge could believe that the suspect has committed the alleged offence, is empowered to summon the accused first, before he could issue an arrest warrant. If the accused refuses to appear before the judge, or there is a necessity (*e.g.* the accused might flee), the judge is empowered to bring him by force (*i.e.*, order his arrest).[53] In addition, public officials and members of the public are also empowered to carry out the arrest themselves without a warrant, where it is considered necessary (*e.g.*, the accused was seen red-handed), as necessity, as explained earlier, knows no law.[54] This opinion is also supported by what Abdullah ibn Abi reported:

> I set out some riders, when we arrived at Dhu al Marwah; one of my garment bags was stolen. There was a man among us looked suspicious, so my companions said to him: "Hey, you give him back his bag." But the man answered: "I didn't take it." When I returned, I went to *Khalifah* Umar ibn Al Khattab and told him what had happened. He asked me how many we had been, so I told him how many we had been there. I also said to him: "I wanted to arrest the man". Umar replied: "You wanted to arrest the man, and yet you did not have any evidence nor you have an authorisation from me to do so. I will not compensate you, nor will I make inquiries about it." Umar became very upset. He never compensated me nor did he make any inquiries.[55]

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in the absence of a good reason. The incident as reported by Al-Nisbouri, *supra* note 18, Report No. 4142, was that '[a] girl was found with her head crushed between two stones. They asked her as to who had done that [they mentioned a couples of names, and she indicated with the nod of her head: No], until they mentioned a Jew. She indicated with the nod of her head [that it was so].' The fact that the girl was dying, and that she identified a specific person as the offender, as the reported incident clearly shows, provides not just a good reason to interrogate the accused but also justifies restricting his liberty until the alleged murder is fully investigated whether the alleged offender is a Jew or a pious Muslim. *See* Farrar, *supra* note 44, pp. 596-597.

[52] *See supra* para. 3.3.

[53] *See* Ahmed, A (Known as Ibn Qudamah, d. 620 H) & Muhammad, A (Know as Ibn Qudamah al-Muqadisi, d. 682), *al-Mghni wa Walshrh al-Kabeer (The Sufficer and the Great Explanation)*, 11 (Beirut: Dar El-Kitab Al-Arabi, 1983), pp. 410-413; Al-Suwalim, *supra* note 17, pp. 65-74.

[54] *See supra* para. 3.1. *See also* Al-Suwalim, *supra* note 17, pp. 75-79; Ibn-Dhufair, *supra* note 24, 82-86.

[55] Reported by Al-Andalusi, *supra* note 29, vol. 11, p. 132.

It is clear, therefore, from the latter opinion and from the above quoted authority, that, in the absence of necessity, there are three requirements for a valid arrest. Firstly, an arrest must only be resorted to where other means have failed to make the accused appear before the judge voluntarily. Secondly, an arrest must be authorised by a judge before it is carried out. Thirdly, there must be, at least, good reasons to believe that the accused has committed an offence, or was on his way to commit an offence.[56]

If the accused is arrested, he will ultimately be either released without bail, released on bail, or detained pending investigation, or pending trial if he is charged with a criminal offence. Since releasing the accused on bail, or detaining him is considered to be an aspect of restriction upon liberty, these issues are treated separately next.

3.4.2 Detention

Muslim jurists are divided upon the permissibility of detention. There are three opinions in this respect. Imam Ibn Hazm, among some other jurists, are of the opinion that detaining the accused before he is convicted of a criminal offence is not permissible, because the accused is innocent and the detention amounts to a punishment of the accused who has not been convicted of any wrongdoing.[57] The second opinion, which is adopted by the *Hanafi* school, distinguishes between the type of offence that the suspect is accused of. If the offence is a *qisas* or *hudud* offence, which carries the severest punishment under the Islamic penal law, the detention is permissible. If, on the other hand, the offence is a *ta'zir* one, detaining the accused is not permissible because a custodial sentence is the maximum punishment that the accused could be sentenced to if found guilty. Therefore, according to this opinion, detention in this case amounts to a punishment before the accused is found guilty which is forbidden by the *Shari'ah*. However, according to the third opinion, which is adopted by the majority of Muslim jurists, detention is permissible in all offences.[58]

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[56] *See* Al-Suwalim, *supra* note 17, pp. 75-79; Saeed, M, 'Tawiad al-Muta'hm (Compensating the Accused)', in *al-Muta'hm wa Huquqh fi al-Shari'ah al-Islamiah (The Accused's Rights in Islamic Shari'ah)*, ed. by Naief Academy for Security Sciences, 2 (Riyadh: Naief Academy for Security Sciences Press, 1986), pp. 325-327.
[57] Al-Andalusi, *supra* note 29, vol.11, pp.131-133.
[58] *See* Al-Suwalim, *supra* note 17, pp. 90-95.

The first opinion is defective because it allows the accused in all circumstances to stay at large, irrespective of the seriousness of the offence and the dictates of the public interest in a given case. The second and the third opinions are persuasive, although they both appear to overlook two important issues. The first issue concerns the balance between, on the one hand, the principle of innocence, and, on the other hand, the impact of releasing the accused on the public interest. The function of detention in any system, including the Islamic criminal justice, is to ensure that the public interest is protected where an accused person, against whom there are sufficient grounds to believe that he has committed an offence, and if released he might flee, commit another offence, or interfere with the course of justice.[59] The principle of innocence requires that the restrictions on the accused during the criminal process are kept to a minimum, unless it is contrary to the public interest which necessitates and justifies interfering with the accused's rights, as necessity makes forbidden things permissible. If there is no fear that the accused will flee, commit another offence, or interfere with the course of justice, there are no reasonable grounds to support that it is necessary to detain him, and hence detaining him is forbidden.

The other issue concerns the seriousness of the offence, which has been partly addressed by the second opinion. However, the second opinion argues that because imprisonment is the maximum punishment that the accused could be given, detention amounts to punishment. What the second opinion overlooks is that detention pending investigation or trial is limited in duration and usually lasts a short time, whereas if the accused is found guilty of a *tazeer* offence, depending on its seriousness, he could be sentenced for up to a life imprisonment.[60] Therefore, if the accused, for instance, is suspected of committing an offence, the maximum penalty of which is a fine, it would be unjustifiable and wrong to detain him, because the detention exceeds the punishment of the offence which the accused is suspected of committing, or has been charged with.

Therefore, it is more consistent with the Islamic *Shari'ah* rules (which recognise both the principle of innocence and the right to liberty, on the one hand, and the right

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[59] *Ibid.* pp. 95-97. What could justify detention on the basis of the public interest is not limited to these grounds, but these grounds are provided as examples of detention as necessary to protect the public interest.

[60] Awdah, *supra* note 47, vol. 1, pp. 694-699.

of the state to interfere with the accused's rights only where it is necessary, on the other), that the seriousness of the offence and whether or not his release would be detrimental to the public interest should be the determinative factors upon which the detention or releasing the accused upon bail, or without bail should be decided.

This conclusion is reinforced if it has been taken into account, in particular, the adverse effects of detention on those individuals who had been detained pending investigation or trial but subsequently were declared innocent by the court, as detention not just affects their right to liberty but also puts them under other unfavourable conditions. In this respect, Professor Ashworth remarked that:

> Detention without trial is widely regarded as an incident of totalitarianism, or at least an expedient to be contemplated only in an extreme kind of national emergency. It therefore follows that any argument for depriving unconvicted individuals of their liberty in civil society ought to have peculiar strength. Indeed, that point is reinforced when one considers the potential consequences for the defendant of a loss of liberty before trial - not just the deprivation of freedom to live a normal life, often compounded by incarceration under the worst conditions in the prison system, but also restricted ability to prepare a defence to the charge, loss of job, strain on family relations and friendships, and often appearance in court in a deteriorated or demoralised condition. The higher rates of suicide or self-injury for unconvicted rather than convicted prisoners may have much to do with these adversities.[61]

The accused, as explained below, has an enforceable right to compensation under the *Shari'ah* rules if he had been tried and found innocent, and the criminal proceedings had caused financial or moral damage to him/her.[62] That is to say the accused, who has been detained and subsequently acquitted in trial, is undoubtedly entitled to compensation, as the detention, regardless of its lawfulness, would result in financial or moral damage or both to the acquitted individual, as pointed out by Professor Ashworth. If detention is widely adopted, regardless of the specific circumstances of each case, the public interest would be adversely affected, as public resources will be spent on compensating acquitted individuals in cases in which detention could have been avoided. Therefore, detention must only be resorted to in exceptional cases, where the public interest requires such a detention; in order to ensure that the

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[61] Ashworth, A, *The Criminal Process: An Evaluative Study*, 2nd edn (New York: Oxford University Press, 1998), p. 209.
[62] *See infra* para. 3.7.2.

principle of innocence and the right to liberty are protected, and public resources are saved for a better use.

As it has been concluded that detention is only permissible where it is necessary, the final question which arises in this respect is who could authorise the detention? Classical Muslim jurists do not address this question in detail, because under the ancient justice system there was no separate investigation stage, and the judge was the master of the investigation and the only person who was empowered to authorise any coercive actions to be taken against the accused.[63] Since an arrest can only be authorised by a judge, it is axiomatic to conclude that, in the absence of necessity, the accused cannot be detained without a judicial authorisation.

3.4.3 Right to bail

Muslims jurists have not written extensively on the right of the accused to bail under criminal law. Therefore, the right to bail will be addressed in the light of the underlying principles of Islamic criminal justice system which are highlighted throughout this chapter. Since detention must only be resorted to in exceptional cases, the investigation authority or a court judge should make use of the bail system, as although it is considered to be a restriction on the accused's rights, its adverse effects on the accused's rights is comparatively lower. It would be consistent with the principle of innocence that any person who has been suspected of or charged with an offence, and there is no fear that his release would be detrimental to the public interest, should be released on bail. The bail system represents a compromise between, on the one hand, the right to liberty and the principle of innocence, and, on the other and, the public interest. Therefore, the conditions of bail must be dependent on the circumstances of the case concerned in order to prevent the accused from fleeing, interfering with the course of justice or committing another offence while he is at large. If any of the bail conditions is not considered necessary for the public interest in the light of the circumstances of a given case, such condition would be considered as a violation of the accused's right to liberty, as the extent of the interference with the accused's rights must not exceed what is absolutely required to achieve the objective of acting on the basis of necessity, *i.e.*, the preservation of public interest.

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[63] Awad, *supra* note 10, p. 96.

3.4.4 Right to be informed promptly of the reasons for arrest

If an arbitrary and unlawful detention is forbidden, informing the arrestee or the detainee of the reasons for his arrest or detention is essential. This is because the accused cannot challenge the legality of the arrest or detention without knowing the reasons behind the arrest or detention, and the arrest or detention cannot be determined to be arbitrary or unlawful or not without reviewing the grounds upon which the accused was arrested or detained. Thus, allowing public officials to carry out an arrest or detention without informing the accused of the reasons behind it would lead inevitably to the power to arrest or detain to be used in an arbitrary or unlawful manner.

The principle of *'sed al-thar'a'* (actions which lead to forbidden consequences are forbidden) provides, in my view, a compelling case for the right to be informed of the reasons for his arrest or detention. In explaining the application of this principle, Imam Abu Sarah stated that 'the action takes the ruling of what it is likely to lead to, regardless of whether the person intends to achieve that result or not, so... if the action leads to something forbidden, it is forbidden.'[64] Since allowing public officials to carry out an arrest or detention without informing the accused of the reasons behind it would lead inevitably to the power of arrest or detention being exercised in a forbidden manner (*i.e.,* arbitrary or unlawful manner), arresting or detaining the accused without informing him of the reasons is equally forbidden.

Even if it is argued that the principle of *sed al-thar'a* cannot justify the right to inform the accused of the reasons for his arrest or detention, public utility could undoubtedly provide the basis for such right. It is considered to be *muslaha murslah* (public utility) any means that enforce the underlying principles of the Islamic *Shari'ah.*[65] This is expressed in the jurisprudential rule that states *'ma la ytem al-wajeb ila bih fho wajeb*' (what is required for the realisation of something obligatory is itself obligatory).[66] Since the right against arbitrary or unlawful arrest or detention

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[64] Abu Zahra, *Usul*, *supra* note 12, p. 245. *See also* Al-Jawziyya, M (known as Imam Ibn Al-Qayyim d. 751 H), *A'lam al-Muwak'eeen (Notable Signers)*, 4 (Beirut: Dar al-Kutob al-Elmiah, 1996) [hereinafter *A'lam*], pp. 108-126.

[65] Al-Ageel, *supra* note 6, pp. 65-67.

[66] Haleem, M, 'Human Rights in Islam and the United Nations Instruments', in *Democracy, the Rule of Law and Islam*, ed. by C Eugene & A Sherif, (London; Boston: Kluwer Law International, 1999), p. 439. For further discussion of this principle, *see* Al-Jawziyya, *A'lam*, *supra* note 64, vol. 3, pp. 108-109; Al-Yuabi, M, *Maqaasid al-Shari'ah wa A'laqtuha bi al-Adilh al-Sharaiah (The Objectives of the*

which is recognised under the *Shari'ah* cannot be adequately and meaningfully safeguarded without informing the accused of the reasons behind his arrest or detention, it is obligatory on public officials to inform the accused of the grounds for his arrest or detention.

3.4.5 Right to be tried within a reasonable time

The right to be tried within a reasonable time seeks to ensure that the adverse and unavoidable effects resulting from the criminal proceedings on the accused's liberty, social and family life, and physical and psychological wellbeing are kept to a minimum. Under the *Shari'ah* rules, the right to be tried within a reasonable time as an individual right can be inferred from the jurisprudential rule, which literally means that causing harm is forbidden *('la darer wla derar')*. This rule in this context places the state under two distinct obligations. Firstly, the state, in exercising its powers to investigate and prosecute alleged criminals, is required to resort to the least coercive measures available to them during the criminal process, as long as it is not contrary to the public interest, in order to ensure that the accused suffers the least amount of damage as a result. In short, the restrictions on the accused's rights must be kept to a minimum.[67] The second obligation is that the state must compensate the accused, whose physical, psychological or financial interests have been adversely affected as a consequence of his involvement in the criminal process and found not guilty.[68]

The discussion here is confined to the first obligation, as the second obligation is discussed under the accused's right to an effective remedy.[69] The criminal proceedings are bound to disrupt the accused's life, who is presumed innocent, and places his liberty under enormous restrictions. These adverse effects on the accused are likely to increase if he is not tried speedily. Since the jurisprudential rule requires the state to ensure that the adverse and avoidable effects of the criminal proceedings on the accused's interests are kept to a minimum, unjustifiable delay would amount to a violation of the state's obligation, and, hence, a violation of the accused right to be tried speedily.[70]

Shari'ah and its Relation to the Sources of Law) (Riyadh: Dar Al-Hijrah For Publishing and Distribution, 2002), pp. 458-481; Abu Zahra, *Usul*, *supra* note 12, pp. 160- 161.

[67] Al-Sadlan, *supra* note 11, pp. 498, 508-511.

[68] *Ibid.* p. 493.

[69] *See infra* para. 3.7.2.

[70] Al alShiak, H, 'Mbd'a Sura't al-Bat fi Al-Qud'a al-Sharie (The Principle of a Speedy Trial under the *Shari'ah* law)', *Al Adl Journal,* 8 (2001), 113, p. 116.

3.4.6 Right to *habeas corpus*

As mentioned earlier, in order for an arrest or detention to be valid it must be authorised by a judge, otherwise the arrest or detention is unlawful. However, in certain circumstances, necessity could be held as a valid basis for carrying out an arrest or detention without authorisation. This power is not without checks and balances, as the accused has the right to review the lawfulness of his arrest or detention before an impartial and independent judge. In this respect, it is reported that:

> The Prophet was once delivering a lecture in the mosque. Then a man rose and said: "O Prophet of God, for what crime have my neighbours been arrested?" The Prophet appeared not to hear the question and continued his lecture. The man rose again and repeated the question. The man rose a third time and repeated the question. Then the Prophet ordered the man's neighbours to be released.[71]

Al-Mawdudi commented on this authority by stating:

> The reason why the Prophet had not answered when the question was asked twice earlier was that the police officer who carried out the arrest was present in the mosque. If there had been valid reasons for the arrest he would have got up to give them. Since the police officer did not, the Prophet ordered that the arrested persons to be released.... The fact that the police officer did not give any reasons for the arrests in open court was sufficient for the Prophet to give immediate order for release of the arrested men.[72]

It is clear therefore, that although the books of jurisprudence does not state specifically this right, as the arrest or detention was usually authorised beforehand, the tradition of the Prophet, and the need to ensure that public officials do not abuse their powers or the rights of the accused, dictate that an arrest or a detention which has not been authorised by a judge before it is carried out, must be reviewed by a judge after it has taken place.

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[71] Reported by Al-Andalusi, *supra* note 29, vol. 11, p. 131-132. The tradition was also reported by Al-Sujustani, S, (known as Imam Abi Dawad, d. 275 H) *Sunin Abi Dawad,* Report No. 3147; also reported with the same meaning although with different wording by Ibn Hanbal, *supra* note 37, Report No. 19187.

[72] Mawdudi, A, *Human Rights in Islam*, 2nd edn (Leicester: Islamic Foundation, 1980), (photo. reprint 1986), p. 26.

3.5 Right to privacy

The *Shari'ah* adds special sanctity to the privacy of individuals. Private life is considered by the *Shari'ah* as an area of autonomy where individuals should enjoy the freedom from outside interferences with their private lives. The *Qur'an*, in several verses set legal rules that must be observed by individuals when they intend to enter private homes so that they do not intrude on the privacy of others. The *Qur'an* states that '[o] ye who believe! Enter no houses other than your own until you have asked permission and saluted the inmates thereof... and if you find no one therein, do not enter them until you are given permission. If it is said to you "Go back", then go back, that is purer for you.'[73] In fact, Muslim jurists interpret the quoted verse as requiring even the owner and the occupier to announce their presence when they enter their homes, so that they do not, unintentionally, intrude on the privacy of other people who are also living in the same place.[74]

The prohibition on interference with the right to privacy is not confined to physical interference but extends to any action which intrudes on the privacy of individuals even if the intrusion is non-physical (*e.g.,* covert surveillance). This is based upon the authority in which:

> A man peeped through a round hole into the dwelling place of the Prophet, while the Prophet had a *midra* (an iron comb) with which he was scratching his head. When the Prophet knew about what the man did, he said: "Had I known you were looking [through the hole], I would have pierced your eye with it [*i.e.,* the comb]. Verily! The order of taking permission [before you enter into private premises] has been enjoined because of sight, [that one should not look unlawfully at the state of others].'[75]

In addition, the right to privacy is not confined to private homes but extends to anything which is connected with the private sphere including correspondence, private communications etc. The legal basis for this rule is based upon several texts some of which have been mentioned in the *Qur'an* and the others have been mentioned in the Prophet's *Sunnah*. The *Qur'an* states that '[o] ye who believe...do

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[73] Verses, 24: 27-28.
[74] Ibn Kutheer, *supra* note 16, vol. 3, pp. 289-293. This is also supported by the *Qur'anic* verse, 24:61, which reads '[w]hen you enter houses, salute people with the greeting of peace, a greeting from your Lord full of blessing and purity....'
[75] Reported by Al-Bukhari, *supra* note 32, Report No. 2060.

not spy....[76] According to Muslim jurists the prohibition on spying on a person within the meaning of the quoted verse extends to protect any information which is considered by the person disclosing it to be private. The prohibition on spying also extends to any method used to collect any private information without the owner's consent.[77] The Prophet was also reported to have said '[w]hoever listens to people's conversations without their permission, he will have melted lead poured in his ears on the Day of Judgment.'[78]

It must be emphasised here that these rules are not just applicable to ordinary citizens so that public officials are not exempted from them. The only valid basis for intruding on the privacy of an individual by the state is necessity, and where necessity does not exist, public officials cannot violate these rules in the name of advancing law enforcement goals. The *Khalifah* Umar Ibn Al-Khattab, in one incident suspected that a person had committed the offence of drinking alcohol. This suspicion was not based upon evidence, or even good reasons, but rather on an intuition. The *Khalifah* proceeded upon this suspicion and entered a private home by jumping the wall and found the owner of the house drinking alcohol. The following conversation took place:

> He [the *Khalifah*] said to him: "I have prevented you from drinking but you have drunk." The owner of the house replied: "If I have committed one sin, you have committed three sins. God has forbidden you from spying, but you have. God has ordered you to enter the house from the door, but you have not. God has ordered you not to enter private premises without permission, but you have." Umar after a brief reflection left him without taking any further action.[79]

It is clear therefore in order for an interference by the state with the right to privacy to be justifiable, a necessity must be established. In order to meet the requirement of

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[76] Verse, 49: 12.

[77] *See* Al-Qurtibi, M (d. 671 H), *al-Jam'a li Ahkam al-Qur'an (The Compiler of Qur'anic Rulings)*, 13, 5th edn (Beirut: Dar al-Kutob al-Ilmiyah, 1996), pp. 33-34; Al-Ghazali, M, (Known as Abi Hamed Al-Ghazali, d. 505), *Ihya' Aoulum Eddeen (Reviving Religion Sciences)*, 2 (Cairo: Al-Halbi for Publishing and Distribution, 1967), pp. 254-256 [hereinafter *Reviving*].

[78] Reported by Al-Bukhari, *supra* note 32, Report No. 6520. Also reported by Al-Sujustani, *supra* note 71, Report No. 4370; Al-Turmthi, M (known as Imam al-Turmthi, d. 279 H), *Sunin al-Turmthi*, Report No.1673; Ibn Hanbal, *supra* note 37, Report No. 2103. In this respect, *see* Awad, *supra* note 10, p. 102; Al-Saleh, O, 'The Rights of the Individual to Personal Security in Islam', in *The Islamic Criminal Justice System*, ed. by C Bassiouni, (London; New York: Oceana Publications, 1982), p. 69; Mawdudi, *supra* note 72, p. 25.

[79] Reported by Al-Ghazali, *Reviving*, *supra* note 77, p. 256. Also reported by Al-Souyouti, J (d. 911), *Addour al-Manthour fi al-Tafseer al-Ma'thour (The Spread Pearls on Interpreting by the Prophetic Aphorisms)*, 7 (Beirut: Dar El-Fikr, 1983), p. 568.

necessity there must be good reasons to believe that the interference with the right to privacy of the person concerned is necessary for preventing or investigating crimes.[80] With regard to the power of the state to interfere with the home, the *Shari'ah* imposes two additional requisites because of the paramount importance of home to individuals, as home is the ultimate place where individuals expect to be protected from outside intrusions. Firstly, public officials should not enter a private home, for whatever reason, in the absence of the house's owner.[81] Secondly, public officials should, to use the *Qur'an's* term, salute the people within the house. This means that public officials must declare their presence and obtain permission before they can enter a private house forcibly, even if they have a search warrant. The last requisite is based upon the authorities which have been already quoted,[82] compounded with the *Qur'anic* verse which reads '[i]t is not righteous that you come to houses by the back thereof; but truly righteous is who fears God. And you should come into houses by the doors thereof....'[83]

Books of jurisprudence do not require a prior judicial authorisation to interfere with the home, in order to ensure that the necessity exists from an objective viewpoint. However, it seems to be consistent with the requirement of necessity and the special sanctity of private homes recognised under the *Shari'ah* rules that, except in urgent circumstances, the grounds on which necessity is based to justify an interference with the accused's right to home to be assessed by a judge before the interference is taken place. Thus, unjustified interferences are prevented before they occur rather than declared unjustified after they have taken place. However, if the circumstances make the compliance with any of these above stated requirements impracticable (*e.g.*, puts the life of the police officers conducting the search at risk), necessity could provide a valid basis for departing from the general rules, as necessity makes forbidden things permissible.

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[80] As it is required by the rule of necessity that there must be good reasons to believe that necessity actually exists. *See supra* para. 3.1.
[81] *See supra* note 73 and accompanying text.
[82] *See supra* notes 73-74, 79 and accompanying text.
[83] Verse, 2: 189.

3.6 Right to justice

The *Shari'ah* in all aspects of life requires that justice must be a characteristic feature of the actions and dealings of people among themselves. The *Qur'an* mentions the word justice at least fourteen times, and the phrase justice and equity (*al'quest*) at least sixteen times.[84] It is appropriate here to quote two of these verses to demonstrate the importance of the right to justice as a basic principle underlying Islam as a religion and as a legal code. The *Qur'an* states '[v]erily, Allah commands you... when ye judge between people that you judge with [a sense of] justice.'[85] It also states in another verse that '[o] ye who believe! Be steadfast in the cause of Allah, bearing witness in equity, and let not a people's enmity towards you incite you to act other than with justice. Be always just, as that is nearer to righteousness....'[86]

From these verses, in addition to other verses and Prophetic reports which cannot all be cited here, it is clear that the accused must be accorded the right to justice.[87] If justice means anything in the context of the criminal justice system, it would encompass, at least, the right not to be wrongly convicted. Wrongly convicting an individual would cause two injustices: one which is suffered by society, as the real culprit is walking free, and one which is suffered by the innocent individual, who has been wrongly convicted. Therefore the benefit of securing the right to justice must not be seen as exclusive to the accused, but something that will be enjoyed by society as a whole, including the accused. The right not to be wrongly convicted also finds its origin in the Prophetic report which states that '[i]f the Imam errs it is better that he errs in favour of innocence [*i.e.*, acquittal] than in favour of guilt [*i.e.*, conviction].'[88]

However, this right, unlike other procedural rights, is an end rather than a means, in the sense that it cannot be secured unless certain rights are guaranteed. The focus here is upon the right to defence which is essential in order to secure the right to justice, and thereby eliminate the risk of wrongly convicting an innocent person, or at least minimise such risk to an acceptable level.

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[84] Al-Saleh, *supra* note 78, p. 80.
[85] Verse, 4: 58.
[86] Verse, 5: 8.
[87] For a discussion of the right to justice outside the criminal law sphere, *see* Al-Areenei, A, 'Taqreer al-Adl Beyn Al-Afrad wa al-Duwal (The Recognition of Justice between Individuals and States)', *Al Adl Journal,* 1 (1999), 99; Abu Zahra, *Usul, supra* note 12, pp.317-318.
[88] Reported by Al-Turmthi, M (d. 279 H), *Sunin al-Turmthi*, Report No.1344.

3.6.1 Right to defence

The right to defence under the ancient Islamic justice system meant principally that the accused was entitled to speak in order to answer and refute the allegations against him. This is evident from the instructions of the Prophet to Ali, the fourth successor to Prophet, when he was appointed as a judge in Yemen. The Prophetic report states '[o] Ali, people will appeal to you for justice. If two adversaries come to you for arbitration, do not rule for the one, before you have similarly heard from the other. It is more proper for justice to become evident to you, and for you to know who is right.'[89] These instructions have become an integral rule of the *Shari'ah*, which is evident from the report in which Umar bin Abdulaziz (who is considered to be the fifth righteous *Khalifah*, d. 101 H) instructed his judges fifty years after the Prophet's death, by saying '[i]f an adversary, whose eye had been blinded by another, comes to you, do not rule [in his favour] until the other party attends. For perhaps the latter had been blinded in both eyes.'[90] Since the discussion here is concerned with the pre-trial stage, three essential components of the right to defence in the pre-trial stage will be discussed next.

3.6.1.1 Right to legal assistance

Contemporary Muslim legal writers differ in their stance with regard to the right of the accused to legal assistance. This is not because they adopt different interpretations of the textual sources, as there is no explicit texts in the *Shari'ah* which prohibit or permit the right to legal assistance, but that their disagreement stems principally from their view of whether lawyers will hinder or help (*i.e., muslaha* or *mufisdah*) the achievement of justice in the criminal process. Those writers, who view lawyers as an impediment to a proper administration of justice, are, understandably, opposed to the granting of such a right. They argue that lawyers are not interested in uncovering the truth, but in winning the case even if it requires the resort to improper or inappropriate tactics to deceive the judge.[91] In addition, they argue that in the early stages of Islam

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[89] Reported by Al-Sujustani, *supra* note 71, Report No. 3111.
[90] As quoted in Awad, *supra* note 10, p. 97.
[91] This concern was also raised in the sixteenth and the seventeenth centuries during the debate of whether the accused should be represented by a lawyer in the criminal trial in England. Despite the forcefulness of this argument, the accused from the nineteenth century gradually won the right to be represented by a lawyer, mainly due to the fact that change in prosecutorial practice, by allowing a professional lawyer to conduct the prosecution, required an equivalent change in the defence practice by allowing the accused to obtain a legal assistance in conducting his defence (*i.e.*, the equality of

this right did not exist, and this factor did not lead the system to function poorly or to be brought into disrepute. Finally, they argue that judges are capable of protecting the interests of the accused, and therefore there is no need for allowing the accused to obtain legal assistance, as it would only make the criminal process more complex, costly and lengthier than it already is.[92]

It is appropriate to present the case for advocating the accused's right to legal assistance by pointing out the defects of the arguments of those who are opposed to such a right. As those who are opposed to the right legal assistance in their opposition to this right do not distinguish between the pre-trial and trial stages of the criminal process, I will advance the arguments for entitling the accused the right to legal assistance at both stages. First of all, lawyers at the trial stage, particularly in the inquisitorial system, which is similar to the Islamic criminal procedure system, plays a less influential role in the determination of the outcome of the case than their counterparts in the adversarial system. Judges, on the other hand, have almost unfettered power over the proceedings as they are entitled to resort to whatever means they deem necessary, unless they are forbidden, to arrive at the proper determination of the case. That is to say, even if ones assumes, for the purposes of argument, that lawyers are not concerned with the proper administration of justice, judges have other means to arrive at the proper outcome.

Secondly, the *Shari'ah* jurisprudential rule states that 'things which are not expressly forbidden by the *Shari'ah* are permissible' (*al-usal fi all al-ashea' al-ibah).*[93] Since there are no explicit texts in the sources of the *Shari'ah* that forbids seeking legal assistance by the accused, he is entitled to seek whatever assistance he requires in order to protect his interests, which are at stake because of the criminal proceedings. In fact, some texts of the *Shari'ah* do touch on the importance of seeking the assistance of those who are capable of presenting the case of the weak party in a

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arms). For an insightful discussion of the factors that led to the introduction of defence lawyers in the English courts, *see* Langbein, *Adversary*, *supra* note 23, chs. 1 & 3.

[92] *See* Jalu, D, *al-Muhmat fi al-fiqh al-Islami wa al-Qanun (Advocacy under Islamic Jurisprudence and Positive Law)* (Riyadh: Naief Academy for Security Sciences Press, 2003), pp. 185-191. These arguments are also advanced by some Saudi *qadis*, the majority of which are opposed to allowing the accused to be assisted by a lawyer. *See* Special Rapporteur, Dato' Param Cumaraswamy, on the Independence of Judges and Lawyers: Report on the Mission to the Kingdom of Saudi Arabia, Submitted Pursuant to Commission on Human Rights Resolution 2002/43, U.N. ESCOR, Comm'n on Hum. Rts., 59th Sess, Item 11(d) of the provisional agenda U.N. Doc. E/CN.4/2003/65/Add.3, para. 36-37. The position of Saudi *qadis* on the right to legal assistance is discussed *infra* paras. 8.3-8.4.

[93] Al-Zamel, A, *Shurh Al-Qu'ad al-Sadiah (Explaining al-Sadiah Rules)*, 2nd edn (Riyadh: Dar Atles, 1999), pp. 65-72.

more eloquent and coherent manner. The *Qur'an* mentions the story in which Allah instructed Prophet Moses to go to Pharaoh and his Chiefs, to inform them of the message of Allah. Prophet Moses pleaded politely to Allah to permit him to acquire the assistance of his brother in accomplishing his mission. The *Qur'an* states that '[h]e [Moses] said "My Lord... my brother Aaron is more eloquent in speech than I: So send him with me as a helper, to confirm [and strengthen] me, for I fear that they may accuse me of falsehood." He [Allah] Said: "We will strengthen thy arm with thy brother...."'[94]

What can be understood from these verses is that even the Prophet of God, who, according to Islamic theology, carries the true message from the Lord, felt the need for moral and presentational support in order to convince the people sent to, and who might doubt the truthfulness of his message.[95] The accused, by analogy, is in an extremely difficult situation. Even if he is capable of defending himself adequately, he might find himself so overwhelmed by the power of the state and confused by the evidence presented against him, and as a consequence be incapable of defending himself adequately. Thus, it would be inconsistent with the principle of innocence and the right of the accused to defence, which are both recognised by the *Shari'ah,* to deny the accused the right to obtain legal assistance.

In the early stages of Islam the accused did not require the assistance of a professional lawyer for two key reasons. Firstly, there was equality between opponents, as the accused and the accuser (who was the injured party or a member of the public who witnessed the alleged offence), were ordinary citizens and possessed relatively the same resources to collect evidence and present their case to the judge.[96] Secondly, at that stage of Islam the criminal process consisted of only one stage, that is the trial stage. The trial stage was public and widely attended by legal experts, and any inequality between the opponents, or unfairness, whether to the accused or the victim, would have been eliminated by the presence and participation of those experts.[97] To demonstrate the latter point, it is instructive to cite the story that occurred when *Khalifah* Umar ibn Al-Khattab summoned a woman to question her

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[94] Verse, 28: 34-35.
[95] *See* Ibn Kutheer, *supra* note 16, vol.3, p. 400.
[96] *See* Bhnasie, A, *Nthreat al-Ithbat fi al-Fiqh al-Jenaei al-Islami (The Theory of Proof in the Islamic Criminal Jurisprudence)* (Cairo: Dar al-Shoruq, 1989), pp. 12-14; Ahmed, *supra* note 39, p. 30.
[97] *See* Al-'Alwani, *supra* note 26, p. 239; Awad, *supra* note 10, p. 98.

about allegations that she was running illegal activities in her house. The report states that:

> When she was told that the *Khalifah* Umar Ibn Al-Khattab had summoned her to explain her behaviour, she exclaimed: "Woe unto me! What chance do I have with someone like Umar?" On her way she was overcome with fear and began to have pains. Unable to continue, she stopped at a house and immediately gave birth to a baby, who after delivery, screamed twice and died. Umar sought the counsel of several companions. They told him that he was not responsible for what happened. Then he turned to Ali [the fourth successor to the Prophet], who was silent, and asked [him] his opinion. Ali replied: "If they spoke on the basis of their opinions, then [in my view] their views are mistaken. If they have spoken to please you, their advice will not benefit you [in the hereafter]. My opinion is that you are responsible and must pay blood money (*diya*). After all, you were the one who frightened her. If you had not frightened her so, she would not have given birth prematurely." So Umar instructed that the money be paid.[98]

The injured party in this case did not need to sue the ruler, who was responsible for the death of her baby, let alone retain a lawyer, in order to secure her right to compensation. If the system today were to function in the same manner and with the same simplicity, those opposed to the right to legal assistance are correct. However, changes in society as well as in the criminal justice system require a different approach to ensure that the competing interests involved in the criminal process are equally protected. The interests of the state in modern times in both the pre-trial stage and the trial stage are protected by the police, the investigation authority and the public prosecutor, while in the absence of the right to legal assistance, the interests of accused to be treated fairly and with dignity are left unprotected. These changes require that the accused is provided with more protection to match the growing power of the state.

What also made the ancient justice system function fairly without the need to provide the accused with legal assistance, as mentioned earlier, is that the criminal process consisted of only one stage. Therefore the judge could oversee all the procedures taken against the accused from the time that a crime was committed, until the judgement was issued. In contemporary criminal justice systems, even if judges on their own are capable of protecting the interests of the accused in the pre-trial stage (which is still questionable), the judges' role, as far as the rights of the accused are

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[98] Reported by Al-Andalusi, *supra* note 29, vol. 12, p. 369.

concerned, is of a remedial nature in the sense that he cannot undo the damage already suffered by the accused. The importance of the presence of a lawyer in the pre-trial stage stems from the need to make the system proactive in protecting the rights of the accused. Lawyers can supervise the actions taken against the accused, ensure the legality of the criminal procedures, and challenge any illegal procedures intended to be taken by the police or the investigation authority. This is without doubt more consistent with the objective of procedural safeguards and the obligation on the state to prevent violations occurring, rather than taking remedial actions after violations have taken place.[99]

In addition, the pre-trial stage of the inquisitorial system, which is the mode of process adopted by the Saudi criminal procedure, is of paramount importance, as most of the evidence gathering and examination takes place at this stage. Providing the accused with effective legal assistance at this stage would provide the accused with a real opportunity to rebut the suspicions against him, and in the event that the suspect is determined not to be involved in the alleged offence, the proceedings against him would be discontinued at an early stage of the criminal process. This would undoubtedly minimise the adverse effects on innocent suspects, allow the investigation authority to focus on other potential suspects, and thereby save public resources for a better use.

Finally, legal assistance could provide the accused with other benefits in the pre-trial stage, which eventually will benefit the justice system as a whole. These benefits, *inter alia*, include: enabling the accused to understand the nature of the offence of which he is suspected or accused of, presenting the case for bail pending investigation or pending trial, and increasing the openness of the investigation by bringing an outsider to observe the practices of the investigation authority.

Those who are opposed to the right to legal assistance, among other procedural safeguards, fail to observe or take account of the changes in society and in the criminal justice system.[100] These opponents reached their conclusion on the right to legal assistance by focusing solely on what they perceive to be negative aspects of this right, without considering the benefits which the right could bring to the justice

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[99] The obligation on the state to act proactively to prevent violations of individual rights is discussed *infra* para. 3.7.2.

[100] *See* Bassiouni, C, 'Sources of Islamic Law, and the Protection of Human Rights in the Islamic Criminal Justice System', in *The Islamic Criminal Justice System*, ed. by C Bassiouni, (London; New York: Oceana Publications, 1982), p. 42.

system as a whole. Since there are no explicit texts in the *Shari'ah* that permit or forbid legal assistance, the analysis of whether the right to legal assistance should be granted to the accused or not should be based on balancing the potential advantages and disadvantages (*musalih* and *mufasid*) of such right in light of the underlying objectives and principles of the Islamic criminal justice system. In light of the arguments for and against the right to legal assistance, as examined above, it is justified to conclude that the accused must be allowed legal assistance at all stages of the criminal proceedings.

Since the basic grounds on which the right to legal assistance is based are the needs to redress the balance between the accused and the state, and to enable the accused to exercise his right to defence effectively, would it be right to say that the protection of law is conditional on the accused being able to afford to pay for legal assistance? In other words, is the right to the protection of law limited just to those who can afford it? Contemporary Muslim writers, including those who advocate the right to legal assistance, have omitted addressing this issue. The question should be answered by determining whether Islam guarantees the right to equality or not. One of the basic values which Islam is based upon is equality. In this respect al-Saleh stated:

> Islam places a great emphasis on justice and equality. The word "justice", which implies equality, is used in the *Qu'ran* more than 14 times, and the word *al'quest*, which means justice and equality appears in the holy text more than 16 times.
> The tradition of the Prophet is equally insistent upon universal justice and equality.[101]

Therefore, to say that the *Shari'ah* grants the right to legal assistance, without providing legal assistance to those who lack the means to afford it, is to say that Islam denies the right to equality. Since this is not the case, it can be safely concluded that the state is obliged to secure legal assistance free of charge to those who lack the means to pay for it. Failing to do so, where this resulted in a prejudice towards the accused's interest, would be seen as violating a basic value, which Islam as a religion and a legal code is based upon.

3.6.1.2 Right to be informed of the charges

The right of the accused to be informed of the charges and evidence against him is an essential part of the right to defence.[102] This is because if the accused is not informed

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[101] Al-Saleh, *supra* note 78, p. 80

of the charges and the evidence against him, he cannot answer and refute allegations which he is not aware of. As public utility considers any means that enforce the underlying principles of the Islamic *Shari'ah* to be obligatory, the accused is entitled to be informed of the charges and evidence against him.[103] Therefore, where the accused's right to be informed of the charges and evidence against him had been violated, and such violation limited his ability to prepare a defence to the charge, his right to defence and ultimately the right to justice are effectively denied.

3.7 Right to an effective remedy

Under the *Shari'ah* rules there are various mechanisms, which the accused could resort to when his rights have been violated in order to obtain a remedy. As has been already discussed, the remedy for obtaining a confession in violation of the of the right against self-incrimination, is the exclusion of such a confession. However, the rules of excluding evidence are not confined to confession evidence, but also apply, with different considerations, to any evidence obtained in violation of the law. In addition, there are sufficient authorities to suggest that the remedy of stay of proceedings could be adopted where there is an abuse of power.[104] Furthermore, the *Shari'ah* entitles the accused to compensation, when it is established that he has suffered damage as a result of a public official's [mis]conduct. Finally, the *Shari'ah* seeks to enforce the accountability of public officials and the protection of the rights of the accused by prosecuting those who abuse their power or the rights of the accused. These remedies are discussed next.

3.7.1 Staying the proceedings and the exclusionary rule

The remedy of staying the proceeding against the accused as a result of an abuse of power by public officials, or the remedy of excluding evidence obtained in violation of the accused's rights, apart from confession evidence, have no mention in the books of classical Muslim jurists. They seem to be inclined to discipline the investigation authority, and compensate the victim of a public official's misconduct through other remedies, as discussed below. This does not mean, however, that there is no legal

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[102] *Ibid.* p. 97.
[103] *See supra* notes 65-66 and accompanying text.
[104] This remedy is similar to the remedy of a stay of proceedings adopted by the common law to deal with specific cases where, *inter alia*, the action of the police or the prosecution amounts to a serious failure to adhere to the rule of law, which could make the trial an abuse of process.

basis for adopting these drastic remedies, as it will be argued below, but rather that it is a matter of determining what the public utility dictates. In two widely reported stories, the *Khalifah* Umar Ibn Al-Khattab did set a precedent for staying the proceedings because of an abuse of power, which could also be cited as a legal basis for excluding evidence obtained by improper means. However, for unknown reasons, subsequent Muslim jurists did not build upon this precedent.

It is worth quoting again the report in which the *Khalifah* Umar abused his power to detect crimes. The report states that:

> The *Khalifah* Umar Ibn Al-Khattab was wondering the street of Al-Madina and he heard someone singing in his house, so Umar climbed the wall of that house and found the owner of the house drinking alcohol. He said to him: "I have prevented you from drinking but you have drunk." The owner of the house replied: "If I have committed one sin, you have committed three sins. God has forbidden you from spying, but you have. God has ordered you to enter the house from the door, but you have not. God has ordered you not to enter private premises without permission, but you have." Umar after a brief reflection left him without taking any further action.[105]

In a similar incident, Abdelrahman Ibn Awf reported that:

> One night, I was on guard with the *Khalifah* Umar in Madina. We noticed a nightlight through hole of a closed door, and when we approached it we heard of loud and noisy voices of some people coming from the house. Umar took my hand and said: "Do you know whose home this is?" I said no. He said "it is the home of Rabiaa ibn Omaya ibn Khalef and they are now drunk." He asked me what we should do. I replied that Allah forbids spying and I think this is what we have just done. Umar left them without taking any further action.[106]

Some Muslim writers, who have considered these authorities, characterise the action of the *Khalifah* Umar as pardoning the defendants, who were caught red-handed.[107] However, this characterisation is incorrect, as under the *Shari'ah* rules neither the ruler nor the judge has the right to pardon the defendant in the *al-hudud* offences, which include the offence of drinking alcohol.[108] Therefore, the only explanation why

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[105] *See supra* note 79.
[106] Reported by Al-Ghazali, *Reviving*, *supra* note 77, vol. 2, p. 255. Also reported by Al-Souyouti, *supra* note 79, vol. 7, p. 567.
[107] *See e.g.*, Ibn Dhufair, *supra* note 21, p. 60.
[108] Ibn Taymiyya, A, *al-Siyasa al-Shar'iyya fi Islah al-Rraiy wa al-Rraiya (The Legitimate Policy for Reforming the Leader and those he Leads)* (Beriut: Dar al-Jeeal, 1993), pp. 82-86; Abu Zahra, M, *Al-Jeremah (The Crime)* (Cairo: Dar al-Fikr al-Arabi, 1998), pp. 282-286 [hereinafter Al-Jeremah]; Awdah, *supra* note 47, vol. 1, pp. 81, 774-775.

the *Khalifah* Umar did not take any further action against the defendants, although they were caught red-handed in both stories, is because the action of the *Khalifah* constituted an abuse of power.

If the remedy of the stay of proceedings is recognised under the *Shari'ah* rules, it could be persuasively argued that there is nothing in the *Shari'ah* which precludes judges from excluding evidence obtained by improper means. This is because in cases where there is sufficient evidence of guilt, as in the two stories described above, a stay of proceedings would inevitably lead a guilty person to walk free. However, the effect of the exclusion of illegally obtained evidence is limited to the contaminated evidence in the sense that the accused still can be convicted if there is sufficient evidence, apart from contaminated evidence, that meets the requirement of proof. In addition, as stated earlier, the majority of Muslim jurists are of the opinion that evidence obtained by coercion should be excluded even if it is reliable. If this is the case, why cannot other kinds of evidence obtained by illegal means be excluded, since the basis for the exclusion is the illegality of the methods by which the evidence is obtained?[109]

It must be added that in relation to the two stories cited above, the offences committed were minor, and yet the violations of the defendants' rights were serious. As the first story clearly indicates, when the defendant said: 'If I committed one sin, you [the *Khalifah* Umar, who was acting in his capacity as an investigator when he found the defendant red-handed] committed three sins.' Thus, it would be wrong to conclude from these two authorities that any abuse of power, or illegality which led to a piece of evidence being uncovered should automatically lead to a stay of proceedings, or the tainted evidence being excluded. Therefore, which of these two drastic remedies should be adopted, if any, should be determined in the light of the circumstances of a given case. It is regrettable that Muslim jurists did not build on those precedents as public utility could provide a valid and creative basis for establishing rules to deal with such an issue of paramount importance. Condoning serious and blatant disregard of the rule of law by admitting evidence obtained through serious violations of the accused's rights could undermine the public interest both in protecting the rights and dignity of individuals from being interfered with by the state, and in preserving the integrity of the judicial process.

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[109] *See supra* para.3.3.

3.7.2 Compensation

Whenever the accused's rights have been violated, and such a violation caused damage to that person, he is entitled to compensation. In fact, Muslim jurists do not require that there must be a violation of the accused's rights, but it is enough to establish that the person concerned has suffered damage as a consequence of the official's conduct. This is based on the jurisprudential rule, which has been already mentioned, that causing harm is forbidden. For example, if the accused has been charged with an offence and was eventually acquitted after he had been tried, but during the trial he suffered loss of reputation or income, the individual concerned does not have to establish that the prosecution was malicious. It is sufficient that he establishes that the restrictions on his liberty during the criminal proceedings, or his involvement in the criminal process have resulted in pecuniary or non-pecuniary damage.[110]

The right to compensation, even where there is no misconduct by a public official, is supported by the story already cited, where the *Khalifah* Umar summoned a woman who was anxious about attending the questioning, and this anxiety caused her to miscarry when she was on here way to see him. In this story, the *Khalifah* Umar in exercising his investigative powers, did nothing wrong which could be held as the cause for the anxiety of the woman summoned. However, since the woman was anxious because of the *Khalifah* Umar's action and this anxiety led to the death of her child, she was entitled to compensation.[111] This is why Muslim jurists interpret the rule not just as entitling the accused to a remedy for any damage suffered by him, but as a rule which requires the state to act proactively to prevent the damage before it occurs.[112]

Regarding the responsibility for damages, Muslim jurists are not unanimous on this, and the persuasive opinion is that it must be distinguished between two situations. On the one hand, if the damage suffered by the accused was not as a result of a violation of his rights, or the violation was not intentional, the state, as an

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[110] *See* Al-Suwalim, *supra* note 17, pp. 378-383. For a discussion of compensation for non-pecuniary damage, *see generally* Al-Zuhili, W, *Nudert al-Duman: Deras'h Muqarnh (Theory of Tort: A Comparative Study)* (Beirut: Dar El-Fikr al-Muaser, 2003), pp. 23-25.

[111] *See supra* note 98 and accompanying text. *See also* Al-Ageel, *supra* note 6, pp. 75-76; Abu Saq, M, *Al-Tawiad a'n al-Durer fi al-Fiqh al-Islami (Compensating for Damage in Islamic Jurisprudence)* (Riyadh: Dar Ashbilia for Publishing and Distribution, 1999), pp. 129-135.

[112] *See supra* note 67.

employer of the official whose [mis]conduct caused the damage, is responsible for paying the compensation.[113]

On the other hand, where the violation of the accused's right was intentional or malicious, and such violation resulted in damage to the accused, the official responsible will be held responsible for paying the compensation, in addition to the criminal liability resulting from the abuse of power or the accused's rights as discussed below.[114] The justification for the personal responsibility for the wrongful and intentional actions taken by an official is to deter public officials from abusing their power or the accused's rights, and thereby enforcing the accountability of the investigation authority and the protection of the rights of the accused.

3.7.3 Disciplinary and criminal actions

It is first worth pointing out that the *Shari'ah* does not distinguish between disciplinary offences and criminal offences. This is because when the official abuses his power or the accused's rights, he has committed a sin by violating the rules of the *Shari'ah* or those set by the ruler, which do not contradict the *Shari'ah*, and therefore his actions will amount to a criminal offence.[115] This is based upon the *Qur'anic* verse which states: 'O ye who believe! Obey Allah, and His Messenger and those who are charged with authority among you....'[116] For the sake of clarity, however, the term disciplinary offences will be used to refer to an official's misconduct which is contrary to the rules governing his job, and the term criminal offences will be used to refer to criminal offences in the strict sense.

Disciplinary offences fall within *al-ta'zir* offences category. The judge has a wide discretionary power with regard to the punishment to be imposed on the wrongdoer. It includes apology, suspension or dismissal from duty, financial compensation to be paid to the victim or imprisonment. The judge has the power to impose one or more sentences on the wrongdoer, depending on the judge's assessment of the seriousness of the misconduct of the convicted official, the damage suffered by the victim and the dictates of the public interest.[117]

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[113] *See* Saeed, *supra* note 56, p. 338; Al-Lahim, A, 'Al-Tawiad a'n al-Sujen (Compensation for Imprisonment)', *Al Adl Journal,* 11 (2002), 96-100.
[114] *See ibid.* p. 337; Al-Lahim, *supra* note 113, 96-100.
[115] *See supra* para. 1.4. *See also* Awdah, *supra* note 47, vol. 1, pp.74-77 & 80-82; Abu Zahra, *Al-Jeremah, supra* note 108, pp. 174-175, 219-229.
[116] Verse 4: 59.
[117] Awdah, *supra* note 47, vol. 1, pp. 685-708.

On the other hand, if the offence committed by a public official does not fall with the category of disciplinary offences, the nature of the offence will determine the punishment that can be imposed in the event that the public official is found guilty. Offences, which relate to this discussion, either fall within the category of *al-qisas* offences or within category of *al-ta'zir* offences.[118] If the alleged offence involves inflicting a physical harm on the accused, the offence will fall within the category of the *al-qisas* offences. The punishment for *al-qisas* offences is either retaliation by inflicting the same harm suffered by the victim on the wrongdoer, unless it is impracticable or the victim pardons the offender, or alternatively paying financial compensation *(diya)*. The judge is also empowered, where retaliation is not imposed, to add one sentence or more, if he considers it to be necessary for the public interest. Other offences, which are not considered to fall within *al-qisas* offences category, will fall within *al-ta'zir* offences category, the punishment of which has been already explained.

3.8 Conclusion

It is clear from the foregoing analysis of the rights of the accused in the Islamic criminal justice system that there is nothing in the textual sources, the principles or the jurisprudential rules of the *Shari'ah* that precludes the recognition and adoption of internationally accepted human rights applicable to the pre-trial stage of the criminal process in a Muslim state. In fact, the two systems share the common objective of ensuring that those persons who are suspected or accused of committing a criminal offence are treated in a dignified and fair manner, without prejudicing the public interest in effective law enforcement. Thus, it is justified to conclude that international human rights standards applicable to the pre-trial stage of the criminal process are not based exclusively upon Western values, but rather are based upon values which are equally embodied in the Islamic *Shari'ah*. It therefore follows that Saudi Arabia, whether it has signed up to the major international human rights instruments or not, is obliged to comply with those standards by virtue of the Saudi Basic Law of Government which recognises human rights in accordance with the *Shari'ah,* which

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[118] It should be noted that under the *Shari'ah* criminal law there is a third category of offences known as *al-hudud* category. However, since these offences are considered to be committed against God, as opposed to those committed against persons or the state, they fall outside the scope of our discussion. For a brief account of *al-hudud* offences, *see supra* para. 1.3.2.

uphold those standards with its full substance, as clearly shown in this chapter. That is to say, a violation of those standards by Saudi Arabia is, by definition, a violation of its own cultural and legal standards.

Part Two

Comparison & Evaluation

Introduction

As mentioned earlier, the recent Saudi criminal procedure reforms have been adopted with the aim of adjusting Saudi law and practice to meet international human rights standards.[1] Hence, in this part the focus will be on the main theme of this thesis, which is to evaluate the extent to which the recently adopted reforms concerning the pre-trial stage of the criminal process are achieving their goal, and to suggest how the Saudi system could be improved, where it is considered to be defective from an international human rights viewpoint, in order to achieve its principal goal. In order to achieve this dual objective, firstly, international human rights standards applicable to the pre-trial stage of the criminal process, which constitute the evaluative criteria adopted by this thesis, are identified in detail. The main international treaty that deals with the rights of the accused is the International Covenant on Civil and Political Rights 1966 (ICCPR). Hence, this part relies principally on the ICCPR, and the decisions of its supervisory organ, *i.e.*, the Human Rights Committee, for identifying the minimum human rights standards applicable to the pre-trial stage of the criminal process. In order to provide a detailed description of the rights under examination, reference will be also made, where appropriate, to other international human rights treaties, including the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984 (CAT),[2] and the jurisprudence of its supervisory organ, *i.e.*, Committee Against Torture (CT), and regional human rights treaties, mainly the European Convention for the Protection of Human Rights and Fundamental Freedoms 1952 (ECHR), and the American Convention on Human Rights 1969 (ACHR), and the decisions of their supervisory organs, *i.e.*, the European Court of Human Rights and the Inter-American Court of Human Rights.

Secondly, a comparison between the Saudi and the Canadian criminal justice systems with regard to the theme of this thesis will be provided. The principal focus of this comparison is how international human rights, examined in this thesis, fare under the two systems under comparison. Once a particular right has been thoroughly defined under international human rights law, a detailed descriptive analysis of each system under comparison with regard to the right under examination will be provided,

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[1] *See supra* pp. 2-3.

[2] Adopted Dec. 10, 1984, G.A. Res. 39/46, U.N. GAOR 39th Sess., Supp. No. 51, at art. 4, U.N. Doc. A/39/51, (1985) (entered into force June 26, 1987) [hereinafter CAT], *available at* <http://www.ohchr.org/english/> (last visited Jan. 2, 2006).

followed by a comparative analysis of the approaches adopted by the systems under comparison with regard to the right under examination.[3] The discussion of the Saudi system focuses primarily on the Basic Law of Government 1992, the Code of Criminal Procedure 2001 (CCP),[4] and the Code of the Investigation and Public Prosecution Commission 1989 (CIPPC).[5] While the Basic Law and the CIPPC are not part of the recently adopted reforms, the discussion of these legislations nonetheless is essential in order to give a complete picture of the impact of the recently adopted reforms on the rights under examination.

In the light of the fact that the reforms under evaluation have only recently come into effect, and given the non-existence of a case law reporting system, which could shed some light on how the recent reforms are implemented in practice, fieldwork on the implementation of the recent reforms has been conducted. The fieldwork was conducted in Riyadh, the capital of Saudi Arabia, between May and November 2004. The empirical information was gathered mainly through one-to-one semi-structured interviews with a sample of individuals representing most of the participants in the criminal process, including police officers, members of the Investigation and Public Prosecution Commission, *qadis*, defence lawyers, and accused persons. The questions were tailored to the interviewee's particular responsibilities or experiences. The adoption of this method proved useful in that it allowed the researcher to restrict the discussion to specific topics and to request clarification and details when the need arose. In addition, it allowed the establishment of trust between the interviewee and the interviewer, which was necessary for encouraging interviewees to discuss some sensitive issues.[6] In addition, the method of participant observation was employed either in order to verify the information gathered through interviews, or to generate new information that, for various reasons, could not be obtained through the interview

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[3] For a discussion of comparative law methodology, *see* Kamba, W, 'Comparative law: A Theoretical Framework', *Int'l. & Comp. L.Q.*, 23(3) (1974), 485; Zweigert, K & Kèotz, H, *Introduction to Comparative Law*, trans. by T Weir (Clarendon Press: Oxford, 1998), pp.15-46.

[4] Issued by Royal Decree No. M/39 (16 October 2001). Published on *Umm al-Qura* (the Saudi official Gazette) No. 3867 on 3 November 2001 [hereinafter CCP].

[5] Issued by Royal Decree No. M/56 (30 May 1989). Published on *Umm al-Qura* (the Saudi official Gazette) No. 3264 on 24 June 1989 [hereinafter CIPPC].

[6] For a discussion of the interview method, *see* Stroh, M, 'Qualitative Interviewing', in *Research Training for Social Scientists: A Handbook for Postgraduate Researchers*, ed. by D Burton (Sage: London, 2000); Clarke, A & Ruth, D, *Evaluation Research: An introduction to Principles, Methods and Practice* (Sage: London, 1999), pp. 71-79.

method.[7] Additional information on the implementation process has been also obtained through reading court records and case files that have been made available to the present researcher. The analysis of the implementation process focuses on the extent to which the CCP requirements are complied with in practice and, in cases where there are disparities between the law and practice, the reasons for these disparities.

The discussion of the Canadian system will focus primarily on the Canadian Charter of Rights and Freedoms 1982 and the jurisprudence of the Canadian courts, in particular the jurisprudence of the Supreme Court of Canada. However, since the Charter is not an exhaustive catalogue of rights, but more a representation of the minimum standard below which the law must not fall, in order to provide a complete picture of the extent of the protection of the rights under discussion, a reference to the statute and common law is also made.

The rights which form the focus of this part are, namely, the right to an effective protection, the right against self-incrimination, the right to humane treatment, the right to liberty, the right to legal assistance and the right to privacy. These rights are comparatively analysed in chapters four, five, six, seven, eight and nine respectively. Part two will conclude by critically evaluating the recently adopted reforms in the light of the findings made by the process of comparison.

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[7] For a discussion of the participant observation method, *see* Jorgensen, D, *Participant Observation: A Methodology for Human Studies* (Sage Publications: Newbury Park, 1989); Clarke, *supra* note 6, pp.79-83.

Chapter Four

The Right to an Effective Protection

A. International human rights law

4.1 Right to an effective remedy

Article 2(3) of the ICCPR states that:

> 3. Each State Party to the present Covenant undertakes:
> (a) To ensure that any person whose rights or freedoms as herein recognised are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
> (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
> (c) To ensure that the competent authorities shall enforce such remedies when granted.

Article 2(3) of the ICCPR guarantees the right to an effective remedy. This right, according to the HRC, is absolute in the sense that it cannot be restricted even during a public emergency that threatens the life of the nation.[1] The term 'effective remedy' is commonly used to refer to either the mechanism by which the violation is determined to have occurred, the redress granted to the victim if a violation is found to have occurred, or to both.[2] The ICCPR requires specific remedies with regard to certain rights, such as the right of detainees to challenge their detention by way of *habeas corpus* and to be released if their detention is determined to be unlawful (Article 9(4)), and the right of an unlawfully detained person to compensation (Article 9(5)). Here, only the specified remedies with regard to both aspects, the mechanism (*i.e.*, the review of detention by a 'court') and the redress (*i.e.*, release and compensation if the detention is found to be unlawful), can be considered as an effective remedy within the meaning of Article 2(3).[3]

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[1] *See infra* para. 4.2.2.
[2] *Cf.* Shelton, D, *Remedies in International Human Rights Law* (Oxford: Oxford University Press, 1999), p. 4, n. 9.
[3] *See Magana ex-Philibert v. Zaire*, Communication No. 90/1981, U.N. Doc. CCPR/C/OP/2 at 124 (1990), paras. 7.2-9. *Cf. De Jong, et al v. The Netherlands* (1986) 8 E.H.R.R. 20, para. 60.

However, where the ICCPR does not specify a particular remedy for a given alleged violation, the question as to whether the right to a remedy has been violated or not will be dependent entirely on whether the remedy is effective or not. Before considering the requirement of effectiveness however, it is important first to determine the point at which Article 2(3) comes into play, and, as a consequence, the individual becomes entitled to an effective remedy.

4.1.1 Engaging the right to an effective remedy

According to Article 2(3)(a) of the ICCPR, the State is obliged to provide an effective remedy to 'any person whose rights or freedoms are ... violated....' What is problematic with the wording of this Article is that the literal reading of it leads to the conclusion that only when the HRC determines that a given right has been violated, Article 2(3) comes into play. In this sense, an effective remedy means the redress that the person receives after his/her Covenant right has been determined by the HRC to have been violated. This literal reading is, at least, inconsistent with the aim of international human rights, which is, as argued in Chapter two, to ensure the enjoyment of the international human rights within the jurisdiction of each State Party.[4] In addition, a subsequent decision by the HRC to grant a remedy to a given person after his/her right has been violated is less effective in combating human rights violations, compared to domestic mechanisms, which can be easily accessed, and can, if a violation is found to have occurred, grant an enforceable remedy with immediate effect.[5] Thus, the literal reading of Article 2(3)(a) would deprive person of the right to effective remedy, and, by implication, the other guaranteed rights under the Covenant from much of the protection that the Covenant attempts to afford to individuals against the State.

Oddly enough, the HRC had initially adopted this reading. It stated in a communication against Argentina that 'under article 2 the right to a remedy arises only after a violation of a Covenant right has been established.'[6] This restrictive interpretation of the right to an effective remedy has led the HRC to adopt contradictory statements, particularly with regard to fundamental freedoms such as

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[4] *See supra* para. 2.2.3.
[5] *Cf.* Harris, D, *et al*, *Law of the European Convention on Human Rights* (London: Butterworths, 1995), p. 446.
[6] *S. E. v. Argentina*, Communication No. 275/1988, U.N. Doc. CCPR/C/38/D/275/1988 (1990), para. 5.3.

the freedom from torture and cruel, inhuman or degrading treatment under Article 7 of the ICCPR. On the basis of the above adopted interpretation, it was argued before the HRC that the right to an effective remedy does not imply the obligation on the part of the State to provide a prior regime by which allegations of torture or cruel, inhuman or degrading treatment can be investigated.[7] The HRC rejected this argument and referred to its General Comment 20, in which it stated that '[a]rticle 7 should be read in conjunction with article 2, paragraph 3.... The right to lodge complaints against maltreatment prohibited by article 7 must be recognised in the domestic law. Complaints must be investigated promptly and impartially by competent authorities so as to make the remedy effective.'[8] Despite the paramount importance of the freedom from torture and cruel, inhuman, or degrading treatment, there is nothing in the language of Article 2(3) to suggest that the meaning of the right to an effective remedy is dependent on the right involved.

By contrast, the European Court of Human Rights (European Court) has applied a different interpretation to the corresponding provision in Article 13 of the ECHR, which provides that '[e]veryone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority ...' The European Court in rejecting the literal reading, which was adopted by the HRC as shown above, held that:

> In the Court's view, Article 13 requires that where an individual considers himself to have been prejudiced by a measure allegedly in breach of the Convention, he should have a remedy before a national authority in order both to have his claim decided and, if appropriate, to obtain redress. Thus, Article 13 must be interpreted as guaranteeing an 'effective remedy before a national authority' to everyone who claims that his rights and freedoms under the Convention have been violated.[9]

The HRC recently in its General Comment 31 seems to have abandoned its previous approach with regard to the meaning of the right to an effective remedy under Article 2(3) of the ICCPR. In this respect, it stated:

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[7] *Rodriguez v. Uruguay*, Communication No. 322/1988, U.N. Doc. CCPR/C/51/D/322/1988 (1994), para. 12.3.

[8] Human Rights Committee, General Comment 20, Article 7 (Forty-fourth session, 1992), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI\GEN\1\Rev.1 at 30 (1994), para. 14.

[9] *Klass and Others v. FRG* (1979-80) 2 E.H.R.R. 214, para. 64. *Cf. also Silver v. United Kingdom* (1983) 5 E.H.R.R. 347, para. 113(a); *Soering v. United Kingdom* (1989) 11 E.H.R.R. 43, para. 120.

> Article 2, paragraph 3, requires that in addition to effective protection of Covenant rights States Parties must ensure that individuals also have accessible and effective remedies to vindicate those rights.... The Committee attaches importance to States Parties' establishing appropriate judicial and administrative mechanisms for addressing *claims* of rights violations under domestic law.[10]

Thus, it can be concluded that the right to an effective remedy under Article 2(3) of the ICCPR comes into play once the individual has an arguable claim that his/her Covenant right has been violated.[11] This right will trigger, in the first place, the State's obligation to provide the individual concerned with an effective mechanism to test his claim, and in the second place, to grant effective redress to the victim if his/her right is found to have been violated. In the next section, attention will be focused on the requirement of effectiveness under Article 2(3) of the ICCPR.

4.1.2 The effectiveness requirement

As mentioned above, the term 'remedy' refers to both the mechanism by which the allegations of human rights violations are tested, and the redress to be granted where a violation has been found to have occurred. With regard to the former, Article 2(3)(b) of the ICCPR requires allegations of human rights violations to be reviewed by the 'competent judicial, administrative or legislative authorities, or by any other

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[10] Human Rights Committee, General Comment 31, Nature of the General Legal Obligation on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004), para. 15 [hereinafter General Comment 31]. It is noteworthy that the change of HRC's approach to the right to effective remedy was signalled in earlier communication against Cyprus in 2003. In that case the applicant invoked, *inter alia*, Article 27 (the right to participate in public service) in conjunction with Article 2(3) (the right to effective remedy), to challenge his non-appointment as a judge. Although the HRC held that the communication was inadmissible because it was unsubstantiated, its comments on the right to an effective remedy seems to suggest that the HRC has, effectively, adopted the European Court's approach in this respect including the so-called 'arguability test'. In this respect, the HRC has stated the following:

> A literal reading of [Article 2(3)(a)] seems to require that an actual breach of one of the guarantees of the Covenant be formally established as a necessary prerequisite to obtain remedies such as reparation or rehabilitation. However, article 2, paragraph 3(b), obliges States parties to ensure determination of the right to such remedy by a competent judicial, administrative or legislative authority, a guarantee which would be void if it were not available where a violation had not yet been established. While a State party cannot be reasonably required, on the basis of article 2, paragraph 3(b), to make such procedures available no matter how unmeritorious such claims may be, article 2, paragraph 3, provides protection to alleged victims if their claims are sufficiently well-founded to be arguable under the Covenant.

Kazantzis v. Cyprus, Communication No. 972/2001, U.N. Doc. CCPR/C/78/D/972/2001 (2003), para. 6.6.

[11] Compare Dijk, P, *et al*, *Theory and Practice of the European Convention on Human Rights*, 3rd edn (The Hague; Boston: Kluwer Law International, 1998), 699-700; Harris, *supra* note 5, pp.447-449, for what constitute an arguable claim under the ECHR.

competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy.' It is clear from this Article that, although State Parties are obliged to develop judicial remedies, they are nonetheless not obliged, at least not yet, to provide judicial ones.

However, the HRC in its General Comment 31 indicated that, where the remedy is not judicial, it is incumbent on the State to establish mechanisms that are 'independent and impartial' in order to satisfy the requirement of effectiveness under Article 2(3).[12] In addition, the HRC has indicated that where the alleged violations concern 'basic human rights', non-judicial remedies will not be sufficient to meet the requirement of effectiveness.[13] Furthermore, the authority concerned must be able to grant a remedy to the victim if a violation of a Covenant right is found to have occurred. Thus, national authorities, which lack the power to issue legally binding decisions, cannot be considered as an effective remedy within the meaning of Article 2(3).[14] Finally, once the remedy is granted by the competent authority, the remedy must be enforced.[15]

If the national authority, which is entrusted with reviewing alleged human rights violations, is found to be effective, and a violation of a Covenant right is found to have occurred, the question of effectiveness will turn to the redress granted to remedy the violation.[16] The HRC seems to consider financial compensation for redress as generally required by the Covenant to satisfy the requirement of effectiveness. In addition, and where appropriate, in order to satisfy the requirement of effectiveness, redress 'can involve restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations.'[17] The remedy of excluding evidence obtained in violation of the accused's rights guaranteed under the Covenant can be also added to these forms of redress. It should be noted, however, that whether a given form of redress is effective or not will depend on the circumstances of the case concerned and the substantive

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[12] General Comment 31, *supra* note 10, para. 15. *See also Gilboa v. Uruguay*, Communication No. 147/1983, U.N. Doc. CCPR/C/OP/2 at 176 (1990), para. 7.2.
[13] *Vicente, et al v. Colombia*, Communication No. 612/1995 (14 June 1994), CCPR/C/60/D/612/1995, para. 5.2.
[14] *C v. Australia*, Communication No. 900/1999, U.N. Doc. CCPR/C/76/D/900/1999 (2002), para. 7.3.
[15] ICCPR, Art. 2(3)(c).
[16] General Comment 31, *supra* note 10, para. 16.
[17] *Ibid.*

right involved.[18] For this reason, relevant forms of remedy will be considered in conjunction with the rights under consideration as a means for remedying their violation in the relevant sections.

4.2 Restrictions on individual rights and freedoms

Under the ICCPR, certain individual rights and freedoms can be subjected to restrictions because the very provisions protecting them include clauses that permit the restriction of the protected right if certain conditions are met, or because of the existence of a public emergency that threatens the life of the nation. Here only the restrictions that can be imposed during a public emergency are discussed, as restrictions concerning the rights under discussion, which are permissible under specific limitation clauses, are treated in detail in the relevant sections. Restrictions, which can be imposed on human rights and freedoms guaranteed under the ICCPR during a public emergency that threatens the life of the nation are regulated under Article 4 of the ICCPR, which states that:

> 1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.
> 2. No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.
> 3. Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates.

Article 4 of the ICCPR allows States Parties to derogate from their obligations under the Covenant where a public emergency threatening the life of the nation exists. The ECHR and ACHR equally recognise the State Party's right to do the same where a public emergency threatening the life of the nation exists.[19] However, the right of a

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[18] Nowak, M, *U.N. Covenant on Civil and Political Rights* (Strasbourg: N.P. Engel, 1993), p. 60.
[19] *See* ECHR, Art. 15; ACHR, Art. 27

State Party to derogate from its obligations is not without limitations. Firstly, the State Party's right to restrict human rights, even if a public emergency does exist, does not extend to limiting certain rights, which are considered as absolute in the sense that they are subject to no limitations whatsoever, irrespective of the exigencies of the situation faced by the State. Secondly, there are certain conditions that must be met in order for the State Party to be able to justify its derogatory measures on the basis of public emergency, namely:

- the existence of 'public emergency which threatens the life of the nation';
- the measures taken to deal with the public emergency must not exceed the 'extent strictly required by the exigencies of the situation';
- the measures taken to deal with the public emergency must not contravene the state' other international law obligations; and
- there must be an official proclamation of public emergency. States Parties to the ICCPR must be notified of the derogatory measures and the reasons for them through the Secretary General of the U.N.

What follows is a discussion of the above-mentioned requisites.

4.2.1 Public emergency threatening the life of the nation

Exceptional restrictions on international human rights can be justified only by the existence of a public emergency that threatens the life of the nation. Apart from the circumstances resulting from an armed conflict, which are considered, generally speaking, as 'public emergency' within the meaning of Article 4(1), there is no clear cut criterion by which given circumstances can be judged as a public emergency within the meaning of Article 4(1) of the ICCPR.[20] The HRC's jurisprudence provides little help in this respect. The Siracusa Principles, which were formulated by a group of distinguished international law experts, consider a public emergency within the meaning of Article 4(1) of the ICCPR to have three essential characteristics. In order for a given situation to be characterised as public emergency, it must:

> (a) affect[] the whole of the population and either the whole or part of the territory of the State, and
> (b) threaten[] the physical integrity of the population, the political independence or the territorial integrity of the State or the existence or

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[20] *See* Human Rights Committee, General Comment 29, States of Emergency (Article 4), U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001), para. 3 [hereinafter General Comment 29].

basic functioning of institutions indispensable to ensure and protect the rights recognised in the Covenant.
40. Internal conflict and unrest that do not constitute a grave and imminent threat to the life of the nation cannot justify derogations under Article 4.[21]

Similarly, the European Commission on Human Rights in the *Greek Case*,[22] stated that a public emergency within the meaning of Article 15(1) of the ECHR, which corresponds literally to Article 4(1) of the ICCPR, must have the following characteristics:

(1) It must be actual or imminent.
(2) Its effects must involve the whole nation.
(3) The continuance of the organised life of the community must be threatened.
(4) The crisis or danger must be exceptional, in that the normal measures or restrictions, permitted by the Convention for the maintenance of the public safety, health and order, are plainly inadequate.[23]

Thus, in order for a given set of circumstances to be qualified as a public emergency threatening the life of the nation within the meaning of Article 4(1) of the ICCPR, the threat resulting from these circumstances must be imminent, general and capable of making ordinary means of protecting the public interest inadequate. However, following the terrorist attacks in the United States of America on September 11, 2001, the Madrid bombings on March 11, 2005 and the recent terrorist attacks on London's transportation system on July 7, 2005, the issue of whether the threat posed by terrorism is capable of creating a public emergency within the meaning of Article 4(1) is an issue subject to controversy. Courts, whether national or international, might find it difficult to question a sovereign country or a democratically elected government's assessment of a given situation as a public emergency within the meaning of Article 4(1). However, the proportionality requirement, which is reviewable by the competent domestic and international authorities, is designed to

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[21] 'The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights', *Hum. Rts. Q.*, 7.1 (1985), 3, paras. 39-40, [hereinafter Siracusa Principles]. These principles were formulated at a conference in 1984 in Siracusa, Sicily, by a group of 31 distinguished experts in international law.
[22] 12 YB 1 (1969).
[23] *Ibid.* p. 72. A public emergency within the meaning of Article 15(1) of the ECHR, was defined by the European Court as 'an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the State is composed.' *Lawless v. Ireland* (1961), (1979-1980) 1 E.H.R.R 15, para. 28.

limit the adverse consequences of the declaration of public emergency on human rights and freedoms as much as possible, as discussed next.

4.2.2 'Strictly required by the exigencies of the situation'/ and non-derogable rights

Article 4(1) makes it clear that derogatory measures are only permissible as long as they are 'strictly required by the exigencies of the situation'. The language of Article 4(1) embodies the principle of proportionality between, on the one hand, the exigencies of the situation faced by the State, and, on the other hand, the duration, geographical scope, and the severity of the derogatory measures taken to deal with them.[24] In order to meet the proportionality test in terms of the duration of the application of the derogatory measures, the measures must be repealed and a state of normalcy be restored as soon as the public emergency ceases to exist.[25] With respect to the severity of the derogatory measures, these measures must constitute the least restrictive measures available to the State to deal with the threat resulting from a public emergency. Hence, if ordinary measures permissible under the ICCPR are capable of adequately dealing with a public emergency, the derogatory measures will be considered as failing to meet the test of proportionality.[26]

It is noteworthy that irrespective of the exigencies of the situation, a public emergency can never justify imposing derogatory measures on those rights and freedoms that are considered as non-derogable under the ICCPR.[27] With respect to the accused's pre-trial rights, Article 7 of the ICCPR, which guarantees the right not to be subjected to torture or cruel, inhuman, or degrading treatment, is recognised by the Covenant as non-derogable.[28] In addition, the HRC has extended the category of non-derogable rights to include some rights that have not been expressly recognised by the ICCPR as non-derogable.[29] According to the Committee, the category of non-derogable rights includes *inter alia*, the right to an effective remedy (Article 2(3)),[30]

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[24] General Comment 29, *supra* note 20, para. 4; Siracusa Principles, *supra* note 21, para. 51.
[25] *Ibid*. para.1.
[26] Siracusa Principles, *supra* note 21, para. 53.
[27] ICCPR, Art 4(2). *See also* Siracusa Principles, *supra* note 21, para. 8.
[28] *Ibid*. Similarly, the ECHR (Art. 15(2)) and the ACHR (Art. 27(2)) recognise the freedom from torture, inhuman or degrading treatment as non-derogable.
[29] General Comment 29, *supra* note 20, paras. 11, 13-16. *See also* Siracusa Principles, *supra* note 21, paras. 59-60, 70.
[30] *Ibid*. para. 14.

the right of detainees to humane treatment (Article 10(1)),[31] the right to *habeas corpus* (Article 9(4)), and the right to a fair trial (Article 14).[32]

The reason behind expanding the category of non-derogable rights is not uniform. With regard to the right of detainees to human treatment under Article 10(1) of the ICCPR, the Committee seems to consider this right a fundamental one given its apparent connection to the freedom from torture and cruel, inhuman, or degrading treatment under Article 7, which is expressly recognised by the Covenant as non-derogable. Hence, the right to humane treatment under Article 10(1) of the ICCPR constitutes, according to the Committee, a peremptory norm of general international law, which States are obliged to abide by even during a public emergency threatening the life of the nation.[33] With regard to the rights to an effective remedy, *habeas corpus,* and a fair trial, the rational behind qualifying them as non-derogable lies in their function as indispensable guarantees designed, *inter alia*, to 'ensure enjoyment of [the express] non-derogable rights [,] provide an effective remedy against their violation',[34] and to preserve the rule of law that the Covenant as a whole is based upon.[35]

From the foregoing it is clear that the Committee adopts a very strict test of proportionality, or indeed, it applies Article 4 to the letter as it allows only certain derogations and only 'to the extent strictly required by the exigencies of the situation.' The expansion of the category of non-derogable rights has not yet been challenged

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[31] *Ibid.* para. 13(a).
[32] *Ibid.* paras. 15-16.
[33] *Ibid.* para. 13(a). *See also infra* para 4.2.3. According to Art. 53 of the Vienna Convention on the Law of Treaties, adopted 22 May 1969, entered into force 27 January 1980, U.N. Doc. A/CONF.39/27 (1969), a peremptory norm of general international law is 'a norm accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.' It is noteworthy in this respect that Art. 27(2) of ACHR considers the right to humane treatment enshrined in Art. 5 of the ACHR as non-derogable.
[34] Siracusa Principles, *supra* note 21, para. 70. *See also* General Comment 29, *supra* note 20, para. 15. It is noteworthy that Art. 27(2) of the ACHR prohibits derogations from a number of guaranteed rights, and 'the judicial guarantees essential for the protection of such rights'. The Inter-American Court of Human Rights has defined these judicial guarantees as 'those [guarantees] that ordinarily will effectively guarantee the full exercise of the rights and freedoms protected by [the] provision [of non-derogable rights] and whose denial or restriction would endanger their full enjoyment.' Hence, the Inter-American Court concluded that, notwithstanding that the right to judicial remedy under Art. 25(1) and the right to *habeas corpus* under Art. 7(6) of the ACHR are not expressly non-derogable under Art. 27(2), they are nonetheless non-derogable as they constitute 'judicial guarantees' within the meaning of Art. 27(2), the derogation from which is prohibited. *See* Habeas Corpus in Emergency Situations (Arts. 27(2) and 7(6) of the American Convention on Human Rights), Advisory Opinion OC-8/87, January 30, 1987, Inter-Am. Ct. H.R. (Ser. A) No. 8 (1987) [Hereinafter Advisory Opinion OC-8/87].
[35] General Comment 29, *supra* note 20, para. 16.

before the Committee, and it remains to be seen whether the Committee will alter its view in this respect.

4.2.3 Conformity with international law

A derogation from the Covenant is considered impermissible under Article 4(1) if it constitutes a violation of any of the State's other international law obligations, even if the derogation is permissible under the Covenant itself. The HRC has declared that as part of its function to monitor the compliance of States Parties with Article 4, it is empowered to review the obligations of the States Parties concerned under international law to ensure that their derogatory measures do not violate their other international law obligations. Thus far, this obligation has not been advanced before the HRC to challenge the legality of any given derogation. However, the HRC, as pointed out above, used this obligation, albeit indirectly, to expand the category of non-derogable rights. It has declared, *inter alia*, the right of detainees to humane treatment under Article 10(1) of the ICCPR as a peremptory norm of general international law, which is non-derogable under the Vienna Convention of Treaties 1969,[36] and, consequently, non-derogable under Article 4(1) of the Covenant.

4.2.4 Non-discrimination

Article 4(1) prohibits applying derogatory measures solely on a discriminatory basis. It should be noted also that applying the derogatory measures solely on a discriminatory basis could lead to those measures failing the proportionality test as well. This is because if the derogatory measures are found to be applied solely on a discriminatory basis, these measures could be argued to be *a priori* disproportionate to the exigencies of the situation and hence in violation of Article 4(1). Although this argument has not yet been tested before any international human rights organ, its soundness is undeniable.

It is worth mentioning in this respect that the English House of Lords has reviewed this argument under Article 15(1) of the ECHR,[37] most of which has been incorporated into the English law by virtue of the Human Rights Act 1998, in the case

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[36] *See supra* note 33.

[37] It provides that '[i]n time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.'

of *A and others v. Secretary of State for the Home Department*.[38] The facts of the case were that the United Kingdom, in response to the threat of terrorism following the terrorist attacks on the United States on September 11, 2001, has derogated from the right to liberty guaranteed under Article 5 of the ECHR. The derogation was designed to allow the Home Secretary under the Anti-Terrorism Act 2001 to detain indefinitely non-UK nationals, who are suspected of terrorism and cannot be deported, but does not extend to British nationals who are suspected terrorists, and, by virtue of their British nationality, cannot be removed from the UK. Given that the threat posed by suspected terrorists is the same, irrespective of their nationality, applying the derogatory measures exclusively to non-UK nationals was found to be discriminatory and, hence, disproportionate to the exigencies of the situation. As Lord Hope eloquently explained:

> I would hold that the indefinite detention of foreign nationals without trial has not been shown to be strictly required, as the same threat from British nationals whom the government is unable or unwilling to prosecute is being met by other measures which do not require them to be detained indefinitely without trial. The distinction which the government seeks to draw between these two groups - British nationals and foreign nationals - raises an issue of discrimination. But, as the distinction is irrational, it goes to the heart of the issue about proportionality also. It proceeds on the misconception that it is a sufficient answer to the question whether the derogation is strictly required that the two groups have different rights in the immigration context. So they do. But the derogation is from the right to liberty. The right to liberty is the same for each group. If derogation is not strictly required in the case of one group, it cannot be strictly required in the case of the other group that presents the same threat.[39]

Therefore, if the State wishes to limit the application of its derogatory measures either to a specific geographical location or to a specific group of people there must be a rational for this differential treatment. Otherwise, the derogatory measures will be held as discriminatory, and, hence, disproportionate as well.[40]

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[38] [2005] 3 All ER 169.
[39] *Ibid.* para. 132.
[40] The European Court of Human Rights in the case of the *Republic of Ireland v. The United Kingdom* (1979-80) 2 E.H.R.R. 25, para. 229, did not find the derogatory measures taken by the British Government in Northern Ireland against one terrorist group (the Irish Republican Army (IRA)), but not the other (the Loyalists) as discriminatory. This was because while the threat posed by the latter group could be contained under ordinary law measures; the threat emanating from the former group could be only tackled by employing derogatory measures.

4.2.5 Declaration and notification of public emergency

Article 4(3) of the ICCPR requires a State that wishes to adopt derogatory measures under Article 4 to declare a public emergency and to notify other States Parties to the Covenant, through the United Nations Secretary General, of these measures and the reasons for them. The discussion here is confined to the requirement of proclaiming a state of public emergency as it is relevant to the enforcement of the Covenant's provisions by domestic means, rather than by international ones as the requirement of the notification intends. The proclamation of a state of public emergency must be done in accordance with the constitutional and legal framework of the State Party derogating from the Covenant. In addition, the derogatory measures must be precise and clear to ensure that is not arbitrarily applied.[41] These requirements are essential to ensure that the population concerned are informed of the limitations that are to be imposed on their Covenant's rights, and to ensure that the rule of law is respected when it is especially needed.[42] In addition, the proclamation of a public emergency is essential in order to enable the persons whose Covenant rights and freedoms have been allegedly affected by illegal derogatory measures to exercise their right to an effective remedy under Article 2(3) in order to challenge the legality of these measures before an independent and impartial authority, as discussed next.

4.2.6 Effective remedy against derogatory measures

As mentioned earlier, the right to an effective remedy may not be derogated from even if there is a public emergency within the meaning of Article 4(1) of the ICCPR. Without ensuring the respect for this right during a public emergency, the State authorities could misuse their power to adopt derogatory measures under Article 4. The right to an effective remedy will ensure that the State meets its obligations under Article 4, particularly with regard to whether there is a public emergency within the meaning of Article 4(1), and whether or not the derogatory measures are proportionate to the exigencies of the situation or are discriminatory.

As discussed above, the State is obliged to provide a mechanism by which alleged violations of the ICCPR are reviewed by an independent and impartial authority, although not necessarily judicial, in order to comply with the requirement of an

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[41] *See* Concluding Observations of the Human Rights Committee, Nepal, U.N. Doc. CCPR/C/79/Add.42 (1994), para. 9; Concluding Observations of the Human Rights Committee, Zambia, U.N. Doc. CCPR/C/79/Add.62 (1996), para 11.

[42] General Comment 29, *supra* note 20, para. 2.

effective remedy under Article 2(3) of ICCPR. However, as the HRC have correctly noted, the review of alleged violations of 'basic human rights' must be judicial to satisfy the requirement of effectiveness under Article 2(3). Given the importance of preserving the rule of law during a public emergency, when it is most needed, and the far-reaching consequences of employing derogatory measures under Article 4 for the protection of the Covenant as a whole, it is highly doubtful that a non-judicial review of the compatibility of the derogatory measures with Article 4 requirements can be considered as an effective remedy within the meaning of Article 2(3).[43]

It is worth pointing out in this connection that the Inter-American Court of Human Rights has taken an unequivocal stance on the nature of the remedy required for reviewing the compatibility of derogatory measures with the provisions of the ACHR. Relying on Article 27(2) of the ACHR, which prohibits derogations from a list of rights and the judicial guarantees for their protection, the American Court concluded unanimously that the right to judicial remedy guaranteed under Article 25(1) of the ACHR is a non-derogable right. Therefore, individuals are entitled to challenge derogatory measures before the national courts.[44]

B. Canada

4.3 Right to an effective remedy

Before discussing the right to an effective remedy under the Canadian Charter it is appropriate first to highlight the status of the human rights prior to the introduction of the Charter. Prior to 1982, human rights under Canadian law had not enjoyed the protection of the constitution; they had, instead been partially protected under the common law. However, this protection was recognised as being limited, as it was not permissible, under the common law, for the courts to strike down any legislation on the basis that it violated human rights. During the 1950s, this recognition resulted in the requirement for a human rights legislation, leading to the Bill of Rights being adopted in 1960. However, this Bill had its own deficiencies and came under intensive criticism as it failed to achieve its underlying objective of protecting human rights. This failure was due to a number of factors: the first and foremost of these was

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[43] *Ibid. See also supra* para. 4.1.2.
[44] *See* Advisory Opinion OC-8/87, *supra* note 34, paras. 39-40, 42-44.

that the Bill was a statutory document, thereby leaving the courts powerless to invalidate any legislation not in conformity with the rights guaranteed under the Bill. Secondly, the Bill of Rights was only applicable to federal jurisdiction, but did not extend to provincial law, thereby not allowing any consistency.[45] As a result of this criticism, the Canadian Constitution was amended in 1982 to include the Charter of Rights and Freedoms (the Charter).[46] Since the Constitution is the supreme law of Canada, generally speaking, all other laws must be consistent with the rules set out in the Constitution. If they are not, they are at risk of being invalidated. The impact of the Charter on the area of human rights and fundamental freedoms in Canada stems from this status, as it enables individuals to resort to the domestic courts in order to enforce protection of these constitutional rights. The Charter also transformed the function of the judiciary, from merely applying the law, to reviewing the policy decisions and ensuring that any statutory act is compatible with the requirements of the Charter.[47]

Regarding the right to an effective remedy under the Charter, section 24(1) provides that '[a]nyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.' The first issue that arises under s. 24(1), is that, what type of authority can be considered, for the purposes of s. 24(1) of the Charter, to be 'a court of competent jurisdiction' to grant remedies for Charter violations? In *Mills v. The Queen*[48] it was held that a court of competent jurisdiction within the meaning of s. 24(1) is the court that has the jurisdiction 'over the offences and persons and [has the] power to make orders sought.'[49] This would mean that the trial judge is the competent court within the meaning of s. 24(1) to grant criminal law remedies for violations of the accused's Charter rights. However, where there is an alleged violation of the accused's Charter

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[45] Manfredi, C, *Judicial Power and the Charter*, 2nd edn (Oxford: Oxford University Press, 2001), pp. 15-16.
[46] Hereinafter the Charter.
[47] *See* Sharpe, R, 'The Impact of A Bill of Rights on the Role of the Judiciary: A Canadian Perspective', in *Promoting Human Rights Through Bills of Rights: Comparative Perspectives*, ed. by P Alston, (Oxford: Clarendon Press, 1999).
[48] [1986] 1 S.C.R. 863, para. 261
[49] *Ibid.* para. 265.

rights, and a trial judge has not been appointed, an application for a remedy under s. 24(1) can be made to a provincial superior court.[50]

A review of claims for remedies under s. 24(1), will involve the determination of two issues: firstly, whether there has been a violation of a Charter right, and if there is, secondly, what is the 'just and appropriate remedy' for the violation?[51] With regard to the former issue, it was held in *Collins*[52] that the person who is seeking a remedy under s. 24(1) of the Charter bears the burden of establishing, on the balance of probabilities, that his Charter right(s) has been violated. However, the granting of a remedy under s. 24(1) is not dependent on establishing that a violation of a Charter right has actually occurred, but whether there is a prospective violation of a Charter right, where it is established that 'there is a very real likelihood that in the absence of that relief an individual's Charter rights will be prejudiced.'[53]

With regard to the latter issue, as is apparent from the wording of s. 24(1), the court is not restricted to any particular form of remedy, but has the discretion to grant the remedy that is 'just and appropriate in the circumstances.'[54] Criminal law remedies for violations of pre-trial rights include an adjournment, bail, ordering disclosure, entering stays, the institution of disciplinary or criminal proceedings against the official responsible for the violation of the accused's right(s), the exclusion of evidence obtained in violation of the Charter rights, and the invalidation of laws that are inconsistent with the Charter to the extent of the inconsistency. These forms of remedy are discussed in the relevant sections.

4.4 Permissible limitations on the Charter rights

The Canadian Charter does not include absolute rights or freedoms as they are all, according to section 1 of the Charter, subject 'to such reasonable limits prescribed by law as can be justified in a free and democratic society.' During the criminal proceedings, the accused can challenge, before the trial court, the constitutionality of any law relevant to the proceedings against him. If the law is not found to be demonstrably justified in a free and democratic society under s.1, the law in question,

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[50] *Ibid. See also Dagenais v. Canadian Broadcasting Corp*, [1994] 3 S.C.R. 835, para. 16.
[51] *Ibid.* para. 275.
[52] [1987] 1 S.C.R. 265, 277.
[53] *Phillips v. Nova Scotia (Westray Mine Inquiry)*, [1995] 2 S.C.R. 97, p. 110.
[54] *Mills*, *supra* note 48, para. 278.

to the extent of the inconsistency, will be declared of no force or effect under s. 52 of the Constitution Act 1982, which states that '[t]he Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.'[55]

The test upon which the limitation on constitutional rights or freedoms is determined to be demonstrably justified in a free and democratic society or otherwise, was established by the Supreme Court of Canada in *R. v. Oakes.*[56] The Court in this case was faced with the question of whether section 8 of the Narcotic Control Act, R.S.C. 1970, c. N-1, which provided that if the accused was found in possession of a narcotic, the accused was presumed to be in possession for the purpose of trafficking and that, unless the accused is able to establish to the contrary, on the balance of probabilities, he must be convicted of trafficking. The Court held the 'reverse onus' clause to be unconstitutional because it violated the presumption of innocence enshrined in section 11(d) of the Charter. In effect, the Court was left with the more important question of whether the limit imposed by section 8 of the Narcotic Control Act could be justified under section 1 as a reasonable limit. In addressing this question, the Court established what has become known as the *Oakes* test, which has practically substituted the formula of section 1.[57] In the following sections, the *Oakes's* test and its implications for the constitutional rights that the accused enjoy during the pre-trial stage of the criminal process will be discussed.

4.4.1 The *Oakes* test

Before discussing the *Oakes* test, it is imperative first to determine the meaning of the clause that states that a limit on a constitutional right or freedom has to be prescribed by law, as a prerequisite to meeting the constitutional requirement of overriding an individual right. Le Dain J., of the Supreme Court, in his dissenting reasons in *R. v. Therens,*[58] stated that:

> The limit will be prescribed by law within the meaning of s. 1 if expressly provided for by statute or regulation, or result by necessary implication from the prescription from the terms of a statute or regulation or from its

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[55] *See R. v. Big M Drug Mart Ltd*, [1985] 1 S.C.R. 295.
[56] [1986] 1 S.C.R. 103.
[57] Stuart, D, *Charter Justice in Canadian Criminal Law*, 3rd edn (Scarborough: Carswell, 2001), p.14.
[58] [1985] 1 S.C.R. 613.

> operating requirements. The limit may also result from the application of a common law rule.[59]

It follows that, where a violation of a Charter right is determined to be a result of police action rather than the operation of the law, the violation cannot be justified under section 1, and consequently there is no need to consider the violation under the *Oakes* test.[60] On the other hand, if the violation is determined to be a consequence of the operation of the law within the meaning articulated above by Le Dain J., the *Oakes* test comes into play. Regarding the burden of proof, while establishing that a violation of constitutional rights or freedoms has occurred always rests with the party seeking the protection of the allegedly impugned right, once a *prima facie* violation has been established, the burden shifts to the party attempting to justify the violation, which is usually the State.[61] According to the *Oakes* test, in order to meet the constitutional requirement of section 1 to override an individual right or freedom, the limit imposed has to meet two criteria.

The first criterion is that the objective that the measures adopted seek to achieve must be of sufficient importance to warrant overriding a right or freedom guaranteed under the Charter. The Court emphasised that the standard must be high, and, hence, in order for an objective to meet the required standard, the objective, according to the Court, must 'relate to concerns which are pressing and substantial in a free and democratic society.'[62] If the limit fails to meet the first criterion, the analysis ceases here. However, if it is established, on the balance of probabilities, that the objective of the limitation is of sufficient importance, the analysis will proceed to the proportionality test stage. At this stage, the collective interest in limiting a right or freedom is weighed against the interests of the individual or group whose right or freedom has been violated.

The proportionality test consists of three components. Firstly, the measures adopted must be carefully tailored to meet the objective that has been identified as of sufficient importance. Briefly, the measures must be based on rational, fair, and non-arbitrary considerations. Secondly, the measures adopted must not impair the right or

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[59] *Ibid.* 645. Dickson C.J., Beetz, Estey, Chouinard, Wilson, McIntyre and Lamer JJ, agreed on this point. This approach was subsequently adopted by the unanimous Court in *R. v. Thomsen* [1988] 1 S.C.R. 640, 650.
[60] *Ibid.*
[61] *Oakes, supra* note 56, 136-137.
[62] *Ibid.* 138.

freedom in question more than is required to achieve the targeted objective and finally, there must be proportionality between the effects of the measures that are responsible for limiting the right or freedom under question and the objective that has been identified as of sufficient importance.[63] It is noteworthy that the Supreme Court's jurisprudence indicates that where the objective is deemed to be of sufficient importance in the Court's view, the test will depend almost entirely on the second component of the second criterion, which has become known as 'the minimum impairment test'. [64]

4.4.2 Section 1 and the accused's constitutional rights

The question this section seeks to explore is whether the rights of the accused, as enshrined in ss.7-12 of the Charter are subject to restrictions demonstrably justified under s.1. It is noteworthy that certain rights, to which the accused under the Charter is entitled in the pre-trial stage of the criminal process, are qualified rights in the sense that the very sections that guarantee these rights contain clauses upon which restrictions in the public interest can be justified, as will be discussed in the relevant Chapters below. With regard to section 7, which protects life, liberty, and the security of person in accordance with the principles of fundamental justice, Justice Lamer, as he was then, speaking for the majority in the commonly cited case of *Re B.C. Motor Vehicle Act*,[65] was strongly opposed even to contemplating the conception of subjecting the respected rights to further balancing except in a state of public emergency. As his Lordship put it, '[s]ection 1 may, for reasons of administrative expediency, successfully come to rescue of an otherwise violation of s.7, but only in cases arising out of exceptional conditions, such as disasters, the outbreak of war, epidemics, and the like.'[66]

In *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [67] Lamer C.J., who was speaking for the majority of the Supreme Court, seemed to have retreated from his initial position expressed in *Re B.C. Motor Vehicle Act*, cited

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[63] *Ibid.* 139-140. For further discussion of the 'proportionality test', *see* Sharpe, R, 'The Impact of A Bill of Rights on the Role of the Judiciary: A Canadian Perspective', in *Promoting Human Rights Through Bills of Rights: Comparative Perspectives*, ed. by P Alston, (Oxford: Clarendon Press, 1999), pp. 445-449; Stuart, *supra* note 57, pp. 13-25.
[64] Stuart, *supra* note 57, p. 14. *See, e.g., R. v. Swain,* [1991] 1 S.C.R. 933; *Adler v. Ontario,* [1996] 3 S.C.R. 609.
[65] [1985] 2 S.C.R. 486.
[66] *Ibid.* 518. (Dickson C.J., Beetz, Chouinard and Le Dain JJ, concurred).
[67] [1999] 3 S.C.R 46.

above, when he did not rule out the possibility of saving a violation of section 7 by resorting to section 1, even if no exceptional conditions exist. However, the significance of this shift in position is limited, as his Lordship expressed the difficulty of justifying such violations under section 1. According to his Lordship, the difficulty is due to two factors. Firstly, the protected rights under section 7 (*i.e.*, life, liberty and security of the person) are of considerable importance and, therefore, cannot be, save in exceptional circumstances, overridden by competing social interests. Secondly, it is difficult to imagine where an infringement of one of the rights protected by section 7, which does not accord with the principles of fundamental justice, could be reasonably justified in a free and democratic society as required by section 1.[68] It is noteworthy that the Supreme Court thus far has not saved any violation of section 7 that does not accord with the principles of fundamental justice.

The question regarding the relationship between section 1 and the right to be secure against unreasonable search and seizure enshrined in section 8, was first raised in *Hunter v. Southam*.[69] However, since the question was not necessary for the determination of the case, the Court left answering the question to another day.[70] Although the Supreme Court did not rule out the possibility of saving violations of the right to be secure against unreasonable search or seizure, whether in fact it is possible to show that unreasonable searches or seizures are demonstrably justified is highly questionable, as so far arguments to that effect have been rejected.[71]

With regard to section 9, which prohibits arbitrary arrest and detention, the Supreme Court has thus far subjected the relevant section to only one exception. In *Hufsky,*[72] the appellant, whose driving showed nothing unusual, was stopped at random in a spot check by the police. The spot check was carried out for the purposes of checking licences, insurance, the mechanical fitness of the cars, and the sobriety of the drivers with the only guideline being that at least one marked police vehicle be engaged in spot check duty. As the Supreme Court observed that the spot check required a brief stop, it held that the spot check was detention within the meaning of section 9.[73] The Court stated that while the procedure was carried out for lawful

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[68] *Ibid.* 92 (Gonthier, Cory, McLachlin, Major and Binnie JJ., concurred).
[69] [1984] 2 S.C.R 145.
[70] *Ibid.* 169-170.
[71] *See, e.g., R. v. Duarte*, [1990] 1 S.C.R. 30, 56-57.
[72] [1988] 1 S.C.R. 621.
[73] *Ibid.* 631-632.

purposes authorised by s.189a(1) of the Quebec Highway Traffic Act, R.S.O. 1980, c. 198, it was nonetheless arbitrary in the sense that there were no criteria, standards, guidelines or procedures to determine which vehicles should be stopped.[74] As a result, the question to be addressed was whether such arbitrary statutorily permitted conduct was justified under section 1 of the Charter.

After stressing the importance of highway safety as an objective of sufficient importance, the Court turned to the role that the random check procedure played in reinforcing the safety of the highway. The Court noted that as motor vehicle offences cannot be detected by mere observation of the drivers, the spot check procedure was the only measure capable of ensuring the safety of the highway. Therefore, the Court concluded that the procedure in question was demonstrably justified in a free and democratic society, within the meaning of section 1 of the Charter.[75] It is noteworthy, however, that as the random stop procedure could be used in an arbitrary and discriminatory fashion, the Court has imposed upon the police certain limits to ensure that the power is used for purpose that is legislated for (*i.e.*, the enforcement of highway safety). These limits, according to Cory J., who was speaking for the majority of the Supreme Court in *R. v. Ladouceur*,[76] are that:

> Officers can stop persons only for legal reasons, in this case reasons related to driving a car such as checking the driver's licence and insurance, the sobriety of the driver and the mechanical fitness of the vehicle. Once stopped the only questions that may justifiably be asked are those related to driving offences. Any further, more intrusive procedures could only be undertaken based upon reasonable and probable grounds. Where a stop is found to be unlawful, the evidence from the stop could well be excluded under s. 24(2) of the Charter.[77]

With regard to the rights of detainees, or those persons who are charged with a criminal offence, as enshrined in sections 10 and 11 respectively, to date, they have not be subjected to any restriction on the basis of s.1 of the Charter. Finally, in relation to section 12, which prohibits cruel and unusual treatment, although it is theoretically subject to limitations by virtue of section 1, in practice it is difficult to imagine that the Supreme Court would allow any restrictions on such a fundamental

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[74] *Ibid.* 632-633.
[75] *Ibid.* 637.
[76] [1990] 1 S.C.R. 1257.
[77] *Ibid.* p. 1287. It was subsequently adopted by the unanimous court in *R. v. Mellenthin* [1992] 3 S.C.R. 615, 628-629.

right. This proposition is based upon two considerations. Firstly, the Court has not yet considered any application for restricting such a right, let alone accepted a violation of it as a demonstrably justified limit in a free and democratic society. Secondly, the corresponding provisions in Article 7 of the ICCPR and Article 2(2) of the CAT, both of which Canada is a Member Party, recognise such a right as an absolute one, which cannot be subjected to any limitations, nor can it be derogated from.[78]

C. Saudi Arabia

4.5 Right to an effective remedy

There is no general right to a remedy under Saudi law. However, according to Article 6(2) of the Civil Procedure Code 2001,[79] in conjunction with Article 188 of the Code of Criminal Procedure 2001 (CCP), it is within the jurisdiction of the trial court to review the legality of any procedural act taken during the course of the criminal proceedings. Hence, the accused is entitled to request the trial court to annul any procedural act taken during the pre-trial stage of the criminal process, if such an act violates his right(s) under Saudi law. The trial court shall annul such an act if it is 'inconsistent with the principles of the *Shari'ah* or the laws derived therefrom....'[80] With regard to the effect of the annulment, the CCP determines that the procedural acts taken before or/and subsequent to the annulled act to be valid as long as they are not based on the annulled act.[81] Thus, a procedural act, which is taken on the basis of an annulled procedure, is invalid too.[82]

However, the Saudi criminal courts, in practice, do not engage in reviewing the legality of procedural acts taken during the pre-trial stage of the criminal process, with the exception of acts relating to confession evidence obtained by torture. The reason

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[78] *See Suresh v. Canada (Minister of Citizenship and Immigration)* [2002] 1 S.C.R. 3, pp. 38-45.

[79] According to Article 6(2) of the Civil Procedure Code 2001, it is within the jurisdiction of the trial court to examine the legality of the actions taken in the case before it came to trial. It should be noted here that provisions of the Civil Procedure Code apply, in accordance with Article 221 of the CCP, 'when there are no provisions provided herein, and in matters that are not inconsistent with the nature of the criminal proceedings.'

[80] CCP. Art. 188.

[81] *Ibid.* Art. 191.

[82] The annulment provisions under the CCP have been drawn from the French criminal procedural law. For a discussion of the annulment proceedings under the French law, *see generally* Vogler, R, 'Criminal Procedure in France', in *Comparative Criminal Procedure*, ed. by J Hatchard, *et al*, (London: B.I.I.C.L., 1996), pp. 48-49; West, A, *et al*, *The French Legal System*, 2nd edn (London: Butterworths, 1998), pp. 244, 263.

advanced by *Qadis* for not conducting the legality review is that the CCP provisions with regard to annulment are vague. Hence, they cannot apply them until the implementing regulation of the CCP is issued in order to clarify the annulment provisions.[83] Another reason is that *Qadis* consider their role to be confined to what takes place in the court room. Therefore, the review of procedural irregularities committed during the pre-trial stage is considered to fall outside the jurisdiction of the trial court.[84]

That is not to say, however, that the accused, whose right(s) has been violated, cannot obtain a remedy at all, but rather that the accused has to resort to avenues other than the trial court, in order to obtain a remedy. Remedies available under Saudi law include the subjection of the official responsible for the violation of the accused's right(s) to disciplinary or criminal proceedings, the ordering of disclosure, the invalidation of law that is inconsistent with the accused's constitutional rights under the *Shari'ah* or/and the Basic Law of Government, and the exclusion of evidence obtained in violation of the accused's rights. These forms of remedy are discussed in the relevant sections.

4.6 Permissible limitations on human rights

Article 62 of the Basic Law of Government regulates the State's powers during a state of public emergency. It states that '[w]ithout prejudice to Article 7, [which states that "the regime derives its power from the Holy *Qur'an* and the Prophet's *Sunnah*. They are sovereign over this Law and other State Laws."], no provision of this law whatsoever may be suspended unless it is temporary in a time of war or during the declaration of a state of emergency. This temporary suspension will be in accordance with the terms of the law.' According to Article 61 of the Basic Law, the King is empowered to 'declare[] a state of emergency, general mobilisation and war....' Thus, Article 62, in essence, subjects the declaration of a state of emergency and emergency measures, as other provisions of the Basic Law, to the principles of the Islamic *Shari'ah*. As discussed in Chapter three, limitations on individual rights under the

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[83] Interview with *Qadi* Tameem Al-Aunizan, Summary Court, Riyadh (July. 11-12, 2004); interview with *Qadi* Muhammad Al Jaarallah, General Court, Riyadh (Aug. 2-3, 2004); interview with *Qadi* Saleh Al-Aujri, General Court, Riyadh (Aug. 4, 2004).
[84] *Ibid.*

Shari'ah are only permitted where a necessity exists, and where the following conditions apply:

- there must be good reasons to believe that a necessity actually exists;
- acting on the basis of necessity must aim to protect a legitimate and substantial interest;
- there is no other legitimate and less restrictive means by which the harm that will result from not acting in accordance with the necessity can be adequately dealt with; and
- the measures that are taken on the basis of necessity must not exceed what is absolutely necessary to achieve the objective of acting on the basis of necessity.[85]

It is worth mentioning here that Article 62 of the Basic Law has never been invoked in practice in order to justify imposing extraordinary measures on human rights guaranteed under the *Shari'ah* and/or the Basic Law even when Saudi Arabia was subjected to an intensive terror campaign by Islamist extremists in 2003, which could have arguably justified the application of Article 62.[86]

The question that arises is whether the courts have the power to review any measures, be they ordinary or emergency, to ensure their compliance with the constitution, and to strike them down if they are not. It is worth recalling first that the King in Saudi Arabia is empowered to enact regulations in areas where the *Shari'ah* does not provide explicit texts, on the prerequisites that these regulations serve the public interest and are guided by the general principles of the *Shari'ah*. This is clearly stated in Article 67 of the Basic Law, which states that 'the regulatory authority [*i.e.*, the King] shall have the jurisdiction to enact regulations and bye-laws in order to attain welfare and avoid harm in the affairs of the State, in accordance with the general rules of Islamic *Shari'ah*.'

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[85] *See supra* para. 3.1.

[86] For a chronology of the terrorist attacks committed on Saudi soil by Islamic extremists since they started their terrorist campaign in May 2003, *see* BBC, *Timeline: Saudi Attacks* (6 December 2004), *available at* <http://news.bbc.co.uk/1/hi/world/middle_east/3760099.stm> (last visited Jan. 2, 2006). For further discussion of the emergency provisions under the Saudi Basic Law, *see* Tarazi, A, 'Saudi Arabia's New Basic Laws: The Struggle for Participatory Islamic Government', *Harv. Int'l L.J.*, 34 (1993), 258, 264-265.

However, the courts, which are entrusted with applying the law, are empowered, theoretically speaking, to review any law and strike it down if it conflicts with the Islamic *Shari'ah*, which is, as previously discussed, the law of the land in Saudi Arabia.[87] This power can be inferred from Article 48 of the Basic Law, which states that '[t]he courts shall apply the rules of the Islamic *Shari'ah* in the cases that are brought before them, in accordance with what is indicated in the Book and the *Sunnah*, and laws decreed by the Ruler which do not contradict the Book or the *Sunnah*.' As the courts have the power to refuse to apply any *siyasa* law that conflicts with the Islamic *Shari'ah*, this implies that, essentially, the courts have the power to review the consistency of any law with the Islamic *Shari'ah* in order to determine the constitutionality of such a law, first, and consequently determine whether to apply it or not in the case before it.

In practice, however, the *Shari'ah* courts either choose to apply the *siyasa* laws or not on the basis of whether it within the jurisdiction of the ruler to enact these laws (*i.e.*, matters which are to be regulated by *siyasa* laws), or whether they fall within the realm of *fiqh*, which should be left for judges to decide upon according to their *ijtihad*.[88] Therefore, if the matters are considered to fall within the realm of *siyasa*, judges will not consider whether the law in question serves the public interest and/or is consistent with the *Shari'ah* general principles as required under Article 67 of the Basic Law. Additionally, the courts, as mentioned above, are only concerned with matters directly related to the court proceedings, as pre-trial matters are considered to fall outside the jurisdiction of the trial court. Hence, if a given law is not directly applicable to the court proceedings (*e.g.*, deals with pre-trial matters), and such a law is allegedly deficient in meeting the constitutional conditions under Article 67 (*i.e*, the fulfilment of the public interest, and the compatibility with the *Shari'ah* general rules), there is no mechanism by which that law can be challenged before a judicial authority and consequently, if indeed found to be deficient, struck down.[89]

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[87] *See supra* para. 1.1.
[88] *See supra* para. 1.4.
[89] *See* Al-Qassem, A & Al-Nasri, A. 'al-Buniah al-Tashriaiah wa al-Qudaiah fi al-Mamlaka (The Legislative and Judicial Infrastructure in the Kingdom).' *Riyadh Economic Forum*, ed. (Riyadh, 2003), pp. 23-25.

4.7 Comparison

The Saudi and Canadian systems diverge and converge on a number of issues in terms of the scope of the protection they afford the accused during the pre-trial stage of the criminal process. In terms of convergence, the two systems consider the constitution (Canada, the Charter; Saudi Arabia, the *Shari'ah*), under which the rights of the accused are protected, to have supremacy over legislative bodies including the Parliament in Canada, and the King in Saudi Arabia. Thus, any state legislation has to conform to the constitution; otherwise, it will have no force or effect. In addition, under the two systems all constitutional rights and freedoms can be, theoretically speaking, restricted if certain conditions are met. Furthermore, the two systems adopt, in substance, the same requirements for limiting an individual right or freedom, namely, that the restriction must aim to secure a legitimate and substantial interest that could justify overriding an individual right, there is a direct link between the limitation measures and the objective sought, and that the limitation measures must constitute the least restrictive alternative available to the State.

However, the two systems differ, in particular, in relation to the mechanism by which the constitutional compatibility of the State's legislations and actions relating to the pre-trial stage of the criminal process can be reviewed. While the Saudi law seems to entrust the courts with the task of reviewing the constitutionality of the state's legislations and actions, in practice the Saudi courts, for the reasons discussed above, do not exercise such a function. By contrast, the Supreme Court of Canada, relying upon the Charter, has created a mechanism by which the compatibility of any state's legislations or actions with the Charter can be impartially and independently reviewed, to declare its incompatibility, if it is indeed found to incompatible with the Charter, and to afford the accused a just and appropriate remedy in the light of the circumstances of the case. This difference is crucial, and its implications for the protection of the rights of the accused under the Saudi and the Canadian systems will become apparent from the discussions in following Chapters.

Chapter Five

The Right Against Self-incrimination

A. International human rights law

5.1 Right against self-incrimination

The right against self-incrimination is protected under the ICCPR through Article 7, which prohibits subjecting the accused to torture or to cruel, inhuman or degrading treatment, whether it aims at the extraction of a confession from the accused or not, and through the privilege against self-incrimination and the presumption of innocence enshrined in Article 14. In the following sections the right against ill-treatment, the privilege against self-incrimination, the presumption of innocence and the remedy for violating them will be discussed.

5.1.1 Right against ill-treatment

Article 7 of the ICCPR states that 'no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.' The right not to be subjected to torture or to cruel, inhuman or degrading treatment aims to protect the inherent dignity and the physical and mental integrity of the individual.[1] It is one of the most fundamental rights that the ICCPR seeks to protect. Hence, the right against torture and other forms of ill-treatment can be neither restricted during a public emergency that threatens the life of the nation, nor can it be subjected to any restrictions on grounds of public interest. The universal recognition of the significance of this right led to the adoption of specialised conventions with enforcement machinery designed solely to ensure its protection.[2] Under the auspices of the U.N, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

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[1] Human Rights Committee, General Comment 20, Article 7 (Forty-fourth session, 1992), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI\GEN\1\Rev.1 at 30 (1994), para. 1 [hereinafter General Comment 20].

[2] Including the Inter-American Convention to Prevent and Punish Torture, adopted Dec. 9, 1985 (entered into force Feb. 28, 1987); and the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, adopted June. 26, 1987 (entered into force Feb. 1, 1989).

(CAT) was adopted in 1984.[3] As of April 2004, 136 States had ratified the CAT, including Saudi Arabia and Canada.[4] Under Article 17 of the CAT, the Committee against Torture (CT) was established to monitor the States Parties' compliance with the CAT provisions. The CT exercises its powers under the CAT through the reporting system, by which States Parties are obliged to submit periodical reports to the CT,[5] and through the individual communications system if the State Party concerned recognises the CT's competence to receive such communications.[6]

Therefore, in determining the meaning and scope of Article 7 of the ICCPR, and the States Parties' obligations under it, in addition to considering the jurisprudence of the HRC, the CTA provisions and CT's jurisprudence will be taken into account, as the two documents and their enforcement mechanisms in respect of the right under consideration aim to achieve the same goal, which is to ensure its protection.

5.1.1.1 Scope of Article 7

Article 7 protects against four forms of ill-treatment: torture, and cruel, inhuman, or degrading treatment. However, cruel and inhuman treatment has the same meaning in the context of Article 7.[7] The main difference between the three forms of ill-treatment is the intensity of the pain inflicted.[8] While torture carries the strongest level of severity of the pain inflicted, cruel and inhuman treatment covers treatments which inflict less severe pain on the victim than that of torture, but more severe pain than that of degrading treatment, which carries the weakest level of the severity of pain inflicted on the victim. These forms of ill-treatment can be defined as follows:

- Torture: '[A]ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the

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[3] Adopted Dec. 10, 1984, G.A. Res. 39/46, U.N. GAOR 39th Sess., Supp. No. 51, at art. 4, U.N. Doc. A/39/51, (1985) (entered into force June 26, 1987), *available at* <http://www.ohchr.org/english/> (last visited Jan. 2, 2006) [hereinafter CAT].

[4] The status of ratifications of the CAT is *available at* <http://www.ohchr.org/english/> (last visited Jan. 2, 2006).

[5] CAT, Art. 19.

[6] *Ibid.* Art. 21.

[7] Nowak, M, *U.N. Covenant on Civil and Political Rights* (Strasbourg: N.P. Engel, 1993), p. 131.

[8] *Cf. Republic of Ireland v. The United Kingdom* (1979-80) 2 E.H.R.R. 25, para. 172.

instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.'[9]

- Inhuman or cruel treatment: A treatment that 'cause[s] severe suffering, mental or physical, which, in the particular circumstances, is unjustifiable'.[10]
- Degrading treatment: A treatment that 'grossly humiliates [an individual] before others or drives him to act against his will or conscience.'[11]

It should be noted, however, that the distinction between these forms of ill-treatment is, as correctly observed by the HRC, irrelevant for the purposes of determining whether a violation of Article 7 has occurred or not. Thus, in order to engage Article 7, the alleged victim does not need to establish that the violation falls specifically within one of the three categories of prohibited treatment. Rather, it is sufficient to engage Article 7 by establishing that the suffering inflicted upon the alleged victim as a result of the alleged treatment that he/she has been subjected to reaches a minimum level of severity.[12] If the treatment passes the threshold test, the HRC will declare a violation of Article 7, without necessarily qualifying the ill-treatment as torture, or cruel, inhumane, or degrading treatment.[13]

5.1.1.2 The State's obligations under Article 7

Article 7 only prohibits ill-treatment without providing safeguards against such a treatment. However, the HRC's jurisprudence and the CAT impose on the State Party the duty to take certain steps to ensure the practical protection of Article 7, including, *inter alia*, the following:

- criminalising all forms of ill-treatment and assigning appropriate penalties for offences of ill-treatment.[14]
- informing its population of the prohibition of all forms of ill-treatment within the meaning of Article 7. The aim of this obligation is to allow individuals to

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[9] CAT, Art. 1(1).
[10] *Greek Case*, 12 YB 1 (1969), p. 186.
[11] *Ibid.*
[12] *Vuolanne v. Finland*, Communication No. 265/1987, U.N. Doc. Supp. No. 40 (A/44/40) at 311 (1989), para. 7.2. *Cf. Republic of Ireland v. The United Kingdom, supra* not 8, para. 162.
[13] *See* General Comment 20, *supra* note 1, para. 4. *See also* Nowak, *supra* note 7, pp.128-129.
[14] *Ibid.* para. 13. Article 4 in conjunction with Article 16(1) of the CAT adopts the same requirement but applies only to forms of ill-treatment which amount to torture, but not to acts which constitute inhuman or degrading treatment.

be aware of this fundamental right, which, consequently, enables them to challenge any practices that threaten to violate it.[15]

- Given that most acts of ill-treatment take place in detention, the State is obliged to put into place a system of safeguards to ensure that detention centres are not used for inflicting ill-treatment on detainees. In addition, the State must ensure that detention centres are free from any equipment or tools that are likely to be used for inflicting ill-treatment on detainees, and that detainees are not cut off from the outside world, by allowing them to be regularly visited by family members, lawyers, and physicians.[16]
- In order to discourage the use of ill-treatment as a means for obtaining confessions, the State is obliged to make confessions obtained through ill-treatment and in particular by torture, legally inadmissible as evidence in any judicial proceedings against the victim of the ill-treatment.[17]

5.1.2 The presumption of innocence and freedom from self-incrimination

According to Article 14(2) of the ICCPR, any person charged with a criminal offence within the meaning of Article 14 is entitled to be presumed innocent until proven otherwise according to law. The presumption of innocence implies that the accuser (*i.e.*, the State) bears the burden of proving the guilt of the accused according to law, and in the absence of such proof, the accused must be acquitted.[18] Given that the State bears the burden of establishing the guilt of the accused, the State cannot compel the accused to provide evidence against himself.[19] The freedom from self-incrimination is also explicitly guaranteed by Article 14(3)(g) of the ICCPR. The specific aim of the freedom from self-incrimination is to ensure that the accused is not compelled,

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[15] *Ibid.* para. 10. *Cf.* CAT, Art. 10 in conjunction with Art. 16(1).
[16] *Ibid.* para. 11.
[17] *Ibid.* para. 12. Also Article 15 in conjunction with Article 16(1) of the CAT adopts the same requirement but it applies only to confessions obtained by torture, but not to confessions obtained by inhuman or degrading treatment.
[18] Human Rights Committee, General Comment 13, Article 14 (Twenty-first session, 1984), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI\GEN\1\Rev.1 at 14 (1994), para. 7 [hereinafter General Comment 13].
[19] *Cf. Saunders v. United Kingdom* (1997) 23 E.H.R.R. 313, para. 68. *Cf. also* Cheney, D, *et al, Criminal Justice and the Human Rights Act 1998*, 2nd edn (Bristol: Jordans, 2001), p. 84.

physically or psychologically, to provide evidence against himself.[20] In addition, as a result of the recognition of the presumption of innocence and the freedom of self-incrimination, the accused is entitled in the face of the accusation presented against him to remain silent, which also cannot be held as evidence of guilt.[21]

5.1.3 Remedies

An alleged violation of Article 7 will trigger the State's duty to provide the alleged victim with an effective remedy. Providing an effective mechanism, by which complaints of ill-treatment are investigated, is considered indispensable for discharging the State's duty under Article 7 in conjunction with Article 2(3) (the right to an effective remedy) of the ICCPR. In order for the complaints mechanism to be considered effective, it must be administered by an independent and impartial authority. To meet the requirement of impartiality the investigating authority must be independent from the authority that allegedly violated an individual's Covenant right. Thus, in the view of the HRC, investigating violations of human rights allegedly committed by the police, by the police themselves does not provide an effective remedy within the meaning of Article 2(3).[22] With regard to the requirement of independence from the executive authority, the European Court held in *Khan v. UK*[23] that the English Police Complaints Authority lacked the required standards of independence to constitute an effective remedy within the meaning of Article 13 of the ECHR (Article 2(3) of the ICCPR). The European Court reached its conclusion by referring, in particular, to the fact that an executive body (the Home Secretary) can appoint, remunerate and dismiss members of the Police Complaints Authority; and that the Police Complaints Authority must pay due regard to the guidance issued to it by the Home Secretary regarding the withdrawal or preferring of disciplinary charges and criminal proceedings.[24]

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[20] *Singarasa v. Sri Lanka*, Communication No. 1033/2001, U.N. Doc. CCPR/C/81/D/1033/2001 (2004), para. 7.4. *Cf. Saunders v. United Kingdom*, *supra* note 19, para. 68.

[21] Concluding Observations of the Human Rights Committee, United Kingdom of Great Britain and Northern Ireland, U.N. Doc. CCPR/CO/73/UK (2001), para. 17. *Cf. Funke v. France* (1993) 16 E.H.R.R. 297, para. 44; *Saunders v. United Kingdom, supra* note 19, para. 69. *But see Murray v. United Kingdom* (1996) 22 E.H.R.R. 29; *Condron v. United Kingdom* (2001) 31 E.H.R.R. 1, in which the European Court held that, provided there are appropriate safeguards in place, drawing adverse inference from silence does not violate the right to a fair hearing under Article 6 of ECHR.

[22] Concluding Observations of the Human Rights Committee, Hong Kong, U.N. Doc. A/50/40, paras. 408-435 (1995), para. 11.

[23] (2001) 31 E.H.R.R. 45.

[24] *Ibid.* paras. 45-47.

Furthermore, for a system to meet the effectiveness requirement within the meaning of Article 2(3), it must confer on those individuals, who have been allegedly subjected to ill-treatment, the legal right to lodge a complaint to the competent authority. The competent authority is in turn required to investigate the complaint promptly, whenever there are reasonable grounds to believe that an act of ill-treatment has taken place. However, that does not mean that the victim needs to lodge a formal complaint against the alleged ill-treatment in order to trigger the State's duty to carry out an investigation into the alleged incident of ill-treatment. Rather, the State's duty is engaged once the alleged victim brings the facts of his treatment to the attention of the State authorities.[25] Failing to provide such a system constitutes, on its own, a violation of the right to an effective remedy under Article 2(3).[26] If the investigation of the alleged violation of Article 7 reveals that the allegations are well-founded, the persons responsible must be prosecuted, and, if found guilty, punished appropriately. Again, failure to do so constitutes, on its own, a violation of the right to an effective remedy.[27]

Finally, the victim of a violation of Article 7 must be granted appropriate redress, including compensation and rehabilitation.[28] Whether admitting evidence obtained through ill-treatment will violate the right to an effective remedy is unclear from the HRC's jurisprudence. However, as pointed out earlier, the State is obliged under Article 7 to make statements obtained by maltreatment legally inadmissible as evidence. Thus, admitting such statements will definitely violate Article 7. In addition, the HRC has stated explicitly that in order to protect the freedom from self-incrimination guaranteed under Article 14(3)(g) and the freedom from torture or cruel, inhumane or degrading treatment guaranteed under Article 7 of the ICCPR, the law should require evidence obtained through any form of compulsion, whether it amounted to a violation of Article 7 or not, to be excluded.[29] If the voluntariness of

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[25] *Cf. Abad v. Spain*, Communication No. 59/1996, U.N. Doc. CAT/C/20/D/59/1996 (1998) (CAT), paras. 8.6 & 9.

[26] Human Rights Committee, General Comment 31, Nature of the General Legal Obligation on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004), para. 15: General Comment 20, *supra* note 1, para. 14. *See also supra* para. 4.1.2. *Cf.* CAT, Arts. 12-13 in conjunction with Art. 16(1). *Cf. also Aksoy v. Turkey* (1997) 23 E.H.R.R. 553, paras. 97-98.

[27] *Ibid.* para. 18.

[28] General Comment 20, *supra* note 1, para. 14. *Cf.* ACT, Art 14 in conjunction with Article 16. *Cf. also Dzemajl et al. v. Yugoslavia*, Communication No. 161/2000, U.N. Doc. CAT/C/29/D/161/2000 (2002) (CAT), para. 9.6.

[29] General Comment 13, *supra* note 18, para. 14.

the confession is disputed by the accused, the State, according to the Committee, bears the burden of establishing that the incriminating evidence has been obtained voluntarily.[30]

B. Canada

5.2 Right against self-incrimination

The right against self-incrimination is protected in Canada through s. 12 of the Charter, which prohibits subjecting the accused to any cruel or unusual treatment; the privilege against self-incrimination, which is recognised under the common law; and the right to silence, which has been recognised as a principle of fundamental justice under section 7 of the Charter. The remedy for violating the right not to be subjected to ill-treatment or/and the principle against self-incrimination is represented in the exclusion of evidence under the common law voluntary confession rule, and the institution of disciplinary or criminal proceedings against the violator of the Charter right(s). These issues are treated separately in the following sections.

5.2.1 Right against ill-treatment

Section 12 of the Charter states that '[e]veryone has the right not to be subjected to any cruel and unusual treatment or punishment.' To the best of this writer's knowledge, in no case has section 12 been invoked by an accused to challenge the way in which he has been treated by the state authority in the context of the criminal justice system, or to have his confession excluded under s.24(2) of the Charter. In addition, under Section 269.1 of the Canadian Criminal Code torture constitutes a criminal offence punishable by imprisonment for a term not exceeding fourteen years.[31] According to Section 269.2 of the Criminal Code, torture is defined as:

> [A]ny act or omission [by an "official, or [any] person acting at the instigation of or with the consent or acquiescence of an official"[32]] by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person
> (a) for a purpose including
> (i) obtaining from the person or from a third person information or a statement,

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[30] *Singarasa v. Sri Lanka*, *supra* note 20, para. 7.4; Concluding Observations of the Human Rights Committee, Romania, U.N. Doc. CCPR/C/79/Add.111 (1999), para. 13.
[31] The discussion of torture under Canadian law draws upon Macdougall, D, 'Torture in Canadian Criminal Law', *C.R.*, (6th) 24 (2005), 74.
[32] Criminal Code, s. 269.1.

(ii) punishing the person for an act that the person or a third person has committed or is suspected of having committed, and
(iii) intimidating or coercing the person or a third person, or
(b) for any reason based on discrimination of any kind,
but does not include any act or omission arising only from, inherent in or incidental to lawful sanctions.

With regard to incriminating statements obtained under torture, Article 269(4) of the Criminal Code makes such statements 'inadmissible in evidence, except as evidence that the statement was so obtained.' It is also worth pointing out that other offences under the Criminal Code cover acts that might fail to engage Section 269 of the Criminal Code, such as assault, assault causing bodily harm, aggravated assault, murder, administering a noxious substance, extortion, and intimidation. The Canadian courts have not elaborated on the offence of torture because, as mentioned above, the courts have not faced cases in which a torture offence during the criminal proceedings has been allegedly committed.[33]

5.2.2 Privilege against self-incrimination & the right to silence

The privilege against self-incrimination is a common law rule that entitles the accused to the right not be compelled to testify against himself. This principle confers on the accused the right to remain silent, which was previously limited to the trial stage. However, since the introduction of the Charter and by virtue of section 7, the Supreme Court extended the right to remain silent to the pre-trial stage.[34] The leading authority on the right to silence in the Charter era is *Hebert*.[35] In this case, the Supreme Court considered the admissibility of incriminating statements made by an accused, who was in custody, to an undercover officer posing as a cell mate, subsequent to his refusal to answer the police questions regarding his alleged involvement in an armed robbery, as his counsel advised him. The Court unanimously held that the statements were obtained in violation of the right to silence enshrined in section 7 as a principle of fundamental justice, and, hence, decided the statements should be excluded under section 24(2) of the Charter.

With regard to the scope of the right to silence, the Court asserted that the essence of the right is to grant the accused the choice of whether to speak to the authorities or not as the right is not designed to shield the accused from the investigation, but is

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[33] Macdougall, *supra* note 31, p. 76.
[34] *R. v Hebert,* [1990] 2 S.C.R. 151; *R v. Broyles*, [1991] 3 S.C.R. 595.
[35] *Ibid.*

mainly concerned with preventing the authorities from compelling the accused to provide them with involuntarily statements, which are commonly damaging to their defence.[36] Therefore, the police must allow the accused to make an informed decision as to whether to exercise his right to silence or not, by allowing him to obtain legal assistance and by not tricking or forcing him to speak. As the Supreme Court stated:

> The Charter … seeks to ensure that the suspect is in a position to make an informed choice by giving him the right to counsel. The guarantee of the right to counsel in the Charter suggests that the suspect must have the right to choose whether to speak to the police or not, but it equally suggests that the test for whether that choice has been violated is essentially objective. Was the suspect accorded his or her right to consult counsel? By extension, was there other police conduct which effectively deprived the suspect of the right to choose to remain silent, thus negating the purpose of the right to counsel?[37]

In *R. v. Chambers*[38] the Supreme Court considered the proposition of modifying the right to silence by allowing an inference to be drawn from the silence of the accused in the face of police questioning. However, the Court rejected such a proposition and stated that it was 'a snare and a delusion' to inform the accused that he does not have to say anything when questioned, but nonetheless allow the fact that the accused exercised his right to silence to be put in evidence.[39]

5.2.3 Remedies

Under Canadian law, two forms of remedies are available to an individual, whose rights not to incriminate himself and/or not to be subjected to ill-treatment have been allegedly violated. These remedies, namely, are the exclusion of confession evidence that has been involuntary obtained, and to have the official responsible for the

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[36] *Ibid.* 175.
[37] *Ibid.* 177.
[38] [1990] 2 S.C.R. 1293.
[39] *Ibid.* 1317. The right to silence in the pre-trial stage in England was modified by the Criminal Justice and Public Order Act 1994. Section 34 allows a jury or magistrate to draw inference as appears proper from the accused's failure to mention, when questioned by the police, a fact relied upon in his defence, if the fact is one, in the light of the circumstances of the case, which the accused could be reasonably expected to mention. In addition, ss. 36 and 37 allow respectively an adverse inference to be drawn from the accused failure to give an explanation for objects, substances, or mark on him or in his possession or at the place where he was arrested, or from his failure to explain his presence at a particular place. This modification has been tightened by the fact that the European Court held that an adverse inference should not be drawn before the accused is given an opportunity to obtain legal advice, which led to the amendments of ss. 34, 36 and 37 by the virtue of s. 58 the Youth Justice and Criminal Evidence Act 1999, in order to comply with the Convention's requirement. For a discussion of the modification of the right to silence under the English law and its implications under the ECHR, *see* Cheney, *supra* note 19, para. 3.7; Sanders, A & Young, R, *Criminal Justice*, 2nd edn (London: Butterworths, 2000), p. 251.

violation(s) to be subjected to disciplinary or criminal proceedings. These forms of remedies are discussed next.

5.2.3.1 The voluntary confession rule

The confession rule in its current state, according to the Supreme Court in *Oickle,*[40] is concerned mainly with voluntariness, and therefore in cases where it is found that the confession is involuntarily supplied, the confession will be consequently ruled inadmissible.[41] In addition, it was stated that the objective of the confession rule is to strike an appropriate balance between, on the one hand, the interest of the accused not to make involuntary incriminating statements against himself, and, on the other hand, the interest of the public in investigating and solving crimes.[42]

Furthermore, the Court held, contrary to its previous holding in *Hebert*,[43] that the voluntary confession rule is a matter of common law rule, and, therefore, it is not based upon the Charter rights including the right to silence and the privilege against self-incrimination. This approach, as pointed out by the Court, has certain advantages for the accused including the application of the rule whenever the accused is questioned by a person in authority, as opposed to the Charter's requirements, which only come into play under, for example, ss. 7 and 10, when the accused has been deprived of his liberty by an arrest or detention. In addition, as a common law rule, the voluntary confession rule requires the Crown to establish the voluntariness of the confession beyond reasonable doubt, in contrast to the Charter which requires the individual, in order to obtain a remedy under s. 24 of the Charter, to establish on the balance of probabilities that his Charter right has been infringed. Finally, a violation of the confession rule will always result in the confession being excluded, while evidence coming under s.24(2) of the Charter will only be excluded if the Court concludes that the admission of evidence would bring the administration of justice into disrepute.[44]

The Court identified four categories for the purposes of the voluntary confession rule: threats or promises, oppression, operating mind and 'other police trickery'. In determining whether the confession was voluntary or not in the first three categories, the determinative factor is the impact that these factors actually had on the will of the

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[40] [2000] 2 S.C. R. 3.
[41] *Ibid.* p. 31.
[42] *Ibid.* p. 26.
[43] *Supra* note 34.
[44] *Oickle*, *supra* note 40, 24-25.

accused. The Court has stressed that any confession obtained by threats or promises, will lead automatically to the exclusion of such a confession. However, the use of the so-called moral or spiritual inducement is distinct as the police officer does not possess control over the suggested benefit, and therefore, if such inducement led the accused to confess, this confession cannot be contended to be involuntary.[45]

Oppression could also lead the accused to confess, not because he wants to do so, but mainly to escape the aggressive atmosphere in which he is being questioned. Depriving a suspect from contacting the outside world for a long time without reasonable justification, denying him access to counsel, depriving him of food, sanitation, and sleep, and questioning him for endless hours are all factors that could amount to oppression, and which could render the confession involuntary and consequently inadmissible as evidence.[46] Regarding the requirement of the possession of an operating mind, the Court adopted the criteria suggested in *Whittle,*[47] which require the accused, in order for his confession to meet the voluntariness requirement, to possess the 'knowledge of what [he] is saying and that he is saying it to police officers who can use it to his detriment.'[48]

In the case of the police trickery category, the overriding concern, according to the Court, is the integrity of the administration of justice, and therefore, the test of whether the evidence should be excluded or not will depend on the court's assessment of whether the admission of the evidence will bring the administration of justice into disrepute. Regarding the test upon which the administration of justice would be determined to have been brought into disrepute or not by the admission of evidence obtained through police tricks, the Court adopted the approach suggested by Lamer J. as he then was, in *Rothman*,[49] which is whether the trick is such as to shock the community.[50] Therefore, if the tactics used by the police are likely to shock the community, the confession must be excluded.[51]

The Court stressed the importance of videotaping police interviews as a means for minimising the occurrence of miscarriages of justice based upon involuntary confessions. Videotaping police interviews could discourage the police from adopting

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[45] *Ibid.* pp. 36-37.
[46] *Ibid.* pp. 38-39.
[47] [1994] 2 S.C.R 914, 936.
[48] *Ibid.* 936.
[49] [1981] 1 S.C.R. 640.
[50] *Ibid.* p. 697.
[51] *Oickle, supra* note 40, 41-42.

illegal means of obtaining an involuntary confession, and allow the courts to supervise police practices. In addition, it could also protect police officers from allegations of misconduct made by the accused against them. Despite accepting the benefits of videotaping, the Court declined to hold non-recorded confessions inadmissible as evidence.[52] It should be noted though that provisional courts are heading towards requiring the electronic recording of confession evidence as a prerequisite for its admission.[53] In addition, it is the standard practice followed by police forces around Canada to videotape statements made by the accused in the police station, at least in serious offences.[54]

5.2.3.2 Complaints against the police

The police in Canada are organised on a provincial and federal basis. Here only the complaint mechanism against the provincial police in Ontario will be presented, in order to illustrate how complaints against the police in Canada are dealt with. There are two different mechanisms under the Ontario Police Services Act 1990 (PSA),[55] as amended by Bill 105,[56] which deal with complaints against the conduct of police officers, depending on the nature of the alleged misconduct. The first mechanism deals with complaints relating to an alleged misconduct committed by a police officer in violation of the Ontario Police Code of Conduct, while the second mechanism deals with complaints that relate to criminal offences allegedly committed by police officers and which resulted in 'serious injuries' or death. These two mechanisms are discussed next.

5.2.3.2.1 Disciplinary misconduct

Complaints against the alleged misconduct of police officers are investigated by the municipal chief of police,[57] under the oversight of the Ontario Civilian Commission on Police Services (OCCPS). The OCCPS is an arm's length, quasi-judicial agency of

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[52] *Ibid.* 30-31.

[53] The Ontario Court of Appeal in *R. v. Ahmed*, Ont. C. A. (2002), para. 14, stated the following:

> Although the most recent case law from the Supreme Court of Canada in *R. v. Oickle* (2000), ... and from this court in *Moore-McFarlane* has stated that it is not necessarily fatal if the police do not record a confession, recording is not only the better practice, but in most circumstances, the failure to record will render the confession suspect.

[54] FPT Heads of Prosecution Committee, *Report of the Working Group on the Prevention of Miscarriages of Justice* (2004), pp. 68-71, *available at* <http://canada.justice.gc.ca/en/dept/pub/hop/toc.html> (last visited Jan. 2, 2006).

[55] R.S.O. 1990, c. P.15 [hereinafter PSA].

[56] An Act to renew the partnership between the Province, Municipalities and the Police and to enhance community safety, S.O. 1997, c.8.

[57] PSA, s. 60(4).

the Ministry of Community Safety and Correctional Services.[58] Members of the OCCPS are appointed by the Lieutenant Governor in Council.[59] In addition to its review role during the complaints process, as discussed below, the OCCPS, *inter alia*, is empowered, on its own motion, 'to investigate, inquire into and report on the conduct ... of a police officer, a municipal chief of police, an auxiliary member of a police force, a special constable, a municipal law enforcement officer or a member of a board.'[60] Furthermore, the OCCPS is empowered under s. 73(1) of PSA on its own motion and at any stage in the complaints process 'to direct a chief of police ... to process a complaint as it specifies or assign the review or investigation of a complaint or the conduct of a hearing in respect of a complaint to a police force other than the police force in respect of which the complaint is made.'

Any member of the public is entitled to make a complaint about the conduct of a police officer.[61] A complaint can be delivered to the station or the detachment of the police force, to which the complaint relates, or to the OCCPS, personally by the complainant or his/her representative, or via mail, or telephone transmission of a facsimile.[62] If the complaint has been made to the OCCPS, the complaint must be referred to the chief of the police force to which the complaint relates.[63]

The chief of police on receiving a complaint has to determine within thirty days from receiving the complaint,[64] the nature of the complaint, that is to say whether it relates to the policies and the services of the police force, or to the conduct of a police officer.[65] If he determines that the complaint relates to the conduct of a police officer, he shall set up an investigation into the complaint and the investigation is to be reported in a written report.[66] If, however, the chief declines to investigate the complaint because it relates to the policies or services of the force; the complaint is unsubstantiated; the complaint is frivolous, vexatious or made in bad faith; the

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[58] Ontario Civilian Commission on Police Services, *Annual Report 2004* (Toronto: Ontario Civilian Commission on Police Services, 2005), p. 5, *available at* <http://www.occps.ca> (last visited Jan. 2, 2006).
[59] PSA, s. 21(2).
[60] *Ibid.* s. 25(1)(a). The Commission, according to s. 25(1)(c) of the PSA, 'shall communicate its report of an investigation ... to the Solicitor General at his or her request and to the board or council at its request, and may communicate the report to any other person as the Commission considers advisable.'
[61] *Ibid.* s. 56(1).
[62] *Ibid.* s. 57(2).
[63] *Ibid.* s. 57(4).
[64] *Ibid.* s. 59(2).
[65] *Ibid.* s. 59(1).
[66] *Ibid.* s. 64(1).

complaint was made six months after the alleged conduct had occurred; or because the complainant was not directly affected by the alleged conduct, the chief must notify the complainant of his decision, and his right to appeal to the OCCPS within thirty days of being notified of the chief's decision.[67]

If the complainant appeals against the chief's decision to the OCCPS, the OCCPS shall 'endeavour to complete its review', without conducting a hearing, within thirty days of receiving the appeal.[68] The OCCPS, upon the completion of its review, 'may confirm the decision [of the chief of police] or may direct [him/her] ..., to process the complaint as it specifies or may assign the review or investigation of the complaint or the conduct of a hearing in respect of the complaint to a police force other than the police force in respect of which the complaint is made.'[69] The decision of the OCCPS on this matter is final and binding.[70]

If the chief, at any time before or during an investigation into a complaint, considers the conduct complained of not to be of a serious nature, the chief has the discretion to resolve the complaint informally, if the parties to the complaint consent to the proposed resolution.[71] However, if an informal resolution has been attempted but failed, the chief of police is empowered to impose the penalty of forfeiture of not more than three days pay on the officer in question, without holding a hearing into the complaint, if the police officer accepts the proposed penalty. If the police officer in question does not consent to such a resolution, a hearing into the complaint must be held.[72] If the complainant does not agree with the chief's determination that the conduct is not of a serious nature, he is entitled to appeal to the OCCPS.[73]

On the other hand, if the chief, at the conclusion of the investigation and after reviewing the written report submitted to him, concludes that the police officer may have committed a misconduct, he shall hold a hearing into the matter.[74] The chief of police may conduct the hearing himself, or may authorise a police officer, a former police officer of the rank of inspector or higher, a judge, or a former judge who has

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[67] *Ibid.* ss. 59(2),(3),(4),(5),(6),(7); 72(1),(2)(3),(4),(5).
[68] *Ibid.* s. 72(7).
[69] *Ibid.* s. 72(8)
[70] *Ibid.* s. 72(12)
[71] *Ibid.* s. 58(1).
[72] *Ibid.* s. 64(15 (1),(2),(3)).
[73] *Ibid.* s. 72(5). The appeal will be reviewed in the same manner as the appeal against the chief's of the police decision not to investigate a complaint, as discussed above, is reviewed.
[74] *Ibid.* s. 64(7).

retired from office, to conduct the hearing.[75] The parties to the hearing are, the prosecutor, (who is a police officer of a rank equal to or higher than that of the police officer subject to the hearing, a legal counsel or an agent), appointed by the chief, the police officer under investigation, and the complainant.[76] The parties to the hearing must be given reasonable notice of the hearing, and each party is entitled to be represented by a counsel or an agent in the hearing.[77] Parties to the hearing must be given an opportunity to examine evidence and reports before the hearing.[78] The oral evidence given at the hearing must be recorded.[79] If, at the conclusion of the hearing, the chief determines that a misconduct or unsatisfactory work performance is proved on clear and convincing evidence, the chief can impose on the police officer subject to the complaint any of the following penalties:

> (a) dismiss the police officer from the police force;
> (b) direct that the police officer be dismissed in seven days unless he or she resigns before that time;
> (c) demote the police officer, specifying the manner and period of the demotion;
> (d) suspend the police officer without pay for a period not exceeding 30 days or 240 hours, as the case may be;
> (e) direct that the police officer forfeit not more than three days or 24 hours pay, as the case may be; or
> (f) direct that the police officer forfeit not more than 20 days or 160 hours off, as the case may be.[80]

A police officer is guilty of misconduct if he, *inter alia*:[81]

- used profane, abusive or insulting language that relates to a person's race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, family status or handicap;
- is found guilty of an indictable criminal offence or a criminal offence punishable upon summary conviction,
- without good and sufficient cause, makes an unlawful or unnecessary arrest, or
- uses any unnecessary force against a prisoner or other person contacted in the execution of duty.[82]

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[75] *Ibid.* s. 76(1)
[76] *Ibid.* ss. 64(8), 69(3).
[77] *Ibid.* s. 69(4).
[78] *Ibid.* s. 69(5),(6).
[79] *Ibid.* s. 69(11).
[80] *Ibid.* s. 68(1).
[81] *Ibid.* s. 74(1)(a).
[82] Code of Conduct, O. Reg. 123/98, s. 2 (1)(ii), 2(1)(ix), 2(1)(g).

The decision of the chief regarding the finding of misconduct or unsatisfactory work performance, or otherwise, can be appealed against to the OCCPS by either the complainant or the police officer subject to the complaint within thirty days of receiving notice of the chief's decision after the hearing.[83] If an appeal has been made, the OCCPS shall conduct a hearing into the appeal. The OCCPS after conducting the hearing, 'may confirm, vary or revoke the decision being appealed or may substitute its own decision for that of the chief ....'[84] An appeal against the decision of the OCCPS can be made in the Divisional Court, within thirty days of receiving the notice of the OCCPS's decision.[85]

5.2.3.2.2 Criminal offences resulting in 'serious injuries' or death

The Special Investigations Unit (SIU), established under the PSA, is responsible for investigating criminal offences, which are allegedly committed by police officers, and which resulted in 'serious injuries' or the death of a citizen.[86] The SIU consists of a director, who is a civilian appointed by the Lieutenant Governor in Council on the recommendation of the Solicitor General, and investigators, who cannot be serving police officers.[87] The SIU has the jurisdiction to investigate, on its own motion, any alleged criminal offences committed by a police officer, which result in 'serious injuries' or death.

According to Mr. Justice Osler, the first director of the SIU, 'serious injuries' within the meaning of the PSA, include:

> [T]hose [injuries] that are likely to interfere with the health or comfort of the victim and are more than merely transient or trifling in nature and will include serious injury resulting from sexual assault. "Serious injury" shall initially be presumed when the victim is admitted to hospital, suffers a fracture to a limb, rib or vertebrae or to the skull, suffers burns to a major portion of the body or loses any portion of the body or suffers loss of vision or hearing, or alleges sexual assault. Where a prolonged delay is likely before the seriousness of the injury can be assessed, the Unit should be notified so that it can monitor the situation and decide its involvement.[88]

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[83] PSA. s. 70(1),(2),(3).
[84] *Ibid.* s. 70(6)
[85] *Ibid.* s. 71(1). For further discussion of the police complaints system, *see* Lesage, P, *Report on the Police Complaint System in Ontario* (Toronto: Ministry of the Attorney General, 2005), *available at* <http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs>(last visited Jan. 2, 2006).
[86] *Ibid.* s. 113(1),(5)
[87] *Ibid.* s. 113(2),(3).
[88] As quoted in Adams, G, *Review Report on the Special Investigations Unit Reforms Prepared for the Attorney General of Ontario* (Toronto: Ministry of the Attorney General, 2003), p. 32 [hereinafter

Chiefs of the police forces, where they reasonably believe that an offence has been committed by a police officer and has resulted in 'serious injuries' or death, are required to report such an incident to the SIU.[89] Members of the police forces are required to 'co-operate fully with the members of the [SIU] in the conducting of investigations.'[90] The director of the SIU, if he has reasonable grounds to do so, may lay criminal charges, which are to be prosecuted in criminal courts, against any officer who is allegedly involved in the incident being investigated.[91]

C. Saudi Arabia

5.3 Right against self-incrimination

Prior to the introduction of the CCP, the use of coercion in order obtain confession evidence from suspected criminals was permitted under the Saudi criminal procedure if permission to use coercion was obtained from the Ministry of Interior. A Directive from the Minster of Interior stated the following:

> We have received information that officers from the Police, the Anti-Drug Police Department and Customs, extract confessions from suspects through torture by hitting them by canes and electric cables *without obtaining a permission from us* or showing the suspect to a doctor beforehand as [our] instructions dictate, which makes innocent suspects confess to what they had been accused of because of the physical pain that they are suffering; that suspects are being threatened when they are sent to courts in order to confirm their confessions not to refuse to do so, otherwise they would be beaten up again; and degrading them by these methods. In order to investigate these allegations, a committee has been established ..., which confirmed the existence of these practices.
> We inform you that the instructions and the orders from the higher authority stress that harshness cannot not be used against suspects, and according to the decision of the Supreme Judicial Council No. 18 in 6/1/1396 [18 January 1976] that [the use of harshness] is inconsistent with what [true] Muslim should be like, who has mercy on his fellow brothers even if they had been convicted of committing crimes.... Even if the accused confesses under torture, such a confession is inadmissible in

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Review Report], *available at* <http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs>(last visited Jan. 2, 2006).

[89] *Ibid.* p. 31.

[90] PSA. s. 113(9).

[91] *Ibid.* s. 113(7). For further discussion of the SIU, *see* Landau, T, 'Back to the Future: The Death of Civilian Review of Public Complaints Against the Police in Ontario, Canada', in *Civilian Oversight of Policing: Governance, Democracy, and Human Rights*, ed. by L Goldsmith and C Lewis, (Oxford: Hart Publishing, 2000), 77-78.

> courts and cannot form the basis for judicial decisions. Hence, obtaining confessions from suspects should be done by conducting thorough investigation, confronting the accused with the evidence against him, and complying with what has been mentioned above ... anyone who violates these instructions will be punished severely.[92]

In addition, a Prime Ministerial Order stated that 'confessions must not be obtained by the use of torture, because torture makes the suspect confess even if he did not commit the crime that he is accused of. [Confessions should be obtained through] conducting a thorough investigation, and if the need arise to [torture the accused in order to make him confess], *it must not be done without our permission*. We have noticed in many cases that torture have been used to force the accused to confess and that is impermissible, *except if permission from us has been obtained*....'[93]

The use of torture on the basis of permission from the higher authority under the previous criminal procedure was based upon the minority Muslim scholars' opinion, discussed in Chapter three, which permits the use of torture where there is circumstantial evidence against the accused indicating that he has committed the offence of which he is accused, and that the accused is considered to be immoral (*i.e.*, a persistent criminal).[94] This can be seen from what the Handbook of Criminal Procedure[95] stated in this respect:

> Although the jurists of the Islamic *Shari'ah* permit inflicting on the accused some harshness to make him speak the truth, as al-Mawardi in *al-Ahkam* al-*Sultaniah*, Ibn Taymiyya in *al-Siyasa al-Shar'iyya*, and Ibn al-Qayyim in *al-Turuq al-Hukmiyya* make clear, nonetheless the Ministry [of the Interior] takes care that none of this occurs without its permission, an exhaustive study of the matter by the specialists of the Ministry, existence of proofs and strong circumstantial evidence of the truth of the accusation, and the accusation being one of major crime like murder, theft, brigandage, rape, abduction, and drug-dealing.[96]

However, since the introduction of the CCP, the use of coercion for any purpose is prohibited by virtue of Article 2 of the CCP, which states, *inter alia*, that '[a]n arrested person shall not be subjected to any bodily or moral harm. Similarly, he shall not be

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[92] Directive of the Minister of Interior No. 16/10708 (2 August 1989).
[93] Prime Ministerial Order No. 4/5716 (15 January 1986).
[94] *See supra* para. 3.3.
[95] Issued by the Ministry of Interior in 1980. It should be noted that the Handbook is not a statute, but rather collection of Council of Ministers Orders, Ministerial Order and directives that were collected in one dossier for easy reference.
[96] *Ibid.* p. 64. The translation is from Vogel, F, *Islamic Law and Legal System: Studies of Saudi Arabia* (Boston: Brill, 2000), p. 239.

subjected to any torture or degrading treatment.' In addition, Article 102 of the CCP states that '[t]he 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 ... subjected to any coercive measures.'

It should be noted here that the use of coercion to obtain confession evidence prior to the introduction of the CCP was, as a general rule prohibited, as can be seen from above quoted directives. This is supported by the fact that torture was and still is criminalised under Article 2(8) of the Royal Decree No. 43 (1958). Article 2(8) states that '[a]nyone who mistreats [the public], abuses their official powers by torturing ..., violating personal liberties ...' is guilty of a criminal offence and liable to imprisonment for a term not exceeding ten years, or a maximum fine of twenty thousands riyals (approximately £3000). Thus, the effect of the CCP with regard to the use of coercion for the purposes of obtaining confession evidence is to extend the prohibition of coercion to those situations where torture could be used with the permission of the Ministry of Interior.

Nonetheless, even after the introduction of the CCP, in practice there are still widespread allegations of torture. Almost in every case where a confession is used as evidence against the defendant, the defendant alleges that he had been subjected to torture in order to make him confess. How many of these allegations are true cannot be verified. However, the above quoted directives indicate that the phenomenon of using torture for the purposes of obtaining confessions, even without the permission of the Ministry of Interior, was very widespread prior to the introduction of the CCP. Thus, the question arises whether the phenomenon of coercing the accused to confess still exists even after the introduction of the CCP.

The present researcher during his two visits to the Anti-Drug Police Department saw a tool, which, in the form it was, could be used only for beating suspects. In the first visit, there was what Saudis call an *iqal*, which is made of rubber (although it is mainly designed as an item of menswear, it is commonly used by Saudis during fights, or by fathers to discipline their children), on the chair next to the one that the investigator was sitting on during his interrogation of two suspects.[97] In the second visit, an *iqal* was on the floor of the hallway leading to the interrogation rooms.[98] The

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[97] Observation, interrogation by Investigator Anonymous, H. R. [Pseudonym.], Anti-Drug Police Department, Riyadh (June. 14, 2004).
[98] Observation, Anti-Drug Police Department, Riyadh (Aug. 18, 2004).

existence of an instrument of beating in an interrogation room and in plain view, where suspects are being interrogated, suggests that suspects, who are held in the Detention Centre of the Anti-Drug Police Department, are routinely beaten at the discretion of the investigator in order to make them confess.[99]

It is noteworthy that the present researcher has observed a number of interrogations that have been conducted in the building of the IPPC Branch in Riyadh, and, although during one of them some intimidating tactics (*e.g.*, threats and pushing) were used,[100] in no interrogation was the suspect beaten by the investigator.[101] This could be due to, *inter alia*, the fact that it is almost impossible for an investigator to beat a suspect in the building of the IPPC without other people in the building, including police officers, investigators, and members of the public, finding out as a result of the accused screaming or their seeing some marks on the accused after he leaves the interrogation room, which indicate that he was beaten during the interrogation.

Under Article 102 of the CCP, the accused must not be interrogated outside the relevant IPPC Branch, except where the investigator considers it necessary to do otherwise. However, in practice interrogations are routinely conducted in police stations, whether it is necessary or not, which gives the investigator the "perfect" opportunity to do whatever he wants to the accused without the fear of being found out. This is because police officers are subordinate to IPPC members, and sometimes they enjoy a friendly relationship, which would prevent or deter a police officer from reporting any incidents of ill-treatment that have allegedly taken place. In one incident, which took place at the Rudah Police Station in Riyadh, the investigator had DNA evidence against a suspect, who was accused of having forcible sodomy with a minor. Nonetheless, the accused denied the accusation against him. The investigator went to interrogate the accused in the police station, and, although the investigator claims that he only slapped him lightly on the face,[102] according to the accused, he was severely beaten in order to make him confess. Subsequently, the accused drank a

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[99] *See also* Case No 1, *infra* note 118 and accompanying text.

[100] Observation, interrogation by Investigator Anonymous, A. U. [Pseudonym.], Investigation and Public Prosecution Commission Branch, Riyadh (May. 31, 2004).

[101] Observation, interrogation by Investigator Hassen Al-Asaker, Investigation and Public Prosecution Commission Branch, Crimes Against Honour Division, Riyadh (June. 4, 2004); Observation, interrogation by Investigator Abdullah Al-Muqbel, Investigation and Public Prosecution Commission Branch, Drug Crimes Division, Riyadh (Jun. 16, 2004).

[102] Interview with Investigator Anonymous, A. S. [Pseudonym.], Investigation and Public Prosecution Commission Branch, Riyadh (Oct. 5, 2004).

shampoo in order to be taken hospital to escape being interrogated, and possibly being beaten again.[103] The allegation of beating in this case has never been investigated, and the accused was charged additionally with attempting to commit suicide, which is prohibited under Islamic law.[104]

The question that these practices raise is whether there is a mechanism by which such incidents could be uncovered and properly investigated? This issue will be addressed later.[105]

5.3.1 Remedies

There are two forms of remedy that an individual, whose right not to incriminate himself has been allegedly violated, can pursue: the exclusion of an involuntary obtained confession, and/or to have the official responsible for the violation subjected to disciplinary or criminal proceedings. These forms of remedy are discussed next.

5.3.1.1 Exclusion of involuntary confessions

The Saudi written law does not contain any provisions that deal with the admissibility of confessions obtained against the will of the accused. The only provision in the CCP that deals with confession evidence is contained in Article 162. It states that '[i]f the accused at any time confesses to the offence with which he is charged, the court shall hear his statement in detail and examine him. If the court is satisfied that the confession is genuine and sees no need for further evidence, it shall take no further action and decide the case. The court shall complete the investigation if it is necessary.' However, Article 162 says nothing about confessions that have been, allegedly, obtained against the will of the accused.

Nonetheless, under Islamic jurisprudence (*fiqh*), by which the Saudi courts are bound,[106] the issue of involuntary confessions is fully dealt with. As discussed in Chapter three, there are two opinions regarding the use of coercive means, including torture, to obtain confessions. According to the majority of Muslim scholars, it is

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[103] I learned of this incident during an interview with Waleed Aoun (Sep. 29, 2004), *infra* ch. 7 note 185, who was kept in the same detention centre as the accused in this incident.
[104] Interview with Investigator Anonymous, A. S., *supra* note 102.
[105] *See infra* para. 5.3.1.2.
[106] *See supra* para.1.1.

impermissible to coerce the accused to make incriminating evidence against himself, and, hence, involuntary confessions are inadmissible as evidence.[107]

In practice, the issue of whether a given confession has been voluntarily supplied by the accused or not for the purposes of determining the admissibility of such a confession, will depend almost exclusively on whether the confession has been judicially confirmed or not. In practice, there is a mechanism known as the 'judicial confirmation of confessions'. The confirmation mechanism is designed to ensure that 'criminals who confess during the police investigation are usually in despair, which helps to extract confessions from them. They are likely to retract their confessions if they are given time to think about the consequences of their confessions.'[108] 'Thus, the confirmation of confessions must be carried out during and after regular hours.'[109]

The confirmation mechanism involves the verification of the identity of the accused, the voluntariness of the confession, and the content of the confession. Under the confirmation mechanism, when an accused person allegedly makes a confession, he is referred to a *qadi*, or three *qadis*, depending on the seriousness of the offence,[110] along with the confession record that has been prepared by a police officer, investigator or an investigation clerk, as the case may be, and has been signed by the accused, in order to confirm his confession.

Once the accused is in court, he is taken to the confessions office (*mukitb al-iqrarat*), where his handcuffs are taken off, and the statement that the accused has allegedly made regarding his involvement in the alleged crime is read out to him by the court clerk.[111] Police officers are not supposed to enter the confessions office, and there is a sign on the office door, signed by the President of the Court, which reads: 'No police officer may enter the room or stand by the door'. If the accused does not understand Arabic, a translator will be present during the confirmation process to

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[107] *See supra* para. 3.3. *See also* Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Initial report of State parties due in 1998: Saudi Arabia*, CAT/C/42/Add.2 (2001), para. 44, *available at* <http://www.unhchr.ch/tbs/doc.nsf> (last visited Jan. 2, 2006).

[108] Council of Minister Order No. 14060 (10 January 1963).

[109] Directive of the Minister of Justice No. 3/3222 (15 March 1963). This directive was based on the Council of Minister Order No. 14060, *supra* note 108.

[110] A confession which relates to an offence the punishment of which is amputation, stoning or death, must be confirmed by three *qadis*. Directive of the Minister of Justice No. 45/12/T (12 March 1980).

[111] The account of the confirmation process presented here is based upon a two-days observation at the Summary Court, Riyadh (Sep. 14-15, 2004); interview with *Qadi* Saleh Al-AlShiek, President of the Summary Court, Riyadh (Sep. 14, 2004); interview with *Qadi* Tameem Al-Aunizan, Summary Court, Riyadh (July. 11-12, 2004); and informal conversations with the court clerks involved in the confirmation process.

explain the content of the confession to the accused before he is asked whether he wants to confirm his confession or not.

If the accused states that he gave the confession voluntarily, a summary of the content of the confession will be recorded in the court register, and the accused, along with the confession record and the court register, will be referred to the President of the Court in order to confirm the confession. When the accused appears before the President of the Court, he will be asked again as to whether the confession was voluntarily supplied or not.[112] If the accused states that the confession is voluntary, the President will print his signature, indicating that the confession has been confirmed on both the confession record and the court register. If, however, the accused states that the confession is not voluntary, the President of the Court will refrain from confirming the confession, and the refusal of the accused to confirm his confession will be indicated in both the confession record and the court register.

On the other hand, if the accused in the confessions office states that he has been mistreated in order to make him confess, the confession record along with the court register will be referred to the President of the Court without the accused, where the President of the Court will print his signature on the confession record and the court register, and states that the accused refused to confirm his confession. In this case, even where there are apparent indications on the accused that he has been mistreated, the relevant court clerk, although he may advise the accused to meet with the President of the Court in order to make a complaint against the ill-treatment to which he had been allegedly subjected by the investigation authority, does not have the authority to allow the accused to appear before the President of the Court. The President of the Court will request the competent authority (*i.e.*, the provincial governor's office) to investigate the alleged ill-treatment of the accused, only if the accused is brought to the court three times in order to confirm his confession, and he refuses to do so on the three occasions on the basis that he has been coerced in order to confess.

It is worth mentioning here an incident, in which the accused had been reluctant to confirm the contents of his confession before the court clerk. The police officer, who was accompanying the accused from the police station, and was present in the

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[112] It is worth mentioning, however, that in one incident, which has been observed by the present researcher, the President of the Court merely verified the identity of the accused, without asking him about the voluntariness of the confession.

confessions office during the whole confirmation process, although, on the order of the President of the Court, he should not have been there, said to the accused 'you will be taken to the station, beaten, and then you will come back here to confirm your confession'. The court clerk did nothing regarding the officer's remark, except point out to the officer that the present researcher, who was present in the confessions office at the time, was a researcher observing how confessions are confirmed in practice. Eventually, the accused confirmed his confession, and the confession was consequently confirmed by the President of the Court.

Where the accused confirms his confession before the *qadi*(s), and the confession is consequently judicially confirmed, the probative value and the voluntariness of the confession become almost indisputable at the trial stage, as will be shown below. The logic behind this is that the accused has been given the opportunity to retract his confession during the confirmation stage, but has confirmed his confession.[113] Therefore, the retraction of confessions at the trial stage is seen as a tactical defence by the defendant to avert justice, and, hence, *qadis* pay little attention to allegations of mistreatment, which aim at the exclusion of a judicially confirmed confession. In addition, where a confession has been judicially confirmed, the burden of establishing the voluntariness or otherwise of the confession shifts from the prosecution to the (unrepresented) defendant.

On the other hand, if the confession is not judicially confirmed, its probative value is very limited, as the investigative procedures are, judicially, perceived to be tainted with the suspicion that coercive measures might have been employed in order to force the accused to confess to a crime that he did not commit. Thus, the accused will be acquitted without the need to establish the fact of coercion; if the confession is not judicially confirmed, its voluntariness is disputed by the defendant and independent evidence pointing to the guilt of the accused is absent.[114]

Although there are no official statistics regarding the number of cases in which convictions are based solely or partly on confession evidence, according to one *Qadi*, convictions based on confession evidence account for around ninety percent of all convictions.[115] There seems to be two reasons to explain the heavy reliance on confession evidence as a means for securing convictions in Saudi Arabia. The first

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[113] Interview with *Qadi* Tameem Al-Aunizan, *supra* note 111. *See also* Vogel, *supra* note 96, p. 238.
[114] *Ibid.*
[115] Interview with *Qadi* Muhammad Al Jaarallah, General Court, Riyadh (Aug. 2-3, 2004)

reason is that investigators believe that *qadis* have a strong faith in the reliability of confession evidence. Hence, investigators focus primarily on obtaining a confession from the suspect as the main means for establishing their case against that suspect.[116] The second reason, which is highly relevant to the first, is that when a confession has been obtained and has been judicially confirmed, the prosecution at the trial stage does not need to do anything beyond presenting the confession evidence to the court, which will most likely convict the accused on the basis of such a confession.[117]

It is appropriate here to present three cases in which confessions that had been judicially confirmed were retracted by the defendants during their trial. These cases will, it is hoped, shed more light on *qadis*' attitude towards confession evidence obtained allegedly by coercion. In the three cases, a summary of the facts of the case, the dispute between the defendant and the prosecution regarding the voluntariness of the confessions, and the ruling of the court on the disputed confession and the reasons for them will be provided.

Case No 1:[118]

This case concerns two Pakistani defendants, who were charged with drug trafficking. The two defendants were caught red-handed by the police selling a large quantity of hash (153, 750 Kg) to a police informer. In addition to the drug-trafficking charge, the second defendant was also charged with smuggling drugs from Pakistan to Saudi Arabia with the assistance of his brother in Pakistan. Only the facts relating to the second defendant concern the subject under discussion.

With regard to the drug-trafficking charge, the evidence presented against the second defendant was the testimony of two police officers from the arresting squad, who witnessed the second defendant, along with the first one, handing the drugs to the police informer, and receiving the money from him (180,000 Saudi riyal) before the two defendants were arrested. Regarding the drug-smuggling charge, the evidence presented against the second defendant was his confession, which had been confirmed by three *qadis*. During the trial, however, the defendant retracted his confession on the basis that it was obtained by torture, claiming the investigators threatened to cut

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[116] Interview with Investigator Abdullah Al-Muqbel, Investigation and Public Prosecution Commission Branch, Drug Crimes Division, Riyadh (Jun. 29, 2004).
[117] Interview with *Qadi* Tameem Al-Aunizan, *supra* note 111.
[118] General Court in Riyadh, *Qadi* Saleh Al-Aujri, court record (criminal) No. 34 (1424 H, 2004 A. D), (May. 15, 2004).

off his tongue if he did not confirm his confession before the confirming *qadis*. When he was asked to provide evidence that he had been tortured, he did not provide any evidence. The Court found the accused guilty on all counts, and sentenced him to death, because his crimes constituted the *ta'zir* offence of spreading corruption on earth within the meaning of the *Qur'anic* verse 5: 33, to which the death penalty, at the discretion of the *qadi*, can be applied.[119]

The defendant appealed against his conviction with regard to the drug-smuggling charge on the basis that his judicially confirmed confession, which was the sole basis for convicting him of drug-smuggling, was involuntary. The appeal by the defendant was heard, in accordance with the Judicial Act 1975, by the same court that convicted the defendant of the drug-smuggling charge.[120] The defendant brought eleven witnesses, who were detained in the same facility as the defendant in the Anti-Drug Police Department in Riyadh when the torture, allegedly, took place. Two of the witnesses testified that they saw the defendant, among other suspects, being beaten with electric cables, canes, and *iqals*, while the other nine witnesses testified to what they considered as indications of torture such as bruises and cuts that appeared on the body of the defendant when he came back to the detention unit from the interrogation room. The Court noted that all the witnesses, when the hearing on the torture allegation took place, were convicted criminals, whose testimony under normal circumstances lacks credibility. However, as such illegal activities can be only by witnessed by people who are in detention, and that it was impossible that eleven witnesses of different nationalities, whose testimony corroborated the allegation of the defendant that he was tortured in order to make him confess, could conspire to lie, the Court accepted their testimony as credible and truthful. Therefore, the conviction of the defendant with regard to the drug-smuggling charge was quashed, and his sentence was reduced from death to fifteen years imprisonment for the drug-trafficking charge and his criminal record, which included a drug trafficking conviction.

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[119] The *Qur'anic* verse, 5: 33, states that '[t]he punishment of those who wage war against Allah and His Messenger, and strive with might and main to spread corruption on earth is: execution, crucifixion, the cutting off of hands and feet from opposite sides, or exile from the land: that is their disgrace in this world, and a heavy punishment is theirs in the Hereafter.'

[120] *See supra* para. 1.3.2.

Case No 2: [121]

This case was heard by three Court *Qadis* in the province of Al-Quseem. It should be noted that the case under consideration was decided before the CCP came into effect. However, given that the CCP does not include any provisions regarding alleged involuntary confessions, the same *fiqh* rules that applied to alleged involuntary confessions prior to the introduction of the CCP still apply to date.

The case concerns sixteen defendants, six of whom were from the Philippines, and here only the case against the six Philippines will be presented, as the present researcher had the benefit of speaking to their lawyer.[122] All the defendants were charged with burgling domestic homes, commercial shops, and public schools. Fourteen of the defendants had confessed to the alleged crimes and their confessions, subsequently, were judicially confirmed. During the trial, all the fourteen defendants retracted their confessions on the basis that they had been obtained under torture. The Court convicted all the fourteen defendants, who confessed to the alleged crimes, while the other remaining two defendants, who did not confess, were acquitted. The Court based its judgment on the fact that the confessions of the fourteen defendants were judicially confirmed, and that the convicted defendants confessed in detail as to when and how the alleged crimes were committed, which indicated that the confessions, which constituted the sole basis for the convictions, were both reliable and voluntary. The lawyer for the six Philippine defendants appealed against the convictions of his clients on the basis that the evidence against the defendants (*i.e.*, the confessions) was neither voluntary nor reliable. The following grounds were cited by the defence as the basis for their appeal.

Firstly, when the case initially came to the trial Court, the Court decided to refer the case to the provincial governor's office in Al-Quseem province in order to investigate the defendants' allegations regarding the torture to which they had been subjected in order to force them to confess. As a consequence, a committee from the Public Security Department, which was the investigating and prosecuting authority in the case under consideration, was established in order to investigate the allegations of mistreatment. The report of the committee was confidential, and, hence, only the *Qadis* and the prosecutor were aware of its content. However, in the judgement, the

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[121] The Second Criminal Division of *al-Shari'ah* Court, Buriadh. Judgment No. 3/6/M/J (25 February 1999).
[122] Interview with lawyer Abdurrahman Al-Muqbel (Nov. 4, 2004).

Court referred to the letter of the provincial governor to the Court, which stated that 'the Court referred the case [to the provincial governor's office], because the defendants have alleged that they confessed because of the torture to which they had been subjected. An investigation has been conducted [into the alleged torture] ... and concluded that the defendants are innocent and there is no case against them.' The defence argued in their appeal that the conclusion reached by the committee of the Public Security Department was conclusive evidence of the innocence of their clients as it came from the same authority that investigated and prosecuted the defendants in the case under consideration.

Secondly, the contents of the fourteen defendants' confessions are contradictory, and some confessions contained some information the falsehood of which is beyond dispute. These contradictions include, *inter alia*, the following:

- The first defendant of the six Philippines stated in his confession that after the end of the month of Ramadan in 1416 H (1996 A.D.), he, along with the second, third, ninth, tenth, twelfth and the thirteenth defendant, broke into a jewellery shop and stole a large quantity of jewellery from it. However, according to the arrest record, which was indicated in the judgement, the twelfth defendant, who was the second Philippine defendant, was arrested on Ramadan 11, 1416 H. This conclusively proves that the second Philippine defendant could not have actually participated in the commission of the alleged crime because he was already in detention.
- The first defendant of the six Philippines stated in his confession that at the end of 1995 he, along with third and fourth Philippine defendants, burgled a house. However, the third and fourth defendants were on holiday in the Philippines at the end of 1995.
- The investigation authority, as mentioned in the judgment, concluded that the seventh, eighth and ninth defendants were responsible for hiding the stolen jewellery, because each one of them confessed separately that all the stolen jewellery was in his possession. However, as it is illogical that each of the three defendants had the possession of the same stolen jewellery at the same time, at least two of the three confessions must be untrue.

Thirdly, the first defendant of the sixteen defendants, who had not confessed and was consequently acquitted, had been hospitalised for two weeks, as mentioned in the judgement of the Court, which was, according to the defendant, because of the torture to which he had been subjected by the police in order to make him confess. In addition, all of the six Philippines had been hospitalised for sometime during their time in detention, which lasted for almost three years before the court finally reached its decision on the case. The first Philippine defendant managed to obtain a medical report from the Buridah Central Hosptial. The report found the defendant to have suffered from burns on his body and from posttraumatic stress disorder. Finally, apart from the disputed confessions, there was no independent evidence that pointed to the guilt of the defendants, nor did any of the six Philippines or the other co-defendants, for that matter, have any criminal record.

However, the Court of Appeal rejected the appeal of the six Philippine defendants, without providing any basis for rejecting the appeal. At the request of the six Philippine defendants, the King allowed an extraordinary appeal to be made to the Supreme Judicial Council (SJC), which also rejected the appeal.

Case No 3:[123]

This case concerns five defendants, who were charged with stealing cars, kidnapping minors and having forcible sodomy with the kidnapped minors. Here only the facts relating to the charge against one defendant, who is referred to here as "defendant B", will be presented, as they relate to the subject under discussion here. Defendant B was only charged with kidnapping two minors and having forcible sodomy with them. The first piece of evidence against him was the testimony of a 14 year old boy. The 14 year old boy testified that when he and the alleged second victim (hereinafter "A") were playing on their bicycles outside their house, a car stopped by; one man came out of it, who was identified by the witness as defendant B, grabbed the alleged victim, put him inside the car, and then the car left.[124] However, defendant B was

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[123] General Court in Riyadh, *Qadi* Muhammad Bin Kuneen, court record (criminal) No. 1 (1424 H, 2004 A. D), (24 May 2004).

[124] It should be noted here that under the CCP there are no provisions that regulate the procedures of the identification of suspects, nor does the judgement under consideration indicate how the identification was carried out. It should be noted also that identification testimony was responsible for a number of high profile miscarriages of justice under comparative jurisdiction. Hence, the credibility of the testimony of this witness, which has been completely accepted by the Court, is in doubt. This is

placed on an identification parade before A and the older brother of the 14 year old boy witness, who is aged eighteen years and who, after he was called by his younger brother to save A from the kidnappers, chased the kidnappers and got close to them but they managed to escape from him. While A failed to identify defendant B as the kidnapper, or the person who forcibly had sex with him, the second witness, when he testified during the trial to what he saw, was not sure if the defendants, including defendant B, were the persons who kidnapped A.

The second piece of evidence against defendant B was his judicially confirmed confession. Defendant B alleged that he had been tortured in order to make him confess. When he was asked by the Court to supply evidence for his allegation, he pointed out that the first time he appeared before the confirming *qadis* in order to confirm his confession, he refused to do so because, as he alleged, his confession had been obtained by torture. When he went back to the police station, according to him, he was tortured again in order to make him confirm his confession, which he did the second time he appeared before the confirming *qadis*. The Court acknowledged that the confession record showed that the defendant refused to confirm his confession the first time he was taken before the confirming *qadis*. It should be noted here that the other four co-defendants retracted their confessions at trial, but they all confirmed their confessions the first time they were taken before the confirming *qadis*. The Court ruled, with regard to the retracted confessions, that although 'the five defendants allege that they had been subjected to coercion in order to confess, their confessions had been judicially confirmed, and they have no evidence to prove it [*i.e.*, the allegation of torture].' The Court decided to sentence defendant B to four years imprisonment on the basis of his alleged role in the crimes committed.

5.3.1.1.1 Commentary

In Case No. 1, the Court during the appeal stage gave the defendant the opportunity to establish his allegation that he had been subjected to torture in order to confess, which he did to the satisfaction of the Court. Consequently, the coerced confession was excluded. However, two considerations arising from the particular circumstances of this case should be mentioned here. Firstly, if the defendant's confession were accepted at the appeal stage as voluntary, the defendant would have been subjected to

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also supported by the fact that the alleged victim himself failed to identify defendant B as the kidnapper, or the person who forcibly had sex with him.

the irrevocable death punishment to which he was initially sentenced during the trial. Secondly, the defendant had been already convicted of another charge and was eventually, even after the exclusion of the coerced confession, sentenced to fifteen years imprisonment.

Saudi *Qadis*, as discussed elsewhere, contend that there is no need to have lawyers in criminal trials because they are capable of protecting the interests of the accused.[125] However, in none of the cases presented above did the trial Court take an active role in verifying whether the contents of the confession were genuine, or verifying whether the confessions were voluntarily supplied. Indeed, in Case No. 2, there was ample evidence in the grounds on which the defence presented their appeal to the Court of Appeal and the SJC to show that the confessions, which constituted the sole basis for the convictions, were neither voluntary nor reliable. However, the Court of Appeal, and the SJC upheld the finding of the trial court, namely, that the confessions were voluntary and reliable, apparently because the confessions had been judicially confirmed.

In Case No. 3, the accused argued that the fact that he did not confirm his confession the first time that he appeared before the confirming *qadis* because, as he alleges, he had been tortured in order to make him confess, indicates that he confirmed his confession the second time he appeared before the confirming *qadis* because he had been tortured; if he had not confirmed it the second time, he would have been tortured for a third time. The argument of the defendant seems to be very reasonable, and it sheds serious doubts on the voluntariness of his confession. Nonetheless, the Court did not accept his argument, nor did it seek to verify the voluntariness of his confession by, for instance, requiring the investigator, whose signature was on the confession record, to take the oath before the court and testify that the confession was voluntarily supplied.[126] Instead, the Court accepted the confession as voluntary without providing any reasons for its ruling, except that it was judicially confirmed.

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[125] *See supra* para. 3.6.1.1. *See also infra* paras. 8.3-8.4.

[126] According to *Qadi* Muhammad Al Jaarallah, where it appears to the *qadi* that the accused refused to confirm his confession the first time he appeared before the confirming *qadis* on the basis that he was coerced to confess, it is the *qadi's* duty to require those investigators who obtained the confession from the accused to testify before him that the confession was voluntarily supplied. Interview with *Qadi* Muhammad Al Jaarallah, *supra* note 115.

It is worth mentioning here that *qadis* who have been interviewed by the present researcher and who have expressed their view on the permissibility of the use of coercion to obtain confessions, subscribe to the minority Muslim scholars' view that coercion can be used to force the accused to confess where there is strong circumstantial evidence to suggest that the accused has committed the alleged offence, and that the accused is a persistent offender.[127] In fact, even the President of the SJC, *Sheikh* Saleh Al-Luhaydan, in addition to a well-known retired appellate *Qadi*, *Sheikh* Suleiman Al-Munia,[128] subscribe to such a view.[129] However, the fact that *qadis* subscribe to such a view does not mean that torture can be used in Saudi Arabia to obtain confessions, as the power to coerce the accused in order to make him confess is considered to fall within the realm of *siyasa shar'iyya* authority, which is only excisable by the ruler.[130] As the King of Saudi Arabia has declared in the CCP that the use of torture, for whatever purpose, is illegal, torture, notwithstanding *qadis'* view in this respect, becomes illegal.[131] However, the *qadis'* views on the issue of the permissibility of using torture to coerce the accused to confess means that, in practice, *qadis*, generally speaking, will not take allegations of torture seriously where the confession is considered to be reliable, and has been judicially confirmed, as they are primarily concerned with the reliability of the confession, rather than its voluntariness. This is supported by the views expressed by *qadis* on the allegations of torture with regard to confession evidence,[132] and from the cases presented above.

In addition, as mentioned above, *qadis* have a strong faith in the effectiveness of the confirmation mechanism to eliminate the possibility of a coerced confession being introduced before the trial court. However, Case No 1 demonstrates vividly that when

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[127] Interview with *Qadi* Saleh Al-Aujri, General Court, Riyadh (Aug. 4, 2004); interview with *Qadi* Suleiman Al-Hudiathi, General Court, Riyadh (July. 18, 2004)

[128] Al-Munia, S, 'Nadari'at Brait al-Muta'hm Hta Tathbut Idanth (The Theory of the Innocence of the Accused until he is Found Guilty)', in *al-Muta'hm wa Huquqh fi al-Shari'ah al-Islamiah (The Accused's Rights in Islamic Shari'ah)*, ed. by Naief Academy for Security Sciences, 1 (Riyadh: Naief Academy for Security Sciences Press, 1986), pp. 267-282.

[129] Al-Lahaydan, S, 'Turuq al-Ithbt al-Sharai (The Rules of Proof under the Shari'ah)', in *al-Naduah al-Ilmiah li Dirast Tadpeeq al-Tashria al-Jenaei al-Islami wa Athrh fi Mukafhet al-Jeremiah fi al-Mamlaka al-Arabiyyah al-Saudiyyah (Scientific Conference for Studying the Application of the Islamic Criminal Law and its Impact in Reducing Crimes in The Kingdom of Saudi Arabia)*, 1 (Riyadh: The Ministry of Interior, 1976) pp. 113, 135-136.

[130] See *supra* paras. 1.4 & 3.3.

[131] Interview with *Qadi* Tameem Al-Aunizan, *supra* note 111.

[132] *Qadi* Tameem Al-Aunizan of the Summary Court said to the present researcher that he does not take allegations of torture seriously if the confession has been judicially confirmed, and that he has never encountered a case in which a judicially confirmed confession was shown to have been obtained by torture. Interview with *Qadi* Tameem Al-Aunizan, *supra* note 111. *See also* Vogel, *supra* note 96, p. 238.

the accused is faced with the real possibility that he will be tortured again if he does not confirm his confession the first or the second time he appears before the confirming *qadis*, he will confirm his confession to avoid this. Indeed, the existence of such a practice was acknowledged by the Government itself, as is clear from the Directive of the Ministry of Interior cited earlier.[133]

5.3.1.2 Disciplinary and criminal actions

According to Article 37 of CCP, the supervision over prisons and detention centres is entrusted to members of the Division for the inspection of prisons and places of detention of the IPPC Branch in the relevant province (hereinafter DIPD). Although the wording of Article 37 suggests that the role of the DIPD is confined to 'ensur[ing] that no person is unlawfully imprisoned or detained', in practice it extends to ensuring that detainees are treated in accordance with the law.[134] Hence, it is the duty of members of the DIPD, in accordance with Article 37 in conjunction with Article 2 of the CCP, which prohibits subjecting the accused to any form of ill-treatment, to ensure that the arrested and detained persons are not subjected to any form of ill-treatment. For the purpose of ensuring, *inter alia*, that Article 2 of the CCP is complied with in practice, Article 37 of the CCP requires members of the DIPD to conduct periodic and surprise visits to prisons and detention centres. In addition, members of the DIPD are required to receive and investigate complaints from detainees and prisoners regarding the lawfulness of their detention or treatment.[135] If a member of the DIPD finds irregularity in the treatment or the detention of the accused, a record of the irregularity must be made and transmitted to the competent authority, which shall take the appropriate action against those responsible for such irregularity.[136]

Members of the DIPD, in exercising their supervisory functions under the CCP, become supervisors of fellow IPPC members (*i.e.*, those members who are investigators in the technical sense), and police officers. The mechanisms for investigating the alleged misconduct of a police officer or a member of the IPPC are treated separately next.

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[133] *See supra* notes 92-93 and accompanying text.
[134] Interview with Investigator Anonymous, H.N. [Pseudonym.], Investigation and Public Prosecution Commission Branch, Riyadh (July. 6, Sept. 11, 2004). *See also* Directive of the Head of the Investigation and Public Prosecution Commission No. H 12/3662 (3 January 2000), pp. 14-16.
[135] CCP. Art. 38.
[136] *Ibid.* Art. 25.

5.3.1.2.1 Investigation of misconduct by police officers

When a DIPD member finds any irregularity committed by a police officer, the member concerned will file a report to his superior, who in turn will refer it to the Head of the DIPD. The Head of the DIPD, depending on the seriousness of the irregularity, will request either the Head of the Police Station, the Head of the Police Department or the provincial governor to investigate the complaint. Requests to investigate serious irregularities, including the mistreatment of the accused, are addressed to the provincial governor. The provincial governor acquires his authority to investigate the alleged misconduct of a police officer from Article 7(h) of the Provincial Administrative Law,[137] which states that the provincial governor has the authority to 'supervise the organs of the state and their employees in the province in order to ensure that they perform their duties well and with all trust and loyalty, taking into account the ties of the employees of ministries and various services in the region with their competent authorities.'[138] It is worth mentioning here that members of the public, who commonly address their grievances against governmental bodies to the provincial governor (known as 'the policy of open door'), can also lodge a complaint with the provincial governor concerning the conduct of a given police officer.

The complaints, however they originated, are dealt with in the same manner. The provincial governor upon receiving the complaint will decide, at his discretion, whether and how the alleged irregularity should be investigated. If the provincial governor decides that the alleged irregularity should be investigated, he usually sets up a committee consisting of three members: one from the police, one from the provincial governor's office and one from the DIPD, to investigate the alleged misconduct. Once the investigation into the alleged misconduct has been completed, the report of the committee and its recommendations regarding the alleged irregularity will be referred to the provincial governor. The provincial governor, at his discretion, will decide whether to take no action, to subject the alleged offender to a disciplinary hearing or to proceed with criminal proceedings.[139]

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[137] Issued by Royal Order No A/92 (1 March 1992). Published on *Umm al-Qura* (the Saudi official Gazette) No. 3397 on 6 March 1992.

[138] *See also* Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Initial report of State parties due in 1998: Saudi Arabia,* CAT/C/42/Add.2 (2001), paras. 37, 40, *available at* <http://www.unhchr.ch/tbs/doc.nsf> (last visited Jan. 2, 2006),

[139] Interview with Investigator Anonymous, H.N., *supra* note 134.

In the following sections the complaints against the police conduct whether they allegedly constitute a criminal offence or a disciplinary offence are discussed.

5.3.1.2.1.1 Disciplinary proceedings

If the complaint has been referred by the provincial governor to the Public Security Department in order that the disciplinary proceedings against the accused officer be instituted, the Head of the Provincial Force, the General Director of the Public Security, or the Minister of Interior, as the case may be, will decide whether to subject the officer who is the subject of the complaint to disciplinary proceedings, to impose an administrative penalty or to take no further action.[140] If the disciplinary proceedings are instituted against a non-commissioned officer, the officer will be tried before the Disciplinary Tribunal, which consists of three commissioned officers appointed by the Head of the Provincial Force.[141] If the accused is a commissioned officer, the Disciplinary Tribunal must consist of three commissioned officers: one member must be of a rank higher than that of the officer being tried, who acts as the head of the Tribunal, and two members who must be of the same rank of the officer being tried or above, to be appointed by General Director of the Public Security. [142] If the officer, who is being tried, is found guilty of a disciplinary offence, he can appeal to the Disciplinary Appeal Tribunal.[143] The Disciplinary Appeal Tribunal consists of three officers: one officer of the rank of Zaeem or above, who acts as the head of the Tribunal, and two officers of the same rank as that of the defendant officer or above. The three officers are to be appointed by the Minister of Interior. A legal consultant, who is appointed by the General Director of Public Security, can participate in the appeal proceedings, but cannot participate in the decision-voting.[144]

It should be noted that the complainant, where the proceedings are the result of a public complaint, is not a party to the disciplinary proceedings, and hence he cannot attend the hearing before either the Disciplinary Tribunal or the Disciplinary Appeal Tribunal.[145] The decisions of the Disciplinary Tribunal become effective only if they are confirmed by the General Director of Public Security, whereas the decisions of the

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[140] Internal Security Forces Code, issued by Royal Decree No. 30 (6 April 1965). Published in *Umm al-Qura* (the Saudi official Gazette) No. 2072 (30 May 1965) Arts. 122, 127 [hereinafter ISFC].
[141] *Ibid*. Art. 130.
[142] *Ibid*. Art. 131.
[143] *Ibid*. Art. 146.
[144] *Ibid*. Art. 134.
[145] Interview with Inspector Ahmed Al Htan, Member of the Disciplinary Tribunal, Public Security Department, Riyadh (Sep. 7, 2004).

Disciplinary Appeal Tribunal, if the defendant is a commissioned officer, become effective only on the confirmation of the decision by the Minister of Interior.[146]

Disciplinary offences under the Internal Security Forces Code include, *inter alia*, the following offences:

- the offence of assaulting a member of the public, which is punishable by a forfeit of not more than three months salary or/and detention for not more than six months;[147]
- the offence of entering private dwellings or detaining a person illegally, which is punishable by either the suspension of promotion for not more than two years, suspension from work for not more than six months; or detention for not more than two months;[148] and
- the offence of mistreating the public and the abuse of official powers, by use of torture or by violating personal liberties, which is punishable by dismissal from the service or/and imprisonment for a term not exceeding six months.[149]

5.3.1.2.1.2 Criminal proceedings

Violations of the accused's rights, to liberty, to privacy, and not to be ill-treated constitute a criminal offence under Article 2(8) of the Royal Decree No. 43 (1958) (hereinafter Decree 43), which states that '[a]nyone who mistreats [the public], abuses his official powers by torturing ..., violating personal liberties ...' is guilty of a criminal offence.

Where the provincial governor decides that criminal proceedings should be instituted against the officer who is the subject of the complaint, the case file will be referred to the Supervision and Investigation Commission (SIC) to complete its investigation into the alleged misconduct and to institute the criminal proceedings against the accused officer before the Board of Grievances. The SIC is a governmental body entrusted with supervising the conduct of civil servants in relation to the discharge of their official duties, and linked to the office of the Prime

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[146] ISFC, Art.148.
[147] *Ibid.* Art. 168(b).
[148] *Ibid.* Art. 169(b),(d).
[149] *Ibid.* Art. 171. A request was made by the present researcher to obtain access to the case files of the Disciplinary Tribunal, but it was denied on the basis that the disciplinary proceedings are secret. Interview with Inspector Ahmed Al Htan, *supra* note 145.

Minister.[150] By way of exception, the investigation and prosecution of particular crimes including those crimes that fall under Article 2(8) of Decree 43 are assigned to the SIC.[151] Similarly, the Board of Grievances is essentially an administrative court, but by way of exception, it has been given the jurisdiction to try certain criminal offences including those offences that fall under Article 2(8) of Decree 43.[152] It should be noted that the although the misconduct of the police officer is tried as a crime under Decree 43, the crime is, in essence, prosecuted as a disciplinary misconduct in the sense that it is a violation of the official Code of Conduct, rather than a violation of the criminal law. Hence, a member of the public, who allegedly has been a victim of a crime under Decree 43, cannot directly submit a complaint to the SIC, as the SIC only receives complaints against the misconduct of a given official from the state authority for which the accused official works, nor is he considered to be party to the proceedings. [153]

The Broad of Grievances has not defined the crimes falling under Decree 43. Instead, if the court found an abuse of power, it would declare that the defendant official was guilty of committing an offence under Article 2(8) of Decree 43, without necessarily specifying the nature of the offence. If the defendant official were found guilty of a criminal offence under Decree 43, he would be liable to imprisonment for a term not exceeding ten years, or a maximum fine of twenty thousands riyals (approximately £3000). This gives the trial court a wide discretionary power in determining the appropriate punishment to be imposed if the defendant official is found guilty. From the Board of Grievances' judgements on Decree 43 offences that have been available to the present researcher, it seems that *qadis*, in terms of sentencing, differentiate between, on the one hand, acts that can be considered as the overstepping of official powers in that although the act is criminal, the objective is "legal", and, on the other hand, those acts that are solely motivated by personal gain, so both the act and the objective are illegal. With regard to the former circumstances, in two cases where a police officer had been found guilty of mistreating the accused in order to make him confess, a fine was imposed on the defendant as a

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[150] The Code of Conduct of Civil Servants, issued by Royal Decree No. M/7 (28 March 1971). Published in *Umm al-Qura* (the Saudi official Gazette) No. 2365 (6 April 1971), Art. 1.
[151] Royal Decree No. M/51 (17/7/1402 H, 1982), Art 2.
[152] Art. 8(1),(g) of the Board of Grievances Law, issued by Royal Decree No. M/51 (11 May 1982). Published in *Umm al-Qura* (the Saudi official Gazette) No. 2918 (22 May 1982).
[153] Interview with Saleh Al-Ali, the Acting Director of the Investigation Department, the Supervision and Investigation Commission, Riyadh (Jun. 6, 2004).

punishment.[154] It is worth mentioning that in one of the two mentioned cases, the defendant police officer of the Police Anti-Drug Department had been previously convicted by the same court of a similar offence.[155] On the other hand, where the defendant official is found guilty of abusing his official powers for personal gain by, for instance, arresting individuals for the purpose of obtaining money illegally from them as a condition for their release, a custodial sentence is imposed.[156]

5.3.1.2.2 Investigation of misconduct by a member of the IPPC

Under the Code of the Investigation and Public Prosecution Commission (CIPPC),[157] the discipline of members of the IPPC is entrusted to the IPPC Administrative Board, which acts as a Disciplinary Tribunal.[158] Allegations of disciplinary misconduct can be investigated only by a member of the IPPC, who is appointed by the Minister of Interior on the advice of the Head of the IPPC.[159] If there is sufficient evidence that there has been misconduct, the disciplinary proceedings can be instituted only if approved by the Minister of Interior on the advice of the Head of IPPC.[160] The decisions of the Disciplinary Tribunal are final. If the Disciplinary Tribunal finds the member concerned guilty of misconduct, there are two forms of discipline available to them: reprimand or retirement. If the former is imposed, it becomes effective only if an order of the Minister of Interior based on the advice of the Head of IPPC implementing the decision of the Disciplinary Tribunal is issued. If the latter is imposed, it becomes effective only if a Royal Order implementing the decision of the Disciplinary Tribunal is issued.[161] If the misconduct of a member of the IPPC constitutes a criminal offence, no investigative measure (*i.e.,* arrest, search, etc) can be taken with regard to the alleged offence, nor can criminal proceedings be instituted against the member concerned, except with the permission of the Administrative Board of the IPPC.[162]

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[154] Board of Grievances, the Third Criminal Division, Judgment No. 87/D/J/3 (1986); Board of Grievances, the First Criminal Division, Judgment No. 76/D/J/1 (1990).
[155] *Ibid.*
[156] Board of Grievances, the Third Criminal Division, Judgment No -/D/J/3 (2000); Board of Grievances, the Third Criminal Division, Judgment No -/D/J/3 (2001).
[157] Issued by Royal Decree No. M/56 (30 May 1989). Published on *Umm al-Qura* (the Saudi official Gazette) No. 3264 on 24 June 1989 [hereinafter CIPPC].
[158] *Ibid.* Art. 15.
[159] *Ibid.* Art. 17.
[160] *Ibid.* Art. 18.
[161] *Ibid.* Art. 26.
[162] *Ibid.* Art. 19.

In practice, it is not clear how members of the IPPC are supervised when carrying out their investigative functions. In theory, the DIPD, which is responsible for the inspection of prisons and detention centres, and how detainees are treated under the CCP, as mentioned above, exercises supervision over fellow members of the IPPC with regard to issues that fall within the DIPD's jurisdiction (*i.e.*, the treatment and the detention of the accused). However, one of the difficulties facing the DIPD, as acknowledged in one of its reports, is that 'the relationship between the DIPD and other Divisions of the IPPC, when the DIPD exercises its supervisory functions with regard to prisons and detention centres, which include the supervision on [other] members of the Commission, is unclear.'[163] This difficulty is caused by the fact that the IPPC, which conducts investigations into criminal offences, supervises itself when it is conducting those investigations. Indeed, in the IPPC Branch in Riyadh, the DIPD is located in the same building as other IPPC investigation and prosecution divisions. This problem is exacerbated by the fact that most members of the DIPD occupy the lower ranks in the IPPC hierarchy compared to those members in the other investigation and prosecution divisions.[164] This means, in practice, that a low-ranking member of the DIPD is supposed to supervise a higher ranking member of the IPPC.[165] It is worth mentioning, finally, that to date no member of the IPPC has ever been subjected to either disciplinary or criminal proceedings on the basis of a report compiled by a member of the DIPD.[166]

5.4 Comparison

The Saudi and Canadian systems converge and diverge on an equal number of issues with regard to the right against self-incrimination. In terms of similarities, both systems recognise the right against ill-treatment, both criminalise torture, consider involuntary confession to be inadmissible as evidence, and adopt mechanisms for

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[163] Directive of the Head of the Investigation and Public Prosecution Commission No. H 12/3662 (3 January 2000), p. 11.

[164] *Ibid.*

[165] These factors may explain why the incident of torture, which was allegedly committed by Investigators from IPPC, has never been investigated by the DIPD in Case No1, despite the fact that the Court in that case excluded the confession on the basis that the accused had been tortured. *See* Case No 1, *supra* note 118 and accompanying text.

[166] Written response from Advisor Dr. Humed Al-Muadi, Investigation and Public Prosecution Commission Branch, Riyadh (July. 13, 2004); interview with Investigator Hassen Al-Asaker, Investigation and Public Prosecution Commission Branch, Crimes Against Honour Division, Riyadh (May. 23-25, 2004); interview with Investigator Anonymous, D.N. [Pseudonym.], Investigation and Public Prosecution Commission Branch, Riyadh (Aug. 22, 2004).

investigating and disciplinarily or criminally prosecuting an alleged misconduct committed by a public official in violation of the accused's rights.

In terms of differences, while the Canadian law recognises explicitly the privilege against self-incrimination and its logical consequence, the right to silence, the Saudi written law is silent on such a right. In addition, while the Saudi system gives the competent court a discretionary power in determining the nature of the punishment for crimes of torture, *i.e.,* a fine or a custodial sentence, under Canadian law crimes of torture will entail the imposition of a custodial sentence. Furthermore, while the Canadian law incorporates the CAT's definition of the crime of torture into the Canadian criminal law, under the Saudi law the crime of torture remains undefined. Moreover, under the Canadian system the burden of establishing beyond reasonable doubt that the confession has been voluntarily supplied lies with the State. By contrast, under the Saudi system the burden of establishing the involuntariness of the confession, where the confession was judicially confirmed, and the voluntariness of the confession was subsequently disputed during the trial, lies with the defendant.

With regard to the mechanism of investigating alleged misconduct by a public official, both the Saudi and the Canadian (as illustrated by the Ontario complaints system) complaints mechanisms recognise, to some extent, the victim of an alleged misconduct to lodge a complaint. However, there are two main differences between the Saudi and Canadian systems in this respect. The first difference is that under the Canadian mechanism the complainant is considered a party to any disciplinary proceedings instituted against the accused official, whereas under the Saudi mechanism the alleged victim of an official misconduct is not considered a party to the disciplinary proceedings instituted against the accused official.

The second difference lies in the nature of the mechanism that is designed to investigate and institute disciplinary or criminal proceedings against an official against whom there is sufficient evidence that he has committed a disciplinary or criminal offence. The complaints mechanism under the Canadian system, where the alleged misconduct constitutes a disciplinary offence, entrusts the investigation of complaints and the institution of the disciplinary proceedings, where appropriate, to the chief of the police force whose member is the subject of the complaint, under the oversight of a civilian and independent body. Where the misconduct constitutes a criminal offence and resulted in 'serious injuries' or death, the investigation and the institution of criminal proceedings, where appropriate, are entrusted to a civilian and

independent body. By contrast, the Saudi system entrusts the investigation of alleged misconduct by a police officer and the institution of criminal or disciplinary proceedings against him, where appropriate, to the provincial governor, who is, in essence, considered to be the head of the provincial police force. Where the alleged misconduct is committed by a member of the IPPC, the Administrative Board of the IPPC, under the oversight of the Minister of Interior, is entrusted with investigating such allegations, and the institution of criminal or disciplinary proceedings against him, where appropriate.

Chapter Six

The Right to Humane Treatment

A. International human rights law

6.1 Right to humane treatment

Article 10(1) of the ICCPR states that '[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.' It should be recalled here that Article 10(1), according to the HRC, is absolute in the sense that it cannot be restricted even during a public emergency that threatens the life of the nation.[1] The issue that arises under Article 10(1) is whether it provides additional protection to the right to humane treatment guaranteed under Article 7, or it is a mere confirmation of that right. Although a given treatment may engage both Article 7 and Article 10(1), there are obvious differences between the two Articles. Firstly, the essence of Article 10(1) is to expand the right to humane treatment under Article 7, by prohibiting all forms of ill-treatment, even those that do not meet the threshold of Article 7. Thus, a given treatment can be considered to be contrary to human dignity under Article 10(1), without meeting the more stringent standard under Article 7. In addition, whereas Article 7 requires the State to refrain from engaging in certain acts (*i.e.*, torture and cruel, inhuman or degrading treatment), Article 10(1) imposes on the State positive obligations to treat detainees in a manner that does not violate their inherent dignity. Finally, while Article 7 is concerned with the physical integrity of the person, Article 10(1) is mainly concerned with the conditions in which detainees are kept.[2]

In many cases, the HRC has found a given treatment to violate simultaneously Articles 7 and 10(1).[3] However, the focus here will be on the additional protection provided by Article 10(1), as Article 7 has been already discussed.[4] The HRC's starting point is that material resources do not constitute a valid justification for not

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[1] *See supra* para. 4.2.2.

[2] Human Rights Committee, General Comment 21, Article 10 (Forty-fourth session, 1992), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI\GEN\1\Rev.1 at 33 (1994) para. 2-3 [hereinafter General Comment 21]; Nowak, M, *U.N. Covenant on Civil and Political Rights* (Strasbourg: N.P. Engel, 1993), pp. 186-189.

[3] *See* Joseph, S, *et al, The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary*, 2nd edn (Oxford: Oxford University Press, 2004), pp. 280-281.

[4] *See supra* para. 5.1.1.

ensuring that detention conditions are consistent with the inherent dignity of the detainees.[5] In addition, the HRC indicated that it will use the minimum standards included in the U.N non-binding resolutions, which are applicable to the conditions of detention, as its guide to the interpretation of the right to humane treatment under Article 10(1), in particular the Standard Minimum Rules for the Treatment of Prisoners 1957 (Standard Minimum Rules).[6] In fact, the HRC has, in effect, incorporated the provisions of the Standard Minimum Rules into Article 10(1), as can be seen from its following statement:

> As to the conditions of detention in general, the Committee observes that certain minimum standards regarding the conditions of detention must be observed regardless of a State party's level of development. These include, in accordance with Rules 10, 12, 17, 19 and 20 of the U.N. Standard Minimum Rules for the Treatment of Prisoners, minimum floor space and cubic content of air for each prisoner, adequate sanitary facilities, clothing which shall be in no manner degrading or humiliating, provision of a separate bed, and provision of food of nutritional value adequate for health and strength.[7]

The HRC's jurisprudence makes it very clear that a failure to meet the above-mentioned standards will automatically result in finding a violation of Article 10(1). Thus, the HRC has found, *inter alia*, inadequate bedding (lack of mattresses and/or blankets),[8] overcrowded conditions,[9] unsanitary conditions[10] and insufficient natural light[11] to constitute a violation of Article 10(1).

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[5] General Comment 21, *supra* note 2, para. 4.

[6] E.S.C. Res. 663(XXIV) C, U.N. ESCOR, 24th Sess., Supp. No. 1, at 11, U.N. Doc. E/3048 (1957) (amended 1977) [hereinafter Standard Minimum Rules]. *See* General Comment 21, *supra* note 2, para. 5. These resolutions also include, The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment G.A. Res. 43/173, U.N. GAOR, 43d Sess., Supp. No. 49, U.N. Doc. A/43/49 (1988) [hereinafter BPPDI]; the Code of Conduct for Law Enforcement Officials, G.A. Res. 34/169, U.N. GAOR, 34th Sess., Supp. No. 46, at 185, U.N. Doc. A/34/46 (1979); and the Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. 37/194, annex, 37 U.N. GAOR Supp. (No. 51) at 211, U.N. Doc. A/37/51 (1982). For a discussion of these resolutions, *see* Bernard, S, 'An Eye for an Eye: The Current Status of International Law on the Humane Treatment of Prisoners', *Rutgers L.J.*, (1994), 25.

[7] *Mukong v. Cameroon*, Communication No. 458/1991, U.N. Doc. CCPR/C/51/D/458/1991 (1994), para. 9.3. *See also* Joseph, *supra* note 3, pp. 283-284.

[8] *Morgan and Williams v. Jamaica*, Communication No. 720/1996, U.N. Doc. CCPR/C/64/D/720/1996 (1998), para.7.2; *Blaine v. Jamaica*, Communication No. 696/1996, CCPR/C/60/D/696/1996 (1996), para. 8.4.

[9] *Portorreal v. Dominican Republic*, Communication No. 188/1984, U.N. Doc. Supp. No. 40 (A/43/40) at 207 (1988)., para. 9.2, 11; *Henry v. Trinidad and Tobago*, Communication No. 752/1997, U.N. Doc. CCPR/C/64/D/752/1997 (1999), para. 7.4; *Kennedy v. Trinidad and Tobago*, Communication No. 845/1998, U.N. Doc. CCPR/C/74/D/845/1998 (2002), para.7.8.

B. Canada

6.2 Right to humane treatment

In Canada, correctional and detention facilities fall under the jurisdiction of either the federal or the provincial government. Here, the aim is not to give a comprehensive review of detention centres in Canada, but rather to illustrate, for the purposes of comparison, how the right of detainees to humane treatment is protected in Canada. Hence, the discussion here is confined to the right of detainees to human treatment in Ontario, for the reasons that will appear from the following discussion.

There are no clear rules that govern the conditions of detention centres in Ontario. Apart from the problem of overcrowding in detention centres, which has been acknowledged by the Canadian Government,[12] most detention conditions have been revealed during sentencing hearings in which convicted persons argued for what has become known as 'enhanced credit' for the time that they spent in pre-sentencing custody. Under s. 719(3) of the Criminal Code, the sentencing judge has the discretion to take into account any time spent by the offender in the pre-sentencing custody when determining the period of the sentence remaining to be served by the offender. Commonly, sentencing judges give an enhanced credit ratio of 2:1 (*i.e.*, 2 days credit for each day spent in pre-sentencing custody). The rational behind this approach, as explained by Arbour J., of the Supreme Court in *R. v. Wust*,[13] is that:

> The often applied ratio of 2:1 reflects not only the harshness of the detention due to the absence of programs, which may be more severe in some cases than in others, but reflects also the fact that none of the remission mechanisms contained in the Corrections and Conditional Release Act apply to that period of detention. "Dead time" [*i.e.*, time spent pre-sentencing custody] is "real" time.[14]

However, sentencing judges have gone beyond the enhanced credit ratio of 2:1 in calculating the pre-sentencing custody time where the conditions of the pre-

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[10] *Améndola v. Uruguay*, Communication No. 25/1978, U.N. Doc. CCPR/C/OP/1 at 136 (1985), paras. 11,13; *Yasseen and Thomas v. Republic of Guyana*, Communication No. 676/1996, U.N. Doc. CCPR/C/62/D/676/1996 (1998), para. 7.4; *Matthews v. Trinidad and Tobago*, Communication No. 569/1993, U.N. Doc. CCPR/C/62/D/569/1993 (1998), para. 7.3.

[11] *Levy v. Jamaica*, Communication No. 719/1996, U.N. Doc. CCPR/C/64/D/719/1996 (1998), para. 7.4.

[12] The International Covenant on Civil and Political Rights, *Fourth Periodic Reports of States Parties Due in 1995*, Canada, CCPR/C/103/Add.5. (1997), para. 111.

[13] (2000) 143 C.C.C. (3d) 129.

[14] *Ibid.* p. 148.

sentencing custody where the offender has been kept have been 'particularly troubling'.[15] In *R. v. R.B.*,[16] the defendant pleaded guilty to one count of sexual assault of his common law partner of two years. The offender spent his pre-sentencing time in the Toronto East Detention Centre. The offender argued that the conditions of his pre-sentencing custody justified the application of enhanced credit of more than the ratio of 2:1 in the sentencing calculation. The cells of the Detention Centre, which measured 9 feet by 13 feet, had a desk, a stool attached to the floor, and an open toilet area. It also contained a compartment holding blankets, sheets and a mattress, in case a third person had to sleep on the floor. The cells were originally designed to sleep two persons in a bunk bed. Due to overcrowded conditions in the Detention Centre, the offender was placed in a cell with two detainees, and he slept on the floor for about one month and a half. The medical records of the offender showed that he suffered from psychiatric difficulties as a result of his detention. In determining that pre-sentencing custody should be given an enhanced credit ratio of 3:1, Feldman J. of the Ontario Court of Justice stated that:

> The use of enhanced credit in sentencing represents, in my view, a principled approach by judges in responding to prolonged inequity or unnecessary hardship occasioned by prisoners where "the circumstances of the incarceration are particularly troubling."
> It permits the Court to signal those with responsibility for the care and housing of prisoners in our Charter-based society that it is concerned about the conditions in the jails and their impact on the security interests and human dignity of individual inmates, as well as the public interest in the protection of these values.[17]

The conditions of the pre-sentencing custody of the offender in *R v. Kravchov*,[18] was more disturbing. The offender was remanded in the Metro West Detention Centre. The Detention Centre was originally designed to hold one person per cell, which included one bunk and a desk. Due to the overcrowded conditions, a second bunk was added to each cell. However, for a number of years now three persons are kept in each cell, due to the soaring number of detainees being remanded in the Detention Centre. The third person in the cell sleeps on a mattress on the floor, bordered by the toilet at one end and by a desk at the other end. The offender had spent seven months

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[15] *R. v. Dorian*, [2003] O.J. No. 1415, p. 8.
[16] [2003] O.J. No. 5627.
[17] *Ibid.* para. 15-16.
[18] [2002] O.J. No. 2172.

of his pre-sentencing custody at the West Detention Centre, and for 75% of the time he slept on the floor. In expressing his dissatisfaction with the accommodation arrangements at the Detention Centre, the sentencing Judge stated that '[t]here was an odd debate among the witnesses about whether inmates on the floor generally preferred to sleep with their heads beside the toilet to be closer to the open grill at the door, or to sleep with their heads under the desk. Whatever the popular answer at "the West", the choice speaks for itself.'[19]

In addition, during a strike that lasted eight weeks, the inmates spent 20 hours a day in their cells. The meals during the strike were served in the cells, and, due to the offender's sleeping position, he ended up eating his meal on the toilet as it was the only remaining fixture in the cell. During the strike, the cells were left unclean. The offender, as a result of the conditions of his remand, contracted a skin disease with a visible infection on his face and hand. During the eight-week strike period, the offender did not receive any medical care. After reviewing the U.N. Standard Minimum Rules,[20] which dictate that, save in exceptional circumstances, each inmate should occupy a room by himself, the sentencing judge decided to apply an enhanced credit ratio of 3,5:1 in calculating the sentence of the offender.

C. Saudi Arabia

6.3 Right to humane treatment

As pointed out earlier, the DIPD is responsible for ensuring that detention conditions are compliant with the law.[21] This includes ensuring that the conditions of detention are healthful (*i.e.*, sufficient light and air), sanitary (*i.e.*, clean) and safe (*i.e*, there is nothing that could undermine the safety of the detainees such as exposure to electric cables etc.).[22] If the relevant Member of the DIPD finds the conditions of the condition unsatisfactory, he will report his findings to the competent authority.[23]

Under Article 5 of the Prison and Detention Code (PDC),[24] detention centres are

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[19] *Ibid*. para. 18.
[20] *See supra* note 6.
[21] *See supra* para. 5.3.1.2.
[22] Interview with Investigator Anonymous, H.N. [Pseudonym.], Public Prosecution and Investigation Commission Branch, Riyadh (July. 6, Sep. 11, 2004).
[23] *See supra* para. 5.3.1.2.
[24] Issued by Royal Decree M/31 (29 May 1978). Published on *Umm al-Qura* (the Saudi official Gazette) No. 2729 on 17 June 1978.

subject to administrative, judicial and health inspections in accordance with the implementing regulation of the of the PDC. However, to date, the implementing regulation of the PDC has not been issued, hence, it is not clear how the administrative, judicial and health inspections under Article 5 of PDC are supposed to be carried out in practice.

In the remainder of this section, attention will be focused on the conditions of three detention centres that the present researcher was able to visit during his fieldwork period. It is worth pointing out first that detention centres are attached to each police station, and the accused will spend his pre-trial detention, which could last up to six months, in the police detention facility until he is either charged, in which case he is transferred to the general prison, or released.

In the Detention Centre of the Anti-Drug Police Department in Riyadh, there are two detention units.[25] The present researcher was allowed to inspect one detention unit. The detention unit did not include any beds or mattresses and, hence, detainees sleep on the floor. The detention unit measures about 20 metres long, 15 metres wide, and 5 metres high. It sometimes holds up to 270 detainees. Due to overcrowding, the detainees sleep 'in turn' (*i.e,* one group sleeps, while the other stay awake until the first group wake up, so the second group can find enough space on the floor in order to lie down on to sleep) as there is no enough space on the floor on which all detainees can lie down on to sleep at the same time.[26] Food waste and the vomit of those detainees who have been arrested while on drugs, are left lying on the floor. The unpleasant smell of the detention unit can be noted from ten metres away. Due to the filthy conditions of the detention centre, the present researcher, although he covered his nose, could not step more than two feet into the detention unit. According to one investigator, he went inside the detention unit to persuade a detainee who refused to leave his solitary confinement cell, which is located inside the detention unit, to come out for interrogation. Subsequently, the investigator contracted a skin disease, which, according to the diagnosing doctor, was caused by encountering 'epidemic conditions'.[27] Although repeated requests have been made by the DIPD to the

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[25] Observation, Detention Centre of the Anti-Drug Police Department, Riyadh (Jun. 15, 2004).
[26] Interview with Investigator Anonymous, U.B. [Pseudonym.], Investigation and Public Prosecution Commission Branch, Riyadh (Jun. 15, 2004).
[27] Interview with Investigator Anonymous, W.B [Pseudonym.], Investigation and Public Prosecution Commission Branch, Riyadh (June. 15, 2004).

provincial governor to find a radical solution to the problem of the conditions of detention, the problem remains unresolved.[28]

In the Detention Centre of the But'ha Police Station, there are two detention units.[29] The first detention unit measures about 6 metres long, 5 metres wide, and 3 metres high. During the present researcher's visit, the detention unit was holding twenty persons. The detention unit does not contain beds or mattresses, except a few old blankets. The detainees were lying down on the floor next to each other, with hardly any space between them. The light in the detention unit was very dim, and only one of the six lamps in the detention unit was working. The air conditioner in the unit is very old, and given that it is always on, due to the very hot weather in Riyadh during the summer, and the overcrowded conditions in the detention unit, the air-conditioning in the unit is very poor. There is one toilet room with a shower, which is located inside the detention unit. The state of the toilet is unsanitary and the drinking water tap is placed directly above the toilet.

The second detention unit measures about 5 metres long, 4 metres, wide and 3 metres high. As with the first detention unit, the second detention unit is overcrowded and, during the time of the visit, was being used to hold 22 detainees. The detention unit does not have beds or mattresses, except a few old blankets. The detainees were lying down next to each other without any space between them whatsoever for any movement. There is one toilet room with a shower inside the detention unit. The drinking water tap is placed inside the toilet room. The state of the toilet room is unsanitary. Although there is enough light inside the detention unit, the air-conditioning was very poor. The solitary confinement cells measure about one and a half metres long, half a metre wide, and 2 metres high. There is a toilet inside the cell, which occupies about a third of the cell space. The detainee sleeps on the floor, without a bed, mattress or blanket on the remaining two thirds of the cell space. There is no barrier between the toilet and the place where the detainee sleeps, nor is there any air-conditioning inside the cell.

The Detention Centre of Maliz Police Station has two detention units.[30] However, because few detainees are held in the Detention Centre, the second detention unit is not used. The detention unit measures about 10 metres long, 5 metres wide and 3

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[28] Interview with Investigator Anonymous, H.N., *supra* note 22.
[29] Observation, Detention Centre of al-But'ha Police Station, Riyadh (July. 4, 2004).
[30] Observation, Detention Centre of the Maliz Police Station, Riyadh (Aug. 15, 2004).

metres high. It has four toilet rooms, without showers. During the present researcher's visit, there were only five detainees held in the detention unit. The air-conditioning was excellent, the conditions of the unit and toilet rooms were sanitary, and there was sufficient light in the detention unit. The detention unit does not have beds, or mattresses, except a few old blankets, so detainees sleep on the floor. There are also four air-conditioned solitary confinement cells. It is worth mentioning here an incident that the present researcher witnessed during his visit to Maliz Police Station. An investigator confronted an accused with the alleged victim of an indecent assault, who were both Philippine nationals, outside the detention unit. The accused, when the investigator was talking to the alleged victim some five metres away, showed the present researcher, who was observing the confrontation, what seemed to be a skin disease on his lower back, presumably believing that the present researcher was a person in authority who could help him with his problem.[31]

6.4 Comparison

The Saudi and the Canadian detention centres suffer from the same problem, namely, overcrowding. However, the two systems differ in respect of the judicial response to the failure of the government under the respective systems to secure satisfactory detention conditions. The Canadian courts responded, firstly, by condemning inhuman detention conditions where and when they exist, and secondly, by giving an enhanced credit to the period spent by the offender in unsatisfactory pre-sentencing custody conditions. By contrast, the Saudi courts have not intervened at all in the problem of unsatisfactory detention conditions.

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[31] *Ibid.*

Chapter Seven

The Right to Liberty

A. International human rights law

7.1 Right to liberty

Article 9 of the ICCPR states that:

> 1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law.
> 2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.
> 3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.
> 4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

Article 9(1) of the ICCPR guarantees two distinct rights: liberty and security of person. The discussion here is concerned only with the right to liberty, as security of person has no application in the pre-trial of the criminal process.[1] The right to liberty protects the physical liberty of individuals.[2] The obvious examples of interference with the right to liberty, as mentioned in Article 9(1), include arrest and detention. However, the right to liberty, unlike, for instance, the right not to be subjected to ill-treatment under Article 7, does not prohibit all kinds of interference with liberty, but only prohibits those interferences that are arbitrary or unlawful.

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[1] *See Páez v. Colombia*, Communication No. 195/1985, U.N. Doc. CCPR/C/39/D/195/1985 (1990), para. 5.5.
[2] *Cf. Engel and Others v. The Netherlands* (No. 1) (1979-80) 1 E.H.R.R. 647, para. 58

In the following sections, the prohibition of arbitrary and unlawful deprivation of the right to liberty and the procedural safeguards designed to protect the right to liberty under Article 9, will be discussed in detail, including:

- the right to be informed of the reasons for arrest and any charges against him;
- the right to be brought promptly before a judicial officer;
- the right be released on bail;
- the right to be tried within reasonable time; and
- the right to *habeas corpus*.

7.1.1 Prohibition of arbitrary and unlawful deprivations of liberty

In order for a deprivation of liberty to comply with Article 9(1), it must not be arbitrary, and it must be carried out 'on such grounds and in accordance with such procedures as are established by law'.[3] In order to satisfy the non-arbitrariness requirement, the deprivation of liberty, according to the HRC, must seek to secure a legitimate aim, necessary in the circumstances and proportionate to the aim pursued.[4] Consequently, the HRC has held that a detention, which did not aim, for example, 'to prevent flight, interference with evidence or the recurrence of crime' (*i.e.*, does not secure a legitimate aim) to be arbitrary.[5] On the basis of the same reasoning, it can be persuasively argued that arresting someone without reasonable grounds for believing that he has committed an offence, or that he was going to commit an offence is arbitrary too. This is because the exercise of the power is not based on the reasonable grounds that the arrest is necessary for the purposes of effective law enforcement, which is the legitimate aim of the power to arrest in the context of the criminal justice.[6]

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[3] ICCPR, Art. 9(1).

[4] *Alphen v. The Netherlands*, Communication No. 305/1988, U.N. Doc. CCPR/C/39/D/305/1988 (1990), para. 5.8. *Cf.* Human Rights Committee, General Comment 27, Freedom of Movement (Art.12), (Sixty-seventh session, 1999), U.N. Doc. CCPR/C/21/Rev.1/Add.9 (1999), reprinted in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.6 at 174 (2003), para. 13 [hereinafter General Comment 27].

[5] *Ibid.*

[6] Article 5(1)(c) of the ECHR requires explicitly that in order for an arrest or detention of persons, which is effected for the purposes of criminal law enforcement, not to be arbitrary, it must be based on 'reasonable suspicion of having committed and offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so'. *Cf. also Fox, et al v. United Kingdom* (1991) 13 E.H.R.R. 157, para. 32.

With regard to the proportionately requirement, the HRC has indicated that where measures less intrusive than the deprivation of liberty are available to secure the aim pursued, the deprivation of liberty would be considered disproportionate and, hence, arbitrary. In the case of *C v. Australia*,[7] the HRC considered the practice of the Australian government whereby all persons who illegally enter the country and subsequently apply for refugee status are subjected to mandatory detention, without a review of the particular circumstances of each case or the need for detaining the person concerned to ensure that he does not abscond into the community while his refugee claim is being determined. As the HRC was of the opinion that less intrusive measures could have been adopted with regard to the applicant, such as the imposition of reporting obligations or sureties, it held that detention in this case was disproportionate to the end sought and, consequently, arbitrary in violation of Article 9(1).[8]

With regard to the requirement of lawfulness, the HRC has not elaborated on the meaning of the phrase 'on such grounds and in accordance with such procedures as are established by law' in the context of Article 9(1). However, the HRC has provided some guidance with regard to the lawfulness requirement under Article 17 (the right to privacy) in which unlawful interference with Article 17 are prohibited, which are equally applicable to the requirement of lawfulness under Article 9(1). In the Committee's view, in order for an interference to be considered lawful, it must be authorised by the national law, and the law itself must be consistent with 'the provisions, aims, and objectives of the Covenant'.[9] In addition, the law must set out precisely and in detail the circumstances under which restrictions on Article 9 are permitted.[10] Thus, where the law grants public officials discretionary powers, the scope of these powers must be sufficiently clear to ensure that the powers are not arbitrarily exercised.[11] Therefore, a law that grants wide and vague discretionary powers would be considered as failing to meet the lawfulness requirement.[12]

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[7] Communication No. 900/1999, U.N. Doc. CCPR/C/76/D/900/1999 (2002).
[8] *Ibid.* para. 8.2.
[9] Human Rights Committee, General Comment 16, (Twenty-third session, 1988), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI\GEN\1\Rev.1 at 21 (1994), para. 4. *Cf.* General Comment 27, *supra* note 4, para. 12.
[10] *Ibid.* para. 8.
[11] *Cf. Olsson v. Sweden* (1989) 11 E.H.R.R. 259, para. 61(c).
[12] *Cf. Malone v. United Kingdom* (1985) 7 E.H.R.R. 14, paras. 79-80, 86-87.

7.1.2 Right to be informed of the reasons for arrest and any charges against him

Under Article 9(2) a person who has been arrested, has to be informed of the reasons for his arrest and any charges against him. In applying Article 9(2), two issues will arise. The first issue concerns when the arrested person is entitled to be informed of the reasons for his arrest. The second issue concerns the amount of information required to be provided to the arrested person in order to comply with Article 9(2). Before addressing these issues, it is imperative first to determine the purpose of Article 9(2), which has a significant bearing on whether the timing or the amount of information in a given case is compliant with Article 9(2) or not. According to the HRC, the purpose of Article 9(2) is to give the arrested person the opportunity to make an informed decision as to whether to exercise his right to challenge the legality of his detention by way of *habeas corpus* under Article 9(4) in order to secure his release if he believes the reasons for his arrest to be unfounded.[13] In addition, apprising the arrested person of the reasons for his arrest enables him to refute the allegations against him and, thereby, secure his release without the need for applying for *habeas corpus*.[14]

Under Article 9(2), the information regarding the reasons for the arrest must be given at the time of the arrest. The HRC held that a three-hour delay was not inconsistent with the requirement to inform the accused of the reasons for his arrest under Article 9(2).[15] On the other hand, a delay of seven days has been held to be inconsistent with the requirement of Article 9(2).[16] The HRC has not set a minimum time limit within which the arrested person has to be informed of the reasons for his arrest. However, a delay, exceeding twenty four hours would seem to breach Article

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[13] *Caldas v. Uruguay*, Communication No. 43/1979, U.N. Doc. CCPR/C/OP/2 at 80 (1990), para. 13.2. *Cf. Fox, et al v. United Kingdom*, *supra* note 6, para. 40.
[14] *Cf.* Harris, D, *et al*, *Law of the European Convention on Human Rights* (London: Butterworths, 1995), p. 129.
[15] *Michael, et al v. Spain*, Communication No. 526/1993, U.N. Doc. CCPR/C/59/D/526/1993 (1997), para. 12.
[16] *Peter Grant v. Jamaica*, Communication No. 597/1994, U.N. Doc. CCPR/C/56/D/597/1994 (1996), para. 8.1.

9(2), as, if a such delay were permitted, the purpose of Article 9(2) would be effectively defeated.[17]

With regard to the information to be communicated to the arrested person under Article 9(2) of the ICCPR, the arrested person needs to be apprised of the factual and legal basis for his arrest.[18] Thus, the HRC has held, *inter alia*, that not informing the arrested person of the facts of the crime for which he was arrested, including the identity of the alleged victim, was inconsistent with the information requirement under Article 9(2).[19]

7.1.3 Right to be brought promptly before a judicial officer

Article 9(3) stipulates that '[a]nyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release.' As the wording of Article 9(3) makes clear, it is the obligation of the State to bring the arrested or detained person promptly before a judicial officer. Thus, it cannot be argued, where the arrested or detained person has not been brought promptly before a judicial officer, that Article 9(3) has not been violated because the arrested or detained person did not request the review of his arrest or detention.[20]

The wording of Article 9(3) seemingly suggests that only persons who have been charged with a criminal offence and subsequently are arrested or detained, are entitled to be brought before a judicial officer to review the need to detain them. This reading, in effect, prevents persons who have been arrested or detained but not yet charged from exercising the right to have the reasons for their detention reviewed by a judicial officer. However, such a reading is inconsistent with the purpose of Article 9(3), which is 'the protection of the individual against arbitrary interferences by the State with his right to liberty'[21] and to keep pre-trial detention 'as short as possible'.[22] Thus,

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[17] *See supra* notes 13-14 and accompanying text.
[18] *Caldas v. Uruguay*, *supra* note 13, paras. 13.2, 14. *Cf. Fox, et al v. United Kingdom*, *supra* note 6, para. 40.
[19] *Kelly v. Jamaica*, Communication No. 253/1987, U.N. Doc. CCPR/C/41/D/253/1987 at 60 (1991), para. 5.8.
[20] *Cf. TW v. Malta* (2000) 29 E.H.R.R. 185, para. 43.
[21] *Brogan and Others v. United Kingdom* (1989) 11 E.H.R.R. 117, para. 58.
[22] Human Rights Committee, General Comment 8, Article 9 (Sixteenth session, 1982), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI\GEN\1\Rev.1 at 8 (1994), para. 3 [hereinafter General Comment 8]. *Cf. McGoff v. Sweden* (1984) 6 E.H.R.R. CD101, para. 26.

the purpose of Article 9(3) is defeated if it only applies to post-charge deprivation of liberty, as the State can escape the obligation under Article 9(3) by simply refraining from charging the accused.

The HRC has not elaborated on this issue. However, the HRC's jurisprudence under Article 9(3), in particular the fact that the time to be considered under the promptness requirement runs from the moment when the arrest is made, suggests that Article 9(3) applies to all deprivations of liberty for the purposes of criminal law enforcement, regardless of whether there has been a charge or not.[23] Alternatively, 'charge' within the meaning of Article 9(3) is to be given an autonomous meaning similar to that of the concept of 'charge' under Article 14, which considers a person to be charged for the purposes of Article 14 once he has been subjected to the State's coercive powers (*i.e,* arrested), regardless of whether or not he is considered to be formally charged under the domestic law.[24]

In order to comply with Article 9(3), the arrested or detained person must be brought promptly before a judicial officer. These requirements are discussed next.

7.1.3.1 Promptness

The requirement of promptness, according to the HRC, means that an arrested or detained person must be brought before a judicial officer within 'a few days' from his arrest or detention.[25] Although the HRC has not fixed a maximum time limit under the requirement of promptness, its jurisprudence suggests a delay that exceeds three days constitutes a violation of Article 9(3).[26]

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[23] *See ibid.* para. 2; *Kulomin v. Hungary*, Communication No. 521/1992, U.N. Doc. CCPR/C/50/D/521/1992 (1996), para. 11.2; *Borisenko v. Hungary*, Communication No. 852/1999, U.N. Doc. CCPR/C/75/D/852/1999 (2002), para. 7.4; *Freemantle v. Jamaica*, Communicaiton No. 625/1995, U.N. Doc. CCPR/C/68/D/625/1995 (2000), para. 7.4; *Silbert Daley v. Jamaica*, Communication No. 750/1997, U.N. Doc. CCPR/C/63/D/750/199 (1998), 7.1. It is also worth mentioning that under Article 5(3) in conjunction with Article 5(1)(c) of the ECHR and under Article 7(5) of the ACHR, every person who has been arrested or detained for the purposes of criminal law enforcement, is entitled to be brought promptly before a judicial officer to review the grounds of his detention, and to be released if there are insufficient grounds for detaining him.

[24] The concept of 'charge' within the meaning of Article 14 is discussed in detail *infra* para. 8.1.1

[25] General Comment 8, *supra* note 22, para. 2.

[26] Joseph, S, *et al, The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary*, 2nd edn (Oxford: Oxford University Press, 2004), pp. 324-325. Similarly, the European Court held that a delay of four days and six hours was incompatible with the requirement of promptness under the corresponding provision in Article 5(3) of the ECHR. *See Brogan and Others v. United Kingdom*, *supra* note 21, para. 62.

7.1.3.2 Judicial officer

Article 9(3) requires the detention to be reviewed by a 'judge or other officer authorised by law to exercise judicial power'. In the case of *Kulomin v. Hungary*[27] the HRC stated that the exercise of judicial power within the meaning of Article 9(3) entails that the detention is reviewed by an 'independent, objective and impartial' authority.[28] Consequently, the HRC held that the Hungarian prosecutor, who reviewed the detention in the case under consideration, could not be regarded as a judicial officer because he lacked 'the institutional objectivity and impartiality' required by Article 9(3).[29] However, the problem with the HRC's ruling is that it did not specify why the Hungarian Prosecutor lacked the necessary 'institutional objectivity and impartiality',[30] nor was it clear from the parties' arguments how this conclusion has been reached.

Given that the requirement of a judicial officer under Article 9(3) corresponds literally to the requirement of judicial officers under Article 5(3) of the ECHR, it is justified to draw upon the European Court's jurisprudence in this respect. According to the European Court, certain guarantees are required in order for an official to be qualified as a judicial officer within the meaning of Art 5(3) of the ECHR. These guarantees, as summarised by Judge Matscher of the European Court in his dissenting opinion in *Huber v. Switzerland*,[31] are as follows:

> [I]nstitutional guarantees: independence *vis-à-vis* the executive and the parties;
> [P]rocedural guarantees: obligation of the official concerned to hear himself the accused brought before him; and
> [S]ubstantive guarantees: decision on the continuation of detention or release to be taken by reference to legal criteria, after circumstances militating for and against detention have been examined; power to order release if they are insufficient reasons to justify the detention.[32]

The main issue raised in *Huber* concerned the last phrase of the first guarantee: the independence of the judicial officer from the parties *(i.e.,* impartiality). The European

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[27] *Supra* note 23.
[28] *Ibid.* para. 11.3.
[29] *Ibid.*
[30] A point of view which has been expressed in this case by Mr. Nisuke Ando in his dissenting opinion. *See ibid.*
[31] Judgment of 23 October 1990, A 188.
[32] *Ibid.* para.1 (Judge Matscher, dissenting). These requirements had been unanimously adopted by the European Court in *Schiesser v. Switzerland* (1979-80) 2 E.H.R.R. 417, para. 31.

Court considered whether the combination of the investigating and prosecuting functions by a judicial officer is compatible with the requirement of impartiality under Article 5(3) of the ECHR. The case concerned District Attorneys in Switzerland, who were empowered to conduct investigations into criminal offences, draw up the indictment and, in some cases, play the role of the prosecuting counsel against the accused who was detained by the same District Attorney. The Swiss government argued that District Attorneys were impartial as they were required to look for and consider incriminating and exonerating evidence in carrying out the investigation or drawing up the indictment, and that they were appointed for their posts by universal direct suffrage for a renewable term of four years. However, the European Court took the view that the combination of the investigating and prosecuting functions, despite the mentioned guarantees, whether in fact occurred or theoretically possible, opens to doubt the impartiality of the District Attorneys in charge of reviewing the detention. Therefore, they cannot be considered as judicial officers within the meaning of Article 5(3) of the ECHR.[33]

A further question arises here is whether the exercise of investigating functions by an official responsible for reviewing the detention undermines his impartiality. This question concerns systems that adopt the inquisitorial mode of process, in which the investigating judge carries out the investigation and plays the role of a 'judicial officer' within the meaning of Article 9(3) or the role of 'court' within the meaning of Article 9(4). The European Court has, in many cases in which the impartiality of a given investigating judge was contested, answered the question before it without addressing whether the combination of investigating and judicial functions by the investigating judge is compatible with the impartiality requirement, as it was never raised before it.[34]

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[33] *Ibid.* para. 43. The need to the separation of investigating and prosecuting functions to satisfy the impartiality requirement under 5(3) was confirmed by the European Court in *Brincat v. Italy* (1993) 16 E.H.R.R. 591, para. 21, when it stated that:

> [O]nly the objective appearances at the time of the decision on detention are material: if it then appears that the 'officer authorised by law to exercise judicial power' may later intervene, in the subsequent proceedings, as a representative of the prosecuting authority, there is a risk that his impartiality may arouse doubts which are to be held objectively justified.

[34] *See Schiesser v. Switzerland, supra* note 32; *Huber v. Switzerland, supra* note 31; *Bezicheri v. Italy* (1990) 12 E.H.R.R. 210; *Brincat v. Italy, supra* note 33.

It should be noted, however, that there is a wide scepticism about the impartiality of investigating judges within countries that adopt the inquisitorial mode of process.[35] The investigating judge, by virtue of being the master of the investigation, has the ultimate responsibility for the successful completion of the investigation. Thus, the investigating judge has a vested interest in keeping the accused in detention in order, for example, to pressure the accused to confess, which opens the impartiality of the investigating judge widely to doubt.[36] As Samet, eloquently, put it:

> [The very character of the role of the *juge d'instruction*] thus surprises and misleads, and it has become common to ask oneself whether the *juge d'instruction* is Salomon or Maigret, judge or investigator, defender of right or pursuer of wrongs.[37]

Therefore, it can be safely concluded that an official in charge of the investigation does not constitute 'a judicial officer' within the meaning of Article 9(3) of the ICCPR or Article 5(3) of the ECHR.

7.1.4 Right to bail

According to Article 9(3) of the ICCPR, an arrested or detained person 'shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement'. The quoted passage of Article 9(3) guarantees an arrested or detained person two distinct rights: release on bail and trial within a reasonable time. Here attention will be focused on the former right as the latter is discussed in the next section.[38] Article 9(3) of the ICCPR states explicitly that the general rule is to release the arrested or detained person on bail, a rule that seeks to reinforce the fundamental principle that the accused is presumed innocent and must

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[35] For a discussion of the impartiality of investigating judges under the French inquisitorial system, *see* Leigh, L & Zedner, L, *A Report on the Administration of Criminal Justice in the Pre-trial Phase in France and Germany* (London: HOMS, Royal Commission on Criminal Justice, Study no 1, 1992), pp. 23, 48-49; Elliott, C, *French Criminal Law* (Devon: Willan Publishing, 2001), pp. 40-43.
[36] *See* Elliott, *supra* note 35, pp. 40-43; Harris, *supra* note 14, p. 147.
[37] As quoted in Bell, J, *French Legal Cultures* (Butterworths: London, 2001), p. 115.
[38] *See infra* para. 7.1.5.

be treated as such until he is proven otherwise in accordance with law, as dictated by Article 14(3) of the ICCPR.[39]

The combination of the right to liberty and the presumption of innocence dictates that the detention of the accused cannot be solely based upon a suspicion, however compelling, that the accused has committed a criminal offence. Therefore, there must be additional public interest grounds to justify the detention of the accused who is innocent in the eyes of the law, pending investigation or trial.[40] According to the Committee, pre-trial detention is considered necessary for the public interest if it is effected in order, for example, to prevent flight, interference with the course of justice or the commission of an offence while the accused is at large.[41] Other grounds for denying bail on the basis of the public interest include the protection of the accused himself, and the prevention of the disturbance of the peace.[42] The burden of establishing that pre-trial detention is necessary for the public interest lies with the State.[43] Pre-trial detention for fear of the accused absconding cannot be interfered merely from, for example, the fact that the accused is a foreigner,[44] or from the fact that the potential sentence is sever.[45]

In the absence of public interests grounds for detaining the accused, he must be released on bail. Article 9(3) allows conditions to be attached to bail. It mentions that the granting of bail can be conditional on the accused's undertaking that he will attend his trial. However, other conditions that do not aim to ensure the attendance of the arrested or detained person at his trial are also permitted under Article 9(3) as long as they aim to secure a legitimate goal, such as preventing the accused from intimidating

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[39] Human Rights Committee, General Comment 13, Article 14 (Twenty-first session, 1984), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI\GEN\1\Rev.1 at 14 (1994), para. 7 [hereinafter General Comment 13].

[40] *W.B.E. v. The Netherlands*, Communication No. 432/1990, U.N. Doc.CCPR/C/46/D/432/1990 (1992), paras. 6.3-6.4. *Cf. Stogmuller v. Austria* (1979-1980) 1 E.H.R.R. 155, para. 4; *Tomasi v. France* (1993) 15 E.H.R.R. 1, para. 84; *C.C. v. The United Kingdom*, App no. 32819/96, Report of 30 June 1998, para. 43. *Cf. also* Dijk, , P, *et al*, *Theory and Practice of the European Convention on Human Rights*, 3rd edn (The Hague; Boston: Kluwer Law International, 1998), p. 461 & n. 998.

[41] *Ibid.*

[42] *Cf.* Harris, *supra* note 14, 139-142; Starmer, K, *et al, Criminal justice, Police Powers and Human Rights* (London: Blackstone, 2001), pp. 110-113.

[43] *Hill v. Spain*, Communication No. 526/1993, U.N. Doc. CCPR/C/59/D/526/1993 (1997), para. 12.3. *Cf. W. v. Switzerland* (1994) 17 E.H.R.R. 60, p. 84 (Judge Pettiti, dissenting).

[44] *Ibid.*

[45] *Cf. Letellier v. France* (1992) 14 E.H.R.R. 83, para. 43.

witnesses, or committing an offence while he is at large. The logic behind this, as observed by Harris *et al*, is that:

> [I]t would be unsatisfactory if Article 5(3) [of the ECHR, which corresponds literally to Article 9(3) of the ICCPR in this respect,] did not allow any considerations other than appearance at trial to be taken into account when allowing bail. Such an approach might work to a person's disadvantage in that it might prevent his release altogether if, for example, a condition as to the suppression of evidence or the prevention of crime were not permissible.[46]

On the other hand, conditions that are not related to the purposes of the bail system, such as basing the amount of the financial guarantee as a condition of bail solely on the economic consequences of a given alleged crime that the accused has allegedly committed, constitutes a violation of Article 9(3).[47]

7.1.5 Right to trial within a reasonable time

Article 9(3) entitles anyone who is under arrest or detention to 'trial within a reasonable time or to release'. The HRC has interpreted the quoted passage of Article 9(3), to mean pre-trail detention period of the accused pending his trial must not be unreasonable. The requirement of 'reasonableness' means that pre-trial detention must be as short as possible.[48] Thus, where the length of the pre-trial detention is unjustified in the light of the circumstances of a given case, the detention would be considered as unreasonable, and, therefore, in breach of Article 9(3).[49] The time to be taken into account in deciding the reasonableness of the pre-trial detention runs from the moment a person is arrested until a decision on the merits of the case at the first instance has been reached.[50] The HRC has not elaborated on the factors to be taken into account when deciding whether or not the pre-trial detention is reasonable. Instead, the HRC has consistently held that, in the absence of a satisfactory response from the respondent state to a period of time that is *prima facie* unreasonable

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[46] Harris, *supra* note 14, p. 142.
[47] Concluding Observations of the Human Rights Committee, Argentina, U.N. Doc. A/50/40, paras. 144-165 (1995), para. 157. *Cf. Neumeister v. Austria* (No. 1) (1979-80) 1 E.H.R.R. 91, para. 14
[48] General Comment 8, *supra* note 22, para. 3.
[49] *See Fillastre, et al v. Bolivia*, Communication No. 336/1988, U.N. Doc. CCPR/C/43/D/336/1988 at 96 (1991), para. 6.5; *Teesdale v. Trinidad and Tobago*, Communication No. 677/1996, U.N. Doc. CCPR/C/74/D/677/1996 (2002), para. 9.3; *Koné v. Senegal*, Communication No. 386/1989, U.N. Doc. CCPR/C/52/D/386/1989 (1994), para. 8.7.
[50] *Ibid.* para. 6.5; *Thomas v. Jamaica*, Communication No 614/1995, U.N. Doc. CCPR/C/65/D/614/1995 (1999), para. 9.6.

(approximately sixteen months), the right to be tried within a reasonable time is violated.[51] The HRC has developed a set of factors to determine whether the accused is tried without undue delay under Article 14 (3)(c), which equally applies to Article 9(3) of the ICCPR. These factors include the complexity of the case, the conduct of both the accused and the State authorities.[52]

7.1.6 Right to *habeas corpus*

In order to remedy any alleged violation of Article 9, Article 9(4) stipulates that any person who has been arrested or detained has the right 'to take proceedings before a court, in order that the court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful'. As discussed earlier, Article 2(3) of the ICCPR guarantees a general right to an effective remedy. However, where there is an alleged violation of Article 9, only the right to *habeas corpus* can constitute an effective remedy within the meaning of Article 2(3).[53] It is also noteworthy that the general right to remedy under Article 2(3) and the specific remedy under Article 9(4) differs in that the former only applies where an individual has 'an arguable claim' that his Covenant has been violated, while the latter applies whenever there is a deprivation of liberty irrespective of whether there is an arguable claim that Article 9 has been violated or not. Furthermore, the right to *habeas corpus* is a continuing remedy in the sense that it is not sufficient only to allow a person who has been detained to have the lawfulness of his detention reviewed by a 'court', and then to keep him detained indefinitely without a proper judicial review over his detention. Detention is an exception that must not last more than it is strictly necessary to protect the public interest. Thus, it must be subjected to constant judicial supervision, preferably in the form of periodic reviews within reasonable intervals, to ensure that it is not prolonged more than is strictly required.[54]

Unlike Article 9(3), Article 9(4) requires the person who has been arrested or detained to take the initiative to assert his right to have the lawfulness of his detention

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[51] *See supra* note 49. *See also* Joseph, *supra* note 26, p. 328.
[52] *Wolf v. Panama*, Communication No. 289/1988, U.N. Doc. CCPR/C/44/D/289/1988 at 80 (1992), para. 6.4; *Stephens v. Jamaica*, Communication No. 373/1989, U.N. Doc. CCPR/C/55/D/373/1989 (1995), para. 9.8; *Michael, et al v. Spain*, Communication No. 526/1993, U.N. Doc. CCPR/C/59/D/526/1993 (1997), para. 12.4. *Cf. König v. FRG* (1979-80) 2 E.H.R.R. 170, para. 99.
[53] *See supra* para. 4.1.
[54] *Cf. Bezicheri v. Italy*, *supra* note 34, para. 21.

reviewed by a 'court'.[55] However, the State on its part is obliged to make the remedy of *habeas corpus* available to any person who has been deprived of his liberty as soon as the deprivation of liberty has taken place in order to comply with Article 9(4). Therefore, if the law does not guarantees this right, delays its application, or if it is practically impossible to exercise it, Article 9(4) is violated regardless of whether the detention is lawful or not. Hence, the HRC held that the non-availability of the right of *habeas corpus* to the detained person until his detention was confirmed by an order of the Minister of Interior one week after the deprivation of liberty had taken place constituted a violation of Article 9(4).[56] The HRC also held that where a person was kept for three days in incommunicado detention, he had been practically denied the right to *habeas corpus* under Article 9(4).[57]

Once the arrested or detained person has asserted his right to *habeas corpus*, the 'court' in charge of reviewing the lawfulness of the detention must take its decision 'without delay'. There is no maximum time limit within which the decision has to be taken, and whether the decision has been taken 'without delay' can be only determined in light of the circumstances of each case.[58]

For any mechanism dealing with alleged violations of the ICCPR provisions to be considered a remedy, it must be effective. The right to *habeas corpus* is not an exception to that rule. In order to enable the arrested or detained person to exercise his right to *habeas corpus* effectively, he must have access to a 'court'. During the detention review process, the detainee must be allowed to respond to any arguments put by the State against his release before the 'court', which is in charge of reviewing his detention, makes its decision on the merits of the request of the detainee to be released.[59] This does not necessarily have to be in the form of an oral hearing, and written proceedings seem to be sufficient to satisfy the principle of equality of arms in

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[55] *Stephens v. Jamaica*, Communication No. 373/1989, U.N. Doc.CCPR/C/55/D/373/1989 (1995), para. 9.7.
[56] *Torres v. Finland*, Communication No. 291/1988, U.N. Doc. CCPR/C/38/D/291/1988 (1990), para. 7.2. Similarly, the European Court has held that the non-availability of the right to *habeas corpus* to the accused for two weeks after his arrest constituted a violation of the right to *habeas corpus* under Article 5(4) of the ECHR. *See De Jong, et al v. The Netherlands* (1986) 8 E.H.R.R. 20, para. 58.
[57] *Hammel v. Madagascar*, Communication No. 155/1983, U.N. Doc. Supp. No. 40 (A/42/40) at 130 (1987), paras. 18.2, 19.4, 20.
[58] *Torres v. Finland*, *supra* note 56, para. 7.4.
[59] *Cf. Sanchez-Reisse v. Switzerland* (1987) 9 E.H.R.R. 71, para. 51-52.

this respect.[60] There is no requirement for the accused, or his representative, to be present at the bail hearing, where his absence from the hearing will not undermine his ability to challenge the reasons for his detention effectively.[61]

Additionally, the authority in charge of reviewing the lawfulness of detention must be impartial and independent in order to be qualified as a 'court' within the meaning of Article 9(4).[62] If the authority responsible for reviewing detention fails to meet the criteria of impartiality and independence required in order to qualify as 'a judicial officer' within the meaning of Article 9(3), as discussed above, it will *a priori* fail to meet the requirement of 'court' within the meaning of Article (4). Furthermore, in order for an authority to be qualified as a 'court' within the meaning of Article 9(4), it must be able to review the 'lawfulness' of the detention in terms of its consistency with domestic law and the Covenant.[63] Finally, the authority reviewing the detention must be empowered to issue legally binding decisions, including the release of the detainee if the detention is found to be 'unlawful' within the meaning of Article 9(4).[64]

B. Canada

7.2 Right to liberty

There are various sections under the Canadian Charter that deal with the right to liberty, which include the following:

> 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.
> 9. Everyone has the right not to be arbitrarily detained or imprisoned.
> 10. Everyone has the right on arrest or detention:
> (a) to be informed promptly of the reasons therefor;
> (b) ...
> (c) to have the validity of the detention determined by way of *habeas corpus* and to be released if the detention is not lawful.

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[60] *Cf. ibid.*
[61] *Cf. ibid.* para. 51.
[62] *Torres v. Finland*, *supra* note 56, para. 7.2. *Cf. De Wilde, v. Belgium* (No. 1) (1979-80) 1 E.H.R.R. 373, para. 77.
[63] *A v. Australia*, Communication No. 560/1993, U.N. Doc. CCPR/C/59/D/560/1993 (1997), para. 9.5; *C v. Australia*, *supra* note 7, para. 8.3. *Cf. Brogan and Others v. United Kingdom*, *supra* note 21, para. 65.
[64] *Ibid. Cf. Van Droogenbroeck v. Belgium* (1982) 4 E.H.R.R. 443, para. 51.

11. Any person charged with an offence has the right:
b) to be tried within a reasonable time;
e) not to be denied reasonable bail without just cause.

What follows is a discussion of the right to liberty and the safeguards, which are designed to protect this right, as guaranteed under the above-quoted sections.

7.2.1 Section 7

Section 7 of the Charter protects three rights, namely, the right to life, liberty and security of person. Section 7, however, does not provide unqualified protection for the rights it guarantees in the sense that the Charter does not prohibit all interferences with these rights. Instead, it prohibits interfering with section 7 rights without respecting the principles of fundamental justice. It follows that the analysis of section 7 consists of two stages. In the first stage, it will be determined whether the applicant's right to life, liberty or security of person has been violated. In the second stage, if a violation of a section 7 right has been found, the question to be addressed, is whether the violation of the protected right conforms with the principles of fundamental justice. Hence, the analysis of section 7 in the following sections will focus on two issues. Firstly, to determine the meaning of the right to liberty in the criminal justice sphere; secondly, to determine those principles of fundamental justice with which a violation of the right to liberty has to accord in order to survive the Charter scrutiny.

7.2.1.1 Liberty

It should be noted from the outset that the Supreme Court throughout section 7 case law has refrained from determining the full scope of Article 7 with regard to both aspects: the rights it protects and the principles of fundamental justice. Instead, the Court preferred to address the scope of section 7 with regard to the case before them. The full scope will be determined gradually as the Court addresses alleged violations of the rights protected under section 7.[65] The full scope of the right to liberty is unclear as there are conflicting views outside the criminal law sphere.[66] However, in

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[65] *Morgentaler et al. v. R*, [1988] 1 S.C.R. 30, 51.
[66] For a detailed discussion of the meaning of liberty under s. 7, *see* Garant, P, 'Fundamental Rights, Fundamental Justice', in *The Canadian Charter of Rights and Freedoms*, 3rd edn, ed. by G Beaudoin & E Mendes, (Scarborough, Ont: Carswell, 1995), ch. 9, p.12-16.

the context of the criminal justice system, the right to liberty protects, at least, against governmental interferences with the physical liberty of the individual.[67]

6.2.1.2 Principles of fundamental justice

The principles of fundamental justice have been subjected to extensive interpretation by the Supreme Court. The Court has stressed that the clause of the principles of fundamental justice is a qualifier of the right to life, liberty and security of person. Justice Lamer in the leading case of *Re B.C. Motor Vehicle Act,*[68] described the principles of fundamental justice in the following terms:

> The term 'principles of fundamental justice' is not a right, but a qualifier of the right not to be deprived of life, liberty and security of the person; its function is to set the parameters of that right.
> Consequently, the principles of fundamental justice are to be found in the basic tenets and principles, not only of our judicial process, but also of the other components of our legal system.
> ...
> Whether any given principle may be said to be a principle of fundamental justice within the meaning of s. 7 will rest upon an analysis of the nature, sources, rationale and essential role of that principle within the judicial process and in our legal system, as it evolves.[69]

Despite the apparent rejection of the Supreme Court to term the principles of fundamental justice as rights, they are, practically, in essence, constitutional rights but their existence is dependent on the breach of the rights protected by section 7. In other words, once the government interferes with the protected rights under section 7 (*i.e.*, life, liberty or security of person), the individual becomes, as a consequence of the interference with his right, entitled to enjoy the protection of the principles of fundamental justice, the basic role of which, with regard to the criminal justice system, is to protect the integrity of the system by striking a fair balance between the interests of the accused to have his rights to life, liberty and security of person respected, and the interests of the society, *inter alia*, in effective law enforcement. [70]

It is noteworthy that there is a strong connection between section 7 and the other legal rights guaranteed by sections 8-14, as observed by the Supreme Court. On the

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[67] *Reference Re Sections 193 and 195.1(1)(c) Criminal Code,* [1990] 1 S.C.R. 1123, 1177.
[68] [1985] 2 S.C.R. 486.
[69] *Ibid.* at pp. 512-513.
[70] *Cunningham v. Canada,* [1993] 2 S.C.R. 143, 151-152.

one hand, section 7 introduces and covers all the protection provided by ss.8-14, which are tailored to deal with specific breaches of the principles of fundamental justice.[71] On the other hand, section 7 provides additional protection in the sense that it recognises and incorporates certain rights that are not specifically guaranteed by sections 8-14.[72] The principles of fundamental justice, as applicable to the pre-trial stage of the criminal process, are, namely, the right to fair treatment and the doctrine of abuse of process, the presumption of innocence and the right to silence. These principles are discussed in the relevant sections.

7.2.2 Right against arbitrary arrest or detention

Section 9 of the Charter states that '[e]veryone has the right not to be arbitrarily detained or imprisoned.' In order to engage the protection of section 9, there are two issues that have to be established. Firstly, the accused has to be detained within the meaning of section 9, and secondly, the detention must be arbitrary. The focus in the following sections will be upon these two issues.

7.2.2.1 Detention

The Supreme Court first considered the meaning of detention in *Therens*[73] in the context of s.10. In the Court's view, detention falls within the scope of section 10, where a police officer or an agent of the State 'assumes control over the movement of a person by a demand or direction which may have significant legal consequences...'[74] Detention, as emphasised by the Supreme Court, extends to physical as well as psychological compulsion. Psychological compulsion could result in detention within the meaning of s. 10, where the person concerned submitting to detention has 'a reasonable perception of suspension of freedom or choice.'[75] In *Hufsky*,[76] where the Supreme Court considered the spot check procedure and whether it amounts to detention under section 9, it was held unanimously that the principles

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[71] *Re B.C. Motor Vehicle Act*, *supra* note 68, 502.
[72] *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 S.C.R. 425, 465-470; *R. v. Genereux*, [1992] 1 S.C.R. 259, 310.
[73] [1985] 1 S.C.R. 613.
[74] *Ibid.* at p. 642.
[75] *Ibid.* at p. 644.
[76] [1988] 1 S.C.R. 621.

developed in *Therens* with regard to the meaning of detention under s.10, were equally applicable to s. 9.[77]

The question that arises is whether an arrest could be considered as a detention within the meaning of Section 9. Unlike detention, the concept of arrest has received little attention from the Supreme Court. The only definition to be found in the current jurisprudence is one adopted 30 years ago where it was stated that 'arrest consists of the actual seizure or touching of a person's body with a view to his detention. The mere pronouncing of words of arrest is not an arrest, unless the person sought to be arrested submits to the process and goes with the arresting officer. An arrest may be made either with or without a warrant.'[78] Although the Supreme Court has not stated explicitly that an arrest constitutes a detention within the meaning of Article 9, the definition of the arrest and detention, cited above, and the fact that the jurisprudence of the Supreme Court considers arbitrary arrest as contrary to Article 9, indicates that Article 9 applies to detention and arrest as well.[79]

7.2.2.2 Arbitrariness

In order for a detention to meet the requirement of non-arbitrariness under section 9, it must be authorised by statute or common law, the power to detain must not provide unfettered discretion that could be exercised without being subjected to any criteria,[80] and it must be based upon reasonable grounds that an offence has been, is being, or is going to be committed.[81]

In *R. v. Duguay*,[82] MacKinnon A.C.J.O., speaking for the majority of the Ontario Court of Appeal, made a clear distinction between arbitrariness and unlawfulness, in the sense that not every unlawful detention is necessarily arbitrary. In considering the power of the police to arrest without warrant where they have reasonable grounds to believe that an indictable offence has been committed under s. 450(1)(a) (now s. 495(1)(a)) of the Criminal Code, MacKinnon A.C.J.O. emphasised that the reasonable grounds criterion has to be met in order for the arrest and the subsequent detention to

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[77] *Ibid.* 632.
[78] 10 Hals., 3rd ed., p. 342. Cited in *The Queen v. Whitfield*, [1970] S.C.R. 46, at p. 48.
[79] *See, e.g., R. v. Duguay et al*, (1985), 18 C.C.C. (3d) 289 (Ont. C.A.), pp. 296-297. Appeal to the Supreme Court was dismissed. *R. v. Duguay et al.* [1989] 1 S.C.R. 93.
[80] *Hufsky v. R, supra* note 76, 632-633.
[81] *R v. Iron*, (1987) 33 C.C.C. (3d) 157, 177.
[82] *Supra* note 79.

be lawful. It is not sufficient that the police officer subjectively believes that there are reasonable grounds that an offence has been committed, but those grounds must be justifiable from an objective point of view. However, reasonable grounds do not need to amount to a *prima facie* case in order for the arrest to be considered lawful. If the grounds on which the police base the unauthorised arrest fall short of what could constitute reasonable and probable grounds, the arrest, though unlawful, is nevertheless not arbitrary. However, if reasonable grounds do not exist at all, the arrest and the subsequent detention are deemed arbitrary contrary to section. 9.[83]

7.2.3 Right to be informed promptly of the reasons thereof

Section 10(a) entitles any person arrested or detained to be informed promptly of the reasons for his arrest or detention. Since refraining from informing that person of the reasons for his arrest will entitle him to resist the arrest, it is imperative, save in exceptional circumstances, that such a person be immediately informed of the grounds for the police action.[84] The Supreme Court in *Evans,*[85] where the arrestee suffered from mental deficiency, held that what the arrestee or detainee needs to be informed of, does not necessarily have to take the form of a specific formula. The question should be whether, in light of the circumstances, the arrestee can be reasonably expected to understand what is happening to him and for what reason. This approach aims to protect the substance of the right to be informed by enabling the arrested person to make an informed decision whether to submit to the arrest or not, and whether to retain counsel, which could be only exercised in a meaningful way if the accused knows the extent of his potential jeopardy.[86]

7.2.4 Right to be brought promptly before a judicial officer

Section 503(1) of the Criminal Code requires a police officer who arrests a person with or without warrant and does not release him within 24 hours from the time of the arrest, to bring the detained or arrested person to a justice of the peace without unreasonable delay, and in any event within 24 hours from the time of the arrest or detention if a justice of the peace is not immediately available. If the justice of the peace remains unavailable after 24 hours, the police officer must bring the arrested or

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[83] *Ibid.* p. 296.
[84] *R. v. Kelly* (1985), 17 C.C.C. (3d) 419, 424.
[85] [1991] 1 S.C.R. 869.
[86] *Ibid.* 888.

detained person before a justice of the peace as soon as possible. Once the arrested or detained person is brought before the justice of the peace, at what is known as 'the show cause hearing',[87] the justice of the peace reviewing the detention must release the accused, unless there is just cause, as discussed below, for detaining him. The review of detention is considered to be a judicial function. Therefore, the justice of the peace who is reviewing the detention must satisfy the requirement of impartiality and independence necessary for the exercise of judicial functions.[88] If the accused is charged with an offence under s. 469,[89] the justice of the peace must order the accused to be held in detention until, upon the application of the accused, his detention is reviewed by a judge of or a judge presiding in a superior court of criminal jurisdiction.[90] If the accused is detained, the detention order must include the reasons for denying bail.[91]

7.2.5 The presumption of innocence and the right to bail

The presumption of innocence, in addition to being guaranteed under the Charter by section 11(d), which does not apply at the bail hearing,[92] is recognised as a principle of fundamental justice under s.7 of the Charter, with which a deprivation of life, liberty, or security of person has to accord.[93] The role of the presumption of innocence as a principle of fundamental justice is to establish the rule that the accused, during the bail stage, is presumed innocent until proven guilty. Apart from that rule, the presumption of innocence, at the bail stage, does not provide more protection beyond that being already provided by s. 11(e) of the Charter. In this respect, the Supreme Court stated that s. 11(e) 'define[s] the procedural content of the presumption of

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[87] Delisle, R & Stuart, D, *Learning Canadian Criminal Procedure*, 4th edn (Ontario: Carswell, 1996), p. 248.
[88] *Ell v. Alberta*, [2003] 1 S.C.R. 857, 871-872.
[89] These offences are '(a) an offence under any of the following sections:(i) section 47 (treason),(ii) section 49 (alarming Her Majesty),(iii) section 51 (intimidating Parliament or a legislature),(iv) section 53 (inciting to mutiny),(v) section 61 (seditious offences),(vi) section 74 (piracy),(vii) section 75 (piratical acts), or (viii) section 235 (murder);(b) the offence of being an accessory after the fact to high treason or treason or murder;(c) an offence under section 119 (bribery) by the holder of a judicial office;(c.1) an offence under any of sections 4 to 7 of the Crimes Against Humanity and War Crimes Act;(d) the offence of attempting to commit any offence mentioned in subparagraphs (a)(i) to (vii); or (e) the offence of conspiring to commit any offence mentioned in paragraph (a).
[90] Criminal Code, ss. 515(11), 522.
[91] *Ibid*. s.515(5).
[92] *R v. Frankforth*, (1982) 70 C.C.C. (2d) 448, p. 451.
[93] *R. v. Pearson*, [1992] 3 S.C.R. 665, 683.

innocence ..., and constitute[s] both the extent and the limit of that presumption at [the bail] stage.'[94]

Section 11(e) guarantees the accused the right not to be denied reasonable bail without just cause. In *Pearson,*[95] it was held that section 11(e) guarantees two distinct rights. In this connection, Lamer C.J. stated that:

> "Reasonable bail" refers to the terms of bail. Thus, the quantum of bail and the restrictions imposed on the accused liberty while on bail must be "reasonable". "Just cause" refers to the right to obtain bail. Thus bail must not be denied unless there is "just cause" to do so. The "just cause" aspect of s. 11(e) imposes constitutional standards on the grounds under which bail is granted or denied.[96]

However, Section 11(e), just like all of section 11 provisions, only applies once the accused is charged with a criminal offence within the meaning of Section 11. In the following sections, the concept of 'charge' within the meaning of s.11, the right not to be denied bail without just cause and the right to reasonable bail will be treated separately next.

7.2.5.1 'Charge'

According to the majority of the Supreme Court in *Kalanj,*[97] spoken for by McIntyre J., the accused is charged within the meaning of section 11, once 'information is sworn alleging an offence against him, or where a direct indictment is laid against him when no information is sworn.'[98] In practice,[99] the accused is considered to be charged within the meaning of Article 11 in the following circumstances:

- Where the accused has been arrested without a warrant and has not been released by the police, the accused is considered to be charged at the moment when the information alleging that he has committed a criminal offence is sworn within the 24 hours after the arrest of the accused upon his appearance before the justice of the peace;[100]

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[94] *Ibid.* 688-689.
[95] *Ibid.*
[96] *Ibid.* at p.689.
[97] [1989] 1 S.C.R.1549
[98] *Ibid.* at p. 1607. *See also R. v. Potvin*, [1993] 2 S.C.R. 880, 908-909.
[99] These circumstances have been conveniently summarised in *Kalanj, supra* note 97, pp. 1613-1617. (Lamer J., dissenting).
[100] *See* Criminal Code, s. 503(1).

- When a summons or an arrest warrant has been issued by a justice of the peace on his being satisfied that the case for compelling the accused to appear before him to answer the charge either by a summons or, if the public interest so requires, by arrest, has been made out on the basis of the information laid before him by the public prosecutor or a police officer, the accused is considered to be charged at the moment that the summons or the arrest warrant is issued;[101] or

- If the accused had been arrested but the police officer had released him with the intention of compelling his appearance by way of summons, on the person giving a promise to appear, or on the person's entering into a recognisance before the officer with or without sureties, the accused is considered to be charged when the information alleging that he has committed a criminal offence is laid before a justice of the peace 'as soon as practicable after [the release of the accused] and in any event before the time stated in the appearance notice, promise to appear or recognisance issued to or given or entered into by the accused for his attendance in court.'[102]

7.2.5.2 Right not to be denied bail without a just cause

The right to bail under section 11(e) is not a free standing one in the sense that it can be denied if a just cause for denying bail exists. 'Just cause' within the meaning of section 11(e) requires, according to Lamer C.J., in *Morales*,[103] that:

> First, the denial of bail must occur only in a narrow set of circumstances. Second, the denial of bail must be necessary to promote the proper functioning of the bail system and must not be undertaken for any purpose extraneous to the bail system.[104]

Under section 515(10) of the Criminal Code, there are four grounds upon which a justice of the peace or a judge could deny bail:

- where the detention is necessary for the protection of the safety of the public, *e.g.* the accused might commit an offence while he is at large;

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[101] *See ibid.* ss. 504, 507(1),(2),(3),(4),(5).
[102] *See ibid.* s. 505.
[103] [1992] 3 S.C.R. 711.
[104] *Ibid.* p. 737.

- there is a substantial likelihood that if the person is released, he may interfere with the administration of justice by, for instance, intimidating a prosecution witness; or
- it is necessary to ensure the attendance of the accused at his trial.

These three grounds have been accepted under the Canadian jurisprudence as a just cause within the meaning of s. 11 (e) upon which the bail can be legally denied.[105] The difficulty arises, however, with the fourth ground, which allows denying bail if it is necessary to uphold the public confidence in the administration of justice. Section 515(10)(c) permits the detention of the accused:

> [O]n any other just cause being shown and, without limiting the generality of the foregoing, where the detention is necessary in order to maintain confidence in the administration of justice, having regard to all the circumstances, including the apparent strength of the prosecution's case, the gravity of the nature of the offence, the circumstances surrounding its commission and the potential for a lengthy term of imprisonment.

The public confidence provision was enacted in 1997 after the Supreme Court had struck down, allegedly, a similar provision that allowed the denial of bail on the basis of public interest.[106] The enactment of s. 515(10)(c) provoked commentators to question the constitutionality of the new provision. It was argued that it violates the presumption of innocence which section 11(e) seeks to strengthen, as it allows detention, *inter alia*, upon a ground that is extraneous to the functions of the bail system.[107] The Supreme Court recently faced the question regarding the constitutionality of this provision. By a majority of five to four, the Supreme Court concluded in *R. v. Hall*,[108] that the respective provision, although unconstitutional in the part that permits denial of bail 'on any other just cause being shown, and without limiting the generality of the forging', the other part of the provision, which allows denial of bail on the basis of maintaining public confidence in the administration of justice, is, nonetheless, constitutional.

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[105] *See ibid.* pp. 737-740.
[106] *Ibid.*
[107] *See* Strezos, L, 'Section 515 (10)(c) of the Criminal Code: Resurrecting the Unconstitutional Denial of Bail', *C.R.*, (5th) 11 (1998), 43.
[108] (2002), 167 C.C.C. (3d) 449.

The majority came to that conclusion on the basis that it passes the test of vagueness, and that it is necessary for the proper functioning of the bail system even if there is no risk of re-offending or absconding if the accused is released on bail. The majority argued that the section in question passes the vagueness test as it provides four criteria upon which the detention could be justified to maintain public confidence in the administration of justice as mentioned in section 515(10)(c) including, namely, the apparent strength of the prosecution's case, the gravity and the nature of the offence, the circumstances surrounding its commission and the potential length of the sentence, if the accused is found guilty. The majority, furthermore, argued that maintaining public confidence in the administration of justice is a function with which the bail system is concerned. The majority based their view largely upon the particular facts of the case.[109] Hence, it is important to consider the opinion of the majority in the context of the facts of that case. The accused was charged with first-degree murder. The victim was found dead in her kitchen with 37 separate stab wounds to her hands, forearms, shoulder, neck, and face. Her assailant had tried to cut her head off. There was strong evidence linking the accused to the crime. The murder received extensive media coverage and caused significant public concern. Against this background, McLachlin C.J., stated:

> To allow an accused to be released into the community on bail in the face of a heinous crime and overwhelming evidence may erode the public's confidence in the administration of justice. Where justice is not seen to be done by the public, confidence in the bail system and, more generally, the entire justice system may falter. When the public's confidence has reasonably been called into question, dangers such as public unrest and vigilantism may emerge.[110]

The minority of the Supreme Court, however, argued that it is difficult to see the link between, on the one hand, the factors to be considered for denying bail, and, on the other hand, retaining public confidence in the administration of justice. As a result, the factors mentioned in s. 515(10)(c) become the real test, and, therefore, where there is a strong *prima facia* case against the accused and the offence is serious, even if there is no risk of re-offending or flight, the accused would be denied bail. This conclusion is supported by the fact that the bail judge in the case under consideration

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[109] *Ibid.* 454 (per Mclachlin C.J.C.).
[110] *Ibid.* at p. 461.

concluded that detention was not necessary for preventing the accused from absconding as the accused had close family ties and the proposed security measures were sufficient to eliminate such a risk. In addition, there was no risk of the accused committing an offence if he was released on bail as the bail conditions that could have been imposed would have prevented such a possibility.[111] Consequently, the minority concluded that the contested provision allowed the denial of bail on grounds extraneous to the bail system, and, therefore, denied the accused bail without just cause in violation of section 11(e).[112]

7.2.5.3 Right to reasonable bail

If the accused is granted bail, the bail conditions must be reasonable in order to comply with the requirement of section 11(e). There is no detailed pronouncement in the jurisprudence of the Supreme Court regarding the conditions of bail. The Criminal Code, however, includes extensive provisions concerning the conditions that could be imposed upon the liberty of the accused if he is granted bail pending his trial. If a justice of the peace or a judge, as the case may be, is satisfied that there is no just cause for detaining the accused charged with an offence, the accused must be released if he accepts any of the requirements mentioned in s. 515 of the Criminal Code.

7.2.6 Right to *habeas corpus*

Section 10(c) of the Charter entitles the accused to have 'the validity of the detention determined by way of *habeas corpus* and to be released if the detention is not lawful.' The right to *habeas corpus*, according to the Supreme Court, is not a remedy against the refusal to grant bail, as it would create 'a costly and unwieldy parallel system of bail review.'[113] Instead, the accused should seek the review of the grounds of his detention by a court through the bail system under the Criminal Code. Under the Criminal Code, the accused is entitled to make an application to have the order of his detention to be reviewed by a judge at any time before trial.[114] The accused is entitled to be present at the review hearing.[115] If an accused's application for release is rejected, he is entitled to request his detention to be reviewed, by a court, every thirty

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[111] *Ibid.* 483-485 (per Iacobucci J.) (Major, Arbour and LeBel JJ. concurred).
[112] *Ibid.* 488.
[113] *R v. Pearson*, *supra* note 93, p. 682.
[114] Criminal Code, s. 520(1).
[115] *Ibid.* s. 520(3).

days, starting from the date of the decision of the judge who heard the previous application.[116] Where the accused is charged with an offence listed in section 469,[117] and his detention has been ordered by a judge of or a judge presiding in a superior court of criminal jurisdiction,[118] his detention can be only reviewed by the chief justice or acting chief justice of the court of appeal.[119]

7.2.7 Right to trial within a reasonable time

Under section 11(b), the accused has the right to be tried within a reasonable time. Since the meaning of the charge for section 11 runs from the moment an information is sworn or where a direct indictment is laid against him when no information has been sworn, the pre-charge delay is disregarded in assessing the reasonableness of the post charge delay save in some circumstances in which it could be considered in the overall determination of the reasonableness of the post-charge delay.[120] The majority of the Supreme Court in *Morin,*[121] held that the individual interests that section 11(b) seeks to protect are the right to liberty, the right to security of person, and the right to a fair trial. It seeks to protect the right to liberty by minimising the period during which the accused is detained, or released upon restrictive bail conditions. The right to security of a person is protected by seeking to minimise stigma, concerns, and anxieties resulting from being involved in the criminal process. The right to a fair trial is protected by ensuring that the proceedings take place while the evidence is fresh and available. [122] Therefore, the analysis of whether section 11(b) was infringed or not, is largely dependent upon the issue of whether or not one of the protected interests has been prejudiced by the delay.[123]

If it is established that the right to be tried within a reasonable time has been violated, the minimum remedy under section 24(1), according to the majority in

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[116] *Ibid.* s. 520(8).
[117] *See supra* note 89.
[118] Criminal Code, s. 522 (1).
[119] *Ibid.* ss. 522(4) and 680.
[120] *Carter v. The Queen*, [1986] 1 S.C.R. 98, 985-986; *R. v. Morin,* [1992] 1 S.C.R. 771, 789.
[121] *Supra* note 1220.
[122] *Ibid.* 786.
[123] It should be noted though that the majority identified three other factors upon which the assessment of the reasonableness of the delay could be determined including (1) the length of the delay; (2) waiver of time periods; (3) the reasons for the delay, including (a) inherent time requirements of the case, (b) actions of the accused, (c) actions of the Crown, (d) limits on institutional resources, and (e) other reasons for delay. *See ibid.* 787-788.

Rahey,[124] which was expressed in three separate judgements, is a permanent stay of proceedings.[125] This is because, according to four Justices, the court has lost the jurisdiction to proceed.[126] As expressed by Lamer J., as he then was:

> If an accused has the constitutional right to be tried within a reasonable time, he has the right not to be tried beyond that point in time, and no court has jurisdiction to try him or order that he be tried in violation of that right. After the passage of an unreasonable period of time, no trial, not even the fairest possible trial, is permissible. To allow a trial to proceed after such a finding would be to participate in a further violation of the Charter.[127]

As a stay of proceedings is a drastic remedy, it was suggested that the courts in exercising their inherent power to control their own process, might expedite the proceedings of these cases by setting an early date for the crown to proceed. Subsequent failure to proceed at the fixed date, however, should result in the charge being dismissed.[128]

C. Saudi Arabia

7.3 Right to liberty

The right to liberty is enshrined in Article 36 of the Basic Law of Government, which states that '[n]o one shall be arrested, detained, imprisoned or have their actions restricted except in cases provided for by law.' Similarly, Article 2 of the Code of Criminal Procedure states that '[n]o person shall be arrested, ... detained, or imprisoned except in cases provided for by law.' It is clear from the quoted Articles that the Saudi law does not prohibit interfering with the right to liberty, but only prohibits unlawful interferences with this right. Hence, the question that arises is what

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[124] [1987] 1 S.C.R. 588.

[125] *Ibid.* Lamer J (Dickson C.J.C., concurred) p. 598, Wilson J. (Estey J. concurred) p. 618, and Le Dain J. (Beetz J. concurred) p. 615. This view was initially expressed by Lamer J. (Dickson C.J.C. concurred) in his dissenting reasons in *Mills v. The Queen*, [1986] 1 S.C.R. 863, 948.

[126] Dickson C.J.C., Estey, Lamer and Wilson JJ.

[127] *Rahey*, *supra* note 124, at p. 615.

[128] This view was initially expressed by Justice Martin of the Ontario Court of Appeal in *Regain v. Beason* (1983), 7 C.C.C. (3d) 20 (Ont. C.A), 43. Since it was adopted by Lamer J. (Dickson C.J.C., concurring) for Supreme Court in *Mills*, *supra* note 125, 947-948, when he stated that:

> It is, in other words, open to the courts to take preventive measures, based on their inherent power to control their process, prior to an actual violation of s. 11(b). Where, however, on balancing the various factors, the court decides that the accused's right to be tried within a reasonable time has already been contravened, a stay of proceedings will be the appropriate remedy.

are the permitted interferences with the right to liberty under Saudi law? The CCP permits the arrest and detention of suspected criminals with or without warrant if certain conditions are met. In the following sections, these permitted types of interferences with the right to liberty and the conditions governing them will be discussed.

7.3.1 Arrest

Article 35 of the CCP states that '[i]n cases other than those involving *flagrante delicto* offences, no person shall be arrested or detained except on the basis of a warrant from the competent authority.' Thus, the criminal investigation police, according to Article 35, are only permitted to arrest without warrant in cases of *flagrante delicto* offences. If the offence is not *flagrante delicto*, the police must obtain an arrest warrant from the 'competent authority'. These types of arrests are discussed next.

7.3.1.1 Arrest without warrant

According to Article 33 of the CCP, the criminal investigation police are authorised to arrest anyone who is present at the scene of the crime and there is 'sufficient evidence' against him that he has committed a *flagrante delicto* offence. According to Article 30 of the CCP, an offence is deemed *flagrante delicto* if:

- the alleged offence is actually being committed, or shortly thereafter;
- the victim of the alleged offence is found pursuing another person or that person is being pursued by a shouting crowd subsequent to the commission of the alleged offence; or
- the perpetrator is found a short time after the commission of the alleged offence in possession of tools, weapons, property, equipment, or other things that indicate that he is the perpetrator of or an accomplice in the alleged offence.

However, if the suspect is not present at the scene, the criminal investigation officer must issue a warrant for arresting that person.[129]

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[129] CCP, Art. 33.

7.3.1.2 Arrest with warrant

If the crime is not considered to be *flagrante delicto*, the criminal investigation police, according to Article 35 of the CCP, must obtain an arrest warrant from the 'competent authority' before they can legally arrest the suspect. The difficulty with Article 35 is that it does not specify the 'competent authority' that has the authority to issue an arrest warrant. However, under the CCP, only members of the IPPC are authorised to issue arrest warrants. In this respect, Article 103 of the CCP provides that '[i]n all cases, the Investigator [*i.e.*, members of the IPPC who are responsible for investigating crimes] may, as the case may be, summon any person to be investigated, or issue a warrant for his arrest whenever the circumstances of the investigation warrant it.' In the same vein, Article 107 of the CCP states that '[i]f the accused fails to appear without an acceptable cause after having been duly summoned, or if it is feared that he may flee, or the crime [which the person is suspected of committing] is *flagrante delicto*, the Investigator may issue a warrant for his arrest even if the incident is of such kind for which the accused should not be detained.' Therefore, it can be safely concluded that the IPPC is the 'competent authority' for issuing a pre-trial arrest warrant within the meaning of Article 35.[130]

An arrest warrant can be issued only where the circumstances of the investigation require it,[131] there is a fear that the accused might flee or interfere with the course of justice, the crime is *flagrante delicto*, or the suspect was summoned and, without an acceptable excuse, did not appear before the investigator.[132] Therefore, under the CCP, arrests without warrant should occur less frequently than arrests with warrant as the former are only permitted in a small set of circumstances compared to the latter.

However, a different picture appears in practice than that envisaged by the CCP. In practice, most of arrests are carried out without warrant whenever the police have grounds to believe that a given person has committed an offence and, in some cases, the grounds for arrest are not even reasonable enough to make the arresting officer

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[130] *See also* Report of the Special Rapporteur, Dato' Param Cumaraswamy, on the Independence of Judges and Lawyers: Report on the Mission to the Kingdom of Saudi Arabia, Submitted Pursuant to Commission on Human Rights Resolution 2002/43, U.N. ESCOR, Comm'n on Hum. Rts., 59th Sess, Item 11(d) of the provisional agenda U.N. Doc. E/CN.4/2003/65/Add.3, para. 51 [Hereinafter the Human Rights Commission Report].
[131] CCP, Art. 103.
[132] *Ibid.* Arty. 107.

believes that the arrested person has committed an offence. In practice, the case file only reaches the IPPC once the suspect has been identified and, consequently, arrested.[133] Hence, the investigator only issues an arrest warrant where the accused has been arrested and subsequently released on the condition to appear before the investigator whenever he is summoned for the purposes of the investigation but violates the condition for his release, an instance that accounts for a small portion of arrest cases.[134]

On the other hand, the most common cases in which the criminal investigation police carry out arrests without warrant is when the crime is *flagrante delicto*, an allegation was made by a member of the public or the alleged victim that someone had committed an offence, or when the police, and in particular the Criminal Inquiry and Search Division (*Shuabi'at al-Tuhriaht wa al-Buhith al-Jenaei*), which specialises in identifying and pursuing suspected criminals, after conducting their inquiries have become convinced that a specific person has committed an alleged offence.[135] Under the CCP only in the first instance, the police are authorised to carry out arrests without warrant. Therefore, arrests without warrant in the second and third instances are illegal as Article 35 of the CCP clearly states that '[i]n cases other than cases involving *flagrante delicto* offences, no person shall be arrested or detained except on the basis of a warrant from the competent authority.'

There is also a second problem particularly with the arrests in the second instance, in addition to the absence of an arrest warrant, which is the absence of reasonable grounds to believe that the suspect has committed the alleged offence. This can be illustrated by two cases obtained from the files of the IPPC.[136] In the first case, a father of a 10 year old boy, based upon what his son had informed him of, made a complaint to the police alleged that his son, hereinafter referred to as "A", had been forced to have anal sex with a fellow student in his school, who was aged 12, hereinafter referred to as "B". In his complaint, the father alleged that B forcibly took

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[133] Interview with Investigator Anonymous, D.N. [Pseudonym.], Investigation and Public Prosecution Commission Branch, Riyadh (Aug. 22, 2004); interview with Investigator Hassen Al-Asaker, Investigation and Public Prosecution Commission Branch, Crimes Against Honour Division, Riyadh (May. 23-25, 2004).

[134] *Ibid.*

[135] Interview with Police Inspector Buder Al-Muqbel, Maliz Police Station, Riyadh (Aug. 10, 2004). *See also* Waleed's case, *infra* note 185 and accompanying text

[136] The case files were obtained from Investigator Hassen Al-Asaker, Investigation and Public Prosecution Commission Branch, Crimes Against Honour Division, Riyadh (May. 25, 2004).

A to a deserted place in the neighbourhood, where B forcibly inserted his penis into A's anus. The complainant also stated that after the alleged incident took place, B urinated in the mouth of the alleged victim, and threatened that he would kill him if he told anyone about what had happened. The police acting upon the complaint arrested, questioned, and detained B in the juvenile facility detention pending his appearance before the investigator on the following day. After appearing before the investigator, the detention of the suspect was extended to five days from the day of his arrest. However, neither the medical examination of the alleged victim's body or clothes, nor the examination of the scene supported that the alleged incident took place. As a result, the investigator decided to stay the case against B and released him because there was insufficient evidence against him.[137]

In the second case, a woman who was in her twenties, hereinafter referred to as "X", made a complaint to the police alleging that her female friend, hereinafter referred to as "D", conspired with a man to rape her. In her complaint, X alleged that a month before the date of her complaint, she and D went to a house that belongs to a female friend of D, hereinafter referred to as "H". When they knocked on the door of H's house, the door was opened by a man, who the victim alleges was, according to D, H's brother. After they sat down, D brought a glass of orange juice to X. After drinking the juice, X went into a coma. Upon waking up from the coma, X found herself alone and naked. After putting on her clothes, X went to the next room, where D was sitting. When X asked D about what happened to her, D denied having any knowledge. After the alleged incident took place, X went home without informing anyone of what had happened to her. Since then, X alleges that she repeatedly visited D to ask about the person who raped her, but D persistently denied having any knowledge about the alleged incident.

The police, upon receiving the mentioned complaint, arrested D. They questioned D about the alleged incident and she was subsequently released upon the condition of appearing before the investigator when summoned. The investigator, after questioning D, who denied that the alleged incident had taken place, ordered the police to inspect the scene of the alleged incident. The apartment described by X was found to be occupied by single expatriates none of whom matched the description of the alleged

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[137] Case File No. 2507401058.

rapist. As a result, the investigator decided to stay the case against D because there was insufficient evidence against her.[138]

In the two cases, not only did the police arrest the suspects without a warrant, but also they did not even have reasonable grounds to believe that the alleged offences had been actually committed, or that the suspects had committed the alleged offences. The police, after conducting their inquires upon the request of the investigator, found no evidence to support either that the alleged incidents took place or that the alleged suspects were involved in the alleged offences. Under the CCP, the police, upon receiving a complaint alleging that someone has committed an offence, are supposed to conduct their inquiries in order to determine, firstly, whether there are reasonable grounds to believe that an offence has been committed and, secondly, whether there are reasonable grounds to believe that the suspect has committed the alleged offence.[139] However, in the mentioned two cases, as in many other cases that involve complaints from alleged victims against a particular person, the police arrested the "suspects" first, and made inquiries later.

These illegal arrests raise the question of why these types of arrests occur in practice in the first place, given that they are illegal under the CCP? The police, because of, *inter alia*, their insufficient legal training, seem to be unaware that arrests without warrant in cases other than those involving *flagrante delicto* offences are illegal under the CCP.[140] This proposition is enhanced by the fact that in a response to a question put to two police officers who were interviewed by the present researcher

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[138] Case File No. 2504900190.

[139] Articles 27 and 28 of the CCP respectively state that:

> Criminal investigations officers shall, each within his jurisdiction, accept notifications and complaints communicated to them with respect to all crimes, inspect and the collect relevant information [regarding the alleged offences] .... The criminal investigation officers shall move to the crime scene to maintain its integrity and seize all that may be relevant to the crime, reserve evidence, and take whatever action required under the circumstances. ....
>
> During the process of the police inquiries, the criminal investigation officer shall hear statements of those who may possess information with respect to facts and perpetrators of crimes, question any suspect, and enter the information in the relevant records. They may seek the assistance of experts, including physicians, and seek their advice in writing.

[140] Arrest without warrant prior to the introduction of the CCP, was regulated under the Statute of Principles of Arrest, Temporary Confinement and Preventive Detention 1983 (SPAD), issued by the Order of the Ministry of Interior No. 233 (24 October 1983). Article 2 of the SPAD, which the police presumably still rely on in carrying out arrests without warrant, states that '[w]henever there are indications which raise the suspicion that a person has committed an offence, he shall be arrested and brought immediately before the competent authority [for the purposes of interrogation in accordance with Article 3 of SPAD].'

regarding the standard practice followed by the police upon receiving a complaint that someone has committed an offence, they stated that if the suspect was identified in the complaint, he would be arrested for questioning before being released or detained, depending on the strength of the evidence against him, pending his appearance before the investigator the following day.[141]

7.3.2 Right to be informed promptly of the reasons for arrest

Article 116 of the CCP stipulates that '[w]hoever is arrested or detained shall be promptly informed of the reasons for his arrest or detention ....'[142] In practice, the arrested or detained person is informed of the reasons for his arrest or detention in the course of the police questioning sometime within the 24 hours following his arrest.[143] In addition, the arrested or detained person will be informed of the reasons for his arrest or detention again once he appears before the investigator for interrogation within the 24 hours following his arrest as required under Article 109 of the CCP as discussed next.[144]

7.3.3 Right to be brought promptly before a judicial officer

According to Article 109 of the CCP, where an arrest warrant has been issued, the arrested person must be brought immediately for the purposes of interrogation before the investigator. On the other hand, Article 34 of the CCP, which applies to arrests without warrant in cases involving *flagrante delicto* offences, requires the arrested person to be brought for the purposes of interrogation before the competent investigator within the 24 hours following his arrest. Based upon the case files that have been made available to the present researcher, it appears that arrests without warrant, which account for the majority of the arrests for criminal enforcement purposes, are treated for the purposes of the right to be brought before a judicial

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[141] Interview with Police Inspector Buder Al-Muqbel, *supra* note 135; Interview with Police Chief Inspector Anonymous, A. X. [Pseudonym.] (Aug. 15, 2004).

[142] Similarly, Article 34 of CCP states that 'any arrested person must be advised of the reasons for his detention ....'

[143] Interview with Police Inspector Buder Al-Muqbel, *supra* note 135, Interview with Police Chief Inspector Anonymous, A. X., *supra* note 141.

[144] Article 101 of the CCP provides that '[w]hen the accused appears for the first time before the investigator for the purposes of the investigation, the Investigator shall take down all his personal information and shall inform him of the offence of which he accused.' Observation, interrogation by Investigator Hassen Al-Asaker, Investigation and Public Prosecution Committee Branch, Crimes Against Honour Division, Riyadh (Jun. 5, 2004); Observation, interrogation by Investigator Abdullah Al-Muqbel, Investigation and Public Prosecution Commission Branch, Drug Crimes Division, Riyadh (Jun. 16, 2004).

officer, as arrests for *flagrante delicto* offences, even if they are not. Hence, the criminal investigation police take the accused before the investigator in the morning following his arrest, and the 24-hour period within which the accused has to be brought before the investigator seems to be, by and large, respected in practice.

On the basis of the outcome of the interrogation and the information available in the case dossier, the investigator will determine whether there is sufficient evidence against the accused to extend his detention or not. If the evidence against the accused is insufficient, the investigator will recommend to the Head of relevant Division that the proceedings against the accused should be discontinued and, if the accused is detained, for him to be released. If the offence is non-major, the decision to discontinue the case and to release the accused becomes effective if it is endorsed by the Head of the relevant Division, whereas in major offences the decision only becomes effective if it is endorsed by the Head of the IPPC.[145]

On the other hand, if there is sufficient evidence against the accused that he has committed a major offence, or that the interest of the investigation requires his detention to prevent his fleeing or interfering with the administration of justice, the investigator shall extend the detention of the accused to five days starting from the day of his arrest.[146] If the investigator is of the opinion that the detention of the accused should be extended beyond the five-day period, the case dossier must be forwarded to the Chairman of the IPPC Branch in the relevant province before the expiry of the five-day period to consider whether the accused should be detained for further period(s) or be released. If the Chairman of the IPPC Branch is of the opinion that the detention should be extended, he can order the detention of the accused for a period or successive periods not exceeding in their totality 40 days from the day of arrest.[147]

If the investigator, after the expiry of the 40-day period, is of the opinion that the detention of the accused should be extended beyond the forty-day period, an application must be made to the Head of IPPC to detain the accused for a period or successive periods, none exceeding thirty days and not exceeding in their totality six months from the day of the arrest. After the expiry of the six-month period from the

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[145] CCP. Art. 124.
[146] CCP, Art. 113.
[147] *Ibid*. Art. 114.

day of arrest, the investigator must either release the accused or transfer him to the competent court for trial.[148]

It is noteworthy that neither under the CCP nor in practice is it required that there must be a bail hearing at which the accused is present or represented by a lawyer, or that the views of the accused on his detention are taken into account before the decision regarding the extension of his detention is made.[149] In practice, the extension of the detention of the accused either by the investigator, the Chairman of the IPPC Branch in the relevant province or the Head of IPPC will depend almost entirely on the seriousness of the alleged offence. In following sections, permitted detention with regard to major and non-major offences is discussed.

7.3.3.1 Detention in major offences

Article 112 of the CCP states that '[t]he Minister of Interior shall, upon a recommendation by the Head of the Investigation and Public Prosecution Commission, specify what may be treated as a major offence requiring detention.' According to the Order of the Minister of Interior No. 1245, 30 September 2002, major offences within the meaning of Article 112 of the CCP include, *inter alia*, offences of *al-hudud* which are punishable by amputation, stoning, or death; murder; voluntary manslaughter; causing grievous bodily harm etc. Article 113 of the CCP states that '[i]f it appears, following the interrogation of the accused ... that there is sufficient evidence that the accused has committed a major offence ... the investigator shall issue a warrant for his detention for a period not exceeding five days from the date of his arrest.' Therefore, Articles 112 and 113 suggest that where there is sufficient evidence that the accused has committed a major offence, his pre-trial detention is mandatory. The only exception to this rule is Article 114, which requires the release of the accused until he appears before the court, if the investigation is not completed within the six-month period from the day of his arrest.

It should be noted, however, that Article 120 of the CCP suggests that an accused, against whom there is sufficient evidence to believe that he has committed a criminal offence, regardless of the nature of that offence, can be released by the investigator if

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[148] *Ibid.*

[149] Interview with Investigator Hassen Al-Asaker, *supra* note 133; Interview with Investigator Anonymous, D.N., *supra* note 133; written response from Investigator Sulman Al-Jurba, Investigation and Public Prosecution Commission Branch, Crimes Against Honour Division, Riyadh (July. 14, 2004).

the latter is of the opinion that the accused's 'release would not impair the investigation, and that there is no fear of his flight or disappearance, provided that the accused undertakes to appear when summoned.' However, in practice, Article 120 is interpreted as not applying to major offences and, thus, where there is sufficient evidence against the accused that he has committed a major offence, his detention is mandatory,[150] unless Article 114 applies as mentioned above.

7.3.3.2 Detention in non-major offences

The accused cannot be detained if he is suspected of committing a non-major offence, unless it appears to the investigator that the interests of the investigation require his detention to prevent his fleeing or disappearing as permitted under Article 120 of the CCP. In practice, those accused of non-major offences are, in most cases, automatically released by virtue of Article 120 after being interrogated by the relevant investigator,[151] on the condition that the accused appear before the investigator when summoned, and that he designate a fixed place of abode that is acceptable to the investigator.[152]

7.3.4 The status of the IPPC

As discussed above, the IPPC plays a supervisory role over the police during the pre-trial stage, and it is entrusted with reviewing the need to detain the accused. Hence, this section will shed some light on the establishment of the IPPC, its organisation and functions, before exploring the status of the IPPC *vis-à-vis* the executive and the parties to the criminal proceedings, which could affect of the ability of the IPPC to exercise its oversight role in an independent and impartial manner, as it is required under international human rights law.[153]

7.3.4.1 Establishment, functions and organisation of the IPPC

The IPPC was established by virtue of Article 1 of the Code of the Investigation and Public Prosecution Commission (CIPPC),[154] which states that 'in accordance with this

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[150] *Ibid.* Written response from Advisor Dr. Humed Al-Muadi, Investigation and Public Prosecution Commission Branch, Riyadh (July. 12, 2004).
[151] Observation, interrogation by Investigator Hassen Al-Asaker, *supra* note 144; Observation, interrogation by Investigator Abdullah Al-Muqbel, *supra* note 144.
[152] CCP, Arts. 120-121.
[153] *See supra* paras. 4.1.2, 5.1.3 & 7.1.3.2.
[154] Issued by Royal Decree No. M/56 (30 May 1989). Published on *Umm al-Qura* (the Saudi official Gazette) No. 3264 on 24 June 1989 [hereinafter CIPPC].

Code, a Commission shall be established and be called "the Investigation of Public Prosecution Commission".' The IPPC was established with the aim of improving the operation of the criminal justice system in the light of the growing complexity of investigating and prosecuting criminal cases.[155] Prior to the establishment of the IPPC, the police under the Public Security Code,[156] and the Handbook of Criminal Procedure[157] had the authority to investigate and prosecute criminal cases. Therefore, the establishment of the IPPC was seen as taking the responsibility of investigating and prosecuting criminals from the police and giving it to an entirely new institution. This change is, by any standards, radical and in the course of the this thesis it will become apparent whether the establishment of the IPPC or assigning the functions which are currently exercised by it, as discussed below, was the right type of reform required in order to draw an appropriate balance between, on the one hand, the need for investigating and prosecuting crimes effectively, and, on the other hand, the need to protect the rights of the accused. Under Article 2 of the CIPPC, the IPPC is responsible for the following tasks:

(a) the investigation of criminal offences;
(b) deciding at the end of the investigation whether to institute proceedings or to discontinue the case against the accused;
(c) conducting prosecutions before the judicial authority;
(d) the lodging of appeals against judgements;
(e) the supervision of the implementation of penal judgement; and
(f) the inspection of prisons, detention centres and any places in which penal judgements are enforced, hearing the complaints of prisoners and detainees, verifying the legality of their imprisonment or detention, ensuring that they are not kept in prison or detention beyond the prescribed period, taking the necessary measures to secure the release of anyone who is imprisoned or detained unlawfully and taking the legally required action against the persons responsible for such unlawful imprisonment or detention.

Although the CIPPC was issued in 1989, it was not until October 3, 1993 that the IPPC started to exercise its functions.[158] From when it started to exercise its functions in 1993 until 2002, when the CCP came into force, the IPPC's powers regarding

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[155] Council of Ministers Order No. 140 (21 March 1989).
[156] Issued by Royal Decree No. 3594 (January 18 1950).
[157] Issued by the Ministry of Interior in 1980. It should be noted that the Handbook is not a statute, but rather collection of Council of Ministers Orders, Ministerial Orders and Directives that were collected in one dossier for easy reference.
[158] The Fourth Annual Report of the Investigation and Public Prosecution Commission (1999), p. 7 [hereinafter Annual Report].

investigation and prosecution were regulated mainly by the Public Security Code and the Handbook of Criminal Procedure.[159] Therefore, the effect of the change brought about by the establishment of the IPPC until the CCP came into effect in 2002, as far as investigating and prosecuting criminal cases were concerned, was confined to the institution that conducts the investigation and prosecution into criminal cases, rather than the rules under which these functions were exercised. It should be noted however, that to date, the IPPC has not fully assumed all its functions. For example, the investigation of crimes of theft in the city of Riyadh is still conducted by the police.[160] The main reason for this is logistical as the IPPC still does not have the manpower and the resources to exercise all the functions assigned to it by virtue of the CIPPC, which are enormous.[161] Despite this, the intention seems to be to allow the IPPC to assume its responsibilities gradually whenever it is ready for discharging them.[162] Hence, in this thesis, those functions that are not currently exercised by the IPPC for logistical reasons are not discussed. Rather, the attention will be focused on those functions that the IPPC currently exercises, in particular in the city of Riyadh, the capital of Saudi Arabia, and where the fieldwork for this thesis has been conducted.

A Head, who is assisted by a number of deputies, presides over the IPPC, which is called the Main Branch and located in Riyadh.[163] The IPPC has a number of branches distributed throughout the provinces of Saudi Arabia, each of which is headed by a Chairman and staffed by a number of investigators. Each branch has a number of divisions, which are assigned different tasks; in the IPPC Branch in Riyadh, for example, there are six divisions as follows:

- a division responsible for investigating cases involving offences against the person;

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[159] Directive of the Ministry of Interior No. H 9/218 (27 May 1997).
[160] Interview with Police Inspector Buder Al-Muqbel, *supra* note 135; Interview with Investigator Anonymous, G.S. [Pseudonym.], Investigation and Public Prosecution Commission Branch, Riyadh (Jun. 8, Sep. 11, 2004).
[161] Annual Report, *supra* note 158, pp. 101-110.
[162] In 1997, IPPC assumed responsibility for investigating crimes against honour (*e.g.*, rape etc.) in the cities of Riyadh, Jiddah and Dammam. *See* Directive of the Ministry of Interior No. H 9/218 (27 May 1997). Also in 1999, the IPPC assumed responsibility for investigating crimes against the person (*e.g.* murder etc.) in the cities of Riyadh, Mecca, Madinah, the Eastern Province, Asser and al-Quseem. *See* Directive of the Ministry of Interior No. H 6/3525 (8 February 1999).
[163] CIPPC, Art. 1.

- a division responsible for investigating cases involving offences against property;
- a division responsible for investigating cases involving offences against honour and morality;
- a division responsible for investigating cases involving prohibited drugs;
- a division responsible for the inspection of prisons and detention centres; and
- a division responsible for public prosecution.

The IPPC branches exercise the IPPC's statutory powers within their jurisdiction,[164] while the main branch supervises the IPPC provincial branches under the relevant provisions of the CCP and CIPPC.

7.3.4.2 The status of the IPPC vis-à-vis the executive authority

Although the IPPC is not a judicial body, Article 5 of the CIPPC declares that 'members of the [Investigation and Public Prosecution] Committee shall enjoy full independence and, in their work, they shall be subject only to the provisions of the Islamic *Shari'ah* and the Laws in force. No one shall interfere in their work.' The supervision of the IPPC is entrusted to the Minister of Interior in accordance with Article 26 of the CIPPC. The Head of the IPPC is appointed by a Royal Decree on the advice of the Minister of Interior on the rank of Super Grade,[165] a rank that is directly below the rank of Minister in the governmental hierarchy.[166] Members of the IPPC, with the exception of the Head of the IPPC, are appointed and transferred by a Royal Decree on the decision of the Administrative Board[167] of the IPPC and the advice of the Minister of Interior.[168]

Publicly, the Ministry of Interior, which is also responsible for the security forces,[169] contends that it does not interfere with the IPPC's work.[170] However, in

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[164] *Ibid.*
[165] *Ibid.* Art. 10.
[166] Law of Ministers, Deputy Ministers and Officials of the Super Grade, issued by Royal Decree No M/10 (15 May 1971).
[167] The Administrative Board of IPPC, according to Article 4(a) of the CIPPC, consists of the Head of ICCP, his Deputy, and five members of the IPPC of the rank of Deputy Division Director (A) of Investigation and Prosecution or above, who are selected by the Minister of Interior on the advice of the Head of IPPC.
[168] CIPPC. Art. 10
[169] Public Security Code, Art. 3; the Handbook of Criminal Procedure, p. 8.
[170] Human Rights Commission Report, *supra* note 130, para. 44.

practice, the Minister of Interior, and his representatives at the provincial level (*i.e,* the provincial governors),[171] exercise some powers, which are assigned to the IPPC by virtue of the CCP or the CIPPC. Under Article 41 of the CCP '[a] criminal investigation officer may not enter or search any inhabited place, except in cases as provided for by law, pursuant to a search warrant specifying the reasons for the search, issued by the Investigation and Public Prosecution Commission.' However, in practice search warrants are issued by the provincial governor, not the IPPC.[172]

In addition, under Article 124 of the CCP, where there is insufficient evidence against the accused that he has committed a major offence, the proceedings can be discontinued against him. If he is detained, he can be released if it is recommended by the investigator in charge, and endorsed by the Head of the relevant Division and the Head of the IPPC. However, in practice, the provincial governor's office is consulted in some cases that involve the release of a person who is suspected of having committed a major criminal offence but there is not sufficient evidence to prosecute him.[173] Furthermore, the provincial governor's office has the authority, in practice, to investigate alleged professional misconduct committed by members of the IPPC. In practice, citizens commonly address their grievances against governmental bodies to the provincial governor (known as 'the policy of open door'), who, by virtue of Article 7(h) of the Provincial Administrative Law, has the authority to 'supervise the organs of the State and their employees in the region in order to ensure that they perform their duties well and with all trust and loyalty, taking into account the ties of the employees of ministries and various services in the region with their competent authorities.'[174] The provincial governor, where the complaint concerns the conduct of a member of the IPPC, instead of referring it to the IPPC Main Branch to be investigated in accordance with CIPPC provisions as discussed in Chapter five, will establish a committee composed of an official from the police and an official from the

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[171] Provincial Administrative Law, issued by Royal Order No A/92 (1 March 1992). Published on *Umm al-Qura* (the Saudi official Gazette) No. 3397 on 6 March 1992, Art. 5.
[172] The power to search is discussed in detail *infra* para. 9.3.
[173] Interview with Investigator Anonymous, D.N., *supra* note 133. *See also* Waleed's Case, *infra* note 185 and accompanying text.
[174] *See also* Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Initial report of State parties due in 1998: Saudi Arabia,* CAT/C/42/Add.2 (2001), paras. 37, 40, *available at* <http://www.unhchr.ch/tbs/doc.nsf> (last visited Jan. 2, 2006)

provincial governor's office to investigate the complaint and question the member concerned and report back to the provincial governor.[175]

Finally, Article 37 of the CCP provides that '[t]he relevant members of the Investigation and Public Prosecution Commission [*i.e.*, Members of the Division for the inspection of prisons and places of detention in the of the ICCP Branch in the relevant province] shall, at any time and without regard to official hours, visit the prisons and other places of detention falling within their jurisdiction to ensure that no person is unlawfully imprisoned or detained.' However, in practice, while members of IPPC Division for inspecting prisons and places of detention are allowed to inspect most detention centres and prisons, they are not allowed, under the order of the Minister of Interior, to inspect the detention centre of the Secret Service (*al-Muba'ith al-Ammah*),[176] in which persons suspected of committing crimes against national security (*i.e.*, political dissent or terrorism) are detained.[177]

7.3.4.3 The status of the IPPC vis-à-vis the parties to the criminal proceedings

Members of the IPPC are referred to by the CCP and the CIPPC as 'investigators',[178] compared to other inquisitorial jurisdictions which refer to what can be considered, despite some obvious differences, as their counterparts under the respective systems as 'investigating judges'.[179] The IPPC, as mentioned earlier, combines both the investigating and prosecuting functions. In this respect, Article 14 of the CCP states that '[t]he Investigation and Public Prosecution Commission shall be responsible for investigating and prosecuting crimes in accordance with its Law and the implementing regulation thereof.' The CCP does not elaborate on whether the investigator who has conducted the investigation into a case can play the role of the

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[175] *See supra* para. 5.3.1.2.2. Interview with Investigator Anonymous, B.B., [Pseudonym.], Investigation and Public Prosecution Commission Branch, Riyadh (May. 29, 2004). It is worth mentioning here that the provincial governor of Riyadh, for example, is Prince Sulman who is brother of both the King of Saudi Arabia and the Minister of Interior, and holds the rank of Minister, which is superior to that of the Head of IPPC. *See supra* note 166 and accompanying text.

[176] Interview with Investigator Anonymous, H.N. [Pseudonym.], Public Prosecution and Investigation Commission Branch, Riyadh (July. 6, Sep. 11, 2004); Interview with Investigator Anonymous, G.S., *supra* note 160. *See also* Directive of the Head of the Investigation and Public Prosecution Commission No. H 12/3662 (3 January 2000), p. 8.

[177] Directive of the Ministry of Interior No. S/1003 (21 January 1979); Directive of the Ministry of Interior No. 16/4941 (8 November 1980).

[178] With regard to the IPPC, *see* Arts. 9, 16. With regard to the CCP, *see* Arts. 29, 33, 34, 41, 48 and 57.

[179] *See generally*, Elliott, *supra* note 35, pp. 34-38.

prosecuting counsel in the same case. However, in practice, as mentioned earlier, the tasks of investigating and prosecuting criminal cases are assigned to different Divisions within the IPPC Branches. In addition, in no case in practice, whether it has been investigated by the same investigator or by someone else from the investigation divisions, has an investigator played the role of the prosecuting counsel.[180]

Under the CCP, there are no provisions that require the investigator to collect evidence in favour of the accused. In practice, the situation does not seem to be any different, as one investigator explained: 'I do not think that we look for the evidence that might exonerate the accused, but we look for the evidence that can incriminate him, and if no such evidence is found, this means the accused is innocent because the original status of the accused is innocence.'[181] Another investigator put it in these words: 'We do not look for evidence that might exonerate the accused. The burden of refuting the accusation is upon him.'[182]

Once the investigation is completed, the investigator has to decide whether to bring a criminal prosecution or to discontinue the proceedings against the accused depending on the sufficiency of the evidence against him. If the investigator is of the opinion that there is sufficient evidence against the accused concerned, he draws up the indictment, refers the case to the competent court, and summons the accused to appear before that court.[183] There are no provisions under the CCP that regulate the drawing up of the indictment by the investigator. However, in practice, only evidence that has the potential of strengthening the case of the prosecution against the accused is included in the indictment. The reason for this, as one investigator put it, is that 'the indictment is a verdict on the guilt of the accused, and [, hence,] it cannot include something that might exonerate him.'[184]

It is appropriate to conclude the discussion of the status of the IPPC by presenting the details of a case that the present researcher encountered during his fieldwork period. Some aspects of the case do not concern the subject under discussion here;

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[180] Interview with Investigator Anonymous D.N., *supra* note 133; interview with Investigator Hassen Al-Asaker, *supra* note 133; written response from Investigator Sulman Al-Jurba, *supra* note 149.
[181] Interview with Investigator Anonymous, D.N., *supra* note 133.
[182] Interview with Investigator Hassen Al-Asaker, *supra* note 133.
[183] CCP. Art. 126.
[184] Written response from Investigator Sulman Al-Jurba, *supra* note 149. Similar answers were provided by other Investigators. Interview with Investigator Anonymous D.N., *supra* note 133; Interview with Investigator Hassen Al-Asaker, *supra* note 133.

however, the full details of the case will be presented here and it will be referred to throughout the second part of this thesis when appropriate. The details of the case have been obtained from the person who was the subject of the investigation.[185]

The case concerns a Yemeni national named Waleed, 29 years old. He had been working in a furniture company in Riyadh for three months when the brother of the owner of the company (named Bunder, aged 28 years old, and who worked for his brother's company) disappeared on Saturday May 8, 2004. On the following Monday, the owner of the company accused Waleed of having some involvement in Bunder's disappearance. The reason for his accusation was that Bunder and Waleed had developed some form of friendly relationship. However, Waleed explained that his relationship with Bunder was strictly professional and he was friendly to him because other workers, who believed Bunder to be troublesome, preferred to stay away from him. In addition, a week before Bunder's disappearance, Waleed's wife gave birth to a baby with minor health problems, and Bunder was calling him on a number of times to check on the health of his baby. As Waleed, in the week prior to Bunder's disappearance, was coming to work on a number of times late, and sometimes not turning up to work at all because of the circumstances regarding his recently born child, the owner of the company demanded Waleed be punctual, or resign. As a consequence, Waleed decided to resign. After accusing Waleed personally of kidnapping Bunder, the owner of the company decided to complete his resignation settlement and let him go. These events took place in the five days following Bunder's disappearance.

On the sixth day, the owner of the company demanded a photo from Waleed as a condition for the settlement, and Waleed complied with his demand. Hours later, the owner of the company called Waleed again in order to ask Waleed to meet with him to settle his resignation. Upon meeting him, Waleed was asked to get into the car, in which a person, who was unknown to Waleed, was present. While Waleed thought they were heading to the company to settle his resignation, he was surprised when the car parked in front of the Criminal Inquiry and Search Division (*Shuabi'at al-Tuhriaht wa al-Buhith al-Jenaei*), which specialises in identifying and pursuing suspected criminals.

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[185] Interview with Waleed Aoun (Sep. 29, 2004) [hereinafter Waleed's Case].

Waleed was arrested by the person who was present in the car, who was later revealed to him as a high-ranking officer of the Criminal Inquiry and Search Division. Waleed was taken inside the Division for questioning. During the questioning, which was conducted by the same officer who had arrested Waleed, Waleed was accused of kidnapping Bunder and the evidence presented against him was the testimony of a mobile phones shopkeeper. The shopkeeper testified that Waleed, on Sunday May 9, 2004 at 8:30 p.m. had sold him the mobile phone that the police believed belonged to Bunder. The mobile phone in question was seized during a police raid on the mobile shop, in which the shopkeeper was subsequently arrested, in order to check whether they were selling stolen mobile phones. Mobile phone shops are required under law not to purchase any used mobile phone without taking the personal information of the seller. The raided mobile shop, in purchasing the mobile phone in question, did not take the personal details of the seller.

Under questioning, Waleed insisted that he could not have sold the mobile phone in question as he was at work from 5 p.m. until 10:30 p.m. on the night that the mobile phone was allegedly sold, and his co-workers could testify to that. After five hours of questioning, he and the witness were transferred to the Detention Centre of the Rudah Police Station, where they were detained separately. On the following day, Waleed and the witness were taken to the IPPC Branch in Riyadh for interrogation. The same questions and answers were repeated before the investigator, who decided to release the witness on bail and to detain Waleed for further questioning. The missing person's car was found, without any fingerprints, somewhere in the district where Waleed lives. Therefore, the main evidence against Waleed remained the testimony of the shopkeeper.

After three weeks of Waleed being detained, the police obtained a warrant from the provincial governor to search his house, in which nothing to indicate his guilt was found. After 10 weeks of Waleed being detained, his case file was sent to the provincial governor with the recommendation of the investigator for his release. Four weeks later, Waleed was finally released on the order of the provincial governor. During his time in detention, Waleed was interrogated about 30 times, in which the same questions and answers were repeated. During all his detention period, Waleed was not represented by a lawyer. His family sought the assistance of a lawyer in order get him out on bail, but they were deterred from hiring the lawyer because of the cost

involved, which is the equivalent of six months-salary of what Waleed used to earn during his previous job. A number of comments on this case are in order:

- Waleed's arrest was illegal as the crime that he was accused of was not *flagrante delicto* and the police did not obtain a warrant from IPPC for his arrest.
- Waleed's account of his whereabouts at the time when he allegedly sold the mobile phone in question was never checked by either the police or the investigator. If Waleed's account was, in fact, true, the only evidence against him, which was the testimony of the mobile phones shopkeeper, would have been completely refuted, and, thus, he would have been cleared of the kidnapping accusation. Waleed claims that the investigator did not even write down what he said in his defence against the kidnapping allegations, as it is required under the CCP.[186]
- There is no clear evidence to suggest that the mobile phone that the police and the investigator in charge believed it to be Bunder's, was actually his. In addition, the shopkeeper, who allegedly purchased the mobile phone in question from Waleed, was a suspect himself as the mobile phone was found in his shop. Oddly enough, the investigator released the shopkeeper on bail, and detained Waleed for about 100 days. Furthermore, Waleed claims that on the latter days of his detention he was confronted with the witness before the investigator, and the witness said that he was coerced by officers of the Criminal Inquiry and Search Division to testify against him. According to Waleed, the witness was, for two days, repeatedly suspended from a bar with handcuffs and his feet barely touching the floor. The witness was then shown a number of photos to identify the person who sold him the mobile phone. When he was eventually shown Waleed's photo, he denied that the person in the photo was the person who sold him the mobile phone. However, under police insistence that the person on the photo (*i.e.*, Waleed) was the person who sold him the mobile phone, he went along with what they wanted.

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[186] Article 101 of the CCP states that '[w]hen the accused appears for the first time before the investigator for the purposes of the investigation, the Investigator shall take down all his personal information and shall inform him of the offence of which he accused. The Investigator shall record any statements the accused makes regarding the accusation.'

- Waleed's house was searched by a warrant from the provincial governor. Under the CCP, as will be shown later, search warrants must be issued by the IPPC; otherwise, the search is illegal.[187]
- Waleed's release was ordered by the provincial governor. Under the CCP, as discussed earlier, it is within the jurisdiction of the Head of the IPPC, on the recommendation of the investigator in charge and the Head of the relevant Division, to release the accused against whom there is not sufficient evidence to believe that he has committed a major offence.

7.3.5 Right to *habeas corpus*

Under the CCP, the accused can challenge his detention before a court only when, after being indicted by the IPPC, he is referred to the court for trial. In this respect, Article 123 of the CCP states that '[i]f the accused is referred to the court, his release if detained, or detention if he is not under arrest shall be within the jurisdiction of the court to which he has been referred. If lack of jurisdiction is determined, the court rendering the judgment of lack of jurisdiction shall have jurisdiction to consider the release or detention request, pending the filing of the case with the competent court.' However, in practice courts do not exercise their judicial supervision on the detention of the accused after the case is referred to them.[188] Therefore, once the order for the detention of the accused, which is issued by the IPPC before he is referred to court, expires, the detention of the accused from that moment until the a final judgement is reached on the case becomes illegal as there is no order from the 'competent authority' for his detention as required under Article 35 of the CCP.

7.4 Comparison

Both the Saudi and the Canadian systems recognise the right to liberty. However, the right to liberty under the Canadian system is more expansive as it protects against arbitrary and illegal interferences with liberty. By contrast, under Saudi written law,

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[187] *See infra* para. 9.3.1.2.
[188] Interview with *Qadi* Suleiman Al-Hudiathi, General Court, Riyadh (July. 18, 2004); interview with *Qadi* Muhammad Al Jaarallah, General Court, Riyadh (Aug. 2-3, 2004); interview with *Qadi* Saleh Al-Aujri, General Court, Riyadh (Aug. 4, 2004); Interview with Investigator Anonymous, H.N., *supra* note 176.

only illegal interferences with the right to liberty are prohibited. Hence, if an arbitrary arrest power were provided for by law, it would be found unconstitutional under the Canadian system, unless it were found to constitute a reasonable limit within the meaning of s. 1 of the Charter. However, it would be considered consistent with the Saudi written law, and given that there is no mechanism for constitutional review under the Saudi system, as discussed in Chapter four, the law in question cannot be challenged on the basis that it violates the Saudi constitution (*i.e.*, the *Shari'ah*).

The underlying difference between the Saudi and Canadian systems with regard to the right to liberty is the extent to which the respective systems recognise the fundamental principle of the presumption of innocence. While the principle of presumption of innocence enjoys a constitutional status under the Canadian Charter by virtue of being a principle of fundamental justice under s. 7 of the Charter, neither the Saudi Basic Law nor the CCP recognise such a principle. The implication of this difference can be vividly illustrated by the difference in how the right to bail is treated under the Saudi and the Canadian systems. The Saudi CCP provisions, as they are currently interpreted in practice, deprive those individuals, against whom there is sufficient evidence that they have committed a major offence, of their right to liberty until a decision on the merits of the case has been reached, unless the investigation of the offence lasted for more than six months, in which case the accused has to be released until he appears before the court for trial, where he could, at the order of the judge, be detained. By contrast, the Canadian Charter entitles the accused to be released on bail unless there is a just cause for detaining him, regardless of the nature of the offence with which the accused is charged.

Both systems recognise the right of the accused to be informed of the reasons for his arrest. However, under the Canadian Charter the accused has to be informed of the reasons for his arrest at the time of the arrest, save in exceptional circumstances, while under the Saudi CCP the accused is entitled to be informed of the reasons for his arrest sometime within the 24 hours from the time of his arrest. In addition, the accused is entitled under the Canadian Charter to be tried within a reasonable time. Where this right has been breached, the court will stay the proceedings permanently against the accused to remedy the violation of this right. By contrast, Saudi law does not recognise the right to be tried within a reasonable time and, hence, does not provide any remedy for its violation. Furthermore, the Canadian system considers 'objective and reasonable grounds' that the accused has committed an offence or was

going to commit an offence as the criteria for whether the arrest is lawful or not. On the other hand, the Saudi system considers 'sufficient evidence' that the accused has committed an offence, or was on his way to commit an offence to be the requirement for a lawful arrest. Needless to say, both criteria are ambiguous, and without proper supervision over arrests, both criteria can be misinterpreted or abused in practice, which leads to the next difference.

The supervision over arrests or detention under the Canadian criminal justice system is entrusted to the judiciary, as the review of the legality of detention is considered to a judicial function. The accused is required to be brought before a justice of the peace within 24 hours following his arrest, and entitled, as a general rule, to have his detention reviewed by a court every 30 days, and to be heard before a decision on the need to detain him is reached. In addition, the accused during his trial can contest the legality of his arrest in order to obtain a remedy under s. 24 of the Charter, including the exclusion of evidence obtained as a result of the illegal arrest, as will be discussed in due course. On the other hand, while under the Saudi system the supervision over arrests and detention is to the IPPC, there is no requirement that the review of detention is conducted in an impartial and independent manner. Although the accused is entitled to appear before the investigator following the 24 hours of his arrest, he does not have the right to be heard before a decision on the extension of his detention is made, nor does he have the right to have the grounds for his pre-trial detention reviewed by a court.

Chapter Eight

The Right to Legal Assistance

A. International human rights law

8.1 Right to legal assistance

The right to legal assistance is guaranteed under Article 14(3)(b),(d) of the ICCPR, which states that:

> 14(3). In the determination of any criminal charge against him, everyone shall be entitled …:
> (b) to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
> (d) to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it.

In discussing the right to legal assistance under Article 14(3)(b),(d), three issues will be addressed: the scope of the right to legal assistance; the conditions for the eligibility of free legal assistance; and the requirement of confidentiality, which is necessary for the effective exercise of the right to legal assistance. These issues are treated separately next.

8.1.1 Scope of the right to legal assistance

As with other guarantees under Article 14, the right to legal assistance only applies once the accused has been charged within the meaning of Article 14. Thus, if an individual wishes to invoke the protection of Article 14, he must first show that he has been charged within the meaning of Article 14 of the ICCPR. Unfortunately, the HRC's jurisprudence offers little help regarding the meaning of 'criminal charge' under Article 14. Given that the application of the right to a fair hearing under Article 6 of the ECHR is also dependent on the accused being charged, it is justified here to draw upon the jurisprudence of the European Court in this respect. The test adopted by the European Court is not whether the accused has been formerly charged according to domestic law, but rather whether 'the situation of the [suspect] has been

substantially affected'[1] by the proceedings taken by the State against him. Thus, Article 14 of the ICCPR comes into play as soon as the State starts to exercise its coercive powers over the individual concerned, which is, in the context of this discussion, as soon as the accused is placed under arrest.[2]

This proposition is also supported by the fact that the HRC in the case of *Gridin v. Russian Federation*[3] held, without addressing the concept of charge under Article 14, that denying the accused access to legal assistance during the first five days of his detention, in which he was interrogated several times, breached Article 14(3)(b).[4] It is noteworthy that the HRC in the mentioned case did not rule that there was a violation of the broader right to legal assistance under Article 14(3)(d), but rather addressed the complaint under the right to communicate with one's lawyer under Article 14(3)(b). Nonetheless, if the accused's right to communicate with his lawyer under Article 14(3)(b) applies upon arrest, then it can be assumed safely that the right to legal assistance under Article 14(3)(d) equally applies once the accused is placed under arrest. This conclusion is reinforced by the fact that, in a recent case, the HRC stated that 'legal assistance should be available at all stages of criminal proceedings'[5] in order to comply with the requirement of Article 14(3)(d).

Article 14(3)(d) of the ICCPR requires explicitly that the accused is informed of his right to legal assistance.[6] The HRC has not yet elaborated on the requirement of information under Article 14(3)(d). However, it would seem that a failure to mention to the accused his right to legal assistance at the moment of his arrest, the time when the right to legal assistance comes into play, would violate the information requirement under Article 14(3)(d). This proposition is reinforced by the growing recognition of the importance of the role of legal assistance in the pre-trial stage of the criminal process. The right to legal assistance is considered, in essence, as the foundation of all procedural rights available to the accused at the pre-trial stage, as if he 'has no lawyer, [he is] less likely to be aware of [his] other rights and therefore to

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[1] *Deweer v. Belgium* (1979-80) 2 E.H.R.R. 439, para. 46.
[2] *See, e.g., Wemhoff v. FRG* (1979-80) 1 E.H.R.R. 55, para. 9.
[3] Communication No. 770, U.N. Doc. CCPR/C/69/D/770/1997 (2000).
[4] *Ibid.* para. 8.5. *See also Kelly v. Jamaica*, Communication No. 537/1993, U.N. Doc CCPR/C/57/D/537/1993 (1996), para. 9.2.
[5] *Borisenko v. Hungary*, Communication No. 852/1999, U.N. Doc. CCPR/C/75/D/852/1999 (2002), para. 7.5. *Cf. Quaranta v. Switzerland* (1991) A 205, para. 36; *Imbrioscia v. Switzerland* (1994) 17 E.H.R.R. 441, para. 36.
[6] *Cf. also Imbrioscia v. Switzerland* (1994) 17 E.H.R.R. 441 (Judge De Meyer, dissenting).

have those rights respected.'[7] Therefore, a failure to inform the accused of his right to legal assistance in effect denies him the effective exercise of all his procedural rights.

8.1.2 Legal aid

An accused charged with a criminal offence within the meaning of Article 14 is entitled to legal assistance free of charge if he lacks the financial means to hire a private lawyer and 'the interests of justice so require'. This provision is of great importance given that, in practice, most accused persons come from a poor background, which can hinder their ability to retain legal assistance.[8] The 'interests of justice' criteria relate mainly to the seriousness of the offence, including the severity of the potential punishment. Thus, the HRC held that the interests of justice do not require the State to assign a legal aid lawyer to the accused who is charged with an offence the maximum penalty of which is a fine.[9]

On the other hand, the HRC found it 'axiomatic' that the accused who is charged with a capital crime must be assigned legal assistance free of charge.[10] Between these two ends of the spectrum, the HRC's jurisprudence provides little guidance. However, the European Court held, with regard to the right to free legal assistance under Article 6(3)(c) of the ECHR, which corresponds literally to Article 14(3)(d) of the ICCPR, that 'where deprivation of liberty is at stake, the interests of justice in principle call for legal representation'.[11] Given the growing recognition of the importance of the right to legal assistance, as mentioned above, and the fundamental right against non-discrimination with regard to the enjoyment of the Covenant rights under Article 2(1) of the ICCPR, it is justified to conclude that where an accused person lacks the financial means to retain a lawyer, the State is obliged under Article 14(3)(d) of the ICCPR to assign him legal assistance free of charge when the potential sentence for the offence with which he is charged involves imprisonment.

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[7] Commission of the European Communities, Procedural Safeguards for Suspects and Defendants in Criminal Proceedings throughout the European Union: Green Paper From the Commission to the European Council, COM(2003) 75 final, para. 2.5. For an extensive discussion of the benefits of legal assistance, *see supra* para.3.6.1.1.

[8] *See, e.g.*, Waleed's Case, *supra* ch. 7 note 185 and accompanying text.

[9] *O. F. v. Norway*, Communication No. 158/1983, U.N. Doc. CCPR/C/OP/2 at 44 (1990), para. 3.4, 5.6; *Lindon v. Australia*, Communication No. 646/1995, U.N. Doc. CCPR/C/64/D/646/1995 (1998), para. 6.5.

[10] *Levy v. Jamaica*, Communication No. 719/1996, U.N. Doc. CCPR/C/64/D/719/1996 (1998), para. 7.2.

[11] *Benham v. United Kingdom* (1996) 22 E.H.R.R. 293, para. 61. *Cf. also Quaranta v. Switzerland*, *supra* note 5, para. 33.

8.1.3 The confidentiality requirement

Article 14(3)(b) guarantees the right of the accused to 'communicate with counsel of his own choosing'. According to the HRC, Article 14(3)(b) 'requires counsel to communicate with the accused in conditions giving full respect for the confidentiality of their communications'[12] in order to ensure the effective exercise of the right to legal assistance. Thus, in the case of *Gridin v. Russian Federation,*[13] where the accused was prevented from communicating with his lawyer in private, the HRC held that Article 14(3)(b) has been violated.[14]

Regarding confidential 'correspondence' between the lawyer and his client, they fall principally under the protection of the right to privacy enshrined in Article 17 of the ICCPR. Under Article 17, confidential 'correspondence' including those relating to the lawyer/client relationship are, in principle, privileged against search and seizure.[15] However, interference with privileged 'correspondence' is not only a violation of Article 17, but has also serious implications for the fairness of the trial under Article 14.[16] If 'correspondence' between a lawyer and his client were not adequately protected, the accused would be deterred from giving his lawyer information that is necessary for the effective exercise of his right to defence.[17] As the European Court observed, 'where a lawyer is involved, an encroachment on professional secrecy may have repercussions on the proper administration of justice and, hence, on the rights guaranteed by Article 6 of the Convention [Article 14 of the ICCPR].'[18] Thus, there must be adequate safeguards to ensure that any correspondence between the accused and his lawyer are protected against unlawful or arbitrary interference with them. As long as the contents of the correspondence fall under the lawyer/client privilege, they

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[12] Human Rights Committee, General Comment 13, Article 14 (Twenty-first session, 1984), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI\GEN\1\Rev.1 at 14 (1994), para. 9.

[13] *Supra* note 3.

[14] *Ibid.* para. 5.8. *Cf. S. v. Switzerland* (1992) 14 E.H.R.R. 670, para. 48; *Cf. also* ACHR, Art. 8(2)(d); Standard Minimum Rules for the Treatment of Prisoners 1957, E.S.C. Res. 663(XXIV) C, U.N. ESCOR, 24th Sess., Supp. No. 1, at 11, U.N. Doc. E/3048 (1957) (amended 1977), Rule 93 [hereinafter Standard Minimum Rules]; The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment G.A. Res. 43/173, U.N. GAOR, 43d Sess., Supp. No. 49, U.N. Doc. A/43/49 (1988), Principle 18(4) [hereinafter BPPDI].

[15] *Van Hulst v. Netherlands,* Communication No. 903/1999, U.N. Doc. CCPR/C/82/D/903/1999 (2004), para. 7.6; Concluding Observations of the Human Rights Committee, Portugal, U.N. Doc. CCPR/CO/78/PRT (2003), para. 18.

[16] *Cf. Campbell v. United Kingdom* (1993) 15 E.H.R.R. 137, para. 46.

[17] *Cf. S. v. Switzerland, supra* note 14, para. 48; *Kopp v. Switzerland* (1999) 27 E.H.R.R. 91, para. 74.

[18] *Niemietz v. Germany* (1993) 16 E.H.R.R. 97, para. 3.

must be inadmissible in evidence in any criminal proceedings against the accused.[19] The only exception to the principle of the legal privilege relates to 'correspondence' between lawyer and his client that is of criminal nature, *i.e.*, does not relate to the accused's right to defence, which the principle is designed to protect.[20]

B. Canada

8.2 Right to legal assistance

Section 10(b) of the Canadian Charter states that everyone has the right on arrest or detention 'to retain and instruct counsel without delay and to be informed of that right.' The role of the right to retain and instruct counsel in the pre-trial stage as enshrined in section 10(b) of the Charter is to allow the accused to understand his rights, the chief amongst them being the right to silence, and equally important; to obtain professional advice on how to exercise his rights.[21] Section 10(b), according to the jurisprudence of the Supreme Court, guarantees the accused two distinct rights, which in turn, places the police under two obligations. Firstly, the police must inform the arrestee or the detainee of his right to retain and instruct counsel without delay. Secondly, if the arrestee or the detainee does assert his right to legal counsel, the police must give him reasonable opportunity to obtain legal counsel, and must refrain during that period from questioning the accused until he obtains legal counsel. A further important issue that requires analysis under section 10(b) is whether section 10(b) guarantees free and immediate legal advice upon arrest or detention to those who lack the financial means to retain legal counsel. The following sections will reflect upon these three issues.

8.2.1 The informational duty

It is clear from the wording of section 10(b) that the accused is entitled to be informed of his right to legal counsel. It follows that, where the accused has not been informed of his right to legal counsel, this on its own, will constitute a breach of section 10(b). There has been some confusion amongst police officers responsible for discharging

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[19] *Cf. BPPDI, supra* note 14, Rule no. 18(5).
[20] *Van Hulst v. Netherlands, supra* note 15, paras. 4.5, 7.8, 7.10-7.11. *Cf. BPPDI, supra* note 14, Rule no. 18(3), (5); *Campbell v. United Kingdom, supra* note 16, para. 48.
[21] *R v. Manninen*, [1987] 1 S.C.R. 1233, 1241-3. In this respect, *see* Boisvert, A, 'The Role of the Accused in the Criminal Process', in *The Canadian Charter of Rights and Freedoms*, 3rd edn, ed. by G Beaudoin & E Mendes, (Scarborough, Ont: Carswell, 1995), ch. 11, pp. 18-22.

the informational duty as to what exactly the accused is entitled to be informed of under section 10(b). In *Brydges*,[22] the accused expressed concerns regarding his inability to retain a private lawyer, and the interviewing officer neglected to inform him of the existence of a free legal aid scheme in the Province of Manitoba where he was arrested. The accused, in his ignorance, therefore, did not insist on contacting the legal aid lawyer, and during the second interview made several statements that were relied upon by the prosecution in the trial. However, the Supreme Court held that these statements had been obtained in breach of section 10(b), as the accused had requested the assistance of a lawyer, but had refrained from using one due to fear of not being able to afford it and the police had, therefore, acted in violation of section 10(b) by not informing him of the availability of the legal aid scheme. As a result, the Court imposed upon the police the duty to inform the detainee of the existence of any legal aid scheme(s) in their jurisdiction as part of the information component of section 10(b).[23]

However, the confusion persisted even after *Brydges*, due to the existence of two different legal aid schemes in Canada. Firstly, there exists the duty counsel scheme, or what has become known as '*Brydges* Duty counsel', which aims to provide the arrestee or detainee with immediate but temporary legal advice, irrespective of the accused's financial status. Secondly, there is the scheme known as 'Legal Aid', which allows the accused to receive long-term legal assistance free of charge so long as the financial criteria, as established by the provincial legal aid plan, are met.[24] In *Bartle*,[25] the appellant was arrested for impaired driving after he failed the roadside alert test. The arresting officer, who was reading the caution from a pre-printed card, advised the arrestee of his right to retain counsel but omitted informing him of the availability of immediate, preliminary legal advice by the duty counsel, and the existence of a 24-hour, toll-free legal aid telephone number, which was printed on his caution card. In addition, the arresting officer did not ask the appellant if he wanted to call a lawyer immediately, a question that was also clearly printed on his caution card.

The Supreme Court, in applying a purposive interpretation of section 10(b), held that since the implementational duty of the State is not triggered unless the arrestee or

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[22] [1990] 1 S.C.R. 190.
[23] *Ibid.* 215.
[24] *R. v. Bartle,* [1994] 3 S.C.R. 173, 195-197.
[25] *Ibid.*

the detainee asserts his right to retain counsel, an arrested or detained person must be provided with all the information on the available services in their jurisdiction regarding the existence of free legal counsel before he can be expected to assert his right. However, the information that must be provided to the accused is not confined to the availability of duty counsel or legal aid, where they exist, but extends to information on how they can be accessed, (*i.e.*, providing him with a list of telephone numbers of lawyers acting as duty counsel, or a 1-800 number).[26] In this case, as the arresting officer failed to provide the accused with sufficient information regarding the availability of free and immediate legal counsel and how they could be accessed, the Supreme Court found a breach of section 10(b).[27] The standard caution as a result of *Brydges* and *Bartle*, was modified to meet the constitutional requirement, and in the Province of Ontario, for example, the caution is given in the following terms:

> It is my duty to inform you that you have the right to retain and instruct counsel without delay. You have the right to telephone any lawyer you wish. You also have the right to free advice from a legal aid lawyer. If you are charged with an offence, you may apply to the Ontario Legal Aid plan for assistance. 1-800-265-0451 is a toll-free number that will put you in contact with a Legal Aid Duty Counsel for free legal advice RIGHT NOW. Do you understand? Do you wish to call a lawyer now?[28]

It should be noted that both cases deal principally with the right to be informed of the existence of the duty counsel and legal aid schemes, and how they can be accessed, but it does not extend to constitutionalise the right to free and immediate legal advice upon arrest or detention.[29] In other words, where the legal aid or duty counsel schemes do not exist, the accused is not entitled to be informed of them simply because they do not exist.

The information regarding the right to counsel must be provided to an arrested or detained person without delay. Therefore, in the absence of exceptional circumstances, according to the Supreme Court in *Debot*,[30] the detained or arrested person should be informed of his rights immediately upon arrest or detention, and must not be questioned nor required to provide evidence, before the caution is given to him. If exceptional circumstances do exist, especially those which threaten the

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[26] *Ibid.* 196-197.
[27] *Ibid.* 193,198, 207-208.
[28] Devonshire, R., 'The Effects of Supreme Court Charter-Based Decisions on Policing: More Beneficial than Detrimental?' *C.R.*, (4th) 31 (1994), 82, pp. 86-87.
[29] The right to free legal assistance is discussed *infra* para. 8.2.3.
[30] [1989] 2 S.C.R. 1140.

safety of the arresting officer, such as a counterattack, the police are obliged to give the caution as soon as they get matters under control.[31]

8.2.2 The Implementational duty

As mentioned above, the implementational duty is not triggered unless the arrestee or the detainee asserts his right to retain counsel. If the right to counsel is asserted, then the police are under two obligations,[32] as discussed next.

8.2.2.1 The duty to afford the accused a reasonable opportunity to retain counsel

As the detainee is under the control of the police, they must give him a reasonable opportunity to exercise his right to retain counsel. In order to discharge this duty, the police must facilitate his contact with a lawyer. In *Manninen*,[33] the Supreme Court held that the police conduct of not offering the accused use of a telephone available in the police station, although the accused did not ask to use the telephone, he had asserted his right to contact a lawyer, was contradictory to their duty to afford the accused a reasonable opportunity to retain counsel. In effect, the Court held that the right to counsel was breached by the way the police had behaved.[34] What constitutes 'a reasonable opportunity' is also affected by the diligence of the accused in exercising his right. Reasonable diligence in this context means that the accused must show a real attempt to contact a lawyer. The requirement of reasonable diligence, according to the majority of the Supreme Court in *Smith*,[35] aims at striking an appropriate balance between the accused's right to retain and instruct a lawyer of his own choosing and the public interest in investigating the alleged involvement of the accused in the offence under investigation.[36] While it was held that it is not inconsistent with reasonable diligence to attempt to contact a lawyer of one's choice, this right is qualified in the sense that it must be reasonable in the circumstances. It follows that, where the lawyer chosen is not available within a reasonable time (*e.g.*, is on holiday), the accused should exercise his right by calling another lawyer. [37]

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[31] *Ibid.* 1163.
[32] *Manninen, supra* note 21, 1241-1243.
[33] *Ibid.*
[34] *Ibid,* 1242.
[35] [1989] 2 S.C.R. 368.
[36] *Ibid.* 385.
[37] *R. v. Ross,* [1989] 1 S.C.R. 3, 11-12.

8.2.2.2 The duty to hold off the investigation until the accused had a reasonable opportunity to retain counsel

The second duty upon the police is to refrain from eliciting incriminating evidence from the accused until he is given reasonable opportunity to contact a lawyer. This duty is consistent with the purpose of the right to legal assistance, as this right would be meaningless if the police were allowed to question the accused before he knew his rights and how they could be exercised, which is what the right is specifically designed to achieve. As Lamer J., as he then was, put it in *Manninen*:[38]

> The purpose of the right to counsel is to allow the detainee not only to be informed of his rights and obligations under the law but, equally if not more important, to obtain advice as to how to exercise those rights. In this case, the police officers correctly informed the respondent of his right to remain silent and the main function of counsel would be to confirm the existence of that right and then to advise him as to how to exercise it. For the right to counsel to be effective, the detainee must have access to this advice before he is questioned or otherwise required to provide evidence.[39]

The period during which the police have to refrain from questioning the accused is dependent on the circumstances of the case, and in particular on the diligence of the accused in pursuing his right, as discussed above, the availability of duty counsel,[40] and the urgency of the investigation.[41]

8.2.3 Legal aid

After *Brydges*,[42] several provinces attempted to secure, within their own jurisdictions, a duty counsel scheme, in order to conform with the Supreme Court's decision. However, as the Supreme Court observed in *Prosper,*[43] not all the provinces adopted the scheme including, namely, the provinces of Nova Scotia and Prince Edward Island. As a result, the Supreme Court was faced with the question as to whether section 10(b) created a positive constitutional obligation on provincial governments to ensure that free and immediate preliminary legal advice was available upon arrest or detention and, if it does not, what are the government's obligations, if any, in a jurisdiction where '*Brydges* duty counsel' is not available to detainees? Despite

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[38] *Supra* note 21.
[39] *Ibid.* at pp. 1243-1244.
[40] *See infra* para. 8.2.3.
[41] [1988] 2 S.C.R. 980.
[42] *Supra* note 22.
[43] [1994] 3 S.C.R. 236.

acknowledging the importance of legal counsel in the pre-trial stage, the Supreme Court was opposed to constitutionalising the right to State-funded legal counsel, where the accused lacks the means to retain a private one. This opposition was based upon a number of considerations. Firstly, the apparent wording of section 10(b) does not make any reference to such a right. Secondly, the creators of the Charter considered including a clause guaranteeing the right to free legal counsel to those without the means to pay for it, and where the interest of the administration of justice so requires, but the proposal was rejected, apparently due to the costs involved. Lastly, and perhaps more importantly, the practical implications of obliging all provincial governments to secure a duty counsel scheme with the related consequence of failing to do so would mean a violation of section 10(b), would be far reaching.[44] As Chief Justice Lamer, speaking for the majority of the Supreme Court in *Prosper*,[45] put it:

> In effect, this Court would be saying that in order to have the power of arrest and detention, a province must have a duty counsel system in place. In provinces and territories where no duty counsel system exists, the logical implication would be that all arrests and detentions are *prima facie* unconstitutional. Moreover, devising an appropriate remedy under circumstances in which a government was found to be in breach of its constitutional obligation for failure to provide duty counsel would prove very difficult. Unless absolutely necessary to protect the Charter rights of individuals, I believe that a holding with implications of this magnitude should be avoided.[46]

In effect, the majority preferred to avoid inflaming a constitutional crisis, and adopted a less drastic approach by extending the period during which the police are obliged to refrain from eliciting evidence from the accused where a duty counsel scheme does not exist. In addition, Chief Justice Lamer warned provincial governments about the implications of not providing duty counsel services within their jurisdiction. It is significant that his Lordship pointed out the connection between the right to a fair trail and the availability of duty counsel upon arrest or detention, which had not been previously considered. He stressed the fact that evidence obtained in violation of the right to a fair trial, as enshrined in section 7 as a principle of fundamental justice, will always result in the tainted evidence being excluded. Therefore, the provincial

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[44] *Ibid.* 266-267.
[45] *Ibid.*
[46] *Ibid.* at p. 267.

governments where duty counsel services are not available would have to accept such a risk.[47]

In *New Brunswick (Minister of Health and Community Services) v. G. (J.),*[48] Lamer C.J., elaborated on the conclusion reached by the majority of Court in *Prosper,*[49] which rejected the submission that section 10(b) include the right to state-funded counsel. He stated that the Charter recognises the right to state-funded counsel, but not as an independent or an absolute right. The right to state-funded counsel, according to his Lordship, is part of the right to a fair hearing, recognised as a principle of fundamental justice under section 7. As such, the right to state-funded counsel becomes a constitutional right, where the fairness of the trial cannot be secured without it. In other words, Lamer C.J., attempted to reconcile two conflicting ends: avoiding imposing a positive constitutional obligation on the government to ensure that legal counsel services are freely available to those who lack sufficient means to afford them otherwise, and securing the fairness of the trial recognised by section 7 as a principle of fundamental justice. A compromise was struck by qualifying the previous statement made in *Prosper* by adding, in the case under consideration, that where an individual's life, liberty, or security is at stake, the circumstances of the case indicate that the accused cannot be afforded a fair trial without having the benefit of legal counsel, and he lacks the means to pay for it, then the government is constitutionally obliged under section 7 to provide him with one free of charge.[50]

Finally, it is worth mentioning that as a result of the Supreme Court's rulings in *Prosper* and *New Brunswick*, discussed above, '*Brydges* duty counsel' scheme is now available in all provinces throughout Canada.[51]

8.2.4 Confidentiality of client-solicitor relationship

The accused has the right to obtain legal counsel under s. 10(b) in private.[52] Where the circumstances under which the information regarding s.10(b) right, discussed above, is given, lead the accused to reasonably believe that he cannot exercise his

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[47] *Ibid.* 273-274.
[48] [1999] 3 S.C.R 46.
[49] *Supra* note 43.
[50] *Ibid.* 95-96.
[51] Verdun-Jones, S, *A Review of Brydges Duty Counsel Services in Canada* (Ottawa: Department of Justice Canada, 2003), pp. 71-72, *available at* <http://canada.justice.gc.ca> (last visited Jan. 2, 2006).
[52] *R v. Jackson*, (1993) 86 C.C.C. (3d) 233, 234.

right to obtain legal counsel in private, and such circumstances are known or ought to be known to the person giving the information, and he knows or ought to know the effects that such circumstances may reasonably have on the accused, the officer giving the information is constitutionally required under s.10(b) to inform the accused of his right to retain and instruct counsel in private. Failure to do so, where the accused has refrained from retaining and instructing counsel in the reasonable belief that he does not have the right to do so in private, will constitute, on its own, a violation of s. 10(b).[53]

The communications between the accused and his lawyer are privileged against search or seizure. The privilege relating to the client-solicitor relationship acquires its constitutional status in Canada from its close connection to the right to full answer and defence and the right to a fair right trial enshrined in section 7, as principles of fundamental justice. Justice Major of the Supreme Court, in his dissenting reasons in *Smith v. Jones*[54] expressed the principle underlying the client-solicitor privilege in the following terms:

> In Canada, everyone is entitled to retain legal counsel to defend and protect their interests. This right is particularly important in criminal proceedings.
> ...
> If the confidences clients share with counsel were not protected by privilege, it seems apparent that accused persons would hesitate to confide in their legal advisors, who in turn could not adequately represent them. The starting point of Canadian justice is that no one, no matter how horrible the alleged offence, be denied a full defence. Nor will they be prejudiced by retaining counsel and freely discussing the case with him or her.[55]

As a consequence, the Supreme Court held unanimously that the solicitor-client privilege was a principle of fundamental justice protected under section 7.[56]

Regarding the procedure upon which claims of solicitor-client privilege can be determined with regard to documents seized in a law office, the Supreme Court in a recent case struck down a provision dealing with this issue under the Criminal Code. The Court found that the protection provided by the unconstitutional provision was

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[53] *Ibid.*
[54] [1999] 1 S.C.R. 455.
[55] *Ibid.* at p. 462.
[56] *Ibid.* Cory J., p. 471 (L'Heureux-Dube, Gonthier, McLachlin, Iacobucci and Bastarache JJ. concurred) Major J., p. 461 (Lamer C.J.C and Binnie J. concurred).

inadequate as it interfered with the privilege more than it was necessary.[57] The Court came to this conclusion for a number of reasons. Firstly, s.488.1 (8) permitted a breach of the privilege without the knowledge or the consent of the privilege holder. Second, there was an absence of judicial discretion in the scheme under s.488. (1), which meant that if the privilege holder or keeper failed to assert the privilege, the prosecution was entitled to access the seized documents. Finally, under s.4881 (b), the Attorney General was permitted to inspect the documents seized, where the judge determining the application deemed it to be of assistance to him in deciding whether the documents were privileged or not.[58] The Court, as a consequence of invalidating the impugned provision, imposed general principles dealing with claims of privileged documents until the Parliament re-enact legislation dealing with this issue. These principles are as follows:

- if the documents are known to be privileged documents, no search warrant shall be issued with regard to them;
- the justice of the peace must be satisfied by the investigation authority that there is no existing alternative to the search of a law office;
- the justice of the peace, before allowing a law office to be searched must demand the police to provide the maximum protection possible for the solicitor-client privilege;
- all documents found in the possession of a lawyer must be sealed before being examined or removed from the lawyer's possession, unless the warrant authorises otherwise;
- the lawyer and the client must be contacted at the time of executing the search warrant. In the event that they cannot be contacted, a representative of the Bar should be present to oversee the sealing and seizure of these documents;
- the officer executing the warrant should report the efforts made to contact all potential privilege holders to the justice, and they should be provided with a reasonable opportunity to assert the privilege. If the claim of privilege was asserted, the issue has to be determined judicially;

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[57] *Lavallee,* Rackel & Heintz v. Canada (Attorney General), et al (2002) 167 C.C.C. (3d) 1, at. 52.
[58] *Ibid.* 4-27 & 32-34.

- if the efforts to notify the potential privilege holders are unsuccessful, the privilege keeper, or a lawyer appointed by either the Law Society or the judge, should be given a reasonable opportunity to examine the documents in order to determine whether to assert a claim of privilege or not;
- the Attorney General is not permitted to inspect the documents in the course of the determination of the status of documents unless it is determined not to be privileged. The Attorney General could make submissions on the issue of privilege;
- where it is determined that the sealed documents are not privileged, the documents can be used in the normal course of the investigation; and
- where the documents are determined to be covered by the solicitor-client privilege, they must be returned immediately to the privilege holder, the privilege keeper, or to the lawyer designated by the Law Society or by the court.[59]

It should be noted, however, that the client-solicitor privilege is not an absolute one, in the sense that information that falls under the client-solicitor privilege can be disclosed where the exception to the rule applies. There are three exceptions to the client-solicitor privilege, which include the following circumstances:

- where the non-disclosure of information falling under the client-solicitor privilege will impede the accused's ability to make full answer and defence against the charges against him;
- where the communications between the accused and his client are of criminal nature, *i.e.*, criminal in themselves or aim at the facilitation of the commission of a criminal offence; and
- where the non-disclosure of privileged information threatens the safety of the public, *e.g.*, serious harm will occur to a person, which could be prevented if the information falling under the client-solicitor privilege were disclosed.

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[59] *Ibid.* 36-37.

In the above-mentioned circumstances, the information falling under the client-solicitor privilege can be disclosed as long as it relates directly to those circumstances.[60]

C. Saudi Arabia

8.3 Right to legal assistance

The CCP, without a precedent, is the first codified law in Saudi legal history to recognise the accused's right to seek legal assistance. Article 4 of the CCP entitles the accused at the investigation and trial stages to seek the assistance of a representative or a lawyer.[61] Given that the accused is only entitled to seek the assistance of a lawyer during the investigation and trial stages, the right to legal assistance does not apply to the police enquiry stage, whether or not it involves a *flagrante delicto* offence, in which the police have extensive powers over the accused. The CCP does not specify the moment at which the investigation stage begins. However, in practice, the investigation stage is considered to begin from the moment that the accused, along with the case dossier, has been referred to the IPPC, usually within the 24 hours following the arrest of the accused.[62]

The CCP does not explicitly state that the accused has the right to contact his lawyer upon arrest or detention. However, this right is implicitly guaranteed under Article 35 of the CCP, which states that any arrested or detained person 'shall be entitled to contact any person of his choice to inform him of his arrest.' According to Article 70 of the CCP, the investigator cannot separate the accused from his accompanying lawyer during the investigation stage. In addition, under Article 19 of the Law Practice Code (LPC)[63] the 'investigation authorities' are required to 'facilitate the lawyer's discharge of his duty, and shall enable him to attend any interrogation .... His request [to, *inter alia*, attend the interrogation] shall not be denied except for a valid reason.' If the relevant investigator decides to prevent a lawyer from attending

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[60] *Smith v. Jones*, *supra* note 54, pp. 477-490.
[61] *See also* CCP. Art. 64.
[62] Written response from Investigator Sulman Al-Jurba, Investigation and Public Prosecution Commission Branch, Crimes Against Honour Division, Riyadh (July. 14, 2004); interview with Investigator Hassen Al-Asaker, Investigation and Public Prosecution Commission Branch, Crimes Against Honour Division, Riyadh (May. 23-25, 2004).
[63] Issued by Royal Decree No M/38 (15 October 2001). Published on Umm al-Qura (the Saudi official Gazette) No. 3867 on 2 November 2001.

the interrogation of his client, the lawyer can appeal against the decision of the investigator by submitting a request to review the decision to the Head of the relevant Division, whose decision is final.[64] The role of a lawyer during the interrogation is a passive one in the sense that he cannot intervene during the interrogation unless the investigator permits him to do so, and in any case, the lawyer is entitled to provide written observations to the investigator to be included in the case file.[65]

Article 84 prohibits the seizure of any correspondence between the lawyer and his accused client if they relate to the ongoing criminal proceedings against the accused, or any documents submitted by the accused to his lawyer, or representative, for the purposes of obtaining his legal advice, if these correspondences or documents are in the possession of the accused's lawyer or representative.

There is no way of knowing how the CCP provisions relating to the right to legal assistance are implemented in practice for the simple reason that the right to legal assistance is hardly exercised by either accused persons during the pre-trial stage or defendants during the trial stage. During the present researcher's six-month fieldwork period, which was spent mostly in the IPPC Branch in Riyadh and the *Shari'ah* courts, he did not encounter any criminal case in which a lawyer was involved. Indeed, those IPPC Investigators who were interviewed by the present researcher encountered either a very small number of cases in which a lawyer representing the accused was involved,[66] or none at all.[67] Therefore, the question that arises is why, in practice, accused persons and defendants alike do not utilise such an important right? There are a number of factors that seem to contribute to this phenomenon. These factors include the following:

- The accused is not entitled to be informed of his right to legal assistance,[68] nor how he can, in practice, exercise it.

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[64] Implementing Regulation of the Law Practice Code, issued by the Justice of Minister Order No. 4649 (17 August 2002).
[65] CCP. Art. 70.
[66] Interview with Investigator Anonymous, D.N. [Pseudonym.], Investigation and Public Prosecution Commission Branch, Riyadh (Aug. 22, 2004); written response from Investigator Sulman Al-Jurba, *supra* note 62.
[67] Interview with Investigator Hassen Al-Asaker, *supra* note 62; written response from Investigator Thamer Al-Suniadi, Investigation and Public Prosecution Commission, Drug Crimes Division, Riyadh (July. 13, 2004).
[68] Written response from Investigator Sulman Al-Jurba, *supra* note 62; Interview with Investigator Hassen Al-Asaker, *supra* note 62.

- As the CCP does not entitle those persons who lack the financial means to retain a private legal assistance to free legal assistance, they are practically deprived, by virtue of their financial status, from the right to legal assistance.[69]
- Law practice was only recognised by Saudi law as a profession as recently as 2001, by virtue of the Law Practice Code. Prior to that date, there were no rules that regulated law practice, or that guaranteed and defined the rights and obligations of lawyers, which had deterred many law graduates from practicing law.[70]
- The Saudi society is not familiar with the concept and the benefits of legal representation.[71] Obtaining the services of a professional lawyer, particularly in criminal cases is seen as an indication of guilt, as it is commonly thought that if the accused were innocent, he would not need a lawyer to prove it. Hence, lawyers are perceived, among other things, as a hindrance to justice rather than a means of achieving it. This perception is even shared by judges.[72] Indeed, even lawyers do not consider providing their services to an accused person they consider 'guilty', as an ethical thing to do.[73]
- As a consequence of the last two mentioned factors, there is a limited number of practicing lawyers in Saudi Arabia. According to the Head of the Department of Law Practice in the Ministry of Justice, the governmental agency responsible for issuing licences for practicing law, as of September 2004, there were only 600 practicing lawyers[74] in a country with a population

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[69] *See, e.g.,* Waleed's Case, *supra* ch. 7 note 185 and accompanying text.
[70] Interview with lawyer Abdurrahman Al-Muqbel, Riyadh (Nov. 4, 2004).
[71] *Ibid. See also* Report of the Special Rapporteur, Dato' Param Cumaraswamy, on the Independence of Judges and Lawyers: Report on the Mission to the Kingdom of Saudi Arabia, Submitted Pursuant to Commission on Human Rights Resolution 2002/43, U.N. ESCOR, Comm'n on Hum. Rts., 59th Sess, Item 11(d) of the provisional agenda U.N. Doc. E/CN.4/2003/65/Add.3, para. 51 [Hereinafter the Human Rights Commission Report], paras. 37, 91.
[72] Interview with *Qadi* Suleiman Al-Hudiathi, General Court, Riyadh (July. 18, 2004);); interview with *Qadi* Muhammad Al Jaarallah, General Court, Riyadh (Aug. 2-3, 2004); interview with *Qadi* Tameem Al-Aunizan, Summary Court, Riyadh (July. 11-12, 2004). *See also* Human Rights Commission Report, *supra* note 71, para. 37, 91; Vogel, F, *Islamic Law and Legal System: Studies of Saudi Arabia* (Boston: Brill, 2000), pp. 160-161.
[73] Interview with lawyer Abdurrahman Al-Muqpel, *supra* note 70.
[74] Interview with *Sheik* Abdurrahman Al-Hutan, Head of the Department of Law Practice, Ministry of Justice, Riyadh (Sep. 19, 2004).

of about 25 million.[75] The majority of those practicing lawyers are involved in commercial and civil cases, which are more profitable and culturally more acceptable to participate in.[76]

8.4 Comparison

Although both the Saudi and the Canadian systems recognise the right to legal assistance, there are stark differences between the two systems in this respect. The underlying difference, from which all other differences flow, is how the role of legal assistance is perceived under the two systems. Under the Saudi system, legal assistance is considered, at best, a useful thing for the accused to have, but in cases where the accused does not have legal assistance, or his right to legal assistance has been violated, the fairness of the trial will not be seen to have been affected. At worst, legal assistance is considered an impediment to the ability of the investigating authority as well as the courts to arrive at the "proper" outcome regarding the guilt or the innocence of the accused. In contrast, under the Canadian system, legal assistance is considered indispensable if the fairness of the trial is to be secured.

These differences, which are the result of the different perception taken by each system of the role on the right to legal assistance in the criminal process, can be summarised in the following points:

- Under the Canadian system, the accused is constitutionally entitled to be informed of his right to legal assistance and how to exercise it, while under the Saudi system the accused does not have such a right.
- The right to legal assistance under the Canadian system is a constitutional one, while the right to legal assistance is recognised statutorily under the Saudi system.
- Under the Canadian system, the right to legal assistance comes into play the moment the accused is arrested or detained, while the right to legal assistance under the Saudi system applies to the investigation stage, *i.e.*, after 24 hours following the arrest of the accused.

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[75] Population Division of the Department of Economic and Social Affairs of the United Nations Secretariat, *World Population Prospects: The 2004 Revision and World Urbanization Prospects*, *available at* <http://esa.un.org/unpp> (last visited Jan. 2, 2006).
[76] Interview with lawyer Abdurrahman Al-Muqpel, *supra* note 70.

- Under the Canadian system, the accused is constitutionally entitled to an effective exercise of his right to legal assistance, if he asserts his right. This includes the duty of the police to facilitate the accused's exercise of his right to legal assistance, *e.g.,* providing him with a telephone, and telephone numbers of legal services; the duty of the police not to question the accused until he has obtained legal assistance, and the duty of the police to allow the accused to obtain legal assistance in private. However, the Saudi system does not address how the accused, who is in the hands of the state authorities, can exercise his right to legal assistance in a meaningful way.
- The right to free legal assistance is a constitutional right under the Canadian system, where the accused's right to a fair trial cannot be secured without it, and he lacks the means to retain a private lawyer. In addition, in practice, throughout Canada there is a duty counsel scheme by which the accused can readily obtain legal assistance free of charge upon arrest or detention. In contrast, the Saudi system does not recognise at all the right to free legal assistance irrespective of the circumstances of the case and the financial status of the accused.
- Under the Canadian system, correspondence and communications between the accused and his lawyer are privileged against search and seizure, unless there are competing social interests that can override them. Under the Saudi system, correspondence and communication between the accused and his lawyer are privileged against search and seizure only if they are in the possession of the lawyer or the representative of the accused.
- Where the accused's right to legal assistance has been violated under the Canadian system and the violation has resulted in the accused making incriminating statements, such statements will almost definitely be excluded under s. 24(2) of the Charter, as will be discussed later. By contrast, the Saudi system does not provide any remedy for the violation of the accused's right to legal assistance.[77]

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[77] The exclusion of illegally obtained evidence under the Saudi and Canadian systems is discussed *infra* paras. 9.2.3 & 9.3.4.

Chapter Nine

The Right to Privacy

A. International human rights law

9.1 Right to privacy

Article 17 of the ICCPR states that:

> 1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
> 2. Everyone has the right to the protection of the law against such interference or attacks.

Article 17 guarantees the right to privacy. However, Article 17 only protects against arbitrary or unlawful interference with the right to privacy. It also requires the State to provide adequate safeguards to ensure the enjoyment of the right to privacy. In the following sections, attention will be focused on the interests protected under Article 17, the legitimate limitations that can be imposed on those interests, the duty of the State to provide adequate protection against unlawful and arbitrary interferences with Article 17, and finally, the remedy of excluding evidence obtained in violation of Article 17.

9.1.1 Interests protected under Article 17

Article 17 protects six interests that fall within the realm of the private sphere: privacy, family, home, correspondence, honour, and reputation. Only three protected interests under Article 17 are relevant to this discussion: privacy, home, and correspondence. These three interests are interconnected and overlap in the sense that a given action can violate more than one interest at the same time.[1] This is particularly true with regard to, on the one hand, the interest of privacy, and, on the other hand, the interests of home and correspondence, as privacy, if interpreted broadly, can encompass home and correspondence. Hence, the right to correspondence and home

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[1] *Cf.* Harris, D, *et al*, *Law of the European Convention on Human Rights* (London: Butterworths, 1995), p. 302.

could be viewed as specific examples of the interests protected under privacy. For the purposes of establishing a violation of Article 17, it is not necessary to determine precisely which interest has been allegedly violated, as an alleged violation of any interest connected with the private sphere can be based on Article 17 as a whole.[2] Nonetheless, it is still necessary for determining the scope of Article 17 to define the protected interests under it.

- Privacy: the HRC has not yet defined privacy within the meaning of Article 17 of the ICCPR.[3] However, privacy can be defined as the freedom from illegal or arbitrary interferences with 'the particular area of individual existence and autonomy [, which, "includes all manifestations of privacy that do not fall under one of the special, usually institutional categories (home, correspondence, etc)", and] does not touch upon the sphere of liberty and privacy of others.'[4] In this sense, the right to private life protects, *inter alia*, against unlawful and arbitrary interferences with the physical and psychological integrity of the individual. Thus, humiliating acts, such as insults or arbitrary intimate body searches, can violate Article 17, even if the suffering inflicted upon the person concerned as a result of them is not so severe as to engage Article 7 or/and Article 10 of the ICCPR.[5]
- Home: home within the meaning of Article 17 has been defined by the HRC as the 'place where a person resides or carries out his usual occupation.'[6] Therefore, the right to home protects against unlawful or arbitrary electronic surveillance (*i.e.*, information collected from the 'home' through electronic listening or video devices), entry, and searches of private homes or business offices.

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[2] *Cf.* Dijk, P, *et al*, *Theory and Practice of the European Convention on Human Rights*, 3rd edn (The Hague; Boston: Kluwer Law International, 1998), p. 489.
[3] *See Coeriel, et al. v. The Netherlands*, Communication No. 453/1991, U.N. Doc .CCPR/C/52/D/453/1991 (1994) (Mr. Kurt Herndl, dissenting).
[4] Nowak, M, *U.N. Covenant on Civil and Political Rights* (Strasbourg: N.P. Engel, 1993), p. 294.
[5] *See* Human Rights Committee, General Comment 16, (Twenty-third session, 1988), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI\GEN\1\Rev.1 at 21 (1994), para. 8 [hereinafter General Comment 16]. *See also* Nowak, *supra* note 4, pp. 295-296
[6] *Ibid.* para. 5. *Cf. Niemietz v. Germany* (1993) 16 E.H.R.R. 97, para. 29.

- Correspondence: correspondence within the meaning of Article 17 refers to all means of communications over distance.[7] It includes letters, telephone, telex, e-mail, telefax etc. Withholding, censoring, intercepting, recording, opening or reading 'correspondence' constitutes interference within the meaning of Article 17.[8]

9.1.2 Limitations on the right to privacy

As indicated earlier, the right to privacy under Article 17 is not absolute in the sense that it can be restricted under certain circumstances. For a restriction on the right to privacy to conform with Article 17, it must not be 'arbitrary or unlawful'. For a restriction to conform with the non-arbitrariness requirement, according to the Committee, the restriction must be necessary to protect 'the interests of society as understood under the Covenant',[9] and to be proportionate to the aim pursued.[10] For a restriction on Article 17 to be considered proportionate and, thus, not arbitrary, it must be established that the restriction is the least restrictive measure available to the State to secure the aim pursued.[11] Article 17 does not specify the legitimate purposes for interfering with Article 17. However, it is doubtless that an interference with Article 17 for the purposes of collecting evidence or arresting a suspected criminal constitutes a legitimate goal for interfering with Article 17.[12]

With regard to the requirement of 'lawfulness', according to the HRC for a restriction on Article 17 to be considered lawful within the meaning of that Article, it must be prescribed by law, and the law itself must comply with 'the provisions, aims and objectives of the Covenant.'[13] Thus, if a given law allows, for example, intimate searches to be carried out by a person of the opposite sex, notwithstanding the search being lawful under the domestic law, it is nonetheless unlawful within the meaning of

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[7] Nowak, *supra* note 4, p. 304.
[8] General Comment 16, *supra* note 5, para. 8.
[9] *Ibid.* para. 7. *See also Coeriel et al. v. The Netherlands*, Communication No. 453/1991, U.N. Doc. CCPR/C/52/D/453/1991 (1994), paras. 10.4-10.5.
[10] *Ibid.* para.4. *See also Toonen v. Australia*, Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994), para. 8.3. *Cf.* the meaning of arbitrariness under Article 9.
[11] *Cf.* Human Rights Committee, General Comment 27, Freedom of Movement (Art.12), (Sixty-seventh session, 1999), U.N. Doc. CCPR/C/21/Rev.1/Add.9 (1999), reprinted in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.6 at 174 (2003), para. 14.
[12] *See* General Comment 16, *supra* note 5, para. 8. *Cf.* ECHR, Art. 8(2).
[13] *Ibid.* para. 3.

Article 17, as it is contrary to the human dignity that is the essence of Article 17.[14] In addition, the law must set precisely and in detail the circumstances under which restrictions on Article 17 may be imposed,[15] and it must provide adequate safeguards against unlawful or arbitrary interferences with the right to privacy.[16] Adequate safeguards against unlawful or arbitrary interferences with the right to privacy implied in the requirement of lawfulness, and expressly required under Article 17(2) are discussed next.

9.1.3 Procedural safeguards

A law that imposes restrictions on the right to privacy must be accompanied by adequate safeguards to ensure that the right to privacy is not arbitrarily or unlawfully interfered with. The HRC's jurisprudence seems to suggest that, under normal circumstances, there must be a judicial supervision including a prior judicial authorisation in order for an interference with Article 17 to conform with the Covenant, in particular where electronic surveillance is involved.[17] However, a prior judicial warrant is not of itself sufficient to make a given restriction on Article 17 lawful, if the interference is not accompanied by appropriate safeguards.[18] Apart from the required judicial supervision over interferences with Article 17, the HRC has not elaborated on the required safeguards to protect against arbitrary or unlawful interferences with the right to privacy. However, in a series of cases concerning the right to privacy under Article 8 of the ECHR, the European Court has developed the required safeguards to protect against arbitrary and unlawful interferences with the right to privacy. According to the European Court's jurisprudence, the law must:[19]

- determine with reasonable clarity the scope of the authorities' discretionary powers with regard to permissible interferences with Article 8;

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[14] *Cf. ibid.* para. 8.
[15] General Comment 16, *supra* note 5, para. 8. *Cf. Huvig v. France* (1990) 12 E.H.R.R. 528, paras. 33-35; *Niemietz v. Germany*, *supra* note 6, para. 32-33.
[16] *Pinkney v. Canada*, Communication No. 27/1978, U.N. Doc. CCPR/C/OP/1 at 95 (1985), para. 34; Concluding Observations of the Human Rights Committee, Russian Federation, U.N. Doc. CCPR/C/79/Add.54 (1995), para. 19. *Cf. Herczegfalvy v. Austria* (1993) 15 E.H.R.R. 437, para. 89.
[17] *See* Concluding Observations of the Human Rights Committee, Zimbabwe, U.N. Doc. CCPR/C/79/Add.89 (1998), para. 25; Concluding Observations of the Human Rights Committee, Poland, U.N. Doc. CCPR/C/79/Add.110 (1999), 22. *Cf. Klass and Others v. FRG* (1979-80) 2 E.H.R.R. 214, para. 56; *Funke v. France* (1993) 16 E.H.R.R. 297, para. 57.
[18] *Cf. Niemietz v. Germany*, *supra* note 6, para. 37.
[19] *See Malone v. United Kingdom* (1985) 7 E.H.R.R. 14; *Olsson v. Sweden* (1989) 11 E.H.R.R. 259; *Kruslin v. France* (1990) 12 E.H.R.R. 547; *Huvig v. France* (1990) 12 E.H.R.R. 528.

- define the categories of people liable to have their Article 8 right interfered with;
- define the nature of the offences that may give rise to interference with Article 8; and
- set a limit on the duration of the interference with Article 8.

The above-mentioned safeguards, which the European Court developed under article 8 of the ECHR, provide some guidance concerning the safeguards required under the corresponding provision in Article 17 of the ICCPR. It should be noted, however, that the more serious the interference with Article 17 is, the more protection the law must provide to comply with the Covenant. Whether a given set of safeguards is sufficient to comply with Article 17 requirements or not can only be determined in the light of the circumstances of each case.[20]

9.1.4 Remedy: Exclusion of illegally obtained evidence

If the accused's right has been violated, he is entitled to a remedy under Article 2(3) of the ICCPR. The question to be addressed here is whether the admission of evidence obtained in violation of the accused's right, breaches the right to effective remedy under Article 2(3). It should be recalled here that the right to remedy refers to both the mechanism by which the violation is determined to have occurred or not, and the redress awarded if there is a violation. With regard to the former, the competent authority (*i.e.*, the court) must first examine whether a Covenant right has been violated or not. Failure to examine an arguable claim that a Covenant right has been violated, in itself constitutes a violation of Article 2(3).[21]

If a violation of a Convent right is determined to have occurred and the violation resulted in the discovery of evidence against the accused, the competent authority must determine whether the exclusion of evidence is the appropriate remedy. The answer to this question will rest wholly on whether or not the admission of the tainted evidence violates the fairness of the trial.[22] As discussed earlier, evidence obtained in violation of the right against self-incrimination together with the right not to be subjected to torture or cruel, inhuman or degrading treatment or without it, will almost

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[20] *Cf. Klass and Others v. FRG*, *supra* note 17, para. 50.
[21] *See supra* para. 4.1.1.
[22] *Cf. Schenk v. Switzerland* (1991) 13 E.H.R.R. 242, para. 46.

definitely undermine the fairness of the trial, and therefore, must be automatically excluded.[23] On the other hand, the effect of admitting evidence obtained in violation of other rights on the fairness of the trial must be determined in the light of the seriousness of the violation, the faith of the police and whether independent evidence, apart from the contaminated evidence, pointing to the guilt of the accused exists.[24]

B. Canada

9.2 Right to privacy

Section 8 of the Charter states that '[e]veryone has the right to be secure against unreasonable search or seizure.' The scope of the right against unreasonable search or seizure was determined in the leading case of *Hunter v. Southam.*[25] Justice Dickson, speaking for the majority of the Supreme Court in that case, adopted the reasoning of Justice Stewart of the Supreme Court of the United States of America in *Katz v. United States,*[26] by stating that section 8 does not protect places but rather people, and, therefore, the underlying interest that section 8 seeks to protect is, at least, the right to privacy. The essence of this right is 'to be left alone by other people.'[27] However, the right to privacy under section 8 is not a free-standing one, but a right that protects individuals against unreasonable governmental interferences with their right to privacy. In other words, it only protects a reasonable expectation of privacy. As Justice Dickson put it:

> The guarantee of security from unreasonable search and seizure only protects a reasonable expectation. This limitation on the right guaranteed by s. 8, whether it is expressed negatively as freedom from "unreasonable" search and seizure, or positively as an entitlement to a "reasonable" expectation of privacy, indicates that an assessment must be made as to whether in a particular situation the public's interest in being left alone by government must give way to the government's interest in intruding on the individual's privacy in order to advance its goals, notably those of law enforcement.[28]

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[23] *See supra* para. 5.1.3.
[24] *Cf.* Cheney, D, *et al, Criminal Justice and the Human Rights Act 1998*, 2nd edn (Bristol: Jordans, 2001), para. 146-147; Starmer, K, *et al, Criminal justice, Police Powers and Human Rights* (London: Blackstone, 2001), pp. 202-205.
[25] [1984] 2 S.C.R 145.
[26] 389 U.S. 347 (1967).
[27] Citing *Katz v. United States*, 389 U.S. 347 (1967), p. 350, in *Hunter v. Southam*, *supra* note 25, p. 159.
[28] *Ibid.* 159-160.

In order to reconcile the competing interests of privacy and law enforcement, the police are required, where it is 'feasible', to obtain a prior judicial authorisation in the form of a warrant before they can conduct the search or seizure. Hence, a warrantless search is presumed unreasonable.[29] The rational behind this requirement was indicated to be that, if the right is to be meaningful, the aim should be to prevent the occurrence of unreasonable searches before they take place, rather than determining their validity after they have occurred.[30] In order to achieve that end, save where it is unfeasible, a prior judicial authorisation is a prerequisite for the constitutionality of an interference with the right to privacy. A search warrant has been defined by the Supreme Court as:

> [A]n order issued by a justice under statutory powers, authorising a named person to enter a specified place to search for and seize specified property which will afford evidence of the actual or intended commission of a crime. A warrant may issue upon a sworn information and proof of reasonable grounds for its issuance. The property seized must be carried before the justice who issued the warrant to be dealt with by him according to law.
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> ....
>
> The issuance of a search warrant is a judicial act on the part of the justice, usually performed ex parte and in camera, by the very nature of the proceedings.[31]

As pointed out earlier, any person, who seeks the protection of the Charter, bears the burden of establishing, on the balance of the probabilities, that his right has been interfered with.[32] Regarding warrantless searches, the accused has only to demonstrate the fact that the search was conducted without a warrant, and the burden will shift to the Crown to rebut the presumption that a warrantless search is unreasonable. In order to do so, the Crown must establish that the search is authorised by the law, and that the law itself as well as the manner in which the search was conducted are reasonable.[33]

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[29] *Ibid.* 161.
[30] *Ibid.* 160.
[31] *A.G. v. MacIntyre*, [1982] 1 S.C.R. 175, 179.
[32] *See supra* para. 4.3.
[33] *Ibid.* pp. 277-278

In the remainder of this section attention will be the requirement of a judicial warrant, the exceptions to the warrant requirement, and the exclusionary rule under s.24(2) of the Charter as a remedy for violations of s.8.

9.2.1 The requirement of a judicial warrant

As mentioned above, the minimum constitutional standard under section 8 is a prior judicial authorisation in the form of a warrant where it is feasible. For a warrant to meet the constitutional standard under section 8 of the Charter, it has to satisfy two requirements. Firstly, the person authorising the search has to make the assessment regarding the reasonableness of the grounds of the search in an independent and impartial manner. The person authorising the search does not have to be a judge, but at least he/she has to be capable of acting judicially.[34] The test to be applied in determining whether the officer empowered to carry out judicial functions (*i.e.*, issuing a search warrant) is capable of discharging his duties impartially, is not dependent on whether there is a real bias in the case or not but, as Vancise J.A., speaking for the majority of the Saskatchewan Court of Appeal in *R. v. Baylis*,[35] put it, is 'whether any reasonable person would have a reasoned suspicion that the person authorising the search could not assess the evidence presented to him or her in an impartial, neutral, and detached manner.'[36] The test of a real or reasonable apprehension of bias seeks not just to ensure that the probable grounds are actually assessed in an impartial and neutral manner, but also seeks to preserve the public confidence in the impartiality of those who are required to act judicially.[37] If the officer who issued the search warrant is determined to be lacking the impartiality requirement because of a real or reasonable suspicion of bias, the search warrant, irrespective of the belief of the officer executing the warrant, is considered to have been illegally obtained under the provision authorising it, and therefore the search is unreasonable in violation of section 8.[38]

On the other hand, the independence of the judicial officer 'involves both individual and institutional relationships: the individual independence of [the judicial officer], as reflected in such matters as security of tenure, and the institutional

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[34] *See Hunter*, *supra* note 25, 161-162; *Baron v. Canada* [1993] 1 S.C.R. 416, p. 434.
[35] (1988) 43 C.C.C. (3d) 514.
[36] *Ibid.* 532. *See also Valente v. the Queen*, [1985] 2 S.C.R. 673, p. 685.
[37] *Ibid.* 534-535.
[38] *Ibid.* 536-537.

independence of [the office] over which he or she presides, as reflected in its institutional or administrative relationships to the executive and legislative branches of government.'[39] The test of whether a given officer, who is empowered to exercise judicial functions, meets the requirement of independence is dependent on whether a reasonable and informed person will perceive such an officer to enjoy the necessary objective conditions and guarantees of judicial independence.[40]

Secondly, the officer issuing the warrant must be satisfied upon reasonable and probable grounds established on oath that an offence has been committed and that evidence concerning the alleged offence will be found on the premises intended to be searched.[41] Vancise J.A., speaking for the majority of the Saskatchewan Court of Appeal in *Turcotte,*[42] explained this requirement in the following terms:

> In deciding whether to issue the search warrant, the justice of the peace must act judicially. He must consider whether what is alleged in the information is sufficient to give him jurisdiction to issue a warrant, that is, that he is satisfied that reasonable and probable grounds exist for believing that there is in the place to be searched anything in respect of which the alleged offence has or was suspected to have been committed.
> The justice of the peace cannot come to that conclusion unless the grounds of suspicion are revealed in the information by the informant. His conclusion must be based on facts. It is the judge who must be satisfied on the evidence presented that reasonable and probable grounds exist.[43]

If the warrant is found to be invalid in substance, because of the insufficiency of the grounds upon which the warrant was granted, the search will be ruled unreasonable, even if the police officer executing the warrant was acting in good faith. However, if the defect of the warrant is of a technical nature, which does not prejudice the interest protected by section 8, and the police officer executing the warrant reasonably believed that he was authorised by law to conduct the search, the reasonableness of the search cannot be contended to have been affected.[44]

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[39] *Valente v. the Queen*, [1985] 2 S.C.R. 673, p. 687.
[40] *Ibid.* 689.
[41] *Hunter, supra* note 25, 168.
[42] (1987), 39 C.C.C. (3d) 193.
[43] *Ibid.* 205-206. (Tallis J. concurred. Bayda C.J.S. in a separate judgment concurred with the majority on this point).
[44] *R. v. Harris* (1987) 35 C.C.C. (3d) 1. 23-24.

9.2.2 'Search and seizure' without warrant

Under Canadian law, there are three powers to search that could be carried out without warrant: search in exigent circumstances, search incident to arrest, and search with consent. These powers are treated separately next.

9.2.2.1 Search in exigent circumstances

As mentioned above, a warrant is a prerequisite for the validity of the search where it is feasible to obtain one. The jurisprudence of the Supreme Court on the issue of whether or not exigent circumstances could justify a warrantless search of a dwelling house has been inconsistent. In *Grant,*[45] the Court held that where exigent circumstances exist, a warrantless search would not violate s.8. These circumstances include, for example, 'an imminent danger of the loss, removal, destruction or disappearance of the evidence sought ... if the search or seizure is delayed.'[46]

However, the Court in *Silveira*[47] retreated from this position by refusing to recognise exigent circumstances as an exception to the warrant requirement. The Court's refusal to grant the police the power to search without warrant in exigent circumstances seems to be because it is inconsistent to do so with the purpose of the Charter, which is to constrain rather than authorise government actions.[48] This is supported by the fact that, as mentioned earlier, it is not inconsistent with *Hunter* to conduct a warrantless search in exigent circumstances because obtaining a warrant in these circumstances will not be feasible, and therefore, not required under *Hunter*. In other words, the Court had refused to grant the police a power, by the virtue of the Charter, and it is more likely that the Court saw the parliament to be the more appropriate authority to grant the police such a power.

In response to that, the Criminal Code was amended to authorise a police officer to carry out a search without warrant where exigent circumstances exist, and the police officer has 'reasonable grounds to believe that there is in a building, receptacle or place:

> (a) anything on or in respect of which any offence ... has been or is suspected to have been committed,
> (b) anything that there are reasonable grounds to believe will afford evidence with respect to the commission of an offence, or will reveal the

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[45] [1993] 3 S.C.R. 223.
[46] *Ibid.* 243.
[47] [1995] 2 S.C.R. 296.
[48] *Hunter*, *supra* note 25, 157.

whereabouts of a person who is believed to have committed an offence, ...or
(c) anything that there are reasonable grounds to believe is intended to be used for the purpose of committing any offence against the person for which a person may be arrested without warrant, or
(c.1) any offence-related property[.]"[49]

9.2.2.2 Search incident to lawful arrest

Search incident to arrest is an established common law exception to the presumption that a warrantless search is unreasonable. The rational behind this exception was explained in *Stillman*,[50] where the common law power to search a person who has been lawfully arrested was challenged. It was cited with approval in *Stillman* that:

> Searches made incidentally to an arrest are justified so that the arresting officer can be assured that the person arrested is not armed or dangerous and seizures are justified to preserve evidence that may go out of existence or be otherwise lost.[51]

It is common sense to note, as the Ontario Court of Appeal pointed out in *Belnavis*,[52] that where the search supplies the reasonable and probable grounds for the arrest, the search cannot be justified as incident to the arrest.[53] In addition, if the arrest justifying the search is ruled to be unlawful, the search consequently will be ruled unlawful.[54]

The scope of the police's power to carry out a strip search incident to arrest was considered recently by the Supreme Court in *Golden*.[55] The Court defined a strip search as 'the removal or rearrangement of some or all of the clothing of a person so as to permit a visual inspection of a person's private areas, namely genitals, buttocks, breasts (in the case of a female), or undergarments.'[56] The Court went on to distinguish between strip search and other types of search to which a person could be

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[49] Criminal Code. s. 487.11
[50] [1997] 1 S.C.R. 607.
[51] Per Hoyt C.J.N.B. in Paul (1994), 155 N.B.R (2d) 195, at p.203, cited by Cory J. in *Stillman*, *supra* note 50, p. 639.
[52] (1996), 107 C.C.C (3d) 195.
[53] *Ibid.* 198.
[54] *Stillman*, *supra* note 50, 634.
[55] [2001] 3 S.C.R. 679. For a full review of the position of strip search incident to arrest after *Golden*, *see* Gottardi, E, 'The Golden Rules: Raising the Bar Regarding Strip Searches Incident to Arrest', *C.R.*, (5th) 47 (2002), 48.
[56] *Ibid.* 706.

subjected depending upon the intrusiveness that the search poses to the privacy of individuals,[57] by stating that:

> This definition distinguishes strip searches from less intrusive "frisk" or "pat-down" searches, which do not involve the removal of clothing, and from more intrusive body cavity searches, which involve a physical inspection of the detainee's genital or anal regions.[58]

Consequently, it was held that the criteria applicable to a strip search are different from those applicable to a superficial search or what is known as a frisk search under Canadian law. Apart from the usual requirement applicable to any search incident to arrest, (*i.e.*, the arrest to be lawful, the search to be truly incidental to arrest, and not to be carried out in an abusive fashion)[59] the Court imposed the requirement that there must be reasonable and probable grounds for conducting the strip search itself. Despite the acknowledgement of the Court of the high degree of intrusiveness that strip searches pose to the right to be secure against unreasonable search, the Court refrained from imposing a warrant requirement on the police before conducting the strip search.[60] However, while it is recognised that search incident to arrest is an established exception to the presumption that a warrantless search is unreasonable, because of the intrusiveness strip search poses to the physical integrity of the person, even if it is carried out as incident to arrest, it is presumed unreasonable.[61] This presumption will be rebutted, if the Crown shows that, first, the strip search was not conducted as a matter of routine police policy. Second, the strip search was based upon reasonable and probable grounds related to the preservation of evidence that might be destroyed, or to ensure the safety of the arresting officer or of the accused himself by disarming the arrestee. Lastly, the Crown must show that the search was conducted in a reasonable manner, having regard to the guidelines set out in *Golden*.[62]

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[57] The minority of the Court spoken for by Bastarache J (McLachlin C.J. and Gonthier J. concurred) saw no need to distinguish a strip search from other types of search and therefore, reasonable and probable grounds relating to the strip search is not a prerequisite for carrying out the strip search, a point of view that has been rejected by the majority. *Ibid.* 689-690.

[58] *Ibid.* at p. 706.

[59] *Cloutier v. Langlois*, [1990] 1 S.C.R. 158, 186.

[60] *Ibid.* 728.

[61] *Ibid.* 736.

[62] *Ibid.* 733-734. The Court found the guidelines set out in the English legislation, the Police and Criminal Evidence Act 1984 (PACE), to be consistent with the constitutional requirement of s.8 and consequently adopted them as a framework for the police in deciding when and how to conduct the strip search incident to arrest in compliance with the Charter. These guidelines are as follows:

1. Can the strip search be conducted at the police station and, if not, why not?

Failing to meet any of these requisites will lead to the conclusion that the search is unreasonable under section 8 of the Charter.

9.2.2.3 Search with consent

In order for a consent to constitute a valid basis for carrying out a search, the consent has to be an informed one, in the sense that the accused knows that he has the right to refuse the search, but he nonetheless consents to it. If the accused does not possess this knowledge, the alleged consent of the accused cannot be contended to be the ground for the search. This approach was based on the coercive nature of the police action, which might convey the impression to the accused that he is obliged to comply with the request of the police, while he actually has the right to do otherwise. As Le Dain C.J. of the Supreme Court put it in *Dedman*:[63]

> Because of the intimidating nature of police action and uncertainty as to the extent of police powers, compliance in such circumstances cannot be regarded as voluntary in any meaningful sense. The possible criminal liability for failure to comply constitutes effective compulsion or coercion.[64]

The Supreme Court in *Borden*[65] further stressed that the accused must know exactly what his options are.[66] It should be noted, however, that the police are not required to inform the accused that he has the right to refuse in the sense that a failure to inform

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2. Will the strip search be conducted in a manner that ensures the health and safety of all involved?
3. Will the strip search be authorised by a police officer acting in a supervisory capacity?
4. Has it been ensured that the police officer(s) carrying out the strip search are of the same gender as the individual being searched?
5. Will the number of police officers involved in the search be no more than is reasonably necessary in the circumstances?
6. What is the minimum of force necessary to conduct the strip search?
7. Will the strip search be carried out in a private area such that no one other than the individuals engaged in the search can observe the search?
8. Will the strip search be conducted as quickly as possible and in a way that ensures that the person is not completely undressed at any one time?
9. Will the strip search involve only a visual inspection of the arrestee's genital and anal areas without any physical contact?
10. If the visual inspection reveals the presence of a weapon or evidence in a body cavity (not including the mouth), will the detainee be given the option of removing the object himself or of having the object removed by a trained medical professional?
11. Will a proper record be kept of the reasons for and the manner in which the strip search was conducted?

For a discussion of the power to conduct an intimate or strip search under PACE, *see* Zander, M, *The Police and Criminal Evidence Act 1984*, 3rd edn (London: Sweet & Maxwell, 1995), pp. 115-119.

[63] [1985] 2 S.C.R. 2.

[64] *Ibid.* at p. 29. This approach was subsequently adopted by the unanimous Court in *R. v. Mellenthin*, [1992] 3 S.C.R. 615, 622-623.

[65] [1994] 3 S.C.R. 145.

[66] *Ibid.* 162.

will not amount to a violation of s.8. However, the failure to inform the accused of his right to refuse, in the totality of the circumstances, might lead the search to be declared unconstitutional.[67] The final word in this context is that the consent is not required to take any form in order to be valid, as long as the person consenting possesses the knowledge required for making an informed decision.

9.2.3 Remedy: The exclusionary rule

Section 24(2) of the Charter states that '[w]here ... a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.' The approach of the exclusionary rule under section 24(2) with regard to evidence obtained in violation of a Charter right, as described by Lamer J., as he then was, in *Collins*,[68] is 'an intermediate position' between the common law, under which every reliable and relevant evidence is admissible even if it is obtained by illegal means, and the exclusionary rule under the Fourth Amendment to the Constitution of the United States,[69] under which any evidence obtained in violation of the right against unreasonable search or seizure is inadmissible.[70] As such, it has been stated that section 24(2) does not create an automatic exclusionary rule whenever the evidence is determined to have been obtained in violation of a constitutional right, nor could it be used for disciplining the police.[71] Instead, it obliges the courts to exclude any evidence obtained in violation of a constitutional right, the admission of which is deemed to bring the administration of justice into disrepute in the eyes of a reasonable man, who is dispassionate and fully appraised of the circumstances of the case concerned.[72]

As has been pointed out elsewhere, the burden of establishing that a violation of a constitutional right or freedom has occurred always rests with the party seeking the

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[67] *See R. v. Lewis* (1998) 122 C.C.C. (3d) 481, 488.
[68] [1987] 1 S.C.R. 265, 280.
[69] *See Mapp v. Ohio*, 367 U.S. 643 (1961).
[70] For a discussion of the exclusionary rule under the Fifth Amendment to the Constitution of the United States, *see generally* Packer, H, *The Limits of the Criminal Sanctions* (Stanford: Stanford University Press, 1968), 198-201; Uglow, S, *Criminal Justice*, 2nd edn (London: Sweet & Maxwell, 2002), 76.
[71] *Collins, supra* note 68, 275.
[72] *Ibid.* 282.

protection of the allegedly impugned right.[73] In order for a remedy under section 24(2) to be granted, the accused also bears the burden of satisfying two further inquiries. Firstly, it must be shown, on the balance of probabilities, that the evidence was obtained in a manner that violated any of the rights recognised by the Charter. In order to satisfy this, it is sufficient, generally speaking, to establish that there is a temporal link between the violation and the subsequent discovery of the disputed evidence.[74] The outcome of the second inquiry is determined upon the basis of the effect of the admission of the tainted evidence upon the repute of the administration of justice. In *Collins*,[75] the Supreme Court established three sets of factors to be considered for the purposes of the second inquiry. These three categories include the effect of the admission of the tainted evidence on the fairness of the trial, the seriousness of the violation, and the effect of excluding the tainted evidence on the repute of the administration of justice.[76]

The first and the most important category concerns the fairness of the trial. The Supreme Court in *Stillman*,[77] elaborated upon the evidence that could affect the fairness of the trial. The analysis established in *Stillman* consists of two inquires. The first inquiry concerns the nature of the tainted evidence as to whether it is conscriptive evidence (*i.e.*, self-incriminating evidence), or non-conscriptive evidence. The evidence is deemed to be conscriptive if the accused is compelled to incriminate himself through the use of a statement, his body, or bodily samples obtained from him. If the evidence is concluded to be non-conscriptive, the test concerning the effect of the admission of the tainted evidence on the fairness of the trial will be answered in the negative and the court must proceed to consider the other factors. On the other hand, if the evidence is determined to be conscriptive, the court must proceed to the second stage of the analysis, which is to determine whether the evidence would have been discoverable had the Charter right not been violated. At this stage of the analysis, the Crown bears the burden of establishing, on the balance of probabilities that either there were constitutional non-conscriptive means to which the police could

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[73] *See supra* para.4.3.
[74] *R v. Strachan*, [1988] 2 S.C.R. 980, 1005-1006.
[75] *Supra* note 68, 293.
[76] *Ibid.* 285-286; summarised in *Strachan*, *supra* note 74, 1006.
[77] *Supra* note 50.

and may have resorted to discover the tainted evidence, or that the tainted evidence would inevitably have been discovered.[78]

If the evidence is determined to be conscriptive and non-discoverable in accordance with the *Stillman* test, the conclusion will inevitably be that the fairness of the trial is affected and, consequently, the admission of the tainted evidence would bring the administration of justice into disrepute, and, therefore, must be excluded. If, on the other hand, the admission of the tainted evidence for whatever reason is determined not to affect the fairness of the trial, the evidence must be considered under the other two sets of factors under the *Collins* test.

The second set of factors relates to the seriousness of the violation. These factors include whether the violation was committed in good faith or was deliberate and wilful, whether there were urgent circumstances justifying the violation, whether the violation was of a technical nature, and whether there were legal alternatives by which the tainted evidence could have been obtained. The final set of factors concerns the effect of the exclusion of the evidence on the repute of the administration of justice. This category revolves around the seriousness of the offence and the potential length of the sentence that the accused would receive if found guilty.

The courts, in dealing with evidence obtained in violation of a Charter right must balance the above-mentioned factors in deciding whether the admission of the impugned evidence would bring the administration of justice into disrepute or not.

C. Saudi Arabia

9.3 Right to privacy

The right to home and correspondence under the Saudi law is enshrined in Articles 37 and 40 respectively of the Basic Law of Government, which state that:

> Homes are inviolable, and shall not be entered or searched without the permission of the owner except in cases provided for by law.
> Telegraphic, postal, telephone, and other means of communications are protected. They shall not be seized, delayed, read or listened to except in cases provided for by law.

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[78] *Ibid.* 668-71. For a critical review of the discoverability test, *see* Stuart, D, 'Eight Plus Twenty-Four Two Equals Zero', *C.R.*, (5th) 13 (1998), 50.

The right to privacy is also expanded by Article 40 of the CCP, which states that 'the privacy of persons, their homes, offices, and vehicles shall be respected. The privacy of a person protects his body, clothes, property, and belongings. The privacy of a home covers any fenced area or any other place enclosed within barriers or intended to be used as a home.' As can be seen from the above quoted Articles, the right to privacy under Saudi law is a qualified one in the sense that it could be interfered with in cases provided for by law. Permitted interferences with the right to privacy are entry into private premises, search of either persons or premises, and seizing anything from them. It also includes the interception of private communications. These forms of interference with the right to privacy are discussed in the following sections.

9.3.1 Permissible interferences with home

The criminal investigation police officers are authorised to enter private premises for purposes other than those of search and seizure, and to enter private premises for the purposes of conducting search and seizure with or without warrant depending on the circumstances of the case as discussed next.

9.3.1.1 Entry, search and seizure without warrant

The police can enter private premises without warrant, but not to search or seize anything from them if the suspect, who is being hotly pursued by the police, enters into private premises,[79] or there is a request for help from within private premises, or in the case of a demolition, drowning, fire, or the like.[80] In the these circumstances, the CCP does not seem to authorise the criminal investigation police to do anything beyond the purpose of their entry (*i.e.*, arresting the suspect in the former, or, in the latter incident, responding to the circumstances on the basis of which the police officer entered the premises).[81] However, once the police officer legally enters the house, and comes across an offence being committed *(i.e., flagrante delicto*), the police officer, by virtue of his powers relating to *flagrante delicto* offences, as discussed below, can search the premises and seize anything relating to that crime from it.

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[79] CCP. Art. 41.
[80] *Ibid.*
[81] *See* Margalani, K, *Ijurat al-Thubed wa al-Tahqeeq al-Jenaei (The Criminal Investigation Procedures)*, 2nd edn (Riyadh: Alnarjes Press, 2004), pp. 183, 190.

One the other hand, the criminal investigation police, where the offence is *flagrante delicto*,[82] are authorised under Article 43 of the CCP to 'search the home of the accused and collect relevant items that may help uncover the truth [regarding the crime under investigation], if there are strong indications that such items exist there.' In addition, the criminal investigation police are authorised to enter and search private premises and seize anything from them where the owner or the occupier of the premises consent to it.[83]

9.3.1.2 Entry, search and seizure with warrant

The criminal investigation police are authorised to enter, search private premises, and seize items from them, if they possess a warrant issued by the Investigation and Public Prosecution Commission. In this respect, Article 41 of the CCP states that '[a] criminal investigation officer may not enter or search any inhabited homes except in cases provided for by law, pursuant to a search warrant specifying the reasons for the search, issued by the Investigation and Public Prosecution Commission. However, other premises may be searched pursuant to a search warrant, specifying the reasons, issued by the Investigator.' Article 41 does not specify the person within the IPPC who is authorised to issue a warrant for searching private homes. However, the proposed implementing regulation of the Code of Criminal Procedure (PIRCCP) determines the Chairman of the IPPC Branch in the relevant province to be the person who is authorised under the CCP to issue a warrant for searching private homes.[84] Therefore, homes can be searched if a warrant authorising the search is issued by the Chairman of the IPPC Branch in the relevant province, while other private premises (*e.g.*, business offices) can be searched by a warrant from the Investigator. Warrants for searching private homes, according to Article 80, can be issued if there is an indictment against the owner or the resident of the house to be searched regarding his commission or participation in the commission of a criminal offence, or there are strong indications that the owner or the resident of the house to be searched is in possession of items relevant to the crime under investigation.

If the search warrant has been issued according to Articles 41 and 80 of the CCP, the criminal investigation police can seize anything relevant to the crime under

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[82] For what constitutes a *flagrante delicto* offence, *see supra* para. 7.3.1.1.
[83] CCP, Art. 37.
[84] PIRCCP. Art. 41(1).

investigation,[85] and in particular, anything which is likely to have been used in the commission of that offence or obtained as a consequence of the commission of an offence, and anything that may be useful in determining the truth about the crime under investigation.[86] However, if the criminal investigation police incidentally come across anything the possession of which is illegal, or anything that might reveal the truth regarding another criminal offence, the criminal investigation police may seize these things.[87]

9.3.1.3 Search of homes: Safeguards

Only the accused's home can be subjected to search, unless it appears that there are strong indications that the search of another person's home is useful for the investigation, in which case a search warrant authorising the search of that person's house can be issued.[88] The search warrant authorising the search must include the reasons for the search.[89] The search must be conducted in the presence of either the owner of the house, his representative, or an adult member of his family residing with him. They are entitled to be shown the search warrant and a note to that effect must be made in the record. However, if none of these persons is available, the chief of the neighbourhood or two witnesses must be shown the search warrant and be present during the search.[90] The search, except in *flagrante delicto* offences, can be carried out only between the sunrise and the sunset.[91] If the accused is a woman, and none of her relatives is present during the search, the criminal investigation police conducting the search must be accompanied by a woman.[92] The criminal investigation police conducting the search of a house in which some women live, must be accompanied by a woman during the search, unless the crime under investigation is *flagrante delicto*. In addition, the women inside the premises to be searched should be given a chance to veil or to leave the premises, and to be provided with necessary assistance as long as it does not prejudice the search or its results. [93]

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[85] CCP. Art. 45.
[86] *Ibid*. Art. 80.
[87] *Ibid*. Art. 45.
[88] *Ibid*. Art. 54.
[89] *Ibid*. Art. 41.
[90] *Ibid*. Art. 46.
[91] *Ibid*. Art. 51.
[92] *Ibid*. Art. 52
[93] *Ibid*. Art. 53

The extent to which the above-mentioned provisions are respected in practice is unclear, as search of private homes in practice are rarely conducted.[94] The reason for this seems to be the inviolability that homes enjoy under the Saudi unwritten (*i.e.*, Islamic law) and written laws (*i.e.,* the Basic Law and the CCP). What is clear, however, is that search warrants, in practice, are issued by the provincial governor rather than the Chairman of the IPPC Branch in the relevant province as required under Article 41 of the CCP, as mentioned above.[95] Apart from the illegality of such a warrant, and, consequently, the search itself, such practice raises other issues as well, as can be seen from the following case.

The case involves the search of the home of a person who was suspected of committing a drug trafficking offence.[96] The police staged an entrapment operation, by managing to get the suspect to agree to sell a police informer an illegal substance (pills). Prior to the operation taking place, the informer was provided with numbered cash notes (*i.e.*, cash notes of which the police note down the distinguishing numbers printed on the face of them before they are given to the informer), and was searched before he met with the suspect. After meeting the suspect under the police surveillance, the informer went back to the police officers with pills that he, allegedly, purchased from the suspect. In these types of operation, the police usually arrest the suspect immediately after the sale and purchase takes place. However, in this case the police did not manage to arrest the suspect because they lost him in the traffic. Hence, the police requested the informer to contact the suspect and tell him that his car had broken down and that he needed his help. Upon meeting the informer, the suspect was arrested and searched by officers from the Anti-Drugs Police Department, but the numbered cash notes used, allegedly, for purchasing the pills from him were not found in his possession. According to the testimony of the police officers involved in the arrest, the suspect, after being confronted by the police regarding the selling of pills to the police informer, consented to his home being searched. In searching his home, the police found the numbered cash notes, and illegal substances including pills

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[94] Interview with Investigator Hassen Al-Asaker, Investigation and Public Prosecution Commission Branch, Crimes Against Honour Division, Riyadh (May. 23-25, 2004).

[95] Written response from Investigator Sulman Al-Jurba, Investigation and Public Prosecution Commission Branch, Crimes Against Honour Division, Riyadh (July. 14, 2004); interview with Investigator Anonymous, D.N. [Pseudonym.], Investigation and Public Prosecution Commission Branch, Riyadh (Aug. 22, 2004). *See also* Waleed's Case, *supra* ch. 7 note 185 and accompanying text.

[96] The case file was obtained from Investigator Anonymous, J.A. [Pseudonym.], Investigation and Public Prosecution Commission Branch, Riyadh (Aug. 11, 2004).

and hash. Although the police, as they claim, had had the consent of the accused before they searched his home, they obtained a search warrant for searching the accused's home. The relevant text of the search warrant reads as follows:

> According to your request No. .... regarding the person named ... who is accused of selling illegal substances, illegal substances have been purchased from him, he was arrested and he lives in the district of ... with his family. Regarding your request to search the home of the above-mentioned accused, we do not object to that as long as the accused was caught red-handed.

The conduct of the search in this case raises a number of issues. Firstly, if the police had the consent of the accused to search his home, as they allege, why did they request a search warrant authorising the search? According to the investigator in charge of this case, the accused claimed that he did not consent to the search but the police had beaten him up and searched his house against his will. His claim is supported by the suggestion of the investigator in charge of the case under consideration that the arresting squad obtained the search warrant after the search of the accused's home had actually taken place, in order to avoid any liability if the accused were to deny that he had consented to the search.[97] The fact that the search warrant did not contain the time at which the warrant was issued supports the investigator's suggestion, and the accused's claim. Secondly, the search warrant was issued on the basis that the accused was caught red-handed. However, as mentioned above, the police, according to their own testimony, which was included in the case file, lost the suspect in the traffic, and when he returned to meet the informer, after being searched by the police, the numbered cash notes were not found upon him. Hence, the police, at best, had only reasonable grounds to suspect that the accused had committed an offence. Finally, and more importantly, the search warrant was issued by the provincial governor in violation of the CCP.

9.3.2 Search of persons

Search of persons can be carried out without warrant if the criminal investigation police officer, while conducting the search of the suspect's house, finds indications indicating that the suspect or any person present in the premises, possesses anything

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[97] Interview with Investigator Anonymous, J.A. [Pseudonym.], Investigation and Public Prosecution Commission Branch, Riyadh (Aug. 11, 2004). According to Investigator Anonymous D.N., *supra* note 95, obtaining a search warrant after the actual search had taken place is a common occurrence in drug cases.

that might be useful for uncovering the truth.[98] In addition, once the accused has been lawfully arrested, the criminal investigation police are empowered to search that person.[99] Furthermore, the investigator is empowered to search the suspect or any other person if there are strong indications that they are concealing something that might reveal the truth.[100] The scope of the power to search a person extends to his body, clothes, and belongings.[101] If the person to be searched is a woman, she must be searched only by a woman.[102]

9.3.3 Interception of private communications

Article 55 of the CCP states that '[m]ail, cables, telephone conversations and other means of communication shall be inviolable. They shall not be intercepted or be subjected to surveillance except pursuant to an order stating the reasons thereof and for a limited period as herein provided for.' The CCP empowers the Head of the IPPC to authorise the interception of private communications including mail, publications, parcels and telephone conversations.[103] According to Article 56 of the CCP, the warrant is subject to three conditions.[104] Firstly, the warrant must include the reasons for issuing it. Secondly, the warrant is only valid for a period of ten days, and it can be renewed for further periods if the Head of the IPPC determines that the renewal of the warrant is necessary for the purposes of the investigation. Finally, the warrant could be issued only with regard to an offence that has been committed. Therefore, a warrant for intercepting private communications cannot be issued in order to prevent the commission of a criminal offence.

The present researcher has not encountered during his fieldwork period a case in which interception of private communications was employed by the IPPC in the investigation of a criminal offence, or that the contents of private communications have been used, during the trial, as evidence against the accused.

9.3.4 Remedy: Exclusion of illegally obtained evidence

As discussed earlier, it is within the jurisdiction of the trial court to review the legality of the procedural acts taken during the pre-trial stage of the criminal process, and to

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[98] CCP. Art. 44.
[99] *Ibid.* Art. 42.
[100] *Ibid.* Art. 81.
[101] *Ibid.* Art. 42.
[102] *Ibid.* Art. 42.
[103] *Ibid.* Art. 52
[104] *Ibid.*

annul any act that is contrary to the Saudi written or unwritten law. If acts subsequent to the annulled act are taken based on that act, such acts are invalid too.[105] This would suggest that evidence that has been obtained in violation of the Saudi written or unwritten law can be excluded on the basis that it has been obtained through an invalid act. In addition, under the *Shari'ah* general principles, it is within the jurisdiction of the trial court to exclude illegally obtained evidence if the admission of it is contrary to the public interest (*i.e.*, the admission of such evidence would bring less benefit to the administration of justice than the harm it would cause to it).[106]

However, in practice, as pointed out earlier, the Saudi criminal courts do not engage in reviewing the legality of procedures taken during the pre-trial stage of the criminal process, with the exception of procedures relating to confession evidence obtained by torture, for the reasons that have already been discussed.[107]

9.4 Comparison

Both the Saudi and Canadian systems recognise the right to privacy, and the State's right to impose restrictions on it for advancing public interest goals. However, there are three main differences between the two respective systems in this respect. Firstly, the right to privacy under the Canadian system is more expansive as it protects against arbitrary and illegal interferences with privacy. In contrast, the Saudi written law only prohibits illegal interferences with the right to privacy, but does not prohibit arbitrary interferences with privacy. The second difference is that under the Canadian system there is an emphasis on the requirement of obtaining a prior authorisation from an independent and impartial judicial officer, where feasible, before intruding on the right to privacy, in order for the intrusion to be considered constitutional. On the other hand, while under the Saudi system the authorisation of an interference with the right to privacy is entrusted to the IPPC, there is no requirement that the authorising officer is independent or impartial and, in practice, it is the provincial governor who authorises permissible interferences with the right to privacy under Saudi law. The third difference concerns the remedy for violating the right to privacy. The Canadian Charter requires the exclusion of any illegally obtained evidence, the admission of

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[105] *See supra* para. 4.5.
[106] Interview with *Qadi* Tameem Al-Aunizan, Summary Court, Riyadh (July. 11-12, 2004). *See also supra* paras. 1.2.2 & 3.7.1.
[107] *See supra* para. 4.5.

which would bring the administration of justice into disrepute. In contrast, under the Saudi system, although in theory evidence obtained illegally can be excluded, if admitting such evidence is contrary to the public interest, in practice, every relevant and credible evidence is admissible, regardless of the legality of the means by which it has been obtained.

Conclusion of Part Two:

Evaluation

As the aim of this thesis is to examine the extent to which Saudi pre-trial criminal procedural law and practice comply with international human rights standards, this Part has sought to provide a comprehensive picture of how human rights examined in this thesis fare under the Saudi criminal justice system. The establishment of the IPPC and the introduction of the CCP signify the recognition by the Saudi Government of the problems from which the Saudi criminal justice system has been suffering. The establishment of the IPPC was intended to create a more accountable criminal justice system by subjecting the police to the supervision of the, supposedly, independent IPPC. The CCP, for its part, was introduced to enhance the protection of the accused by providing him with safeguards that had not existed prior to the introduction of the CCP, most notably the right to legal assistance.

However, although the recent reforms have solved some problems, they have created new ones. Before discussing these problems, it is important to point out the source of these reforms. While the CCP provisions have been largely borrowed from the Egyptian Code of Criminal Procedure,[1] the IPPC, in terms of its combination of the investigating and prosecuting functions, has been roughly modelled on the Egyptian Department of Public Prosecution.[2] The basis for choosing Egypt as a model for the Saudi reforms is unclear, given that Egypt suffers from its own human rights problems.[3]

In the following paragraphs, the Saudi criminal justice system with regard to each right examined in this thesis will be evaluated.

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[1] Law. No. 150 of 1950 as amended by Law. No. 174 of 1998. For a discussion of the Egyptian Code of Criminal Procedure, *see* Abu Sad, M, *Al-Musuah al-Jinaieh al-Haditha: al-Taleeq a'l Qanun al-Ijrat al-Jinaieh (The Modern Criminal Treatise: Commentary on Criminal Procedure)*, 2nd edn (Al-Mansurah: Dar al-Fikr wa al-Qanun, 2002).

[2] For a discussion of the investigating and prosecuting functions of the Egyptian Department of Public Prosecution, *see* Hassen, A, *Mabid'a al-Fasel bain Sultati al-Itham wa al-Tahqeeq (The Principle of Separation between Prosecuting and Investigating Powers)* (Alexandria: Dar al-Fikr al-Jamie, 2004), pp.573-608.

[3] For an overview of human rights conditions in Egypt, *see* Conclusions and Recommendations of the Committee against Torture, Egypt, U.N. Doc. CAT/C/CR/29/4 (2002); Concluding Observations of the Human Rights Committee, Egypt, U.N. Doc. CCPR/CO/76/EGY (2002); Amnesty International, *Egypt: No Protection - Systematic Torture Continues* (Nov. 2002), *available at* <http://www.amnesty.org> (last visited Jan. 2, 2006).

Right to an effective protection

As argued in Chapter three, the accused's rights guaranteed under international human rights law are equally recognised under the Islamic *Shari'ah*. According to the Basic Law of Government, as discussed in Chapters one and two, the *Shari'ah* is the law of the land, and human rights are protected in accordance with the *Shari'ah*. Therefore, the accused's rights under international human rights law, by virtue of being recognised by the *Shari'ah*, are constitutional rights under Saudi law. However, the problem with the provisions of the *Shari'ah*, in the Saudi context, as discussed in Chapter one, is that they are largely left uncodified and, hence, subject to differing interpretations, as can be illustrated by the position of Muslim scholars on the permissibility of using coercion in order to make the accused confess. This factor has the potential of undermining the protection that the *Shari'ah* affords the accused in the pre-trial stage of the criminal process.

This problem is exacerbated by the absence of a constitutional review in Saudi Arabia, by which the State's (*siyasa*) laws and actions can be reviewed in order to determine their compatibility with the *Shari'ah* law. In the absence of a constitutional review, an individual's constitutional right(s) can be interfered with, without him having the opportunity to challenge the unconstitutionality of such interference. The CCP provisions with regard to the right to liberty in cases that involve the commission of a major offence are a case in point. The CCP, as interpreted in practice, makes the detention of up to six months of a person who is suspected of committing a major offence, mandatory, even if his release on bail is not contrary to the public interest. This provision is unconstitutional because it permits interference with the right to liberty without the existence of necessity, upon which interference with an individual's rights under the *Shari'ah* (*i.e.*, the Constitution) can be justified. If the Saudi system provided a constitutional review, any person detained under the provision in question could apply for a constitutional review to have this provision, to the extent that it allows the accused's detention where there are no grounds to support that his detention is in the public interest, declared without force or effect, and, consequently, to have his request for bail granted. However, as things stand, accused persons against whom there is sufficient evidence that they have committed a major offence are subject to mandatory detention under an unconstitutional provision without having any remedy to enforce their right to liberty.

With regard to the legality review, although in practice it is not conducted because, according to Saudi *qadis*, the CCP provisions on annulment are ambiguous, there is no logical reason that prevents the courts from, at least, reviewing the legality of a given procedural act, and declaring such an act to be illegal, if this is the case, without addressing the consequences for such a declaration. The fact that *qadis* do not even review the detention of the accused when he appears for the first time before them for trial, contrary to the requirements of the CCP, demonstrates that the problem is not so much that the provisions of the CCP regarding annulment are unclear than that *qadis* consider the procedural rules to be mere "technicalities". Therefore, where these "technicalities" have been disregarded, the *qadis* should focus on the substantive issue involved in the case, which is, in their view, the guilt or the innocence of the defendant, rather than "wasting" the trial time on "side" issues. As shown in Chapters six and eight respectively, there are illegal practices such as arrest without warrant in cases where the law requires obtaining a warrant from the IPPC before carrying out the arrest, or conducting a search of private homes on the basis of a search warrant obtained from the provincial governor, in violation of the law that requires warrants for searching private homes to be obtained from the IPPC. The fact that the courts do not review the legality of these practices allows these practices to continue, thereby undermining the rule of law, the respect for which is indispensable if the accused's rights are to have any practical meaning.

The reply to the logic behind the Saudi courts' approach towards illegal practices committed by the State in its pursuit of (private) criminals can be found in the inspiring and eloquent words of Justice Brandeis of the Supreme Court of the United States, when he expressed his dissenting opinion in the case of *Olmstead v. United States*:[4]

> Decency, security and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means – to declare that the Government may commit crimes in order to secure the conviction

[4] 277 U.S. 438 (1982).

> of a private criminal – would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face.[5]

Thus, the absence of a constitutional and legal review under the Saudi legal system leaves the rights of the accused open to arbitrary and illegal attacks by the state authorities and wholly undermines the protection that Saudi law affords the accused during the pre-trial stage of the criminal process, as will be further demonstrated below.

Right against self-incrimination

Saudi (written) law does not recognise the right against self-incrimination; neither does it recognise the fundamental principle of the presumption of innocence. Hence, investigators are justified in their belief as in their practice, that it is the duty of the accused to prove his innocence, not the opposite. The omission of the right against self-incrimination and the presumption of innocence, therefore, has the potential to encourage investigators to put pressure on the accused "to speak the truth", with the likely consequence of violating the right against ill-treatment. In addition, although subjecting the accused to any form of ill-treatment, irrespective of its purpose, is prohibited under the CCP, in light of the remedies available under Saudi law to deal with alleged violations of the right against ill-treatment, one is justified in concluding that coercing the accused to confess is condoned, if not indirectly encouraged, in practice.

With regard to the admissibility of the confessions obtained through violation of the right against ill-treatment, there is a lack of explicit prohibition of the use of such evidence in any criminal proceedings against the accused. The most damaging aspect of the Saudi legal system with regard to confessions obtained in violation of the right against ill-treatment is the 'confession confirmation mechanism'. The confirmation mechanism, as mentioned earlier, does not aim to verify the voluntariness of the confession, but is mainly designed to undermine the accused's right to challenge the voluntariness of his confession at the trial stage. The confirmation mechanism could be argued, therefore, to have the effect of encouraging the investigating authority to violate the accused's right against ill-treatment in pursuit of a confession. This proposition is supported by the fact that the confirmation mechanism, as illustrated by

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[5] *Ibid.* p. 485 (Brandeis, J., dissenting).

the cases discussed earlier, has been used by investigators in practice to judicially confirm confessions as voluntary, which, in the light of the facts of the case, would be considered by any reasonable person to be otherwise. Worse still, as Cases No. 2 and 3, discussed earlier, vividly show, *qadis* might ignore obvious signs that the accused has been mistreated in order to make him confess, where the confession has been judicially confirmed, if they believe such a confession to be reliable. Even where the confession has been established to have been obtained under torture, and consequently such a confession is excluded, as in Case No 1, discussed earlier, the courts do not specify why such evidence is excluded, neither do they condemn the ill-treatment to which the accused has been subjected.

With regard to disciplinary or criminal actions available under Saudi law as a means to remedy alleged violations of the right against-ill-treatment, these remedies fail to meet the requirement of effectiveness under Article 2(3) of the ICCPR because complaints against the police and the IPPC are neither investigated nor prosecuted by an independent and impartial authority. Neither a police officer nor a member of the IPPC can be subjected to a disciplinary or criminal investigation without the permission of the executive authority represented by the Minister of the Interior and the provincial governor, to whom the police and the IPPC are answerable at the provincial and the national level. Similarly, no disciplinary or criminal proceedings can be instituted against either a police officer or a member of the IPPC without the permission of either the Minister of the Interior or the provincial governor. The ineffectiveness of these mechanisms is evident from the fact that none of the IPPC investigators who allegedly mistreated the accused in the cases discussed above has been subjected to investigation, much less subjected to disciplinary or criminal prosecution.

Finally, although torture is considered to be a criminal offence under Saudi law, the fact that the Board of Grievances, which is responsible for trying crimes of torture, sentences those officials who are convicted of torture to a fine, reduces further the effectiveness of this mechanism as a means for remedying the violation of the accused's right not to be ill-treated, or as a means of deterring public officials from abusing the right of the accused not to be ill-treated.

Right to humane treatment

Overcrowding, lack of proper sleeping arrangements, and unsanitary conditions are common features of Saudi detention centres. Even where the detention conditions seemed to be good compared to the conditions of other detention centres, as is the case of the Detention Centre of the Maliz Police Station, one detainee contracted a skin disease during his time in detention. Needless to say, these detention conditions violate the right to humane treatment under Article 10(1) of the ICCPR. The underlying problem seems to be the lack of recognition on the part of the Saudi government of the adverse effects of poor detention conditions on the physical and psychological well being of the detainees, and its unwillingness to commit sufficient financial resources to improve the conditions of these detention centres.

Right to liberty

The CCP provisions have strengthened the right to liberty under Saudi law in a number of respects. The CCP entitles the accused to be informed promptly of the reasons for his arrest or detention, and to be brought before the IPPC within 24 hours from the time of his arrest in order to have his detention reviewed. However, Saudi law suffers from serious shortcomings with regard to the right to liberty as well. The Basic Law of Government as well as the CCP only prohibits illegal interferences with the right to liberty. Thus, a given law cannot be challenged on the basis that it permits an arbitrary interference with the right to liberty. Indeed, as mentioned earlier, the CCP, as interpreted in practice, allows the accused to be detained for up to six months if there is sufficient evidence against him that he has committed a major offence, even if the detention of the accused is not necessary for the public interest. This power is clearly in violation of the prohibition of arbitrary interference with the right to liberty under Article 9(1) of the ICCPR.

The most deficient aspect of the Saudi system with regard to the right to liberty is that it does not subject the legality of deprivations of liberty and the need to detain the accused pending investigation or trial to the oversight of an impartial and independent authority. The Saudi system seems to consider the IPPC an adequate safeguard against illegal interference with the right to liberty. However, the IPPC fails to meet the requirements of a 'judicial officer' within the meaning of Article 9(3) and the requirements of a 'court' within the meaning of Article 9(4) of the ICCPR in every respect. In terms of impartiality, the CCP confers on the IPPC judicial powers

including issuing arrest and search warrants, and reviewing the detention of the accused. However, at the same time, the CCP entrusts the IPPC, *inter alia*, with the investigation of criminal offences, including the conduct of interrogations, and evidence gathering among others. The exercise of these investigative functions by the IPPC undermines its ability to exercise its judicial functions impartially. The fact that some of the IPPC investigators are so eager to build a case against suspects to the extent that they are prepared to mistreat suspects in order to obtain incriminating evidence from them, and the fact that the IPPC investigators are not required under the CCP to gather exculpatory evidence, nor do they in practice, and include such evidence, if it exists, in the indictment, underline the IPPC's lack of impartiality.

The supposed judicial character of the IPPC is also undermined by two additional factors. First, the IPPC is subject to the supervision of the Minister of the Interior (*i.e.*, an executive body), who is also the head of the security forces. The second factor is the inability of the IPPC to either challenge the illegal exercise of its statutory powers by the executive branch, namely provincial governors, such as the issuing of search warrants by the provincial governor in violation of the CCP, which requires search warrants to be issued by the IPPC, or challenge illegal police practices such as the carrying out of arrests without warrant in cases where the CCP requires the obtaining of a warrant before an arrest can be legally made. The lack of independence of the IPPC is also evident from the fact that the IPPC in some cases that involve the commission of a major offence does not release the accused before consulting the provincial governor, although the CCP clearly states that it is within the jurisdiction of the IPPC to release the accused in this case. The lack of impartiality and independence of the IPPC, therefore, makes the IPPC neither fit to exercise the judicial functions that are currently assigned to it, nor to offer an effective protection against violations of the accused's rights, including the right to liberty.

Another serious shortcoming in Saudi law is that, as mentioned above, it does not recognise the fundamental principle of the presumption of innocence. In fact, the CCP provisions and the way they are implemented in practice underline the fact that the accused in Saudi Arabia is presumed guilty until he establishes his innocence. The presumption of innocence operates in the pre-trial stage of the criminal process as a procedural rule that regulates the treatment of the accused by the state authorities. The omission of the presumption of innocence could be argued, therefore, to be the source from which all other shortcomings of Saudi law and practice with regard to the right

to liberty flow. Apart from the mandatory detention of persons who are accused of committing a major offence, as discussed above, which implies a presumption of guilt, the presumption of guilt in practice is evident in the police practice of arresting any person against whom a complaint has been made by a member of the public alleging that that person has committed an offence. In this case, as explained earlier, the police will arrest the "suspect" without inquiring into the reliability of the complaint, or whether there is sufficient evidence upon which a reasonable person would believe that the person under complaint has committed a criminal offence. Apart from the illegality of such a practice, it demonstrates not just that the presumption of innocence does not exist under the Saudi system, but that a presumption of guilt operates in its place.

Finally, Saudi law does not recognise the right to be tried within a reasonable time, and it is difficult to judge whether, despite the omission of such a right, it is respected in practice or not. It is worth pointing out, however, that the CCP allows the accused to be detained for to up six months prior to being charged, which could interfere with the right of the accused to be tried within a reasonable time if the facts of the case do not make the length of the pre-charge delay justifiable.

Right to legal assistance

The CCP is, without precedent, the first codified law in Saudi legal history to recognise the right of the accused to legal assistance. However, Saudi law in respect of this right have serious shortcomings. In violation of Article 14(3)(d) of the ICCPR, Saudi law does not require the accused to be informed of his right to legal assistance. In addition, Saudi law does not provide provision for free legal assistance to those arrested or detained persons who lack the means to afford a private lawyer, irrespective of the seriousness of the offence and the complexity of the case, in violation of Article 14(3)(d) of the ICCPR, which requires any person charged within the meaning of Article 14 (*i.e.*, arrested or detained) to be provided with free legal assistance if the 'interests of justice so require'. Furthermore, Saudi law does not guarantee an effective exercise of the right to legal assistance as it does not address how the accused, who is in the hands of the state authorities, can exercise his right effectively. Finally, as discussed above, the Saudi courts do not conduct a legality review. Thus, where the accused's right to legal assistance has been violated, the accused will not be afforded any remedy.

Right to privacy

Saudi law recognises both the right to privacy and the State's right to impose restrictions on it in pursuit of effective law enforcement. In practice, search of private homes is rarely conducted due to the inviolability that homes enjoy under Saudi written and unwritten law. However, Saudi (written) law and practice contravene its own legal standards and, by definition, international human rights standards at various levels. To start with, Saudi written law only protects against unlawful interference with the right to privacy. In fact, the CCP contains provisions that permit arbitrary interference with the right to privacy. Article 80 of the CCP permits the search of private homes with warrant if there is an indictment against the owner or the resident of the house, even if there are no good reasons to make the search of the accused's home necessary for the public interest in order, for instance, to uncover evidence relating to the crime under investigation. Needless to say, indicting the accused does not by itself make the search of his house necessary for the public interest. The effect of this provision, therefore, is to allow interference with the right to privacy, which is not necessary for the public interest and, hence, arbitrary. This provision violates both the *Shari'ah* rules, which only allow the interference with an individual's right where it is necessary, and international human rights standards, which adopt the same requirement.

In addition, the CCP does not provide any safeguards with regard to the search of persons, in particular, where the search involves the stripping of the accused or the inspection of his private parts. While the CCP regulates the circumstances in which the accused can be searched, the manner in which the search is to be conducted is left completely to the discretion of the searching officer, with the exception of the search of women, in which case the searching officer has to be a woman. The absence of adequate safeguards, therefore, leaves the right to privacy under Article 17 of the ICCPR, and more worryingly, the right against torture, and against inhuman, cruel or degrading treatment under Article 7 of the ICCPR open to abuse by the state authorities.

In terms of practice, the CCP requirements with regard to the search of homes do not seem to be respected. As is clear from the case discussed earlier, the police routinely search homes without warrant in cases where the CCP requires the police to obtain a warrant from the IPPC before conducting the search. Secondly, search

warrants in practice, where they are obtained, are issued by the provincial governor in violation of the CCP, which entrusts the power to issue search warrants to the IPPC.

Finally, where the search is allegedly illegal, the Saudi courts, as discussed above, will not address the question of the legality of the search and, therefore, will not consider whether the evidence obtained in violation of the accused's right to privacy should be excluded. While there is no requirement under international human rights law that evidence obtained in violation of the accused's right should be automatically excluded, not reviewing the legality of the search by which the evidence against the accused has been obtained, nevertheless, constitutes, on its own, a violation of the right to remedy under Article 2(3) of the ICCPR.

Conclusion

The adoption of the UDHR by the United Nations in 1948 signified the change of the status of individuals under international law from subjects of the State, which could treat them as it saw fit, to autonomous human beings with inalienable rights. Since 1948, a large number of international and regional human rights treaties have been adopted with the sole aim of ensuring the protection of these inalienable rights. Until very recently, Saudi Arabia considered itself not to be subject to the rules of international human rights law. Two lines of argument had been advanced by Saudi governments over the years to legitimatise their opposition to the application of international human rights law to Saudi Arabia. First, the international human rights law is based upon Western values, which makes it inapplicable to non-Western states, including Saudi Arabia. Second, Saudi Arabia is governed by God's Divine law (*i.e.*, the *Shari'ah*), which provides a complete and comprehensive protection to 'human rights'. Therefore, international human rights law would not provide any further protection to 'human rights' in Saudi Arabia than God's (perfect) law already does.

However, while these arguments point out several facts about the international human rights law *vis-à-vis* the *Shari'ah* law, namely that international human rights law has been based on the natural rights theory, which has been developed in the West, and differs from the Islamic definition of human rights, which considers them entitlements from God, and that some aspects of international human rights law are in conflict with the *Shari'ah* norms, they contain some elements of falsehood as well, which are clear from the *Shari'ah* position on the rights examined in this thesis. Firstly, it assumes that the observance of any given human rights standard requires, by definition, the departure from the *Shari'ah* norms. This assumption, as far as the accused's pre-trial rights are concerned, has been shown in this thesis to be completely false. In fact, as far as the rights examined in this thesis are concerned, there is a complete harmony between the *Shari'ah* and international human rights law in terms of the values they seek to protect to the extent that it can be persuasively argued that recognition of the former requires recognition of the latter. Secondly, it assumes that because Saudi Arabia subjects itself to the *Shari'ah* law, it will not benefit in any way from the rules of international human rights law. This assumption has also been shown to be false in that the *Shari'ah* law, with regard to the issues examined in this thesis, only mentions the principles and the values that underline the Islamic criminal

justice system, and leaves the State to decide how these principles and values are to be protected in a given time and place in the light of the circumstances of that time and place. Given that both the *Shari'ah* law and international human rights law in terms of the pre-trial process aim to ensure that those persons who are suspected or accused of committing a criminal offence are treated in a dignified and fair manner, without prejudicing the public interest in effective law enforcement, the adoption of international human rights norms, which are designed to achieve this aim, will reinforce the underlying principles and values of the *Shari'ah* in Saudi Arabia.

The recognition by the Saudi Government of the deficiency of their stance on international human rights norms has led to the change of their stance from total opposition to those norms, regardless of their compatibility with the *Shari'ah*, to the acceptance of those norms that do not conflict with the *Shari'ah*. While this qualified acceptance, viewed from an international human rights viewpoint, is not acceptable, as cultural distinctiveness does not constitute a valid ground under international human rights law for the departure from its norms, it is nonetheless far more sincere and pragmatic than the previous position. It is pragmatic in the sense that it minimises the external criticism of the human rights situation in Saudi Arabia, and sincere in that it reflects the principles of the *Shari'ah*, which weigh the legitimacy of things in terms of their compatibility with its ideals, rather than their place of origin. This thesis adopts an approach that endorses this position and argues in favour of the adoption of this approach by human rights scholars and activists interested in furthering the cause of human rights in Muslim states in general, and in Saudi Arabia in particular.

By focusing on the commonly shared values, human rights will gain in legitimacy, the lack of which represents the biggest obstacle to the advancement of human rights in Muslim countries. This approach will add a much needed cultural legitimacy to the struggle for human rights in Muslim societies, which is currently mainly fought 'on their behalf' by Western non-governmental organisations and human rights scholars. It will equally deprive unelected and unpopular governments that are engaged in widespread human rights violations against their people, from the disguise of cultural distinctiveness. Thus, criticisms of these violations, or even the imposition of economic or military sanctions against the perpetrators of human rights violations, where appropriate, would be justified from both viewpoints: the local culture and international human rights law.

In adopting this approach, this thesis has also sought to demonstrate that it is possible to evaluate the laws and practices of Muslim states, at least with regard to some issues, on the basis of international human rights law without violating the principle of cultural relativity. This, it is hoped, will give more cultural credibility to its evaluation of Saudi law and practice in the eyes of the Saudi populace who, in the final analysis, are meant to enjoy the protection of international human rights law. Consequently, the recommendations of this thesis will have a more realistic prospect of being implemented in practice. The only challenge this approach faces, which is constantly raised by universalists, is that it will subject the application of international human rights law to the mercy of local cultures, which are often at variance with international human rights norms. However, this approach does not claim, nor does it aim, to solve areas of conflict between the *Shari'ah* and international human rights law. Rather, it seeks to justify the implementation of international human rights norms that have the support of the *Shari'ah*, but have been systematically denied to citizens of Muslim states in the name of cultural distinctiveness. In doing so, it will also create a culture that is more receptive to human rights ideas, thereby creating a climate of dialogue in which human rights issues can be openly and respectfully debated, with the result of reaching an acceptable resolution to this conflict.

Given that the *Shari'ah* can be cited for justifying the implementation of international human rights standards in the pre-trail process in Saudi Arabia, rather than the basis for departing from them, the critical question that arises in this context is, why does not the reality of the human rights situation in Saudi Arabia reflects the ideals of the *Shari'ah*? The short answer to this question is that a system is only as good as the people who run it. This is precisely where one of the underlying problems for the apparent lack of respect for human rights in Saudi Arabia lies, even those the *Shari'ah* recognises. Since the unification of Saudi Arabia in 1932, the *Shari'ah* has always enjoyed a constitutional supremacy over the state legislative authorities. Under the *Shari'ah* law, qualified jurists or *qadis* (*i.e.*, *mujtihdeen*) have a wide law-making power by virtue of the concept of the *ijtihad*, which empowers them to comprehend and develop God's law. Therefore, the responsibility for guarding the Constitution (*i.e.*, the *Shari'ah*), devising and developing legal rules to deal with pressing social problems and needs in Saudi Arabia lies principally with the judiciary. However, the lack of legal creativity on the part of the Saudi *qadis,* their inability or unwillingness to exercise their law-making power under the concept of *ijtihad*, and their content

with the status quo and resistance to adopting a system of binding precedents by which the development and the application of law can be systematised and unified, has left the Saudi legal system paralysed in responding adequately to the challenges it faces, including the need to provide effective protection to human rights.

The response of the government to this problem has been to make wider use of its *siyasa* powers in order to fill the gaps in the law that are not addressed by the *ulama*, the interpreter of the Constitution, and to give practical meaning to the principles it embodies. However due to the ideological stance of the *ulama* on the scope of the ruler's power to legislate under the *Shari'ah*, and their ignorance of the underlying values and objectives of the Saudi *siyasa* laws, the Saudi *ulama*, by virtue of their control over the judiciary, have undercut the practical value of these laws by refusing to lend support or legitimacy to these laws, which weakened the prospect of their enforceability in practice. In effect, this has undermined the respect for the rule of law in the eyes of both state officials, who are responsible for implementing these laws, and citizens, who are subject to these laws.

The laws relating to the issues examined in this thesis have not escaped this problem. While the CCP suffers from serious shortcomings in terms of its compatibility with both the Islamic *Shari'ah* and international human rights standards, it is undoubtedly, in the context of the Saudi Arabia, progressive and a step in the right direction. However, the CCP's practical value, in terms of the protection it provides to the accused, has been significantly undercut by the fact that many of its provisions are routinely disregarded in practice. Under the CCP, there are two authorities that are entrusted with ensuring the implementation of the CCP provisions in the pre-trial process: the courts and the IPPC. With regard to the former, *qadis*, as with all *siyasa* laws, have taken no steps whatsoever to ensure that the CCP requirements are complied with in practice. In fact, *qadis* themselves have disregarded the provisions of the CCP, which can be illustrated by the fact that they do not review the detention of the accused when he appears before them for the first time, as required under the CCP.

The underlying cause of this problem is the lack of proper education and training of *qadis*. *Qadis*, in particular, seem unable to know how to apply the provisions of the CCP in practice, much less understand the principles underlying these provisions. This is clear from the court's lack of exercise of its supervisory role over the pre-trial process conferred upon it by the CCP in the form of the legality review. In this

respect, the attitude of the courts is not even justified by the *ulama's* empty argument of the non-permissibility to issue *siyasa* laws in areas that fall within the realm of *fiqh*, which is to be adjudicated according to *qadis' ijtihad*. The CCP provisions are only a codification of the *qadi's* power under the *Shari'ah* law. Currently, *qadis* view their role in the criminal process to be confined to the determination of the guilt or innocence of the accused, but it does not extend to deciding whether the state authorities have in the process complied with the requirements of the law. This position is driven by the unawareness on the part of the courts of the impact of what takes place in the court room with respect to the rule law. In ignoring the provisions on the legality of procedural acts, the courts reduced the law to empty rhetoric, the disregard of which does not result in any sanction. Hence, those law enforcement officials responsible for violating the accused's rights would be excused in thinking that procedural rules are mere "technicalities", the violation of which is always justified by the "end".

It is evident from the discussion of the Canadian system that the respect for the rights that the accused enjoys under the Charter is not due to the constitutional status of the Charter *per se*, but the readiness of the Canadian courts and, in particular, the Supreme Court, firstly, to interpret the Charter in a manner that makes the exercise of the guaranteed rights practical and effective, and, secondly, to enforce the rights protected under the Charter through various strategies available to them. Stay of proceedings and the exclusion of illegally obtained evidence are just a few examples of these strategies. One particular strategy, which is known in Canada as 'enhanced credit', is worth recalling here. Without even relying on the Charter rights, the courts responded to poor detention conditions by giving an enhanced credit to time spent in pre-sentencing custody when determining the period of the sentence remaining to be served by the offender. This approach can indeed be described as a judicial innovation. In adopting such an approach, and in the process exposing poor detention conditions, the courts ensured that the adverse effects of poor detention conditions on the human dignity of the accused have been adequately addressed, and that these unacceptable conditions are brought to the attention of the public, thereby placing pressure on the government to resolve the problem of poor detention conditions.

That is to say, whatever changes are made to Saudi law, they will not materialise in practice unless the judiciary are prepared to enforce them. Only the proper education and training of *qadis* can yield this result. Currently *qadis* are chiefly

educated in *fiqh*, with little or no education at all in modern law. Modern law is viewed by conservative *ulama* as a man-made law, the study of which constitutes an insult to the perfection and the divinity of the *Shari'ah* law. The curriculum of *Shari'ah* law schools, from which *qadis* are recruited, does not include any courses on modern law, not even Saudi Arabia's *siyasa* laws. By way of a compromise, the conservative *ulama* agreed to the teaching of *siyasa* laws during the postgraduate study, which *Shari'ah* schools graduates, who are appointed as *qadis*, are required to undertake before they take their posts. However, while this development is welcome, it is inadequate for two reasons. The study of *siyasa* laws is optional. Therefore, a *Shari'ah* law school graduate could become a *qadi* without coming into contact with, much less understand, Saudi Arabia's written laws. Secondly, text books on courses relating to, for example, the Saudi criminal procedure, are chiefly those that were written in the medieval age by jurists such as Ibn Al-Qayyim (d. 751 H), and Ibn Farhoun (d. 799 H), which can hardly be relied upon to develop the critical capacity of the would be *qadis*, in order to enable them not just to apply and interpret the law coherently and systematically, but to develop the law in a way that is consistent with the *Shari'ah's* underlying principles and values in light of the modern time's needs and problems. Thus it is recommended, as a matter of urgency, that the education and training programs of up and coming *qadis* are improved, in order to facilitate the emergence of competent and creative *qadis* who can then go on, via the practice of *ijtihad*, to develop what is, in essence, the Saudi common law (*i.e.*, *fiqh*), in a systematic and coherent manner, and exercise their crucial role as the guardians of the Constitution.

The second authority responsible for the enforcement of the CCP provisions in the pre-trail process is the IPPC. The CCP entrusts the supervision of the police and the exercise of judicial functions including the issuing of arrest and search warrants, the review of the detention and the prosecution of criminal cases to the IPPC. However, due to the lack of impartiality and independence of the IPPC, it has failed to discharge adequately its supposed role as the guardian of the accused's pre-trial rights. The lack of independence of the IPPC is due to the fact that in law as well as in reality it is subject to the supervision of the Minister of the Interior and his provincial representatives, *i.e.*, the provincial governors, which give them the power, in practice, to interfere in the IPPC's exercise of its statutory powers, despite the statutorily guaranteed independence of the IPPC. On the other hand, the IPPC's lack of

impartiality stems from its central role in the investigation process, during which it is also empowered to exercise judicial functions.

Thus, in the light of the existing system's structure, the problem of the lack of accountability, and with it the disrespect for the rule of law, would persist. It should be recalled here that IPPC was modelled on the Egyptian Public Prosecution Department. In addition, entrusting the IPPC with judicial and investigative functions was aimed at improving the effectiveness and accountability in the criminal justice system. However, there is no evidence from the Egyptian literature that the Public Prosecution Department has managed to achieve these aims, and this thesis has vividly demonstrated that while some new, although very limited, form of accountability came about by virtue of the establishment of the IPPC, the police and the IPPC still remain unaccountable. The routine disregard for the CCP provisions by both the IPPC and the police underlines that fact. With regard to effectiveness, there is no clear evidence to suggest that the establishment of the IPPC has speeded up the operation of the criminal justice system, or that the IPPC is better at investigating crimes than the police were.

Given that the IPPC has failed to achieve its principal objectives, a rethinking of the structure of the existing system is essential. Currently, the IPPC is invested with too much power: the authorisation of taking coercive measures against the accused, the investigation of crimes, the supervision of the police, the prosecution of criminal cases, and the lodging of appeals against judgements. In order to make the system more accountable, there is a need to divest the IPPC of most of its existing powers in favour of other criminal justice agencies. The responsibility for investigating crimes and the decision whether to charge suspects should be returned to the police. The IPPC should only retain, in addition to the power of lodging an appeal against judgements, the power to decide whether to institute criminal proceedings against those individuals who have been charged by the police, and, where the proceedings have been instituted, to conduct the prosecution before the criminal courts. With regard to the authorisation of coercive measures and the pre-trial supervision of the police, these functions, ideally, would be better entrusted to the courts. However, as mentioned above, due to lack of proper legal training and education, the courts currently are neither capable nor competent to discharge these functions adequately. Thus, the only way to ensure that the power to authorise coercive measures is exercised competently, independently and impartially, and that the police are

subjected to an effective supervision, is to create a new category of judges with the sole purpose of exercising these functions. Judges serving in these courts should be recruited from among either modern law school graduates, or *Shari'ah* law school graduates, who have received adequate training and education in modern law. The jurisdiction of the proposed pre-trial judges should extend to review any alleged violations of the accused's pre-trial rights, and to afford the accused an effective remedy where a violation is found to have occurred.

This recommendation is by any measure very radical and it may take years to implement. However, given that the IPPC is currently under development, it would be easier to correct the mistake in the structure of the existing system at this time, rather than continue with it, which will only serve to make the resolution of this problem costlier and more difficult. Providing better training and education to *qadis* and the restructuring of the existing system should ensure that the law is rigorously implemented, and whoever violates the law is held fully accountable.

With regard to the law itself, as opposed to its implementation, it has been shown in Part Two of this thesis that Saudi law fails to meet international human rights standards in many respects. The following recommendations will only address those shortcomings that undermine the essence of each right under discussion in this thesis.

Right against self-incrimination

It has been pointed out that there are several factors that undermine the right against self-incrimination. Most notably, Saudi law does not explicitly guarantee the right against-self incrimination, the presumption of innocence, or, explicitly, prohibit the admission of evidence obtained in violation of the right against self-incrimination. In addition, the remedies that the law provides for alleged violations of the right against-self incrimination have been shown to be ineffective. While the 'confessions confirmation mechanism' has been used in practice to verify the voluntariness of confessions that do not appear to have been voluntarily supplied, the mechanism for investigating and prosecuting those accused of violating the right against ill-treatment is neither impartial nor independent. Finally, sentencing officials convicted of torture to a fine renders the criminalisation of torture an ineffective remedy for combating violations of the right against ill-treatment. It has been shown that the combination of these factors has left the accused's right against self-incrimination open to abuse by

law enforcement officials. Thus, it is recommended that the law be amended to reflect explicitly the following principles:

a. the right against self-incrimination and the right to silence;
b. the presumption of innocence; and
c. the prohibition of the admission of confessions obtained in violation of the right against self-incrimination.

In addition, the 'confessions confirmation mechanism' should be abandoned, and the jurisdiction to review the voluntariness of confessions should be given to the proposed pre-trial judges. The burden of establishing the voluntariness of the confession, where it is disputed by the defendant, must be placed on the shoulders of the prosecution. The proposed pre-trial judges, as part of their jurisdiction to review allegations of violations of the accused's pre-trial rights, should have the jurisdiction to discipline and to recommend the prosecution of any official against whom there is sufficient evidence that he has committed a criminal offence. Any person convicted of a crime of torture must be given a custodial sentence, the length of which is to be determined in the light of the circumstances of the case, and the need for deterrence in order to ensure that the practice of torture is completely stamped out. Furthermore, provisions for compulsory and complete electronic recordings of interviews and interrogations should be introduced. Finally, the attendance of the accused's legal counsel at the interrogation of his client, where he requests his attendance, should be considered as a precondition for the admissibility of any incriminating statements made by the accused during the interrogation. These modifications should ensure that illegal interferences with the right against self-incrimination are prevented; where there is an alleged violation of this right, such an allegation is reviewed in an independent and impartial manner, and if the allegation is established to be true, an effective remedy is granted as required under international human rights law.

Right to humane treatment

The conditions of detention centres in Saudi Arabia are largely inconsistent with international human rights requirements. They are neither consistent with the human dignity of the accused, nor do they guarantee his health and safety. To ensure that these problems are rectified, a minimum regarding detention conditions must be introduced. Hence, it is recommended that the UN Standard Minimum Rules for the

Treatment of Prisoners 1957 be incorporated into Saudi law. In order to ensure that these Standard Minimum Rules are met in practice, sufficient material resources must be committed to building new detention facilities, in which persons who are to be detained for more 24 hours be held, and to improving the conditions of the existing detention centres to hold those detainees who are to be held for less than 24 hours. The reason for this is that the existing detention centres seem to have been originally designed to hold detainees for a couple of hours, hence the lack of appropriate sleeping arrangements in these facilities, as opposed to general prisons, which have proper sleeping arrangements. Both types of detention facilities should be subjected to appropriate health and judicial inspections, to ensure that the conditions of the detention centres do not fall below the minimum proposed standards.

Right to liberty

It has been shown that Saudi law not only does not prohibit arbitrary detention, but in fact allows it, as exemplified by the mandatory detention of those persons accused of committing a major offence, which also undermines the presumption of innocence. In addition, arrests not based upon sufficient evidence that the accused has committed an offence in violation of Saudi law are routinely carried out in practice. The law does not guarantee that the initial review of detention is conducted by an independent and impartial officer, nor does it subject the detention to a periodic review by a 'court'. The law neither recognises the presumption of innocence, nor the right to be tried within a reasonable time. Suffice to say that, with regard to the right to liberty, Saudi law falls far below what is required under international human rights law.

In order to make the law compliant with international human rights requirements, the law must be amended to prohibit arbitrary arrest or detention, and provisions on mandatory detention must be repealed. It is recommended that the factors to be considered when determining whether to detain the accused or not contain explicit reference to the principle of the presumption of innocence. This will enforce the right to liberty, thereby ensuring that detention is only ordered where a legitimate public goal cannot be secured without it.

The recommendation of entrusting the proposed pre-trial judges with the power to authorise coercive measures against the accused should be sufficient to ensure that the need to arrest the accused is independently and impartially reviewed. When the accused is arrested, he should be brought before the proposed pre-trial judge to assess

the need for his continuing detention. The latter recommendation should ensure that the practice of arbitrary arrests, which currently widely exists, is eliminated. However, there is a need to introduce new provisions to the law to ensure that the accused at the bail hearing is given an effective opportunity to challenge the reasons for his detention, and that the detention is reviewed periodically. The first need can be met by entitling the accused to seek the assistance of a legal counsel upon arrest or detention, and to be provided with legal assistance free of charge, if the accused does not have the financial means to afford a private lawyer. In order to meet the latter need, the law should be amended to permit the review of the detention by the proposed pre-trial judge every 30 days.

Finally, the law should be amended to include the right to trial within a reasonable time. More importantly, the law must provide the accused with an effective remedy against its violation. Thus, it is recommended that the accused be given the right to apply to the proposed pre-trial judge where his right to be tried within a reasonable time is, allegedly, threatened with violation, or has been violated. It is recommended that the proposed pre-trial judge be given the power to expedite the proceedings, where the right to be tried within a reasonable time is threatened with violation, or to halt the proceedings where the right to be tried within a reasonable time has been violated.

Right to legal assistance

Saudi law currently entitles the accused at the investigation stage to the right to legal assistance. Despite this, in practice, the right to legal assistance is very rarely utilised by accused persons and defendants alike. Without taking the appropriate measures to ensure that the effective exercise of the right to legal assistance is guaranteed in law as well as in practice, the impact of any modifications to the existing system will be undercut by the fact that the accused is not aware of his rights, which undermines the prospect of having these rights respected.

Hence, it is recommended that the law be amended to guarantee the right to legal assistance upon arrest or detention, and to have legal assistance free of charge if the accused lacks the means to afford a private lawyer. In addition, the accused should be informed in clear and simple language of his right to legal assistance and, in order to ensure that this requirement is complied with in practice, be provided with a written note explaining to him in a language that he understands his right to legal assistance

and be required to sign for the written note acknowledging its receipt. As suggested earlier, the attendance of the legal counsel at the interrogation of his client, where the accused requests his attendance, should be considered as a precondition for the admission of any incriminating statements obtained from the accused. With regard to the confidentiality of the communications between the accused and his client, the law should ensure that the accused is given the opportunity to communicate with his lawyer in private, and that documents that relate to the client-lawyer relationship are exempted from search and seizure. If there is a dispute regarding the confidentiality of a given document, it should be reviewed by the proposed pre-trial judge before such a document is seized or used in evidence against the accused.

Right to privacy

It has been shown that, with regard to the right to privacy, Saudi law falls below international human rights requirements in a number of respects. The law does not prohibit arbitrary interference with the right to privacy. In fact, the law allows arbitrary interference with home in that it allows the search of the house of an indicted accused without the existence of grounds that make the search necessary for the public interest. Hence, it is recommended that a prohibition on arbitrary interference with the right to privacy is introduced to the law, and that the power to conduct arbitrary searches is repealed. Another area of deficiency in Saudi law is that it leaves the manner of searching persons completely at the discretion of the searching officer. Hence, there is a need to introduce a set of safeguards to ensure that the inherent dignity of the person being searched is not violated by the manner in which the search is conducted. Furthermore, the practice in Saudi Arabia is that warrants for searching houses are issued by the provincial governor in violation of Saudi law itself. As was suggested earlier, coercive measures, including the power to authorise the search of private homes, should be entrusted to the proposed pre-trial judges. In addition, as the proposed pre-trial judges would have the jurisdiction to afford the accused an effective remedy, the law should include an explicit provision empowering pre-trial judges to exclude any evidence the admission of which would bring less benefit to the administration of justice than the harm it would cause to it. The latter two proposed modifications should ensure that the need to search the accused's house is reviewed in an independent and impartial manner, and violations of the rights of the accused, including the right to privacy, are adequately dealt with.

The implementation of these recommendations should bring Saudi criminal procedural law and practice into line with international human rights standards. The changes to both the law and the implementation process should be carried out simultaneously in order to ensure that the changes to the law are reflected in reality. Studying the experience of foreign legal systems, on which these recommendations have been largely drawn, is indispensable for building on these recommendations, or even adopting different ones that could lead to the same goal. However, studies of foreign legal systems must focus on those systems under which human rights are respected in law as well as in reality. As such, the study of Western systems, for the purposes of reforming the Saudi criminal justice system, is indispensable, given the major achievements that they have made in this respect.

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